

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600871

DAVID YORK, EMPLOYEE

CLAIMANT

POTLATCH CORPORATION, EMPLOYER

RESPONDENT

MANAGEMENT CLAIM SOLUTIONS, CARRIER

RESPONDENT

OPINION FILED JANUARY 4, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 8, 2006, at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE STEVEN R. MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on December 19, 2005 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$461.00/\$346.00 in the event this claim is found to be compensable. Some medical expenses have been paid by Health Advantage, the claimant's group carrier.

The claimant contends he was injured on December 19, 2005 pulling lumber that was jammed in a machine. He sustained a new back injury and either a new neck injury or an aggravation of a preexisting neck condition in the course and scope of his employment. He seeks payment of medical expenses, temporary total disability benefits from December 20, 2005 to a date

yet to be determined and attorney's fees.

The respondents contend the claimant did not sustain a compensable injury in the course and scope of his employment.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and his wife; leadperson, Tanya Hampton; supervisor, Kenneth Kolen and safety manager, Raymond Culp.

The claimant, age 51 (D.O.B. December 29, 1954), has a high school education. He has worked for the respondent-employer since 1974. His job duties as a head rig operator include cutting logs into boards. The claimant's health history includes arthritis in his neck and ankle. His non-work related ankle injury required surgery in April, 2001. Medical records show he received prescription pain medication for arthritis.

The claimant injured his right shoulder, neck and arms in October, 2001 when he was struck by a board at work. He received treatment from Drs. Foscue and Ackerman and missed thirty days of work until November, 2001. He transferred jobs from utility relief worker to head rig operator. He took medication for this injury but was able to work, fish and participate in sports.

On Sunday, December 19, 2005, the claimant experienced back pain pulling on a board. He fell back when the board came loose and felt pain in his neck (Tr. p. 10-16, 22-23). After carrying a chain saw, he began experiencing a "pins and needles sensation" in his shoulders while operating control levers. He took a prescription pain pill he kept in his lunch pail for arthritis. He then reported the incident to supervisor, Kenneth Kolen and completed an accident report form before going home.

The claimant's's symptoms did not relent and he went back to the plant office where he was referred to Dr. Foscue. The claimant was off work Monday through Thursday. He tried to go back to work on Friday night but the pain was too great to continue.

On April 10, 2006 the claimant had neck surgery which relieved the pain, however, his neck is still sore and stiff. Medication has helped the claimant's back but he still experiences pain, especially when walking or climbing steps. The claimant remains under the doctor's care and is not working.

The testimony of the witnesses corroborated the claimant's testimony.

Diane York testified that even though her husband developed neck problems after a 2001 injury, he was able to work, mow the yard, and service their automobiles until the 2005 injury.

Tanya Hampton, a lead person with the respondent-employer for nine years, recalls the jam on the line that led to the claimant's accident in 2005. She advised him to report the accident and go home if he was hurting. The claimant called her the next week to inform her he was unable to return to work. Ms. Hampton also testified the claimant had no physical problems performing his job prior to December, 2005.

Kenneth Kolen, supervisor, testified the claimant reported an injury pulling on a slab and filled out an accident report form. The claimant took a pain pill to see if that would alleviate his symptoms. The claimant was instructed to let Raymond Culp or Bob Ahart know if he decided he wanted to go to the doctor. Later, he spoke with the claimant and Tanya about the claimant's absence from work. Mr. Kolen testified that prior to 2005, the claimant was a good employee and had no physical problems that prevented him from performing his job.

Raymond Culp, safety coordinator, testified the claimant called him on December 19, 2006 to report an injury. After the WCC Form AR-N was completed, Mr. Culp took the claimant to see the company physician. Mr. Culp thought the claimant seemed stiff and sore initially but didn't appear to be injured when talking to two females at the doctor's office. Mr. Culp asked the doctor and nurse to observe the claimant's movements.

MEDICAL EVIDENCE

The claimant's medical records begin in November 2001 with complaints of a right shoulder

injury with decreased grip strength, numbness and tingling in the right hand as well as neck pain. Dr. Foscue, a general practitioner, diagnosed a strain/sprain and prescribed medication. A report dated October 6, 2004 shows the claimant was taking arthritis medication for neck, back and ankle pain. A notation on a report dated June 28, 2005 indicates the claimant's neck and shoulder pain had worsened.

A cervical MRI scan conducted September 23, 2003 revealed a "moderate disk/osteophyte complex at C5-6, effacing the left canal contacting the left cervical cord."

One day after the injury, the claimant saw Dr. Foscue on December 20, 2005, complaining of neck and back pain. The doctor's report has a section devoted to details surrounding the history of injury. The claimant reported a history of injury at work pulling a slab on December 19, 2005 at 1:45 a.m. and indicated the incident had been reported to his supervisor.

An MRI scan of the lumbar spine taken December 30, 2005 revealed an annular tear at L4-5 on the left, spondylitic changes at L5-S1 and heterogenous bone marrow related to cigarette smoking.

An MRI scan of the cervical spine taken January 10, 2006 showed evidence of a central disc herniation at C5-C6. This report shows a history of neck and arm pain since 2001. Dr. Foscue referred the claimant to Dr. Mason in January, 2006. Dr. Mason recommended cervical surgery at C5-6 but did not relate this to the claimant's work-related injury.

The question was asked from him if this would be related to his December 19, 2005 injury. I would not expect this to be due to the recent injury, as this appears to be chronic in nature.

Dr. Kevin Collins, a rehabilitation physician, examined the claimant on March 17, 2006. The claimant again offered a history of injury consistent with his testimony. Dr. Collins recites the claimant's medical history, noting preexisting neck and back problems. The claimant also walked with a limp developed from a childhood injury.

Dr. Collins referred the claimant to Dr. Bernard Crowell on March 23, 2006. Dr. Crowell reviewed the claimant's 2003 MRI report and compared that with the 2006 MRI scan, commenting, "It appears to be a process which was there approximately three years ago and has progressed since

that time.” Dr. Crowell recommended surgery for the neck and facet blocks for the back.

On April 10, 2006 Dr. Crowell performed fusion surgery for a herniated nucleus pulposus at the C5-C6 level, noting degenerative disc disease and stenosis at that same level. Dr. Crowell felt the claimant’s neck condition was causally related to the injury at work.

Dr. Crowell’s Letter of May 23, 2006:

He is status post anterior cervical discectomy with interbody fusion at C5-C6 for an injury which he sustained on the job.

In all likelihood the changes seen in his cervical spine, primarily C5-C6, are due to the injury which he sustained on December 19, 2005.

This aggravated his neck producing the herniated nucleus pulposus.

FINDINGS AND CONCLUSIONS

The respondents have denied this claim on the basis that the claimant did sustain an injury in the course and scope of his employment.

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

“Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

An aggravation of a preexisting condition is compensable as the employer takes the employee as he finds him. Hermitage Baptist Temple v. Robinson, 82 Ark. App. 460, 120 S.W.3d 150 (2003); Smith Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002); Oliver v. Guardsmark, Inc., 68 Ark. App. 24, 3 S.W.3d 336 (1999).

The evidence of record shows that although the claimant had a preexisting degenerative disc disease, a chronic and progressive condition, the problem was controlled by medication and he was able to work, participate in sports, and take care of household chores prior to the accident in December 2005. I found the claimant to be a credible witness who has consistently reported his injury to both his employer and his physicians. Therefore I find the claimant has met his burden of proving an aggravation of a preexisting neck condition and a new injury (annular tear) in his back. The 2005 injury aggravated or combined with his preexisting condition to accelerate the claimant’s need for medical treatment. The 2005 injury was a factor in the doctor’s decision to recommend surgery. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

On December 19, 2005, the testimony of the claimant, his lead person, and his supervisor establishes that a jam occurred on the line and the claimant injured his neck and back pulling on a slab. The injury was duly reported to both his employer and his physicians. Therefore, the claimant has met his burden of proving a specific incident identifiable by time and place of occurrence which

arose out of and in the course of his employment.

The claimant was diagnosed with a cervical disc herniation and a lumbar annular tear which required medication and surgery and prevented the claimant from working. The claimant's treating and operating physician, Dr. Crowell has opined that the claimant's present condition is work-related. Therefore, I find the claimant has met his burden of proving internal physical harm to the body requiring medical treatment, established by objective medical evidence.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on December 19, 2005 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$461.00/\$346.00.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30.
4. The claimant has proven by a preponderance of the evidence that he remains in his healing period totally incapacitated from working. The respondents are directed to pay temporary total disability benefits from December 20, 2005 to a date yet to be determined.
5. The respondents are directed to pay court reporting fees and expenses to Ms. Linda Parker pursuant to Commission Rule 20.
6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by

the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge