

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308992

HENRY BOSWELL, EMPLOYEE

CLAIMANT

J & H LOGGING, INC., EMPLOYER

RESPONDENT

**CAPITAL CITY INSURANCE COMPANY/
SOUTHEASTERN CLAIMS SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED FEBRUARY 9, 2004

Hearing before Administrative Law Judge Dail Stiles on January 9, 2004, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

A hearing was held on January 9, 2004, to determine the compensability of the claim filed herein.

It was stipulated that the employer/employee relationship existed on June 3, 2003. It was stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity rates of \$258.00 for temporary total disability and \$194.00 for permanent partial disability benefits.

The claimant contends he sustained an injury arising out of and during the course and scope of his employment on June 3, 2003. The claimant contends he sustained an injury as a result of a specific incident identifiable by time and place of occurrence. In the alternative, the claimant contends that he sustained a gradual onset injury which was aggravated by a specific incident on June 3, 2003.

The claimant seeks temporary total disability benefits commencing August 12, 2003 and continuing until October 5, 2003, as well as attendant medical benefits and attorney's fees.

The respondents controvert the claim in its entirety. The respondents contend the claimant did not sustain a compensable injury. The respondents contend that if the claimant sustained an injury on June 3, 2003, it was at a time when no employment services were being performed. The respondents contend that the claimant's physical injury was the result of an independent intervening incident. Lastly, the respondents contend that the claimant will not be able to demonstrate a causal connection between his injury and his work activity, and that there is no major cause established to support the claim of a gradual injury.

STATEMENT OF THE CASE

The claimant drove a log truck for the respondent employer. The claimant said on June 3, 2003, as his truck was being loaded, he went to the loader to get a book to fill out a ticket. The claimant said the pen fell out of the book, and when he reached down to pick up the pen and then straighten up, he felt a catch in his back. The claimant's truck was loaded and he went to a mill and unloaded, and at that time, he noticed that his shoe was untied. The claimant said that he put his foot up on the step of his truck and tied his shoe, and as he put his foot back to the ground, he said again he felt a catch in his low back.

Later in the day, the claimant attempted to unhook a chain from his truck. The claimant stated that as he eased his arm down from reaching for the chain, he again felt a catch and moved slow for the rest of the day.

The claimant testified that those incidents occurred on a Thursday, and that that was the last day they worked on that particular section of woods.

The claimant stated that the next morning, on Friday, he felt that he would go fishing but that he initially had trouble getting out of bed. The claimant stated that he went out to hook up his boat to a trailer, and as he was cranking the handle to raise the boat up to the trailer hitch, he felt a catch in his back, and that

it did not stop hurting. The claimant said he returned to the house and basically spent the rest of Friday and the weekend lying down.

On cross-examination, the claimant was asked about the boat and trailer hitch incident, and it was revealed that the claimant was startled by a dog that had gotten loose and jerked back up to a full standing position from attempting to hook up his boat trailer to his truck.

The claimant began treating with Dr. Kerry Pennington, his family physician in Warren. It was discovered that the claimant had a herniated disc at L5-S1, and the claimant was referred to Dr. Scott Schlesinger, a neurosurgeon in Little Rock, who performed surgery on the claimant on August 12, 2003.

Dr. Pennington stated in an October 26, 2003 letter to the claimant's attorney, the following:

I cannot speculate on whether Mr. Boswell's ruptured disc was related to his driving a log truck for the past six to seven years. I know many men who have driven log trucks for many more years than this, who have never had problems with their back.

Dr. Schlesinger expressed no opinion as to the cause of the claimant's herniated disc.

The claimant stated that he did not report the incidents on June 3, 2003, as work related injuries to his employer until after he had been told by the physicians that he had a herniated disc.

Jackie Harton, the owner of J & H Logging, testified that the claimant never told him he had a job related accident until August 15, 2003.

FINDING OF FACT

The claimant does not meet his burden of demonstrating by a preponderance of the evidence of record that his herniated disc in his low back is causally related to any work activity he was engaged in on June 3, 2003.

DISCUSSION

While it is well-settled that it is not essential that a causal relationship between the accident and disability be established by medical evidence, the claimant is not relieved of the burden of establishing a causal connection between the accident and a risk which is reasonably incident to the employment. There must be affirmative proof of a distinctive employment risk as the cause of the injury; the connection with the employment cannot be supplied by speculation. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

In the instant case, the claimant recounts several incidents: a bending over incident on June 3, 2003, while at work; an incident involving tying his shoes which occurred at work on June 3, 2003; and an incident involving reaching for and pulling down a chain on June 3, 2003. There is the additional incident which occurred at home the next day when he was attempting to hitch a boat trailer to his truck. The claimant stated in his deposition and reaffirmed that testimony at hearing, that after that incident at home, the pain became greater and did not go away.

For this examiner to attribute the claimant's herniated disc to one incident as opposed to another or to state that his herniated disc is caused by one or more incidents in concert, would require speculation and conjecture on my part. It is well-settled that speculation and conjecture, no matter how plausible, does not take the place of proof. See Dena Construction v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

The above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DAIL STILES
Administrative Law Judge