

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F205606

JAY L. CLAPPER, Employee	CLAIMANT
J.B. HUNT TRANSPORT, Employer	RESPONDENT
AIG CLAIM SERVICES, INC., Carrier	RESPONDENT

OPINION FILED APRIL 13, 2007

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

Claimant represented by R. THEODOR STRICKER, Attorney, Jonesboro, Arkansas.

Respondents represented by JOSEPH H. PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 15, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 17, 2007, and a pre-hearing order was filed on January 18, 2007. 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 relationship of employee-employer existed between the parties on April 12, 2002.

Subsequent to the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to the maximum compensation rate.

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

1. Compensability of injury to claimant's right foot and ankle.
2. Temporary total disability benefits from April 13, 2002 through May 2005.
3. Medical.

4. Attorney fee.

At the time of the hearing claimant modified his request for temporary total disability benefits to include the periods of April 13, 2002 through August 12, 2002, and a second period beginning September 2, 2002 through October 2, 2002.

The claimant contends he suffered a compensable injury to his right foot and ankle on April 12, 2003. Claimant contends that he is entitled to temporary total disability benefits. In addition, claimant contends he is entitled to additional medical treatment and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury. That the osteochondritis dissecans is a pre-existing degenerative disease or condition that was not caused by anything with the claimant's employment and is therefore not the responsibility of the respondent.

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 witness and to observe his 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 January 17, 2007, and contained in a pre-hearing order filed January 18, 2007, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle him to the maximum compensation rate is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right foot and/or ankle while employed by the respondent.

FACTUAL BACKGROUND

The claimant began working for the respondent in May 2001 as an over-the-road truck driver. On April 12, 2002 claimant was sleeping in his truck while waiting to get dispatched under a load. After waking up the claimant got out of his truck in order to perform a pre-trip inspection as required by the DOT. Claimant testified that as he stepped off of his truck and started walking towards the back of the truck to perform the inspection he felt something in his ankle "like it had a Charleyhorse."

Claimant testified that this injury occurred on Friday and that he continued to walk around the rest of the day and also on Saturday. Claimant testified that on Sunday morning he realized he had a problem because he felt like he had needles in his foot. As a result, that morning he called the respondent and reported what he believed to be a Charley Horse.

On April 15, 2002 claimant sought medical treatment from Dr. John Herberth, his family physician. Dr. Herberth referred claimant to Dr. Manuel Martinez, an orthopaedic physician. Dr. Martinez placed the claimant in a boot, ordered an MRI scan, and referred claimant to therapy. Dr. Martinez diagnosed claimant's condition as osteochondritis dissecans and arthritis. Dr. Martinez testified that osteochondritis dissecans involves a vascular necrosis of the ankle bone. The necrosis is caused by cessation or cutting off of the blood supply to the bone itself so that the bone actually dies and a portion of the ankle bone which has lost the blood supply sometimes breaks off. Dr. Martinez testified that this condition is not something that occurs immediately, but instead occurs over time.

The MRI scan according to Dr. Martinez's report of April 29, 2002 was consistent with an osteochondral fracture of the talar dome. Claimant was instructed to engage in no weight bearing activities and to remain off work. Claimant returned to Dr. Martinez on May 21, 2002, at which time Dr. Martinez instructed claimant on the importance of non-weight bearing activities and noted that x-rays showed no change in the claimant's fracture

alignment.

Dr. Martinez eventually released the claimant to return to work in August 2002 and claimant returned to work for the respondent as a truck driver. In September 2002 claimant again injured his right ankle when he twisted it while stepping on a rock. Claimant again returned to Dr. Martinez for medical treatment and Dr. Martinez in a report of September 9, 2002, indicated that he suspected that claimant had flared up an arthritic condition in his right ankle. Dr. Martinez provided the claimant a brace and referred him to Dr. Davis for possible surgical treatment of arthritis and removal of a loose body. Medical reports from Dr. Davis dated December 23, 2002 indicate that he discussed surgery with the claimant. Respondent did not accept claimant's injury as compensable and surgery has not yet been performed on claimant's right ankle.

Claimant has filed this claim contending that he suffered a compensable injury to his right foot and ankle while employed by respondent on April 12, 2002. He requests temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

The parties in this case are in agreement that claimant had a pre-existing condition to his right ankle. Approximately one year before April 12, 2002, claimant had a similar incident with his right ankle while working for another employer. Claimant testified that on April 19, 2001 while working for another trucking company he got up after making a phone call and noticed soreness in his right ankle. Claimant testified that he continued working. The medical evidence indicates that claimant sought medical treatment at New Health Concepts on April 23, 2001 and was diagnosed as suffering from a right ankle sprain/strain. Claimant testified that after that date he would occasionally get a Charley Horse in his right leg.

Pursuant to the workers' compensation law in Arkansas, an employer takes an

employee as he finds him and employment circumstances which aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). In this particular case, Dr. Davis in a letter dated March 5, 2007 indicated that in his opinion the claimant's April 2002 injury aggravated his pre-existing ankle condition. Dr. Martinez also initially indicated that claimant's ankle problems were the result of the April 12, 2002 incident. However, during his deposition when Dr. Martinez was shown medical records regarding claimant's prior ankle injury in April 2001, Dr. Martinez indicated that he could not state within a reasonable degree of medical certainty that the April 2002 incident had aggravated the pre-existing condition. Instead, Dr. Martinez testified that it was more likely that claimant's problems in April 2002 were not the result of an aggravation.

At his deposition Dr. Martinez learned for the first time about the claimant's prior injury to his right ankle in April 2001. Dr. Martinez went on to address the causal relationship when questioned by attorneys for both the claimant and the respondent.

Q. And you say that, "Obviously the osteochondritis dissecans and the arthritis pre-existed the incident of September the 12th and had been there for a while."

R. Right.

Q. And you think that when he - - essentially, when he stepped out of the truck, that he sustained some sort of injury but knowing what we know now about the prior injury and everything else, can you say to any reasonable degree of medical certainty that that fracture that was found occurred on the 12th of April of '02, when he stepped down?

A. No, I can't say that. With a history of having a similar episode in the past, it most likely is a pre-existing condition and is a result of the osteochondritis dissecans.

Q. And that knowing this gentleman's history, you cannot say to any reasonable degree of medical certainty what caused the small fracture that was found via the MRI done in mid April of '02, can you?

A. That's correct. I cannot.

Q. All right. That fracture could have been part of the overall process itself and could have been there for quite a while, could it not?

A. Yes. With a history of a previous, similar episode, absolutely. Most likely it was present before, yes.

Q. And can we rule out - - Mr. Purvis wants you to rule out the possibility that these fragments could have occurred on April '01, at that April '01 injury? Can we rule that out?

A. No, I can't tell you that. There is no way to tell.

Q. So it could well have happened then, just as easily - -

A. I'm sorry?

Q. The fragments could have developed then, as well as sometime earlier?

A. The fragment appeared to be chronic in nature, it did not appear to be acute. Where along that line it happened, I can't tell you that, nobody can.

Q. So chronic, when you examined him in '02 could have been as far back as April of '01?

A. Yes, possibly.

MR. STRICKER: I think what I'm asking is that his injury on 4-12, which we've alleged that he had an injury at the time that he stepped out of the truck, regardless of the extent of it, I'm asking if he can rule out any - - well, no, I'm asking if that even could have aggravated a pre-existing injury.

THE WITNESS: That's possible.

By MR. STRICKER:

Q. Is that likely?

A. Given the history now that I have, probably not. It is more compatible with the same scenario he had approximately a year or whatever that was before,

when there was no external trauma that caused the similar symptoms of the pain when he stood up, so.

If you came to me and you said I've never had this kind of problem before, never had any problems with it, then is it more medically reasonable that the stepping off caused that injury, but if you're telling me that a year before or whatever time before he had a similar scenario without any trauma, then it is most likely the similar episode that happened and not a new trauma.

Q. So I guess my question was: Could that event have aggravated the pre-existing injury, those two scenarios?

A. The answer is, yes, it can do that. If you're asking me what my medical opinion is, the answer is probably not.

I was not aware of the preexisting condition. That I think has a lot to do with it in this scenario. If he had a similar episode like that before, unless proven otherwise, it is more than likely the same thing that is occurring.

Without that previous episode, then, yes, it is feasible that it was there and it wasn't causing him any problem until that point in time, when he stepped off the truck funny or whatever may be, but if he had a similar episode the year before and there was nothing going on, chances are that is what happened again.

A. Now, what you're asking me, and I can't tell you that answer: Is that reactive as a result of that direct flow at that point in time, 4-12, or is it due from before.

What I'm saying is, without my knowledge of this incident before, most likely it was due to that. With the knowledge of that incident having occurred, it probably wasn't on 4-12, because you have the same thing occurring beforehand. That is an important piece of information that I was not aware of, so.

Thus, once Dr. Martinez learned of claimant's prior incident in April 2001, it was his opinion that it was more likely than not that claimant's problems in April 2002 were simply a continuation, not an aggravation, of a pre-existing condition.

I find that the opinion of Dr. Martinez is credible and entitled to great weight. I note that both Dr. Martinez and Dr. Davis are specialists. However, Dr. Martinez has evaluated

the claimant on a number of occasions while Dr. Davis apparently has evaluated the claimant on only two occasions. Furthermore, Dr. Davis' opinion regarding causation consists of a three sentence letter with little explanation as to the basis of his opinion. On the other hand, Dr. Martinez's opinion is set forth in a deposition and includes his explanation for the basis of his opinion. Finally, I believe it is also important to note that Dr. Davis did not evaluate the claimant until December 2002. This was after the claimant had returned to work for the respondent in August 2002 and had suffered another alleged new injury to his right ankle in September 2002 for which he has filed a workers' compensation claim in Ohio.

In summary, the claimant has the burden of proving by a preponderance of the evidence that he suffered an aggravation of his pre-existing condition while employed by respondent in April 2002. According to the testimony of Dr. Martinez, it is more likely than not that the claimant's right ankle condition in April 2002 was a continuation of his pre-existing condition which first manifested itself in April 2001. I find that the opinion of Dr. Martinez is credible and entitled to great weight and therefore find that claimant has failed to meet his burden of proof.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right foot and/or ankle while employed by the respondent in April 2002. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE