

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208886

RONALD HODGE, EMPLOYEE	CLAIMANT
CLARIDGE PRODUCTS & EQUIPMENT, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
FIREMAN'S FUND, INSURANCE CARRIER	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED JANUARY 9, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL in Harrison, Boone County, Arkansas.

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE JAMES A. ARNOLD II, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by HONORABLE WHITNEY L. MOORE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 15, 2003 in Harrison, Arkansas. A prehearing order was entered in this case on August 14, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. The employer and employee relationship existed between Ronald Hodge and Claridge Products at all relevant times.
2. The employer/carrier relationship existed between Claridge Products and Liberty Mutual on all relevant dates after December 1, 1999.
3. The claimant sustained a compensable injury to his low back on or about October 19, 1998 while Claridge Products' workers' compensation coverage was provided by Fireman's Fund.
4. The claimant's compensation rate for that 1998 injury was \$354/\$266 per week.
5. The claimant was paid temporary total disability benefits from November 16, 1998 through January 24, 1999 and from June 7, 1999 through October 11, 1999.
6. The claimant sustained a 9% impairment rating to the body as a whole for the 1998 injury which was paid.

By agreement of the parties, the issues to be litigated are limited to the following:

1. Statute of limitations on a claim for additional benefits for the claimant's admittedly compensable 1998 low back injury.
2. Compensability (i.e., whether on July 26, 2002 the claimant experienced a recurrence of his 1998 injury, a new injury or aggravation of the 1998 injury, or no new injury/recurrence at all).
3. Attorneys fees.

DISCUSSION

Issue 1: Is a claim for additional benefits for the claimant's admittedly compensable 1998 low back injury barred by the applicable statute of limitations?

Ark. Code Ann. § 11-9-702 provides in relevant part:

(a) TIME FOR FILING. (1) (A) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury.

. . .

(B) For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(5).

. . .

(b) TIME FOR FILING ADDITIONAL COMPENSATION.

(1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one (1) year from the date of the last payment of compensation, or two (2) years from the date of the injury, whichever is greater.

In the present case, the claimant sustained a compensable injury to his low back on or about October 19, 1998 which ultimately required surgical decompression at the L3-4 level of the spine. His treating physician, Dr. James Blankenship, ultimately assigned the claimant an impairment rating of 8% to the body as a whole for the L3-4 surgical decompression and an additional 1% to the body as a whole for a broad-based disk bulge at the L5-S1 level, which Firemen's Fund Insurance ultimately accepted and paid.

Following an alleged incident at work on July 26, 2002, the claimant filed a claim for additional benefits. Prior to the July 26, 2002 alleged incident at work, the claimant last received medical treatment for his back at the respondents' expense in May of 1999, and the respondents last paid the claimant indemnity benefits for his 1998 back injury in October of 1999. Therefore, Firemen's Fund Insurance is correct that the claimant's present claim for

additional benefits, filed sometime after July 26, 2002, was filed more than two years after the date of the 1998 back injury and more than one year after the last payment of compensation in 1999 for the compensable 1998 back injury. Therefore, I find that a preponderance of the evidence in the record establishes that, to the extent that the claimant may assert that his 2002 back problems are a recurrence of his compensable 1998 back injury, any claim for additional benefits for the 1998 back injury is barred by the applicable statute of limitations.

Issue 2: Did the claimant sustain a compensable new injury on July 26, 2002?

The claimant has the burden of proving by a preponderance of the evidence that his back condition in 2002 is causally related to his employment. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Workers' Compensation Commission. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 188, 975 S.W.2d 857 (1998). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2003). Objective findings are those

findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16) (A) (i) (Repl. 2003). The Arkansas courts have long recognized that a preexisting disease or infirmity does not necessarily disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Jim Walter Homes, ___ Ark. App. ___, ___, S.W.3d ___ (June 25, 2003).

In the present case, Liberty Mutual Insurance Company asserts in its post-hearing brief that the claimant has failed to establish the occurrence of a back injury at the L5-S1 level of the spine on July 26, 2002, based primarily on (1) the fact that a pre-2002 MRI indicated some level of abnormality at L5-S1 that preexisted July 26, 2002; based on (2) the fact that the claimant was experiencing at least some degree of back pain and radicular symptoms in his legs prior to July 26, 2002; and based on (3) the testimony of Ronnie Kilgore indicating that the claimant had told him before July 26, 2002 that the claimant would "fake an injury" in order to get out of working on the 1500 machine, which the claimant alleges caused his injury on July 26, 2002.

After hearing the live testimony and observing the demeanor of the witnesses, I find credible Mr. Kilgore's testimony that the claimant told him before July 26, 2002 that the claimant would fake an injury in order to get out of working on the 1500 machine. Therefore, it is highly unlikely that I would find the claimant's testimony, by itself, adequate to persuade me that the claimant sustained an injury on July 26, 2002 shortly after beginning work on the 1500 machine. On the other hand, I note that Mr. Kilgore's testimony was only that the claimant would fake an injury in order to get out of working on the 1500 machine, and not that the claimant later told him that he did fake an injury to get out of working the 1500 machine.

Furthermore, while it is certainly conceivable that the claimant could fake an onset of severe symptoms during setup of the 1500 machine, I note that it is not possible for the claimant to fake the more pronounced objective medical findings at L5-S1 which were identified by diagnostic testing after July 26, 2002.

In addition to the objective diagnostic findings which the claimant could not fake, I note that his claim of a compensable July 26, 2002 back injury is also supported by the medical opinion of Dr. Blankenship. I find it highly

significant that Dr. Blankenship was the claimant's treating specialist after the 1998 back injury, as well as the claimant's treating specialist after the July 26, 2002 alleged injury. Significantly, Dr. Blankenship's October 8, 2002 clinic note indicates that the claimant's L5-S1 abnormality is now a surgical condition, and Dr. Blankenship has indicated, within a reasonable degree of medical certainty in that same report, that the claimant's current problem is related to an original work-related injury (in 1998), which was exacerbated while working on July 26, 2002. Dr. Blankenship attributes the claimant's right lower extremity symptoms to an L5 radiculopathy secondary to a lateral disk herniation at L5-S1, and also attributes the claimant's current left leg symptoms to stenosis from loss of disk space height, also due to the disk herniation at L5-S1. While Liberty Mutual Insurance Company notes the presence of at least some degree of left and/or right lower extremity radiculopathy symptoms that preexisted July 26, 2002, I note that whatever degree of symptoms the claimant may have been experiencing prior to July 26, 2002 were not severe enough for the claimant to seek ongoing medical treatment.

Finally, I note that there is at least some degree of question as to whether or not the nature of the work duties that the claimant performed on the 1500 machine on July 26, 2002 were even adequate to cause additional low back injury. On this point, I note that Dr. Blankenship ultimately released the claimant to return to work after the L3-4 surgery from his 1998 injury with a 75-pound lifting restriction, and that the claimant was still under that 75-pound lifting restriction on July 26, 2002. There appears to be no dispute that the roll the claimant was lifting at the time of the alleged injury on July 26, 2002 weighed less than 75 pounds.

Nevertheless, I note that the type of lifting involved on the 1500 machine on July 26, 2002 appears to be a break from the claimant's normal work duties, and as I noted at the hearing, there appears to be no dispute that the lifting involved at that time was not a straight up lift, but was instead lifting with the arms extended. I find it significant that when Dr. Langston saw the claimant on July 26, 2002, Dr. Langston commented in his office note that "I find it hard to believe that a fellow with ongoing back trouble since his surgery would be doing lifting of that (i.e., 75 pounds) caliber, but that's what Dr. Blankenship

released him to do." As noted above, even Dr. Blankenship, who had assigned a 75-pound lifting restriction prior to July 26, 2002, has now attributed the claimant's current condition to the 1998 back injury, as exacerbated on July 26, 2002.

In summary, I find that the claimant has established by a preponderance of the credible evidence that he sustained a new back injury on July 26, 2002, which is established by medical evidence supported by objective findings, based on the following evidence which I find credible: (1) Dr. Blankenship's medical opinion (the only medical opinion in the record), which attributes the claimant's current medical condition, at least in part, to a July 26, 2002 injury; (2) Dr. Blankenship's reports indicating that the claimant is presently a surgical candidate for the disk abnormality at L5-S1; (3) the documentary evidence and witness testimony indicating that the claimant was not receiving any ongoing medical treatment and was not a surgical candidate for the degree of abnormalities that he had at the L5-S1 level prior to July 26, 2002; (4) the objective diagnostic test reports in the record which indicate that after July 26, 2002 the claimant had a severe disk abnormality at L5-S1 of a surgical nature which was clearly more advanced on

diagnostic testing than the level of abnormality identified in the last diagnostic test prior to July 26, 2002; and (5) the unrebutted witness testimony that the claimant was lifting with his arms extended on July 26, 2002 a roll of fabric weighing approximately 36 to 45 pounds shortly before he reported his injury.

Issue 3: Is the claimant's attorney entitled to a fee?

Respondent no. 1, the carrier on the risk at the time of the 2002 injury, contended that the claimant did not sustain a new compensable injury in 2002. I have found otherwise. Because respondent no. 1 has controverted the 2002 injury in its entirety, the claimant's attorney is entitled to a controverted attorney's fee on all benefits payable on that injury. See generally Sanders v. K-Mart Corporation, Full Workers' Compensation Commission, Opinion filed May 11, 1999 (WCC No. D402737).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer relationship existed between Ronald Hodge and Claridge Products at all relevant times.

3. The employer/carrier relationship existed between Claridge Products and Liberty Mutual on all relevant dates after July 1, 1999.
4. The claimant sustained a compensable injury to his low back on or about October 19, 1998 while Claridge Products' workers' compensation coverage was provided by Firemen's Fund.
5. The claimant's compensation rate for that 1998 injury was \$354/\$266 per week.
6. The claimant was paid temporary total disability benefits from November 16, 1998 through January 24, 1999 and from June 7, 1999 through October 11, 1999.
7. The claimant sustained a 9% impairment rating to the body as a whole for the 1998 injury which was paid.
8. The claimant's compensation rate for temporary total disability on July 26, 2002 was \$341 per week.
9. Any claim for additional benefits for the claimant's October 19, 1998 compensable low back injury is barred by the applicable statute of limitations.

10. The claimant sustained compensable low back injury at the L5-S1 level of the spine on July 26, 2002.
11. The respondents have controverted this claim in its entirety.
12. The claimant's attorney is entitled to the statutorily prescribed statutory attorney's fee in Ark. Code Ann. § 11-9-715 (Repl. 2003).

AWARD

Respondent no. 1 is directed to pay benefits in accordance with the findings of fact set forth herein.

The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits for the 2002 injury, one-half of which is to be paid by the claimant and one-half to be paid by respondent no. 1 in accordance with Ark. Code Ann. § 11-9-715; and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463(2002).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge