

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412400

BILLY J. LEACH, EMPLOYEE	CLAIMANT
ENTERPRISE PRODUCTS COMPANY, EMPLOYER	RESPONDENT
ESIS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 24, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on July 1, 2005, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Joe M. Rogers, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 1, 2005, to determine whether the claimant sustained a compensable injury within the meaning of our Arkansas Workers' Compensation laws.

A prehearing conference was conducted in this claim on May 18, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to a new stipulation concerning the end of claimant's healing period in the event compensability was found.

During the prehearing conference, it was stipulated that the employment relationship existed at all relevant times, including June 17, 2003; that the claimant earned sufficient wages to entitle him to the maximum compensation rates of

\$440.00 per week for temporary total disability and \$330.00 per week for permanent partial disability in the event the claim was found compensable; and that the respondents had controverted the claim in its entirety. At the hearing, the parties agreed that the claimant was released to full-duty work on April 1, 2005, and that if compensability was determined, that the claimant's healing period ended on said date. A copy of the Prehearing Order was introduced, without objection as "Commission's Exhibit 1."

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed. In addition, the claimant raised an issue concerning the constitutionality of Ark. Code Ann. §11-9-411.

Claimant contended, in summary, that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on June 17, 2003; that the respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for the period beginning July 2, 2003, and continuing through July 22, 2003, and, again, for the period beginning November 9, 2004, and continuing through an undetermined date, maintaining that his healing period has not ended (which the parties subsequently agreed ended April 1, 2005); and that a controverted attorney's fee should attach to any benefits awarded. The claimant further objected to any offset of medical

benefits paid by his health insurance provider under the provisions of A.C.A. §11-9-411, maintaining that because he pays for his own health insurance coverage and/or disability coverage that it is unconstitutional to allow respondents an offset because it deprived him of his contractual rights, and, furthermore, was contrary to the requirement that respondents provide him medical treatment and disability benefits for his work-related injury.

The respondents contended that the claimant did not sustain a compensable injury on June 17, 2003. Respondents further contended that the claimant did not receive any medical treatment associated with his alleged injury until November, 2004, and that medical treatment associated with any alleged injury, assuming compensability was found, was not reasonably necessary, while maintaining that the claimant's need for treatment was associated with pre-existing problems, unrelated to any alleged injury on June 17, 2003.

In addition to the claimant, William F. Davis was called as a corroborating witness. Larry Scruggs was called as a witness by the respondents. The record is composed solely of the transcript of the July 1, 2005, hearing containing numerous exhibits. Both parties submitted legal briefs addressing the constitutionality of Ark. Code Ann. §11-9-411 subsequent to the hearing which has been blue-backed and retained in the Commission file.

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. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the evidence, that he sustained a compensable injury in the form of an aggravation of a pre-existing condition which arose out of and during the course of his employment with Enterprise Products Company as the result of a specific incident identifiable in time and place of occurrence on June 17, 2003.
4. Respondents are responsible for all medical and related treatment as the result of claimant's June 17, 2003, injury, and remain responsible for continued, reasonably necessary medical treatment.
5. The claimant is entitled to temporary total disability benefits for the period beginning July 2, 2003, and continuing through July 22, 2003, and, again, for the period beginning November 9, 2004, and continuing through April 1, 2005, at which time his healing period ended.
6. Respondents are entitled to an offset or credit equal to, dollar-for-dollar, the amount of benefits the claimant has previously received in medical services

and/or disability benefits pursuant to A.C.A. §11-9-411. Respondents are responsible for reimbursing the appropriate health insurance and disability providers for any benefits they have paid since the within claim has been determined to be compensable. The provisions of Ark. Code Ann. §11-9-411 are constitutional. *Dooley vs. Automated Conveyor Systems, Inc.*, 83 Ark. App. 411, 143 S.W.3d 585 (2004).

7. Issues not addressed herein are specifically reserved.

DISCUSSION

The claimant, Billy J. Leach, is fifty-eight (58) years old. Since 1989, the claimant has worked as an over-the-road truck driver. The claimant began working for the employer herein in December, 2001. His primary duty was to drive a tanker truck to deliver petroleum products. The claimant was employed by the respondent at the time of the hearing, having returned to work following an alleged injury and surgery, the compensability of which is the subject of this claim. It is undisputed that the claimant reported an injury which result from a specific work-related incident identifiable in time and place of occurrence on June 17, 2003. The real dispute between the parties is whether the reported incident was either a new injury or an aggravation of a pre-existing condition, and whether the claimant's subsequent physical problems, need for treatment, including surgery and disability were causally related to the reported incident. It is apparent from a review of the record, as will be set out further below, that this claim was frustrated because it was not properly

documented by the claimant's supervisor who failed to fill out an Employer's First Report of Industrial Injury. It is clear from the testimony of Larry Scruggs, the terminal manager for the employer in June, 2003, that he failed to appreciate that an aggravation of a pre-existing condition is compensable under our workers' compensation laws. Despite the claimant's prompt reporting of the injury, Mr. Scruggs failed and/or refused to document the report of injury which resulted in subsequent litigation.

Under our workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple vs. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. *Oliver vs. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup vs. Regalware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. vs. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996); *Ford vs. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Under our law, since an employer takes an employee as it finds him, a pre-existing disease or infirmity does not disqualify a claim if the employment circumstances aggravate, accelerate, or combine with the disease or infirmity to

produce the disability for which compensation is sought. *Jim Walter Homes vs. Beard*, 82 Ark. App. 607 120 S.W.3d 160 (2003). Furthermore, if the claimant can prove that an injury occurred, major cause is not necessary to establish compensability. *Williams vs. L & W Janitorial, Inc.*, 85 Ark. App. 1, ___ S.W.3d __ (2004).

The claimant's description of the injury, as well as its prompt reporting to Mr. Scruggs is set out below:

Q Now, Mr. Leach, I direct your attention to the date of June the 17th of 2003, and ask you if you received a work-related injury on that date?

A Yes, I did.

Q And where were you, sir?

A Tupelo, Mississippi.

Q Okay. And what were you doing in Tupelo, Mississippi?

A We had just unloaded a tanker, and I was helping their employee drain the product out of the hose back into his pump.

Q Okay. Now, you drove – you were driving – you drive a tanker truck for your employer, is that correct?

A Right.

Q And your headquarters is here in West Memphis?

A Right.

Q Okay. Did you go from your employer's business on that date to this place in Tupelo, Mississippi?

A I went from Charleston, West Virginia, where the load originated from –

Q Okay.

A – to Tupelo, Mississippi.

Q And you were directed to go there by your employer?

A Right.

Q Okay. And tell us exactly what was happening when you say you were injured?

A We use the customer's pump and the customer's hose, and once you're emptied out, you lift the hose up to drain the product to his pump to where you can handle the hose.

Q Are you draining the – using the customer's pump and taking it out of your tanker?

A Right.

Q And depositing it in the customer's storage facility?

A Right.

Q Okay. And, again, describe how this happened?

A Once the tank was empty, we disconnected the hose from the tank and was lifting it over our heads.

Q Now, you're saying we, who is we?

A Myself and the employee at the customer.

Q At the customer. Do you remember the name of the business?

A Carpenter.

Q Okay. And do you know who that person was?

A No, I do not.

Q All right. Now, describe how you felt and what happened.

A It was a real sharp pain in my back, like somebody hit me in the back with a sledgehammer.

Q Now, were you holding –

MS. WORLEY: Your Honor, could I stop for a minute. I have forgotten to invoke the Rule, and I understand there is a witness out here I would like to sit outside the courtroom.

MR. ROGERS: Mr. Davis, wait outside.

MS. WORLEY: I'm sorry.

BY MR. ROGERS:

Q This hose that you're describing, what's the weight of it approximately, if you know, sir?

A Full, several hundred pounds.

Q So you and this other person that's working for this company, working for your customer's company, are holding this hose?

A Yes, sir.

Q With it being full?

A Yes, sir.

Q Okay. Now, you said something about it, once it was emptied –

A Once the hose is empty, it's light enough that two people can handle it and disconnect it and store it.

Q And that's what you were in the process of doing?

A Yes, sir.

Q Okay. And what happened?

A When we lifted the hose, either he let go of it or my back went.

Q You're lifting it over your head?

A Right.

Q And is he helping you do that?

A Yes, sir.

Q Okay. Now, describe the sensation that you said your back – describe what part of your back and what sensation you felt?

A Upper back, lower neck, just like somebody had hit it with a hammer. It was just a real sharp instant pain.

Q Okay. Now, had you ever had any of that kind of pain before?

A No, sir.

Q You had been working for this company since – I believe you said December of '01?

A Yes, sir.

Q What did – you said you felt the pain in your – what part of your body now?

A Like upper back, lower neck.

Q What about your arm? Did you have any feeling in your arm?

A I had numbness, tingling, pain.

Q Which arm?

A Right arm.

Q Right arm, okay. Had you ever had any problem with your right arm before?

A No, sir.

Q All right. Now, what did you do upon this happening, sir?

A Once I completed the emptying out and got my paperwork signed, I went to the

closest telephone and called it in.

Q And you say got the paperwork, are you talking about the paperwork with the customer?

A He would have to sign our bills.

Q Okay. And you went to the closest telephone and what did you do?

A Called the terminal and explained to them what had happened, told them I was feeling bad.

Q Who did you report – who did you talk with?

A Larry Scruggs.

Q And who is Mr. Scruggs?

A He's sitting over there. He was terminal manager at the time.

Q Okay. And did you ask for permission to do anything, or what was the extent of the conversation you had with Mr. Scruggs?

A At that point I told him what had happened, and that I felt bad, and that I was going to lay down for a little bit, which I did. I laid down for about two hours.

Q In your truck?

A Right.

Q Okay.

A And then I drove to Memphis.

Q Okay. You say you drove to Memphis. Is the terminal in Memphis –

A West Memphis.

Q – or in West Memphis? All right. When you got to the terminal in West Memphis, what did you do?

A Explained to him what had happened. (Tr.12-17)

The claimant testified that Mr. Scruggs refused to either fill out an injury report or provide medical treatment because Mr. Scruggs attributed the claimant's physical problems to a previous injury. The claimant denied reporting that the incident aggravated a pre-existing condition while maintaining that Mr. Scruggs attributed his complaints to a previous injury. Mr. Scruggs acknowledged that the claimant reported injuring himself performing the activities described above while asserting that the claimant reported aggravating a pre-existing condition. It is equally clear that Mr. Scruggs was not properly trained concerning the filing of Employer's First Report of Industrial Injury and the importance of promptly documenting injury reports. A portion of his illuminating testimony follows:

Q Okay. And you've admitted that he called you the day of this incident and told you he was in Tupelo, Mississippi at a customer's place, and that someone had dropped a hose, and he had hurt his back –

A Yes, sir.

Q – right?

A Yes, sir.

Q And he said, "I'm going to have to – I'm going to rest here a while, then try to get on in." And that's what he told you, wasn't it, sir?

A Yes, sir.

Q And so he did that, and he got on in, and when he came in, he reiterated and reported the same thing, that he had hurt his neck on the job, didn't he?

A Yes, sir.

Q And you know, sir, as a terminal manager, that it's the responsibility of the company to report that injury, don't you, sir?

A At this point I do, yes.

Q Are you saying you didn't know even though you had been the manager since December of '97?

A At the time that this incident happened, I did not know the law concerning these type of reports when he had reported to me that it was a previous injury involved.

Q He told you – yeah, I think your description was it was an aggravation?

A Aggravation, yes, sir, aggravation.

Q Do you not know, sir, from all your training, whether it's a new injury or an aggravation of an old injury, that's still an on-the-job injury that's supposed to be reported?

A I did not at that time.

Q So you didn't report it?

A No, sir.

Q And he asked you to be allowed to go see the company doctor, didn't he?

A No, sir.

Q You're denying that he requested that?

A Yes, sir.

Q He wanted to pay for it out of his pocket, is that what you're telling the Judge?

A He told me that he was going to set up an appointment to see his doctor. (Tr.63-65)

The claimant stated that he attempted to see his personal physician, Dr. Bell, in Munford, Tennessee, and that Dr. Bell refused to treat him for a work-related injury without a workers' compensation claim number. The claimant stated that he rested four (4) days while continuing to request medical treatment from Mr. Scruggs

which was never provided. The claimant returned to work on June 21, 2003, and resumed driving until July 2, 2003. He related that his pain grew progressively worse and that when he returned to the terminal on July 2, he related his continuing problems to Mr. Scruggs who reportedly told him, "If I couldn't do the job, I didn't need to be an over-the-road truck driver." at which time he sought medical treatment on his own from a chiropractor, Dr. Curtis Damien in Millington, Tennessee. Dr. Damien's notes and report fail to reflect any history of work-related injury which I find inconsequential since the claimant admittedly reported the injury to his supervisor two (2) weeks previously. (Tr.23)(Cl. Ex. A, pp.1-7)

In a report dated September 3, 2003, addressed to the claimant's family physician, Dr. Damien reports the following:

Billy Leach has been a patient in our clinic since July 2, 2003. His initial complaint was of C7-T2 pain radiating completely down the arm to the C6 dermatome. Mr. Leach's evaluation included surface EMG and thermography, which showed significant abnormal readings in the cervical spine. X-ray evaluation revealed moderate level spondylosis in the mid to lower cervical spine. Positive compression and positive Jackson's tests were obtained.

Mr. Leach has been treated using chiropractic adjustments, traction, muscle stimulation, and ultrasound with decent results. On two separate occasions he has experienced eighty-five to ninety percent less pain, however, the condition was exacerbated due to increase in hard work. It has been recommended that he decrease all aggressive activities and allow the area more time to heal. At this point, he has returned to work and has been working with some pain and discomfort. We anticipate seeing him periodically over the next several weeks for follow-up care. (Cl. Ex. A, p.9)

The claimant returned to work following his release by Dr. Damien on July 28, 2003, and apparently did not miss any additional work until on or about November

9, 2004, at which time he sought additional medical treatment, and, for the first time, actively pursued his claim under workers' compensation. The claimant maintained that by that time, his pain had become unbearable and that after calling OSHA and the Arkansas Workers' Compensation Commission, he threatened legal action which prompted the employer's insurance carrier for the first time to provide him with a medical evaluation by Dr. Mark Harriman, an orthopedic surgeon with the Memphis Orthopedic Group. Respondents initially paid for the treatment provided by Dr. Harriman prior to controverting the claim in its entirety. After respondents controverted the claim in its entirety, the claimant sought medical treatment on his own, utilizing health insurance which he had obtained by that time. The claimant was ultimately evaluated by Dr. Joseph Hudson at the Semmes-Murphey Neurological Clinic in Memphis, Tennessee. The claimant underwent a cervical anterior microdiscectomy and fusion by Dr. Hudson on January 13, 2005. As reflected by the stipulations, claimant reached maximum medical improvement and returned to work on April 1, 2005. (Tr.27-34)

Although Dr. Damien's initial reports do not indicate a history of work-related incident which, again, is undisputed, his follow-up case notes reflect that the claimant was treated by workers' comp for complaints of the same problems. (Cl. Ex. A, p.11)

On cross-examination, respondents question the claimant concerning the fact that an incident report was filled out after the June 17, 2003, claim, specifically, on

September 22, 2003, apparently to question the claimant's credibility for failing to fill out his own report of injury for the June 17, 2003, claim. I do not fully appreciate the relevance of the September 22, 2003, "Accident/Incident Review" because it does not appear to be a report of injury, but, rather, appears to be related to an equipment incident. (Tr.44, 48-49)(Resp. Ex. C, p.1)

Respondents also question the claimant about prior neck injuries which the claimant denied. Although the claimant admitted sustaining a head injury, specifically, a head laceration in October, 2001, he denied any subsequent cervical injury before June 17, 2003. On cross-examination, claimant could not explain the report of neck and back pain for six (6) weeks before March 12, 2003, which is contained in an unidentified and unverified report which could possibly be from his primary physician, Dr. Bell (which is sheer speculation) who prescribed medications. In any event, I do not find that these unsigned reports change the ultimate conclusions reached herein. (Resp. Ex. A, pp.2, 7)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant

and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met his burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

When a claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation, the Commission may find the existence of the causally connection. *Hall vs. Pittman Construction Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Co. vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1978). The following informative testimony from the claimant's immediate supervisor confirms the causal connection:

Q Okay. Did you fill out a First – I think you testified about a First Report of Injury, that you did ultimately fill out a First Report of Injury and sent it in to workers' compensation?

A Yes, sir.

Q All right. And is that the report?

A Yes, sir, it is.

Q And you, in that report, do you not indicate that you were notified of the injury on 6/17/03?

A Yes, sir.

Q And that it was a neck injury?

A Yes, sir.

Q All right. And that he and another person were walking the hose to empty the line when the other person dropped the hose, right?

A Yes, sir.

Q Okay. So you reported that to workers' compensation, right?

A Yes, sir.

Q And he notified you of the injury on that date?

A On 6/17.

Q 6/17/03?

A Yes, sir.

Q He didn't work any more at the company after November the 9th of 2004 back up until April 2nd of 2005, did he?

A I am pretty sure that is the correct dates. (Tr.69-70)

BY JUDGE GREENBAUM:

Q Were you the terminal manager, I assume, the entire period of time that Mr. Leach worked there, is that right?

A Yes, sir.

Q And you've acknowledged that you didn't know about any previous injury or condition before June 17th of '03, is that right?

A No, sir, I didn't.

Q Then would it be correct that he continued to perform his day to day activities without complaint to you at all times up until that date?

A That's correct.

Q When he called you and reported to you that he thought he aggravated a previous condition when he was working with this hose, did you question him any

further about that?

A As to what?

Q As to the previous condition and –

A No, sir.

Q – how he thought he aggravated it?

A No, sir. Well, the aggravation, yes. That was the conversation, is how the incident happened. And as far as asking him anything about what the injury was before wasn't relevant to me at that time.

Q And what type of training as a supervisor have you received as to how to properly fill out claim forms and incident reports?

A Mostly on-the-job training, just pick it up as you go.

Q Had you filled out workers' comp claim forms prior to –

A Yes, sir.

Q – November of '04?

A Yes, sir.

Q And what made this claim different than other claims?

A The fact that I didn't know at that time that when it was considered a previous injury, that it would need to be reported, and statements that he was going to see his doctor.

Q And how did you first learn or when did you first learn that you were required to fill out an incident report on aggravations of preexisting injuries? When did you learn that?

A That was approximately the time that he had called with the statement that he had spoke to OSHA and Workmen's Comp, and I contacted our representatives in the Houston office and informed them of this question.

Q And am I correct that, with the exception of the brief time that the Claimant

missed work in July of '03, did he continue to work until November of '04?

A Yes, sir.

Q Did he make any further complaints of any physical problems that he was having with his neck during the duration or the remainder of his employment until he took off for surgery?

A Yes, sir.

Q Were his complaints, would you characterize them as regular or frequent?

A I would.

Q Okay. And then would it be correct that he just basically toughed it out for all that period of time until he finally got these reports filed and got it paid on other insurance?

A Yes, sir. (Tr.72-74)

Rather than conduct a further analysis of the record in this cause, suffice it to say that after reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven that he sustained a compensable injury on June 17, 2003, entitling him to appropriate workers' compensation benefits.

At the conclusion of the hearing, claimant's attorney was questioned concerning his constitutional argument and the holding in *Dooley vs. Automated Conveyor Systems, Inc.*, 83 Ark. App. 411, 143 S.W.3d 585 (2004). Claimant's attorney acknowledged that he was simply wishing to preserve his constitutional arguments so that he could raise this issue in future appeals. (Tr.76)

AWARD

Respondent, ESIS, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$440.00 per week beginning July 2, 2003, and continuing through July 22, 2003, and, again, for the period beginning November 9, 2004, and continuing through April 1, 2005.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay all hospital, medical, and related treatment as the result of claimant's June 17, 2003, injury, and respondents remain responsible for continued, reasonably necessary medical treatment. Respondents are entitled to a credit or offset for any benefits paid by other providers under A.C.A. §11-9-411; however, respondents are to reimburse the appropriate providers.

Additionally, claimant's attorney, Mr. Joe M. Rogers, is hereby awarded the maximum statutory attorney's fee on this entire Award pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge