

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F406612

JERRY DOLLARHIDE, Employee	CLAIMANT
GARRETT TIRES, Employer	RESPONDENT
FARMERS INSURANCE EXCHANGE, Carrier	RESPONDENT

OPINION FILED FEBRUARY 8, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 5, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on September 22, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed between the parties on June 12, 2004.
3. The claimant was earning an average weekly wage of \$295.65 which would entitle him to compensation at the weekly rates of \$197.00 for total disability benefits and \$154.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability.
2. Temporary total disability benefits from June 29, 2004 through a date yet to be

determined.

3. Related medical.
4. Attorney fee.
5. *Shippers'* defense.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was injured on June 12, 2004 when he was lifting tires. He was paid some benefits until the insurance company found out that he was hurt badly and then had nothing to lose by controverting the case. I say this because on June 21<sup>st</sup> the claimant was limited to the lifting, standing, sitting, and bending requirements as set forth herein. Late on June 29<sup>th</sup> he was taken off completely until surgery. He requests medical and TTD."

The respondents' contentions as set forth in their pre-hearing questionnaire are as follows: "Respondents assert the Shippers' Defense with regard to compensability in this matter. Additionally, respondents contend the claimant's current need for medical treatment is associated with pre-existing or underlying conditions for which respondents are not liable. Respondents assert the claimant has not suffered a compensable injury under the Arkansas Workers' Compensation Act. Respondents contend there are no new objective findings to support a compensable injury. Respondents contend the claimant's alleged work-related injury is not the major cause of his need for treatment."

At the time of the hearing the record in this claim was left open until February 7 for respondent to submit social security records and a supplemental report from Dr. Kendrick. Respondent was not able to submit either of those documentary exhibits; therefore, this case was submitted solely on the evidence presented at the hearing conducted on January 5, 2005.

From a review of 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 witness and to observe his demeanor, the following findings of fact and

conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 22, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's back injury.

4. Claimant is entitled to temporary total disability benefits from the date he last worked as a carrier delivering *The Morning News* until a date yet to be determined.

5. Respondent has failed to prove by a preponderance of the evidence that claimant's claim is barred by the *Shippers'* defense.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 31-year-old man with a ninth grade education. Claimant's prior job activities have included farm work, heavy labor, and mechanic work.

Claimant suffered a prior work-related injury to his back while working for Rae Corporation in Oklahoma on December 19, 1997. That injury resulted in claimant undergoing surgery for a disc herniation at the L5-S1 level on February 16, 1998. Following the surgical procedure claimant continued to have additional back pain but was nevertheless released by his treating physician.

Claimant testified that he attempted to return to work in 1999 or 2000, but continued

to have trouble sitting, standing, bending, and twisting. Claimant testified that due to his difficulties in finding a job he filed for social security disability benefits in 2000. Claimant testified that he was not approved for social security benefits and as a result again attempted to return to work.

Claimant testified that his first job after his social security rejection was working in a salvage yard pulling automotive parts. Following that employment claimant worked as a mechanic off and on at Bill's Garage. While not working at Bill's Garage, claimant worked for a powder coating company coating heavy machinery parts with paint.

In September 2003 the claimant went to work for the respondent as a mechanic. Claimant testified that on June 12, 2004 he was in the process of lifting a tire off of the floor when he felt pain in his low back. Claimant reported this incident to Jim Craig, his supervisor, who sent him to the emergency room.

Emergency room records from St. Mary's dated June 12, 2004 indicate that claimant was referred to follow up with Dr. Raben. Claimant was initially evaluated by Dr. Raben on June 21, 2004, and an MRI scan was ordered. According to Dr. Raben's reports, the MRI scan revealed a large disc herniation at the L5-S1 level. Dr. Raben has recommended a fusion procedure to repair the herniated disc.

Claimant has filed this claim contending that he suffered a compensable injury to his back while working for the respondent. He seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee. Respondent raises as an affirmative defense the *Shippers'* defense.

#### ADJUDICATION

Claimant contends that he suffered a compensable injury to his low back while lifting a tire while working for the respondent on June 12, 2004. Claimant's claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in

*Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 injury;
- (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.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back.

There is no question that claimant had a pre-existing injury to his back in 1997 which resulted in surgery at the L5-S1 level, the assignment of an impairment rating, and an award of permanent benefits by the Oklahoma Workers' Compensation Board. There is also no question that claimant testified that after his surgery he continued to have some additional back pain and he filed for social security disability benefits as a result of that injury.

However, claimant's request for social security disability benefits was denied and as a result claimant returned to work performing heavy manual labor at a salvage yard, at a powder coating company, and as a mechanic for Bill's Garage and for the respondent. According to claimant's testimony he was able to perform all of those jobs without any

difficulty relating to his back and he has not taken medication or sought any medical treatment for his back since 1998.

As previously noted, claimant testified that his current back problems began when he was lifting a tire while working for respondent on June 12, 2004. Claimant immediately reported this incident to his supervisor and was sent to the emergency room. Claimant received treatment at the emergency room and was referred to Dr. Raben. Dr. Raben ordered an MRI scan which according to his report revealed a large disc herniation at the L5-S1 level. It is Dr. Raben's opinion that claimant is in need of surgery for this herniated disc.

While claimant did have a prior work related injury to his low back, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a new injury to his low back while working for the respondent. Although claimant filed for social security disability benefits as a result of continued back problems in 2000, claimant's request for social security disability benefits was denied. Furthermore, the evidence indicates that claimant has not taken medication or sought medical treatment for his back condition since 1998. Following his rejection by social security, claimant returned to work for employers performing heavy manual labor without any problems with his back until the incident on June 12, 2004. Following that incident the claimant reported his injury and was referred for medical treatment which revealed a herniated disc at the L5-S1 level.

Based upon the claimant's testimony which I find to be credible, as well as the medical evidence which has been offered, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back which arose out of and in the course of his employment with the respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services

and that claimant has established the injury by objective evidence. Dr. Raben prescribed medication for muscle spasm and more importantly, the MRI scan revealed a large disc herniation at the L5-S1 level.

With respect to this issue, I note that respondent might argue that the herniated disc at the L5-S1 level existed as far back as 1998 following the claimant's surgical procedure. The evidence does refer to a second MRI scan which was performed in 1998 after claimant's surgical procedure. However, there is insufficient evidence establishing that claimant had a herniated disc at the L5-S1 level at that time. To the contrary, an independent medical evaluation by Dr. Hallford dated September 25, 1998 indicates that the post-surgical MRI scan in March 1998 revealed scar tissue. Furthermore, Dr. Kendrick who performed an independent medical evaluation in November 2004 indicated that he would like the opportunity to review both the second MRI scan in 1998 and the 2004 MRI scan before stating an opinion as to the cause of claimant's disc herniation. However, Dr. Kendrick has not reviewed the radiographic studies and therefore has not issued an opinion. In summary, there is insufficient evidence that claimant's disc herniation at the L5-S1 level existed post surgery in 1998.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for the respondent on June 12, 2004.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

The next issue for consideration involves claimant's request for temporary total disability benefits. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. Claimant seeks payment of temporary total disability benefits beginning June 29, 2004 and continuing

through a date yet to be determined. Dr. Raben's medical report of June 29, 2004 indicates that the MRI scan revealed a large disc herniation at the L5-S1 level. It was Dr. Raben's recommendation that the claimant undergo a surgical procedure and he completed an off-work slip dated June 29, 2004 indicating that claimant should remain off work until surgery was performed.

Absent any other evidence, Dr. Raben's report would support a finding that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning June 29, 2004 and continuing through a date yet to be determined. However, evidence was presented at the hearing indicating that in addition to his job with the respondent claimant also worked as a contract carrier delivering *The Morning News*. Claimant testified that he performed this job for approximately two months after his injury with the respondent and that he was forced to quit that work due to back pain caused by sitting and riding in a car. According to a letter written by Lewis Floyd, the Circulation Director of *The Morning News*, claimant began working as a contract carrier on May 16, 2004. Floyd's letter does not indicate the date claimant last worked as a contract carrier.

Based upon the foregoing evidence, I find that claimant is entitled to temporary total disability benefits beginning the day after he last worked as a contract carrier and continuing through a date yet to be determined. According to claimant's testimony he was unable to continue working as a contract carrier due to back pain and Dr. Raben had completed an off-work slip indicating that claimant should remain off work until after surgery.

The final issue for consideration involves the *Shippers'* defense. The *Shippers'* defense was originally set out in *Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 578 S.W. 2d 232 (1979). The Court held in that case that a false statement in an employment application will bar benefits if the following elements are proven:

- (1) The employee must have knowingly and willfully made a false representation as to his physical condition.
- (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.
- (3) There must have been a causal connection between the false representation and the injury.

The *Shippers'* defense is an affirmative defense and the respondent must prove each element by a preponderance of the evidence. *Tahutini v. Tastybird Foods*, 18 Ark. App. 82, 711 S.W. 2d 173 (1986).

I find that respondent has failed to satisfy the elements of the *Shippers'* defense. First, I find that the respondent has failed to prove that the employee knowingly and willfully made a false representation as to his physical condition. Although claimant admitted that he did not inform respondent about his prior back problems, claimant testified that the employment application which he completed did not ask about prior injuries or workers' compensation claims. In addition, claimant testified that no one with the respondent asked him about prior injuries. Indeed, respondent has offered no employment application or testimony from any witness indicating that claimant knowingly and willfully made a false representation as to his physical condition. While claimant may not have volunteered that information, the *Shippers'* defense requires a knowingly and willfully false representation. Furthermore, respondent has also failed to prove that it relied upon the false representation and that this reliance was a substantial factor in the claimant's hiring. Respondent offered no testimony or documentary evidence indicating that it relied in any way upon statements made by the claimant when he was hired.

Accordingly, for the foregoing reasons, I find that respondent has failed to prove by a preponderance of the evidence that claimant's claim for compensation benefits is barred by the *Shippers'* defense.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while employed by respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant is entitled to temporary total disability benefits from the date he last worked as a contract carrier delivering newspapers until a date yet to be determined. Respondent has controverted claimant's entitlement to indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE