

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F407748**

**WESLEY T. EDDLEMON**

**CLAIMANT**

**ADVOCAT DIVERSICARE**

**RESPONDENT EMPLOYER**

**AMERICAN HOME ASSURANCE CO.**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED MAY 13, 2005**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE DONALD C. PULLEN, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE MELISSA ROSS CRINER, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Hot Springs, Arkansas on April 15, 2005. A prehearing conference was held on January 26, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference and before the hearing, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on June 21, 2004.
2. The compensation rates are \$324/259.

The claimant contends that he sustained a compensable specific incident injury on June 21, 2004 and is entitled to medical benefits. The claimant also contends that he is entitled to temporary total disability benefits from June 28, 2004 through July 5,

2004; from July 8, 2004 through September 17, 2004, and from October 26, 2004 through February 8, 2005, and attorney's fees.

Respondents contend there was no specific incident in the course and scope of the employment. Respondents contend the claimant had a pre-existing condition from which the current problem stems and there are no objective findings of a new injury.

Respondents also contend there was no compensable gradual onset injury.

Respondents further assert the notice defense and contend the first notice was July 15, 2004. The claim has been controverted in its entirety.

### **ISSUES TO BE LITIGATED**

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann.

§11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on June 21, 2004.
2. The compensation rates are \$324/259.

3. The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury on June 21, 2004.

4. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from July 14, 2004 through September 8, 2004 and from November 3, 2004 through February 7, 2005.

### **DISCUSSION**

The claimant, 44 years old, was employed with the respondent employer for four years as the maintenance supervisor. On June 21, 2004, the claimant was working at Garland Nursing and was shoveling rock in the yard when he twisted wrong or had a load too heavy as he was loading rock into a small utility vehicle, his back popped and he buckled. Another employee, Troy Morris, was coming into the yard and asked the claimant what was wrong and advised him to report the incident to the administrator, Ms. Gilmore. The claimant testified he arrived at work about 6:00 a.m. and the incident happened between 8:00 and 9:00 a.m. According to the claimant, shortly after the incident, he went to the administrator's office and Ms. Gilmore was having a conversation with Mr. Morris and he advised her he could not finish the job as he had hurt his back. At about 11:00 a.m., the claimant reported that he told Ms. Gilmore that his back was hurting and he needed to go home. There was no written report of injury made at that time. The claimant verified that he had two previous work injuries at another nursing home, an eye injury in 1978 and a herniated disk with back surgery in 1999. According to the claimant, he recovered from that surgery and returned to work without problems.

The first medical treatment following the June 21, 2004, incident was a June 30, 2004, emergency room visit and the claimant saw Dr. Stecker on July 1, 2004 and was set up for a MRI. The claimant saw Dr. Ferdinand Roda on July 13, 2004, and was hospitalized for pain management with surgery performed by Dr. John Pace on July 23, 2004, for a herniated disc at L5-S1. The claimant was released to return to work about September 17, 2004 and returned performing the same work as before. The claimant continued to work for about three to four weeks but began experiencing pain in his buttocks and did not return to work after October 26, 2004. The claimant had surgery for a pinched nerve and had an additional surgery for an epidural hematoma. Physical therapy and pain medication were the regime following the surgeries and the claimant was released to return to work on February 7, 2005, with no restrictions. The claimant returned to work for the respondent employer but was unable to perform the duties and resigned.

The claimant has been awarded social security disability benefits and continues to have low back problems with numbness in the left leg.

Troy Morris, previous director of nursing for the respondent employer, testified that on June 21, 2004, he saw the claimant shoveling rock and noticed him slumped over the shovel. The claimant advised him that his back had popped and was hurting. Mr. Morris advised the claimant to report the incident. Mr. Morris testified that he was in Ms. Gilmore's office when the claimant reported he had injured his back.

Barbara Gilmore, administrator for the respondent employer, testified that she did not recall the claimant telling her of a back injury on June 21, 2004. Ms. Gilmore completed an injury report on July 15, 2004, after the claimant advised her he was

going to need back surgery. Even though the claimant missed work after the June 21, 2004, incident and called in with back pain, Ms. Gilmore testified that she did not know the claimant had sustained a work injury. Ms. Gilmore testified that she never asked the claimant when he called in several days in a row what the cause of his back problem might be.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant has proven by a preponderance of the evidence that he sustained a specific incident compensable injury on June 21, 2004. The claimant presented credible testimony that was corroborated by Troy Morris, another employee of the respondent employer at the time of the incident. The first medical report is an emergency room report dated June 30, 2004. This report indicated the claimant had an exacerbation of his chronic back pain for the past four days. A July

8, 2004, MRI revealed a central HNP at L5-S1 and a June 13, 2004, physician's report documented the claimant had been shoveling rock and scraping tile at work. The claimant underwent surgery on July 23, 2004, with Dr. John Pace. Dr. Pace opined on August 30, 2004, that the claimant's condition resulted from his work injury on June 21, 2004, and he gave this opinion within a reasonable degree of medical certainty. Dr. Ferdinand Roda further corroborated Dr. Pace's opinion by stating that the claimant had a previous work injury with surgery in 1999 and had a good recovery from that surgery until the June 2004, work incident. Dr. Roda opined the claimant's need for surgery was the work injury.

The claimant underwent another surgical procedure on November 15, 2004, for removal of an epidural hematoma at L3-4. The claimant was finally released to return to regular duties on February 7, 2005, by Dr. Pace.

While the administrator did not remember the claimant telling her of a work injury, Troy Morris testified that he was in the administrator's office when the claimant reported the injury. I found the claimant's testimony to be plausible and his report of the injury to be credible. The administrator testified that she simply did not remember a conversation with the claimant. The administrator's failure to inquire as to the nature of the claimant's problems when he was calling in and missing work was puzzling to this examiner. I find respondents are liable for all reasonable and necessary medical the claimant has pursued for his back injury.

The claimant contends he is entitled to temporary total disability benefits from June 28, 2004 through July 5, 2004; July 8, 2004 through September 17, 2004; and October 26, 2004 through February 8, 2005. In order to be entitled to temporary total

disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to work, beginning July 14, 2004 through September 8, 2004. The medical records document the claimant was hospitalized on July 14, 2004, for pain management and ultimately had surgery on July 23, 2004 and was released with restrictions on September 8, 2004. The claimant was again admitted to the hospital on November 3, 2004 and underwent a second surgery on November 15, 2004 and was released to return to work on February 7, 2005, with no restrictions. I find the claimant has presented credible testimony about his inability to work and the medical records document the claimant remained in his healing period from July 14, 2004 through September 8, 2004 and again from November 3, 2004 through February 7, 2005.

### **ORDER**

The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury on June 21, 2004. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages from July 14, 2004 through September 8, 2004 and from November 3, 2004 through February 7, 2005.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be

paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**