

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706914

SHIRL IRONS, EMPLOYEE	CLAIMANT
HYDROVAC SERVICES, INC., EMPLOYER	RESPONDENT #1
AIG CLAIM SERVICES, CARRIER	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED FEBRUARY 8, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on December 19, 2007 at Pine Bluff, Jefferson County, Arkansas.

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

Respondents No. 1, represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2, represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas, did not participate in this hearing.

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 suffered a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

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 that an employee-employer-carrier relationship existed during March 2007 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$336/\$252.00 for temporary total disability and a compensation rate of \$200.00 for temporary partial disability in the event this claim is found to be compensable. The Desha County Office of Child Support Enforcement has filed a lien in this case.

The claimant contends he injured his right hip and knee in a fall at work on March 8, 10, or 12, 2007. He seeks payment of medical expenses, TTD benefits from May 31, 2007 to August 2007, and TPD benefits from August, 6 2007 to October, 31 2007, as well as attorney's fees.

Respondents #1, AIG, contends the claimant did not sustain a compensable injury. The claimant's present condition and need for treatment is the result of a preexisting condition and is not causally related to activity at work.

Respondent #2, The Second Injury Fund, was joined after the prehearing conference and is not a party to the stipulations entered into by the claimant and respondent #1.

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, Andrea; co-workers, Paula Stevens and manager, T. J. Pendergrass. Mr. Pendergrass testified an accident had affected his memory, but I found his memory to be more selective than diminished.

The claimant, age 42 (D.O.B. October 24, 1964) has an eleventh grade education. His work experience includes welding, roofing, driving dump trucks, blasting paint, construction and farm work. His health history includes a prior workers' compensation claim for a 2001 back injury, settled for \$38,000.00.

The claimant had worked for the respondent-employer three or four weeks before he was injured. The claimant was a pump operator cleaning industrial buildings with water pressure. In March, 2007, the claimant was working at the International Paper Mill (now called Evergreen) when he slipped and fell, injuring his right knee and groin. He continued working but reported the incident to his foreman, Will Compton. No accident report was completed, and the claimant is unsure of the date of injury. Mr. Compton still works for the respondent-employer but was not called to rebut this testimony.

The claimant repeatedly asked the secretary to authorize medical treatment. Eventually, in May, 2007, his employer sent him to Healthcare Plus, the company physician where he came under the care of Drs. Morris and Alexander, general practitioners. An incident report was generated showing the claimant was injured on May 8, 2007 at the Hydrovac shop. Subsequently the claimant was evaluated by orthopaedic surgeons, Drs. Walker and Massanelli, who recommended hip surgery.

The claimant and his employer got into an argument toward the end of May, 2007, ending the employment relationship (Tr. p. 20-21, 32).

After the carrier denied his claim, the claimant tried to work part time for a friend doing farm work. He stated that he borrowed \$1,675.00 from his friend; worked August, September and October against the debt; and still owes his friend some money, (Tr. p. 22-23). No verification of these wages was provided.

The claimant remains symptomatic with pain and sleep disturbance. He wishes to pursue the doctor's recommendation for surgery but is financially unable to do so.

Co-worker, Paula Stevens testified she did not see the claimant fall, but crew members were talking about it. Ms. Stevens testified the claimant walked with an altered gait before the accident, but after March, 2007, his gait noticeably worsened.

Manager, T. J. Pendergrass testified the claimant reported a pulled groin muscle. After the third week, he was limping. Mr. Pendergrass told the claimant to go to the company doctor in May 2007. Mr. Pendergrass conceded the claimant was able to work prior to the incident in March, 2007. Mr. Pendergrass stated that he and the claimant argued about the claimant wearing his wedding ring on the job which was violation of policy. However, the claimant was not fired, he walked off the job, (Tr. p. 42-44). As I understand the lay testimony, Mr. Pendergrass' admonition to the claimant to "pack his bags" is the equivalent of firing an employee.

MEDICAL EVIDENCE

Prior to this workers' compensation claim for a hip injury, the claimant had been treated for back pain in 2000-2001 by Dr. Harold Wilson and Dr. Zach Mason on another worker's compensation claim. Dr. Wilson suspected the claimant of prescription drug abuse. He was diagnosed with multi-level degenerative disc disease and a small disc bulge at L5-S1. He was treated with medication and injections, assessed a 5% rating; and advised not to lift over 70-80 lbs. This claim was settled.

In the case at bar, the claimant saw the company physician, Dr. Gerald Morris with HealthCare Plus, on May 8, 2007. He reported work-related injuries and was diagnosed with a right hip strain after normal x-rays of the right hip and knee. He was prescribed medication, a splint, crutches, and light duty.

Dr. Morris' report of 5-8-07:

SUBJECTIVE:

He fell off of a hood of a truck today right on his knee. He kept working and then was carrying a very heavy hose, slipped and fell again on the same knee and is having both knee and groin and right hip pain.

OBJECTIVE:

There is a small abrasion and tenderness at the right knee, especially some burning pain at the gastrocnemius muscle posteriorly. There is no effusion. No popping or locking. Weight bearing is very painful to the patient. He also has pain up the thigh medially into the groin and public rami and hip area. (Emphasis added)

Dr. Morris' report of 6-7-07:

He fell off the flat bed of a truck four or five feet, injuring the right hip and straining muscles in the right groin.

In follow-up on May 15, 2007, the claimant complained of "pain which starts in his right hip and radiates into the right thigh. It is made worse by weight bearing, adduction, or external rotation of his right hip." The claimant was prescribed physical therapy for a "strain of the right hip, right lower extremity, and right sacroiliac joint."

Dr. Morris' report of May 24, 2007 indicated the claimant's decision to continue working might be contributing to his pain. On June 7, 2007, the claimant was excused from work. A

handwritten notation on the typed report shows a right hip “contusion” as an objective finding. In several reports, the doctor mentions the claimant was checked for a hernia due to his groin pain but the examination was negative.

Dr. Morris’ report of June 14, 2007 reveals the claimant had been experiencing hip pain prior to the May accident at work.

X-rays show some degeneration of the right hip, but nothing unusual. In talking to him, he has had some pain actually for a couple of months before he came in... he has never had leg or knee pain.

After comparing the claimant’s testimony with the medical records, it appears the right knee abrasion and right hip contusion from the accident in March was still evident when he saw the doctor in May and June.

FINDINGS AND CONCLUSIONS

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. Under the Act, the claimant has the burden of proving the following requirements by a preponderance of the evidence of record:

1. An injury arising out of and in the course of employment
2. An injury causing internal or external harm to the body, requiring medical services or resulting in disability or death
3. An injury established by objective medical findings
4. (a) An injury caused by a specific event identifiable by time and place of occurrence
or
5. (b) A gradual injury, caused by rapid and repetitive motion, which is the major cause of the disability or need for medical treatment.

There are numerous discrepancies in the record regarding the date of injury. According to the claimant, the accident happened in March and was reported to the employer but no accident

report was completed until May. The two people who could have refuted this testimony, the supervisor and secretary, were not called to testify. Mr. Pendergrass testified the claimant's condition worsened over three weeks until he went to the doctor in May, 2007, which would fit with the March to May timeline.

Where it is within the power of a party to call a witness or to produce evidence on a material question, the failure to produce the witness or evidence raises the presumption that the testimony or evidence would have been unfavorable to the party who has failed to produce it and every intendment will be favorable to the opposing party, Arkansas State Hwy. Comm. v. Phillips, 478 S.W.2d 27, 252 S.W.2d 206; Mutual Relief Assn. v. Weatherly, 172 Ark. 991, 291 S.W. 74 (1927); APCO Oil Corp. v. Stephens, 270 Ark. 715, 606 S.W.2d 134 (1980); Allred v. Demuth, 319 Ark. 62, 890 S.W. 2d 578 (1994).

Accordingly, I find the claimant sustained a specific injury in March arising out of and in the course of his employment and reported it to his supervisor, but no accident report was filled out until the claimant saw the company physician in May, 2007.

I find the knee abrasion and hip contusion noted in the medical records to be objective evidence of physical harm.

Based on lay testimony, the claimant was able to work prior to the incident but his condition worsened after the accident affecting his ability to work, supporting a causal connection between the accident, his need for medical treatment and subsequent disability.

The claimant had not received medical treatment for his hip, knee or leg prior to this incident so it is difficult to determine the existence of a preexisting condition. The medical records indicate his hip condition could be related to an injury or to other health risks. A co-worker testified the claimant walked with a "catch" prior to the incident but then the claimant also suffered from back trouble which could explain his altered gait. To the extent that the claimant may have suffered from a preexisting hip condition, the fall aggravated the preexisting condition Williams v. L & W Janitorial, Inc., 85 Ark. App. 145 S.W.3d 383 (2004). But as I interpret the medical evidence, the

first x-ray was negative, indicating there was no preexisting condition.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during March, 2007.
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. Respondents are directed to pay all reasonable and necessary medical expenses pursuant to Rule 30 within thirty days of receipt.
4. The claimant is entitled to temporary total disability benefits at a rate of \$336.00 weekly from May 31, 2007 to August 5, 2007 and from November 1, 2007 to a date yet to be determined as he remained in his healing period, unable to work.
5. The claimant is entitled to temporary partial disability benefits at a rate of \$200.00 weekly from August 6, 2007 to October 31, 2007 during the time he worked for a friend, but remained in his healing period.
6. The claimant's benefits are subject to a child support lien.
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.
8. 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.

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
Administrative Law Judge

Entered Nun Pro Tunc: March 3, 2008