

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413074

JOHN SMILEY,
EMPLOYEE

CLAIMANT

BRUCE OAKLEY, INC.,
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INS. CO.,
CARRIER

RESPONDENT

OPINION FILED NOVEMBER 4, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL in Searcy, White County, Arkansas.

Claimant appeared pro se.

Respondents represented by HONORABLE MELISSA ROSS CRINER, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 27, 2005 in Searcy, Arkansas. A Prehearing Order was entered in this case on July 11, 2005. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or during the course of the hearing and are hereby accepted:

1. The parties stipulate to the employer/employee relationship on 12/14/04.

2. The claimant's alleged injury has been controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited in the Prehearing Order to the following:

Claimant:

1. Compensability.
2. Payment of medical expenses.
3. TTD (for approximately three weeks beginning December 14, 2005).

Respondents:

1. The compensability of claimant's alleged injury.
The record consists of the September 27, 2005 hearing transcript and the exhibits contained therein.

DISCUSSION

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, 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. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Regarding the objective findings requirement for an aggravation type injury, I note that a claimant must establish the existence of an alleged aggravation by objective findings of an acute injury, and the claimant cannot carry his burden of proof merely through objective findings of preexisting degenerative conditions. Furthermore, a claimant is required to establish a causal connection between any objective finding in the record and the alleged compensable injury, even if the alleged compensable injury is an aggravation of a preexisting condition. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). Objective findings are those findings which cannot come within the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

In the present case, Mr. Smiley's hearing testimony and the contemporaneous history which he provided to Dr. Williams on December 15, 2004 persuade me by a preponderance of the evidence that Mr. Smiley injured himself on December 14, 2004 while helping a co-worker lift a heavy wheelbarrow filled with wet corn. Lifting a wheelbarrow is a specific

incident. Since moving the wet corn was one of Mr. Smiley's job duties, any injury caused by lifting the wheelbarrow arose out of Mr. Smiley's employment with Bruce Oakley, Inc. The severity of Mr. Smiley's symptoms by the morning of December 15, 2004, also persuades me that Mr. Smiley's injury while lifting the wheelbarrow caused internal harm to his body which required medical services.

The difficult legal questions are the nature and extent of the physical injury established by medical evidence supported by objective findings, and the degree of Dr. Williams' treatment which was reasonably necessary for the injury established by objective medical findings.

1. Back Injury

Relevant precedent indicates to me that Dr. Williams' active range-of-motion testing, her sensory testing, and her recording of moderate to severe lumbar region tenderness are not "objective" findings within the meaning of Ark. Code Ann. § 11-9-102(16). Although the radiographs of various levels of the spine produced objective atypical findings, I interpret from Dr. Williams' treatment orders that the abnormal spine curvature indicated on radiographs was a pre-existing condition for which she did not prescribe or perform any treatment. While Dr. Williams' reflex testing may have produced objective results, Mr. Smiley's reflexes

were all normal. Straight leg raise testing likewise produced normal results.

While Dr. Williams' active range-of-motion test results are not objective, I note that, as a part of her musculo-skeletal examination, Dr. Williams performed static joint palpation through which she located several hypomobile joints in the thoracic and lumbar spine. I am not aware of any published Commission or Court precedent addressing whether or not static joint palpation produces objective findings within the meaning of Ark. Code Ann. § 11-9-102(16). However, I note that this testing assesses mechanical joint function or mobility, and the results produced by definition are based on palpation, which is within the voluntary control of the physician, not the patient. Therefore, both the nature of the testing and the results produced by static joint palpation appear to me akin to passive range-of-motion testing, which the Arkansas courts have determined to produce objective medical findings. See Hayes v. Wal-Mart Stores, 71 Ark. App. 207, 29 S.W.3d 751 (2000).¹

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By legislative exclusion, even passive range-of-motion testing of the spine is not considered an objective finding for purposes of making physical or anatomical impairment ratings to the spine. See Ark. Code Ann. § 11-9-102(16) (A) (ii). However, I note that this statutory exclusion applies only to the determination of permanent impairment ratings, and that the provisions of the Arkansas

Finally, I note that Dr. Williams' notation of hypomobility in various joints from the upper back to the pelvis on September 15, 2004 appears consistent with Mr. Smiley's recollection that his whole body was stiff when he woke up that morning. I therefore find that the claimant has established by a preponderance of the evidence that Dr. Williams' static joint palpation test results were objective, and that these objective medical results of abnormality were causally related to the acute injury that Mr. Smiley experienced to his back while lifting a wheelbarrow of wet corn on December 14, 2004.

2. Rib and Chest Injury

The Arkansas courts have long recognized that muscle spasm can qualify as an objective medical finding of an acute injury. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). I find that Dr. Williams' clinical finding of pectoralis minor muscle spasm satisfies the objective medical finding requirement to establish the existence of Mr. Smiley's reported chest and rib injury that occurred during the wheelbarrow lifting incident. I

Workers' Compensation Law are to be strictly construed. Therefore, I do not interpret Ark. Code Ann. §11-9-102(16) (A) (ii) as prohibiting the use of passive range-of-motion testing as a form of objective medical finding in order to determine the occurrence of a compensable back injury.

therefore find that Mr. Smiley has established by a preponderance of the evidence each of the requirements necessary to establish the compensability of both his diagnosed back injury and his reported rib and chest injury.

3. Reasonable and Necessary Medical Treatment

The respondents interpret that Dr. Williams' chiropractic care in December of 2004 and January of 2005 was mostly for curvature and malalignment of Mr. Smiley's lumbar and thoracic spine. I respectfully point out from page six of Dr. Williams' December 15, 2004 report, however, that Mr. Smiley's spinal deformity was assessed as only a secondary problem, and Dr. Williams prescribed no treatment order for the codes (738.5 and 738.6) associated with the diagnosed deformities.

Mr. Smiley's testimony also establishes that the symptoms from his diagnosed strain injuries essentially resolved through the course of approximately 11 chiropractic sessions between December of 2004 and January of 2005. Consequently, I find that Mr. Smiley has established by a preponderance of the evidence that Dr. Williams' treatment at issue was reasonably necessary to diagnose, treat, and resolve Mr. Smiley's strain injury sustained at work on December 14, 2004.

4. Temporary Total Disability

Ark. Code Ann. § 11-9-501(a)(1) provides that temporary total disability compensation shall not be allowed for the first seven days of disability resulting from injury, excluding the day of injury. In the present case, on December 15, 2004, Dr. Williams placed Mr. Smiley in off-work status only until December 20, 2004, which is an insufficient period of time to exceed the statutory seven day minimum to commence payment of disability compensation. Consequently, I find that Mr. Smiley has failed to establish by a preponderance of the evidence that he is entitled to any period of temporary disability compensation under the Arkansas Workers' Compensation Law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer/employee relationship existed on December 14, 2004.
2. The respondents have controverted this claim in its entirety.
3. The claimant has established by a preponderance of the evidence that he sustained a compensable injury to his back, chest, and ribs as a result of lifting a heavy wheelbarrow full of wet corn at work on December 14, 2004.
4. The claimant has established by a preponderance of the evidence that the chiropractic treatment provided by Dr.

Williams in December of 2004 and January of 2005 was reasonably necessary for treatment of Mr. Smiley's work-related injuries.

5. The claimant has failed to establish by a preponderance of the evidence that he was disabled from work for a sufficient period of time to be entitled to a period of temporary total disability compensation under the Arkansas Workers' Compensation Law.

AWARD

The respondents are directed to pay benefits in accordance with the findings of fact and conclusions of law contained herein.

IT IS SO ORDERED.

HONORABLE MARK CHURCHWELL
Administrative Law Judge