BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504022

DONALD BONDS, EMPLOYEE	CLAIMANT
I. C. CORPORATION, SELF-INSURED, EMPLOYER	RESPONDENT

OPINION FILED APRIL 16, 2007

Hearing held before the HONORABLE FRANKLIN D. AREY, Administrative Law Judge, on November 13, 2006 at Little Rock, Arkansas. Opinion rendered by HONORABLE S. DALE DOUTHIT.

Claimant represented by HON. STEPHEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by HON. JOHN DAVIS, II, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 13, 2006, in Little Rock, Arkansas before Administrative La w Judge Franklin D. Arey. After the hearing, the case was randomly re-assigned, without objection, to Administrative Law Judge, Dale Douthit for a decision on the record developed at the November 13, 2006 hearing.

A prehearing order was entered in this case on June 27, 2006. The prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved. A copy of the prehearing order was marked Commission Exhibit "1" to the hearing record.

The following stipulations were submitted by the parties at the full hearing on November 13, 2006:

1) The employee/employer relationship existed on November 3, 2003, and at all other relevant times.

2) Claimant's temporary total disability rate is $405.00 per week, and his permanent partial disability rate is $304.00 per week.

3) Respondents controverted the compensability of claimant's neck and back claims.

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

1) Whether this claim is barred, in whole or in part, by the applicable statute of limitations.

2) Whether claimant sustained a compensable specific incident cervical injury on November 3, 2003.

3) Whether claimant aggravated a pre-existing back condition on November 3, 2003, so that the aggravation is compensable.

4) Whether claimant is entitled to medical benefits.

5) Whether claimant is entitled to temporary total disability benefits from September 1, 2005 to a date to be determined.

6) Attorney's fees.

The record consists of the November 13, 2006 hearing transcript and the exhibits contained therein. In addition, I have "blue-backed" respondents', (BB Ex. 1), and claimant's, (BB Ex. 2), post hearing briefs as directed by Judge Arey at the November 13, 2006 hearing. (T. pg. 36, lines 25 & Pg. 37, lines 1-11)

DISCUSSION

A. Statute of Limitations AND Claimant's Proffered Exhibit.

Respondents raised the defense of Statute of Limitations with regard to this claim, but never developed their argument. When given the opportunity to make this argument at the full hearing, respondent stated they would prefer to address their argument in the form of a post hearing brief: (See T. pg 36, lines 17-25 & T. pg. 37, lines 1-7);

> JUDGE AREY: Gentlemen, let's look at the issues real quick, and while the tape is running, let me make sure I understand your respective positions. The first issue dealing with the statute of limitations, I think that would be your burden, Mr. Davis. What's your argument there?
>
> MR. DAVIS: Your Honor, if it would be all right, I know you normally given ten days to file a posthearing brief, could you extend that? I though I might just kind of

capsulize some of my arguments. I know this case has been going on a long time, and there are two or three different aspects to it.

JUDGE AREY: Well, that will be fine.

As stated, I have blue-backed respondents post hearing brief to the record herein, and there is no mention by the respondents of the statute of limitations argument. It appears the respondents have abandoned the statute of limitations defense, and as such, I find the respondents statute of limitation defense must fail. Additionally, the parties disagreed on whether claimant's proffered exhibit #3 should be admitted into evidence. Judge Arey indicated he would rule on the admissibility of claimant's proffered exhibit "3" when rendering his decision. (T. pg. 39, lines 7-11.) Claimant's attorney stated at the hearing that the proffered exhibit was being introduced to combat respondents statute of limitations argument. Since the respondents have elected to abandon their statute of limitations argument, the issue of admissibility of claimant's proffered exhibit #3 becomes moot.

B. Compensability of Cervical Injury.

The claimant has alleged he sustained a compenable cervical injury on November 3, 2003.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirement 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 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 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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. _Mikel v. Engineered Specialty Plastics_, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

Clearly, the claimant's cervical MRI conducted on September 2, 2005, shows objective medical evidence of a cervical injury. However, it cannot be overlooked that these objective findings were not found until nearly two years after the claimant alleged they happened. Also, the claimant's own testimony and the medical records raise serious doubt as to causation of the claimant's cervical problems.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind or presumption in his favor. _Pearson v._

Faulkner Radio Service, 220 Ark. 368, 247 S.W. 2d 964 (1952); _Farmer v. L. H. Knight Company_, 220 Ark. 333, 248 S.W. 2d 629 (1970).

The claimant was far too inconsistent regarding his neck condition after November 3, 2003 to prove by a preponderance of the evidence that his cervical injury arose out of his employment with I. C. Corporation on November 3, 2003. At the hearing, claimant admitted to going to Dr. Long and telling him his neck pain had resolved. (T. pg. 33, lines 23-25 & pg. 34, lines 1-3). Then, on re-direct examination, the claimant says the complete opposite:

> MR. MCNEELY: Mr Bonds, did your neck pain actually go away then right after the injury?
>
> MR. BONDS: No sir. (T. pg. 34, lines 24 & T. pg. 35, lines 1)

The claimant again changed his opinion about his condition in May and June of 2005, and stated he had no problems then:

> MR. MCNEELY: Okay, actually I'm asking you about Conestoga in like May and June of 2005.
>
> MR. BONDS: Well, when I first stated at Conestoga, I had no problem. But in September, it was - - that's when I started having problems . (T. pg. 35, lines 16-20)

The medical records show that on the day claimant alleges his cervical problem originated, he denied any neck pain or trauma. (RX-1, pg. 33). To further complicate the issue, the medical records show that claimant didn't mention a neck

problem until he was walking down some stairs two days later. (RX-1, pg. 36). The claimant's medical records show that he did not seek medical treatment for his neck for well over one year, and certainly did not seek any neck treatment for the year prior to going to work for Conestoga Wood Products in June of 2005. One again, the claimant testified he had no problems when he started working for Conestoga. I do not disregard the causation opinion of Dr. Oberlander; however, Dr. Oberlander relied on claimant's statements which I have found to be inconsistent.

Based on the claimant's inconsistent testimony regarding his cervical condition, the medical records, and the nearly two year gap between the alleged specific incident and the cervical MRI; I find the claimant has failed to prove by a preponderance of the evidence that his cervical injury arose out of and in the course of his employment. Therefore, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable cervical injury while working for the respondents on November 3, 2003.

C. Back Injury - Compensable Aggravation?

Once again, it is undisputed that the claimant has objective medical findings of a back injury. The question is whether the injuries arose out of and in the course of claimant's employment with I.C. Corporation on November 3, 2003. The claimant argues he suffered a compensable aggravation of his back when he slipped and fell on Antifreeze while working for I.C. Corporation on November 3, 2003.

To prove a compenable aggravation, claimant still has to meet the elements of

compensability outlined in Section B herein. An aggravation is a new injury resulting from an independent incident . *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W. 2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Const.*, 54 Ark. App. 344, 925 S.W. 2d 179 (1996). An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc.*, 63 Ark. App. 260, 977 W. S. 2d 5 (1998).

The medical records show the claimant had long standing back problems prior to November 3, 2003. Claimant hurt his low back in 1999, while working for Lennox International The claimant treated with Dr. Philip Johnson in 1999, and in a report dated June 18, 1999, Dr. Johnson stated the following:

> "An MRI was done that showed a bulging disc at the last module segment which is L4-5, where there is a combination of disc bulge, osteophyte formation, and broad-based central disc herniation...." "It shows a high density zone and an annular tear in this area." (Rx-1, Pg. 1) (Emphasis added.)

A discogram/CT Scan was also performed on claimant in June of 1999 that revealed a "central disc herniation at L4-5 with fairly significant mass effect on the thecal sac anteriorly." (Rx-1, pg. 5)

On April 2, 2001, a lumbar MRI was performed which revealed

> "degenerative disc disease associated with a disc bulge and

> posterior annular tear at L4-S1." (Rx-1, pg. 13)

On August 5, 2003, another lumbar MRI was conducted that showed;

> "Advanced degenerative disc disease changes and a moderate to large central and left paracentral disc protrusion at L5-S1. This MRI also showed broad based disc bulges at L3-4 and L4-5." (Rx-1, pg. 29).

After the claimant's alleged incident of November 3, 2003, another MRI of the lumbar spine was conducted and showed a posterior protrusion of the L5-S1 intervertebral disc. (Rx-1, pg. 39). When comparing the November 11, 2003, MRI to those prior to November 3, 2003, it is clear to this examiner that the claimant's back injuries pre-existed his alleged slip and fall on November 3, 2003.

Also, it must be noted again that the claimant testified he had no problems prior to going to work for Conestoga in 2005. Since I have found claimant's back injuries to be pre-existing and not associated with his November 3, 2003 incident. The claimant has failed to prove by a preponderance of the evidence that his back injuries arose out of and in the course of his employment with I.C. Corporation on November 3, 2003. Therefore, claimant has failed to prove by a preponderance of the evidence that he sustained a compenable aggravation of his back while working for the respondents on November 3, 2003.

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, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704.

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

2) The stipulations agreed to by the parties and recited herein are hereby accepted as fact.

3) The respondents have failed to show that this claim is barred by the Statute of Limitations.

4) The clamant has failed to prove, by a preponderance of the evidence, that he sustained a compensable cervical injury while working for the respondents on November 3, 2003.

5) The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable aggravation of his back injuries while employed by the respondents on November 3, 2003.

6) All other issues are rendered moot.

CONCLUSION

Based on the reasons outlined herein, I find this claim should be, respectfully, denied and dismissed.

IT IS SO ORDERED.

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S. DALE DOUTHIT
Administrative Law Judge

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