

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410538

JOE PEER	CLAIMANT
GERBER PRODUCTS CO.	RESPONDENT
TRAVELERS INDEMNITY CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 11, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 7, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 24, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 30, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained an injury at work on September 30, 2004.

4. The claimant is entitled to a weekly compensation rate of \$231.00 for temporary total disability and \$174.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injuries under Arkansas law.

2. Related medical.

3. Temporary total disability from October 5, 2004, to December 8, 2004.

4. Claimant's entitlement to a 7 percent whole body impairment rating.

5. Attorney's fees.

In regard to the foregoing issues the claimant contends that this claim has been controverted in its entirety. The claimant is entitled to reasonable and necessary medical treatment, TTD from September 30, 2004, to a date yet to be determined, as well as statutory attorney's fees and change of physician.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury in the accident on September 30, 2004. Without waiving other defenses, the respondents contend that the claimant's injury was substantially occasioned by the use of illicit drugs as reflected by the positive drug test performed shortly after the accident.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted medical records marked Claimant's Exhibit No. 1 and photographs marked Claimant's Exhibit No. 2. The respondents submitted medical records marked Respondents' Exhibit No. 1 and additional information marked Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was forty-two years old and had been working for the respondent for a little over 24 years. The claimant testified that on September 30, 2004, he was working as a forklift driver. The claimant testified that he had driven onto the back of a truck to unload the product, the safety chain was down and the dock plate was down. The claimant testified that he used the radio on the forklift to call to see what they wanted him to do as to unloading the materials and before he got a response the truck pulled away and since he was sitting half way on the truck and half way on the dock it pulled him off the dock. The claimant testified that he fell approximately four or five feet and in his fall he injured his neck, shoulders, both knees and his lower back. The claimant testified that he was taken to the nurse's station in a buggy by one of the maintenance men. The claimant testified that he was taken to the hospital by the plant nurse. The claimant testified that the first thing that was done at the doctor's office was that he was given a drug test since this was company policy. The claimant testified that initially he was seen by Dr. Parham then he was seen by Dr. Holder. The claimant testified that he was sent to physical therapy and told he would be

all right but eventually he was referred to Dr. Standefer. The claimant testified that he was seen by Dr. Standefer one time only.

The claimant testified that his drug test came back positive for the use of marijuana. The claimant testified that following his injury he returned to work for the next couple of days or until his drug results were returned, then he was released from work until he completed a drug rehab program. The claimant testified that he was off work until December 8, 2004. The claimant testified that he has continued to work for the respondent.

The claimant testified that he had smoked marijuana on the Monday evening prior to his accident on Thursday. The claimant testified that he had not smoked marijuana the day of his accident or the day before.

The claimant testified that on the day of his injury, his shift began at 6:00 in the morning. The claimant testified that he and another employee were working putting product into the freezer with their forklifts until around 9:00. The claimant testified that around 9:00 he went into the scale house and it was full of people just sitting around. The claimant explained that this was sort of like a little break room and he smoked a cigarette. The claimant remembered that George Benge, his group leader, was in the scale house. The claimant testified that he may have even smoked a cigarette with Mr. Benge in the scale house prior to going to work that morning.

The claimant testified that he and two other men, Morris Clayburn and Jimmy House, were working loading and unloading trucks

that morning with their forklifts. The claimant explained that there is a lot of unloading trucks and restacking the product to be placed into the freezer. The claimant testified that there also is a lot of unloading samples from trucks to see if the quality is sufficient before it is loaded back on the trucks and sent to Zero Mountain for storage.

The claimant identified photographs of the area in which he worked. The claimant testified that there is a dock plate which is attached to the dock which flips over onto the truck to form sort of a bridge between the loading dock and the truck so that the forklifts can come and go. The claimant testified that there are lights which should indicate when a truck is locked in and cannot be driven off but there are times when a truck cannot get locked in. The claimant explained that the red light indicates that the truck is not locked and the green light would indicate that the truck was locked. The claimant testified that there is a hook that prevents the truck from going forward, however, some trucks have pulled out with the load lock still on and when this happened it would mess up the load lock or perhaps tear the bumper off the truck. Again the claimant testified that there are occasions when the lock would not lock into a truck, therefore, they had to unload the truck with the red lights flashing not to go on. The claimant testified that prior to his accident, they would unload trucks with the load lock unengaged but since his accident they have been very cautious. The claimant testified on the day of his accident the dock plate was down and the caution chain was down when he drove

onto the truck. The claimant testified that the truck was full and he could not get all the way in, that was when he began radioing to try and figure out what needed to be done and that is when the driver drove off. The claimant testified that he is supposed to get off his forklift and make sure that the load lock is on but it was not uncommon prior to his accident for him not to follow this procedure. The claimant testified that others were not enforcing the rule to putting the chain up and everything before the accident either.

On cross examination, the claimant admitted that he smoked marijuana occasionally. The claimant testified that when he talked to Dr. Parham he told him that he needed to keep his job and that he needed for the doctor to help him get into a substance program so that he could get back to work. The claimant testified that Dr. Parham did not treat him for any of his injuries. The claimant testified that he was aware that the safety chain, the dock plate and the truck lock were all there as safety features to protect the employees who are loading and unloading the trucks. The claimant was shown picture Y and testified that the accident site looked just like it did in the picture. The claimant testified that he did not check to make sure that the truck was locked in. The claimant agreed that in the photograph marked X this picture shows that the red light is on. The claimant testified that on the date of the accident he did not look to see if the truck was locked in, he just looked to see if the chain was down and the dock plate was down but he did not check the light security. The claimant

testified that the red light was probably on when he pulled onto the back of the truck but he did not check it. The claimant testified that he assumed that the truck lock was locked because the chain was down and the dock plate was down but he did not get off his forklift to check and see if the truck was locked in nor did he look to see if the red security light was on. The claimant agreed that the day following his accident he returned to work at full duty and only had some scraps on his knees. The claimant testified that he continued to work for the respondent until October 5, a Tuesday, when he reported to work and was told that he would need to go home because of his positive drug test. The claimant then agreed that he was off work and involved in a drug rehabilitation program until December 8, 2004, when he was allowed to return back to work for the respondent. The claimant testified that although he was involved in physical therapy for at least six weeks, he was off work because he was in a drug rehab program. The claimant testified that he drew short term disability benefits through the respondent's group program for eight of the nine weeks he was off. The claimant also agreed that he drew \$260.00 per week gross on his short term disability. The claimant agreed that he experienced neck pain prior to his accident on September 30, 2004. The claimant testified that he had had medical treatment as well as chiropractic treatment off and on since 1992 or 1993.

On redirect examination, the claimant explained that his use of a chiropractor for occasional neck pain was due to sports injuries or golfing, noting that he would just get sore and want

some relief from a chiropractor through an adjustment. The claimant stated that in 1998 he did see a chiropractor after driving a forklift for sixty hours in one week and he just wanted some relief from the discomfort after the constant banging. The claimant agreed that he did not have any treatment for his neck between 1998 and 2004. The claimant testified that the neck pain and low back pain which he has following his September 30 accident is much different from that which he had previously. The claimant testified that usually the man on the forklift gives clearance to the truck driver before he leaves the dock. The claimant testified that Jimmy House who was new to this particular job had already done the load, put it back on and had gone into the scale house when the claimant got onto the truck. On recross examination, the claimant stated that it was a combination of errors, some on Mr. House and some on him, which resulted in his accident. The claimant agreed that it is not the safety chain or the dock plate which would prevent the truck from pulling away from the dock but that it is the load lock that is suppose to keep the truck from leaving the dock until ready.

George Bengé testified that he had been working for the respondent for seventeen years and was a group leader in receiving. Mr. Bengé testified that his office is in the scale house and he has worked with the claimant for a couple of years. This witness testified that on September 30, 2004, everyone got there around 6:00 and as usual there was a little shop talk and some would go outside and smoke in the smoking area. This witness testified that

shortly before the accident happened the claimant came into the scale house and picked up a set of tags which he had printed out for product which came from Zero Mountain. Mr. Bengé testified that this would indicate that there were trucks which needed to be unloaded. Mr. Bengé testified that there was nothing about the claimant that would make him feel suspicious about the claimant or that he was under the influence of anything. This witness testified that the claimant seemed normal in all ways as he always did and if he thought that he had been under the influence of anything he would have talked to him about it. Mr. Bengé testified that he had on occasion drive a forklift and is familiar with the lock system as well as the other safety regulations that they are to follow when on a forklift. Mr. Bengé testified that when a truck is loaded or unloaded it is the responsibility of the forklift driver to put the chain up and unlock the dock lock, explaining that the dock plate will just fall when the truck leaves. Mr. Bengé agreed that there are times that the employees do not put the chain up although that does not occur as much now as it once did. This witness testified that the claimant's wreck caused people not to be so hap-hazard. Mr. Bengé testified that it is the forklift driver's responsibility to let the truck driver know that it is ok to leave but that he, Mr. Bengé, could do it also. This witness testified that on the day of the claimant's accident he did not give the ok for the truck to leave but it was Jimmy. Mr. Bengé testified that there are times when he would be driving a forklift when he would drive onto the truck when the red

light was on and that he has also seen others do it. This witness testified that because in the past he has had truck drivers pull their bumpers off with the load lock on he has quit using the load lock. Mr. Bengé agreed that he does not get off his forklift to check and see if the load lock is on because he does not use it. Mr. Bengé testified that since the claimant's accident, he locks the load in every time. Mr. Bengé testified that the claimant was a good employee and came to work every day and did a good job. This witness testified that he has ridden motor cycles with the claimant but has never been to his home.

Morris Clayborn testified that he was a group leader, forklift driver for the respondent and had been working for them for approximately eleven years. Mr. Clayborn testified that he works third shift but had to work over the day of the claimant's accident so he was there when the claimant arrived. Mr. Clayborn testified that the day of the claimant's accident they all met in the scale house to get their assignments. This witness testified that the claimant did not seem to be acting out of the ordinary. Mr. Clayborn testified that he has driven his forklift onto trucks without the truck being locked down. This witness testified that he just sometimes would forget to check and other times he would just be going on the truck to get one pallet and agreed that it would be a pain to get off the forklift to lock the truck down. Mr. Clayborn was shown picture Y and was asked is he had seen a truck like that would he have been looking over at the lights to see if it had been locked down or not and Mr. Clayborn responded,

"No." Mr. Clayborn agreed that was something that he did not pay attention to on a regular basis.

On cross examination, Mr. Clayborn testified that on the day of the claimant's accident he was working on a completely different dock doing a different procedure. Mr. Clayborn testified that he and the claimant had visited just a little bit at the beginning of the claimant's shift at 6:00 and around 10:00 or 10:30 they had taken a break of about ten to fifteen minutes waiting for trucks to come in and also visited then. Mr. Clayborn testified that he did not normally work on the dock where the claimant's accident happened. This witness testified that he was not indicating that he never checked the truck lock and never looked at the light but that he has at times failed to do so.

Jimmy House testified that he had been working for the respondent for twenty-three years. Mr. House testified that he had been working as a forklift driver for approximately one year. Mr. House testified that he had been working on the truck that pulled away causing the claimant's injury. Mr. House testified that he locked the truck in and that he always locks down the truck if it will lock. This witness agreed that there are some people that sometimes do not lock the trucks in but he just got in the habit of doing it at his earlier job. Mr. House testified that after the truck was reloaded he was suppose to put the yellow chain across the back but he did not always do this religiously. This witness agreed that there are a lot of other people out there that do not put the chain up as well. Mr. House testified that after he had

Loaded the truck he went to the office and the driver of the truck was in the scale house. Mr. House testified that the driver asked him if he could pull out and he told him yes. Mr. House testified that there have been times when he was working and he would see a truck backed up with a dock plate down and the yellow chain off and he would drive onto the truck without checking to see if it was locked in. Mr. House was asked if he would look over and see if the warning lights were indicating that the truck was locked in. Mr. House responded, "Well, today I would. Back then, you know, I just didn't pay that much attention." Mr. House testified that he had seen the claimant probably between five and ten minutes that morning and that he did not notice anything strange or unusual about him.

Mike Hamilton testified that he has been with the respondent for approximately seventeen and a half years and is currently the formulation supervisor. Mr. Hamilton testified that he has been in this position a little less than a year and that on September 30, 2004, he was in transition from receiving supervisor into the formulation supervisor. Mr. Hamilton testified that he had been the receiving supervisor for approximately six years. Mr. Hamilton agreed that he was the supervisor in the area where the claimant's accident happened on September 30, 2004. Mr. Hamilton testified that he conducted periodic safety meetings prior to the claimant's accident and that some of these meetings contained information about the warning system and the truck lock system. Mr. Hamilton testified that his job as a supervisor in receiving required him to

be out on the docks four or five times a day, noting that it was a good sized area covering about two to two and a half to three acres. Mr. Hamilton testified that based on his observations prior to the claimant's accident, the safety warning system and the truck lock system was used on a regular basis by the employees in that department. Mr. Hamilton was asked if there were occasions when he would see that these systems were not being utilized. This witness responded, "None that I can recall." This witness testified that if he had seen an employee not implementing or using these safety systems he would have stopped that person and asked them to follow company policy. Mr. Hamilton testified that it was part of his job to check on the safety standards. Mr. Hamilton testified that it was not common place or regular for a forklift driver in the receiving department to totally ignore the warning systems and truck lock systems. Mr. Hamilton was asked if he had any recollection of a single incident before the claimant's accident on September 30, 2004, of observing one of the forklift drivers violating the truck lock system. Mr. Hamilton responded, "None that I can recall." Mr. Hamilton agreed that it might have happened but he just did not recall it.

The medical records set forth that the claimant was seen at Cooper Clinic on September 30, 2004, where it is noted that he had small abrasions to his right and left knees. The office narrative notes that he was driving his forklift onto an eighteen wheeler when it pulled away from the dock and he fell to the ground, first on his back and then on the right side. It is noted that the

claimant reports that he does not have any problems other than a few scraps across his knees. After examination, the claimant was returned to work without restrictions and instructed to keep the wounded areas clean and dry. The claimant was seen back at the Cooper Clinic on October 1, 2004, reporting that his left knee is more painful today, noting that this knee had previously been fractured. It is also noted that the claimant's low back is tender and his neck is tender, noting that he has taken Ibuprofen and gotten little relief. After examination, the claimant was diagnosed with cervical and lumbar strain as well as left knee and right knee contusions. Medications were prescribed and neck and back exercises were explained, noting that he can return to work with no lifting over twenty pounds and no repetitive back motions. The claimant was administered a drug test on September 30, 2004, which showed positive for the use of marijuana. The claimant was seen on October 4, 2004, at Cooper Clinic with continued complaints of neck pain. After examination and review of the claimant's x-rays of his cervical and thoracic spine, he was diagnosed with having cervical strain with cervical spondylosis, lumbar strain and left and right knee contusions. Physical therapy was ordered and an MRI of the claimant's cervical spine recommended with continued medications and return to work with a lifting limitation of ten to fifteen pounds and continuation of his previous restrictions. The claimant underwent an MRI of his cervical spine on October 22, 2004, which revealed very mild left sided facet hypertrophy at C4-5. This same test showed spondylosis and possible central disc

bulge versus protrusion at C5-6 with mild channel stenosis and biforaminal stenosis. This MRI also showed spondylotic ridging with right sided disc protrusion at C6-7 with moderate channel stenosis and biforaminal stenosis. When the claimant was seen by Dr. Holder on November 10, 2004, it is noted that his neck is feeling better and that he has been attending physical therapy. Dr. Holder writes that the claimant is not taking any medications and did not get the Celebrex or Naprosyn refilled. After examination, the claimant was again diagnosed with cervical strain and cervical spondylosis, noting that he is to continue his home exercise and that the appointment with Dr. Queeney has been canceled at the claimant's request and that an appointment with Dr. Standefer is being pursued. Dr. Holder returned the claimant to work with no lifting over thirty pounds above his head. Dr. Keith Holder saw the claimant again on December 1, 2004, noting that he is now having a different type of pain, more in the base of his skull in his upper neck primarily at night. Dr. Holder notes that the claimant has been in rehab for several weeks and is currently on antibiotics for an upper respiratory infection. Dr. Holder notes that they are awaiting a neurosurgical evaluation for the claimant. It was recommended that the claimant could return to work with no lifting over thirty pounds over his head.

Robin Phillips, Dr. Michael Standefer's assistant, writes on December 6, 2004, that the claimant was seen for his complaints of persistent neck pain. The claimant reports to Mr. Phillips, that he has had intermittent neck pain for many years although since his

September 2004 accident the pain has been fairly persistent. After examination and review of the claimant's MRI, the claimant was assessed with having cervical spondylosis and it was recommended that the claimant consider a cervical myelogram and possible surgery. It is noted that the claimant does not wish to consider surgery at this time but will think about it. According to the medical records, the claimant was last seen by Dr. Holder on January 5, 2005, where it is noted that he is currently taking Tylenol and may return to work without restrictions. On March 18, 2005, Dr. Michael Standefer writes that the claimant's MRI demonstrated a small right disc protrusion at C5-6 with a disc and associated osteophyte complex at C6-7 with some mild to moderate channel stenosis. Dr. Standefer writes that with these facts in mind, a permanent impairment of 7 percent as it regards the whole body should be applied to this patient, further noting that this is obtained from the A.M.A. Guides, Forth Edition.

After a complete review of this entire matter, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on September 30, 2004. It of course is noted that the claimant tested positive for the use of marijuana and he has in fact testified that he did smoke marijuana the Monday night prior to his accident on Thursday. The claimant has testified that when he reported to work on September 30 he was not under the influence of marijuana and several of his co-employees including his supervisor have testified that he was acting normally, performed his job functions normally

and that his actions were no different as to his work procedures as any of the rest of them would have done at that particular time. Each of these witness has testified that there were safety standards which were routinely ignored but that since the claimant's accident, they all are much more mindful of the need to follow the recommended safety precautions. Jim House testified that when he finished unloading the truck which ultimately the claimant sustained his compensable injury on, he failed to put up the caution chain and drop the dock plate and in fact went to the scale house and told the driver it was ok for him to leave. The indication from the testimony of the various employees who work in the dock area on the forklifts is that if they were faced with the same situation the claimant was confronted with at the time he entered the back of the truck on his forklift, they would have done exactly the same thing. The respondents' witness, Mike Hamilton, who was the supervisor in receiving did testify that he never observed employees not following these safety requirements while he was present. Mr. Hamilton's testimony did set forth, however, that he could not say with certainty that these practices were always carried out when he was not present. Therefore, in light of the testimony as well as current decisions by the Full Commission dealing with intoxication, I find that the claimant has rebutted the presumption that his use of marijuana three days before did not substantially contribute to his compensable injury. The respondents, therefore, shall pay for all reasonable and necessary medical treatment for this claimant's compensable injuries, neck

and abrasions to his knees. I find, however, that the claimant is not entitled to temporary total disability. The claimant testified that he returned to work the very next day for the respondent and continued to work until he was sent home due to his positive drug test. The medical records have not released the claimant from work although they did set some restrictions as to lifting and turning and twisting but none of the treating physicians have indicated that he was not able to work, therefore, there is no finding of temporary total disability. The claimant, in his testimony, testified that the reason he was off work was because of his drug rehabilitation program. Dr. Standefer has assessed the claimant with a 7 percent whole body impairment rating as set forth in his letter of March 18, 2005. This assessment is based on the A.M.A. Guides, Forth Edition, using Table 75. Dr. Standefer notes that the claimant's MRI demonstrated a small right disc protrusion at C5-6 and then he notes some additional problems with the claimant's back more associated with degenerative disc disease such as an osteophyte complex. The A.M.A. Guides, Forth Edition, Page 113, Table 75, sets forth in Paragraph IV-A that a single level decompression without spinal fusion and without signal signs or symptoms is a 7 percent whole body for the cervical spine. The respondents, therefore, should pay a 7 percent whole body impairment rating for this claimant's compensable cervical injury.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On September 30, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained an injury at work on September 30, 2004.

4. The claimant is entitled to a weekly compensation rate of \$231.00 for temporary total disability and \$174.00 for permanent partial disability.

5. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his neck and two knees while working for the respondent on September 30, 2004. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for the claimant's compensable injuries.

7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from the date of his injury to December 8, 2004. See discussion above.

8. The claimant has proven by a preponderance of the evidence that he is entitled to a whole body impairment rating of 7 percent as assessed by Dr. Standefer in accordance with A.M.A. Guides, Forth Edition. See discussion above.

9. The respondents have controverted this claim in its entirety.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained compensable injuries while he was working for the respondent on September 30, 2004.

The respondents should pay for all reasonable and necessary medical treatment for the claimant's compensable injuries.

The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from the date of his injury through December 8, 2004.

The claimant has proven by a preponderance of the evidence that he is entitled to a 7 percent whole body impairment rating for his compensable neck injury.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE