

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513545

JASON G. MORRIS, EMPLOYEE	CLAIMANT
YOUNG WELL SERVICE, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 1, 2006

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on June 6, 2006 at Texarkana, Miller County, Arkansas.

Claimant was represented by HON. NELSON V. SHAW, Attorney at Law, Texarkana, Texas.

Respondents were represented by HON. JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 6, 2006, the above-captioned claim came on for a full hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on March 15, 2006, and a pre-hearing order was filed on March 16, 2006. A copy of the pre-hearing order was marked as Commission Exhibit "1" and made a part of the record without objection.

At the full hearing the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including November 14, 2005.
- 3) The claimant's average weekly wage at the time of the

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alleged injury was \$647.29, which would entitle him to compensation rates of \$432.00 and \$324.00 per week for TTD and PPD, respectively.

At the full hearing, the parties agreed to litigate the following issues:

- 1) Compensability.
- 2) Notice defense.
- 3) Intoxication defense.
- 4) If compensability is overcome, whether claimant is entitled to associated TTD benefits, medical expenses and attorney's fees.

The claimant contended he suffered a compensable injury to his spleen on November 14, 2005, and that he was not intoxicated at the time.

The respondents contended the claimant did not sustain a compensable injury while working for the respondent/employer and that there was no notice of an alleged injury until December 27, 2005. In the event compensability is found, respondents contend that they should not be responsible for benefits until actual notice was received. Respondents affirmatively raised the intoxication defense.

### **I. DISCUSSION**

The claimant, age 34, testified he began working for Young Well Service in the mid 1990's. The claimant stated that on November 14, 2005, he was a "derrickman" for the respondent/employer. The claimant testified as follows regarding a derrickman's duties:

- A. Works the tubing board and rod basket. When you are

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pulling the rods and the tubing out of the hole, you latch onto the pipe and the rod with your elevator.

Q. What is the purpose of all that that you just said for a layperson?

We don't understand that. What are you trying to accomplish whenever you do all those things.

A. You are repairing the oil well. (T. pgs. 10 & 11, lines 25 & 1-8)

While repairing an oil well on November 14, 2005, the claimant testified a rod transfer struck him on the left side of his back. The claimant described the incident as follows:

Q. Describe how the accident occurred, how you were injured.

A. We was going in the hole with the rods. I had got a rod out of the fingers and set it down, they had made it up. The operator picked up on the block and before I could get the transfer off, he come down and the cable is so long. When it hit the end of that cable, the transfer shot off and swung around an hit me in the back.

Q. Is that the rod transfer that you are talking about?

A. Yes, sir. (T. pgs. 17 & 18, lines 23-25 & 1-9)

The claimant testified that upon being struck in the back with the rod transfer, the breath was knocked out of him and he felt a sharp pain. (T. pg. 19, lines 11-18) The claimant

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testified that he was able to continue working for several days after the incident , but remained sore up to the time in which he had to go to the emergency room.

The claimant testified that about a week after the incident of November 14, 2005, he collapsed in the floor at his home and was taken by ambulance to the Hope Hospital. The medical exhibits contained in the record herein show that on November 23, 2005, the claimant was diagnosed with a ruptured spleen and had to have his spleen removed. Dr. Alan Solomon performed the splenectomy on the claimant and continued to treat the claimant after the surgery. On January 30, 2006, Dr. Solomon gave the claimant authority to return to work. (CI X-1, pg. 7)

## II. ADJUDICATION

### A. COMPENSABILITY

Claimant contends that he suffered a compensable injury to his spleen while working for the respondent/employer on November 14, 2005. Claimant's claim is for a specific incident identifiable by time and place of occurrence injury, and for the claimant to prove such, 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 his 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 on resulted in disability or death.
- 3) Medical evidence supported by objective findings, as defined in A.C.A. 11-9-102(16), establishing the existence and extent of the injury; and,
- 4) proof by a preponderance of the evidence that the injury

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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 Speciality Plastics, 56 Ark. App. 126, 938 S.W. 2d 876 (1997). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee was required to show a causal connection existed between the injury and his employment. Gerber Products v. McDonald. 15 Ark. App. 226, 691 S.W. 2d 879 (1985).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find the claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his spleen while employed by the respondent.

In making this finding, I am aware of the conflicting testimony between the claimant and Mr. Ricky Magness. However, both the claimant and Mr. Magness agreed that a rod transfer did break loose on November 14, 2005. Mr. Magness testified he did not follow the line of the transfer rod as it broke loose and, therefore, did not know if the rod did or did not strike the claimant. Both the claimant and Mr. Magness testified that after the rod transfer came loose, Mr. Magness called up to the claimant to inquire about his status. Even though Mr. Magness' testimony differed in some respects from the claimant's, I still found the claimant's testimony regarding the events of November 14, 2005 to be credible. Mr. Magness did not testify that he knew the rod didn't hit the claimant, instead he seemed to testify that he

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simply wasn't looking in the claimant's direction at the time of the alleged incident.

Besides the claimant's credible testimony regarding the alleged incident, the statements regarding causation from Dr. Alan Solomon also lead this examiner to the conclusion the claimant suffered a compensable injury. Medical evidence is not required to prove causation, but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. On December 21, 2005, Dr. Solomon stated that the incident of November 14, 2005, as described to him by the claimant, was the sole cause of the claimant's medical problems. Dr. Solomon went on to state that his findings of causation was based upon a reasonable degree of medical certainty. (Cl X-1, pg. 6) It is important to note the history of the incident given to Dr. Dolomon by the claimant was consistent with the claimant's testimony at the full hearing. (CX-1, pg. 14) Dr. Solomon's impression in his 11/23/05 report is consistent with his finding of causation. Dr. Solomon stated the following impression in his 11/23/05 report:

IMPRESSION: Blunt trauma to the abdomen with delayed splenic rupture and associated anemia. Because of his anemia and degree of peritoneum, I think he requires an operation and will proceed with splenectomy."

Obviously, Dr. Solomon did not find it strange that the spleen took several days after the blunt trauma to finally rupture, and he still found causation within a reasonable degree of medical certainty. There is no medical evidence in the record that disputes Dr. Solomon's findings. Therefore, based on the claimant's testimony, Dr. Solomon's reports and the fact the claimant ruptured his spleen and had to have it removed; I find the claimant has proven by a preponderance of the evidence all of the elements necessary to establish

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compensability. Even Ricky Magness did not have any indication that the claimant's injury did not happen at work:

Q. Do you have any indication that this didn't happen at work?

A. Not that I know of, no. (T. pgs. 55 & 56, lines 25 & 1-2)

Accordingly, for the foregoing reasons, I find the claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his spleen while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's spleen, including, but not limited to, the splenectomy operation performed by Dr. Solomon.

#### **B. NOTICE DEFENSE**

Respondents argue the claimant did not comply with A.C.A. §11-9-701 as to notice of or reporting his injury. Under that statute an employee shall report an injury to the employer in a specified manner and the employer is not responsible for benefits prior to receipt of the employee's report of injury. Failure to give notice does bar a claim if the employee had no knowledge that the condition arose out of and in the course of the employment. *Id.* A.C.A. §11-9-701(b)(1)(B). The Commission has observed that "subjective beliefs and lack of understanding" if reasonable under the circumstances, appear to be exactly the type of situation which excuse the failure to give notice under A.C.A. §11-9-701(b)(1)(B). *Sherry v. McDonalds*", Full Commission Opinion filed 8/19/94, (E115727).

I find the claimant's delay in reporting his injury does not bar his claim for any

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time frames whatsoever. As Dr. Solomon explained, the claimant suffered a delayed rupture of the spleen. The claimant testified he remained sore after the blunt trauma on November 14, 2005, but, obviously the claimant tried to continue working until he had to have his spleen removed. Further, the claimant testified he did tell his supervisor, Mr. Magness, the day of the incident. Even though Mr. Magness disagreed with that, he did acknowledge that after the claimant was out of the hospital following his splenectomy, the claimant told Mr. Magness the trauma happened on November 14, 2005 while at work. Mr. Magness stated he made no reply to the claimant's report of injury at that time. Also, Mr. Phil Keith testified the claimant's mother called him the day the claimant's spleen was removed to advise him of her son's condition.

No matter if one believes the claimant when he said he told Ricky Magness on November 14, 2005 of the incident, or even if the claimant didn't report the injury until after he was released from the hospital, under either scenario notice would be proper. If the claimant told Mr. Magness on November 14, 2005, obviously notice was timely; however, if notice wasn't given until after his emergency splenectomy, that is just the circumstances A.C.A. §11-9-701(b)(1)(B) allows as an exception. Additionally, I find the delayed nature of the claimant's ruptured spleen to be a satisfactory reason for delay in notice even if the claimant waited until after his emergency surgery to notify his employer and such good cause would be an exception under §11-9-701(b)(1)(C). Therefore, based on the reasons stated above, I find respondents notice defense to be without merit.

**C. Intoxication Defense**

A.C.A. §11-9-102(4)(B)(iv)(a) states that a compensable injury does not include an "injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders" A.C.A. §11-9-102(4)(B)(iv)(b) states that "the presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders." A.C.A. §11-9-102(4)(B)(iv)(d) states "an employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of physician's orders did not substantially occasion the injury or accident."

In the case at hand, the claimant wasn't given a drug test until his time of surgery, November 23, 2005. The compensable incident took place nearly nine days earlier on November 14, 2005. Based on the delay in testing, I question whether the rebuttable presumption outlined in §11-9-102-(4)(B)(iv)(b) should even apply. However, there is no time constraint in the statute for testing; therefore, due to the drug screen report contained in the record the rebuttable presumption outlined in A.C.A. §11-9-102(4)(B)(iv)(b) applies to the claimant herein. However, I find the claimant has proven by a preponderance of the evidence that the drugs shown in his 11/23/05 drug screen did not substantially occasion the compensable injury or accident. I come to this conclusion for a number of reasons. First, the drug screen was conducted nearly nine days after the incident and the claimant gave a credible

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explanation of the presence of the drugs and testified the drugs were ingested after November 14, 2005. Also, Mr. Ricky Magness testified that he did not notice the claimant being under the influence of any type of illegal substance on November 14, 2005, or any of the days the claimant worked after the incident.

Other than the rebuttable presumption, there is absolutely no evidence that the claimant's accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders. I find the claimant has proven by a preponderance of the evidence that his injury, or accident, was not substantially occasioned due to the drugs found in the claimant's drug screen of 11/23/05.

#### **D. Temporary Total Disability Benefits**

Claimant has requested temporary total disability benefits in this claim. The claimant's injury to his spleen is an uncheduled injury. In order to be entitled to temporary total disability benefits for an uncheduled injury, claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *AHTD v. Breashers*, 277 Ark. 244, 613 S.W. 2d 392 (1981).

In this case, I find the claimant is entitled to TTD benefits from November 23, 2005 through January 30, 2006. November 23, 2005 is the date the claimant underwent his emergency splenectomy, and January 30, 2006, is the date Dr. Solomon released the claimant to regular work. (C1 X-1, pg. 7) Based on the claimant's testimony and the reports from Dr. Solomon, I find the claimant remained within his healing period and unable to earn wages for the period 11/23/05 through 1/30/06, and that he has proven such by the preponderance of the

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credible evidence.

Accordingly, I find the claimant is entitled to TTD benefits beginning 11/23/05 and continuing through 1/30/06. Respondents have controverted claimant's entitlement to these unpaid indemnity benefits and a full statutory attorney's fee shall attach.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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 hereby made in accordance with A.C.A. §11-9-704.

- 1) The stipulations agreed to by the parties at the full hearing are hereby accepted as fact.
- 2) Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his spleen while employed by the respondents.
- 3) Claimant is entitled to TTD benefits beginning November 23, 2005 and continuing through January 30, 2006.
- 4) Respondents notice defense is without merit. Any delay in notice of the compensable injury was justified pursuant to A.C.A. §11-9-701(b)(1)(B) and A.C.A. §11-9-701(b)(1)(C).
- 5) Claimant sustained his burden of proving by a preponderance of the evidence that he is entitled to reasonable

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necessary medical benefits in connection with his injury, including, but not limited to the splenectomy operation of 11/23/05.

- 6) The claimant has proven by a preponderance of the evidence that the drugs contained in his 11/23/05 drug screen (RX-2, pg. 4) did not substantially occasion the compensable injury or accident of November 14, 2005.
- 7) Respondents have controverted all benefits sought herein.
- 8) Claimant's attorney is entitled to the maximum prescribed attorney's fee under A.C.A. §11-9-715.

**AWARD**

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

Claimant's attorney, Mr. Nelson Shaw, is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half to be paid by claimant and one-half to be paid by respondents.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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S. DALE DOUTHIT  
Administrative Law Judge