

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112526

TONEY L. McVAY, EMPLOYEE	CLAIMANT
WATKINS MOTOR LINES, INC., EMPLOYER	RESPONDENT
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 28, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on March 5, 2004, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Kristofer E. Richardson, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on March 5, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on January 28, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employee/employer/carrier relationship existed at all relevant times, including November 1, 2001; that the claimant sustained

a compensable injury on said date which was treated as a medical only claim; that the claimant earned sufficient wages to entitle him to compensation rates of \$422.00 per week for temporary total disability and \$317.00 per week for permanent partial disability, if applicable; and that respondents had controverted all benefits beyond those previously paid.

By agreement of the parties, the primary issue to be presented for determination was whether the claimant's physical problems, need for medical treatment and disability beginning during February, 2002, were causally related to the admitted injury. If answered affirmatively, claimant's entitlement to temporary total disability and additional medical treatment must be addressed.

Claimant contended, in summary, that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on November 1, 2001; that all his subsequent medical problems and need for treatment, including back surgery, were causally related to the admitted injury; that respondents should be held responsible for all outstanding medical expenses, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning February 11, 2002, and continuing through June 27, 2002; and that a controverted attorney's fee should attach to any benefits awarded. The claimant reserved the issue of permanent disability.

The respondents contended that it provided appropriate medical treatment

for the claimant's back injury on November 1, 2001; that the claimant was released to return to work without restrictions on November 5, 2001, and that he, in fact, continued working full-duty without restrictions until an incident at home during February, 2002. Respondents maintain that the claimant's subsequent surgery was caused by the accident at home in February, 2002, and unrelated to the work incident on November 1, 2001. Alternatively, respondents plead an offset for short-term disability benefits paid to the claimant through respondents group disability plan at the rate of \$334.00 per week for the period beginning February 23, 2002, through June 27, 2002, as well as an offset for any medicals which may have been paid under a health insurance plan.

In addition to the claimant, Debra Reed was called as a corroborating witness. Johnny M. Cherry and Chuck Bath were called as witnesses for the respondents. The record is composed solely of the transcript of the March 5, 2004, hearing containing numerous exhibits.

From a review of 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 made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that his physical problems, need for medical treatment, including surgery, were directly and causally related to the November 1, 2001, admitted injury, entitling the claimant to appropriate workers' compensation benefits.
4. The claimant was temporarily totally disabled for the period beginning February 11, 2002, and continuing through June 27, 2002, at which time the claimant returned to work for the employer herein.
5. The claimant's healing period ended June 27, 2002.
6. Respondents are responsible for all hospital, medical, and related expenses as a result of claimant's November 1, 2001, injury and respondents remain responsible for continued, reasonably necessary medical treatment.
7. Respondents are entitled to a credit or offset, equal to dollar-for-dollar, the amount of benefits the claimant received under respondents' short-term disability policy and group health care plan, while, at the same time being responsible to reimburse the appropriate providers pursuant to A.C.A. §11-9-411.

8. Respondents have controverted all benefits beyond those previously paid.
9. Claimant's entitlement to permanent disability benefits has been specifically reserved.

DISCUSSION

The claimant, Toney L. McVay, is thirty-five (35) years old. He has been employed by Watkins Motor Lines as a freight handler for seven (7) years. In fact, the claimant was working for the employer at the time of the within hearing, working full-time at his regular job. The claimant sustained an admitted injury to his low back on November 1, 2001. While lifting and loading boxes of freight, weighing between thirty-five (35) to seventy (70) pounds, the claimant felt a pop in his low back which caused him immediate pain which he stated, "...it almost threw me to the ground." The claimant maintained that he subsequently experienced shooting pains down his left leg. The injury was promptly reported, and the claimant was immediately sent to the Crittenden Memorial Hospital emergency room in West Memphis, Arkansas. (Tr.9-10)

The only diagnostic test performed at the emergency room was an x-ray. The claimant was taken off work, advised to rest in bed for two (2) days at which time he was prescribed three (3) prescription medications, one for pain, a muscle relaxer, as well as anti-inflammatory medication, and to follow-up with the company doctor. The claimant was next examined by a physician with the Coast-to-Coast Medical Clinic on November 5, 2001. The claimant was

diagnosed as having sustained an acute lumbar strain, at which time he was released to return to work and given more medication. (Tr.10-11)(Cl. Ex. A, pp.1-4)

It is undisputed that the claimant did not seek additional medical treatment until February 11, 2002, following an exacerbation at home while doing laundry. Again, it is undisputed that the claimant sustained a compensable injury on November 1, 2001. The primary issue to be addressed is whether the claimant's physical problems, need for treatment and disability beginning in February, 2002, were directly and causally related to the admitted injury or the result of an independent intervening accident at home, totally unrelated to the admitted injury.

In *Davis vs. Old Dominion Freightline, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000), our Supreme Court held that the Legislature's enactment of Act 796 of 1993 did not change the prior, existing law regarding independent intervening causes. In *Broadway vs. B.A.S.S.*, 41 Ark. App. 111, 848 S.W.2d 445 (1993), our Courts outlined the test for when an independent intervening cause relieves an employer from liability:

In *Guidry vs. J.R. Eads Construction Co.*, 1 Ark. App. 219, 669 S.W.2d 483 (1984), we said that the question is whether there is a causal connection between the primary injury and the subsequent disability; and if there is such a connection, there is no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant which was unreasonable under the circumstances. One of the circumstances

to consider in deciding whether the “triggering activity” was reasonable is the claimant’s knowledge of his condition. See 1 Larsons, *The Law of Workers’ Compensation* §13.11 (1986).

Id at 114, 848 S.W.2d at 447-48

A preponderance of the credible evidence reflects that the claimant’s problems were related to the November 1, 2001, injury.

First, I found the claimant to be a credible witness. Despite a few inconsistencies in the claimant’s medical histories which were pointed out by respondents’ attorney, and, which will be discussed further below, the record reflects that the claimant has been a dedicated, hard-working employee for the employer herein both before and after his November 1, 2001, admitted injury, as well as following back surgery in February, 2002. Following surgery and a short rehabilitation period, the claimant returned to work for Watkins Motor Lines on or about June 27, 2002, and has continued to perform full-time, regular duties since that time. This reflects a strong work ethic and desire to work which explains, in part, why the claimant did not seek additional medical treatment between November 5, 2001, and February, 2002.

The claimant maintained that his physical condition grew progressively worse following the November 1, 2001, admitted injury. As previously noted, no diagnostic studies, save a plain film x-ray were performed in an effort to diagnose the claimant’s injury. He continued taking prescription medications while off-work, while refusing to seek follow-up medical treatment. On cross-

examination, it was pointed out that the claimant, when seen in the emergency room on February 11, 2002, reported an onset of back pain two (2) hours previously, apparently while doing laundry, and that he failed to give any history of prior injury. Clearly, the emergency room records are incomplete because it is undisputed that the claimant had a history of an admitted injury on November 1, 2001, which was diagnosed as an acute lumbar sprain. On further cross-examination, respondents pointed out that the claimant had sustained a prior back and left leg injury following a motor vehicle accident in May, 1990, which I find to be insignificant. Further, respondents point out that, in his discovery deposition, the claimant denied any prior workers' compensation claims. Despite respondents' assertion that, as a matter public record, the claimant filed a claim in February, 1999, the claimant could not recall such an injury. Again, if such an injury occurred, which is not conceded, I find it insignificant for two (2) reasons. First, the alleged injury occurred while the claimant was working for the employer herein. Whatever the nature and extent of the injury was, clearly, it did not prevent the claimant from working because the claimant continued working for the respondent performing extremely heavy work until the November 1, 2001, admitted injury.

Debra Reed, the claimant's girlfriend, was called as a corroborating witness. She testified that the claimant did not have any physical limitations before November 1, 2001. She stated that after the claimant's injury, his

physical condition progressively deteriorated and that he refused to seek any additional medical treatment until February 11, 2002, at which point she insisted that he seek additional medical treatment.

Ms. Reed is a R.N., working as a research nurse in Memphis, Tennessee. On February 11, 2002, she took the claimant to the Delta Medical Center emergency room in West Memphis, Arkansas. She stated that both she and the claimant provided the history which, as previously noted, is incomplete. The claimant received a follow-up examination at Ms. Reed's insistence with Dr. James C. Varner, an orthopedic surgeon at the hospital where she works. Dr. Varner's initial diagnosis was chronic lumbar strain with left side sciatica. I feel compelled to point out that, in the clinical history provided to Dr. Varner, the claimant described the onset of symptoms three (3) months earlier, related to moving freight at Watkins Motor Lines. The history provided by the claimant was before the true nature and extent of claimant's injury was ascertained. Following an MRI evaluation, it was determined that the claimant had a ruptured disc requiring surgical intervention. It must further be noted that even Dr. Varner's history contains inconsistencies. Dr. Varner indicated that the claimant presented himself on February 15, 2002, with an exacerbation "three (3) months" ago which I believe should reflect three (3) days previously. (Cl. Ex. A, p.5)

The record reflects that the claimant underwent successful surgical

intervention, and returned to work for the employer on June 27, 2002. The claimant has continued to work since that time.

Johnny M. Cherry was called as a witness for the respondents. Mr. Cherry was the terminal manager for the employer through November, 2003. He stated that the claimant performed full-duty work, without restrictions, complaints or request for treatment, and that he did not observe the claimant experiencing any problems. I did not find the testimony of Mr. Cherry to be of any probative value. As reflected on cross-examination, Mr. Cherry was not the claimant's supervisor. In fact, the record reflects that the claimant had at least ten (10) supervisors, depending on his work-shift, and that if the claimant had complaints, he would not report them to Mr. Cherry. On further cross-examination, Mr. Cherry acknowledged that he did not have personal knowledge of the November 1, 2001, admitted, work-related injury. (Tr.57, 63)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the

doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met his burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven, by a preponderance of the evidence, that his physical problems, need for treatment and disability beginning February, 2002, were directly and causally related to the admitted injury. Accordingly, I find that the claimant is entitled to appropriate, and continued workers' compensation benefits.

It is further undisputed that the claimant received short-term disability benefits and that a portion of his medical expenses were paid by the employer's health insurance provider, and that the respondents are entitled to an offset for benefits previously paid pursuant to Ark. Code Ann. §11-9-411 (Repl. 2003).

AWARD

The respondent, Liberty Insurance Corporation, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$422.00 per week beginning February 11, 2002, and continuing through June 27, 2002.

All benefits having accrued, respondents shall pay same in lump sum and without discount; however, respondents are entitled to an offset for short-term disability benefits previously received.

Respondents are further directed and ordered to pay, and/or reimburse, the appropriate medical provider for all hospital, medical and related expenses, including, but not limited to claimant's surgery, and respondents remain responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Kristofer E. Richardson, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

Additional issues not addressed herein are specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge