

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304735

ROBERT SOWELL,
EMPLOYEE

CLAIMANT

CONAGRA POULTRY CO.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MARCH 12, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Batesville, Independence County, Arkansas.

The claimant was represented by MR. GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by MR. BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 15, 2003 in Batesville, Arkansas. A prehearing order was entered in this case on September 16, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. Employee/employer/insurance carrier relationship existed on or about 3/13/03.

2. The claimant's average weekly wage on 3/13/03 was \$428.40 and temporary total disability rate is \$286.00 per week and permanent partial disability rate is \$215.00 per week.

3. The respondent has controverted the claim.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability of low back injury.
2. Temporary total disability benefits.
3. Medical.
4. Attorney's fees on indemnity benefits.

The record consists of the transcript of the December 15, 2003 hearing with exhibits contained therein, and the transcript of the January 29, 2004 oral deposition of Ledonna Gilmer.

DISCUSSION

The claimant is a veteran employee of ConAgra Poultry Company, having worked at ConAgra first from 1974 until 1987, and later from 1998 until March 31, 2003, when he became incapacitated due to low back problems. In between his periods of ConAgra employment, the claimant worked for five or six years as a room inspector for Fairfield Bay

Housing and worked for over a year in his brother's painting business.

When the claimant became re-employed at ConAgra in 1998, he worked in the employment pool filling in on different jobs initially. Within a year, he became the lead man in the paw room. As the lead man, the claimant reported to work 30 minutes early each day to set up and then made boxes and shoveled ice during the production shift. The claimant estimated that he shoveled approximately 16,000 to 18,000 pounds of ice per shift using an aluminum shovel with a blade measuring somewhere between 18 inches by 18 inches and 24 inches by 24 inches. The claimant contends that his job duties as a lead person in the paw room caused a gradual injury to his lower back requiring surgery and disability beginning on April 1, 2003.

In Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001), the Arkansas Court of Appeals summarized the requirements for establishing a compensable gradual onset low back injury as follows:

When a claimant requests benefits for an injury characterized by gradual onset, Arkansas Code Annotated section 11-9-102(4)(A)(ii) (Supp. 1999) controls, defining "compensable injury" as follows:

(4) (A) (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

. . . .

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A claimant seeking benefits for a gradual-onset injury must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was a major cause of the disability or need for treatment. *Freeman, supra*. Furthermore, objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

Some of the evidence which most supports the claimant's claim for a work related gradual onset back injury includes the July 22, 2003 written opinion of Dr. Harry Starnes that the claimant's back problems requiring surgery were "ultimately related to his job duties of continued heavy activity." Likewise, Dr. John Waller, who performed the claimant's two level lumbar disk surgery in May of 2003,

opined in a July 30, 2003 letter that the claimant's "back condition is a result of his job with ConAgra which caused his injury of 03/13/2003." Similarly, when Dr. Starnes filled out the claimant's disability form on April 21, 2003, Dr. Starnes indicated that the claimant's condition arose out of his employment.

The claimant's claim is also supported by the fact that he shoveled 16,000 to 18,000 pounds of ice per night out of a five foot high tub each shift from sometime in 1999 to early 2003, while only occasionally missing any time from work. The claimant's claim is supported by the severity of the symptoms documented beginning in February and March of 2003, and by Dr. Waller's April 11, 2003 impressions (after MRI) that (1) the claimant had ruptured discs at L5-S1 and L4-5 on the left with L5 and S1 radiculopathy and that (2) the claimant had obvious tethering of either the L5 and/or the S1 nerve root on the left side from a bulging disc.

In assessing the weight to accord the above evidence, however, I initially note that Dr. Waller candidly acknowledged in his July 30, 2003 opinion letter that his opinion was formed "with the limited information and history that I have from Mr. Sowell." After reviewing Dr. Waller's written reports before July 30, 2003, in light of Mr.

Sowell's August 14, 2003 deposition testimony, I interpret that the history the claimant provided Dr. Waller did not include any reference to his 1995 presentation to Dr. Reddy for low back pain, his 1995 MRI of the lumbosacral spine, his 1996 presentation to Dr. Reedy with "very, very limited" lumbar flexion and low back pain radiating down his left leg for "many months", or his history to Dr. McCarron in 1996 indicating that his back had been hurting him for about five years. I also gather that Dr. Waller was not aware of the claimant's diagnosis of low back degenerative arthritis in 1995 and 1996 or aware of the claimant's Social Security application for disability based upon degenerative arthritis.

I likewise note that Dr. Starnes became the claimant's family doctor in approximately 2000, and nothing in Dr. Starnes' reports indicates to me that Dr. Starnes was ever made aware of the claimant's back problems in 1995-1996 and for years before that period.

In light of the documentary evidence establishing the existence of symptomatic back problems, including degenerative disc disease and arthritis, pre-existing the claimant's employment with ConAgra in 1998, and in light of the fact that the opinions of Dr. Waller and Dr. Starnes

make no reference to these pre-existing conditions, the claimant has failed to establish by a preponderance of the evidence in the record that, in relation to his pre-existing degenerative disc disease and arthritis, his injury at ConAgra was the major cause of his disability or need for medical treatment.

Because the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable gradual onset low back injury, I find that the issues of appropriate benefits and attorney's fees are moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Employee/employer/insurance carrier relationship existed on or about 3/13/03.

2. The claimant's average weekly wage on 3/13/03 was \$428.40 and temporary total disability rate is \$286.00 per week and permanent partial disability rate is \$215.00 per week.

3. The respondent has controverted the claim.

4. The claimant has failed to prove by a preponderance of the evidence in the record that a work-related injury at ConAgra, in relation to his pre-existing degenerative disc disease and arthritis, is the major cause of his disability or need for medical treatment.

5. The claimant has therefore failed to prove by a preponderance of the evidence that he has sustained a compensable gradual onset low back injury.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge