

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509311

CHRISTOPHER AUSLER, EMPLOYEE	CLAIMANT
J. B. HUNT TRANSPORT, INC., EMPLOYER	RESPONDENT
AIG CLAIMS SERVICE, CARRIER	RESPONDENT

OPINION FILED JUNE 12, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on March 14, 2008 at Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE WILLIAM C. BIRD, III, Attorney at Law, Little Rock, Arkansas.

ISSUES

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

At issue is whether or not the claimant sustained a compensable back injury as defined by Ark. Code Ann. §11-9-102 and whether or not the claimant is entitled to additional treatment for a compensable knee injury pursuant to Ark. Code Ann. §11-9-508.

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 with regard to the back injury.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on August 28, 2005 at which time the claimant sustained a compensable right knee injury at a compensation rate of \$408.00/\$286.00. Medical expenses and temporary total disability benefits were paid until December 5, 2005 when Drs. Pearce and Dodge released the claimant to return to work. The claimant drew ESD benefits March 16, 2006 to June 26, 2006 in the amount of \$307.00 a weekly. He worked for Wayne-Smith Trucking at an average weekly wage of \$455.00 from June 27, 2006 to September 14, 2006. In addition to truck-driving, the claimant was self-employed laying carpet.

He is presently unemployed and undergoing treatment at the VA Hospital.

The claimant slipped and injured his right knee and back entering the cab of the truck. He seeks payment of additional medical treatment and temporary total disability benefits from September 14, 2006 to a date yet to be determined. The claimant anticipates more surgery on his knee.

The respondents contend all appropriate benefits have been paid for the compensable knee injury. The claimant's present condition is the result of a preexisting condition. The respondents further contend there is no medical evidence linking the claimant's back condition to the compensable knee injury.

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

The claimant was the only witness to testify at the hearing.

The claimant, age 48 (D.O.B. March 26, 1960), had training in electrical work in the Army. His work experience includes carpet laying and truck driving. The claimant's health history includes prior knee injuries (a 10% rating to the right knee after two surgeries by Dr. Bud Dickson) and back injuries (pulled muscle in late '80's or early '90's/ MVA in 1992 taking him off work for 6 to 8 months/ 1995 fall from a forklift/ and a fall in 2000). In 2006, the claimant began drawing \$115.00 monthly from the VA for a left hip and knee injury assessed at 10%. The VA is also paying for the claimant to pursue Bible studies. His Social Security claim is pending.

The claimant testified he injured his back and right knee on August 28, 2005 when he slipped and fell while entering the cab of his truck. The claimant stated that he complained of right knee pain and numbness in the heel of his right foot which was later attributed to radiating back pain.

The claimant came under the care of Dr. Dodge who diagnosed a right knee strain and recommended light duty. The claimant continued to work part-time laying carpet while he was on light duty with the respondent-employer. In October, Dr. Dodge released him to full duty. The claimant saw Dr. Pearce who also recommended the claimant return to work. A Functional Capacity Evaluation (FCE) was performed which showed the claimant could lift up to 80 lbs.,

placing him in the Heavy work category.

The respondents stopped paying benefits in December 2005, so the claimant sought treatment at the VA. Dr. Vander Schilden performed knee surgery on August 20, 2007 and Dr. Obasi performed back surgery on May 1, 2007. A knee replacement is the next step if the claimant remains symptomatic..

MEDICAL EVIDENCE

The claimant was seen in the emergency room (ER) on August 29, 2005, unable to bear weight on his right leg. He told the doctor he fell when his knee gave out while he was climbing into his truck. The claimant also informed the doctor about his two previous knee surgeries in 1986 and 1987.

The claimant followed up with Dr. Benjamin Dodge. There is no mention of any back symptoms but the doctor noted, "he has difficulty with straight leg raising." The claimant must have complained about his right foot because the doctor examined it, noting the foot was "neurologically intact."

An MRI scan of the knee revealed evidence of a previous lateral meniscectomy, tendinosis, and tendinopathy of the quadriceps and patellar tendons with a partial ACL tear. The doctor prescribed physical therapy and a knee brace to wear while walking but not while driving. Nevertheless, Dr. Dodge's report of November 30, 2005 shows the respondent-employer refused to return the claimant to work because they didn't want him driving while wearing a knee brace.

The claimant saw Dr. Stephen Carter on November 4, 2005. He commented the claimant was "having trouble with right ankle numbness and weakness since an injury to his right knee on August 28. Dr. Dodge does not think it relates to the knee injury and Mr. Ausler has had lower back problems with degenerative disc disease for a number of years." He diagnosed degenerative disc disease of the lumbar spine with right ankle parathesia.

An MRI scan dated November 7, 2005 revealed "degenerative disk disease with a mild broad-based bulging disk and central disk herniation which is very small, at L5-S1. There are also

bilateral facet degenerative changes at this level with mild to moderate bilateral neural foraminal narrowing” and “very minimal bilateral inferior neuroforaminal narrowing is noted at L4-L5.”

The claimant saw Dr. Charles Pearce on November 17, 2005. Dr. Pearce felt the claimant had exacerbated a preexisting condition in the right knee but was able to return to work.

Significantly, Mr. Ausler has had right knee arthroscopy in 1986 and then again in 1987 done by Dr. Bud Dickson. The exact pathology and the procedures done are not known. Mr. Ausler admits to having some problems with his knee since that time and has never been completely pain-free. Additionally, Mr. Ausler has a floor installation company of his own. He says that, for the most part, he is not involved in installation but occasionally has to do so. IMPRESSION: Right knee injury, which I suspect is an exacerbation of a prior underlying problem of chondromalacia after surgeries done in 1986 and 1987. He also has quadriceps atrophy and deconditioning.

Dr. Pearce opined the claimant could return to work and use Tylenol for pain. The doctor commented that the claimant was unable to take anti-inflammatories due to stomach upset.

The claimant saw Dr. Carter on November 21, 2005 who recorded, “back pain follow-up...worsening radiation. Improving locally in the back. Radiation into the right buttock and back of the thigh...with activity...bending.” Dr. Carter diagnosed chronic lower back pain with sciatica.

A Functional Capacity Evaluation (FCE) was completed on December 1, 2005. The test was considered valid, indicating the claimant could lift 80 pounds, placing him in the Heavy work category. The examiner noted that the claimant’s limp increased during testing.

On December 6, 2005, Dr. Pearce reiterated his opinion that the claimant could return to work.

He has sustained no new injury to his knee. It is my feeling that, at most, he has sustained an exacerbation of an underlying problem; but the majority of his problem is due to a pre-existing problem.

On December 8, 2005, Dr. Dodge concurred with Dr. Pearce returning the claimant to work with no restrictions, based on a diagnosis of a right knee strain with quadriceps tendinitis. He referred the claimant to Dr. Bruce Safman to evaluate the claimant’s back.

The claimant saw Dr. Carter on December 14, 2005 and December 15, 2005 for back pain.

Onset of pain was listed as “6 weeks ago” and “4 months ago.” Dr Carter diagnosed an acute exacerbation of degenerative preexisting disc disease in the lumbar spine.

The claimant saw Dr. Safman on December 20, 2005. He seems to be under the impression that the claimant injured his back while performing the FCE and that his pain was not radiating. Dr. Safman ordered an EMG/NCV study to explore the claimant’s complaint of numbness in the right foot. The test, performed two months later on February 21, 2006, revealed no evidence of an active right lumbar or sacral radiculopathy, myopathy or polyneuropathy. Dr. Safman opined, “I believe that his lumbar problem is due to a lumbar strain. The degenerative changes are relatively mild and I think are consistent with his age.”

The claimant saw Dr. Dodge on January 19, 2006, requesting anti-inflammatory medication. Dr. Dodge opined the claimant’s right knee strain and quadriceps tendon tendinitis had improved and healed but he prescribed Celebrex.

The claimant saw Dr. Allison on February 7, 2006. The claimant reported that he had gone back to work for a different employer but his symptoms worsened.

When he got into his truck, his knee started to hurt and the leg started to go numb. ...After the FCE, where he was asked to lift heavy weights over and over again, his back became very painful and the leg even more numb. He drove home from Oklahoma City today and is late for his appointment. He states he had to stop and get out of the truck over and over due to pain.

Dr. Allison reviewed the lumbar MRI scan and recommended physical therapy and an EMG/NCV study which was normal. A report dated February 15, 2006 indicates the claimant was not compliant with his physical therapy appointments. The claimant told Dr. Allison that therapy was too painful so Dr. Allison referred him to Dr. Wilbourn for epidural injections.

Dr. Allison’s report of April 11, 2006 shows the claimant had been fired and was financially unable to pursue treatment with Dr. Wilbourn. The claimant was depressed and remained symptomatic. Dr. Allison did not feel the claimant was a surgical candidate and advised the claimant to return to his general practitioner.

The claimant saw Dr. Dodge in April, 2006 for right knee pain. More physical therapy and

injections were prescribed. The therapist diagnosed an ACL tear.

In June, 2006, the claimant began treatment at the VA. The claimant reported left hip pain after driving a car from Florida to Arkansas. Diagnostic testing showed minimal degenerative changes in the hip.

In July, 2006 he returned to the VA with “lower back and left hip pain since fall Aug. ‘05, states pain is getting worse.” A report of the same date shows the claimant’s back pain had improved until he began truck driving “over the last 3 days.”

The claimant was diagnosed with back spasm and degenerative joint disease of the back and hip in August, 2006. In September 2006, X-rays of both knees and the back were performed. Mild chondrocalcinosis of the left menisci was noted with ethesophyte formations in both knees. Degenerative changes in the lumbar spine were found in the lower thoracic vertebrae with mild arthritic changes in the facet joints at L4-5, L5-S1.

The claimant’s history of injury appears in a October 5, 2006 report as follows:

He also stated that while was (sic) lying around trying to get his knee well that he began having pain in his back and that this has also progressed.

PAST HISTORY: Significant in that Dr. Budd Dixon, an orthopedic surgeon did arthroscopic surgery in 08/1986 and 1987. He was still symptomatic when he left, but over a period of a year or so, he has become asymptomatic. He was then in the service and had some injury to the left hip and had an evacuation of a hematoma in the left lateral buttocks area.

MRI scans taken on November 13, 2006 were interpreted as showing a lateral meniscal degenerative tear in the mid body and posterior horn with chondromalacia and a large osteophyte of the tibial plateau in the knee and a disc protrusion at T11/S1.

An EMG/NCV study on November 20, 2006 could not confirm radiculopathy or myelopathy related to the thoracic findings.

The claimant saw Dr. Vander Schilden in December, 2006 at the VA. He diagnosed a “complex tear of the posterior horn of his medial meniscus as well as some changes on the undersurface of his patella...” with an osteophyte in the medial compartment. Arthroscopy was

performed on August 20, 2007, with the understanding that the procedure would not cure the “peripatellar discomfort.”

A report dated February 16, 2007 indicates, “still works in his own carpet business but it hurts when he works.”

Lumbar surgery was performed on May 1, 2007, for a left paracentral disk herniation at L5-S1, by Dr. Obasi. After surgery, the claimant still complained of numbness in the right leg which was attributed to swelling of the S1 nerve.

In July, 2007, the claimant saw VA doctors for hand pain related to a 1993 accident. Apparently, surgical hardware was implanted in his hands. He also complained of shoulder pain.

Right knee surgery was performed on August 20, 2007 for Grade 3 chondromalacia of the medial compartment. The ACL was “frayed” but not completely torn. ACL reconstruction was not performed.

On August 23, 2007, Dr. Rauls commented that if the claimant’s symptoms persisted, the next step would be unicondylar knee arthroplasty.

In his deposition, Dr. Carter, the claimant’s general practitioner, testified he had treated the claimant since 1993. After the incident in August, 2005, the claimant did not see Dr. Carter until November and the claimant did not bring any prior medical records on this injury.

Respondents’ counsel showed Dr. Carter the medical records from Dr. Dodge showing no mention of back pain (Depo. p. 88-89). Counsel also questioned Dr. Carter about his decision to refer the claimant to a specialist around the same time the claimant’s FMLA leave expired on December 16, 2005, (Depo. p. 27-41). Dr. Carter explained that he changed the claimant’s medication which could explain the worsening of symptoms, however, the dates of onset appeared to be inconsistent.

Dr. Safman’s records appeared to be in error because the claimant had presented to Dr. Carter with back pain on November 4, prior to the FCE performed on December 1, 2005. And although Dr. Carter thought the specialist were excusing the claimant from work, in reality, Dr.

Safman deferred to Dr. Carter about work release, (Depo. p. 49-50).

Dr. Carter released the claimant to return to work on December 13, 2005, but this document had been altered to reflect a date of January 10, 2006, (Depo. p. 51-58).

On cross-examination, the claimant pointed out the references to his right foot in Dr. Dodge's records (Depo. p. 62, 87).

The claimant also pointed out that despite Dr. Carter's characterization of "chronic" back pain, Dr. Carter had not treated the claimant for back pain since 1994, (Depo. p. 66, 87-88).

The claimant noted that even though he had been released to return to work based on the FCE results of lifting 80 lbs., the essential function of his job duties required him to lift 100 lbs. (Depo. p. 67-71, 83-84). And Dr. Safman also examined his ankle and released him only because the EMG-NCV study was not approved (Depo. p. 76-81).

With regard to the altered report, the claimant indicated he asked the doctor to change it so his employer would accept it and return him to work (Depo. p. 84-87).

FINDINGS AND CONCLUSIONS

The evidence of record shows the claimant had a preexisting history of knee and back problems prior to his fall from the cab of a truck on August 28, 2005. During treatment for his knee, the claimant continued to work as a carpet layer. The claimant also complained of numbness in his ankle which he relates to a back injury on August 28, 2005.

In workers' compensation law, an employer takes an employee as he finds him, and a preexisting disease or infirmity does not disqualify a claim if the employment circumstances aggravated, accelerated, or combined 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). An aggravation is a new injury resulting from an independent incident, and 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. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003).

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).

After the compensable knee injury in 2005, there is evidence the claimant complained of foot pain and doctors tested his straight leg raising ability. There is also evidence of preexisting back problems but the claimant had not been treated for back pain since 1994. The lumbar MRI in 2005 showed a herniated disc at L5-S1 which ultimately required surgery in 2006. Therefore I find the claimant suffered a compensable back injury in 2005 at the same time as the compensable knee injury.

The compensable knee injury in 2005 was diagnosed as a strain and the claimant was released to return to work. The employer erred when they did not return him to the work force in a timely manner. However, the claimant continued to lay carpet after this injury, and there is a change in the condition of his knee between 2005 and 2006. By 2006, diagnostic testing involved both knees and surgery was performed to address Grade 3 Chondromalacia. Therefore, I find additional medical treatment for the knee is not reasonable, necessary or related to the compensable injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on August 28, 2005 at which time the claimant sustained a compensable knee injury at a compensation rate of \$408.00/\$286.00. Medical expenses and temporary total disability benefits were paid until December 5, 2005.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable back 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 medical expenses related to the back within thirty days pursuant to Rule 30.
4. Additional medical treatment for the compensable knee injury is not reasonable and necessary because his present condition is unrelated to the compensable injury.
5. The claimant is entitled to payment of temporary total disability benefits for his compensable knee injury from December 6, 2005 to the date he returned to work for his employer. The release from the doctor did not match the essential job function requirements.
6. The claimant is entitled to temporary total disability benefits for his back from May 1, 2007 to a date yet to be determined.
7. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above. 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