

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608975

DAVID D. WYLIE, EMPLOYEE	CLAIMANT
ConAGRA FOODS, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 21, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on April 13, 2007, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. M. Scott Willhite, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Betty J. Hardy, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 13, 2007, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws, arising out of and during the course of his employment with ConAgra Foods.

A prehearing conference was conducted in this claim on January 31, 2007, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed at all relevant

times, including July 11, 2006; that the claimant's average weekly wage was sufficient to entitle him to compensation rates of \$325.00 per week for temporary total disability and \$244.00 per week for permanent partial disability; and that the claim had been controverted in its entirety.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that he sustained a compensable cervical and shoulder injury as the result of a specific incident identifiable in time and place of occurrence on July 11, 2006; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning August 11, 2006, and continuing through January 2, 2007; that he was entitled to an eleven percent (11%) whole body impairment; and that a controverted attorney's fee should attach to any benefits awarded. Claimant reserved the issue of wage-loss disability.

The respondent contended that the claimant cannot meet his burden of proving a compensable work-related injury, while asserting that the claimant's need for treatment was not causally related to his employment, but, rather, related to a pre-existing condition.

It must be noted that the record reflects that a portion of the claimant's

medical treatment and surgery was paid by the claimant's group health insurance plan. In addition, the record reflects that the claimant received short-term disability benefits under the employer's group disability or loss of income policy. Accordingly, in the event the claim is determined to be compensable, respondents would be entitled to an offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received pursuant to Ark. Code Ann. §11-9-411, pending eventual resolution of the claim.

The claimant testified in his own behalf. Bill Hall and James Vaughn were called as witnesses by the respondents. The record in this claim is composed solely of the transcript of the April 13, 2007, hearing containing a volume of medical records introduced as "Joint Exhibit A," an abstract of the medical introduced as "Joint Exhibit B," together with the evidentiary deposition of Dr. Robert Abraham, introduced as "Joint Exhibit C" and retained in the Commission file in bound form.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that he sustained a compensable injury caused by a specific incident on July 11, 2006, arising out of and in the course of his employment which produced physical, bodily harm, supported by objective findings, requiring medical treatment and producing disability pursuant to Ark. Code Ann. §11-9-102.
4. The respondents are directed and ordered to pay all reasonable and necessary medical expenses as the result of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.
5. The claimant has proven, by a preponderance of the evidence, that he was temporarily totally disabled for the period beginning August 11, 2006, and continuing through January 2, 2007.
6. The claimant has proven, by a preponderance of the evidence, that he is entitled to a seven percent (7%) whole body impairment.
7. The claimant has proven, by a preponderance of the evidence, that the major cause of his permanent impairment is the July 11, 2006, compensable injury.
8. Respondents are entitled to a credit or offset for benefits paid by group health insurance and/or group short-term disability policies.
9. The issue of claimant's entitlement to wage-loss disability has been

specifically reserved.

DISCUSSION

The relevant facts in this case are basically undisputed. The record reflects that the claimant timely reported a work-related injury on July 11, 2006. It appears that the primary factual dispute is whether the claimant's cervical injury, need for treatment, surgery, and resulting disability were directly and causally related to the admitted incident. Respondents rely, in part, upon the fact that the claimant reported an injury to his right shoulder rather than a neck injury. The record clearly reflects that the claimant's physical complaints which resulted in his need for medical treatment and ultimately to surgery was the July 11, 2006, injury. The claimant is not a physician. He is not required to self-diagnose his injury. When a claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation, the Commission may find the existence of the causal connection. *Hall v. Pittman Construction Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Company v. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1978).

Wylie's credible testimony, together with the medical opinion of record, establishes the causal connection. *Kearby v. Yarborough Brother's Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970); *Exxon Corp. v. Fleming*, 253 Ark. 798, 489 S.W.2d 766 (1973).

The claimant's description of the accident, as well as its prompt reporting, is

set out below:

Q Okay. Were you – tell me exactly what you were doing when you first felt the pain or the numbness.

A I was pulling the bags out of the trash cans in the, as I said, in the mangles department, and throwing them into the buggy there.

Q Okay. And once you felt that pain or the numbness, what did you do?

A It was about 4:00 o'clock. I went up and told Jamie and Bill, they were both up at the front office.

Q Okay. Now, who are Jamie and Bill?

A Jamie is the safety coordinator at ConAgra, and Bill was my boss on first shift.

Q Okay. Do you know their last names?

A Bill Hall and Jamie Vaughn.

Q Okay. And to your knowledge were those the people that you were supposed to tell if you had any sort of work injury?

A Yes.

Q All right. And what did you tell Bill and Jamie?

A That I was having sharp shooting pains going down from my neck down to the right side of my arm.

Q And did they do anything in response to your comments?

A I got those heating pads and went back to work until about 5:00 o'clock.

Q All right. What was the hours of your shift that day?

A 7:30 to 6:00 or 7:30 at night. They started working 12 hours.

Q Okay. At about what time during the day did this pain begin?

A 4:00 o'clock.

Q All right. So you got some sort of heating pad to put on your neck?

A It was ThermaCare patches, is what it was, like a Ben-Gay patch.

Q Who gave that to you?

A Jamie.

Q All right. And did you go back to work?

A Yes, until about 5:00 or 6:00, I believe.

Q And then what happened at that point?

A They let me go home.

Q All right. So you went home early that day?

A Yes.

Q Okay. Now, at the time that you were beginning to experience this pain – prior to July 11, 2006, had you ever experienced pain in that area of your neck and right extremity before?

A No. (Tr.16-18)

The record reflects that the claimant continued to work for ConAgra from July 11 through August 11, 2006. Apparently, because of his physical problems, the employer modified the claimant's work duties. The claimant stated that his physical problems grew progressively worse. The employer eventually sent the claimant to its company doctor, Dr. Michael Lack, on August 4, 2006. Dr. Lack's notes corroborate the history of the injury. Dr. Lack diagnosed right shoulder pain and released the claimant to return to work. Because of his continued problems, the claimant next saw his family physician, Dr. Arnold Gilliam, who scheduled the

claimant for a MRI which revealed a HNP at C-5. Based on the MRI, Dr. Gilliam referred the claimant to Dr. Robert E. Abraham, a neurosurgeon with the NEA Clinic in Jonesboro, Arkansas. Interestingly, the company doctor, Dr. Lack, acknowledged that the MRI reflected a herniated disc at C-5, while pointing out that it was most likely due to chronic changes or MVA, while admitting that it was possibly due to the claimant's work. Incredibly, Dr. Lack stated that the claimant had no history of injury to his neck and again released the claimant to return to work on August 8, 2006, while opining that it was undetermined whether the claimant's problems were work-related. (Jt. Ex. A, pp.84, 88)

Admittedly, the record reflects that the claimant was involved in a motor vehicle accident on or about May 22, 1999, which was a minor injury. Further, the record reflects that the claimant had pre-existing degenerative disc disease. However, the claimant denied having any prior cervical problems. Although the claimant sustained a prior shoulder sprain involving his left shoulder as the result of a work-related injury with the employer herein during 2005, the claimant returned to work without any significant additional problems until the July 11, 2006, admitted injury. The claimant was taken off work by Dr. Abraham on August 11, 2006. Dr. Abraham initially treated the claimant conservatively with medication and physical therapy. However, the claimant's condition continued to progressively worsen rather than improve. Dr. Abraham then performed additional diagnostic studies, including a myelogram and CT which both showed a herniated disc with nerve root

involvement at C4-5. Dr. Abraham performed surgery on November 14, 2006, consisting of an anterocervical discectomy with fusion at C4-5. The claimant maintained that the surgery improved both the pain, as well as the numbness in his right upper extremity. (Jt. Ex. A, p.127)(Tr.29)

Bill Hall, the claimant's immediate supervisor, and James Vaughn, the employer's safety manager, were both called as witnesses by the respondent. Rather than dispute the claimant's July 11, 2006, injury, their testimony corroborated the injury, claimant's need for treatment, and resulting disability. The testimony of Mr. Hall and Mr. Vaughn related to the fact that the claimant reported a right shoulder injury rather than a neck injury. Again, the claimant's physical complaints were always consistent. Unfortunately, the true nature and extent of claimant's injury was not determined until diagnostic studies confirmed that the claimant had sustained a cervical injury rather than a shoulder injury. A portion of Mr. Hall's testimony, on cross-examination, follows:

Q Mr. Hall, you knew David had injured himself on July 11, 2006?

A Yes.

Q You were aware that he was reporting an injury?

A Yes.

Q It's your position that he reported a shoulder injury, a right shoulder injury, as opposed to a neck injury?

A That's correct.

Q Okay. But he consistently told you from July 11, 2006 at about 4:00 o'clock,

from that point forward that he had injured himself in the area between actually the point of his shoulder and his neck, somewhere in that area, didn't he?

A His right shoulder area, yes.

Q Okay. And he also reported that he had numbness in his right fingers?

A After the vacation, yes.

Q Okay. But the story never changed, did it? He reported he was injured on that day in that area of his body, is that correct?

A Yes. (Tr.46-47)

The testimony of Jamie Vaughn, the safety manager, is equally illuminating.

It is set out below:

Q You have been present in the courtroom and heard Mr. Wylie testify that he came to you on July 11, 2006 to report an injury. Do you recall that afternoon?

A Yes, I do.

Q What did Mr. Wylie report to you when he came on that afternoon?

A Basically that as he was pulling the bag out of the trash, his shoulder – I don't know if he described it as gave way or his arm gave way, but his shoulder ached or hurt.

Q Which shoulder was he referring to?

A His right shoulder.

Q Did he mention anything about his neck or having a problem with his neck?

A I do not recall, just the shoulder pain as we diagnosed or what he told us about at that time.

Q What did you do after he made the report to you of injuring his right shoulder area?

A Well, in my limited knowledge of medical needs is usually we think it is a

strained muscle. So we use the heating pad because that's usually what Dr. Lack, when I take people down there, is kind of the course of treatment. So we have some of those in-house to use for minor aches, pains, and strains, and that's what we try to do at the time.

Q Do you know where he went after he got the heat pad from you?

A I believe he went to the restroom to apply it.

Q Did you see where he applied it?

A I did not.

Q Do you know if he went back to work at that point in time?

A Yes, I believe he did.

Q When was your next contact with Mr. Wylie regarding this right shoulder complaints?

A I believe it was a week or so after his vacation or after he returned from vacation. He stated he still had some pain with that, so we scheduled a doctor's appointment with Dr. Lack.

Q Where did he indicate he still had pain?

A Still in his shoulder, just lifting things and said he still had pain and issues with that.

Q The records indicate that he saw Dr. Lack on August the 4th of 2006. Did you receive any kind of report back from Dr. Lack as far as whether or not he was to return to work or if he asked for any restrictions or anything like that?

A On that day after his examination of his shoulder, he stated in the report that the work-related was undetermined or none, and then there was no restrictions. So he could return to work for full duty.

Q Did you return him back to work at that point at ConAgra?

A Yes.

Q What was your next contact with Mr. Wylie as far as his claim was concerned?

A I believe at that time he was instructed by Dr. Lack as well to see a family physician because he felt the injury that he reported, there wasn't anything there. So whatever pain he may have may be related to something else, and he was directed to see his family physician.

Q Did you ever send Mr. Wylie back to Dr. Lack for any reason after August the 4th, 2006?

A I believe there might have been one follow-up visit, but Dr. Lack had requested – I believe at the time he had told them that he had an MRI, and Dr. Lack said, "Well, I would like to see that." He did take that up there to him, but I do not know that it was an actual visit.

Q Okay. Did you receive a report back from Dr. Lack regarding the review of the MRI report?

A Yes, he basically said still undetermined as work related, but he did put restrictions on Mr. Wylie due to the fact of the MRI, but it was for nonwork-related or unwork-related injury.

Q Was it at this point that the claim was denied by the workers' compensation system?

A Yes, ma'am.

Q Okay.

MS. HARDY: Nothing further.

CROSS EXAMINATION

BY MR. WILLHITE:

Q Mr. Vaughn, you said you received the second report of Dr. Lack?

A Yes.

Q And I believe it was dated – 8/8/06 is the date on page 88 of the report that is indicated. Does that sound correct?

A That sounds about right, yes, sir.

Q And it appears that Dr. Lack says, "Whether the problem is work related is undetermined."

A Uh-huh.

Q Is that your understanding?

A Yes.

Q Okay. And then go to the next – if you would have reviewed the next page, it says, "Refer to a neurosurgeon. If approved, is work related to this job." Were you aware of that?

A Yes.

Q Did you refer him to a neurosurgeon?

A I did not. At that time it goes to Sedgwick. They are the ones that would agree to transfer him to a neurosurgeon at that time. Due to Dr. Lack's medical notes at the time, it wasn't determined as work related, so they declined the claim.

Q Okay. Now, we just said that whether Dr. Lack determined it was work related was undetermined on 8/8/06.

A Okay.

Q All right. Then he says if it's work related, he needs to see a neurosurgeon.

A Okay.

Q All right. But that was never scheduled was it?

A No.

Q So if he says it's undetermined whether it's work related, who made the determination whether it was work related or not?

A I'm sure it was Sedgwick at the time due to his notes.

Q It wasn't Dr. Lack, was it?

A It was undetermined, so it could have been him to a certain degree as well.

Q Okay. But you didn't make that determination?

A No.

Q Okay. And you didn't refer him to a neurosurgeon?

A No, I wouldn't do that anyway. A doctor would have to refer him.

Q Okay. And you didn't ask Dr. Lack to refer him to a neurosurgeon?

A He didn't feel like he could. With the knowledge he had for a work-related injury, then he would not refer the person.

Q Okay. (Tr.52-57)

Respondents also assert that the claimant's injury and need for treatment was his pre-existing degenerative disc disease. Respondents' contention is not supported by the record as a whole. The record reflects that the claimant's cervical disc disease, if any, was not causing the claimant any problem before the July 11, 2006, admitted injury. Under our workers' compensation laws, an aggravation or a pre-existing condition is compensable.

The claimant must prove that his injury was "the result of an accidental injury that arose in the course of employment, and that it grew out of, or resulted from, the employment." *Cook v. Aluminum Co. of America*, 35 Ark. App. 16, 21, 811 S.W.2d 329, 332 (1991); *See also*, Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2002). Objective findings are those findings which cannot come under the voluntary control of the patient/claimant. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2002). Complaints of

pain, *per se*, may not be considered by the physician, the administrative law judge, the Commission, or the Courts. Ark. Code Ann. §11-9-102(16)(A)(ii)(Repl. 2002).

Under our workers' compensation law, an employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regalware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996); *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Under our law, since an employer takes an employee as he finds him, a pre-existing disease or infirmity does not disqualify a claim if the employment circumstances aggravate, accelerate, or combine with the disease or infirmity to produce the disability for which compensation is sought. *Jim Walter Homes v. Beard*, 82 Ark. App. 607 120 S.W.3d 160 (2003). Furthermore, if the claimant can prove that an injury occurred, major cause is not necessary to establish compensability. *Williams v. L & W Janitorial, Inc.*, 85 Ark. App. 1, ___ S.W.3d ___ (2004).

I found the claimant to be a most credible witness. The job-related incident is undisputed. The claimant's testimony, together with the credible testimony of Dr. Abraham, proves the causal connection. Portions of Dr. Abraham's testimony follow:

Q Doctor, I'm Scott Willhite, I represent Mr. Wiley [sic]. I've just got a few questions. We've sort of talked about objective findings and things of that sort and refer to osteophytes but, Doctor, it's my understanding that you also diagnosed Mr. Wiley [sic] of having a disk that was impinging upon the nerve root at the C4-5 level.

A Yes, sir.

Q And did you repair that during the surgical procedure?

A Yes.

Q And if the proof shows, Doctor, that Mr. Wiley [sic] didn't have significant pain in his neck and upper extremity as you reported in your medical records prior to July 11, 2006, do you feel comfortable in making the opinion that the major cause of the surgery was the accident he sustained on July 11, 2006?

A From the point that – and this, like I said, this is all based upon what they are telling me and that's what we go on. A lot of times patients come to see us and they don't have a lot of their records and everything so we don't just stop everything because they don't. We still see them and still treat them. Even if they do have a bunch of records, if the records, uh – I go with what I find more so that [sic] what somebody else did.

Q Let me restate my question. If the Judge in this case determines that Mr. Wiley's [sic] report of his accident on July 11, 2006 is credible and believes that he did sustain an injury on that date and that he had no significant pain or treatment for his neck prior to that date, are you comfortable in saying that the major cause of the need for surgery on his neck was the July 11, 2006 work accident?

A Yes, sir, I'm comfortable with that.

Q And are you also comfortable, given those parameters; the Judge's determination of credibility on the accident and certainly no significant treatment prior to July 11th, that the impairment rating that you assigned is attributable to the

accident of July 11, 2006?

A Yes. (Jt. Ex. C, pp. 26-27)

Q And so isn't it reasonable to conclude, Doctor, the reason that you did surgery was the July 11, 2006 trauma laid upon the underlying condition that Mr. Wiley [sic] had?

A Most likely.

Q And so I guess my final question on that is in light of that wouldn't the major cause of the need for that surgery be the trauma coupled with the degenerative condition?

A Yes.

Q And absent the trauma, the degenerative condition may have gone on for several years without any sort of need for medical or surgical intervention?

A Yes, sir.

Q And if the Judge believes that there was no significant pain or problem with Dr. Wiley's [sic] neck prior to July 11th, isn't [sic] it reasonable [sic] to conclude that the major cause of the need for surgery was trauma?

A Yes, sir. (Jt. Ex. C, p.31)

Dr. Abraham also addressed the issue of permanent impairment. In a report dated January 3, 2007, Dr. Abraham opined that the claimant should receive an eleven percent (11%) impairment rating to the body as a whole as outlined in the *Guides to Permanent Impairment*, Fourth Edition, AMA. (Jt. Ex. A, p.132) However, in his evidentiary deposition, Dr. Abraham clarified the impairment rating as set out below:

Q And Doctor, it's my understanding that some of your rating or possible all of

it – I had a little trouble understanding it – the repair of the disk problem resulting in the 11 percent rating.

A Most of it.

Q Can you quantify – obviously, the Comp Commission wants us to avoid range of motion or subjective parts of the rating. As far as an objective this portion of the rating is attributable to anatomic loss?

A Seven percent of it is.

Q So seven percent of it would be a hard number attributable to hard factors?

A Seven percent is just attributable to the fact the patient had a [sic] abnormality on his radiographic studies that required operative therapy.

Q So the four percent would be for the range of motion?

A Yes. Range of motion and the fact that basically the patient had some musculoskeletal pain and so forth. (Jt. Ex. C, pp.32-33)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of 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 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss v. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met the burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade v. Mr.*

C.Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven each and every element necessary to establish compensability of his claim. Accordingly, I hereby make the following:

AWARD

Respondent, Sedgwick Claims Management Services, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$325.00 per week beginning August 11, 2006, and continuing through January 2, 2007.

Thereafter, respondents are directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$244.00 per week beginning January 3, 2007, and continuing for 31.5 weeks, representing a seven percent (7%) permanent impairment to the body as a whole.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay for all outstanding hospital, medical, and related expenses, including, but not limited to reimbursement to the claimant for any out-of-pocket medical expenses, including reimbursement of prescription medication, and respondents remain responsible for continued, reasonably necessary follow-up medical care.

Respondents may claim credit or an offset for any benefits paid by other providers pursuant to Ark. Code Ann. §11-9-411.

Additionally, claimant's attorney, Mr. M. Scott Willhite, is hereby awarded the maximum statutory attorney's fee on this entire Award, pursuant to and limited by, Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge