

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711225

GARY R. RODGERS, EMPLOYEE	CLAIMANT
HELMS CATV SERVICE, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE COMPANY, c/o AIG CLAIMS SERVICE, INC., INSURANCE CARRIER/TPA	RESPONDENT #1
SECOND INJURY FUND	RESPONDENT #2

OPINION FILED JULY 9, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on May 9, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Jim R. Burton, Attorney-at-Law, Jonesboro, Arkansas.

Respondents #1 represented by Mr. Jarrod S. Parrish, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 did not appear.

STATEMENT OF THE CASE

A hearing was conducted May 9, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

A prehearing conference was conducted in this claim on January 15, 2008, 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 subject to some further clarification concerning the employment relationship. A copy of the Prehearing Order was

introduced as "Commission's Exhibit 1."

At the prehearing conference, it was stipulated that the employee/employer/carrier relationship existed at all relevant times through on or about September 20, 2007; that the claimant earned sufficient wages to entitle him to the maximum compensation rates of \$504.00 per week for temporary total disability and \$378.00 per week for permanent partial disability; and that respondents had controverted the claim in its entirety. At the hearing, the parties stipulated that the claimant was actually a covered, independent contractor rather than an employee because premiums for workers' compensation coverage were withheld from his wages to cover any work-related injury and that the Commission had jurisdiction over this claim.

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

Claimant contended, in summary, that he sustained a compensable injury to his neck, back, and hip as a result of a specific incident when he fell from a ladder on or about April 1, 2007; that he continued working through on or about September 20, 2007; that respondents should be held responsible for all outstanding hospital, medical, and related expenses, together with continued reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for the period beginning September 21, 2007, and continuing through the present,

maintaining that his healing period had not ended; and that a controverted attorney's fee should attach to any benefits awarded. The claimant specifically reserved the issue of entitlement to permanent disability benefits, if any. Because the record reflected that the claimant had returned to work for another employer on or about April 21, 2008, the claimant amended his contentions during the hearing to request temporary total disability beginning September 21, 2007, and continuing through April 21, 2008. (Tr.35-38)

The respondent contended that the claimant did not sustain work-related injuries on April 1, 2007, or on any other dates. Respondents contended that the medical documentation did not support a compensable injury and does not support entitlement to temporary total disability in the event a compensable injury was found. Alternatively, respondents maintained that they did not receive notice of any alleged injury until September 28, 2007, and would, therefore, not be liable for benefits prior to receipt of notice in the event a compensable injury was found.

Because all of the witnesses to this claim resided outside the State of Arkansas, the parties mutually agreed to submit evidentiary depositions of various lay witnesses. The record in this claim consists of the May 9, 2008, hearing containing several exhibits, together with the evidentiary depositions of Kristine Deere and Bill Melchionne introduced by the respondents at the hearing as "Exhibit C" and "Exhibit D," respectively, and retained in the Commission file in bound form, together with the evidentiary deposition of Jonas Taylor taken by the claimant

subsequent to the hearing and made a part of the record herein.

From a review of the record as a whole, to include medical reports, documents, depositions, and other matters properly before the Commission, and having read the testimony of the witnesses without the ability to observe their character and demeanor, save the testimony of the claimant, 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 within the meaning of the Arkansas workers' compensation laws which arose out of and during the course of a contractual relationship with Helm's CATV Service, the employer herein and which was the result of a specific incident identifiable in time and place of occurrence on or about April 1, 2007, which resulted in injuries requiring medical services which was confirmed by medical evidence supported by objective findings.
4. Respondents are responsible for any outstanding hospital, medical, and related expenses, and respondents remain responsible for additional

diagnostic testing and treatment to determine the exact nature and extent of the claimant's compensable injury.

5. The claimant has failed to prove that he is entitled to any temporary total disability benefits.
6. Claimant's entitlement to permanent disability benefits, if any, has been specifically reserved. The issue of claimant's entitlement to permanent disability requires further development of the medical evidence.
7. Respondents have controverted this claim in its entirety for purposes of attorney's fees. Since no indemnity benefits have been awarded, to date, any attorney's fee is premature pursuant to, and limited by, Ark. Code Ann. §11-9-715.

#### DISCUSSION

\_\_\_\_\_The relevant facts in this claim are basically undisputed. The only factual dispute appears to be whether or not the claimant requested medical treatment following one or more incidents when he fell off a ladder while providing employment-related services to the employer herein. In fact, the record as a whole indicates that a work-related incident occurred on or about April 1, 2007, which was observed by a co-employee, Jonas Taylor, as well as reported to the claimant's immediate supervisor, Bill Melchionne. The record reflects that following the work-related incident, the claimant continued working for the employer herein through on or about September 21, 2007, at which time he voluntarily terminated

his services for reasons totally unrelated to the claim. Although the record reflects that the claimant received some limited treatment following the April 1, 2007, incident, the claimant continued working. The record reflects that the claimant did not file a formal claim for benefits until after he voluntarily terminated his contractual relationship with the employer. Further, there is no medical evidence of record finding that the claimant was, at any time, unable to work. In fact, the only medical evidence introduced by the parties was limited to a diagnostic MRI taken approximately two (2) months after the claimant's fall and some notes from the Family Medical Clinic where the claimant was seen by Dr. Donald Lamoureux in Horseshoe Bend, Arkansas, his primary care physician, beginning July 3, 2007, which are of little probative value.

The claimant, Gary R. Rodgers, a/k/a Rich Rodgers, testified in his own behalf. The claimant is thirty-eight (38) years old. At the time of the hearing, the claimant was four (4) credits shy of obtaining a Bachelor's Degree in Internet Technology. In addition, at the time of the hearing, the claimant was working with a company out of California doing internet and telephone wiring for a new ASU campus addition. Prior to his current employment, the claimant contracted with the employer herein, Helm's CATV Service, as a cable TV installer. The claimant performed services for the employer beginning on or about September, 2005, through September 21, 2007. The claimant worked primarily in Little Rock, Arkansas, and Hattiesburg, Mississippi. The claimant testified that during April,

2007, while installing cable, he fell off an extension ladder and landed flat on his back. The claimant maintained that the incident was witnessed by his co-worker, Jonas Taylor. He further stated that he reported the incident to his immediate supervisor, Bill Melchionne, but that he continued working. (Tr.18-20)

The claimant maintained that he merely changed his work habits and continued working. The claimant stated that he initially received treatment from a chiropractor, Dr. Rapetti, and that he saw Dr. Rapetti six (6) times; however, no reports from Dr. Rapetti were introduced. The claimant stated that he subsequently contacted the VA in Hattiesburg, Mississippi. The claimant is a former Army Ranger. He stated that the VA scheduled a MRI. The MRI dated June 5, 2007, contains a clinical history of the claimant falling off a telephone pole. Although there is no comparison reports, the MRI did reveal some objective findings at both L3-L4 and L4-L5, specifically, slight disc bulge at L3-L4, as well as a central disc herniation at L4-L5. (Cl. Ex. A)

The claimant was next examined and treated by his family physician, Dr. Donald Lamoureux, in Horseshoe Bend, Arkansas. The claimant was initially seen by Dr. Lamoureux on July 3, 2007. Admittedly, Dr. Lamoureux's history contains an inaccurate history concerning the date of the claimant's fall because it indicates that the claimant states: "fell off a telephone pole 2 weeks ago, went to VA where an MRI was done, and was told he had ruptured L4 and L5 in his spine." Clearly, the error in Dr. Lamoureux's report can be attributed to the physician's

clerical error because the MRI, aforementioned, was taken more than a month before the claimant went to Dr. Lamoureaux. The best explanation is that the claimant reported a fall approximately two (2) months rather than two (2) weeks prior to the visit. In any event, as previously pointed out, the claimant was never taken off work and, in fact, continued working until voluntarily terminating the employment relationship in late September, 2007, at which time he left Hattiesburg, Mississippi, and returned to Arkansas to be with his family because his wife was required to undergo surgery. Although the claimant maintained that he was temporarily totally disabled for the period beginning September 21, 2007, until returning to work for another employer during April, 2008, his testimony concerning his disability is a mere conclusion, unsupported by the record as a whole. On cross-examination, it was pointed out that the claimant had his own web-site and worked six (6) days a week analyzing computer problems. The claimant maintained that he did not earn any wages as the result of his internet service. It is clear that the claimant has several technical skills and has, at all times, had the ability to be gainfully employed. In fact, the claimant's course of conduct and work history with the respondent herein, as well as his current employment reflects that the claimant has been capable, at all times, of remaining gainfully employed.

Jonas Taylor, a witness called by the claimant, by evidentiary deposition submitted subsequent to the hearing, corroborated the claimant's testimony concerning two (2) separate incidents when the claimant fell off a ladder. Mr. Taylor

stated that the first incident occurred on or about April, 2007, when the claimant fell off a ladder, and that a second incident occurred on or about September, 2007. Mr. Taylor stated that he personally observed the first incident while acknowledging that he only learned about the second incident after the fact as reported by the claimant.

The only factual dispute concerns whether the claimant requested medical treatment following the April, 2007, fall. The claimant maintained that he frequently requested medical treatment from his immediate supervisor, Bill Melchionne. Mr. Melchionne specifically denied that the claimant ever requested any medical treatment from him; however, Mr. Melchionne acknowledged that the claimant reported falling from a ladder to him personally on or about April, 2007. No claim was filed because the claimant did not request medical treatment. Mr. Melchionne acknowledged that the claimant periodically complained about problems with his back after April, 2007, but that his complaints did not prevent him from working.

#### COMPENSABILITY

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).

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, *Wal-Mart Stores, Inc. v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). However, if the disability does not manifest itself until months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. *Kivett v. Redmond Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962). See also, *Wentz v. Servicemaster*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

The claimant was involved in a work-related incident during April, 2007. The incident was witnessed by a co-worker. The incident was reported to the claimant's supervisor. The incident resulted in the claimant's need for medical treatment. An MRI taken on June 5, 2007, reflects that there was objective findings to support the claim.

After reviewing the evidence in this case impartially, without giving the benefits of the doubt to either party, I find that the claimant has proven that he sustained a compensable injury within the meaning of the Arkansas workers' compensation laws. Accordingly, the claimant is entitled to payment of reasonably necessary medical treatment, as well as follow-up diagnostic testing to determine the nature and extent of the claimant's injury.

Alternatively, respondents maintained that if compensability is determined, that it is not responsible for any benefits prior to the filing of a formal claim on September 28, 2007. Because the employer had knowledge of the injury, it is my finding that failure to give written notice is not a bar to the claim. A.C.A. §11-9-701(b)(1)(A).

#### TEMPORARY TOTAL DISABILITY

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate his ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant has the burden of proving his entitlement to any benefits. The record as a whole reflects that the claimant had, at all times, been physically able to perform various forms of work. In fact, the claimant's course of conduct and work history suggests that he has, at no time, been totally disabled within the meaning of the Arkansas workers' compensation laws. Accordingly, the claim for temporary total disability must be, and it is, hereby respectfully denied and dismissed.

The claimant has specifically reserved the issue of entitlement to permanent disability, if any. Indeed, it appears that in the event the claimant is entitled to disability benefits, they are permanent in nature. By necessity, claimant's entitlement to additional benefits requires further development of the medical evidence.

#### AWARD

Respondents, Commerce & Industry Insurance Company and AIG Claims Service, Inc., is hereby directed and ordered to pay all outstanding hospital,

medical, and related expenses as the result of claimant's compensable injury and respondents remain responsible for continued reasonably necessary medical treatment, including additional diagnostic studies to determine the nature and extent of claimant's injuries.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge