

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F710017

KARL SCHUENEMANN, Employee	CLAIMANT
FRANK CRUM 1, INC., Employer	RESPONDENT
PROVIDENCE PROPERTY & CASUALTY, Carrier	RESPONDENT

OPINION FILED APRIL 28, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by C. MICHAEL WHITE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 3, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 28, 2007, and a pre-hearing order was filed on November 29, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties at all relevant times.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to the maximum compensation rate.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to low back on February 8, 2007.
2. Medical.

3. Temporary total disability benefits.
4. Notice.
5. Attorney fee.

At the time of the hearing the claimant indicated that his alleged date of injury was on or about December 5, 2006, not February 8, 2007. In addition, the claimant also withdrew as an issue his entitlement to temporary total disability benefits.

The claimant contends he sustained a compensable injury on December 5, 2006 when his lower back was injured while bending a wire in an electrical panel. He contends that he is entitled to the payment of medical treatment for his compensable injury.

The respondents contend the claimant cannot sustain his burden of establishing by a preponderance of the evidence the elements necessary to establish a compensable injury under the Arkansas workers' compensation law. In the event the claimant is found to be compensable, the respondents contend that claimant is not entitled to any benefits prior to the time that he gave the respondents notice of the alleged injury.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 28, 2007, and contained in a pre-hearing order filed November 29, 2007, are hereby accepted as fact.
2. The parties' stipulation that claimant earned sufficient wages to entitle him to the maximum compensation rate in effect in 2006 is also hereby accepted as fact.
3. Claimant has met his burden of proving by a preponderance of the evidence that

he suffered a compensable injury to his low back while employed by the respondent.

4. Respondent is not liable for payment of compensation prior to January 5, 2007 when claimant provided notice of his work-related injury.

FACTUAL BACKGROUND

_____The claimant is a 45-year-old man who has worked for Prime Power as an electrician for eight years. Prime Power entered into an agreement with Frank Crum, a PEO. In late November and early December 2006 Prime Power was performing electrical work on the Dayco building. Claimant testified that as a part of this process he and Alex Carlson had to “pull wire” into the main electrical box. Claimant testified that on or about December 5, 2006 while he was performing this activity of “pulling wire” he felt something snap in his back. Claimant testified that the wire he was pulling was approximately one inch in diameter and took a great deal of force to bend. Claimant testified that after this incident his co-worker had to finish the wiring. At some point after this incident the claimant sought medical treatment from the Sands Chiropractic Clinic, a clinic from whom claimant had previously received treatment following a motor vehicle accident in May 2005.

After some initial medical treatment at Sands the claimant was evaluated by Dr. McGehee who treated claimant with medication and physical therapy. Dr. McGehee ordered an MRI scan which was read as revealing a disc herniation at the L2-3 level with a possible compromise of the L2 nerve root. Claimant subsequently came under the care of Dr. Raben, neurosurgeon. Dr. Raben did not read the MRI scan as showing a frank disc herniation and he has treated claimant conservatively with medication and physical therapy.

Claimant has filed this claim contending that he suffered a compensable injury to his low back while employed by respondent on or about December 5, 2006. He requests payment of medical treatment relating to his compensable injury.

ADJUDICATION

_____ Claimant contends that he suffered a compensable injury to his low back while working for the respondent on or about December 5, 2006. Claimant's claim is for an injury which was caused by a specific incident and is identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

_____ After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back.

Initially, it must be acknowledged that claimant had a pre-existing injury to his spine which involved the low back following a motor vehicle accident in May 2005. Claimant received medical treatment for his back injury from the Sands Chiropractic Clinic. The medical records contain a letter from Dr. Collins at Sands dated May 30, 2006 indicating that claimant had been released from care for injuries sustained in the accident of May 2005. However, Dr. Collins indicated that he would recommend palliative care for continued instability in the claimant's spine. The medical records indicate that claimant did

in fact continue to receive some treatment from Sands after that date. However, Dr. Collins also indicated in a letter dated January 21, 2008 that claimant had new complaints as of December 6, 2006.

According to our patient records, Mr. Schuenemann reported to Sands Chiropractic on December 6, 2006 with a new complaint of lower back pain with radiation of pain into the right flank.

Thus, while claimant did have a pre-existing injury to his low back, the medical records in the form of a letter from Dr. Collins indicate that claimant had a new complaint of lower back pain with radiation into his right flank as of December 6, 2006. This would have been shortly after claimant's injury.

It is apparent from a review of claimant's testimony and the medical records in this case that claimant is a poor historian with respect to dates and the temporal relationship of various incidents such as the injury and dates of medical treatment. There is certainly medical evidence which does not support a finding of compensability. Dr. McGehee's medical reports seem to relate claimant's low back complaints to the motor vehicle accident in May 2005. The first medical report containing a history of a work-related history while pulling wire is Dr. Raben's medical report of June 26, 2007. Despite these discrepancies, I nevertheless find that claimant has proven a compensable injury because his testimony is corroborated by other evidence of record. First, as previously noted, the January 21, 2008 letter from Dr. Collins indicates that claimant was seen on December 6, 2006 with new complaints of lower back pain with radiation into his right flank. These complaints had not been present prior to December 6, 2006. Furthermore, claimant's testimony regarding the injury is corroborated by the testimony of two other witnesses, including a totally unbiased witness.

Testifying at the hearing was Blain Erskine who is employed as a project manager for Edwards Design & Construction. Erskine testified that Edwards frequently employs the

respondent to perform electrical work. Erskine testified that in November and December 2006 Edwards was in the process of building a tech lab addition for Dayco. He further testified that the building was “finaled” at the end of November 2006 and that an electrical transformer changeover occurred at that time. Erskine testified that this process required “pulling wire”. Significantly, Erskine testified that he recalls the claimant complaining of having injured his back while pulling wire during this process.

Also testifying at the hearing was Alex Carlson, an employee who was working with the claimant on the day of the injury. Carlson testified that he remembers an incident when he and claimant were pulling wiring and claimant said that he felt something pop in his back. Carlson testified that he could see that “it was bothering him.” Carlson testified that he finished the wiring job himself and that after that incident the claimant changed his work style with regard to lifting and “different things.”

In my opinion, the medical report from Dr. Collins indicating that claimant made new complaints on December 6, 2006 coupled with the testimony of Erskine and Carlson corroborating claimant’s testimony outweighs the inconsistencies in claimant’s testimony and the medical reports regarding dates and the cause of claimant’s complaints.

In short, after consideration of all of the evidence of record, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and that he has offered medical evidence supported by objective findings establishing an injury. Dr. Collins’ letter of January 21, 2008 indicates that at the time of the examination on December 6, 2006 when claimant was making new complaints

objective findings included muscle spasms. Likewise, medical reports from Dr. McGehee indicate that muscle spasms in the claimant's lumbar spine were observed and he was prescribed medication for that condition. As a result of claimant's compensable injury, he has been treated conservatively with medication and physical therapy.

Based upon the foregoing, I find that claimant has satisfied the remaining elements of compensability.

For the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by the respondent on or about December 5, 2006.

The next issue for consideration involves notice. According to A.C.A. §11-9-701, unless an injury renders an employee unable to do so the employee must report the injury to the employer immediately after it occurs. Failure to do so results in the employer not being responsible for any compensation benefits prior to the reporting of the injury. A claimant's failure to give notice may be excused if the employer had knowledge of the injury; the employee had no knowledge that the condition arose out of and in the course of employment; or the Commission excuses the failure on grounds that for some satisfactory reason notice could not be given.

I find that claimant failed to provide notice of the injury to the respondent until four weeks after the injury occurred and I find that no satisfactory reason for this failure to give notice has been shown.

Testifying at the hearing was Phillip Cowen, the owner of Prime Power. Cowen testified that he was claimant's supervisor and that claimant did not mention a work-related injury to him until at least three or four weeks after the injury occurred. Claimant corroborated Cowen's testimony and admitted that it may have been three or four weeks after the injury before he reported it to either Cowen or Mylie, a secretary for the respondent.

I do not find any satisfactory reason for claimant's failure to provide notice of the injury to the respondent. As previously noted, claimant had even reported the injury to Blain Erskine, an individual who worked for another company. In addition, claimant had also sought medical treatment for new complaints from Sands Chiropractic Clinic. Given claimant's admission that he did not report the injury to the respondent until three or four weeks after it occurred. I find pursuant to A.C.A. §11-9-701 that respondent is not liable for payment of any compensation benefits prior to January 5, 2007.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury. Respondent is not liable for payment of compensation benefits incurred prior to January 5, 2007.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$471.50.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE