

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F405776

JAMES K. WATTS, EMPLOYEE	CLAIMANT
NELSON UTILITY CONSTRUCTION, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 18, 2005

A hearing in this case was conducted on December 2, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Harrison, Boone County, Arkansas.

Claimant was represented by Steven R. McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on September 21, 2004; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations; these stipulations are set forth in the Prehearing Order, were confirmed by the parties at the hearing, and are hereby accepted.

1. The employee-employer-carrier relationship existed on May 7, 2004 and at all other relevant times.

2. Claimant's average weekly wage is \$750.00.

3. Respondents have controverted this claim in its entirety.

At the December 2, 2004 hearing, the parties discussed the issues set forth in the

Prehearing Order; they confirmed these issues and agreed to add one additional issue. Therefore, the issues to be litigated and resolved, by agreement of the parties, are limited to the following:

1. Whether Claimant sustained a compensable injury to his back on May 7, 2004.
2. Whether Claimant's incident on May 9, 2004, while cleaning his truck, constituted an independent intervening cause.
3. Whether Claimant is entitled to reasonably necessary medical benefits in connection with his injury.
4. Whether Claimant is entitled to temporary total disability benefits from May 28, 2004 to July 17, 2004.
5. Whether Claimant is entitled to an award of attorney's fees.

Claimant specifically reserves all other issues.

Claimant contends that he sustained a compensable injury on May 7, 2004, while operating a bulldozer. He argues that he is entitled to medical benefits in connection with this injury, as well as temporary total disability benefits and an attorney's fee. Respondents challenge the compensability of Claimant's May 7, 2004 incident, and further argue that his May 9, 2004 incident constitutes an independent intervening cause.

DISCUSSION

_____ Claimant was thirty years of age at the time of the hearing on this claim. He pulled some muscles in his back while playing football in 1992. He attained a high school education, and since 1994 has worked primarily in construction. In 2000, he was involved in a motor vehicle accident that resulted in injury to the side of his head and his neck. Claimant did not recall an alleged complaint of a pulled muscle in his back reportedly made

on September 20, 2002.

Claimant began to work for the respondent employer in March of 2004 as a heavy equipment operator. He denied experiencing any problems with his back, other than noted above, prior to going to work for the respondent employer. Claimant testified that he injured himself on May 7, 2004.

We were working in Ralston, Arkansas, down in south Arkansas. And I'd been running the dozer for Matt [Claimant's boss], and I was pulling him on - - he was on a dozer and I was on a dozer, and I was pulling him. And I was turned around, watching him, and then, you know, I was twisting and turning, you know. And, when I turned back around, I just felt, you know, like a sharp pain in my back. Just, you know, all the way down my legs. And I got off and told Matt I hurt my back. And he could see, you know, that I hurt my back. And that's pretty much what happened then.

This incident occurred on a Friday, right around lunch time; Claimant denied experiencing any problems with his back earlier that week. Claimant decided not to seek medical treatment that day: "You know, I thought it might have been a pulled muscle or something. I thought I could -- you know. And Matt asked me if I needed to go, and I said, no, let me just sit out this weekend...."

Claimant did not exert himself again until Sunday, May 9, 2004. After eating breakfast with his parents that day, Claimant decided to sweep out his truck while his father sat on the porch.

And I asked my dad where the whisk broom was, and I got -- it was on the porch, and I got it and went out, and he went and set in the chair outside, because it was a pretty day. And I was sweeping out my truck, and I just went down to start sweeping it out, and I bent back up, and I just screamed. And, you know, I laid down on my truck seat, and I couldn't get up, you know. And he said, you know, your back went out, didn't it? And I said, yeah, I can't get up out of my truck.

Claimant "called Matt, and I told him, I said, I'm going to have to go to the doctor."

Claimant's father then drove him to an emergency room in Mountain Home.

Claimant insisted that his back was hurt prior to his May 9, 2004 incident.

Q. Okay. Now, do you -- when do you consider that back injury occurred then? Was it Sunday or was it Friday?

A. My back was -- I messed my back up Friday. And then, that Sunday, it went completely out. I even told my wife that Sunday morning, before we went down there, that --

...

I was telling my wife, you know, that I was going to have to probably get a hold of Matt tonight and tell him that I was going to have to go see a doctor that Monday, and that I probably wouldn't be able to make it down there. But it went ahead and went out that day.

At the emergency room, Claimant received medication and underwent an x-ray. His study resulted in an impression finding "irregularities... but an acute process or specific cause for back pain is not definitively appreciated." Claimant was scheduled for an MRI and referred to Dr. Sarah Sullivan. Claimant underwent an MRI of his lumbar spine on May 28, 2004. This study resulted in the following impression:

Protruding disc at the L3-L4, L4-L5, and L5-S1 levels, most pronounced at the L4-L5, where this causes central canal and mild bilateral neural foraminal narrowing. The L3-L4 level indents the thecal sac, but it does not cause severe central canal stenosis nor does it at the L5-S1 level.

These findings were called in to Dr. Sullivan.

Dr. Sullivan examined Claimant on that same date, May 28, 2004. At her October 1, 2004 deposition, Dr. Sullivan recalled Claimant's history, as reflected on her May 28, 2004 clinic note: "Patient was on a bulldozer on 5/07/04 and he made a sudden turn and started having back pain." Claimant did not give Dr. Sullivan any history concerning his May 9, 2004 incident. Other than finding tenderness, Claimant's examination "was close to normal." She explained her understanding of Claimant's MRI.

I felt it was consistent with his pain. He has an L-3, L-4 indentation of the thecal sac and that can certainly cause a lot of pain, cause it's impinging on the nerve. At L-4, L-5 he has disc herniation with foraminal narrowing, so I do feel that this could be a cause of pain also.

Dr. Sullivan prescribed medications and physical therapy, and recommended consultation with an orthopaedic surgeon.

Claimant did not work during the week following May 7, 2004. He returned to work on May 17, and did work until May 28, 2004, at which time Dr. Sullivan took Claimant off work. On June 19, 2004, Dr. Sullivan signed a Physician's Statement indicating that Claimant's healing period had not ended, that he had been unable to work since May 7, 2004, and that he currently was not able to work.

Claimant presented to Susan Housley for physical therapy on July 9, 2004. Among other observations, she noted a "slight increase in lumbar lordosis." She also observed "palpable spasms present in (R) LB."

Claimant presented to Dr. Sullivan for a second time on July 17, 2004. Claimant reported an improvement in his pain, and that it had localized "on the right side of the lumbar spine approximately L5." Dr. Sullivan found "tenderness to palpation" upon examination, but did not report spasms. Claimant requested a release to light duty work; Dr. Sullivan recalled: "I was very concerned because of the findings of his MRI. I felt he should not go back to work but he really wanted me to give him a release, so I gave him one for light duty only." Claimant apparently attempted to work from July 19, 2004 until August 6, 2004. He had trouble working; the respondent employer did not have "a whole lot of construction work that you can do that's really called light duty...."

Claimant presented to Dr. Sullivan a third time on August 7, 2004. He reported that

“his pain is continuing. He does have periods where he is without pain.” Upon examination, Dr. Sullivan observed “tenderness to palpation in the L3-L5 region. Some soft tissue swelling is noted over the spine itself.” She prescribed medications, continuing physical therapy, and light duty at work; once again, she recommended an orthopaedic referral.

Claimant again presented to the physical therapist on August 10, 2004. This time, she noted “decreased lumbar lordosis” and “[p]alpable spasming present throughout (R) lumbar paraspinals.” She opined that Claimant’s “[s]igns and symptoms appear to be consistent with diagnosis” of “L3/L4/L5 herniated discs.”

At the hearing, Claimant testified that he last presented to Dr. Sullivan “last month,” and that all she can do for him is provide pain pills. He confirmed that he quit seeking medical treatment because he has difficulty paying for it. However, Dr. Sullivan testified that Claimant would have been seen regardless of his financial condition.

The record reflects that Claimant is still restricted to light duty. Following his release by the respondent employer he sought unemployment benefits. He testified to searching for a job without success. As to his current condition, Claimant testified that his back is “doing better, but if - - you know, if I try to, you know, walk around a lot or do a lot during the day, then it hurts at night, you know. You can barely sleep, you know.” He reiterated upon cross-examination that “[s]ometimes it’s better than others. Sometimes I don’t have it shooting down my legs.”

Claimant’s father testified that prior to May of 2004 he was not aware of Claimant having any problems with his back. On the morning of May 9, 2004, Claimant’s father observed that Claimant was in pain prior to sweeping out his truck. He corroborated

Claimant's description of the May 9, 2004 incident.

Matthew Nelson, Claimant's boss, testified that on May 7, 2004 Claimant did report hurting his back on the bulldozer. Nelson could tell that Claimant "was -- his back was real sore. He was walking with a limp. He was holding his back. That's what I remember." He asked Claimant if he needed to go to a doctor and "he said he was going to take it easy over the weekend and he thought it might have been a pulled muscle or something." He confirmed that Claimant called him on Sunday, May 9, 2004, and told Nelson that he was going to the emergency room. As to Claimant's light duty work when he returned in July 2004, Nelson recalled that Claimant was mostly transporting equipment. Claimant was laid off because "it was pretty slow" and there was not sufficient light duty work available. Nelson confirmed that, in July and August, Claimant could not do the job he was doing before May 7, 2004.

In her deposition, Dr. Sullivan explained that Claimant's disc at L3-4 indenting the thecal sac is problematic, because "any touching of the thecal sac will cause pain." She believes Claimant's complaints of pain to be reasonable.

A. And he has not been what I would consider a major complainer, he's tried to go back to work and I don't feel that his complaints of pain are out of line.

Q. Okay, and as far as his complaints of pain and the subjective complaints, are those consistent with the objective findings that you see on that MRI, radiologist report?

A. If anything his pain should be worse, from reading the MRI, but you know, as we discussed, it's hard to say whether this is an incidental finding but it's very, very consistent with his physical findings. The pain is where it is shown on the MRI.

Dr. Sullivan recommended a referral to an orthopaedic surgeon "every time I saw him." Even now, "if he was to call me and say I am still having pain, I would say, I still

recommend you see the orthopedic surgeon, I would not require him to come in for me to send him to one.”

A. Compensability of the Claim

Claimant must prove that he sustained a compensable injury.

“Compensable injury” means: ... An accidental injury causing internal or external physical harm to the body... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence.

Ark. Code Ann. § 11-9-102(4)(A)(i); see Hargis (War Eagle) Transp. v. Chesser, ___ Ark App. ___, ___ S.W.3d ___ (September 8, 2004). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

The employee must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back on May 7, 2004. The elements necessary to prove a compensable injury will be discussed in turn.

Claimant’s injury arose out of and occurred in the course of his employment.

In order to prove a compensable injury a claimant must prove, among other things, a causal relationship between the injury and the employment... Objective medical evidence is not essential to establish the causal

relationship between the injury and a work-related accident where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical evidence establishes a causal relation to a work-related incident.

Horticare Landscape Mgmt. v. McDonald, 80 Ark. App. 45, 50, 89 S.W.3d 375, ___ (2002) (citations omitted). Here, the parties stipulated that the employer/employee relationship existed on May 7, 2004. Claimant's testimony, corroborated by his boss, establishes that Claimant sustained an injury while operating a bulldozer at a work site on that date. The evidence of greater convincing force establishes the causal relationship between the injury and a work-related accident.

Claimant's injury was caused by a specific incident, identifiable by time and place of occurrence. Claimant and his boss agree as to the date (May 7, 2004) and the location of occurrence (a work site at Ralston, Arkansas) of Claimant's accident. Claimant identified a specific incident, twisting and turning on the bulldozer; Claimant's boss testified to Claimant's obvious subsequent discomfort, including limping and holding his back.

Claimant's injury caused physical harm to his body. Apart from an occasional pulled muscle, Claimant testified that he did not have back problems prior to the accident; his testimony was confirmed by his father. After the accident, Claimant's physical condition was impaired, even prior to his May 9, 2004 incident, as corroborated by Claimant's boss and his father. Further, the record contains medical evidence supported by objective findings establishing Claimant's injury; these findings include the May 28, 2004 MRI revealing protruding discs at three levels in Claimant's lumbar spine; the physical therapist's July 9, 2004 and August 10, 2004 findings of spasms; and the physical therapist's August 10, 2004 observation of decreased lumbar lordosis. See Ark. Code

Ann. § 11-9-102(4)(D) and (16)(A)(i).

Claimant's injury required medical services. The medical record establishes that Claimant required medical treatment. Claimant is not able to work or otherwise exert himself without pain; Dr. Sullivan testified that "[i]f anything his pain should be worse, from reading the MRI..." If Claimant remains in pain, she would still recommend a referral to an orthopaedic surgeon.

To summarize, the evidence of greater convincing force establishes that Claimant sustained a compensable injury on May 7, 2004. Claimant was operating a bulldozer at a work site when he sustained an injury to his back; Claimant sought and received medical treatment two days later. As noted by the Arkansas Supreme Court, "[i]f the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award." Hall v. Pittman Constr. Co., 235 Ark. 104, 105, 357 S.W.2d 263, ___ (1962) (citation omitted).

B. Independent Intervening Cause

Respondents contend that Claimant's May 9, 2004 incident is an independent intervening cause. When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury, and the basic test is whether there is a causal connection between the injury and the consequences of such. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 225, 79 S.W.3d 414, ___ (2002). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent

disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 168, 969 S.W.2d 677, ___ (1998). A nonwork-related independent intervening cause does not require negligence or recklessness, but if the claimant is engaged in unreasonable conduct, the result may be an independent intervening cause. K II Constr. Co., 78 Ark. App. at 225, 79 S.W.3d at ___.

I find that there is a causal connection between Claimant's May 7, 2004 injury and his subsequent pain on May 9, 2004. The testimony of Claimant's boss establishes that Claimant was in pain immediately after his May 7, 2004 injury; Claimant remained symptomatic prior to the May 9, 2004 incident, as confirmed by Claimant's father. Thus, there is a causal connection between Claimant's May 7, 2004 injury and his May 9, 2004 increase in his back pain.

Further, I find that Claimant's activity on May 9, 2004 is not unreasonable under the circumstances. Using a whisk broom to clean out the floorboard of his truck is not unreasonable conduct; Claimant was not under a doctor's restrictions at the time. Rather, the evidence reflects that Claimant was already in pain, and that his sweeping activity merely increased his symptoms but did not result in a second injury or intervening cause that would break the required causal connection. See K II Constr. Co., 78 Ark. App. at 226-27, 79 S.W.3d at ___; Georgia-Pacific, 62 Ark. App. at 167-68, 969 S.W.2d at ___.

C. Medical Benefits

An employer shall 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). Reasonably necessary medical services "may include that

necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury.” Greer v. Phillip Mitchell Construction, Full Workers’ Compensation Commission Opinion filed February 14, 2003 (E906565) (citations omitted). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (May 19, 2004).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits in connection with his injury. Claimant needed, and still needs, medical treatment: he testified to pain if he works or otherwise attempts to exert himself. This need for treatment did not arise until May 7, 2004; the record is silent concerning any other cause for this need for treatment arising after May 7, 2004. Dr. Sullivan’s deposition testimony establishes the reasonableness and necessity of Claimant’s prior treatment, and his need for consultation with an orthopaedic surgeon if he remains in pain. Thus, the record reflects a need for medical treatment on Claimant’s part, in connection with his May 7, 2004 compensable injury.

D. Temporary Total Disability Benefits

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 172, 72 S.W.3d 889, ___ (2002). “Disability” means incapacity because of compensable injury to earn, in the same or any other employment, the wages which the

employee was receiving at the time of the compensable injury. Ark. Code Ann. § 11-9-102(8). The hearing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. K II Constr. Co., 78 Ark. App. at 228, 79 S.W.3d at ___. The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits. See Ark. Code Ann. § 11-9-704(c)(2).

I find that Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 28, 2004 to July 17, 2004. There is no contention that Claimant ended his healing period on July 17, 2004; Claimant's attorney specifically reserved all remaining issues, including entitlement to additional temporary total disability benefits from July 18, 2004 forward. The record establishes that Dr. Sullivan took Claimant off work on May 28, 2004. On June 19, 2004, Dr. Sullivan signed a statement that Claimant was unable to work and still within his healing period. She hesitantly provided him with a release to return to light duty on July 17, 2004. Claimant testified that he did not work within this time period, and that he had trouble working after his release to return to light duty. Thus, the record reflects that Claimant was totally incapacitated from earning wages from May 28, 2004 until July 17, 2004, and that Claimant remained within his healing period as of July 17, 2004.

E. Attorney's Fees

Since Claimant's compensable injury occurred after July 1, 2001, his request for an attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Under the statute, attorney's fees shall only be allowed on the amount

of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). This Opinion awards Claimant temporary total disability benefits; the parties stipulated that Respondents controverted this claim in its entirety. Therefore, Claimant is entitled to an award of attorney's fees under the statute.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on May 7, 2004 and at all other relevant times.
3. Claimant's average weekly wage is \$750.00.
4. Respondents have controverted this claim in its entirety.
5. Claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back on May 7, 2004. Claimant sustained his injury in a specific incident, twisting and turning on the bulldozer at a work site at Ralston, Arkansas, on May 7, 2004. This injury impaired Claimant's physical condition; objective findings establishing this injury include a May 28, 2004 MRI revealing protruding discs at three levels and findings of spasms. The medical records and the deposition testimony of Dr. Sarah Sullivan establish that Claimant's injury required medical services; this is also established by Claimant's testimony concerning his pain and inability to work.
6. Claimant's May 9, 2004 incident does not constitute an independent intervening cause. Claimant's corroborated testimony concerning the onset of pain immediately after his May 7, 2004 injury establishes a causal connection between the injury and the increase in Claimant's back pain experienced on May 9, 2004. Further, Claimant's activity of using a whisk broom to clean out the floor board of his truck is not unreasonable conduct under

the circumstances; the preponderance of the evidence establishes that this activity merely increased his symptoms, but did not result in a second injury or intervening cause.

7. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits in connection with his injury. Claimant's need for treatment did not arise until May 7, 2004; since that date, Claimant has needed medical treatment to address the pain that arises if he works or otherwise attempts to exert himself. Dr. Sullivan's deposition testimony affirms the reasonableness and necessity of Claimant's prior treatment and his need for consultation with an orthopaedic surgeon.

8. Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 28, 2004 to July 17, 2004. Dr. Sullivan took Claimant off work from May 28, 2004 until July 17, 2004, at which time she hesitantly provided him with a release to return to light duty. Claimant testified that he did not work within this time period, and that he had trouble working after his release to return to light duty. In the midst of this time period, Dr. Sullivan confirmed that Claimant was unable to work.

9. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715. The parties stipulated that Respondents controverted this claim, which would include the indemnity benefits awarded in this Opinion.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits

awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents, in accordance with Ark. Code Ann. § 11-9-715 and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml