

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F405652

FREDDIE HATCHER, EMPLOYEE	CLAIMANT
CARROLL COUNTY SOLID WASTE AUTHORITY, EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 20, 2005

A hearing in this case was conducted on November 4, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 7, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations; these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the start of the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed on April 20, 2004, and at all other relevant times.
2. The claimant's average weekly wage was \$380.00, resulting in a temporary total disability rate of \$253.00 and a permanent partial disability rate of \$190.00.

3. Respondent initially paid \$1,843.14 in indemnity benefits and \$904.24 in medical benefits.

4. Respondents have controverted this claim in its entirety since June 9, 2004.

At the November 4, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant suffered a compensable injury on April 20, 2004.
2. Whether Claimant is entitled to reasonably necessary medical benefits.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he sustained a compensable specific incident injury on April 20, 2004. He seeks medical and temporary total disability benefits, as well as an attorney's fee, as a result of his alleged compensable injury. Respondents contend that Claimant did not suffer an injury in the course and scope of his employment. Assuming Claimant's injury is found to be compensable, Respondents argue that Claimant's need for medical treatment is not connected to his compensable injury.

DISCUSSION

On January 12, 2004, Claimant began to work for the respondent employer, Carroll County Solid Waste Authority. Claimant's job was to haul full containers, holding as much as forty yards of waste, from the respondent employer's "yard" in Carroll County ninety-eight miles to a landfill northwest of Mountain Home. At the landfill, Claimant's routine was to drive through the gate, pass a scale house, turn and go up the hill to a staging area, unload the two full containers on his truck and trailer, and then pick up two empty

containers. He would then return to the yard.

On April 20, 2004, sometime after noon, Claimant was in the process of loading two empty containers prior to returning to the yard. One forty-yard container had already been loaded when Claimant attempted to close its door.

Q. Okay. And what happened?

A. Well, as I was closing the door, the bar in the -- going across to the middle of the door, there's a handle at one end, kind of like a cane handle.

Q. Okay.

A. And it turned sideways, as I was pushing the door to. And, in the slot where the door would go, the end of that handle caught on the can frame, and it just sprung backward. And I was wearing my glasses, which I usually don't do. My first response was to put my hands up to protect my face, and that is the beginning of all this.

Claimant testified to feeling "immediately, that something wasn't right"; he described feeling "sharp, very consistent" pain.

Later on in the hearing, Claimant was asked to provide more details about his incident.

Q. Mr. Hatcher, if I understood your testimony correctly, you were at the landfill on April 20th, around noon. You said you tried to close the door, but the handle was in the way and the door popped back.

A. Right.

Q. And you said you had your glasses on, and you put your hand up to protect your face or your glasses?

A. Right.

Q. What happened after that?

A. I very slowly got back in the truck.

Q. Well, I mean, did the door hit you or --

A. No, no.

Q. Okay.

A. No, it didn't. I would have probably been a lot better off if it had of. I think I could have dealt with a little bit of face pain a lot easier than what I'm dealing with, as far as back pain.

Q. Well, I guess that's what I'm trying to understand is. When it started to pop back and you put your hand up, what happened next? I mean, did you bend over? Did you try to duck out of the way? Did you twist or --

A. Well, I didn't have the time to do anything except just stick my hands up to protect my glasses. I don't have a spare pair, so that's always top priority, thinking or not.

Q. Sure.

A. And then I don't really recall ever getting the door fastened or not. I do - - seems like I recall hooking the safety chain to where it wouldn't come open any further.

Q. Uh-huh.

A. But, as far as actually getting that can, the door closed securely like it should be, I don't recall if I did or not.

Q. Is it that incident, trying to close the door and having it pop back, that you recall the pop in your back?

A. Yes.

Q. I guess what I'm trying to figure out is, what did you do, in all of that, that you think would have hurt your back?

A. I really don't know. It happened so fast. I thought my body was standing pretty evenly and squarely with the back of the container, but when I stuck my hands up, my hands were probably about shoulder high, maybe a little higher, and I just felt being pushed backward.

Q. Okay. But not because the door hit you. You just --

A. Well, the weight of the door pushing against me.

Q. I see.

A. While my hands were up in front of my face.

Q. Okay. So you did have contact with the door when it swung back.

A. Yes.

Q. Okay. Anything else in that? I don't want to cut you off too soon. Anything else in that that you think would have caused you to hurt your back?

A. No.

On redirect examination, Claimant explained that this heavy container door swung back quickly. He put his hands up, and the door struck his hands; he did not remember "how much of a jar it was," but he did "remember a push backwards." The door did not knock Claimant to the ground. On recross examination, Claimant did not recall suffering any type of injury to his hands such as bruising or scratches.

After this incident, Claimant loaded his second container without closing its door and returned to the Carroll County yard. His condition worsened on this return trip. Claimant testified that he did not see anybody when he arrived at the yard, and that the yard's condition indicated that he would need to make a second trip to the landfill that day. So, Claimant loaded two more full containers and made another trip. However, on cross examination, Claimant confirmed his earlier deposition testimony that he did speak to his supervisor at the yard after making his first trip, and that his supervisor instructed him to make a second trip. Claimant also confirmed his earlier testimony that he did not tell his supervisor about his back.

Claimant returned to the yard from his second trip around 8:30 or 9:00 that evening; "[t]he place was all locked up, and everybody was gone." The next morning, Claimant felt worse than when he went to bed the prior evening, and he scheduled a 10:00 appointment

with Dr. Randal Spurgin. Claimant then called his boss, Rod Vise, to inform him that Claimant had hurt his back and scheduled an appointment with a doctor later that morning.

Dr. Spurgin's April 21, 2004 note states, under the heading "Reason for Visit," that Claimant "c/o back pain - 'heard pop' last night." The note provides additional history:

Freddie said he started having some back pain last night. He felt something pop down in the right lower lumbar region. He has had similar problems in the past, but it generally goes away.

Dr. Spurgin noted tenderness upon examination, but did not feel any spasm. Dr. Spurgin assessed "lumbar sprain," prescribed medications and an injection, and took Claimant off work for two more days.

Claimant's subsequent medical records indicate treatment for pain in his back. An April 22, 2004 emergency physician record records a brief history similar to Claimant's testimony and notes the presence of muscle spasm. An MRI of Claimant's lumbar spine, taken April 22, 2004, produced the following impression:

1. Extensive changes of aging in the intervertebral disc spaces from the lower thoracic spine down to the S1 level.
2. Central disc herniation at L4-5.
3. Active endplate reparative changes at multiple levels.

Dr. Spurgin's April 26, 2004 note acknowledges these findings and that Claimant "has degenerative disc disease at most levels and he is continuing to have pain. He is unable to work."

Claimant testified that prior to his April 21, 2004 visit with Dr. Spurgin, he had not ever been to a doctor for problems with his back; similarly, prior to April 20, 2004, Claimant had not needed an MRI run on his back. He denied hurting his back in any other way than

this incident. At the time of the hearing Claimant was using a cane; he explained that “[i]t makes it a lot easier to get around, as far as wear and tear on my back.” Claimant testified that he is still seeking medical treatment and that he has not been released to return to work.

On cross examination, Claimant testified that his supervisor could have been called by radio or cell phone on the date of the incident; he acknowledged that he did not use either method to contact his supervisor and notify him of the incident and his back problem. Claimant did not recall telling Dr. Spurgin on April 21, 2004 that he hurt himself “last night.” Claimant denied that this is what had happened - he insisted that he hurt himself on the afternoon of April 20.

Claimant’s supervisor, Rod Vise, testified for Respondents. Vise noted the procedure explained to employees for reporting accidents. He has a radio in his pickup and a cell phone, so that “[t]hey can almost get me twenty-four hours a day.” Vise recalled Claimant returning from his first trip on April 20, 2004.

Q. Would you tell me what happened when he came back from the first run?

A. I asked him to make another run.

Q. Did he mention anything about an injury?

A. No.

Q. Did he exhibit, to you, any physical problems when he came back from that?

A. No. He just went ahead and loaded up and took off.

Q. What does he have to do to load back up and take off?

A. He has to get out of the truck, and the roll-off truck’s got a big cable. They hook it onto the box and get back into the truck, or you’ve got controls

on the outside of the truck where they could pull the box up on. Then they back up to the trailer, tip the box up to slide it onto the other -- onto the trailer, then just unhook and pick up another box, and back up to it. Finish pushing that one on the trailer, and fasten it down.

Q. And he did that and left.

A. Yes.

Q. Did you hear from him the rest of the day?

A. No.

Vise confirmed Claimant's call the following morning about his doctor appointment. Vise recalled that Claimant did not mention that he had injured himself at work; if he had, Vise would have reminded him of the need to make an accident report, and the company would have made an appointment with a doctor.

_____ Claimant must prove that he sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, Claimant must prove that his injury is one "arising out of and in the course of employment...." Id. "Arising out of the employment" refers to the origin or cause of the accident while the phrase "in the course of the employment" refers to the time, place, and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, ___ (1985); see Preacher v. Cave City Nursing Home Inc., Full Workers' Compensation Commission Opinion filed January 15, 2004 (E512363).

Claimant must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i); see Preacher, supra. "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith

v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant did not sustain his burden of proving that he sustained his injury in the course of his employment. The evidence of greater convincing force calls into question whether Claimant sustained an injury during his work hours on April 20, 2004.

I acknowledge Claimant's testimony concerning the time and occurrence of his injury. However, I find that Claimant is not a credible witness, in the sense that his testimony is not consistent and, by his own admission, is not reliable. For example, upon direct examination, Claimant denied seeing anybody when he arrived at the yard after his first trip on April 20, 2004. But, upon cross-examination, Claimant acknowledged prior deposition testimony that he actually spoke to his supervisor at the yard between trips. Similarly, during the course of the hearing on November 4, 2004, Claimant acknowledged that "my train of thought is not what it was" and that "I'm sure my memory was better then than today." These and similar statements challenge the reliability of Claimant's testimony.

It is difficult to understand from Claimant's testimony exactly how he injured his back. While Claimant explained that he was struck by a swinging door, he stopped the door with his hands; he acknowledged that the force of the door was not sufficient to injure his hands or to knock him to the ground. He did not "know how much of a jar it was," but he did remember a "push backwards." It is difficult to identify the trauma in this incident that would produce a central disc herniation at L4-5.

Claimant testified that the incident occurred shortly after noon; however, Dr. Spurgin's note of April 21, 2004 records a history of "'heard pop' last night" and "[Claimant] said he started having some back pain last night." Claimant denied relating this history, but there is no other satisfactory explanation as to why this history was recorded.

Further, although Claimant knew “immediately, that something wasn’t right” and instantly experienced pain that he described as “sharp, very consistent,” Claimant did not report his incident to his supervisor between his first and second trips. Indeed, Vise testified that Claimant did not mention his injury and did not exhibit any physical problems. Vise was fairly specific concerning the activity required of Claimant to prepare his truck and trailer for the second trip. Vise testified, and Claimant confirmed, that Claimant could have reached Vise later in the day, if needed; but Claimant did not report anything later, either.

The preponderance of the evidence does not establish that Claimant sustained an injury in the course of his employment. Claimant’s testimony is inconsistent and unreliable; Dr. Spurgin’s recorded history indicates that an injury occurred at some time other than shortly after noon on April 20, 2004; and, Claimant failed to report that day an injury that he claims produced “sharp, very consistent” pain. Therefore, Claimant has not sustained his burden of proving a compensable injury on April 20, 2004.

It is not necessary to discuss Claimant’s request for medical benefits, temporary total disability benefits, or an attorney’s fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of the injury alleged, he failed to establish the compensability of his claim and compensation must be denied. See Reed v. Conagra Frozen Foods, Full Workers’ Compensation Commission Opinion filed February 2, 1995 (E317744). Without an initial finding of compensability, Claimant cannot be awarded temporary total disability benefits or additional medical treatment. Cross v. Magnolia Hosp. Reciprocal Group, 82 Ark. App. 406, 109 S.W.3d 145 (2003); see Ark. Code Ann. § 11-9-102(4)(F)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on April 20, 2004, and at all other relevant times.
3. The claimant's average weekly wage was \$380.00, resulting in a temporary total disability rate of \$253.00 and a permanent partial disability rate of \$190.00.
4. Respondent initially paid \$1,843.14 in indemnity benefits and \$904.24 in medical benefits.
5. Respondent has controverted this claim in its entirety since June 9, 2004.
6. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered an injury in the course of his employment. Claimant's testimony is inconsistent and unreliable, and therefore not credible. Dr. Spurgin's recorded history indicates that an injury occurred at some time other than shortly after noon on April 20, 2004; and, Claimant failed to report that day an injury that he claims produced "sharp, very consistent" pain.
7. Because Claimant failed to prove a compensable injury, it is not necessary to discuss his request for medical benefits, temporary total disability benefits, or an attorney's fee.

ORDER

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml