

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F410694**

<b>CHARLES TODD, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GENERAL DYNAMICS, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AMERICAN INTERNATIONAL, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JUNE 17, 2005**

Hearing before Administrative Law Judge J. Mark White on April 28, 2005, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On April 28, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on February 28, 2005, and a Prehearing Order was entered that same day. A copy of the February 28, 2005, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including August 9, 2004; and that the respondents have controverted this claim in its entirety. At the hearing, the parties further stipulated that the claimant earned an average weekly wage of \$386, entitling him to a compensation rate of \$257 for total disability benefits and \$193 for permanent partial disability benefits.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary total disability benefits; whether the medical treatment received by the claimant has been reasonably necessary in connection with a compensable injury; whether additional medical treatment remains reasonably necessary in connection with a compensable injury; and controversion and attorney's fees.

The claimant contends that he sustained compensable injuries to his back/neck on August 9, 2004; that he is entitled to temporary total disability benefits from on or about September 8, 2004, to a date yet to be determined; that the medical treatment he has received to date has been reasonable, necessary, and related; that he is in need of additional medical treatment which should be awarded; and that respondents should be ordered to pay attorney's fee as permitted by law.

The respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment with respondent-employer; that if the

claimant sustained a compensable injury while employed by respondent-employer, it was a temporary aggravation of a pre-existing degenerative condition; that the claimant's healing period has ended; and that the claimant is not entitled to an award of weekly or medical benefits.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he sustained back and neck injuries causing internal physical harm to the body requiring medical services, that the existence and extent of his injuries are established by medical evidence supported by objective findings, and that his

injuries were caused by a specific incident identifiable by time and place of occurrence.

4. The claimant has proven by a preponderance of the evidence that he sustained injuries to his back and neck arising out of and in the course of his employment.
5. The claimant has therefore proven by a preponderance of the evidence that he sustained compensable injuries to his back and neck.
6. The claimant has proven by a preponderance of the evidence that he has been totally incapacitated to earn wages from September 8, 2004, to a date yet to be determined.
7. The claimant has proven by a preponderance of the evidence that he has remained in his healing period from September 8, 2004, to a date yet to be determined.
8. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 8, 2004, to a date yet to be determined.
9. The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date for his back and neck, along with future medical treatment, has been and remains reasonably necessary in connection

with the compensable injury.

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

## **DISCUSSION**

### **I. History**

The claimant herein is 55 years of age, with a high school education and a welding certificate. He spent eleven years in the military as a vehicle mechanic and was honorably discharged. Since his discharge he has worked as a production worker, first for International Paper and then for the respondent-employer.

The claimant testified that on August 9 or 10, 2004 – the documentary evidence suggests August 10 – he sustained an injury to his low back and neck while lifting an empty pallet. He denied experiencing significant back pain at any time prior to this incident. He reported to his supervisor, Jimmy Dale Williams, that he was having back pain, and he testified that Williams ignored him. Williams agreed that the claimant reported back pain, but he testified the claimant said nothing about a work incident and only asked for medication, which Williams did not have.

The claimant testified that around lunchtime he called his wife, Rosemary Todd, on his cell phone, told her of the work injury, and asked that she schedule a doctor's appointment. Rosemary Todd testified and corroborated the claimant's

testimony in this regard. She also agreed that the claimant had not exhibited signs of back pain prior to this incident.

The claimant left work early that afternoon and saw Dr. Mark Crump, his personal physician. The claimant testified he did not remember what he told Dr. Crump or his nurse about his back pain, or whether he told them it began with a work incident. Dr. Crump recorded in his notes of that visit: "Check-up – 54 yrs old. LBP x 2 wks into both hips/thighs, swollen." Dr. Crump prescribed medication and mentioned the possibility of an MRI exam. The claimant took a couple of days off, and then returned to work. He testified that he had difficulty working while under the influence of the medication prescribed by Dr. Crump, and that he began to experience pain shooting down his leg, along with throbbing in his neck.

On August 26, because of his worsening symptoms, the claimant returned to Dr. Crump. The doctor's notes reflect the claimant complained of neck and upper back pain, along with finger numbness. Dr. Crump gave his impression as, "1) Chronic LBP – DJD/DDD 2) Numbness of fingers (?CT of hands probably secondary to DJD/DDD of C-spine". He recommended an MRI and continued medication.

Cervical and lumbar MRI exams were performed September 3, revealing degenerative changes in both the cervical and lumbar spine. The exams also revealed a left paracentral hard disc protrusion at C5-6 and a left paracentral disc

extrusion at L2-3. In his letter to the claimant summarizing the MRI results, Dr. Crump wrote: "You do have significant arthritis in your neck. There was also a disc protrusion in your neck as well. This is really bulging and not fully herniated or ruptured. You do, however, have a herniated or ruptured disc in your lower back." Dr. Crump recommended the claimant see a specialist.

When the claimant first learned of the MRI results, he reported them to the respondent-employer and specifically informed them that he had sustained an injury at work. Documentation in the record establishes that the claimant gave this notice on September 7. The "Injury and Illness Incident Report" apparently completed by other employees says the claimant sustained an injury while "moving a pallet without a pallet jack, in August." The report also says, "Employee did not report the injury and does not remember the exact circumstances & date."

The respondents sent the claimant to the company doctor, Dr. Judson Hout, who is in the same clinic as Dr. Crump. By the claimant's account, Dr. Hout did no examination but only reviewed records. Nothing in Dr. Hout's notes indicate that he actually examined the claimant. Dr. Hout refused to give the claimant a diagnosis or opinion, instead giving him a note that read only, "Complicated case – letter will follow." Dr. Hout then wrote in a letter sent to "Sir or Madam" at the respondent-employer's mailing address:

This just does not add up. He obviously has degenerative disc disease, multiple levels, both cervical and lumbar spine, that has taken years to develop, and one disc at L2-L3 which could be surgically amenable. I cannot say with absolute certainty that the job did not aggravate this disc, but I can say with absolute certainty that it has taken some time for all the above changes to take place. There is an inconsistency in that he says he hurt his back on the job on August 10, 2004, but when he saw Dr. Crump on that date, he gave him a two week history of back pain and did not give any history of any injury.

I will therefore leave it up to your company and insurance carrier whether or not to accept this as a work-related injury. I cannot definitely say it is. I have recommended that the patient go ahead and see the neurosurgeon on his own and let your company and your Worker's Comp carrier sort out whether or not it will be handled as work related.

The claimant had been scheduled to see neurosurgeon Dr. Scott Schlesinger on Dr. Crump's referral, but the appointment was cancelled as the respondents controverted further treatment. Sometime in September the claimant stopped working, and in the following months Dr. Crump continued to prescribe medication and refills for the claimant's back condition.

The claimant finally saw Dr. Schlesinger on March 18, 2005, paying for the visit himself. Dr. Schlesinger reviewed the claimant's MRI films and determined that he was "in basic agreement" with the radiologist's interpretation noted above. He offered his conclusion as follows:

Certainly, he has a complex set of symptoms. I believe that his problem is a work related aggravation of his underlying lumbar and cervical disease coupled with some fresh problems. I think the new problem is the herniated disc at the L2-3 level and this is undoubtedly where the symptoms down his legs are coming from. The back pain is more complicated.

As regards to his cervical complaints, I think this is an aggravation and the symptoms may be coming from the C4-5 and C5-6 levels.

Dr. Schlesinger recommended conservative treatment, including several epidural steroid injections. As of the hearing, the claimant had received one lumbar injection, with another one scheduled for May. The claimant testified the first injection provided him with some temporary relief.

## **II. Adjudication**

### **A. Compensability**

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 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 findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of 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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.* To prove compensability, a claimant is not required to identify the precise time and date of the injury; rather, the claimant must show only that the occurrence of the injury is capable of being identified. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001).

The testimony of the claimant is internally consistent and plausible, and it is mostly consistent with the other evidence of record. The only contradiction I find significant is Dr. Crump's note stating the back pain had begun some two weeks prior and omitting any mention of a work injury. The claimant testified that he could not remember what he told the doctor. It is plausible that the claimant may have omitted any mention of the work incident. It is also plausible that Dr. Crump or his staff may have made an error; the records of every other medical provider reflect a history consistent with the claimant's testimony. On balance, considering all of the evidence herein, I give more weight to the claimant's testimony than to Dr.

Crump's isolated note, and I find that the claimant's testimony was credible, including his account of the August 10 lifting incident at work.

Given the testimony of the claimant as to the circumstances of his accident, and given the medical evidence herein, specifically the cervical and lumbar MRI exam results, I find that the claimant has proven by a preponderance of the evidence that he sustained back and neck injuries causing internal physical harm to the body requiring medical services, that the existence and extent of his injuries are established by medical evidence supported by objective findings, and that his injuries were caused by a specific incident identifiable by time and place of occurrence. The remaining question, then, is whether the claimant's injuries arose out of and in the course of his employment.

An employer takes an employee as he finds him, and the aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

The claimant testified that he injured his back and neck while lifting a pallet. As noted above, I find the claimant's testimony to be credible. The claimant's wife corroborated his story, testifying that he called her on August 10 reporting a work injury to his back and asking her to schedule a doctor's appointment. Phone records submitted by the claimant establish that a call was made on August 10. The claimant's ex-wife and co-worker, Mary Carolyn Richardson, testified that the claimant complained of a back injury sustained while lifting pallets. The claimant's supervisor, Jimmy Dale Williams, testified that the claimant did complain of back pain; he denied that the claimant told him it was work-related, but the claimant testified he could not recall whether he told Williams it was work-related. The testimony of Jonathan Ford corroborates the claimant's testimony, but given the conflicts admitted to by Ford between his testimony at the hearing and an earlier recorded statement, I do not find his testimony to be credible.

In short, the claimant's testimony is largely corroborated by the testimony of other witnesses. It is true that these other witnesses may have a bias in his favor, but there is no evidence in the record to contradict the claimant's version of events, other than the isolated note by Dr. Crump discussed above. I also note that Dr. Schlesinger expressly opined the claimant's pre-existing back and neck conditions had been aggravated by his work injury, though of course Dr. Schlesinger was

relying on the history provided by the claimant. But as discussed above I find that history to be credible.

Therefore, given the above evidence, I find that the claimant has proven by a preponderance of the evidence that he sustained injuries to his back and neck arising out of and in the course of his employment. The claimant has proven every element of compensability, and I therefore find that the claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his back and neck.

In making this finding, I note the skeptical letter authored by Dr. Haut. I take Dr. Haut's letter to mean that the degenerative process in the claimant's back did not happen in a single incident, but that Dr. Haut did not rule out the possibility of a work accident aggravating that condition and causing the herniation. One could also interpret Dr. Haut to mean that a herniation can never be caused by a specific incident, but such a conclusion would be totally at odds with my perception of the general consensus of the medical community – not to mention at odds with the hundreds if not thousands of Commission and court cases finding that a work injury caused or aggravated a herniation in the spine. In any event, it is plain that nowhere in his letter does Dr. Haut opine that the claimant's alleged work injury did not aggravate his spine. Whatever skepticism or animosity may be read into his letter

is attributable to his reliance on Dr. Crump's history, and as noted above I place greater weight on the claimant's testimony than on the history recorded by Dr. Crump. Given the claimant's credible testimony, corroborating eyewitness testimony, and the medical evidence, I find it more probable than not that the claimant did indeed sustain an injury to his back and neck while lifting pallets at work, an injury that aggravated and combined with his pre-existing spinal condition to produce the current disability. By the same token, even if the claimant had been experiencing back pain for two weeks prior to the accident – a finding which I do not make – I find it more probable than not that the claimant did indeed experience an aggravation of his pre-existing condition, and a significant increase in pain and symptoms, while lifting an empty pallet at work on August 10, 2004.

### **B. Entitlement to Benefits**

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad*

*Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant seeks temporary total disability benefits from September 8, 2004, to a date yet to be determined. Dr. Crump initially took the claimant off of work, and on September 9 he issued another off-work slip, with an end date of September 27. Based on his handwritten notes, Dr. Hout evidently extended the release until October 4. Though there are no subsequent work releases contained within the record, there is no evidence to show that the claimant's condition had improved by October 4 to the point he could return to work. I find that the claimant has proven by a preponderance of the evidence that he has been totally incapacitated to earn wages from September 8, 2004, to a date yet to be determined.

The claimant finally saw a neurosurgeon, Dr. Schlesinger, in March 2005, and received his first epidural steroid injection in April. At the time of the hearing he was scheduled to receive a second injection in May. Dr. Schlesinger outlined in his notes a future treatment plan in the event the injections were not effective. Given that Dr. Schlesinger has recommended additional treatment and that as of the hearing the claimant was still being treated, I find that the claimant has proven by a preponderance of the evidence that he has remained in his healing period from September 8, 2004, to a date yet to be determined. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to

temporary total disability benefits from September 8, 2004, to a date yet to be determined.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

There is no evidence in the record to suggest that any of the treatment provided the claimant thus far for his neck and back has been unreasonable or unnecessary. Though the claimant's present condition is an aggravation of a pre-existing condition, there is no evidence to show that the claimant has returned to his pre-accident condition, other than the isolated statement of Dr. Crump discussed above. I find that the claimant has proven by a preponderance of the evidence that the medical treatment he has received to date for his back and neck, along with future medical treatment, has been and remains reasonably necessary in connection with the compensable injury.

### **C. Evidentiary Matters**

Two evidentiary decisions were made at the hearing which merit mention.

First, the respondents objected on the grounds of hearsay to the testimony of the claimant's wife that the claimant called her complaining of a work injury and asking her to schedule a doctor's appointment. While formal rules of evidence do not bind the Commission, Ark. Code Ann. § 11-9-705(a)(1), they do possess persuasive authority. Moreover, the Court of Appeals has previously held that the Commission should be more liberal with the admission of evidence, rather than more stringent. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). With these principals in mind, I note that the testimony objected to by respondents is not, by its precise definition, hearsay. Hearsay is defined by the Arkansas Rules of Evidence as *not* including a statement which is "consistent with [a witness's] testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." Ark. R. Evid. 801. The testimony objected to by the respondents falls squarely within the exclusions of Rule 801 and is therefore admissible and not hearsay.

Second, the respondents were barred from introducing a prior recorded statement taken from witness Jonathan Ford, though they were allowed to proffer the statement into the record. The Prehearing Order entered herein plainly states, "Exhibits and the identity of witnesses must be exchanged at least seven (7) days prior to the hearing. ... Evidence not disclosed in compliance with this Order shall

not be considered as evidence unless prior permission of the Commission is obtained and for good cause shown.” The respondents acknowledged not only that they did not provide the claimant with a copy of this recorded statement, but that they also failed to admit to the existence of any such recorded statement in their response to the claimant’s interrogatories. Without expressing an opinion as to the respondents’ reliance on Rule 26 of the Arkansas Rules of Civil Procedure, the fact remains that they did not meet the seven-day deadline established by the Prehearing Order, nor did they establish or offer good cause for the deadline to be waived. Moreover, I note that based on his admitting to conflicts between his testimony and the recorded statement, I did not find Ford’s testimony to be credible, and I do not rely on it in making my decision herein.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his back and neck, and that he is entitled to medical treatment and temporary total disability benefits from September 8, 2004, to a date yet to be determined. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge