

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F300429

Randal C. Turner, EMPLOYEE	CLAIMANT
Virco Manufacturing Corp., EMPLOYER	RESPONDENT
Zurich American Ins. Co., INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 5, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Conway, Faulkner County, Arkansas.

The claimant was represented by MR. THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

The respondents were represented by MR. MICHAEL MAYTON, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on December 10, 2003 in Conway, Arkansas. A prehearing order was entered in this case on November 6, 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 either in the prehearing conference or during the course of the hearing and are hereby accepted:

1. An employer-employee-carrier relationship existed

on October 21, 2002, at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$349.00/\$262.00, in the event this claim is found to be compensable.

2. The Respondents have controverted the claimant's entitlement to any additional benefits.

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

1. Compensability (aggravation/recurrence).
2. Notice of injury.
3. Medical expenses.
4. TTD benefits.
5. Controversion.
6. Attorney's fees.
7. The respondents' right to an offset for medical and disability payments made by group carriers if this claim is found compensable.

DISCUSSION

The claimant was employed as a lead person at Virco at all relevant times. His job duties required him to change dies that weighted between 250 and 900 lbs.

The claimant has received documented medical treatment at various times for his back since 1997. In this regard, there is no dispute that the claimant experienced some degree of back problems in 1997 after lifting a basketball goal away from work. He experienced a work-related back injury in 1999. He experienced another period of back problems in 2001 after lifting a lawn mower away from work. He experienced another work-related back injury in April 2002. The claimant experienced another period of back problems in September of 2002 after attempting to change a lawn mower tire.

The claimant's present period of disability and need for surgical low back treatment began while brushing his teeth in October of 2002. The claimant ultimately underwent two surgeries at the L3-4 level of the spine in late 2002 and early 2003. The threshold issue in this case is whether or not the respondents are liable for the medical treatment and disability incurred beginning in October of 2002.

At the conclusion of the hearing, the claimant's attorney very ably and succinctly summarized his client's contentions as follows:

[W]hat we have here is an admittedly compensable injury in 1999, possibly an additional admittedly compensable injury on April 15, 2002, or at a

minimum a recurrence of the 1999 injury on -- in 2002. Your Honor, we contend that because this is mostly a recurrence versus aggravation issue, it's actually -- the burden's on the Respondents to prove that there is an independent intervening cause which has cut off the natural sequence and probable sequence of events from that original compensable injury in 1999. In fact, I believe this is a natural and probable consequence case. There is no dispute that the claimant did go to the doctor for problems from lifting a lawnmower, changing a lawnmower tire, and we don't dispute that he did that, and he doesn't dispute he did it. However, Your Honor, I think you're going to see when you read the transcript that you will find that the kind and character of his symptoms and his behavior at the job from those lawnmower incidents, I'll just collectively refer to them as, the kind and character of the symptoms didn't get worse. He didn't suddenly go toward -- toward, you know, needing surgery and all these other things. What happened on the morning -- on that Saturday morning when he was just brushing his teeth is the same as an individual who injures himself at work and sneezes. As far as I'm concerned, brushing your teeth, sneezing, what have you, if you're predisposed to a disc herniation from an original compensable injury, well, if you sneeze, the sneeze is not what caused it. What set it up was the original injury. The fact that the sneeze was just -- that was the final event that triggered the need for surgery. Our contention is this gentlemen got hurt in '99. He continued to suit up and show up for work. Granted, he had a couple of minor insults to his back that as can be seen in the medical records, the big difference is when he saw Dr. Lawrence in 1999 -- or I'm sorry, in 2001, with the lawnmower incident, he went one time and he went back to work. When he had the lawnmower incident in September of 2002, he was off work for just a little bit and then went back to work and continued to work throughout the month of October. Our contention is, Your Honor, is that he was just waiting to have this disc herniation, and I think

that Dr. Russell's report on page 23 of the medical does sufficiently corroborate the claimant's history and his claim here. Also, I don't think that Mr. Credit's testimony in anyway [sic] impugns the claimant's credibility. He's testified that he thought the claimant was an honest person. The claimant has not attempted to mislead anybody, as we believe that what we have here is an aggravation versus recurrence issue, and all of these things that the Respondents are talking about are simply recurrences. And if there are so many of them that it's clouded the mud, well, if our burden was to prove it was more likely than not that he had a recurrence, that would be true. But the law is they have a burden of proving an independent intervening cause and neither the medical records nor the testimony give rise to that. I would also call the Commission's attention to, and I would have to get you the cite when I get back to the office, but it's a case that I worked on, defended actually, and ended up at the Full Commission and lost. It is Jeff Cagle vs. Wynne School District. It's from four or five years ago, but that case involved a principal, assistant principal, of a junior high school who was moving around tables in August, hurt his back, and then just a few weeks later on Labor Day he bent over to put on his socks at home and he had an episode very similar to what Mr. Turner describes. And ultimately, it was determined that gentleman did not have an aggravation; he had a recurrence of what was obviously an admittedly compensable injury. And I believe the facts of that case, as well as the law, controls the outcome of this case.

Mr. Mayton, likewise ably summarized the respondents' contentions at the end of the hearing as follows:

It's like he's had three - he's complained of a couple of instances at work. He's been to the doctor three times for non-work-related things, and then the actual event that put him out was off work. So, I think he's probably trying to say an

accumulation of these injuries he had at work and work he did has pushed him into the need for surgery. We're saying, how can you tell which one it is because he's had just as many occurrences outside of work, or maybe even more specific occurrences outside of work. Then that could just as well be the cause as the work he was doing. And I think they're saying the doctors [sic] reports, the doctor just focuses on the bending over and brushing his teeth at home, and does not mention anything about these other three problems. So, I'm assuming the doctor wasn't looking at the records, because he's going to say, look, it's more related to work than it is bending over brushing your teeth at home. Your work -- because the guy explained to me what he did at work. That's the cause of his problem. Well, then we've got, starting in '97, the very first injury he ever had non-work related, and three or four of those non-work related he was getting just as much treatment for as he was for work-related problems. So, you know, I think the -- I think the whole issue boils down to how can you tell which one it is. He's had incidents out of work, he's had incidents at work, and now he's had surgery. How can you say by a preponderance of the evidence that it's the work related and not these other instances. And the last known work-related one he had was only like thirty days prior, and it had been, you know, several months prior before his last work-related incident. Then, in April '02 back at work until he had a problem in September of '02 outside of work. So, I think that's more of the broader issue.

The Arkansas Court of Appeals has recently summarized the area of law discussed in the parties' contentions as follows in *GNB Technologies v. Bryant*, ___ Ark. App. ___, ___, S.W.3d ___ (CA03-549, November 19, 2003):

We have held that, where the second complication is found to be a natural and probable result of

the first injury, the employer remains liable; only where it is found that the second episode has resulted from an independent intervening cause is that liability affected. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (1983). The basic test is whether there is a causal connection between the two episodes. *Id.*

With regard to the burden of proof question, I note that in a tort claim the burden of proving an independent intervening factor is on the party asserting the independent intervening factor. *Missouri R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988). My research did not reveal any published court decisions indicating who has the burden of proof on a causation issue involving a potential independent intervening factor in a workers' compensation claim. However, I note that Ark. Code Ann. § 11-9-102(4)(E) states that the burden of proof for a compensable injury shall be on the employee. Absent any published guidance to the contrary, I find this statutory provision controlling, and I find that the claimant has the burden of proof of establishing a causal connection between his work-related injuries and his present complications at issue. Accord *Crudup v. Regal Ware, Inc.*, 69 Ark. App. 206 11 S.W.3d 567(2000) [claimant had burden to prove that his injury was caused by work].

The only expert medical opinion offered into the record on causation is the January 10, 2003 opinion of Dr. Anthony Russell, the claimant's treating specialist and an esteemed Central Arkansas Neurosurgeon. Dr. Russell's report of that date states in relevant part:

As sometimes happens in these cases the question is regarding the etiology of his initial disc herniation. In discussing the activities of his job, it is clear that the initial injury occurred around 1999 when he was attempting to move a large dye onto a press. This weighs several hundred pounds and entails sliding the dye over the press while pivoting the lower body. This would be the only thing that would explain a L3-4 disk, which is extremely rare unless there is a direct injury. I am convinced that this is the initial source of his abnormality rather than the relatively benign incident of brushing this teeth. That most likely was the straw that broke the camel's back.

Consistent with Dr. Russell's expert medical opinion, I note that a January 10, 2003 MRI report states in relevant part:

REASON FOR EXAM: 39-YEAR-OLD MALE WITH LOW BACK PAIN RADIATING TO THE BILATERAL LOWER EXTREMITIES. THE PATIENT REPORTS SYMPTOMS SINCE 1999.

However, for my part, I conclude, as did the respondents' attorney, that Dr. Russell appears to have relied solely on the patient's history, and did not review the claimant's prior medical records, in rendering his medical expert opinion. After comparing Dr. Russell's

expert medical opinion to the claimant's more contemporaneous medical records from 1997 and 1999, I am constrained to conclude that Dr. Russell's opinion is based on a material mistake of fact, and must be accorded essentially no weight for the following reasons.

First, as the respondents have repeatedly noted, the claimant's low back problems actually began away from work in 1997, and not at work in 1999. Second, the claimant's low back problems in both 1997 and 1999 appear from the medical records to have been temporary. Most importantly, I note that Dr. Russell diagnosed an abnormality in the lumbar region of the spine, and Dr. Johnson concluded on August 31, 1999 that the claimant's problem in 1999 did not involve the lumbosacral spine, but was instead an acute strain of the parathoracic spine. In fact, of the several incidents of low back problems documented in the records and discussed herein, in light of Dr. Johnson's diagnosis, the 1999 work-related injury (in the thoracic spine) would appear to be the least likely problem to cause the L3-4 disc herniation, assuming that the L3-4 disk abnormality was in fact caused by an insult, as Dr. Russell seems to have concluded. I see nothing in *Cagle v. Wynne School District, Full Workers' Compensation Commission*, Opinion filed September 15, 1998

(E612724) which appears to me to suggest a different result on the evidence presented in the present case.

Because I am constrained to accord Dr. Russell's medical expert opinion essentially no weight, and because I see no evidence indicating to me that the claimant's medical problems in October of 2002 were any more likely caused by his work-related injuries, as opposed to his non work-related injuries, I find that a preponderance of the evidence in the record fails to establish that the claimant's back problems at issue beginning in October 2002 are a recurrence of either his 1999 injury at work or his 2001 injury at work, or in any other manner are causally related to his work. Furthermore, because I find that the preponderance of the evidence fails to establish that the claimant's medical problems at issue are a compensable recurrence of his earlier work-related back problems or a new compensable injury, I find that the remaining issues of benefits, notice, an offset, and attorney's fees are moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. An employer-employee-carrier relationship existed on October 21, 2002, at which time the claimant was earning sufficient wages to entitle him to a compensation rate of

\$349.00/\$262.00, in the event this claim is found to be compensable.

2. The Respondents have controverted the claimant's entitlement to any additional benefits.

3. The preponderance of the evidence fails to establish that the claimant's medical problems and disability at issue beginning in October of 2002 are a recurrence of his earlier work-related injuries or a new compensable injury.

ORDER

For the reasons discussed herein, this claim for additional benefit is respectfully denied and dismissed.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge