

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F305634**

**BRIAN SABINSKE, EMPLOYEE**

**CLAIMANT**

**MORGAN BUILDINGS & SPAS, INC., EMPLOYER**

**RESPONDENT**

**LIBERTY MUTUAL INSURANCE COMPANY,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED APRIL 22, 2004**

Hearing before Chief Administrative Law Judge David Greenbaum on February 27, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. John C. Bartelt, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Mark A. Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted February 27, 2004, to determine whether the claimant is entitled to additional workers' compensation benefits.

A prehearing conference was conducted in this claim on January 21, 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 marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed between the

parties at all relevant times, including April 17, 2003; that the claimant sustained a compensable injury to his right wrist as the result of a specific incident identifiable in time and place of occurrence on said date; that claimant's average weekly was \$270.00, entitling him to a compensation rate of \$180.00 per week for temporary total disability, if applicable; that respondents paid related medical through on or about June 2, 2003; and that the respondents have controverted all additional benefits beyond those previously paid.

The primary issue presented for determination was whether the claimant's continued, physical problems involving his right wrist were related to the admitted injury, entitling him to additional workers' compensation benefits.

Claimant contended, in summary, that he sustained a compensable aggravation of a pre-existing condition as a result of the April 17, 2003, injury; that all of his continued, physical problems were directly and causally related to the compensable injury; that he was entitled to continued, reasonably necessary medical treatment, including, but not limited to a recommended surgical repair of his right wrist; that respondents should be responsible for temporary total disability beginning with the date of the surgery, if approved; and that a controverted attorney's fee should attach to any additional benefits awarded.

The respondents contended that the claimant's injury on April 17, 2003, was a temporary exacerbation of a nonunion of claimant's scaphoid bone; that

respondents paid appropriate medical benefits through June 2, 2003, at which time claimant was found to have reached maximum medical improvement; and that any additional medical requested was not causally related to the admitted injury, but, rather to the claimant's pre-existing condition.

The claimant was the only witness to testify. The record in this case is composed solely of the transcript of the February 27, 2004, hearing containing a joint medical exhibit consisting of fourteen (14) pages.

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 claimant and to observe his 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 agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that his continued physical problems are directly and causally related to the admitted injury, entitling him to continued, reasonably necessary medical treatment, including, but not limited to surgical repair of the right

wrist, if still recommended, together with temporary total disability benefits beginning with the date of surgery, if performed.

4. The claimant's injury was the result of a specific incident identifiable in time and place of occurrence on April 17, 2003, which aggravated a pre-existing condition rather than a temporary exacerbation of a pre-existing condition.
5. Respondents have controverted all benefits beyond those previously paid.

#### DISCUSSION

\_\_\_\_\_The claimant, Brian Sabinske, testified in his own behalf. I found the claimant to be an extremely credible witness. His testimony is undisputed. The claimant has been employed by the respondent, Morgan Buildings and Spas for approximately six (6) years. His work is physically demanding. The claimant works in the steel yard, his duties consisting of gathering metal, cutting it up and shipping it out to contractors. The claimant denied experiencing any physical problems with his right wrist or right upper extremity at any time immediately prior to April 17, 2003. He acknowledged having sustained a prior injury approximately twenty (20) years earlier and relating a prior fracture to an examining and treating physician, Dr. Jeffrey Cole, an orthopedic surgeon in Memphis, Tennessee. The claimant's description of the injury, as well as his subsequent difficulties with the insurance company's claims adjuster is set out

below :

Q Tell us how you were injured last year on April 17<sup>th</sup>?

A I was carrying a piece of 23 foot nine metal up above my head, and there was a stack of metal on the ground which I tripped over. When I fell, I went to brace myself with my hand, and that's when it broke. That's when it broke.

Q When your wrist broke?

A Right, when I hit the ground.

Q When you hit the ground. So you actually went all the way down to the ground?

A Oh, yes, sir.

Q Did you put out both hands or just your right hand to brace your fall?

A I put out both hands.

Q Did you fall to one side or the other?

A I fell on the right side.

Q The right side?

A The one that hit first.

Q Did you immediately feel pain?

A Yeah. It was red and started swelling up right away.

Q Did you receive medical treatment fairly quickly after that?

A It was like an hour and a half after that when they got me to the doctor?

Q How many days did you miss work?

A I missed a total of five days.

Q And as I understand it, Morgan Building & Spas or their insurance company provided you with medical treatment for a period of time, is that correct?

A Yes, sir.

Q Approximately a month or two, something like that?

A Yeah.

Q And you ended up with Dr. Cole, is that correct?

A Yes, sir.

Q An orthopedic doctor?

A Yeah.

Q My records indicate that you last saw Dr. Cole about 5/13/03. Does that sound about right to you, in May?

A Yeah.

Q At that time what was your understanding concerning further treatment?

A At that time I wanted to go ahead and get it fixed, because he said if it went too long, there would be a chance of permanent damage to it.

Q So Dr. Cole – there was a procedure that Dr. Cole wanted to do, is that right?

A Yes, sir.

Q I believe he called it excision of a scaphoid with a four-corner arthrodesis?

A Yes.

Q And did you talk with anyone from Liberty Mutual Insurance Company with respect to getting that done?

A I talked to Ms. Shanta Byrd.

Q And what did Ms. Byrd tell you? She's an adjuster, as you understand it, with Liberty Mutual, is that right?

A Right. Yeah.

Q And what did she tell you about going back to Dr. Cole for further treatment?

A She told me that they've done all that they were going to do.

Q And who's they? When you say "they," who are you talking about?

A I guess it would be workmen's comp.

Q Okay.

A They did all that they was going to do, and they paid for all they were going to pay for, and that was it.

Q So, did she tell you that she would not pay for you to go back to Dr. Cole again?

A Yes.

Q All right. And have you returned to Dr. Cole since that time?

A No, sir.

Q Why not?

A I don't have no insurance to go. Can't afford it.

Q Have you continued to work at Morgan Buildings & Spas –

A Yes. (Tr.8-10)

The record reflects that the claimant is a highly motivated individual. To date, he has not undergone recommended surgery, apparently because he cannot

afford to miss work and pay the cost involved in undergoing surgery. The claimant has continued working while wearing a hard plastic cast and taking over-the-counter medication for pain and swelling. There is no evidence that the claimant experienced any pain or swelling prior to April 17, 2003. He stated that he continued to experience swelling involving his right wrist with activities which was readily observable.

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).

The Workers' Compensation Commission is not bound by a medical opinion which is based largely on history. Further, the Workers' Compensation Commission need not base a decision on how medical professionals may characterize a given injury, but, rather primarily on factors germane to the purpose of the workers' compensation law. *Roberts vs. Leo-Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983); *Weldon vs. Pierce Brothers' Construction*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Under our Act, an employer takes an employee as he finds him. An aggravation of a pre-existing non-compensable condition by a compensable injury is compensable. In the instant case, the claimant sustained an aggravation of a pre-existing condition as a result of an independent incident, identifiable in time and place of occurrence. It is clearly compensable. The fact that Dr. Cole found that the claimant had a pre-existing scaphoid nonunion which was unrelated to the admitted incident is not binding on this Commission. It is apparent that the doctor and/or the carrier considered the major cause for the need for surgery to control their opinion as to the reasonableness of the treatment which is not required under our law. *Farmland Insurance Co. vs. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). This claim is strikingly similar, while at the same time more compelling, than a recent decision issued by the Arkansas Court of Appeals. See, *Williams vs. L & W Janitorial, Inc.*, CA 03-681 (Opinion

filed February 4, 2004).

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 need for additional medical treatment is directly and causally related to the April 17, 2003, admitted injury. Accordingly, I hereby make the following:

AWARD

Respondent, Liberty Mutual Insurance Company, is hereby directed and ordered to pay continued, reasonably necessary medical treatment, including, but not limited to surgical repair of claimant's right wrist, if still recommended.

Respondents are further directed and ordered to pay temporary total disability benefits beginning with the date of surgery, if performed, and continuing during the time of claimant's healing period and while he is unable to work.

Additionally, claimant's attorney, Mr. John C. Bartelt, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715.

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

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge