

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F214269**

<b>JOHNNY L. BYERS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BYERS REFRIGERATION, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>UTICA MUTUAL INSURANCE CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MARCH 17, 2004**

Hearing before Administrative Law Judge J. Mark White on February 12, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On February 12, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on September 15, 2003, and a Prehearing Conference Order was entered that same day. A copy of the September 15, 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, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, and that the employee/employer/carrier

relationship existed between the parties on April 27, 2001. At the hearing the parties also stipulated that the claimant filed his claim for compensation via form AR-C on December 18, 2002. The parties agreed to stipulate to the claimant's average weekly wage and compensation rate within twenty-one days after the hearing, but the parties failed to notify the Commission of any final stipulation.

The parties agreed that the issue to be presented was whether the claimant sustained a compensable injury for which he is entitled to medical and indemnity benefits. At the hearing the claimant added a contention for temporary total disability benefits, to which the respondents did not object.

The claimant contends that he sustained a gradual-onset compensable back injury which manifested itself on or about April 27, 2001, for which he is entitled to medical and indemnity benefits; and that he is entitled to an attorney's fee as permitted by law. At the hearing, the claimant added a contention that he is entitled to temporary total disability benefits from the date of his surgery, February 24, 2003, until October 7, 2003.

Respondents contend that the claimant did not sustain a compensable injury arising out of and in the course of his employment; that the claimant's low back pain is not causally related to his employment; and that the claimant did not file a claim for a work-related injury occurring on April 27, 2001, until December 18, 2002.

## 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 witnesses and to observe their 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. The claimant has proven by a preponderance of the evidence that his alleged compensable injury arose out of and in the course of his employment.
4. The claimant has proven by a preponderance of the evidence that his alleged compensable injury caused internal physical harm to the body requiring medical services; that the existence and extent of his injury is established by medical evidence supported by objective findings; and that his injury was the major cause of his need for treatment.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset back injury on or about April 27,

2001.

6. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from February 24, 2003, until October 7, 2003.
7. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 24, 2003, until October 7, 2003.
8. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant is the nephew of Wallace Byers, owner of the respondent-employer. He has worked as a laborer for the respondent-employer off and on since 1980, and full-time since 1980, though whether "full-time" in this sense meant a full 40 hours per week is a matter of dispute. In 1994, while working for the respondent-employer, the claimant sustained a compensable injury to his back. He underwent surgery to repair a herniated disk at L4-L5, and he was assigned a permanent anatomical impairment rating of 7%. After the 1994 surgery he returned to work for the respondent-employer at his old job. He testified that from 1995 until April, 2002,

he never missed work because of back pain. The record contains no medical evidence to indicate that the claimant ever sought treatment for his back from 1995 to April, 2001.

In the spring of 2001, the claimant testified, he began to experience worsening pain in his back. He testified that it came on gradually, not the result of a specific incident. He sought treatment for his back from Dr. Phillip H. White on April 27, 2001. Dr. White noted the presence of spasms and prescribed medication. The claimant saw Dr. White again in May and June. The May visit was primarily for depression and anxiety, but Dr. White did issue a prescription for more medication for the claimant's back on that visit.

The claimant did not see a doctor again until December 8, 2001, when he saw Dr. James Turbeville. Dr. Turbeville continued to treat the claimant conservatively, and the claimant saw him repeatedly through 2002. An MRI performed August 13, 2002, revealed disk herniations at L3-L4, L4-L5 and L5-S1. The 2002 MRI differed from a 1994 MRI in that the 2002 study noted no canal stenosis, while the 1994 study noted canal stenosis at L4-L5. Likewise, the 2002 MRI described the L4-L5 herniation as a "broad-based central disc herniation," while the 1994 MRI described a herniation at L4-L5 on the right.

On a referral from Dr. Turbeville, the claimant sought treatment from the

Neurosurgery Clinic at UAMS on January 2, 2003. His doctors concluded that his symptoms were originating from the herniation at L4-L5. He eventually underwent surgery by Dr. John Fox on February 24, 2003, a microlumbar diskectomy at L4-L5.

When the claimant reported the injury to his employer is a matter of dispute. The claimant testified that he repeatedly complained to Wallace Byers about the injury throughout 2001 and 2002. On April 5, 2002, he stopped working for the respondent-employer because of his back. He testified that in July, 2002, he asked Wallace Byers to file the injury as a workers' compensation injury, and he alleged that Wallace Byers claimed to have no workers' compensation coverage. He testified that he saw a poster on a wall with the respondent-carrier's name and phone number on it, and he called that number to report his injury. Wallace Byers testified that although the claimant often complained of back pain, he never indicated it was the result of a work injury. He denied telling the claimant that he carried no workers' compensation coverage, and he testified that his first knowledge of the alleged injury was when his insurance company notified him of the claim.

## **II. Adjudication**

To prove the compensability of a gradual-onset injury, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the

course of his employment; that the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and that the injury was a major cause of the disability or need for treatment. *Wal-Mart Stores v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001); ARK. CODE ANN. § 11-9-102 (4)(A)(ii). Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores v. Leach, supra*; ARK. CODE ANN. § 11-9-102 (4)(D).

The key dispute herein is whether the claimant has successfully proven that his injury, a herniated disc at L4-L5, arose out of and in the course of his employment. Though the claimant did have surgery at this level in 1994, there is no evidence whatsoever in the record that the claimant had any significant back problems requiring medical treatment from 1995 until his alleged compensable injury in April, 2001. A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

The parties deposed the doctor who performed the claimant's 2003 surgery,

Dr. John Fox. Dr. Fox testified that based on his examination and the history related by the claimant, it was his opinion that the claimant's back injury and resultant surgery were causally connected with the claimant's work, and that the work had combined with the pre-existing condition to produce the need for treatment. He testified that his opinion was given within a reasonable degree of medical certainty. It should be noted that at another point, Dr. Fox testified that he could not ascertain a causal connection "from a medical standpoint." The context of that statement makes clear that Dr. Fox meant that considering solely the objective medical evidence, without the benefit of the claimant's history, he could not offer an opinion as to causation. But he did testify that considering the claimant's history, he could opine that the claimant's work had combined with the pre-existing condition to cause the need for surgery.

It is true that the commission is not bound by a doctor's opinion which is based largely on facts related to him by a claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. *See, Roberts v. Leo-Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983). In the present case, however, there is sufficient independent knowledge upon which to corroborate the claimant's claim. Dr. Fox testified that the history he relied upon to offer his opinion as to causation was as follows: "Patient states that his pain had been present for the

past two years and started with an incident involving heavy weight lifting in an incident at work which he, in his opinion, injured his back two years ago. That's the only, I mean, it's the patient's history, is where we get that from." The record herein establishes that the claimant first sought treatment for this round of back pain nearly two years prior to his visit with Dr. Fox, in April of 2001. The record establishes that though the claimant had back problems in 1994, he had not sought medical treatment for back problems again until April, 2001.

Moreover, the claimant's description of his job duties – that his job required lifting, twisting, bending, etc. – was corroborated in detail by his supervisor, Wallace Byers, who was called as a witness on behalf of the respondents. In short, the history which Dr. Fox would have relied upon to reach his opinion as to causation – the claimant's job duties, his previous back problems, and the onset of symptoms in April, 2001 – is corroborated by the other credible evidence of record. Therefore, Dr. Fox's opinion cannot be dismissed for its reliance on the claimant's history.

Given the testimony of the claimant and Wallace Byers regarding the claimant's job duties, the medical evidence establishing the claimant's prior back problems, the lack of evidence of any back problems prior to April, 2001, and the causation opinion offered by Dr. Fox, I find that the claimant has proven by a preponderance of the evidence that he sustained an injury to his back arising out of

and in the course of his employment.

As for the remaining elements of compensability: the objective medical evidence in the record, including the MRI, CT and myelogram reports, establishes that the claimant had a disc herniation at L4-L5. Dr. Fox testified that he performed surgery to correct this herniation. Nothing in the record identifies any other cause of this need for treatment, other than the herniated disc at L4-L5. Given this evidence, I find that the claimant has proven by a preponderance of the evidence that his injury caused internal physical harm to the body requiring medical services; that the existence and extent of his injury is established by medical evidence supported by objective findings; and that his injury was the major cause of his need for treatment.

Therefore, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset back injury on or about April 27, 2001.

### **Temporary Total Disability Benefits**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing

period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant had his back surgery on February 24, 2003. A letter from Dr. Fox dated October 7, 2003, indicated the claimant was capable of working again. Nothing in the record indicates that Dr. Fox had released the claimant to work at any time prior to that. I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from February 24, 2003, until October 7, 2003. I therefore find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from February 24, 2003, until October 7, 2003.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual-onset back injury on or about April 27, 2001. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Kenneth Olsen, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant

to Ark. Code Ann. § 11-9-715.

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. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge