

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F310788

HAROLD RIPLEY, Employee	CLAIMANT
MANSFIELD PROPERTY MANAGEMENT, Employer	RESPONDENT
AIG CLAIM SERVICES, INC., Carrier	RESPONDENT

OPINION FILED MARCH 30, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by R. SCOTT MORGAN, Attorney, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

On March 3, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 7, 2004, and a pre-hearing order was filed on January 9, 2004. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on August 29, 2003.
3. The claimant was earning an average weekly wage of \$324.00 which would entitle him to compensation at the rate of \$216.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back on August 29, 2003.
2. Temporary total disability benefits from September 4, 2003 through a date yet to be determined.

3. Medical.
4. Attorney fee.

The claimant contends he injured his low back on September 4, 2003 while unloading tanks and toilet bowls from a tractor trailer. He requests temporary total disability benefits, medical benefits, and an attorney fee.

The respondents contend the claimant did not suffer a compensable injury.

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 A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 7, 2004, and contained in a pre-hearing order filed January 9, 2004, are hereby accepted as fact.
2. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on August 29, 2003.
3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.
4. Claimant is entitled to temporary total disability benefits beginning September 4, 2003 and continuing through a date yet to be determined.
5. Respondent has controverted claimant's entitlement to unpaid indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 52-year-old man with an eighth grade education. Claimant has

a history of low back complaints. Claimant underwent surgery in 1985 for a ruptured disc as a result of a workers' compensation injury in Missouri. Since that time claimant has had intermittent back pain.

The claimant went to work for the respondent on February 2, 2003 performing renovation work. Claimant testified that he and others would renovate one and two bedroom apartments and that his job duties required him to perform plumbing, electrical, and carpentry work.

Claimant contends that he suffered a compensable injury to his low back while working for respondent on Friday, August 29, 2003. Claimant testified that on that date he and other employees were unloading a tractor-trailer that was full of new toilets for the apartments they were renovating. Claimant testified that as he was carrying a toilet on his shoulder he made a turn and felt a sharp shooting pain in the right side of his back. Claimant did not immediately report the injury because he thought he had a pulled muscle. Claimant continued to work the remainder of his shift.

Claimant was not scheduled to work on Saturday, Sunday or Monday after August 29 due to the Labor Day weekend. On Tuesday, September 2<sup>nd</sup>, claimant went to work and apparently talked to both Juan, his immediate supervisor, and Josh Harbour, the director of operations for respondent. Claimant testified that he reported the injury of August 29 to Juan and told him he needed to go to the doctor. Claimant also testified that he reported the incident to Josh and told him that he thought it was a pulled muscle and was going to file it on his group health insurance. Claimant testified that he later informed Harbour that he was going to request workers' compensation benefits.

The medical records reflect that claimant sought medical treatment from the emergency room on September 2, September 7, and September 8. Claimant was referred by the emergency room physicians to Dr. Gallaher, a neurosurgeon. Dr. Gallaher ordered an MRI scan which revealed a herniated disc at the L5-S1 level. Dr. Gallaher has

recommended surgery but it has not yet been performed.

### ADJUDICATION

Claimant contends that he suffered a compensable injury while he was carrying a toilet while working for respondent on August 29, 2003. Therefore, claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving a compensable injury.

There is no question in this case that claimant suffered from a pre-existing back condition. Claimant testified that he had been diagnosed as suffering from a ruptured disc for which he underwent surgery in 1985. Claimant also testified that between 1985 and August 29, 2003, he had intermittent back pain. Claimant testified that prior to September 2, 2003 he had last sought medical treatment in January 2003. However, the evidence also indicates that claimant apparently missed one week of work during the summer of

2003 due to his back condition.

Thus, while there is no question that claimant suffered from a pre-existing low back condition, I find based upon the evidence presented that the incident on August 29, 2003 aggravated this pre-existing condition. A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with a disease or infirmity to produce the disability for which compensation is sought. *Nashville Livestock Commission v. Cox*, 302 Ark. 69, 787 S.W. 2d 664 (1990); *Minor v. Poinsett Lumber & Manufacturing Co.*, 235 Ark. 195, 357 S.W. 2d 504 (1962); *St. Vincent Medical Center v. Brown*, 53 Ark. App. 30, 917 S.W. 2d 550 (1996).

As previously noted, the claimant testified that prior to September 2, 2003, he last sought medical treatment for his pre-existing low back condition in January 2003. Apparently, an MRI scan was performed at that time which revealed a herniated disc. After the injury of August 29, 2003, another MRI scan was performed and was compared to the January 2003 MRI scan. This comparison was made by Dr. Michael Penney in the MRI report of September 16, 2003. In that report Dr. Penney noted that he compared claimant's current MRI scan to the prior MRI scan of January 2003. Dr. Penney noted that the September 2003 MRI scan reveals an enlargement in the L5-S1 disc protrusion. Dr. Penney also noted that there had been an enlargement in the right lateral component to the disc bulge at that level that was severely narrowing the right L5-S1 neural foramen with impingement on the L5 nerve root.

I also believe it is important to note that Dr. Gallaher has opined that claimant has suffered a new injury as a result of the incident on August 29, 2003. In a letter dated February 11, 2004, Dr. Gallaher noted that while claimant had had intermittent problems in the past, the claimant had never had right lower extremity pain to the extent that he was required to seek treatment from the emergency room. He also relies upon the fact that the September 2003 MRI scan reveals that the disc protrusion has enlarged when

compared to the January 2003 MRI scan.

Based upon the foregoing evidence, I find that claimant did have a pre-existing low back condition prior to August 29, 2003. However, I find based upon a comparison between the September 2003 MRI scan and the January 2003 MRI scan that the incident on August 29, 2003 aggravated claimant's pre-existing condition. Based upon this evidence, I find that claimant has offered proof by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. When claimant sought medical treatment on September 2, 2003, claimant gave a history of a pre-existing condition but the emergency room report also indicates that claimant's condition had worsened since August 29.

Arrives limping with R anterior hip pain and numbness, worse since 8-29. Pain and numbness in leg and foot. Has had these symptoms intermittently since 1-03 - - - constantly since 8-29.

I also note that the emergency room report of September 7, 2003 indicates that claimant was alleging a workers' compensation injury and that the emergency room report of September 8, 2003 also indicates that claimant suffered a "Accident/Employment" as well on August 29, 2003.

While Josh Harbour, the respondent's director of operations, testified that he did not know on September 2, 2003 that claimant was alleging a work-related injury, I note that claimant testified that he reported the work-related injury to his immediate supervisor, Juan, on September 2, 2003 and informed him that he was going to seek medical treatment.

Claimant's testimony that he reported the work-related injury to Juan on September 2, 2003 was not refuted by the respondent.

Accordingly, based upon the testimony of the claimant and the remaining evidence including the medical records reflecting that claimant was alleging a work-related injury, I find that claimant has met his burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment with respondent and that it was the result of a specific injury identifiable by time and place of occurrence.

Having found that claimant has satisfied all elements of compensability, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on August 29, 2003.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

I also find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits beginning September 4, 2003, and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, after reviewing the testimony of the claimant as well as the medical records indicating that claimant has a herniated disc for which surgery has been recommended by Dr. Gallaher, I find that claimant has met his burden of proving by a preponderance of the evidence that he remains within his healing period and that he has suffered a total incapacity to earn wages since September 4, 2003. Accordingly, claimant is entitled to temporary total disability benefits beginning September 4, 2003 and continuing through a date yet to be determined.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on August 29, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits beginning September 4, 2003 and continuing through a date yet to be determined. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE