

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F407378**

<b>CARL D. GREENWAY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MCGEORGE CONTRACTING COMPANY, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CNA INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED SEPTEMBER 22, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on June 27, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE TERENCE C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, additional temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant's surgery is causally related to the compensable injury pursuant to Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship as of June 7, 2004, at which time the claimant sustained a compensable back injury at a compensation rate of \$453.00/\$340.00. Medical expenses and temporary total disability benefits were paid until July 2, 2004 when this claim was controverted. Some expenses have been paid by the claimant's group carrier, Blue Cross Blue Shield.

The claimant contends he injured his back as a result of a defective seat in the cab of his truck. He remains symptomatic and seeks payment of continuing medical treatment, temporary total disability benefits (from July 2, 2004 to December 30, 2004) and attorney's fees.

The respondents contend the compensable injury was a temporary aggravation of a preexisting condition which has now returned to the pre-injury baseline. The claimant's injury was not the cause of his need for surgery.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant and his wife, who appeared to be credible, were the only witnesses to testify at the hearing.

The claimant, age 51 (D.O.B. November 12, 1953), has a work history of construction, carpentry and operating heavy equipment. He has worked for the respondent-employer for the last twelve years. His health history includes arthritis in the left wrist and knees, a 1996 torn right rotator cuff and a 1997 right leg, right ankle, right hip and low back injury. The claimant explained that he injured his back eight years ago when he jumped off a grader with no brakes and landed on his right side. He took physical therapy but missed no time from work. The claimant began receiving Social Security Disability benefits (\$1,037.00 mo.) in March, 2005 and has not tried to return to work.

The claimant testified that he operated a 50 ton dump truck with a defective seat which "bottomed out" when he drove over bumps. This bothered his back and he spoke to the mechanics about the problem but it was never properly fixed. He even tried putting rolls of paper towels under the seat to act as shock absorbers.

On June 7, 2004, while working on a construction project, he hit a wake of dirt left by a dozier and experienced "electrical" pain from his right hip to his toes. He reported an injury to his foreman, Max Harmon, who told him to see a chiropractor. Eventually, the claimant was instructed to report to the Concentra clinic. He was provided conservative care and released. He tried to return to work but the grader seat was bad and bothered his back. He returned to Concentra but was again released to light duty on August 9, 2004.

The claimant contacted his family physician, Dr. Roger Tilley, who referred him to neurosurgeon, Dr. Akin. Surgery was performed on August 30, 2004 and the claimant was released December 4, 2004. He remains symptomatic with pain and difficulty walking.

On cross-examination, respondents' counsel emphasized the claimant's long history of back and right hip pain since 1997 necessitating treatment with arthritis medication. Counsel also pointed out that there is no mention of a work-related injury in the claimant's medical records.

### **MEDICAL EVIDENCE**

Following the 1997 injury, the claimant underwent testing in July by x-ray, bone scan, and MRI scan. The results were interpreted as showing, "probable degenerative and/or post-traumatic changes of the hips, left knee, right ankle," with multilevel osteoarthritis of the lumbar spine associated with osteophyte formation and disc bulging (L2-3/L5-S1).

The claimant was treated by Dr. Robert Dickins with medication and physical therapy. Dr. Dickins felt the L5-S1 lesion was a herniation and the etiology of the claimant's symptoms. The claimant reported improvement with medication and he was released on August 18, 1997. There is no mention of a work-related injury in Dr. Dickins' records. He recorded a history of injury as the "onset of right hip and leg pain about four to six weeks ago." He states this came on "spontaneously."

There is a five year gap in the medical records from 1997 to 2002. In December, 2002, the claimant's general practitioner began prescribing medication for arthritis. On December 26, 2003, Dr. Tilley recorded, "sharp pain, numbness R hip." The report mentions a cortisone medication, Prednisone. The claimant stated this was prescribed for sores that wouldn't heal. The records are hand-written and difficult to read but I could find no entry regarding sores. In fact, the next entry seems to confirm that Prednisone was prescribed for his back.

1-7-04: back problems since Christmas... 2 herniated disc - R leg c  
radicular pain..saw specialist.. Prednisone has helped (getting better  
every day)

2-12-04: Pt. called back wants Rx. Dr. Dickins gave him/looked back in chart/seen Dr. Dickins 1997/gave Naproxyn.

6-9-04: Appt. with Dr. Adametz MRI of lumbar

It doesn't appear that the claimant was ever treated by Dr. Adametz.

On June 10, 2004 the claimant was seen by Dr. Scott Carle at Concentra:

Patient is a 50 year old male employee of McGeorge Contracting Company, Inc. who complains about his back which was injured on June 7, 2004 10:00 AM. Patient states: "injured lower back when seat broke in haul truck."

History of Present Illness:...

Over several weeks his back has been sore. It has gotten much worse withing (sic) the past 3 days and is radiating into the right leg. No numbness. Has been at new job recently with increase axial vibration and loading... Had similar problem 7 and 3 years ago with dose pak and PT.

The claimant was diagnosed with a sacroiliac strain. He was given an injection, prescribed medication and scheduled for physical therapy.

A physical therapy note dated June 10, 2004 shows a gradual history of injury.

The patient relates their chief complaint to repetitive trauma on low back while driving company vehicle. Pt states that the seat had broken and it's now metal on metal without any cushion... The cause of symptoms/dysfunctions is consistent with the above mechanism of injury... Subjective report is consistent with objective findings.

The claimant reported worsening of his symptoms in a June 14, 2004 report with radiation down his right leg. An MRI scan taken on the same day was interpreted as showing multi-level degenerative disc disease with facet osteoarthritis contributing to canal stenosis at L2-3 and L3-4. Moderate bilateral neural foraminal narrowing was also present at L5-S1.

Dr. Ackerman administered steroid injections and returned the claimant to Dr. Carle, who continued his light duty status until June 21, 2004. The claimant saw Dr. William Warren at Concentra on June 22, 2004 and July 2, 2004. Dr. Warren felt the claimant's symptoms were out of proportion with the objective findings and recorded positive Waddell's testing. Nevertheless, Dr. Warren continued his treatment and light duty status. A June 30, 2004 EMG/NCV study of the lower extremities was interpreted as normal. The claimant was no longer working when he saw

Dr. Warren on July 2, 2004, and the doctor released him with no impairment.

The claimant came under neurosurgeon, Dr. Eric Akin's care on July 14, 2004, on referral from Dr. Roger Tilley, the claimant's general practitioner. Dr. Aiken's history of injury indicates "the pain began after riding in a haul truck for 2 weeks." Dr. Aiken continued the claimant's physical therapy and excused him from work for 3 weeks. The claimant's symptoms continued and he was referred to Dr. Williams for chronic pain management with nerve blocks.

The claimant returned to his general practitioner complaining of unbearable back pain and dissatisfaction with his treatment.

In a report dated August 25, 2004 Dr. Aiken diagnosed an L5-S1 disc herniation with nerve root compromise and scheduled surgery on August 30, 2004. The operative report shows a diagnosis of degenerative disc disease, diskogenic pain at L5-S1 and an annular tear. Dr. Akin commented:

The patient is a 50 year-old male with refractory low back pain. This has been present for a number of years. It has been refractory to multiple medical treatments. He has had back pain documented back to 1997. He is taken to surgery at this time for elective posterior lumbar interbody fusion for treatment of diskogenic low back pain.

In response to a question posed by Attorney Newell, Dr. William Warren opined:

.. As of 7-2-04, Mr. Greenway's condition had returned to baseline for him. I was unable to find any measurable or ratable impairment that is causally related to a workplace incident for this patient, which occurred July 2, 2004. I make this statement with a reasonable degree of medical certainty. The patient's subjective complaints of injury are not supported by objective medical evidence. It is likely that he has significant non-physiological processes that are impacting his illness, behavior and case duration. His work or activity intolerance would be apportioned to non-occupational processes, which may warrant him to seek further care under his group health carrier.

In response to a question posed by Attorney Jensen, Dr. Akin opined:

I believe within a reasonable degree of medical certainty, that Carl Greenway sustained an injury supported by objective findings to his back at work while driving a truck on or about June 7, 2004, and that said injury was the major cause of his current disability and need for treatment.

I believe, within a reasonable degree of medical certainty, that Carl Greenway aggravated a pre-existing condition to his back supported by objective findings while driving a truck at work on or about June

7, 2004, and that said aggravation to a pre-existing condition is the major cause of his disability and need for treatment.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993, which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. Under the Act, the claimant has the burden of proving the following requirements by a preponderance of the evidence of record:

1. An injury arising out of and in the course of employment
2. An injury causing internal or external harm to the body, requiring medical services or resulting in disability or death
3. An injury established by objective medical findings
4. (a) An injury caused by a specific event identifiable by time and place of occurrence  
  
or
5. (b) A gradual injury, caused by rapid and repetitive motion, which is the major cause of the disability or need for medical treatment.

The evidence of record shows the claimant's job as a heavy equipment operator is physically demanding work. The defective equipment he was forced to use aggravated his pre-existing degenerative disc disease.

On June 7, 2004, the claimant experienced "electrical" pain while driving over rough terrain, causing right leg pain and an inability to perform his job. I would interpret this as a specific injury, explaining the annular tear found during surgery.

Since the accident at work triggered a change in the claimant's symptoms, frequency of medical treatment and ability to work, I find the claimant sustained a specific incident, identifiable by time and place of occurrence, arising out of and in the course of his employment. The incident caused internal harm, the annular tear an objective surgical finding. Therefore, I find the claimant sustained a compensable aggravation of a pre-existing condition of degenerative disc disease to produce disability and the need for medical treatment. Pearline Williams v. J & W Janitorial, 85 Ark. App. 1, 145 S.W.3d 383 (2004).

The “major cause” analysis applies only to gradual injuries and permanent disability benefits, not applicable to the issues in this case. Furthermore, as the operating physician, Dr. Akin’s opinion has been afforded greater weight than Dr. Warren’s opinion in assessing this claim.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on June 7, 2004 at which time the claimant sustained a compensable back injury at a compensation rate of \$453.00/\$340.00. Medical expenses and temporary total disability benefits were paid until July 2, 2004 when the claim was controverted.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. This injury combined with a pre-existing degenerative condition necessitating medical treatment and causing disability.
4. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.
5. The claimant has proven by a preponderance of the evidence of record that he is entitled to temporary total disability benefits from July 2, 2004 to December 30, 2004 as he remained in his healing period, incapacitated from working.
6. The respondents are directed to pay the court reporter’s fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from,

and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

**AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge