

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310770

JIM TURNER	CLAIMANT
NABHOLZ INDUSTRIAL SERVICE	RESPONDENT
MISTY THOMPSON INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 23, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by MARK FREEMAN, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 20, 2004, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on February 13, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On June 20, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained is entitled to a weekly compensation rate of \$387.00 for temporary total disability and \$290.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury of June 20, 2003.

2. Related medical.

3. Temporary total disability from July 15, 2003, to July 25, 2003, and then from September 5, 2003, to January 5, 2004.

4. The respondents raised the defense of lack of notice until October 10, 2003.

5. Attorney's fees.

In regard to the foregoing issues the claimant contends that he suffered a compensable injury on June 20, 2003, to his low back while lifting sheeting wall as a steel erector.

In regard to the foregoing issues the respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. The respondents further contended in a letter dated March 19, 2004, that they were raising the affirmative defense of lack of notice until October 10, 2003, when the Form AR-C was filed with the Commission.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was twenty-nine years old and received a GED having gone to the tenth grade in high school. The claimant testified that he is currently working for Advanced Home Builders as a framer and is earning \$13.00 an hour and working a 40-hour week. The claimant was asked how his back was and the claimant responded that he had good days and bad but after an eight to ten hour day he was usually pretty sore. The claimant testified that he is not currently under a doctor's care but feels he should be involved in some sort of pain management. The claimant testified that he is not taking prescription drugs at this time but feels he is in need of them.

The claimant testified that he has been seeing a chiropractor, Dr. Mark Sewell, since December 1999. The claimant testified that in December 1999 he was working for Turner Construction using a whacker packer when he injured his back and first sought chiropractic treatment. The claimant testified that he was just off work long enough to go to the chiropractor and then was back to work the very next day. The claimant testified that he has worked in the construction industry for his entire work history and after the December 1999 injury he continued to work in construction.

The claimant testified that he has worked for the respondent two different times but each time he has worked as a steel erector. The claimant explained that he would assist in erecting metal buildings, putting on roofs, trimming out, putting in insulation, everything that had to do with metal. The claimant testified that

his lifting requirements were anywhere from fifty to a couple hundred pounds. The claimant explained that he would be lifting purlins, girts, insulation and sheet panels. The claimant agreed that there was a forklift that helped with the lifting but that even with this machine's help the work was very physical. The claimant agreed that all during the period of time he has worked for the respondent he has continued to be seen by Dr. Sewell for his back problems. The claimant testified that adding up all the days he has been off work due to his back he has probably missed a couple of weeks in the two and one-half years that he has worked for the respondent. The claimant testified that during the period of time that he has been working for the respondent he was not limited in his lifting abilities and he pretty much did what everyone else did.

The claimant testified that on June 20, 2003, he was working for the respondent sheeting and insulating a side wall. The claimant testified that he was hurting pretty bad by the end of the day so he called the chiropractor and was seen after he got off work after around 3:30 or 4:00. The claimant testified that he was experiencing pain in his low back and at the time he thought it was just the normal routine back problems which an adjustment would take care of and he would be back at work. The claimant testified that Dr. Sewell gave him an adjustment and since the next day was Saturday he was not scheduled to work. The claimant remembered that when he got up on Saturday he could hardly move and stayed in bed due to his low back pain. The claimant testified that on June

20, 2003, he told his supervisor, Jeremy Lewis, that he was hurting pretty good and he was going to see the chiropractor. The claimant testified that on Monday he went to work and then again told Jeremy that he was going to the doctor and he went to Washington Regional Emergency Center. The claimant testified that he returned to work after this ER visit but was not able to work full time. The claimant testified that he worked up until July 15, 2003, when he underwent surgery on his back to repair a herniated disc. The claimant testified that Dr. Gallaher performed a diskectomy. The claimant stated that he returned to work July 25, 2003. The claimant testified that he was off work again beginning on September 5, 2003, due to another disc being ruptured and he underwent a second surgery to remove the disc, put in a new disc and screw his back back together. The claimant testified that he had a lumbar fusion this time. The claimant testified that he returned to work following this second surgery on January 5, 2004. The claimant was asked if he was back working full time and the claimant responded that yes he was. The claimant was also asked if his surgery had helped and he responded, "Yes."

On cross examination, the claimant testified that when he went to work for the respondent he was instructed that he was supposed to report injuries if he was hurt on the job at the time he was injured. The claimant testified that on June 20 sometime after lunch he told Jeremy Lewis that he was hurting and he was going to go see his chiropractor after he got off work. The claimant agreed that he had worked on other jobs for the respondent where Mr. Lewis

was his supervisor and he gone to the chiropractor while working on these jobs. The claimant testified that on June 23 he showed up at work and reported to Jeremy Lewis that he was going to see a doctor because there was something bad wrong with his back. The claimant was asked if he had said anything about hurting his back on the job and the claimant responded, "I don't---I don't remember the precise conversation." The claimant agreed that he returned to work and worked for the respondent on modified duty up until his first surgery on July 15, 2003. The claimant was asked if it was true that he did not talk to anyone at the respondent's business about getting workers' compensation until after his first surgery and the claimant responded, "That is possible, yes." Reading from his recorded statement dated October 28, 2003, the claimant agreed that he had said:

"I come back again and told him (Jeremy Lewis) my back was messed up and I believe that I had hurt it on June 20. I also told Larry Nixon, which is Jeremy's boss, that I wanted to file a workers' compensation deal because of I believe that was hurt on the job and he told me at the time that since I didn't file a paper on June 20th that I couldn't file a workers' comp deal on it nor could he honestly say that I hurt myself on the job."

The claimant was then asked when he had this discussion with Mr. Lewis and Mr. Nixon and the claimant responded in his statement, "that's right after my first surgery which was July 15, so it was a short period of time after that." The claimant agreed that it was sometime after his first surgery that he mentioned that he could have been hurt on the job. The claimant agreed that he had initially turned in the bills for his first surgery on his group

health insurance and that he had also applied for two medical leaves the first following his first surgery and the second time following his second surgery. The claimant agreed that there was no specific incident during the day of June 20, 2003, where he recalls sustaining an accident or hearing a pop or feeling a pull in his back.

The parties stipulated that the claimant's wife, Debbie Turner, would corroborate the claimant's testimony.

Jeremy Lewis testified that he has been working for the respondent for approximately eight years and currently is a Senior foreman. Mr. Lewis testified that he has worked with the claimant on several jobs for the respondent prior to June 20, 2003. Mr. Lewis testified that from the very beginning the claimant made it known that he had back problems and had asked off several times throughout the years they had worked together. Mr. Lewis was asked if he had ever let the claimant off to go to the chiropractor and he responded, "Yes." This witness testified that at times the claimant would be given a little easier work if he was having a spell with his back. Mr. Lewis agreed that it was not a surprise when the claimant would take off or have to have the job modified because of his back. Mr. Lewis testified that on June 20, 2003, a Friday, the claimant did come to him and tell him that he needed to go to the chiropractor and this was in no way unusual from any of the other times he had asked to get off to go to the chiropractor. Mr. Lewis testified that, "He never came to me to tell me that he hurt himself doing any kind of work on the job. He never specified

anything." Mr. Lewis testified that on the following Monday he had a conversation with the claimant and the substance was that he had been to the chiropractor on Friday and he needed to go to the doctor that morning. This witness testified that he was not exactly sure of the dates but he knows the claimant worked light duty from June 23 to his surgery in July. Mr. Lewis testified that on June 20 the claimant was working with a crew of about four to five men putting up rolls of insulation and sheet metal on the side of a building. This witness testified that a roll of insulation would weigh approximately fifty pounds and this insulation was unrolled on the ground and that a man on a rope would literally pull the insulation up. Mr. Lewis testified that the sheet metal which was then put over the insulation was approximately forty feet in length and weighed approximately a pound a foot. This witness testified that at all times two people would be working handling the sheet metal. Mr. Lewis testified that he cannot recall the claimant ever coming to him to report that he had hurt himself while working on June 20, 2003.

On cross examination, Mr. Lewis testified that on June 20 the claimant was working regular duty, pulling his load. Mr. Lewis testified that the claimant was one of his best workers and physically in order to do the job he would have to do a lot of lifting. Mr. Lewis agreed that the claimant was always honest and open about himself as well as he did not lie or exaggerate anything. Mr. Lewis was asked when was the first time he learned that the claimant was claiming that he had hurt himself on the job

and Mr. Lewis responded that he believes that it was after the claimant's first surgery. Mr. Lewis testified that to his memory the claimant had never missed more than two days at a time prior to June 20 from work.

Larry Nixon testified on behalf of the respondent stating that he had been working for the respondent approximately two and a half years as a project manager, general superintendent and the respondent's safety team. Mr. Nixon testified that he was aware that the claimant would occasionally take off to go to the chiropractor because his back was hurting prior to June 20, 2003. Mr. Nixon testified that the first he heard of the claimant having any physical problems was on Monday when the claimant made it known that he was going to another doctor besides the chiropractor. Mr. Nixon testified that he does not recall having a conversation with the claimant that day but does remember talking with the claimant after he had received a prognosis as to his condition. This witness testified that when he and the claimant did have a conversation as to his prognosis, the claimant did not mention anything about his job causing his problems and he did not request workers' compensation benefits at that time. Mr. Nixon testified that he talked with the claimant several times prior to July 15, 2003, and had tried to help the claimant arrange for medical leave because he knew the claimant would be down for a while and would need the money. Mr. Nixon testified that during all of these various conversations and his attempt to try and help the claimant to make sure his health insurance premiums were being paid, the

claimant did not mention wanting to file workers' compensation. Mr. Nixon testified that following the claimant's surgery he delivered a check to the claimant's home and they stood on the front porch and talked and that nothing was said about workers' comp benefits or anything happening on the job. Mr. Nixon testified that the claimant was placed back on light duty when he was released to return to work after his first surgery. This witness testified that the claimant never did report to him a workers' compensation injury but he learned about it through a third person, a secretary, who he passed in the hallway and she told him that the claimant's benefits had been denied by Blue Cross Blue Shield because he had filed for workers' compensation. Mr. Nixon testified that he learned that the claimant had filed for workers' comp sometime in September but the claimant never had a personal conversation with him about filing for workers' compensation. Mr. Nixon testified that the claimant again applied for medical leave during his second surgery and that the respondent had continued to consider the claimant an employee up until the time when they learned that the claimant had been working for someone else since January. Mr. Nixon testified that up until that time the respondent considered the claimant an employee and had him on leave as well as on their insurance rolls.

On cross examination, Mr. Nixon testified that the claimant was always able to return to work after he would be seen by the chiropractor prior to June 20, 2003. Mr. Nixon testified that the claimant would take off in the afternoon to see the chiropractor

and then he was back at work the next morning. This witness testified that the claimant did not favor his back and did what was required of him at work. This witness stated that the claimant would climb all over remembering that the claimant would get up where some of the other employees would not tread. Mr. Nixon testified that the claimant was good at his work and agreed that he was a good hard honest worker.

The medical records set forth that the claimant was seen by Dr. Mark Sewell for chiropractic treatment of his low back beginning on November 12, 1999, and had treatment at this time for approximately three months on what would appear to be a weekly basis. In the year 2000 beginning in January the claimant was seen twelve times by Dr. Sewell for treatment of his low back pain and in the year 2001 was seen four times. The medical records set forth that the claimant was seen once or perhaps twice in the year 2002 then in the year 2003 was seen in the month of February, March and then in June for a total of seven times for his low back pain. A case note from Dr. Sewell dated June 20, 2003, sets forth that the claimant was seen for severe low back pain with decreased range of motion and muscle spasms in his lumbar area noting that the claimant states he was lifting heavy wall in place and his back started hurting. The claimant was seen at the Washington Regional Medical Center on June 23, 2003, with complaints of left leg and low back pain. The claimant's history notes that he works construction and has injured his low back and left hip in the past and has been treated by a chiropractor which is no longer helpful.

The claimant underwent a CT of his lumbar spine which revealed a central bulge and a herniation at L5/S1. In the CT scan report it is noted that in addition to the herniation there is a disc protrusion to the left causing some displacement of the left S1 nerve root which probably accounts for the claimant's left leg pain. The claimant was seen at the Fayetteville Neurological and Spine Institute on July 8, 2003, by Dr. Gallaher. Dr. Gallaher notes that in the history the claimant notes low back pain off and on for several years with a recent onset of left leg pain which has been severe approximately one month. Dr. Gallaher examined the claimant and reviewed his CT scan and recommended that an MRI of his lumbar spine be obtained. The doctor assessed the claimant with having acute left S1 radiculopathy which appears to be getting worse. The claimant underwent an MRI on July 10, 2003, which revealed that he has degenerative disc changes and a large disc extrusion at the L5/S1 level. This test shows that the disc material effaces the anterior aspect of the thecal sac and impresses on the right and left S1 nerve roots. It is further noted that there is some thickening of the left S-1 nerve root. Dr. Regan Gallaher operated on the claimant's back on July 15, 2003. Dr. Gallaher writes on July 25, 2003, that the claimant underwent a lumbar diskectomy one a half weeks ago noting that his leg pain is completely gone and he is pleased. Dr. Gallaher released the claimant to return to light duty work with no pushing, pulling, bending or climbing ladders and no lifting over twenty pounds for a period of six weeks.

The medial records set forth that the claimant underwent a second MRI of his low back on September 2, 2003. This September MRI revealed a large left para central disc extrusion at the L5/S1 level which effaces the anterior left lateral aspect of the thecal sac and the left S1 nerve root. It is also noted that the claimant has post surgical changes in the left lamina of L5. Dr. Gallaher writes on September 5 that he has seen the claimant for his complaints of left lower extremity pain in the S1 distribution and that his MRI reveals a large recurrent disc herniation on the left side at L5-S1. A redo of the claimant's diskectomy versus a lumbar fusion was discussed with the claimant. The claimant underwent a second back surgery on September 12, 2003. The operative procedure performed by Dr. Gallaher was a redo of the L5-S1 diskectomy, allograft, arthrodesis L5-S1 and posterior lateral interbody fusion and pedicle screw fixation. The claimant was released from Washington Regional Medical Center on September 15, 2003, following his back surgery. It is noted that the claimant reports that the claimant was discharged home to follow up in ten days for neuro surgical follow up and staple removal. Susan Cox, a billing administrator for Federal Neurological and Spine Institute, writes on September 30, 2003, that the claimant is a patient of the clinic who underwent surgery on September 12, 2003, noting that he had had a previous surgery in July 2003. This notes set forth that the claimant will be off work due to surgery for a minimum of eight weeks. Dr. Gallaher writes on October 17, 2003, that the claimant may not return to work at that time since he is still in physical

therapy until November 10, 2003. On January 25, 2004, Dr. Gallaher released the claimant to return to work full time.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained a gradual onset injury on June 20, 2003, while working for the respondent. It is not questioned that this claimant has had some ongoing back problems for several years but according to the testimony of the claimant as well as his supervisor he has been able to receive conservative treatment and continue with his regular work duties. There is nothing in this record to indicate that this claimant had a previous herniated disc only that he had occasional back pain after a day at work. The claimant, by his own testimony, has stated that he did not report a work related injury on June 20 and in fact did not claim a job related injury until after his first back surgery. Therefore, benefits for this claim will not begin until September 5, 2003, when the claimant signed his AR-C and Mr. Larry Nixon, a supervisor for the respondent, testified that he learned that the claimant was filing for workers' compensation in September after his first surgery. The claimant testified that he inquired about and reported a work related injury to the respondent but was told that he could not file a claim because he had waited too long to report his injury and, therefore, was not allowed to file papers with the respondents. The respondents, therefore, shall pay the cost of this claimant's medical treatment for his compensable injury from September 5, 2003, as well as temporary total disability from that date until

January 5, 2004. The medical records set forth that the claimant was released from work on September 5, 2003, by Dr. Gallaher and was released to return to work on January 5, 2004. The respondents have raised the defense of lack of notice until October 10, 2003, when this claim was filed with the Workers' Compensation Commission in Little Rock. As stated previously, the AR-C Form was signed in September 2003 and the respondents' witness, Larry Nixon, has testified that he became aware of the claimant's claim of a work related injury in September 2003, therefore, I find that notice to the respondents of a work related claim began September 5, 2003.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On June 20, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained is entitled to a weekly compensation rate of \$387.00 for temporary total disability and \$290.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual onset back injury while working for the respondent on June 20, 2003. See discussion above.

5. The claimant failed to report a work related injury to the respondents until September 5, 2003. See discussion above.

6. The respondents shall pay the cost of this claimant's medical treatment subsequent to September 5, 2003.

7. The respondents shall pay temporary total disability to this claimant in the amount of \$387.00 per week from September 5, 2003, to January 5, 2004. Dr. Gallaher released the claimant from work on September 5, 2003, and did not release him to return to full duty work until January 5, 2004.

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

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury while working for the respondent on June 20, 2003.

The respondents have proven that the claimant did not give notice of a work related claim until September 5, 2003.

The respondents shall pay medical costs for this claimant compensable injury from September 5, 2003.

The respondents shall pay temporary total disability to his claimant for his compensable injury from September 5, 2003, until January 5, 2004.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE