

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F505590

RICKEY STRONG, EMPLOYEE	CLAIMANT
PINE BLUFF HAULING, EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE CO. OF NORTH AMERICA/ GALLAGHER BASSETT SERVICES (TPA), INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 5, 2008

Hearing before Administrative Law Judge Barbara Webb on November 9, 2007, in Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Mr. Gene E. McKissic, Attorney at Law, Pine Bluff, Arkansas.

Respondents No. 1 were represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on November 9, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on July 17, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the July 17, 2007 Pre-hearing Order is made a part of the hearing record.

By agreement of the parties, the stipulations as submitted by the parties in the Pre-hearing Order as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on May 23, 2005.
3. The claimant's average weekly wage was \$436.00, resulting in a temporary total disability rate of \$291.00.
4. The claimant sustained a prior injury to his back in January of 2001.
5. Respondents No. 1 have controverted this claim in its entirety.
6. The claimant was paid short-term disability benefits by CIGNA on behalf of Waste Management from May 22, 2005, through September 24, 2005 at a rate of \$250.00 per week for a total of \$4,485.60.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. The compensability of claimant's alleged May 23, 2005 injury.
2. The claimant's entitlement to temporary total disability benefits and medical expenses.
3. Controversion and attorney's fees.
4. The claimant reserves the issue of his entitlement to permanent total disability and/or wage loss benefits.

CONTENTIONS

The claimant contends he was an employee of respondents on May 23, 2005, and on that date he sustained a compensable injury to his back while stepping down from a garbage truck during the course and scope of his employment. The claimant contends he is entitled to temporary total disability benefits from May 23, 2005, until a date yet to be determined. The claimant contends he is entitled to medical benefits, as well as attorney's fees. The claimant contends that respondents have refused to offer him any employment within restrictions as recommended by his authorized treating family physician. The claimant reserves all other issues, including permanent and total disability and/or wage loss.

Respondents No. 1 contend that the claimant's problems are idiopathic in nature and not related to his employment. Alternatively, respondents No. 1 contend that claimant's problems are a recurrence of his previous back problems and not due to an alleged work-related injury in May of 2005. Alternatively, respondents No. 1 contend that if the claim is found compensable, they are entitled to an offset pursuant to A.C.A. § 11-9-411 for disability payments paid to the claimant by Waste Management. Respondents No. 1 join in the Second Injury Fund's contention that there are no objective findings of a physical injury.

Respondent No. 2, the Second Injury Fund, contends that there must be a compensable injury for Second Injury Fund liability. They further contend that claimant cannot meet his burden of proof to show a compensable injury and that

claimant's incident resulted from an idiopathic condition peculiar to himself and not work-related. The Fund additionally contends that there are no objective or measurable findings of physical injury over and above what was already there previously when a comparison is made between a diagnostic test before and after May 23, 2005.

The record consists of a one volume transcript of the November 9, 2007 hearing, consisting of the testimony of Rickey Strong, George Lee Whale, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Reports with Index); and Respondents No. 1's Exhibit No. 1 (Medical Records with Index); Respondents No. 1's Exhibit No. 2 (Non-medical Evidence with Index); Respondent No. 2's Exhibit No. 1 (Medical Records with Index); Respondent No. 2's Exhibit No. 2 (Deposition of Rickey Strong). In addition and in lieu of her testimony, the parties stipulated that Joycette Strong is related to the Claimant by marriage and that whatever the claimant testifies to would be corroborated by her testimony.

FACTUAL BACKGROUND

The claimant, Rickey Strong, is fifty years of age (b.d. 05-27-57). He completed twelfth grade and can read and write the English language. He worked for respondent No. 1, Pine Bluff Hauling a/k/a Waste Management, from 1999 until May of 2007. Waste Management is in the business of picking up garbage or refuse. Strong was a truck driver and operated one of the large trucks picking up the canisters beside the road. He injured his back in 2001 and

underwent back surgery. Following surgery, he returned to work for Waste Management as a lead driver. As a lead driver he was not required to drive a garbage truck every day. After a change in management, he began operating a truck on a daily basis in January of 2005. In this job, he would have to use a handle to physically pull himself up and into the truck since it was about four to five feet from the ground. He was driving on gravel roads in Arkansas County causing a rough and bouncing ride. Strong explained that his back began hurting and he began seeing a chiropractor.

Strong testified that on May 23, 2005, he was delivering a container to an apartment complex. As he stepped down out of the truck, he felt a real sharp pain in his lower back and radiating down his leg. He rested in the office for approximately fifteen minutes and on a scale of one to ten, his pain level was a ten. He explained that the pain was more severe than the pain he had been experiencing after work. He could not continue to drive and contacted his supervisor, David Cockrell. Cockrell picked him up and took him back to the office. He sought medical treatment with Dr. Harris and was admitted to the hospital. He was also evaluated by Dr. Simpson. He was diagnosed with acute lumbar strain. After conservative treatment, Strong tried to return to work but his doctor recommended that he not drive a truck. He explained that prior to January, 2005, he was driving a regular pick-up truck which did not require climbing and did not have the bouncing. He currently works part-time for himself. He does not drive a big truck, lift, or put stress on his back. He testified that

Waste Management had not offered him a job within the restrictions outlined by Dr. Harris.

On cross-examination, Strong testified that he had back problems in 1985 and 1986. He recalled having a low back injury while working for a lumber company. He reported the injury, sought medical treatment for a herniated disk at L-5, and was paid benefits. In 2001, he was injured while working for Waste Management, while dumping garbage out of his truck. He reported the injury and was treated by the company doctor and received benefits. He was treated surgically by Dr. Simpson for back pain and pain radiating down the right leg, similar to the current complaints.

George Whale testified for the respondents. He was initially employed by Little Rock Hauling in Little Rock in August of 2002 and began working in Pine Bluff in July of 2003. He explained that Strong was fixing and repairing carts and helping with observations. He testified that Strong was a truck driver and began driving trucks again in 2005. He explained that Strong told him that on May 23rd he was walking to the customer location and felt pain. Strong related the pain to arthritis. He understood the condition was not work-related and Strong went to his own doctor, not the workers' compensation doctor. Strong's claim was handled as a non-work-related claim through his group health and short-term disability insurance. Strong never filled out any paperwork to report a work-related claim. On cross-examination, Strong had to have help to get back from the job after the injury.

On rebuttal, Strong testified that he reported to Whales how the injury occurred and that Whales sent him to his own doctor.

Medical records reflect that the claimant previously sought medical treatment in January of 2001 for a lumbar strain. On February 10, 2001, an MRI indicated that the claimant suffered from L5-S1 disc disease with right paracentral disc herniation. On March 1, 2001, Dr. Simpson performed a lumbar hemilaminotomy on the claimant. On May 2, 2001, the claimant was released to return to light duty work. On May 16, 2001, the claimant attempted to return to work but the work was too rough on his back. On July 11, 2007, the claimant was returned to work with restrictions of no lifting.

On August 15, 2001, Dr. Simpson found that the claimant had reached maximum medical improvement with a 10% impairment. On December 20, 2001, the claimant underwent an independent medical examination performed by Dr. Peoples. Dr. Peoples agreed with the findings of Dr. Simpson. On March 28, 2002, the claimant returned to Dr. Simpson with complaints of pain and numbness. The claimant was taken off work for one month and treated conservatively.

On May 23, 2005, the claimant sought treatment with Dr. Harris. Clinic notes reflect that the claimant presented with complaints of severe low back pain radiating to his right leg. "He states that the pain started today when he got out of his truck at work, and pretty soon was so bad that he could hardly get back in the truck". He was hospitalized for pain management and an MRI. The MRI report dated May 24, 2005, observed "There is asymmetrical bulging at the disk

at L5-S1 on the right, which abuts the nerve root. This could cause the radiculopathy experienced by the patient.” The MRI findings reflect “Focal abnormal soft tissue density on the right at L5-S1 which may represent a focal bulge in the annulus or a small herniated disk far laterally @ L5-S1 on the right.” On May 24, 2005, Dr. Harris noted that claimant said he was getting out of the truck and had severe low back pain radiating down to the right foot – just like it did when he had his herniated disk in the past. On June 1, 2005, Dr. Simpson noted that the MRI was negative and that the claimant appeared to be getting better and was not a candidate for surgery. On June 2, 2005, Dr. Harris noted that Strong had been hospitalized since 5-23-05 with “severe low back spasms” that were uncontrolled with oral medications. On July 22, 2005, Dr. Harris noted that it was the opinion of two neurosurgeons that the MRI revealed scar tissue which was causing pain under excess stress and strain. He noted, “I feel his occupation as a sanitation driver is, at least at times, exacerbating his problem” due to the bouncing and climbing up and down. He further noted that Strong could perform any job with a normal workday and could sit, stand, walk, and ambulate satisfactorily.

DISCUSSION

Compensability

Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”:

(a)n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is

caused by a specific incident and is identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

An idiopathic injury is one whose cause is personal in nature, or peculiar to the individual. Swaim v. Wal-Mart Assoc., Inc., 91 Ark. App. 120, 208 S.W.3d 837 (2005). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998). Where a claimant suffers an unexplained injury at work, it is generally compensable. Little Rock Convention & Visitors Bureau v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997). Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk of injury or aggravate the injury. Cedar Chemical Co. v. Knight, No. 07-307 (Ark. January 31, 2008).

In the instant case, respondents contend that the outcome of this case should be governed by Whitten v. Edward Trucking/Corp. Solutions, 87 Ark. App. 112, 189 S.W.3d 82 (2004), a case in which the Court of Appeals held the

claimant's injury to be idiopathic. The claimant in Whitten suddenly felt a pain in his back as he was ascending the stairs to his supervisor's office. The evidence did not show that he tripped, stumbled, or was carrying anything heavy at the time. A medical examination of the claimant revealed that he suffered from three pre-existing injuries, which could have caused his pain, none of which were caused or aggravated by his employment. Nor did the court find evidence that his employment significantly increased his risk of injury or contributed to his fall. *Contrast, ERC Contractor Yard & Sales, supra.*

However, I find that the instant case is analogous to Cedar Chemical Co. v. Knight, supra, and Crawford v. Single Source Transportation, 87 Ark. App. 216, 189 S.W.3d 507 (2004). In the instant case, the claimant gave a detailed account of his actions preceding the onset of pain. He testified that he was injured as he descended the steps of the garbage truck. He explained that he had to sit down, had to call for help, and could no longer perform his job duties. He sought medical treatment, underwent an MRI, and was diagnosed with acute lumbar strain. While there is medical evidence that the claimant continued to have symptoms and problems with his low back after his surgery, he was able to return to work in 2002 and work without medical treatment for several years. It was only when the claimant returned to the daily routine of driving the garbage truck that he began to have pain. He explained the symptoms and pain on May 23, 2005, as similar to the time in 2001 when he suffered the herniated disk prior to surgery. The medical evidence further documents new findings including muscle spasms and the May 24, 2005 MRI revealed a possible herniated disk.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

Objective Findings

Respondents contend that there are no "objective findings" as required in order to support compensability of the alleged injury. The claimant bears the burden of proving a compensable injury by a preponderance of the evidence. Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004). In addition to proving his injury by a preponderance of the evidence, the claimant must

establish the existence of the injury by medical evidence and supported by “objective findings.” See Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those that cannot come under the voluntary control of the patient. See Ark. Code Ann. § 11-9-102(16)(A)(i). The claimant must also prove that there is a causal connection between the work-related accident and the injury. Stevenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). With respect to this proof, the claimant must show that the “major cause” of the injury is the workplace. When making this determination, the claimant does not receive the benefit of the doubt. Ark. Code Ann. § 11-9-704(c)(4)(Supp. 1995); Glencorp Polymer Products v. Landers, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

In the present case, I find that the claimant does establish a compensable back injury by medical evidence supported by objective findings. A review of the medical records offered in this case reflect there is objective medical evidence that the claimant sustained an acute lumbar strain as evidenced by muscle spasms and MRI findings of scar tissue which was determined by Dr. Harris and Simpson to constitute an aggravation to his back as a result of the work-related incident.

Causation

In a workers’ compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stevenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the

Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B)(Repl. 1996). The Arkansas Court of Appeals has held:

the plethora of possible causes for work-related injuries includes many that can be established by a common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident - but not in every case. We find the Court of Appeal's reasoning in *Millican* and *Tilley* persuasive. We therefore adopt the holding in *Millican* that objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and the work-related incident (emphasis added).

Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000), quoting Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). See Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997) and Aeroquip, Inc. v. Tilley, 59 Ark. App. 163, 954 S.W.2d 305 (1997).

Based on this reasoning, Freeman, summed up the current state of the law as such:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between the injury and the claimant's employment, but if an unnecessary medical opinion is offered on that issue, the opinion must be stated with a reasonable degree of medical certainty.

Freeman, supra, citing Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

The law is clear that medical opinions based upon “could”, “may”, “possibly”, and “can” lack the definitiveness required by Ark. Code Ann. §11-9-102(16)(B)(Supp.1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Scott v. Middleton Drywall, 2005 AWCC 22 (Feb. 9, 1005) (“probably did” found insufficient to prove causation); Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) (overruling prior Court of Appeals decision and holding that “could” was insufficient to satisfy standard); Crudup v. Regal Ware, Inc. , 341 Ark. 804, 20 S.W.3d 760 (2001) (“theoretical possibility” did not meet standard of proof); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001) (to pass muster, opinion must be more than speculation and go beyond possibilities).

The Arkansas courts have frequently discussed the distinction between a recurrence and an aggravation of a pre-existing injury. When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence is not a new injury but simply another period of incapacitation resulting from the previous injury. Pinkston v. General Tire & Rubber Co., 30 Ark. App. 46, 782 S.W.2d 375 (1990). The test for determining whether a subsequent episode is a recurrence or an aggravation is

whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Id.*

In Davis v. Helena Chemical Co., claimant suffered from a pre-existing lumbar degenerative condition before sustaining a compensable injury. Full Commission Opinion, filed August 3, 1999 (D406121). The Full Commission affirmed an administrative law judge's finding that claimant was entitled to additional medical treatment, stating:

The respondents' and the dissent's central argument in this case is that the treatment the claimant is presently receiving is because of an ongoing degenerative condition which would be occurring whether or not the claimant suffered an injury in 1984. However, this argument overlooks the fact that the claimant's previously asymptomatic degenerative process physically progressed and became symptomatic because of his 1984 compensable injury . . . the compensable injury, not some speculative event, is what resulted in the claimant's present condition.

Id.

The Full Commission later upheld a finding of compensability where symptoms of claimant's pre-existing condition were asymptomatic for five years prior to the compensable event. Jerry Hamblton v. Guy King & Sons, Inc. & Bituminous

Casualty Corp., Full Commission Opinion, filed February 22, 2001 (E904812).

The Commission held that a preponderance of the evidence showed that claimant's symptoms were the result of his compensable injury, despite the fact that claimant had a pre-existing ongoing degenerative process. Id. at 19.

In the instant case, as demonstrated above, there is medical evidence to confirm that claimant aggravated his pre-existing condition. The evidence further demonstrates that his need for treatment was related to the claimant's work-related injury. Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the medical treatment provided by Dr. Harris and Dr. Simpson is reasonable and necessary and related to the compensable injury.

Temporary Total Disability

The claimant is entitled to temporary total benefits if he can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). Based on Dr. Simpson's recommendations, the claimant remains in his healing period. I find that the claimant is entitled to temporary total disability for the time period from May 23, 2007, through a date yet to be determined.

Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that respondents have fully controverted compensability of the claimant's back injury in May of 2007, medical treatment, and temporary total disability benefits from May 23, 2007, to a date yet to be determined. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on May 23, 2005.
3. The claimant's average weekly wage was \$436.00, resulting in a temporary total disability rate of \$291.00.
4. The claimant sustained a prior injury to his back in January of 2001.
5. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury at a specific date and time.
6. Respondents No. 1 have controverted this claim in its entirety.

7. Claimant has proven by a preponderance of the evidence that he is entitled to medical treatment and temporary total disability benefits from May 23, 2007, until a date yet to be determined.
8. The claimant was paid short-term disability benefits by CIGNA on behalf of Waste Management from May 22, 2005, through September 24, 2005 at a rate of \$250.00 per week for a total of \$4485.60. Respondents are entitled to an offset pursuant to A.C.A. §11-9-411 for any short-term disability payments received by claimant.
9. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

Respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein. 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 Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

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IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge