

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E902261

JEREL HILL, EMPLOYEE

CLAIMANT

GEORGIA PACIFIC, SELF-INSURED EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., TPA

RESPONDENT

OPINION FILED NOVEMBER 22, 2005

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on August 31, 2005, at Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE AARON MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE SUSAN FOWLER, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 31, 2005, in Little Rock, Arkansas. A prehearing conference was conducted in this claim on July 20, 2005, and a prehearing order was filed July 21, 2005. At the hearing the parties announced the stipulations, issues, and their respective conditions were properly set out in the prehearing order, subject to additional stipulations, contentions and issues agreed to at the hearing. A copy of the prehearing order was introduced into evidence as

Commission Exhibit "1", and made a part of the record without objection.

At the hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times, including May 13, 1998.
- 3) The claimant earned sufficient wages to entitle him to compensation rates of \$359.00 and \$269.00 for temporary total disability and permanent partial disability, respectively.

By agreement of the parties at the hearing, the issues to be litigated and resolved at the full hearing were limited to the following:

- 1) Whether the claimant sustained a compensable specific incident back injury in December of 1996.
- 2) Whether the claimant sustained a compensable recurrence to his back on May 13, 1998, entitling him to associated medical and indemnity benefits.
- 3) Whether the statute of limitations bars a claim for the alleged December, 1996 compensable injury, and for the alleged recurrence on May 13, 1998.
- 4) Whether the respondents are estopped from asserting a statute of limitations defense, if it is determined the May 13, 1998 incident was a recurrence.
- 5) In the alternative, whether the claimant sustained a new compensable injury or aggravation to the back on May 13, 1998.

The claimant contended he suffered a compensable injury to his lower back and lumbar spine in December of 1996 while lifting large blocks at work for the Respondent employer. (T. pg. 6) A MRI dated January 24, 1997 revealed that the

claimant had suffered a herniated L5-S1 disc. Also, corresponding medical reports from Dr. Gregorie noted that the claimant injured his back at work sometime in December of 1996. However, this injury resolved and the Claimant was able to continue performing his usual job activities until May the 13th of 1998.

Claimant also contended that he suffered a compensable recurrence on May the 13th, 1998. He re-injured his back at work for the Respondent employer on May 13, 1998, while lifting a bucket of bolts. Respondents paid benefits for this injury through December the 2nd of 2003. The claimant contends that the May 13th, 1998 recurrence entitles the Claimant to further medical and indemnity benefits.

The claimant further contends that if it is determined that the May 13, 1998 incident was a recurrence of the compensable December of 1996 injury, the Claimant will contend that the Respondent is waived or estopped from asserting the statute of limitations defense. The Respondent originally accepted this claim and paid benefits through 2003. The Claimant relied on the Respondents' voluntary payments for this claim and was led to believe that filing a claim was not necessary. (T. pg. 7)

The claim was not officially controverted until November 14, 2004, and if the Respondents had denied this claim or failed to pay benefits at any time before December of 1998, the Claimant would have filed a claim with the Commission within the two-year statute of limitations. The Claimant reasonably relied on the Respondents' actions to his detriment. Therefore, the Respondents waived and/or are

estopped from asserting a statute of limitations defense.

Further, Claimant contends that Rule 8 requires an employer to file an injury form with the Commission within ten days if the injury causes a loss of time in excess of seven days. The claimant was paid TTD benefits in June of 1998 and July of 1998. However, nothing was filed with the Commission until 1999. If the Respondent had complied with Rule 8, then this claim would have been properly filed with the Commission before December of 1998, and a statute of limitations defense would not be applicable to the Respondents.

Alternatively, the Claimant will contend that he suffered a compensable injury or aggravation on May the 13th, 1998; that the Claimant injured his back on that date while lifting a bucket of bolts at work. A MRI dated February 15th, 1999 revealed anatomical changes from the 1997 MRI including, but not limited to, a worsening of a disc bulge at L4-5; that the Respondent paid benefits for the Claimant's injury through 2003; that on May the 2nd, 2005, Dr. Gabbie completed a report noting that diagnostic tests confirmed an anatomical change which was reasonably related to the Claimant's current symptoms. Therefore, it is the Claimant's contention that he sustained a compensable injury or aggravation on May the 13th, 1998, which entitles him to additional medical and indemnity benefits.

Finally, the Claimant will contend that he is entitled to the appropriate attorney's fees for this controverted claim; that the Respondent has denied this claim in

its entirety, and the Claimant is entitled to the appropriate attorney's fees for all additional benefits.(T. pg. 9)

The Respondents contended the claimant is not entitled to any of the requested benefits. That the claimant did not sustain a compensable injury to his lower back arising out of an in the course of his employment with the respondent/employer in December of 1996. That any claim for benefits related to the December 1996 injury is forever barred by the applicable two year statute of limitations as set forth in A.C.A. 11-9-702(a)(1)(A). Respondents also contend any benefits for which claimant now asserts is a recurrence of his December, 1996 injury on May 13, 1998, should be barred by the statute of limitations. Respondents deny they are estopped from asserting the statute of limitations. Respondents further contend the claimant did not sustain a compensable new injury or aggravation on May 13, 1998, or, in the alternative, that the claimant's need for medical treatment is not reasonable, necessary, or related to the May 13, 1998 incident.

DISCUSSION

The claimant has alleged a compensable specific incident back injury occurring while at work in December of 1996. For the claimant to prove the occurrence of a compensable injury as the result of a specific incident, the claimant must establish by a preponderance of the evidence: 1) that an injury occurred arising out of and in the

scope of employment; 2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; 3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. 11-9-102(16); and 4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. **Mickel v. Engineered Specialty Plastics**, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

In this case, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable specific incident back injury in December of 1996 while in the respondents' employ. First, by the claimant's own admission at the hearing, he never filed an accident report related to the alleged injury.

Q. So in 1996, when you feel a ripping, burning sensation that shoots down your leg, why didn't - - did you ever report that then to your employer?

A. No, I didn't.

Q. Have you still filed an accident report related to that with your employer?

A. No, ma'am. (T. pg. 31, lns 18-24)

Second, after the alleged 1996 injury, the claimant testified he was called by someone associated with his health insurance company and told them that the December, 1996 injury was not work-related.

Q. You may have an explanation, but I just want a yes or no. Did your health insurance ask you if it was work-related? Your health insurance company.

A. The health insurance company?

Q. Yes, sir.

A. Someone did call me.

Q. Did they ask you if it was a work-related injury?

A. Yes, they did

Q. What did you say?

A. I told them that it was not.

Q. You told them it was not. So basically, you lied to your health insurance carrier.

A. I do admit to that. (T. pg 32, lns 7-19)

At the hearing, the claimant testified he knew immediately that he sustained a work injury in December of 1996, when it happened. However, the claimant's testimony is highly suspect when it comes to that issue. The evidence shows the first time the claimant ever mentioned a work injury to his back in 1996 to his employer was over seven years after the alleged event in a December 7, 2004 deposition. (RX-3, pg 33. lns 2-8) In the same deposition the claimant admitted that he had never reported the December, 1996 back injury to his employer, and stated he lied when questioned

whether or not it was a work related accident. The claimant's testimony at deposition was significantly different than that at the full hearing regarding the December, 1996 injury. At deposition the claimant testified he didn't "know what I had done."

A. Yes, ma'am. And the insurance company also called me and asked me if it was work related and if they could pursue it, and I told her that I didn't do a report because I did not know what I had done.

Q. Okay. When exact - - I mean , I know you said you didn't know exactly what date. Was it wintertime, summertime, end of the year, beginning of the year?

A. We were called in on a big welding job on the number three lime kiln, and that's when I noticed the pain. We were having to weld big blocks on the lime kiln working on scaffolds.

Q. Okay. Was that like at the beginning of the year then or the end of the year?

A. I can't recall. (T. pg. 18, lns. 18-24)

Based on the evidence presented, and the claimant's lack of credibility regarding the December, 1996 alleged compensable injury, I find the claimant has failed to prove by a preponderance of the evidence that he sustained an injury to his back in December of 1996 that arose out of and in the scope of his employment. I

further find the claimant has failed to prove by a preponderance of the evidence a specific incident identifiable by time and place of occurrence that caused his alleged December, 1996 work injury. (RX-3, pg. 33, lns. 4-8)

As such, I find the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable specific incident back injury in December of 1996.

Based on my finding that the claimant has failed to prove a December, 1996 compensable specific incident back injury; issues two, three and four outlined herein, are rendered moot.

The claimant argued in the alternative that he sustained a new compensable injury or aggravation to his back on May 13, 1998, entitling him to medical benefits, indemnity benefits and attorney's fees. To prove compensability or aggravation, the claimant must still prove the necessary elements recited in Mickel v. Engineered Specialty Plastics outlined previously herein. An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, must meet the definition of a compensable injury.

Clearly, the evidence contained in the record, shows the claimant had a previous back injury. The claimant underwent a MRI of the lumbar spine on January 24, 1997. (Well over a year prior to the alleged May 13, 1998 compensable injury or aggravation.) The 1997 MRI states as follows: (RX-1, pg. 7)

IMPRESSION: Large left posterolateral disk herniation at L5-S1. Desiccation of the L2-3 through L4-5 disks with narrowing of the L4-5 disk space and mild posterior bulging of the disk that does not effect the canal or neural exit foramen.

The claimant's pre-existing back injury caused his physician, Dr. Gregorie, to think it was serious enough to consider surgery. (RX-1, pg. 11) After the 1997 MRI the claimant continued to treat with Dr. Gregorie until March 7, 1997. On June 28, of 1998 the claimant went to Southern Clinic to treat for his back. At that time the physician noted "no swelling or spasm." and mentioned the claimant's previous 1997 MRI that shows a bulging disc. (RX-1 , pg 14) Southern Clinic then ordered another MRI of the lumbar spine that was conducted on February 15, 1999. Dr. Peebles stated the following impression of the February 15, 1999 MRI:

IMPRESSION: 1. Moderate sized HNP on the left at the L5-S1 level. This has actually decreased in size since the previous exam. Minimal bulging anteriorly at L2 through 4 being slightly worse at the 4-5 level. There is no extrinsic pressure on the subarachnoid space at these levels. Moderate degenerative disc disease. (RX-1, pg. 17)

It is clear to this examiner that the claimant's two MRIs of the lumbar spine are virtually identical and the only difference is that the claimant's L5-S1 herniated disc actually improved. I disagree with Dr. Gabbies May 2, 2005 interpretation of the February 15, 1999 MRI. Dr. Gabbie interpreted the 1999 MRI to show a worsening of disc bulge at the L4-5 level "when compared to the previous MRI of January 24, 1997." (RX-1, pg. 30) My reading of the February 15, 1999, MRI reveals no such comparison

of the two MRIs at that level. I interpreted the radiologist to state in the 1999 MRI that L4-5 disk is worse than that of L2-4 in 1999. The same comparison was also made in the 1997 MRI.

Further, the claimant's symptoms are virtually the same in 1997 and 1999. The medical records show the claimant had S1 radiculopathy as a result of the left L5-S1 herniated disc. (RX-1, pg. 11), and in 1999 the claimant still had left sided radiculopathy due to the same herniated disc. (RX-1, pg 20 & 21) The MRIs show bulging at L4-5 in 1997 and still a mild bulge in 1999; but in neither MRI was L4-5 described as having an effect on the neural exit foramen or subarachnoid space.

Based on the overwhelming medical evidence of the claimant's injury pre-existing his alleged specific incident of May 13, 1998, I find the claimant has failed to prove by a preponderance of the evidence that his injuries arose out of and in the course of his employment on May 13, 1998. I find the claimant's injuries could not have been caused by a specific incident while at work on May 13, 1998 because the injuries arose prior to 1998 as evidenced by the medical exhibits cited herein.

An analysis of the medical evidence does not support any objective medical findings of any new injury or aggravation to the claimant's pre-existing condition which is required under our Act. The objective findings relate only to pre-existing conditions without evidence of new injury.

The claimant has the burden of proving job relatedness of any alleged injury

without the aid of any kind of presumption in his favor. Farmers v. Little Knight Co., 220 Ark. 353, 246 S.W. 2d 41 (1952), The burden of proof the claimant must meet is a preponderance of the evidence. Voss v. Wade Pulpwood Yard, 248 Ark. 465, 425 S.W. 2d 629 (1970). In the present case, the claimant has failed to prove by a preponderance of the evidence a compensable specific incident back injury occurring on May 13, 1998.

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 claimant 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 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 the opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence, that he sustained a compensable injury to his back as a result of a specific incident at the work place in December of 1996.
- 4) The claimant has failed to prove by a preponderance of the evidence, that he sustained a compensable injury to his back as a result of a specific incident at the work place on May 13, 1998.

ORDER

_____After careful consideration of all the evidence in this matter and viewing such impartiality, and without giving the benefit of the doubt to either party, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in December of 1996, or May 13, 1998. Therefore, respectfully, the above captioned claim is hereby denied and dismissed.

IT IS SO ORDERED.

HON. DALE DOUTHIT
Administrative Law Judge

Hill/E902261