

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311119

BILLY RAY THARP, EMPLOYEE	CLAIMANT
JUSTICE FARMS, INC., EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND,	RESPONDENT NO. 2
DEATH & PTD TRUST FUND,	RESPONDENT NO. 3

OPINION FILED AUGUST 12, 2005

Hearing conducted May 19, 2005, before the HONORABLE DALE DOUTHIT, Administrative Law Judge, in Little Rock, Pulaski County, Arkansas.

Claimant was represented by HON. KEVIN M. O'DWYER, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 were represented by HON. MELISSA CRINER, Attorney at Law, Little Rock, Arkansas.

Since it was requested that issues 2, 4, 5, 6, 7 & 8, as outlined in the prehearing order, be removed for determination at this time, counsel for Respondents No. 2 and 3, Hon. Terry Pence and Hon. Judy Rudd, respectively, were excused from appearing at the hearing.

OPINION AND ORDER

On May 19, 2005, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A prehearing conference was conducted on February 9, 2004, and a prehearing order was entered on February 16, 2004. A copy of the February 16, 2004 prehearing order was introduced into evidence as Commission Exhibit No. 1, and made a part of the record without objection.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, and that the employee/employer/carrier relationship existed at all relevant times, including August 24, 2003.

The parties further stipulated that the claimant sustained a compensable neck injury on August 24, 2003, and that the claimant's applicable compensation rates at the time of the injury were \$440.00 and \$330.00 weekly for temporary total disability and permanent partial disability, respectively.

At the full hearing, the parties agreed to reduce the eight issues outlined in the prehearing order to only the following two:

- 1) Whether the claimant sustained a compensable injury to his lumbar spine on August 24, 2003 and, if so, determination of related medical

and indemnity benefits to which the claimant would be entitled.

- 2) Whether claimant is entitled to additional indemnity and medical benefits associated with his compensable neck injury of August 24, 2003.

The parties agreed to reserve all other issues outlined in the prehearing order, and agreed to reserve all issues concerning permanent impairment.

The claimant contended that he was working for the respondents on or about August 24, 2003, when the cab of his truck fell on him, injuring his back, neck and shoulder, while he was doing a routine, necessary maintenance check. That at the time of the injury Commerce and Industry Insurance Company was the employer's workers' compensation carrier. That claimant is entitled to TTD benefits from the date of last payment to a date yet to be determined, associated medical and attorney fees.

Respondents No. 1 contended that all appropriate benefits have been paid with regard to the claimant's cervical spine injury, and that he had been released to return to work by Dr. Scott Carle. Further, Respondents No. 1 contend the medical documentation has been developed indicating the claimant's lumbar

spine problems are not associated with his work related injury,

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 A.C.A. §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 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 on August 24, 2003. Specifically, the claimant has failed to prove causation.
- 4) The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional TTD benefits, or medical benefits as a result of his August 24, 2003 compensable neck injury.

DISCUSSION

A. HISTORY

_____The claimant, 63 years of age, worked as a commercial truck driver for approximately forty-three (43) years prior to August 24, 2003. For about seventeen (17) years prior to August 24, 2003, the claimant worked for Justice Farms, Inc., (respondent-employer), driving a cattle truck. On August 24, 2003, the claimant had stopped in Woodward, Oklahoma to have his trailer washed out. While attempting to check the oil in his truck, claimant sustained an admittedly compensable injury to his neck. The claimant testified as follows regarding the August 24, 2003 incident.

A. I was checking my oil; and when I pulled the hood over, my leg slipped out from under me and the hood came all over and the safety cables broke and it jammed me into the ground.

Q. When it jammed you to the ground, describe what position you were in.

A. Well, when you pull that hood over, you have both hands on it.

There's a hole in the middle of the bumper, and you put your right foot in it and bring it over. You jump up and bring it over. You use your weight as a counterbalance. As I came over, my foot slipped out; and that caused my left one to give way.

(Indicating) I was holding on with one hand, putting this one behind me. As I come on over and them safety cables broke, this hand went down and my head popped real hard. Then as the hood came on over, I went back and hit the ground with my head.

Q. Okay. Where was the hood?

A. There's two springs on that hood - after I hit the ground and it had hit me, them springs started pulling it back up. (T. pg. 19,lines 6-25)

According to the claimant's testimony, he made two more hauls after the August 24, 2003 incident and then went to see his family doctor, Dr. Dedman. Dr. Dedman's records reflect he first saw the claimant on September 10, 2003. (C-X 1, pg. 14) Dr. Deadman's July 30, 2004, letter states that he treated the claimant for neck pain only from September 10, 2003, through February 16, 2004. Dr. Dedman stated in his letter (CX-1, pg. 14) that it was not until February 17, 2004 that the

claimant mentioned any low back pain.

_____A MRI of the claimant's neck was done on October 8, 2003, and revealed the following: "C3-4, diffuse disk bulge with associated uncinat hypertrophy on the left side with resultant left-sided neural foraminal narrowing. At C4-5 central small disk herniation mildly deforming the spinal cord. At C6-7, diffuse disk bulge and uncinat hypertrophy and resultant right-sided mild and left-sided moderate neural foraminal narrowing. Associated facet and ligamentous hypertrophy at that level as well. The patient was also noted to be status post L5-7 vertebral body fusion." (RX-1, pg. 23)

As stated, the respondents accepted the cervical injury as compensable and paid some medical benefits. After the cervical MRI, Dr. Dedman treated the claimant with physical therapy and then referred him to a neurosurgeon, Dr. Arthur. The claimant testified he chose Dr. Arthur because he had used Dr. Arthur in the past. Dr. Arthur gave an injection and ordered an EMG. (T. pg. 24, lines 19-22)

After treating with Dr. Arthur, the claimant then underwent an IME from Dr. Carle. He then had a full EMG from Dr. Williams and then received

pain management from Dr. Covey.

With regard to the claimant's low back, the claimant testified he started experiencing problems about one and one-half weeks after the August 24, 2003 incident. On February 24, 2004, the claimant underwent a MRI of the lumbar spine, which showed the following:

" Multi-level degenerative changes of the lumbar spine characterized by degenerative disk bulge at L2-L3, L4-L5. Central annular tear at L4-L5 with thickening of the ligamentum flavum and facet joint hypertrophy causing moderate canal stenosis. Right posterolateral disc protrusion at L5-S1 compressing S1 root." (RX-1, pg. 24)

B. ADJUDICATION

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. §11-9-102(4)(A)(i) must be established.

- 1) Proof by a preponderance of the evidence of an injury arising out of and in the course of employment.
- 2) Proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services, or resulted in disability or death.

- 3) Medical evidence supported by objective medical findings as defined in A.C.A. 11-9-102(16), establishing the injury, and
- 4) Proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish compensability of the claim, and compensation must be denied. C. Mikel v. Engineered Specialty Plastics, 56 Ark. App 126, 938 S.W. 2d 876 (1997) The claimant has the burden of proving the job relatedness of an alleged injury without the aid of any kind of presumption in his favor. Farmers v. Little Knight Co., 220 Ark. 353, 247 S.W. 2d 111 (1956).

In the case at hand, the claimant fails to meet his burden of proof concerning compensability of his back injury due to his lack of proving a causal link between the injury and his employment. Medical evidence is not ordinarily required to prove causation, Wal-Mart v. Van Wagner, 337 Ark. 443, 990 S.W. 2d (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. In this instance, the claimant's own doctor of choice, Dr. James Arthur, unequivocally stated causation was not present: (CX-

1, pg 8)

"Regarding your question of causation related to the injury/and or diagnosis of lumbar spine related to the mechanism of injury on date 8/24/03. The injury is not related."

_____ Additionally, Dr. Scott Carle concluded within a reasonable degree of medical certainty the claimant's injury was not causally related to the 8/24/03 accident. Dr. Carle stated as follows: (RX-1, pg. 30)

"With respect to the degenerative disc disease, annular tears and disk bulging without radiculopathy - these conditions in both the cervical and lumbar spine without associated fractures are most probably secondary to degenerative processes associated with aging and familial factors. It does not appear from electrodiagnostic evidence that a measurable aggravation took place to these levels of disk pathology. No radiographic evidence of fracture has been made as well."

Generally, when a claimant's disability arises soon after an accident and there is no other explanation for the condition, then there is no substantial evidence to sustain a refusal to award compensation. However, if the disability does not manifest itself until many months after an accident, so that reasonable men might disagree about the existence of a causal connection, the issue becomes one of fact upon which the Commission's conclusion is controlling. Hall v.

Pittman Construction Co., 235 Ark. 104, 357 S.W. 2d 263 (1962).

_____Here the claimant's family doctor, Dr. Dedman, stated that nearly six months went by after the accident before the claimant started complaining of back pain. The claimant testified he first had the back pain about one week after the accident. Why did he wait nearly six months to mention it to a treating physician? The delay in reporting the back manifestation, coupled with Drs. Carle and Arthur stating no causation, leads this examiner to find the claimant has fallen short of his burden to prove his back injury arose from the 8/24/03 accident.

_____The claimant also argued he is entitled to additional indemnity and medical benefits due to his 8/24/03 compensable neck injury. To receive additional TTD benefits the claimant must prove by a preponderance of the evidence that he is within a healing period and totally incapacitated to earn wages as a result of a compensable injury. My review of the medical evidence shows a lack of development with regard to the claimant's ability to work or a healing period. In fact, Dr. Ronald Williams stated as follows on May 1, 2004:

"Mr. Tharp's recent cervical MRI has not changed much and shows a small central disc protrusion at C4-5 and some mild bulge at C6-7. I don't really see anything on the MRI of the lumbar spine surgery would help. He has already had physical therapy without much benefit and I don't think there is much

else to do at present."

The medical evidence does not support a finding that Mr. Tharp is still within a healing period. Dr. Scott Carle also stated in his 4/13/04 report that "his current need for continual treatment however appears to be related to a group health disorder, not an identifiable impairment from the workplace incident eight months ago." (RX-1, pg. 45) The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. This examiner went to great length to determine what exact additional medical treatment the claimant was seeking for his cervical injury:

_____ Judge Douthit: As far as the additional medical on the cervical injury, what specific medical are you asking for?

Mr. O'Dwyer: Your honor, the last treating physician to see Mr. Tharp was Doctor Arthur, and Mr. Tharp testified that they stopped that after one injection. He's actually seeing Doctor Kevin Collins now, but I didn't supply any medical records because he just now started with him and Respondents wouldn't

have had a chance to ask him any questions. He is an orthopedic surgeon, but I don't know what can be done for him. At this point, we're still waiting on Doctor Collins to give us an indication as to what he believes can be done.

Judge Douthit: Is there any exhibit you can point me to with regard to Doctor Arthur - continuing medical treatment that he's recommended? I'm going to read this later, but is there anything that you can point me to? You say he did some injections?

Mr. O'Dwyer: He did one injection, and he was pretty mad. Mr. Tharp testified about this. He was mad at workers' comp and pretty much said: I'm done with you."

Judge Douthit: Okay.

Mr. O'Dwyer: I mean, he not going to put that in a medical record, but Mr. Tharp testified to that.

Judge Douthit: Are you asking at this point for continued pain management through Doctor Covey?

Mr. O'Dwyer: That, your honor, and we would request an

independent medical examiner. Doctor Carle is not an independent medical examiner. (T. pgs, 50 & 51, lns. 15-25 & 1-19)

According to the claimant's attorney, a Dr. Collins was going to evaluate the claimant and recommend treatment.

It is clear to this examiner that the issue of additional medical treatment was not ripe at the time of the hearing. This Administrative Law Judge will not award additional treatment without knowing what type of treatment is being recommended. As far as the continued treatment from Dr. Covey for pain management, nothing in any of Dr. Covey's reports indicate the need for additional treatment. Therefore, the claimant has failed to sustain his burden for additional medical treatment.

Toward the end of the hearing, claimant's attorney requested an independent medical examination. A §11-9-511 request was never listed as an issue at the prehearing conference, or at the beginning of the full hearing. This examiner will not address the request as it was not timely made.

ORDER

The claimant has failed to sustain his burden of proof that he sustained a compensable back injury and that he is entitled to additional benefits as a result of his 8/24/03 compensable neck injury. Therefore, the above claim is respectfully denied.

IT IS SO ORDERED.

Dale Douthit
Administrative Law Judge

BILLY RAY THARP-F311119

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