

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310663

THOMAS C. ARNOLD, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., SELF-INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED JULY 11, 2005

Hearing before Administrative Law Judge J. Mark White on June 23, 2005, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. F. Mattison Thomas, III, Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 23, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on April 4, 2005, and a Prehearing Order was entered that same day. A copy of the April 4, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee-employer-carrier relationship existed at all relevant times, including September 26, 2003; and that the respondents have controverted this claim in its entirety. At the hearing the parties further stipulated that the claimant earned wages sufficient to entitle him to a compensation rate of \$252 for total disability benefits and \$189 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits; whether medical treatment is reasonably necessary in connection with a compensable injury; and controversion and attorney's fees.

The claimant contends that he suffered a compensable injury on September 26, 2003, while working at Wal-Mart in Magnolia, Arkansas, when he bent over to put a case of cereal in the bend and incurred an injury which has resulted in muscle spasms which have continued to this date.

The respondents contend that the claimant is not entitled to the requested benefits because claimant cannot establish that he sustained accidental injuries to his low back, identifiable by time and place of occurrence, which arose out of and in the course of his employment with respondent-employer on or about September 26, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he sustained an injury to his low back caused by a specific incident identifiable by time and place of occurrence; that his low back injury arose out of and in the course of his employment; and that his low back injury caused internal physical harm to the body requiring medical services.
4. The claimant has proven by a preponderance of the evidence that the existence and extent of his low back injury is established by medical evidence supported by objective findings.
5. The claimant has therefore proven by a preponderance of the evidence that

he sustained a compensable injury to his low back.

6. The claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from January 13, 2004, until he returned to work.
7. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 13, 2004, until the date he returned to work.
8. The claimant has proven by a preponderance of the evidence that the medical treatment he has received for his low back since September 26, 2003, has been reasonably necessary in connection with a compensable injury.
9. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

In the first few months of 2003, the claimant experienced a gradual onset of low back pain that was apparently not work related. On March 14, 2003, Dr. Jorge Martinez diagnosed a herniated lumbar disc at L4-5 and recommended surgery. The claimant underwent surgery on March 27, a lumbar decompressive laminectomy and foraminotomy at L4-5 bilaterally, and a discectomy at L4-5 right. As of May 23

the claimant was “doing remarkably well,” denying any back or leg pain. Dr. Martinez released him from care and allowed him to return to “the same type work activities as prior to surgical intervention.”

The claimant testified that six months later, on September 26, 2003, he injured his back again when he bent over to place a case of cereal boxes in a bin. He said: “I went to bend over and couldn’t straighten up real good. My back was hurting real bad. My muscles were tensed up.” He testified that his pain was in a slightly different location than the pain prior to his earlier surgery, and that his “back locked up.” The claimant testified that as he was bent over, co-worker Sam Waddell came by and helped him straighten up. Waddell testified at the hearing; he agreed that he saw the claimant “leaning against the back stock bins, against the shelves. He told me that he had hurt his back.” Waddell denied helping the claimant straighten up, but agreed that the claimant appeared to be “in some discomfort.” The claimant testified he reported the injury to his supervisor, and after completing an injury report he was sent to Dr. Patrick Antoon.

Dr. Antoon noted pain and spasms in the low back, as well as pain radiating into the left leg. He recommended conservative treatment and placed the claimant on light duty, but when the claimant returned on October 2 he indicated medication was not helping. Dr. Antoon then ordered an MRI exam, performed October 27. The

exam was limited, in that the films were “significantly compromised due to motion artifact,” because the claimant did not stay still through the exam. The radiologist noted the existence of mild to moderate disc bulging from L2-3 through L4-5. The claimant then had a series of epidural steroid injections in the following months, and he continued with physical therapy through at least January 2004. In March, Dr. Antoon completed a “physician’s statement” that indicated the claimant was still under his care, and that the claimant had been totally disabled from January 13, 2004, through the date of the letter. He estimated the claimant could return to work in six to 12 months.

On February 20, 2004, the claimant saw Dr. Tim Talbert. Dr. Talbert noted as history:

Pt. previously had surgery at the L4 - L5 level in March of 2003. After his back locked up after bending he underwent a successful decompression by Dr. Cavanaugh that subsequently had return of symptoms down his left lower extremity in a slightly different pattern after re-injuring it. Pt. also had a series of transforaminal Epidural steroid injections October and November by Dr. Bennett. These were described as being midline and not having any significant relief of symptoms.

Upon reviewing the MRI films, Dr. Talbert opined that the films showed an “acentric herniation of the L5-S1 disk on the left side causing some nerve root compression.” He diagnosed an L5-S1 herniation with S1 radiculopathy and

recommended additional injections, but later records indicate the injections provided only minimal relief.

The claimant then saw Dr. Pierce Nunley on April 14. Dr. Nunley recorded the history as follows:

For the pain in his low back he reports having an on the job injury on 09-26-03 while at work, just taking a case of cereal and putting it down into a bend. He fell over and twisted his back and it "locked up on me" and he had to have assistance to stand.

At the hearing, the claimant denied telling Dr. Nunley that he had fallen. Dr. Nunley agreed with Dr. Talbert's diagnosis of an L5-S1 herniation and indicated he thought the claimant had some radiculopathy originating from that herniation. He recommended a selective nerve root block, but the claimant reported only minimal relief. EMG/nerve conduction tests were negative. A new MRI exam again revealed the herniation at L5-S1 with "fairly significant stenosis."

II. Adjudication

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of

and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

Given the claimant's testimony, as corroborated by the testimony of Waddell and the documentary and medical evidence submitted herein, I find that the claimant has proven by a preponderance of the evidence that he sustained an injury to his low back caused by a specific incident identifiable by time and place of occurrence; that his low back injury arose out of and in the course of his employment; and that his low back injury caused internal physical harm to the body requiring medical services. Given the spasms noted by Dr. Antoon and the later MRI findings of a herniation at L5-S1, I find that the claimant has proven by a preponderance of the evidence that the existence and extent of his low back injury

is established by medical evidence supported by objective findings. The claimant has proven every element of a compensable injury; I therefore conclude that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back.

In making these findings, I realize that the claimant has a long-standing history of back problems. But an employer takes an employee as it finds him, and the aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). The claimant did have back surgery only six months before this incident, but that surgery was at L4-5. The claimant's new back injury is at L5-S1, and there is simply no persuasive evidence of a cause of these L5-S1 problems other than the claimant's work injury. There is no evidence that MRI or other diagnostic tools revealed any herniation at L5-S1 prior to the work incident. Even if the claimant had severe degenerative changes at L5-S1 prior to this incident, I am persuaded that this work injury aggravated or accelerated those

changes to produce the claimant's present disability and need for treatment.

I further note that in his deposition Dr. Nunley expressly opined that bending and twisting the back, even to lift a lightweight box of cereal, is sufficient to herniate a disc. It is true that the original history recorded by Dr. Nunley – that the claimant fell to the ground – is not accurate. Even so, when presented with the accurate history at his deposition, Dr. Nunley maintained his opinion that the work incident could cause a herniation. In any event, I would make the same findings above regardless of whether I had the benefit of Dr. Nunley's opinion herein.

B. Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Dr. Nunley indicated in his records that the claimant was totally disabled from working as of January 13, 2004. The claimant testified that he was off work

several months and then returned to a light-duty position, but the record does not identify precisely when he returned. He worked for several months until he had a stroke and was off work for that injury. Given the medical evidence herein, I find that the claimant has proven by a preponderance of the evidence that he was within his healing period and totally incapacitated from earning wages from January 13, 2004, until he returned to work. I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 13, 2004, until the date he returned to work.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994). Even if it is demonstrated that a pre-existing condition is also a causal factor, the claimant has met his burden of proof for additional medical treatment so long as he proves that the work injury combined with or aggravated the pre-existing condition to bring about the need for the treatment. *General Electric Railcar Repair Servs. V. Hardin*, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

As discussed above, I am persuaded that the L5-S1 herniation and resulting

symptoms a result of the claimant's September 2003 work incident. Nothing in the record suggests that the low back treatment provided to the claimant since that time has been *per se* unreasonable. I find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received for his low back since September 26, 2003, has been reasonably necessary in connection with a compensable injury.

AWARD

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back; that he is entitled to temporary total disability benefits from January 13, 2004, until the date he returned to work; and that the medical treatment he has received for his low back has been reasonably necessary in connection with a compensable injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, F. Mattison Thomas, III, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this

award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. §
11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge