

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308310

RONALD SHENKS, EMPLOYEE

CLAIMANT

SCHNEIDER NATIONAL CARRIERS, INC, EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO ., CARRIER

RESPONDENT

OPINION FILED NOVEMBER 19, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on August 27, 2004, at Marion, Crittenden County, Arkansas.

Claimant appeared by the HONORABLE MARC I. BARETZ, Attorney at Law, West Memphis, Arkansas.

Respondents appeared by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled case to determine claimant's entitlement to workers' compensation benefits.

A pre-hearing conference was conducted in this claim on March 23, 2004, from which a Pre-hearing Order was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' respective contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission's Exhibit #1. The parties reached stipulations relative to the claimant's compensation rate.

In addition to the contentions set forth in their pre-hearing questionnaire, respondent also assert that notice of the injury alleged by the claimant was not received until August 4, 2003, such that if the claim is found to be compensable they would not be liable for benefits accrued

prior to the date of notice. Further, respondents assert entitlement to a set-off relative to any benefits paid to the claimant by a third party, to include short term benefits, and medical benefits in the event the claim is found to be compensable.

The testimony of Ronald Shenks, the claimant, and Jane Shenks, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Ronald Shenks, the claimant, with a date of birth of June 9, 1949, has a high school education and one year of college. Claimant commenced his employment with respondent in May 1992, as a truck driver.

Claimant presents a varied work history, to include military service in Viet Nam, factory work in Louisville, Kentucky, and construction work in the Memphis, Tennessee area. Claimant also worked for ten years at the Naval base until the job was eliminated. Commencing May 1992, claimant was employed continuously by Schneider National Transportation as a truck driver. Claimant asserts that on July 3, 2003, he suffered injury to his low back which serves as the basis of the present claim.

Claimant acknowledged that prior to July 2003, he was having problems with his back which he attributed to kidney stones, and due to his prior experience attributed symptoms growing out of the July 3, 2003, incident to same. Claimant asserts that it was only after he had received treatment for the kidney stones without resolution of his low back complaint that he appreciated the July 3, 2003, low back injury.

Claimant's testimony reflects that approximately a year and a half prior to the July 3, 2003, incident, he started having problems with kidney stones. The testimony of the claimant

reflects that in June 2002, he has diagnosed with kidney stones by the physician at the VA Hospital. Claimant described the type of symptoms he experienced as a results of the diagnosed kidney stones:

Well, from that I was out at Wal-Mart getting tires put on my van and I was there in the waiting area for them to do that and my wife saw a fan that she thought I wanted for my truck and I got up to go look at the fan and I got halfway across the floor and my legs quit working. I didn't knew f I was going to make it to the counter to set down or not. And, I didn't know what was wrong. I mean, it just scared me.

* * *

That's what they aid, that one moved on me. That's the first, that was the first time that I, I mean that I had stones. (T.11-12)

Thereafter, claimant received treatment at the VA Hospital for the diagnosed kidney stones:

Oh yeah, oh yeah, that was 2002. It was June. They diagnosed that in June I had stones. So, it was in June or July that they busted that one up and they put a stint in and I've been going in and out of the hospital with that. But I've been using my vacation time so I wouldn't lose any work, you know. (T.12)

Following the 2002 procedure claimant returned to the employment of respondent and worked continuously thereafter.

Claimant's testimony reflects, regarding his work activities through July 2003:

Is go to work, it was a Sears account and I'd go to work at what's basically working four days and being off three. And I'd pick up a load at Sears in Memphis and carry it over to the Carolinas and parked over there overnight and get my break. They would unload the trailer the next morning and I'd

go from there and pick a load up and bring it back to Memphis. (T. 13)

With respect to the routine physical demands of his job duties the testimony of the claimant reflects that the same was limited to driving the truck, climbing in and out of the truck, and bending over and cranking when engaging tandems. Claimant maintains that he was able to do his job from a physical stand point without any great pain or problems prior to July 3, 2003.

In describing the mechanics of the July 3, 2003, injury, claimant's testimony reflects:

Well, I had to pick up an empty trailer down at Sears. I picked up a load coming back from South Carolina that went to Sears down in Olive Branch and I dropped a load down at Olive Branch and I had to pick up an empty trailer at Olive Branch and I brought it back up to the OC over here in West Memphis, that's operating center. And I noticed when I brought it up here that - - I didn't get caught but I noticed that the tandems weren't right for Tennessee and chances was they was going to take them back over to Tennessee so , it's a 53 foot trailer, they have to be under at least a 14th hole, they can't be back no further than that. And I want to slide the tandems and they was find of, they was rusty and clogged. They was all the way back and whoever would have picked it up they'd come out on the highway with it, they would have gotten a ticket going from here to Memphis. It would have been all right in Arkansas but in Tennessee they have gotten them good so, I went out to pull the tandems and they was kind of froze up, they had rusted. They wouldn't pull. So, I went and got a tandem puller, it's a new one that Schneider got out, just got and it's like a bing T handle and it's got a chain on it and I took and I rocked the trailer and I went back there with my T handle, it still wouldn't pull by hand. So, I reached and put the chain up there and put the T handle on there and I bent down to grab the handle and I pulled up and when I did I just quit coming up and my knees wend down to the

ground. And I thought that, to me it was the same, I mean , I didn't hear anything pop or none of that. To me it was the same thing that happened when I was at Wal-Mart. I thought a stone had moved on me because like I said, my legs just quit working. And I didn't know if I was going to make it home or not. (T.14-15)

Claimant sought medical treatment at the VA Hospital, and, based on his previous experience, was certain that his complaint was one of a kidney stone having moved on him.

After learning that it would be approximately a month before he could get into the VA Hospital for treatment claimant sought and obtained treatment from a physician outside of the VA. Specifically, claimant was seen by a urologist at Memphis Urological Center. Claimant asserts that after being examined by Dr.Larimer his complaint was diagnosed as low back injury. However, following further diagnosed studies, to include a CT scan a kidney stone was located. Claimant underwent a procedure for removal of the kidney stone at Methodist North Hospital in Memphis. Claimant's testimony reflects:

And he busted up the stone and everything and he put a stint in and he didn't want me to work with the stint so that was two weeks there and he said that after I got the stint out, the stint removed and everything should be cool. So, I went back to him, it was two weeks later. I had the stint removed. I jumped the gun and sent the release in to Schneider that I was going to be able to go to work that following Monday - - (T. 17)

The testimony in the record reflects that claimant had been off work for a period of one month following the July 3, 2003, incident, during which time he received short time disability. (RX 1,p7-9)

Claimant noted that while he was supposed to returned to work on the Monday following

his previous visit of Friday with the urologist, and having notified supervisory personnel of respondent of the pending release when Monday arrived he was unable to get out of bed due to severe low back pain. Claimant noted that when he had previously undergone the procedure to dispose of the kidney stone there had been a relief of back pain, however in this instance the same had not occurred. The testimony of the claimant reflects that he had never previously experienced symptoms that he was unable to get out of bed because of back pain prior to July 3, 2003. Claimant testified regarding his actions on the Monday in August when he was to report back for work following his release from the kidney stones procedure:

Okay. This was August - - was the last week in August. I guess the 28th or 29th because I called Mike and told him I wasn't going to be able to come to work that I guess I hurt my back . Like I said, I went the whole month treating it as a kidney stone. And then I called Mike and told him I guess I hurt my back when I was dropping that trailer. And he, so he said, well, it sounds like workmen's comp to me so we went that route and it's been a nightmare ever since. (T. 18-19)

Claimant's testimony reflects that he notified Mr. Mike Frederico, service team leader of respondent, of his back injury. As a consequence of the afore, a workers' compensation form was completed, and thereafter he was referred by respondents to Dr. Robinson for medical treatment. The testimony of the claimant reflects that the appointment with Dr. Robinson was arranged by respondent-carrier. Claimant maintains that he was seen by the physician designated by respondent on one occasion and was thereafter referred to OrthoMemphis. Claimant noted that respondents refused to pay for the cost of further treatment beyond the initial visit to Dr. Robinson. Claimant was seen at OrthoMemphis and additional diagnostic studies performed to

include a CT scan and MRI scan. Claimant asserts that the physician at OrthoMemphis were more focus on his neck than on the low back, which he attributed to his accident. Claimant ultimately underwent surgery relative to his cervical spine pursuant to the recommendation of the physician at OrthoMemphis in June 2004.

Claimant attributes his inability to work subsequent to July 3, 2003, to his back complaint. Claimant observed that he was seen at a pain clinic for treatment, was prescribed Percocet, which assisted in alleviating some of his pain relative to his low back, and that the same would have prevented him from driving. Claimant asserts that between July 3, 2003, and June 2004, when he had the neck surgery, he was unable to work due to the injury to his low back. Regarding his current symptoms which he attributes to the July 3, 2003, injury claimant's testimony reflects:

Just aches. It's hurting just to sit here. I've got a muscle relaxer and anti-inflammatory and they don't have me on any narcotics. I was on, Percocet is a narcotic and I'm not on any narcotics. It just hurts to sit. (T. 25)

Claimant acknowledged while he been seen by a neurosurgeon relative to his low back no physician has recommended surgery for same.

Ms. Jane Shenks, the claimant's wife, presented testimony corroborative of that of the claimant. Ms. Shenks testified that she was unaware of the claimant having low back problems prior to July 2003. Ms. Shenks' testimony reflects that the claimant under took routine activities prior to July 2003, to include repair of their residence and automobiles and well as recreational activities without limitations. The testimony of Ms. Shenks reflects that the claimant's back pain which was later diagnosed as kidney stones occurred in June 2002, and that after it was

addressed claimant appeared to be pain free and resumed his regular employment duties. Ms.

Shenks testified regarding her observation of the claimant between July 3, 2003 and the time that he had the June 2004 neck surgery:

He couldn't. He couldn't hardly do anything like that it hurt him so bad to even sit or stand. I have to help him around the house. I took him to the doctor. I had to get a wheelchair. I still have to get a wheelchair because he can't walk hardly any at all.
(T. 39)

While claimant denies that he experienced complaints relative to his cervical spine prior to July 2003, a review of the medical in the record is to the contrary. At the outset it is noted that the bulk of the claimant's medical treatment was had at the VA Hospital in Memphis, Tennessee. A December 31, 2003 report of Dr. Michael J. Sorensen, at OrthoMemphis, relative to the claimant, reflects, in pertinent part:

The patient is seen for multiple problems including neck pain with complaints of pain into the arms, low back pain and ataxia. He was sent for an MRI scan which apparently was delayed due to insurance problems. This was then scheduled and was performed. There were signal abnormalities within the cord at C6-7, and he was sent for another scan with contrast.

The patient states he is no better. He states that back pain occurred as a work injury, but was complicated as around the same time he had kidney stones, and so his work comp claim was denied. The patient states that his leg gave out on him on the left side. Symptoms otherwise the same as previously noted. (RX 1, p14)

After noting the results of the physical examination and diagnostic studies, to include August 7, 2003, VA films relative to the claimant's lumbar spine, the December 31, 2003, report reflects:

ASSESSMENT:

1. Cervical myelopathy C6-7 level, secondary to spondylosis, primarily affecting the left side.
2. Lumbar degenerative disc disease and severe facet hypertrophy narrowing the foreman, left much more than right. L5-S1 level.
3. Given the other findings and complaints from the cervical myelopathy it is difficult to tell if there is isolated L5 radiculopathy. In addition, he has mild diabetic neuropathy apparent.

RECOMMENDATIONS:

1. With respect to the cervical myalopahty, we will have him set up with Dr. Pratt or Dr. Murrell in clinic promptly and have set up an evaluation with Dr. Murrell on Monday, January 5th.
2. Since the patient's MRI scan shows primarily degenerative changes of the facet joints and some disc bulging, which is likely degenerative, I am unable to see any changes which are clearly acute from work injury. Certainly, one could have degenerative changes and have the sprain with back symptoms, but review of the scan cannot show this. One can only rely on the patient's complaints of pain after the alleged work injury compared to history of non complaints prior to this. Perhaps Dr. Murrell can address it at some point, but the most pressing problem is the cervical problem which is not a worker's comp problem. (RX 1, p15)

Claimant underwent surgery relative to the cervical spine.

The medical in the record reflects that claimant was seen on June 30, 2003, at which time diagnostic studies were obtained relative to his lumbosacral spine. The radiology report reflects that the claimant had low back pain for several years with no known injury. The impression generated as a result of the diagnostic studies of June 30, 2003 was that of osteoarthritis facets with probable compression left L5 nerve root secondary to stenosis. (RX 1, p3-5)

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, a review of the medical reports, and application of the appropriate statutory provision, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 3, 2003, the relationship of employee-employer-carrier existed among the parties.
3. On July 3, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$440.00/\$330.00 for temporary total/permanent partial disability.
4. On July 3, 2003, the claimant sustained an injury arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the period beginning July 4, 2003, and continuing through the end of his healing period, a date yet to be determine.
6. Claimant first notified respondents of the July 3,2003, work related injury on August 4, 2003.
7. The respondent shall pay all reasonable hospital and medical expenses arising out

of the injury of July 3, 2003.

8. The respondents have controverted this claim in its entirety.

CONCLUSIONS

Claimant was employed by respondent as a truck driver from May 1992 until July 2003. On July 3, 2003, claimant asserts that she suffered an injury to his low back while discharging employment duties for respondent. Having suffered previously kidney stones, claimant maintains that in addition to the back injury the July 3, 2003, incident produced symptoms similar those previously experienced relative to the kidney stores. As a consequence of the afore, claimant initially attributed his low back pain and symptoms of July 3, 2003, to another bout with kidney stones. After receiving treatment for the diagnoses kidney stone without relief of the low back pain and symptoms, claimant notified respondent of the July 3, 2003, accident, and attributed his back complaints to the injury. Claimant asserts entitlement to temporary total disability benefits and medical benefits as well as controverted attorney fees relative to the July 3, 2003, accident. Respondents deny that the claimant suffered a compensable injury in his employment. Further, respondents maintain that claimant did not report an alleged work-related injury until August 4, 2003, such that if the claim is found to be compensable they would not be responsible for any accrued benefits until notice was had.

The present claim is one governed by the provisions of Act 796 of 1993, in that claimant asserts entitlement to workers' compensation benefits as a result of a injury having been sustained subsequent to the effective date of the afore provision. Claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. In the instant claim claimant asserts having sustained an accidental injury on July 3, 2003, to his low back while

discharging employment duties.

An accidental injury is caused by a specific incident, identifiable by time and place of occurrence Ark. Code Ann. §11-9-102(4)(A)(i). In order to establish an accidental injury as compensable, claimant must show that he sustained an accidental injury; that the injury caused physical harm to the body; that the injury arose out of and in the course of his employment; and that the injury required medical services or resulted in disability or death. Further, the claimant must establish a compensable injury by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(D) “Objective Findings” are those findings which could not come under voluntary control of the patient. Ark Code Ann. §11-9-102(16) the requirement that a compensable injury be established by medical evidence supported by objective findings applied only to the existence and extent of the injury. Stephens Truck Line v. Millican. 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The evidence in the record reflects that on July 3, 2003, while discharging employment duties for respondent claimant suffered an injury to his low back while pulling on the tandems puller. (T. 14-15) The mechanics of the claimant’s July 3, 2003, accident are not disputed. Symptoms generated as a result of claimant’s efforts at pulling the tandems, on July 3, 2003, were similar to those associated with the movement of a kidney stone, previously experienced by the claimant.

On June 30, 2003, claimant was seen for complaints relative to low back pain. At the time of the June 30, 2003, visit claimant provided a history of several months of low back pain with no known injury. Further, the report generated as a result of the visit disclosed no radiation to the leg. Based upon radiology study the claimant’s complaint was assessed as osteoarthritis,

facets with probable compression left L5 nerve root secondary to stenosis. (RX 1, p5)

On July 3, 2003, claimant suffered debilitating symptoms while pulling on the tandems within the course and scope of his employment with respondent. Claimant attributed the symptoms, which were similar to those experience with the previous movement of a kidney stone, to the movement of another kidney stone. Claimant later underwent diagnostic studies under the care of Dr. Robert A. Duke. A CT report disclosed the present of a 6mm distal right urethral stone. Claimant ultimately underwent a procedure for removal of the stone on July 25, 2003. After the kidney stone was addressed claimant continued to experience complaints of pain in his lower back radiating down his left lower extremity. At that juncture respondents were notified by the claimant that he felt he had injured his back in the July 3, 2003, incident and that he was seeking workers' compensation benefits. The evidence discloses that prior to August 4, 2003, claimant had been off work receiving treatment relative to the diagnosed kidney stone and received short term disability benefits for the period in the amount of \$200.00 per week.

A December 31, 2003, report of Dr. Michael J. Sorensen, and OrthoMemphis reflects an overview of the treatment received by the claimant to include the VA films of August 7, 2003:

The patient brings VA films from 8/7/03, which are somewhat difficult to evaluate due to the small size of the prints. Previously, a disc was brought to clinic, but it was difficult to view, as well, with the software. There is some anterior bulging at L2, greater than L1 level. There is foraminal narrowing primarily left greater than right, partially due to disc bulge, but primarily due to facet hypertrophy at the L5 level. The official VA report also states osteoarthritis of facets with probable compression of left L5 nerve root, secondary to stenosis. It stated that it was particularly severe at the left. (RX 1, p14-15)

As a consequence of the claimant's continued symptoms and complaints subsequent to August 4, 2003, he received treatment at the VA relative to his low back pain and complaint. Claimant received treatment in the form of injections, physical therapy, and medication.

Respondents assert that the claimant had the same findings relative to his back prior to July 3, 2003, as he had subsequent to the asserted injury, based upon the June 30, 2003, diagnostic studies. Accordingly, respondents dispute the occurrence of a injury pursuant to Ark. Code Ann. §11-9-1-2(4)(A)(i), on July 3, 2003.

It is undisputed that the claimant suffered from degenerative disc disease prior to July 3, 2003, as reflected in the medical evidence. The aggravation of pre-existing, non-compensable condition by a compensable injury is itself compensable. Hubley v. Best Western-Governor's Inn, 52 Ark. App. 226, 916 S.W.2d 143 (1996). Further the aggravation of a pre-existing condition by a specific work-related incident need not be the major cause of a claimant's disability in order to be compensable. Farmland Insurance Co., v Dubois, 54 Ark. App. 141, 932 S.W.2d 883 (1996). Finally, the Arkansas appellate courts recognize that an aggravation is a new injury resulting from an independent incident Maverick Transportation v. Buzzard, 69 Ark. App. 128, 10 S.W 3d 467 (2000). An August 12, 2003, progress report of the VA hospital relative to the claimant noted the claimant with a one + spasm before his exam and the following exam the spasm was a two +. (CX 2, p14)

A review of the medical in the record reflects claimant relayed consistent history relative to the July 2003, low back injury as being the product of his work activity. An August 27, 2003, progress report from the VA relative to the claimant reflects, in pertinent part:

. . . Pt states he injured back July '03 while working.

Pt currently rates back pain in sitting position as 8/10, but pt notes he forgot to take pain meds this a.m. Pt reports pain meds “make pain more tolerable.” Pt indicates pain radiates to L hip & dow L leg. Pt describes leg pain as “tingling feeling, like my leg is going to sleep.” . . . (CX 2, p18)

In its January 6, 2004, report, Dr. Michael Sorensen address the casual nexus of the claimant’s low back complaint with the July 3, 2003 , work-related accident:

As the patient has not had back pain or treatment Previously and did have a pulling type flexion injury to the back, this would be described as an aggravation of a pre-existing asymptomatic degenerative process. If this is the case, it would be covered as a work comp and needs to be looked at again under work comp. I would be happy to treat him via work comp or private insurance for this.

* * *

The patient was told that the MRI scan cannot prove whether or not he had an acute injury to his back as there are degenerative changes. However, from the history as stated, this would be consistent with a back injury which occurred during work. He will once again submit additional information to work comp. (RX 1, p21)

Finally, the record reflects an August 20, 2004, correspondence of Dr. Stephanie Einhaus, Chief, Neurosurgeon Service, Veterans Affairs Medical Center, which provided, in pertinent part:

This letter is in regards to Ronald Shenks,. . . I have thoroughly reviewed Mr. Shenks records at the VA. He was seen by neurosurgery on September 15, 2003, for the first time regarding back pain and some left leg weakness. He mentioned that he had hurt his back at work “pulling some tandems”. He was unable to work because of the back pain. He had complained of back pain previous to this, but apparently it did not prevent him from working until

he hurt himself at work. Apparently the work injury significantly aggravated his back problem, which had not been working up yet. (CX1)

he hurt himself at work. Apparently the work injury significantly aggravated his back problem, which had not been working up yet. (CX1)

The evidence preponderates that claimant suffered a compensable aggravation a pre-existing condition on July 3, 2003, growing out of a work-related accident. As a consequence of the afore, claimant was rendered totally incapacitation for engaging in gainful employment and remains within his healing period. It was undisputed that claimant had complaints of low back pain prior to July 3, 2003, as a result of the degenerative disc disease in his lumbar spine, the same had not served as the basis to prevent him from engaging in gainful employment. More importantly, claimant had not registered complaints of radiating pain in his lower extremity from his back pain prior to the July 3, 2003, injury. Further, there is no evidence in the record to reflect that the clamant experienced muscle spasms in his low back prior to July 3, 2003, work-related injury. Since the claimant's July 3, 2004, injury, he has experienced radiating pain from his low back and into the left lower extremity. Claimant has also experienced muscle spasm in the low back which was documented during an August 12, 2003, visit. Claimant has received medical treatment relative to his low back injury under the care of physician at the VA Hospital, for which respondents are liable. VA has filed a lien in the amount \$7,256.85 relative to the treatment provided to the claimant with respect to his July 3, 2003, compensable injury.

The evidence discloses that between the period of July 3, 2003 and August 4, 2003, claimant received short term disability benefits in the amount of \$200.00 per week while he underwent treatment and recover for a kidney stone. The symptoms experienced by the claimant,

which he attributed to kidney stones, continued subsequent to the treatment for the kidney stone, and indeed was the product of the claimant's low back injury suffered in the employment of respondent. While respondents may claim credit for the short term disability benefits paid to the claimant subsequent to July 3, 2003, respondents have nonetheless controverted the claimant's entitlement to workers' compensation benefits relative to the July 3, 2003, compensable injury.

AWARD

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at a weekly compensation benefit rate of \$440.00 , for the period covering July 4, 2003 and continuing through the end of claimant's healing period, a date yet to be determine. Respondents may claim credit for sums paid to the claimant in the form of short term disability benefits pursuant to Ark. Code Ann. §11-9-411. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay all reasonable related medical, hospital, nursing, and other apparatus expenses, to include medical related travel, growing out of the claimant's compensable injury of July 3, 2003.

Respondents are further ordered and directed reimburse the VA Hospital for sums expended on behalf of the claimant relative to the claimant's July 3, 2003, compensable low back injury, in the amount of \$7,256.85.

Maximum attorney fees are herein awarded to the claimant's attorney the Honorable Marc I. Baretz, on the controverted portion of this Award, pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood
Administrative Law Judge