

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F605720

TROY PHIFER, Employee	CLAIMANT
GATES RUBBER COMPANY, Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED NOVEMBER 21, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by RONALD M. MCCANN, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On October 25, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 30, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on January 18, 2005.
3. The respondents have controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$588.00 which would entitle him to compensation at the rate of \$392.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back on January 18, 2005.
2. Related medical.

3. Temporary total disability benefits.
4. Attorney fee.

The claimant contends that he sustained a low back injury on January 18, 2005 while in the course and scope of his employment with Gates Rubber Company when lifting a roll of stock which it used to make fan belts. He contends he is entitled to reasonable and necessary medical treatment of his back condition, including payment to Dr. Greenberg for his treatment and surgery, and to any additional medical treatment related to his back injury. The claimant has remained unable to work except for a short period of light duty in June of 2005 and contends he is entitled to continuing temporary total disability benefits to a date yet to be determined. The claimant contends he is entitled to a controverted attorney's fee.

The respondents contend the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act.

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 & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 30, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$588.00 which would entitle him to compensation at the rate of \$392.00 for temporary total disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that

he suffered a compensable injury to his low back while working for respondent on January 18, 2005.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. Claimant is entitled to temporary total disability benefits beginning January 28, 2005 and continuing through a date yet to be determined with the exception of any periods of time the claimant worked for the respondent, including the period of June 13, 2005 through July 25, 2005.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 41-year-old high school graduate who began working for the respondent in 2001 on its "cure" line. After performing that job for approximately eight months the claimant began performing work as a "builder". A builder works at a machine where rubber belts are built by adding several layers of rubber and cord together. According to claimant the machine has a carousel in front that contains rolls of rubber and cord stock. When a particular roll empties there is an empty liner which must be removed. Claimant testified that an empty liner is approximately four feet wide and when it is empty it is taken off by hand and thrown into an empty bin liner. Claimant testified that depending upon the type of stock, the empty liner could weigh anywhere from 50 to 120 pounds or more.

Claimant testified that on January 18, 2005, he lifted an empty liner and sat it on his shoulder to walk approximately 10 to 15 feet to throw it in the empty bin liner when he turned to his left, took approximately three steps, and felt a burning pain in his low back and right leg. Claimant testified that he instantly dropped the liner on the floor and fell to

his knees because of pain. According to claimant's testimony he remained on his knees until another builder came along and helped him up and took him to the office where an accident report was completed. After sitting in the office for approximately 30 minutes the claimant returned to his building machine but performed no additional work the remainder of his shift.

Claimant testified that he went home after his shift ended, took a hot shower, and tried to lay down but was unable to sleep. Claimant testified that he called the respondent the next morning and informed them that he would not be at work, but instead needed to seek medical treatment. Claimant testified that an individual named Shawn Swift made claimant an appointment to see Dr. Clemens on January 19, 2005.

Claimant was evaluated by Dr. Clemens on January 19, 2005, and was diagnosed as suffering from a low back strain. Clemens placed claimant on limited activity at work at that time. Claimant was next evaluated by Dr. Clemens on January 27, 2005, at which time he referred claimant to a neurosurgeon for further evaluation. Claimant was evaluated by Dr. Greenberg, neurosurgeon, on January 28, 2005. After some conservative treatment including medication and physical therapy, Dr. Greenberg performed surgery to repair a herniated disc at the L4-5 and L5-S1 levels on March 24, 2005.

In a report dated June 10, 2005, Dr. Greenberg returned the claimant to light-duty work and claimant did return to work for the respondent training other individuals to work on the builder beginning June 13, 2005 and continuing through July 25, 2005, at which time he was informed that respondent no longer had any work available. Since that time the claimant has continued to complain of low back pain which radiates into his leg. According to claimant's testimony Dr. Greenberg no longer practices in this area and as a result he was evaluated by Dr. Danks on December 20, 2005. In his report of that date Dr. Danks indicates that plain x-rays show what appears to be a disconnected screw at the L5 level

and he ordered a CT scan to further evaluate the position of the screw. Based upon respondent's denial of this claim claimant has not undergone this evaluation.

Claimant has filed this claim contending that he suffered a compensable injury to his low back while working for respondent on January 18, 2005. He seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

### ADJUDICATION

Claimant contends that he suffered a compensable injury to his low back while in the process of moving an empty liner while working for respondent on January 18, 2005. Claimant's claim is for an injury caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (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 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 injury;
- (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.

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

First, I find that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment and that the injury was caused by a specific incident identifiable by time and place of occurrence. Claimant testified that he developed a burning pain in his low back and right leg while he was in the process of moving an empty liner from his machine. Claimant testified that he developed instant pain and dropped the liner on the floor and fell to his knees. According to claimant's testimony he immediately reported the incident and completed an accident report. Claimant testified that the next day he called respondent and informed his supervisors that he would not be at work, but instead needed medical treatment. As a result, respondent made claimant an appointment to see Dr. Clemens.

Initially, I find the testimony of the claimant to be credible and entitled to great weight. Claimant's testimony is supported by the fact that he completed an accident report immediately after this incident. In addition, Bill Medley, the respondent's Health, Safety, and Environmental Coordinator testified that the incident report was completed on January 18 and he learned of the incident the next day. In fact, it was Medley who made an appointment for claimant to be evaluated by the respondent's company physician. In addition to this evidence which corroborates claimant's testimony, I also note that the medical report of Dr. Clemens dated January 19, 2005 also contains history of claimant having injured himself at work while lifting.

The claimant admitted at the time of the hearing that he did not request treatment from the respondent's first responders on the night of the injury. He also admitted that he did not file a workers' compensation claim until the AR-C form was filed. However, the respondent was certainly aware that claimant was reporting an injury and in fact made the appointment for claimant's initial medical treatment. According to claimant's testimony, he was not aware that he could file a claim for workers' compensation benefits because those benefits were not mentioned when he was injured. I believe that the fact that

respondent was aware of claimant's injury and the fact that an incident report was completed is evidence that this incident was reported to the respondent immediately and that respondent had notice that a potential workers' compensation claim existed.

In summary, I find based upon the claimant's testimony which I find to be credible and entitled to great weight as well as the remaining evidence that claimant has met his burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has offered proof by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services or resulted in disability and that claimant has established his injury by objective findings. After claimant was evaluated by Dr. Clemens on two occasions he was sent to Dr. Greenberg, neurosurgeon, for further evaluation. Dr. Greenberg's medical report of January 28, 2005, contains a notation indicating that he observed spasm during claimant's low back examination. Muscle spasms are recognized as an objective finding. Furthermore, based upon the MRI scan and claimant's failure to respond to conservative treatment, claimant underwent surgery to repair a herniated disc at the L4-5 and L5-S1 levels by Dr. Greenberg on March 24, 2005. The herniated disc would also constitute objective findings and would establish that the injury caused internal harm which required medical services and resulted in disability.

Accordingly, based upon the foregoing evidence, I also find that claimant has satisfied the remaining elements of compensability; therefore, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by the respondent on January 18, 2005.

Having found that claimant suffered a compensable injury to his low back, I find that respondent is liable for payment of all reasonable and necessary medical treatment

provided in connection with claimant's compensable injury. According to claimant's testimony, a portion of his medical treatment has been paid for by a group health policy. Pursuant to A.C.A. §11-9-411, respondent is entitled to a credit for those payments.

I also find that as a result of claimant's compensable injury he is entitled to temporary total disability benefits beginning January 28, 2005 and continuing through a date yet to be determined, with the exception of any periods of time the claimant worked for the respondent which would include June 13, 2005 through July 25, 2005.

Following claimant's injury he was initially evaluated by Dr. Clemens on January 19 and again on January 27. Dr. Clemens did not take claimant off work at that time, but instead placed limits on claimant's work activities. Therefore, claimant did not suffer a total incapacity to earn wages at that time. When claimant was evaluated by Dr. Greenberg on January 28, 2005, Dr. Greenberg took the claimant off work and that work restriction continued until Dr. Greenberg released the claimant to return to light-duty work on June 12, 2005. On June 13, 2005, the claimant did return to work for respondent training other individuals to perform the job on the building machine. Claimant continued to perform this work for the respondent until July 25, 2005, at which time he was notified that respondent had no additional work available. Claimant testified that when performing this work he did not have to do any lifting or walking and that he was provided a chair to sit in. Claimant testified that he has not worked for the respondent or anyone else since July 25, 2005, because of continued complaints of pain in his low back and leg. Based upon his complaints of pain, claimant does not believe that he is capable of working since the date he last worked for the respondent.

The medical evidence indicates that claimant was last evaluated by Dr. Danks on December 20, 2005, at which time he noted that claimant was complaining of back pain which radiated into his leg. According to Dr. Danks' notes, plain x-rays revealed what appeared to be a disconnected screw at the L5 level. Dr. Danks ordered a CT scan to

evaluate the position of the screw. Claimant has not undergone the CT evaluation because respondent has denied compensability and claimant has insufficient funds.

Based upon the foregoing evidence, I find that claimant suffered a total incapacity to earn wages and that he remained within his healing period beginning January 28, 2005 and continuing through a date yet to be determined with the exception of any period of time which claimant actually worked for the respondent which would include June 13, 2005 through July 25, 2005.

At the time of the hearing claimant testified that he was paid sick leave for periods of time he missed from work from the date of the injury until September 2005. However, given the absence of any evidence that these payments were advance payment of compensation, respondent is not entitled to a credit for benefits paid pursuant to sick leave. See *Socha v. Northwest Airlines*, Full Commission Opinion filed April 7, 2006 (F500085).

Respondent has controverted claimant's entitlement to all unpaid indemnity benefits. Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by respondent on January 18, 2005. Respondent is liable for payment of all reasonable and necessary

medical treatment provided in connection with claimant's compensable injury. Respondent is entitled to a credit for benefits previously paid by a group policy pursuant to A.C.A. §11-9-411. Claimant is also entitled to temporary total disability benefits beginning January 28, 2005 and continuing through a date yet to be determined with the exception of any period of time claimant worked for the respondent. Finally, respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

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.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE