

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309180

L.E. JOHNSON, EMPLOYEE	CLAIMANT
TARGET, EMPLOYER	RESPONDENT
CONSTITUTION STATE SERVICE COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 18, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on November 22, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE BEN E. RICE, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

ISSUES

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

At issue is the compensability of the claim as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

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 does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on August 19, 2003 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$440.00/\$330.00, in the event this claim is found to be compensable. The claimant is receiving Social Security Disability benefits.

The claimant contends he injured his neck in a lifting incident at work on August 19, 2003. He seeks payment of medical expenses, temporary total disability benefits from August 20, 2003 to a date yet to be determined, and attorney's fees.

The respondents contend the claimant's symptoms are the result of a pre-existing condition and

did not occur within the course and scope of his employment. The claimant cannot meet the statutory definitions required for compensability.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the deposition of Dr. Betton, incorporated by reference.

The claimant was the only witness to testify at the hearing.

The claimant, age 51 (D.O.B. November 6, 1953) has a high school education with some college courses and business school courses, but no degrees. He also attended military quartermaster's school. For the past thirty years, he has been employed as a warehouseman. He has worked for the respondent-employer almost ten years.

The claimant's health history includes a 1977 back injury while in the Army; a 1993 motor vehicle accident with neck and back pain; a 1999 motor vehicle accident when he was hit from the side and missed three months of work; and a 2002 pulled neck muscle.

On August 19, 2003, the claimant was lifting a pallet when he experienced neck pain. He reported to the plant nurse but felt his condition was worsening. The next day he saw Dr. Gilbert Evans for pain in his neck, shoulders, and hip. After Dr. Evans died in March, 2004, the claimant sought treatment with Dr. Betton (recommended by friends), Dr. Saer, and Dr. Christen (a pain specialist). The claimant has also seen Dr. Bennett (a chiropractor)..

The claimant's current symptoms include neck pain, restricted range of motion and lack of stamina.

MEDICAL EVIDENCE

_____The claimant has been treated conservatively and is not considered a surgical candidate.

The claimant saw Dr. Evans, a general practitioner on August 20, 2003. The claimant reported an injury while lifting a pallet at work. Dr. Evans diagnosed a cervical and lumbar strain with the notation, "aggravation of a pre-existing condition?" Dr. Evans prescribed medication and excused him from work. Dr. Evans found no spasm but was concerned about the claimant's report of left arm numbness. According to Dr. Evans' records, he spoke with the workers' compensation insurance adjuster and she accepted the claim.

An MRI scan conducted August 28, 2003 showed multilevel spondyarthropathic changes with dehydration and disc displacement most pronounced at C5-6 and to a lesser extent C3-4 and C6-7. A comparison of this study with previous MRI scans taken September 30, 2002 and November 15, 2002 showed this condition pre-existed the accident at work.

The claimant was treated with physical therapy before seeing Dr. Saer in November, 2003. Dr. Saer treated the claimant ten years ago for back and neck injuries following a motor vehicle accident. He noted the claimant "has had some intermittent neck problems over the years and, in fact, was off work three months last year because of problems with his neck. Apparently he did see Dr. Tony Russell at that time and no surgery was recommended." Dr. Saer's physical examination of the claimant was normal except for restricted range of motion. He interpreted the MRI scan as showing, "recurrent neck problems due to degenerative disk disease and recurrent cervical sprains."

Dr. Harold Betton, general practitioner, agreed with Dr. Evans that the claimant sustained an aggravation of a pre-existing condition. Dr. Betton assessed a 14% impairment to the body as a whole based on the Functional Capacity Evaluation (FCE) showing rigidity and problems with the cervical spine and MRI scans showing a bulging disc at C3-C4, and limited range of motion, (see his report of September 13, 2004).

An FCE was conducted in August, 2004 which was interpreted as valid. The claimant was recommended to return to work in the “Light Physical Demand Level”, noting restrictions with prolonged standing, walking, bending, squatting, kneeling, cervical range of motion, stair climbing, and cardio-vascular fitness. These findings are remarkably similar to a medical assessment done with Dr. Saer on December 10, 2003:

Summary: History of neck and should pain with left upper extremity radicular pain. Patient has had neck pain since 1977 but symptoms have increased over the last year. Pain primarily occurs in his neck, which is a severe, stabbing, throbbing pain that comes and goes. There are bouts of tingling, numbness, and left upper extremity weakness. Symptoms exacerbated by standing, walking, lifting, exercise, twisting, lying in bed, bending, squatting, kneeling, stair climbing, sitting, coughing, sneezing... MRI shows some degenerative changed and mild disc bulging at C3-4 with mild degenerative changes at adjacent levels. Assessment: cervical degenerative disc disease and mild disc bulging...

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. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability

- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements.

Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A point of contention between the parties is whether or not the August 2003 accident at work produced objective evidence of a new injury or worsening of a preexisting condition.

Act 796 of 1993, did not abolish compensation for a preexisting condition. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). The employer "takes the employee as he finds him" and employment circumstances that aggravate preexisting conditions are compensable. St. Vincent Infirmary v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). Public Employee Claims Division v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992).

A preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d (Ark. App. 1979).

An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability. Heritage Baptist Temple v. Robinson, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

The comparative MRI report of September 22, 2003 mentions, "the C3-4 spondyloarthropathy is producing a slightly greater degree of encroachment," but the same report regards the claimant's condition as stable over the last three exams (September 30, 2002; November

15, 2002 and August 28, 2003). Dr. Betton has opined there is no evidence of a recent traumatic or acute injury. Any changes in the claimant's condition would be the natural progression of the degenerative condition.

In summary, the evidence of record shows the claimant has a long history of neck complaints which were symptomatic, causing him to seek medical treatment and miss time from work prior to the incident on August 19, 2003. I find there is no objective medical evidence to establish a compensable injury and the claimant has failed to meet his burden of proof.

Assuming arguendo that the claimant had established a temporary aggravation of his subjective symptoms (pain, range of motion), I find the healing period ended with Dr. Saer's assessment in December, 2003. By that time, the claimant had received adequate medical treatment for pain; had the opportunity to consult with a specialist; knew his work restrictions; and knew he was not a surgical candidate. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The persistence of pain does not prolong the healing period. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 19, 2003 at a compensation rate of \$440.00/\$330.00.
2. The claimant has failed to prove by a preponderance of the evidence of record that he sustained a compensable aggravation of a preexisting condition based on objective medical evidence as required by Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge