

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F213599 & F403017

RONNIE LYELL, EMPLOYEE	CLAIMANT
ALCOA ARCHITECTURAL PRODUCTS, EMPLOYER	RESPONDENT
BANKERS STANDARD INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2004

Submitted on the record before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN.

Claimant represented by the HONORABLE EMILY S. PAUL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained two compensable low back injuries as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on October 4, 2002 at which time the claimant sustained a compensable neck injury in a motor vehicle accident at a compensation rate of \$425.00/\$319.00.

The parties also stipulated to an employer-employee-carrier relationship on July 17, 2003 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$425.00/\$319.00, in the event this claim for a back injury is found to be compensable. The claimant has received group benefits from MetLife and some expenses have been paid by the group carrier Blue Cross Blue Shield. The claimant is now receiving social security disability benefits and has child support obligations.

The claimant contends he injured his back at the same time he sustained the compensable neck injury on October 4, 2002. Alternatively, he sustained a new compensable injury on July 17, 2003. He seeks payment of medical expenses, temporary total disability benefits and attorney's fees.

The respondents contend the claimant's current back problems are the result of a non-work related incident while doing yard work at home. Alternatively, in the event of an award, the respondents seek a credit against benefits paid by third parties.

The claimant, age 42 (D.O.B. February 25, 1962), has a G.E.D., some military service, and work experience at Fred's Dollar Store and at an electroplating shop. The claimant began work for the respondent-employer eleven years ago in February 1993 as a long haul truck driver.

On October 10, 2002, the claimant was driving his route when he noticed a problem with the handling of the truck. He came to a sudden stop in the median of the highway, using the air brake. He got out of the truck and discovered a loose tie-rod. The company was notified and another truck was delivered for his use.

Later that evening, the claimant developed soreness in his neck and shoulder which he attributed to being thrown forward and back while wearing the seatbelt. He reported the injury to his dispatcher. The claimant initially declined medical care.

While on a trip to Texas, the claimant's neck became worse and he came under the care of the company physician, Dr. Antoon, for whiplash. A week or two later, the claimant told the doctor his back was also hurting. The claimant then saw Dr. Bruffett on one occasion for his low back before being referred to Dr. Safman. Dr. Safman treated the claimant with cortisone shots after the carrier denied the doctor's request for an MRI scan of the low back.

The claimant returned to regular duty on December 22, 2002. His pain persisted and he called the case management nurse but she declined to return him to a physician.

On May 3, 2003, the claimant bent over while doing yard work at his home and experienced sharp pain. He went to the emergency room and later to his general practitioner, Dr. Griffin, for treatment of a pulled muscle in his low back. He did not notify the workers' compensation insurance

adjuster about this incident. After medication and physical therapy, he returned to work at full duty in July after a 6-8 week absence. He drew short term disability benefits and took leave under the Family Medical Leave Act.

The claimant's pain persisted, but he performed his job with stops to rest along his route. On July 17, 2003, the claimant reinjured his back when he bent over to inspect a tag on the load. He called the dispatcher, Brenda Faulk, to report a pulled muscle. He finished his journey with lumpers unloading his truck. When he returned home, he sought treatment from his family physician, Dr. Griffin, because his "boss lady" told him his back problem was related to the May 2003 incident at his home.

Dr. Griffin prescribed medication and an MRI scan revealed a herniation at L3-4. Dr. Griffin referred the claimant to a neurosurgeon, Dr. Contreras. Surgery was performed on October 1, 2003.

The claimant last worked July 17. He remains under the care of Dr. Contreras and is unable to work. The claimant did not regard the surgery as successful. The claimant receives Social Security disability benefits.

On cross-examination, the claimant admitted to a prior back injury (pulled muscle) while working in Baltimore, however, the date is unknown. The claimant denied a prior neck injury, however, Dr. Griffin's records show a cervical x-ray was performed in April, 2002, six months before the accident at work. The claimant attributed this to another pulled muscle while working in Allen, Texas. Even though the claimant reinjured his neck after the October 4, 2002 incident, the neck injury has resolved.

The claimant testified his back has never healed, although there does appear to be some confusion about what part of the spine the claimant regards as the upper, middle and lower back (Tr. p. 29-31). The claimant reported a neck and upper back injury to the adjuster but Dr. Safman was treating the whole back.

There is also a gap in the claimant's medical treatment from his return to work on December 2002 to May 2003, the incident at home. The claimant admitted that the May 2003 incident was a

different kind of pain and he had to have assistance to get inside the house and go to the doctor. He also conceded that he did not miss time from work after the October 2002 incident in contrast to May 2003 where he missed eight weeks of work and drew group benefits. Dr. Griffin treated him in May, June and July before he returned to work for two or three weeks, still with some pain before the third incident on July 17, 2003 when he bent over to inspect a tag on the load. This was the same pain as the May incident at home.

MEDICAL EVIDENCE

Medical records show the claimant's family physician, Dr. Griffin took a cervical x-ray (which was normal) on April 24, 2002. There is no history of injury or indication why the x-ray was needed.

After the MVA on October 4, 2002, Dr. Antoon treated the claimant for whiplash, noting muscle pain and spasm. X-rays were taken showing mild scoliosis, but normal vertebral height and no fractures. On October 21, 2002, the claimant complained of numbness in his arms, hands and feet. Dr. Antoon ordered a cervical MRI which showed a "barely detectable" osteophyte at C3-C4. No disc herniations were found. Dr. Antoon recommended consultation with a neurosurgeon in a report dated October 29, 2002, but the carrier denied the request.

The claimant saw Dr. Bruffett on November 27, 2002 for neck and upper back pain from the October 2002 MVA. The doctor noted, "He describes pain that is moderate and aching. It seems to be in his upper back and somewhat down into his thoracolumbar area. He really does not describe much radicular pain." Dr. Bruffett examined the claimant and reviewed the diagnostic testing (x-ray, MRI) before concluding the claimant suffered from a cervical and thoracic strain. He referred the claimant to Dr. Safman.

Dr. Safman began treating the claimant on December 7, 2002 for cervical, thoracic and lumbar pain. Dr. Safman noted the claimant's symptoms had improved.

He has no cervical and upper trapezius pain. There is no upper thoracic pain. He has guarding and muscle spasm as well as tenderness in the lower thoracic, upper and mid lumbar spine.

This patient related to me that he was having paresthesias initially from the elbows to the hands and the knees to the feet. This has almost completely resolved. He still has some paresthesias in the fingers and toes, but his neurological exam was normal.

Dr. Safman diagnosed cervical and lumbar strain and prescribed injections and medications.

In a follow-up visit on December 19, 2002, Dr. Safman noted spasms in the paravertebral muscles in the mid lumbar spine. There was no cervical pain and the paresthesias had improved. A lumbar x-ray taken May 5, 2003 was interpreted as normal. Dr. Safman released the claimant and there is a gap in the medical records from December 2002 to May 2003.

The claimant went to the emergency room on May 3, 2003 and saw his family physician, Dr. Griffin on May 7, 2003 for low back pain after bending over at home to pick up a small rock. The doctor recorded "the onset of extreme pain in his lower back... he can hardly walk because of the extreme pain and he cannot bend or stoop." There was no radicular pain or paresthesias. There is no mention of the earlier work-related injury. Dr. Griffin diagnosed an acute muscle strain of the low back.

Follow-up reports indicate no improvement. The doctor noted, "Ronnie Lyell relates his back seems to be worsening again. He is hardly able to do anything other than just kind of lay around and be still." Dr. Griffin prescribed physical therapy which seemed to help the claimant's symptoms. He was released June 23, 2003.

The claimant returned to Dr. Griffin on July 21, 2003 complaining of increased low back pain and left upper back pain after bending over to check the load on the truck. In a report dated July 21, 2003, the doctor referred to a "reoccurrence" of his left upper and low back pain, noting, "he is about like he was before". However, because the claimant's straight leg raise exam was positive on the left, he recommended an MRI scan. A herniation was discovered at L3-4 on the left and Dr. Griffin referred the claimant to a neurosurgeon.

The claimant saw Dr. Contreras on August 29, 2003 for left hip and leg pain. The claimant related the three incidents at work and at home. Dr. Contreras offered conservative treatment but

the claimant didn't feel that would be helpful. Surgery was performed on October 1, 2003.

In follow-up visits, the claimant continued to complain of left leg pain and reported that he had fallen on two occasions. Dr. Contreras ordered a repeat MRI which showed a degenerative disk at L3-4. A CT scan on January 28, 2004 showed fibrosis (scar tissue) at the L4 nerve root, with narrowing of the left L3 foramen. A disc bulge was also noted at L2-3 with no stenosis. Dr. Contreras reviewed the diagnostic tests in a report dated February 17, 2004 and opined the claimant's L3-4 nerve root was damaged prior to surgery. Dr. Contreras has not assessed any specific work restrictions or assessed a permanent impairment rating. The claimant is now drawing Social Security disability benefits.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In a workers' compensation case, the burden rests on the claimant to establish his claim for compensation by a preponderance of the evidence. Bragg v. Evans St. Clair, Inc., 15 Ark. App. 53, 688 S.W.2d 959 (1985). The claimant must also prove a causal connection between the work-related injury and any subsequent physical problem for which he seeks compensation. Bates v. Frost Logging Company, 38 Ark. App. 36, 827 S.W.2d 664 (1992).

Where the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. McDonald Equipment Company v. Turner, 26 Ark. App. 264, 766 S.W.2d 936 (1989). A recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury. See Atkins, supra. This principle has been consistently applied in cases where a second complication is found to be a natural and probable result of the first injury. It is only where it is found that the second episode has resulted from an independent intervening cause that liability will be affected. Bearden Lumber Company v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In summary, the evidence shows the claimant developed symptoms after three incidents:

- October 4, 2002 - MVA, compensable whiplash (neck, shoulder) RTW 12-02
- May 5, 2003 - bending over in his yard at home/off work 8 weeks for low back pain RTW 6-23-03
- July 17, 2003 - bending over to look at a tag on the load he was transporting/surgery for L3-4 lumbar disc/has not returned to work

The question is whether there is a connection between a whiplash injury and lumbar disc surgery nine months later. In reviewing the claimant's testimony, there is a dramatic difference between the October 2002 compensable injury and the May 5, 2003 incident, regarding the onset and intensity of the claimant's back symptoms. Therefore, I find no causal connection between these two episodes.

After the compensable MVA, the claimant reported neck and shoulder pain which ultimately resolved. He did not, however, report back pain until a couple of weeks later. Although he complained of numbness in his feet, that symptom was never investigated and there is no mention of radicular hip and leg pain. Drs. Antoon and Bruffett diagnosed the claimant with a cervical and thoracic strain. Two months after the MVA, Dr. Safman noted the neck symptoms had resolved but the claimant had spasms in the mid-back. The carrier controverted the back complaints. The claimant then returned to work for six months and did not require medical care.

In contrast, on May 5, 2003 when the claimant bent over to pick up a rock in his yard at home, the pain was immediate and extreme. He required assistance to walk back to his home and get to the emergency room. He missed eight weeks of work. Clearly, this was a significant injury to the back. Unfortunately, no diagnostic testing was performed to assess this injury and the claimant returned to work on June 23, 2003 after a course of physical therapy. The claimant was still symptomatic, however.

A few weeks later, the claimant reinjured himself in a manner similar to the May 2003 incident. The injury resulted from the act of bending over, not because of a lifting injury. And the claimant testified the location of the pain was the same as the May incident. It was only after the third incident that an MRI of the lumbar spine confirmed the presence of a disc herniation and the claimant's symptoms changed to include the left hip and leg.

Because of the similarities in the location of the pain, the immediate onset of pain and the closeness in time, I find there is a causal connection between the May and July 2003 incidents. The July 2003 injury is a recurrence of the non-work related May 2003 back injury. Therefore, the respondents are not liable for any additional benefits.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed in 2002 and 2003 at which time the claimant earned sufficient wages to entitle him to a compensation rate of \$425.00/\$319.00.

2. The claimant suffered a compensable neck injury on October 4, 2002 as a result of a MVA. Medical expenses and temporary total disability benefits were paid before the claimant returned to work. The respondents have paid all appropriate benefits with regard to the neck injury.
3. The claimant has failed to prove by a preponderance of the credible evidence of record that back injuries suffered on May 5, 2003 and July 17, 2003 are causally related to the compensable injury as recurrences.
4. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury to the back, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
5. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge