

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303457/F303458

JACKIE MILLER	CLAIMANT
BARGO ENGINEERING, INC.	NO. 1 RESPONDENT
AMERICAN INTERSTATE INS.	NO. 1 RESPONDENT
TRANSPORTATION INS. INSURANCE CARRIER	NO. 2 RESPONDENT

OPINION FILED OCTOBER 29, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents No. 1 represented by MICHAEL RYBURN, Attorney, Little Rock, Arkansas.

Respondents No. 2 represented by CONSTANCE CLARK, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 18, 2003, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 10, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. Respondents No. 2 had coverage from April 21, 2002, to April 21, 2003.

4. Respondents No. 1 had coverage from April 21, 2001, to April 21, 2002.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury to his low back.
2. Related medical.
3. Temporary total disability from March 4, 2003, to a date to be determined.
4. Attorney's fees.
5. Defense of lack of notice.

In regard to the foregoing issues the claimant contends that he was originally injured in September 2001 and continued working, even though he was having problems and was under restrictions. He aggravated his condition in November 2002. The exact date of the September and November incident will be defined by the medical and the medical has not been received at the present time. Claimant alleges two specific, identifiable injuries that were certain. The first occurred when the claimant was operating a lath, running product for Scroll Technologies, when he was involved in continual, constant, twisting and turning and began symptomatology that led to the event of September 2001. He aggravated that condition in early November 2002.

In regard to the foregoing issues Respondents No. 1 contend that the claimant has been treated for chronic low back pain prior

to September 2001. The claimant did not give notice to the employer of the September 2001 injury. The claimant sustained a new injury in November 2002 with a different carrier.

In regard to the foregoing issues Respondents No. 2 DENY that the claimant sustained a compensable accidental injury in the course and scope of his employment for Bargo Engineering, Inc. The respondents contend that the claimant failed to give them timely notice of his alleged injuries. The respondents further contend that any back problems which the claimant may be experiencing are the result of either an injury which occurred away from the work place or a condition or injury which preexisted his employment with Bargo Engineering. Alternatively, the respondents contend that if the claimant proves that he sustained a compensable work related injury in September 2001, any benefits to which the claimant is entitled are the responsibility of the carrier on the risk at that time. In other words, the respondents contend that the claimant did not sustain a new injury or an aggravation in November of 2002 which would expose CNA Insurance Company to liability for any benefits to the claimant. The respondents reserve the right to amend their contentions after the completion of investigation and discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1 and a letter marked Claimant's Exhibit No. 2. Respondents No. 2 submitted medical information marked Respondents

No. 2's Exhibit No. 1, non-medical information marked Respondents No. 2's Exhibit No. 2, a video tape marked Respondents No. 2's Exhibit No. 3 and a deposition marked Respondents No. 2's Exhibit No. 4. Respondents No. 2 also offered the investigator's report as a proffer which is marked Respondents No. 2's Proffered Exhibit No. 1.

DISCUSSION

The claimant testified that he was 29 years old and had graduated from high school. The claimant testified that he went to work for the respondent on September 18, 2000, as a welder. The claimant explained that the Respondent is a metal fabricating shop. The claimant stated that initially he worked assembling large machines for Superior Wheel. The claimant explained that this job required him to stand for his entire shift and assemble parts weighing from 20 up to 100 pounds onto this machine. The claimant stated that after about six months he was switched to a job for Scroll Technologies and this job required him to stand for his shift but the lifting was not as great and this job entailed lifting parts of 20 pounds or more continually. The claimant testified that the Scroll job was a milling operation which required him to pick up a part off of a pallet and place it into a machine to begin the milling process. The claimant testified that he would handle or do a procedure to each part at least twelve times. The claimant testified that there were seventy-two parts to a pallet and he would do as many as thirty pallets a day. The

claimant stated that he was constantly bending, twisting, lifting and pushing these parts into the milling machine.

The claimant testified that in August 2001 he was seen by Dr. Al Gordon for low back pain which he had been experiencing for approximately six months. The claimant testified that by the time he was seen by the doctor he had pain going down into his right leg as well as numbness and tingling. The claimant remembered that the doctor prescribed medications and the claimant testified that he reported to his shop foreman, James Strayhorn, that he believed that the job he had been doing had aggravated his back. The claimant testified that after he had his MRI in September 2001, he was assigned another job which was much less physical than the Scroll job. The claimant testified that he was put at a job welding anode parts for Superior Welding and this job allowed him to sit and did not require him to do constant bending, twisting and lifting all day long. The claimant testified that he continued to take his medications and that the numbness went away and his pain was not as intense. The claimant testified that he remained on this alternative work from approximately September 2001 to November 2002.

The claimant testified that he went to see Dr. Reddell, a chiropractor, in April 2002. The claimant explained that he had seen this chiropractor back in 1996 for middle back problems but he had not seen him or gone to him for treatment since 1996 up until his April 2002 visit. The claimant explained that the symptoms which he saw Dr. Reddell for were more intense and they were in his

lower back which was different from his 1996 problems. The claimant testified that at the time he went to see the chiropractor he was having leg pain but after treatments this problem went away.

The claimant testified that around the first of November 2002 he was placed back on the Scroll Technologies job. The claimant testified that on January 24, 2003, he was seen by Dr. Bonner for his recurrent back pain. The claimant testified that he told Dr. Bonner that his pain began in November 2002, agreeing that before he began the Scroll job in November 2002, the tingling, numbness and leg pain had resolved, remembering that he was still taking his medications but agreeing that he had had a complete resolution of his symptoms. The claimant testified that after about one month of beginning the Scroll job which required him to do bending, twisting and lifting 25 plus pound parts his symptoms returned. The claimant testified that he was off work, "down in my back the whole month of January 2003." The claimant testified that he spoke with his shop foreman in November 2002 that running the production parts on the Scroll job had re-aggravated his back. The claimant testified that he saw Dr. Bonner on January 24, 2003, and when he returned to work he was to be on light duty. The claimant remembered that on this new job he was allowed to sit and he loaded little bitty parts into a machine. The claimant remembered that this job was much different from his earlier jobs in that the lifting was much much lighter. The claimant testified that this new alternative duty job did require him to twist at times as well as bend but the lifting was very light. The claimant testified

that even though his new job was much easier and lighter his symptoms did not resolve and his lower back and leg pain was nonstop.

The claimant testified that after his MRI he was seen by Dr. Gallaher in February 2003. The claimant testified that he continued to work for the respondent until his foreman, Mr. Strayhorn, told him that if he did not start working as much overtime as possible, he was going to be fired. The claimant testified that he was able to work overtime but he did not. When asked, the claimant testified that before he changed jobs in November 2002 his pain level would have been probably a three but by January 2003 his pain had elevated to ten plus, remembering that he could hardly stand up. The claimant testified he has been off since March 2003 and he is somewhat better but he still has pain in his back going down into his leg.

The claimant testified that he has not worked since March 2003 and has been drawing unemployment in the amount of \$270.00 for the past thirteen weeks. The claimant testified that since March 2003 he has done a day or two of volunteer work for his church helping to build a brush arbor for a revival. The claimant agreed that the surveillance video tape does show him helping with the construction of the brush arbor with other members of his church.

On cross examination by Respondents No. 1, the claimant agreed that his back began to hurt gradually over a period of time after he began working for the respondent. The claimant also agreed that before going to work for the respondent, he had been working for

William's Tractor and his back had again gradually begun to hurt but no workers' compensation claim was filed. The claimant indicated, in his testimony, that his back began to gradually hurt after he started doing the Scroll Technology job and that he was seen by a doctor in September 2001 reporting that he had been experiencing back pain for approximately six months. The claimant testified that when he began running the Scroll Technology parts and his back began to hurt, he reported to his shop foreman, Mr. Strayhorn, that he hurt his back running those parts. The claimant testified that after he was seen by the doctor, Mr. Strayhorn switched him to a different job. The claimant testified that he reported to Dr. Gordon that he had hurt himself running parts. The claimant agreed that after seeing the doctor in 2001 he continued to work and did not miss time off work except to go to the doctor. The claimant also agreed that he did not go to the doctor between April 2002 to January 2003. The claimant again testified that his symptoms basically resolved after he was taken off the Scroll job in 2001 and his problems did not resurface until he was put back on the Scroll job in November 2002. The claimant testified that his medical care was handled through his group insurance because the respondent had told him that since he had had previous back problems any back treatment could not be turned into workers' compensation. The claimant testified that this conversation concerning whom to turn the medical claim over to took place in 2003. The claimant testified that he did not speak with the administrator's with the respondent about comp prior to this time.

On cross examination by Respondents No. 2, the claimant agreed that in 1996, when he was treated by the chiropractor, he had complaints of low back pain resulting from slipping on wet floors while working for the jail. The claimant agreed that in 1996 when he was seen by Dr. Reddell he also had complaints of right leg pain. The claimant agreed that when he saw Dr. Gordon in August 2001 he had not been running the Scroll Technology parts straight through for the past six months but had been running them off and on. The claimant agreed that when he went to see Dr. Gordon in August 2001 he went on his own and did not ask for the respondent to send him. The claimant testified that Dr. Gordon recommended that he undergo physical therapy for several weeks and prescribed medications. The claimant testified that after physical therapy did not help he returned to see Dr. Reddell in April 2002. Again, the claimant agreed that he did not ask the respondent to send him to the chiropractor but he turned in his medical bills to his group carrier. The claimant testified that he had mentioned to the respondent, prior to his termination, that his back problems were work related but he did not file a workers' compensation claim until after his termination in March 2003. The claimant testified that he was terminated by the respondent for his refusal to work overtime. The claimant indicated that he was not physically able to work overtime and he had babysitter problems with overtime and weekend work. The claimant was asked that if he had not been terminated, would he have been able to do the work provided for him by the respondent and the claimant responded, "yes." The claimant

testified that since his termination he has sought employment at mini marts and fast food establishments, a candle company, to drive a log truck and for the sheriff's department. The claimant testified that the work he applied for at these various establishments was less strenuous than what he had been doing for the respondent. The claimant was asked about the video tape of him helping build a brush arbor and the claimant agreed that he was carrying some metal chairs, racking, driving a front end loader and carrying some boards. The claimant questioned whether that was him carrying cement blocks. The claimant agreed that he was engaged in a variety of physical activities while working on this project for his church. The claimant agreed that his testimony in his deposition that he was very limited physically as to his activities was not correct. The claimant was asked if his problems in 2001 resolved or did his pain continue until his exacerbation in 2002. The claimant responded, "I had some pains, but they wasn't as intense." The claimant agreed that he continued to take his medications after his 2001 doctor's visits. The claimant testified that the pain that he began to experience in November 2002 was in the same location as it was in 2001 but just more intense.

On redirect examination, the claimant recanted his testimony by stating that in March 2003, when he was terminated, he was not able to do the work for the respondent. The claimant testified that between 1996, when he last saw Dr. Reddell, and August 20, 2001, he had not been seen by a doctor nor had he taken medications. The claimant testified that he also was not

experiencing any leg pain or numbness and tingling during this period of time. The claimant testified that he did not miss any time from work as a result of his back problems until January 2003. The claimant testified that he told James Strayhorn in September 2001, after he had been to the doctor, that he believed that he had hurt himself running parts and that he wished to be put on a different job. The claimant agreed that the respondent did accommodate his request for a change of job, stating that they gave him a pay raise and later explaining that he was put on a job that did not require the constant lifting that the Scroll job required. The claimant again testified that it was not until he was placed back on the Scroll job in November 2002 that his symptoms returned. The claimant testified that his group carrier, Blue Cross Blue Shield has paid for some of his medical treatment.

On recross examination by Respondent No. 2 the claimant agreed that when he saw Dr. Reddell on April 22, 2002, it had been a number of years since he had seen that doctor. The claimant further agreed that he saw the chiropractor after he had received treatment by Dr. Gordon, taken medication as well as gone through physical therapy. The claimant also agreed that when he saw Dr. Reddell in April 2002, he told the doctor that he had been having these back problems for several months. The claimant testified that he has been seeing Dr. Reddell as well as been to the emergency room several times before he was seen by Dr. Bonner. The claimant testified that he was pain free between May 2002 and

whenever he went to the ER stating that he did not have pain going down his leg but he still had some lower back pain.

James Strayhorn was called to testify on behalf of the respondents stating that he had been employed by the respondent for sixteen years and was currently the plant manager. Respondents No. 1 asked Mr. Strayhorn if the claimant had ever reported a work related injury prior to April 2002 and Mr. Strayhorn responded, "no." Mr. Strayhorn also testified that the claimant did not file a workers' compensation claim nor did he know anything about the claimant injuring himself due to his employment prior to April 2002. Mr. Strayhorn also testified that he was unaware of any report of a work related injury being filed by the claimant after April 2002 and it was not until after the claimant was terminated in March 2003 that he learned that the claimant was claiming a work related injury. Mr. Strayhorn testified that the claimant was terminated because he refused to work on Saturdays because he could not get child care.

Mr. Strayhorn, in response to Respondent No. 2's questions, stated that prior to the claimant's termination he was physically performing his job duties for the respondent, noting that he was on light duty at that time. Mr. Strayhorn testified that the respondent was aware of the claimant's light duty restrictions and had provided work within the doctor's restrictions. Mr. Strayhorn indicated that the claimant never told him that he was physically unable to do the work required of him. This witness testified that

the claimant never reported to him any type of job injury or back injury in or about November 2002.

The medical records set forth that the claimant was seen on September 23, 1996, by Dr. Marlin K. Reddell for low back pain, previous neck and middle back pain as well as headaches and the low back pain, the doctor's chart indicates was a five on a scale of one to ten. The claimant continued to be treated for his low back pain and by October 18, 1996, his low back pain was rated as a one and his neck pain at a four. Dr. Reddell released the claimant on December 31, 1996, noting that the claimant had missed his past scheduled appointments and although the doctor had not completed his optimum recommendations, the claimant's case was being closed.

The claimant was seen by Dr. Al Gordon on August 20, 2001, for complaints of low back pain for the past six months. The claimant was assessed as having low back muscle strain and medications were prescribed. The claimant underwent an MRI of his lumbar spine on September 28, 2001, which showed a broad based disc protrusion at L5/S1, noting that there appears to be mass affect on each S1 nerve root but no nerve root enlargement was demonstrated. This test also showed defused annulus bulge of the L4/5 level affecting the anterior aspect of the thecal sac and there is mild narrowing of the spinal column. The MRI showed no disc extrusion, no neuroforminal stenosis and no asymmetric fluid or synovial cyst. There was noted some mild to moderate facet atrophy. The medical records set forth that the claimant underwent physical therapy beginning on October 4, 2001, at Healthsouth and continued with his physical

therapy at least through October 19, 2001. Dr. Gordon wrote on October 15, 2001, that the claimant should be allowed to sit as needed due to his back condition. The medical records set forth that the claimant continued receiving medications from Dr. Gordon up through April 30, 2002. The claimant was again seen by Dr. Reddell on April 22, 2002, for complaints of low back pain which did radiate down his leg but not currently and this condition has been present for several months. The form from Dr. Reddell's office indicates that the claimant believes his condition was caused from lifting and it is further indicated that his problems did not result from an accident and there is not indication that he relates it as a workers' comp injury.

Dr. Marlin Reddell writes on January 1, 2003, that in order to avoid aggravation, the claimant should not return to work before January 6, 2003, as a result of a neuro spinal condition. Dr. Reddell writes again on January 6, 2003, that the claimant is able to return to light duty with no lifting over twenty pounds and no excessive bending and twisting. Dr. Reddell writes on January 7, 2003, that to avoid aggravation to the claimant's condition, he should be restricted from work duties until January 20, 2003, at which time he can hopefully return to light duty. Dr. Reddell writes on January 16, 2003, that the claimant is still unable to return to full duty work without exacerbation and he should be restricted from work until January 27, 2003. The claimant was seen by Dr. Mark Bonner on January 24, 2003, for complaints of low back pain due to lifting. The claimant underwent a second MRI on

January 29, 2003, and the results of this test indicates that he has a larger central and right parasagittal disc protrusion of the L5/S-1 level with significant mass affect on the thecal sac. Spinal cord stenosis is also present. This test revealed defused annulus bulge of the L-4/5 level causing milder degree of narrowing of the spinal channel, the claimant had broad based central and left parasagittal disc protrusion of the L-3/4 level resulting in some narrowing of the spinal channel, the claimant also had defused annulus bulge of the thoracic 10/11 level resulting in some spinal channel narrowing and he had facet arthropathy of the lumbar spine. Dr. Regan Gallaher writes on February 3, 2003, that he has seen the claimant for his back problems since September 2001 noting that he had pain in his low back from bending and twisting at which time he saw a chiropractor and slowly got better. Dr. Gallaher notes that the claimant has had a resurgence of his back pain along with right hip pain that goes into his groin which has been present since the end of December. Dr. Gallaher writes that he has reviewed the claimant's MRI which reveals defused degenerative disc disease with disc herniations at L3-4, L4-5 and L5-S1. The largest disc herniation is the L5-S1 with right paracentral component. Dr. Gallaher notes that the MRI shows that the claimant has disc herniations at L3-4 and L4-5 causing spinal stenosis and he also has a herniated disc at T10-11. The doctor assessed the claimant with right L5 radiculopathy secondary to herniated disc and recommended that the claimant try Medro Dose pack followed by epidural steroid injections. Dr. Gallaher notes that should these

treatments fail, they could consider a right L5-S1 diskectomy but due to the claimant's age he is hesitant to operate on a man with such extensive disease. The claimant received lumbar epidural steroid injections from Dr. Marc Valley on March 14, 2003. The claimant completed a pain questionnaire for Dr. Valley in which he indicates that his back did not start hurting until he ran production parts for the respondent, noting that he went to the doctor in September 2001 and that he did not realize he had hurt himself at work until recently because he had not had back problems until he ran these particular parts for the respondent doing excessive bending and twisting.

The non-medical documentary evidence sets forth that the claimant filed for medical benefits under his Blue Cross Blue Shield policy on September 25, 2001, for treatment of his low back pain. On this form, the claimant has indicated that his problems were not due to an accident nor were they work or employment related. The documentation from the employment security division dealing with the claimant's termination by the respondent indicates that he was terminated for insubordination resulting from an argument concerning overtime where it was indicated that he could not work overtime due to baby-sitting problems.

After a complete review of this entire matter, I find that the claimant has proven by a preponderance of the evidence that he sustained work related injuries while working for the respondent. The claimant has testified and the medical records set forth that in September 2001, after working on the Scroll job for a period of

time, he began to experience back pain for which he sought medical treatment. An MRI performed at this time indicated that the claimant had multilevel herniations. The claimant has testified that after treatment and a change of jobs to a lighter less lifting type activity, his symptoms primarily resolved and that it was not until he was placed back on the Scroll job in November 2002 that his symptoms returned. The claimant again sought medical treatment for his back and leg pain in January 2003 and a second MRI again revealed multilevel herniations as well as extensive degenerative disc disease. Conservative medical treatment was recommended for this claimant as well as work with less lifting requirements. I find, therefore, that the claimant's back problems and the treatment therefore should be apportioned between Respondents No. 1 and Respondent No. 2 in the amount of 50 percent to each respondent. The record sets forth that the claimant's back problems were first identified in September 2001 but were exacerbated in November 2002 when he was again placed on a job requiring continuous lifting. I further find that this claimant did not give notice to the respondent of a work related injury until April 4, 2003, when he filed his workers' compensation claim. Therefore, the claimant will not be entitled to any benefits prior to April 4, 2003. I also find that the claimant is not entitled to temporary total disability from the date of his termination to a date to be determined. The claimant has testified that he was able to do the work provided to him by the respondent at the time of his termination and none of the medical records indicate that the

claimant has been unable to work subsequent to March 4, 2003. Therefore, the claimant is not temporarily totally disabled benefits.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. Respondents No. 2 had coverage from April 21, 2002, to April 21, 2003.

4. Respondents No. 1 had coverage from April 21, 2001, to April 21, 2002.

5. The claimant has proven by a preponderance of the evidence that he sustained work related injuries in 2001 as well as 2002 to his low back while working for the respondent. See discussion above.

6. The benefits to be provided to this claimant's should be apportioned equally between Respondents No. 1 and Respondent No. 2. See discussion above.

7. The claimant did not report a work related injury to the respondents until he filed his workers' compensation claim on April 4, 2003, therefore, he is not entitled to benefits prior to the April 4, 2003, date.

8. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from March 4, 2003, to a date to be determined. See discussion above.

9. The respondents have controverted these claims in their entirety.

10. The claimant's attorney should be entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained work related injuries in 2001 as well as 2002 while working for the respondent.

The claimant failed to give notice of any work related injuries prior to his filing of his workers' compensation claim on April 4, 2003. Therefore, this claimant will not be entitled to any benefits prior to April 4, 2003.

Any benefits due this claimant for his compensable injury should be apportioned equally between Respondents No. 1's carrier and Respondent No. 2.

The claimant has failed to prove that he is entitled to temporary total disability from March 4, 2003, to a date to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE