

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407844

TONY WILLIAMS	CLAIMANT
DANAHER TOOL GROUP	RESPONDENT
ACE AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT
GAB ROBINS RISK MANAGEMENT, TPA	RESPONDENT

OPINION FILED JUNE 2, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by MARK McCARTY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 14, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on October 19, 2004 . This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties proposed an amendment to the appropriate weekly compensation rates and further agreed to the additional stipulation that the claimant had received, under a group insurance policy maintained through the respondent, both medical and disability payments that would coincide with the workers' compensation benefits he now seeks. A copy of this pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

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

1. On June 28, 2004, the relationship of employee-employer-carrier-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$450.00 for total

disability and \$338.00 for permanent partial disability.

3. The claim is controverted in its entirety.
4. Certain medical and disability payments have been made under a policy of group benefits provided through the respondent, which would be subject to Ark. Code Ann. §11-9-411.

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

1. Whether the claimant sustained a compensable injury to his low back on June 28, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from June 28, 2004 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant was injured on June 28, 2004, while working at Danaher Tool. He injured his back while moving a sixty-five pound basket. Claimant requests TTD and medical."

In regard to these issues, the respondents contend:

"The respondents contend that the claimant's alleged condition is not compensable."

DISCUSSION

I. COMPENSABILITY

The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his low back or lumbar spine on June 28, 2004. The burden rests upon the claimant to prove all of the elements necessary to establish such a compensable injury. These elements are found in Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(D).

Ark. Code Ann. §11-9-102(4)(A)(i) requires the claimant to prove:

- (1) That the physical injury arose out of and occurred in the course of the employment;
- (2) That the physical injury was caused by a specific incident;
- (3) That the physical injury is identifiable by time and place of occurrence;
- (4) That the physical injury caused internal or external harm to the claimant's body;
- (5) That the physical injury required medical services or resulted in disability.

Ark. Code Ann. §11-9-102(4)(D), requires the claimant to prove by medical evidence, the actual existence of the physical injury or condition alleged to be compensable. Further, the actual existence of such a physical injury or condition must be supported by "objective findings," as that term is defined by Ark. Code Ann. §11-9-102(16)(A),

In the present case, the medical evidence "establishes" the actual existence of a multitude of defects involving the claimant's lumbar spine, which existed prior to the alleged incident on June 28, 2004. On June 17, 2004, the claimant was evaluated by Dr. Luke Knox, a neurosurgeon. This evaluation was performed at the request of Dr. Burton Bledsoe, the claimant's family physician. In his report of that date, Dr. Knox indicated that the claimant was experiencing back and bilateral leg pain and had a long history of back and leg pain that extends into his legs in an L5 dermatomal distribution. Dr. Knox noted that the claimant had also experienced symptoms indicative of a radiculopathy in an L4 dermatomal distribution. On physical examination, Dr. Knox noted a decrease in the claimant's ankle reflexes, a slight list to the right and "marked" paraspinal muscle spasm. Dr. Knox recommended "redoing" the claimant's MRI scan and directed the claimant to return following this study.

Apparently, the recommended "redo" of the claimant's MRI was performed on that same date as Dr. Knox's initial evaluation (i.e. June 17, 2004). This study was

interpreted by Dr. David Davis as being abnormal. He indicated that the study revealed:

"At L5-S1 the intervertebral disc is of normal height with diminished signal. There is mild diffuse annular bulging which does not appear to involve neural elements. The L5 neuroforamina are patent bilaterally. The pars are intact bilaterally.

At L4-5 there is diminished intervertebral disc height and signal. There is mild anterior osteophytosis, moderate diffuse annular bulging posteriorly. The annular bulging, along with ligamentum-facet hypertrophy and probably mild epidural lipomatosis, results in central and lateral spinal stenosis with loss of CSF signal within the theca. There is bilateral L4 neuroforaminal narrowing from the annular protrusion, but there is not obvious impingement upon the L4 nerve roots. The pars are intact bilaterally.

At L3-4 the intervertebral disc is of normal height with mildly diminished signal. There is minimal annular bulging which does not appear to involve neural elements. The L3 neuroforamina are patent bilaterally. The pars are intact bilaterally.

From T10-11 through L2-3, the intervertebral discs are of normal height and signal without significant posterior disc protrusion. There is anterior osteophytosis at L1-2 and L2-3.

IMPRESSION: MRI study of the lumbar spine at L4-5 shows disc space narrowing and desiccation, moderate annular bulging and ligamentum-facet hypertrophy resulting in central and lateral spinal stenosis. There is bilateral L4 neuroforaminal narrowing. At L5-S1 there is disc desiccation, mild annular bulging which does not appear to involve neural elements."

X-rays performed by Dr. Knox on June 17, 2004, were interpreted by him as follows:

"LS spine, AP, lateral, flexion and extension with oblique views. There is no apparent pathologic motion on flexion and extension views. There appears to be five non-rib-bearing lumbar vertebrae. There is slight degenerative scoliosis convexity to the left, centered at L4-5 with a slight lateral rotatory tilt. There is a very slight anterolisthesis at L4 on L5. It tends to improve on neutral

and extension and tends to be a bit more prominent on full flexion. Significant degenerative disc changes noted throughout the lumbar spine with disc space settling at L4-5 with concomitant facet settling noted as well."

The claimant was next seen by Dr. Knox for routine follow up on July 1, 2004. Although this visit was after the alleged incident on June 28, 2004, Dr. Knox makes no mention in his report of this incident or any change or increase in the claimant's symptomology. Based on the results of the June 17, 2004 MRI study and x-rays, Dr. Knox recommended surgical intervention which included a fusion at L4-L5. Finally, Dr. Knox noted that this surgical procedure was to be arranged "in the near future."

The medical evidence shows that this surgery was ultimately performed by Dr. Knox on July 30, 2004. The claimant's testimony shows that except for a routine plant "bi-yearly shut down," he continued to work until time for the scheduled surgery.

The evidence further shows that the claimant applied for and received (apparently continues to receive) both medical and disability benefits under a group policy of insurance for his back difficulties. On a form report, dated July 21, 2004, Dr. Knox indicated that the claimant's lumbar difficulties are not due to any injury or sickness arising out of the claimant's employment. Again, in a disability questionnaire completed on September 13, 2004, Dr. Knox indicated that the back difficulties for which he treated the claimant (including surgery) were not work related. In fact, it would appear from his reports that Dr. Knox was totally unaware of the alleged employment related incident on June 28, 2004 or that this alleged incident resulted in any change in the claimant's symptomology, until after Dr. Knox was contacted by claimant's counsel in January of 2005. There is no mention, whatsoever, of this incident or any resulting change in the claimant's symptoms in the reports and records of Dr. Knox that were authored, prior to January of 2005.

In a report to claimant's counsel, dated January 27, 2005, Dr. Knox notes that

he has reviewed his records and that he did not note a change in the MRI scan dated on June 17 and another dated on July 2. He goes on to state:

"I do note that the reason for the redo of the MRI scan was because of a change in his (the claimant's) symptoms."

The obvious reason that Dr. Knox did not note in his records any change in the two MRI's was that he was unaware that an MRI scan had been performed on July 2, 2004. This study was not performed at his request, but was rather performed at the request of Dr. Simpson, (the company physician). The "redo" MRI noted by Dr. Knox was clearly the one that he recommended, on June 17, 2004, and that was performed on the same date. Thus, the change in the claimant's symptoms that caused by Dr. Knox to recommend this "redo" of the MRI must have occurred prior to June 28, 2004. Regardless, it is undisputable that Dr. Knox's recommendation of surgery, on July 1, 2004, could in no way have been based upon the results of the MRI study that was performed on July 2, 2004.

In a report to claimant's attorney, dated February 24, 2005, Dr. Knox stated that he has now had the opportunity to compare the MRI studies of June 17, 2004, and July 2, 2004. In regard to these studies, he states:

"It appears that the disc herniation previously noted at L4-5 is indeed slightly worse on the one done one month later (July). It is seen on the sagittal images and lateral recesses where it was not apparent on the June MRI scan."

However, such a change clearly played no role in Dr. Knox's initial recommendation of surgery and there is no indication that, in Dr. Knox's opinion, such a change played any causal role in the claimant's back difficulties, either at that time or subsequently. Further, Dr. Knox expresses no opinion on the cause of this change.

There is an indication (in the respondent's medical exhibits) that a request was made for a comparison by the radiologist of the MRI study performed on July 2, 2004 with the one that was performed on June 17, 2004. However, this request was

made by Dr. Simpson, rather than by Dr. Knox. The radiologist that interpreted the July 2, 2004 study responded that there was relatively little change between these two studies (Respondent's Exhibit No. 1, page 24).

The medical records show that, following his back surgery on July 30, 2004, the claimant was also provided with evaluations and testing by Dr. Knox for complaints involving his cervical spine and shoulder. As a result, Dr. Knox indicated that these difficulties were attributable to the claimant experiencing "disseminated inter-skeletal hyperostosis." Dr. Knox has also subsequently diagnosed the claimant's continued back difficulties as being the result of the development of cystic progression of facet sclerosis at the level above his fusion site with facet arthropathy and worsening of severe spinal stenosis. Dr. Knox has recommended further surgical intervention to remove the facet joints, decompress the L3-4 intervertebral area, and extend the claimant's fusion to L3.

The only direct evidence of the occurrence of any work related physical injury to the claimant's back on June 28, 2004, is the claimant's own testimony. In this regard, the claimant testified that while twisting to slide a "basket" of tools, at approximately 4:00 p.m. on June 28, 2004, he experienced a sudden sharp "shock" from his back down his legs into his toes and felt something "pop" in his back. He further testified that following this incident, his previous symptoms became "more intense and more frequent."

The evidence is undisputed that the claimant immediately reported this incident to his supervisor and to the plant nurse. The plant nurse then took the claimant to a physical therapist for evaluation and subsequently to Dr. Simpson. Curiously, no one has tendered any reports on records from Dr. Simpson.

Tammy Pulliam, the plant nurse, testified that when she observed the claimant, on, June 29, 2004, he moved freely and exhibited no visible signs of discomfort or

pain. She stated that, when she took him to the physical therapist for evaluation, he exhibited no signs of distress, during the testing or when he was getting in and out of the vehicle. She stated that on June 30, 2004, she observed the claimant being evaluated by Dr. Simpson and that again he exhibited no outward signs of distress.

Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, to prove any fact it is legally competent to address. Clearly, the claimant's testimony would be legally competent to establish the occurrence of an employment related incident and to prove the existence of a close temporal relationship between such an incident and the onset of any pain or other symptoms that could be indicative of the occurrence of a physical injury to his back or lumbar spine.

However, after consideration of all the evidence presented, it is my opinion that the claimant's testimony is not sufficient to prove the existence of a causal relationship between a specific employment related incident, on June 28, 2004, and his lower back or lumbar spine defects and resulting difficulties. As previously noted, the evidence shows that the claimant's pre-existing lumbar defects and pre-existing symptoms were sufficiently severe to necessitate all the medical treatment he has received, including the surgical procedures that have been provided or recommended, on all of the disability he has experienced. His testimony that a specific employment related incident, on June 28, 2004, somehow made these symptoms more severe is contradicted by the testimony of Ms. Pulliam, by the claimant's apparent failure to inform Dr. Knox of such a fact, by his application for group benefits, and indicating in his application for group benefits that his lumbar difficulties were not work related.

Even had the claimant proven the occurrence of a "compensable injury" to his lower back or lumbar spine, on June 28, 2004, he would still have failed to prove that he is entitled to the benefits he now seeks. The greater weight of the evidence fails to show that the medical services provided the claimant by and at the direction of Dr. Knox would constitute "reasonably necessary medical services" for such a compensable injury or that any disability he has or is experiencing would be attributable to the effects of such a compensable injury. As previously noted, the evidence clearly shows that the medical services that were provided the claimant for his lower back difficulties, by and at the direction of Dr. Knox (including the surgical intervention performed on July 30, 2004), were solely necessitated by conditions and defects involving the claimant's lumbar spine that clearly existed prior to June 28, 2004. The subsequent medical services provided and recommended by Dr. Knox after the surgery on July 30, 2004, were necessitated solely by complication or the natural progression of these pre-existing conditions and defects. The greater weight of the credible evidence further shows that any disability experienced by the claimant, beginning in late July of 2004, was also the result of the pre-existing lumbar conditions and defects, the surgical correction of these pre-existing conditions and defects, and the natural progression of these conditions and defects. There has been essentially no evidence presented that would show that the medical services provided the claimant by Dr. Knox were in any way necessitated by or related to any physical injury to the claimant's back on June 28, 2004, or that any disability which the claimant may have experienced was in any way caused by any injury on June 28, 2004.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On June 28, 2004, the relationship of employee- employer- carrier- third party administrator existed between the parties.
3. On June 28, 2004, the appropriate weekly compensation rates were \$450.00 for total disability and \$338.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his lower back or lumbar spine on June 28, 2004.
5. The respondents have denied the occurrence of a compensable injury to the claimant's lower back or lumbar spine on June 28, 2004, and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge