

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214268

CECIL R. TERRY, EMPLOYEE

CLAIMANT

HANSON AGGREGATES, EMPLOYER

RESPONDENT

AIG CLAIMS SERVICES, INC., CARRIER

RESPONDENT NO. 1

ZURICH AMERICAN INSURANCE CO., CARRIER

RESPONDENT NO. 2

OPINION FILED NOVEMBER 4, 2003

Hearing before Administrative Law Judge J. Mark White on October 2, 2003, in Hope, Hempstead County, Arkansas.

Claimant appeared *pro se*.

Respondent No. 1 represented by Mr. R. Scott Morgan, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 2 represented by Mr. David Jones, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 2, 2003, the above-captioned claim came on for a hearing in Hope, Arkansas. A pre-hearing conference was conducted on June 25, 2003, and a Prehearing Conference Order was entered on June 26. A copy of the June 26, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer relationship existed between the parties at all relevant times; that Respondent No. 1, AIG Claims Services, Inc., had coverage for claimant's compensable injury of August 1, 2000; that Respondent No. 2, Zurich American Insurance Company, had coverage for respondent employer from October 31, 2001, through October 1, 2003; and that Royal Indemnity Company did not have coverage for respondent employer at any time relevant to this claim.

The parties agreed that the issues to be presented were whether the claimant sustained an aggravation or new injury in October of 2002 which would place liability for claimant's medical treatment on Zurich American Insurance Company; and whether claimant's need for additional medical treatment subsequent to October of 2002 was a continuation of or recurrence of claimant's August 1, 2000, compensable injury for which Respondent No. 1, AIG Claims Services, remains liable.

The claimant contends that he has a compensable injury for which either Respondent No. 1, AIG Claims Services, or Respondent No. 2, Zurich American Insurance Company, is liable.

Respondent No. 1, AIG Claims Services, contends that the claimant sustained

a new injury or aggravation in October of 2002, for which Respondent No. 2, Zurich American, is liable.

Respondent No. 2, Zurich American, contends that the claimant's need for medical treatment and continued complaints are a direct result of claimant's original August 1, 2000, injury and is therefore the liability of Respondent No. 1, AIG Claims Services.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. A preponderance of the evidence shows that the complications experienced by the claimant in October, 2002, were the natural and probable consequence of his original injury.

4. A preponderance of the evidence shows that the truck incident of October 18, 2002, did not contribute even slightly to the causation of the disabling condition.
5. A preponderance of the evidence shows that the complications experienced by the claimant in October, 2002, were merely a recurrence of the original injury and not an aggravation or new injury.
6. The insurer on the risk at the time of the original injury, Respondent No. 1, AIG Claims Services, Inc., therefore remains liable for the complications experienced by the claimant, and for all associated benefits.

DISCUSSION

I. History

The claimant worked for respondent Hanson Aggregates as a truck driver. He sustained a compensable injury to his right foot on August 1, 2000, when he fell and hit the back of his foot on a piece of steel. Respondent No. 1, AIG Claims Services, Inc., had coverage for the respondent-employer at that time and accepted the injury as compensable. The claimant sought treatment from Dr. Frank Hamlin who diagnosed, "insertional Achilles tendinitis of the right heel." Dr. Hamlin treated the claimant conservatively with ice, a shoe lift, medication, and eventually a cast. The claimant's problems persisted over the next month, and on October 11, 2000, Dr.

Hamlin first mentioned the possibility of surgery.

At some point thereafter the claimant returned to work, and over time his problems resolved to the point that he was “asymptomatic”. The pain in his foot returned, though, and on October 29, 2001, he returned to Dr. Hamlin with a history of increased pain over the previous two or three months. On December 7, 2001, Dr. Hamlin noted the claimant was doing “much better” and returned him to regular-duty work, with a plan of discharging him from care in six weeks.

The claimant’s problems returned yet again, prompting a visit to Dr. Hamlin on January 18, 2002. Dr. Hamlin noted that the claimant was “having quite a flair up [sic] compared to what he has had the previous visits in the last year.” Dr. Hamlin recommended another cast, but the claimant demurred. The claimant eventually changed his mind and had another cast made on February 1, 2002. The cast was removed on March 15, 2002, and the claimant again returned to regular-duty work.

Throughout this course of treatment Dr. Hamlin mentioned the possibility of surgery, and at one point he recommended that the claimant seek a surgical opinion from Dr. Lillich. The claimant declined surgery and the second opinion but said he would reconsider surgery in the event of another flare-up. Dr. Hamlin thus released the claimant from care on June 17, 2002, with no disability rating. Dr. Hamlin warned in his notes, “He is aware that this could flare up at any time and

if so, we will have to reopen the case. He is to continue stretching exercises.”

After he was discharged, the claimant testified, he continued to have periodic pain and swelling in his foot, “every time I would work my foot real hard or walk a lot.” He described the pain as “burning in the calf of my leg and I just couldn’t put no pressure on the back of my heel.” The pain and swelling continued up until October, 2002, and through that time the claimant continued to wear inserts in his boots to help with the pain.

The claimant testified that he had pain in his foot throughout the morning of October 18, 2002. His leg began to swell, at which point he stopped his truck and stepped out – a “normal step out” as he described it. The pain in his leg then became so severe that he could not continue working. The claimant testified that this had happened to him before, but that he had just endured the pain of the previous episodes. Later that day the claimant saw Dr. Hamlin and gave a history of “having trouble for three or four months.” The claimant eventually agreed to the recommended surgery, which Dr. Hamlin performed on December 16.

Respondent No. 2, AIG Claims Services, alleged that the truck incident of October 18, 2002, was a specific incident causing a different type of pain, constituting an aggravation or new injury and relieving them of responsibility for this claim. Respondent No. 1, Zurich American, argues that the complications of

October 18, 2002, were causally connected to the original injury and that there were no objective findings of a new injury.

II. Adjudication

An aggravation is a new injury resulting from an independent incident; a recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Maverick Transportation v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). A recurrence exists when the second complication is a natural and probable consequence of a prior injury; only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. *Id.* The test for determining whether a subsequent episode is a recurrence or an aggravation is whether there is a causal connection between the two episodes. *Henson v. Club Products*, 22 Ark. App. 136, 736 S.W.2d 290 (1987). If a claimant's second injury takes the form merely of a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The record in this case plainly reflects a causal connection between the claimant's original injury and this most recent period of disability beginning October 18, 2002. Since his original injury, the claimant has gone through a

continuing pattern of symptom relief followed by symptom recurrence. As detailed above in the history of this claim, the October 18, 2002, incident wherein the claimant stepped out of his truck and felt pain was actually the second – and arguably third – time that he had sustained a recurrence of this injury. Respondent No. 1 seeks to paint the truck incident as an aggravation on the basis of Dr. Hamlin's discharging the claimant from care on June 17, 2002, and the claimant's subsequent return to work. Yet Dr. Hamlin recorded in his note for the discharge the likelihood of a recurrence of this injury, warning that the claimant's condition "... could flare up at any time and if so, we will have to reopen the case." Indeed, one of the reasons that Dr. Hamlin released the claimant at that point was the claimant's refusal to undergo surgery, a surgery that had been discussed nearly two years before and the same surgery that the claimant eventually underwent.

The claimant credibly testified that he continued to experience pain and swelling between his release by Dr. Hamlin on June 17, 2002, and the October 18, 2002, truck incident. Dr. Hamlin likewise recorded the claimant as saying he had been having pain and swelling in the months leading up to the truck incident. The claimant's testimony indicated that he did not experience a sudden increase in pain when he stepped out of his truck on that morning, but rather that his pain and swelling had been increasing throughout the morning, reaching a breaking point

when he stepped out of the truck. The only difference in the claimant's condition before and after the truck incident is in the scale of his symptoms, and there is no evidence in the record to suggest that merely stepping out of a truck was sufficient to cause his increased symptoms.

Admittedly, there is no bright-line rule that continued pain between incidents mandates a finding of a recurrence. I note, however, that the Court of Appeals has affirmed the finding by the Commission of a recurrence where a claimant continued to experience pain and difficulty between the two incidents despite being discharged from care and assigned an impairment rating. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Full Commission has likewise found a recurrence where a claimant had been discharged and rated prior to the second incident, even though the claimant did not testify to continued pain. *Gunter v. Dearien Lumber & Supply*, Workers' Compensation Commission E900860 & E900861 (March 31, 2000). I cannot find that the present case justifies a different finding, given the short amount of time between the claimant's discharge and the second incident, his testimony of continued pain and swelling, and his physician's prediction of a future flare-up.

The claimant's testimony and the medical evidence clearly indicate that the claimant's renewed symptomology would have happened regardless of whether the

claimant had stepped out of his truck that morning. The medical evidence likewise clearly indicates that this is but one in a string of recurrences of this injury. Given these facts, I must find by a preponderance of the evidence that the complications of October, 2002, were the natural and probable consequence of the claimant's original injury, and that the complications were merely a recurrence of the original injury. I also find by a preponderance of the evidence that the truck incident of October 18, 2002, did not contribute even slightly to the causation of the disabling condition. I must therefore find that the complications experienced by the claimant in October, 2002, were merely a recurrence of the original injury and not an aggravation or new injury. The insurer on the risk at the time of the original injury, Respondent No. 1, AIG Claims Services, remains liable for this injury and the subsequent recurrences.

AWARD

Respondent No. 2, Zurich American Insurance Company, has proven by a preponderance of the evidence that the complications experienced by the claimant were a recurrence of the original injury, and that Respondent No. 1, AIG Claims Services, is therefore liable for the complications and all associated benefits.

Respondent No. 1, AIG Claims Services, is hereby directed and ordered to pay for all outstanding medical and related treatment and benefits, and Respondent

No. 1 remains responsible for continued benefits and reasonably necessary medical treatment. Respondent No. 1 is further directed and ordered to reimburse Respondent No. 2, Zurich American Insurance Company, for all moneys paid, pursuant to ARK. CODE ANN. § 11-9-806. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. §§ 11-9-806 and 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge