

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F705097**

<b>JOHN WALKER, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>DREW COTTONSEED OIL MILL, EMPLOYER</b>	<b>RESPONDENT</b>
<b>AIG CLAIMS SERVICE, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 24, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on April 25, 2008 at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE ERIN M. DALTON, and the HONORABLE JEFFERY H. KEARNEY, Attorneys at Law, Pine Bluff, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, anatomical impairment and attorney's fees.

At issue is whether or not the claimant sustained compensable injuries 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 an employee/employer/carrier relationship on April 21, 2007, at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$358.00/\$269.00 in the event this claim is found to be compensable. The healing period ended on July 2007. Blue Cross Blue Shield has paid some expenses but they were not identified in the

claimant's prehearing questionnaire and have not been given notice of these proceedings in order to file a lien. The claimant drew unemployment benefits from August 29, 2007 to January 20, 2008.

The claimant contends that he gradually developed back pain starting in December 2006 , culminating in the need for medical treatment on April 21, 2007, as a result of his job duties. The claimant also sustained a specific left hand injury on April 21, 2007. He seeks payment of medical expenses, temporary total disability benefits from April 22, 2007 to July 9, 2007 and attorney's fees.

The respondents contend the claimant's back injury is not compensable because the injury is not the major cause of disability or the need for medical treatment.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the December 10, 2007 deposition of the claimant, incorporated by reference.

The claimant , who was emotionally distraught, was the only witness to testify at the hearing.

The claimant (D.O.B. June 3, 1957) has a high school education. His employment history includes work as a lead man at a lumber mill producing hardwood flooring and general carpentry. His health history includes hypertension but he denied any prior back or hand injuries. In 1981, he injured his head in a motor vehicle accident resulting in seizures.

The claimant was employed by the respondent-employer as a head cutter machine operator at \$13.29 per hour. He had worked for them 11 years at the time of his injuries.

The claimant injured his back in a lifting incident removing styrofoam logs weighing up to 250 pounds from the conveyor belt to the floor so they could be transported by forklift, (Depo.

12-19, 26/Tr. p. 10-11, 16-20, 26, 28-29, 37-38). He reported the incident but temporary supervisor, Keith Stewart, told him he would be fired if he didn't finish his shift. The claimant had been complaining to his usual supervisor, Jerry Miller, about his back for 4 months because co-workers weren't pulling their weight. On April 21, 2007, the claimant was working alone because the plant was shorthanded and his pain became worse.

The claimant received treatment from his family physician, Dr. Connelly. He was referred to Dr. Cathey who performed surgery on May 23, 2007. His back remains sore with pain in his right hip and leg. He has difficulty with prolonged sitting and standing.

The claimant also injured his left hand on April 21, 2007 while running blocks (Depo. p. 23-26, 42/Tr. p. 10, 29-32, 36). He smashed his hand and it became swollen. He saw Dr. Connelly and was diagnosed with cellulitis. This exam revealed his blood pressure was elevated and the doctor gave him some medication and x-rayed his back and hand. The claimant also took a drug test. After three weeks of medication, the claimant's hand improved.

When the claimant tried to return to work on July 9, Glenda Andrew, Human Resource manager, informed him he was fired due to a positive drug screen taken April 23, 2007. However, Attorney Newell has not raised an intoxication defense in this claim.

After the claimant lost his job and insurance, he came under the care of Dr. Burt. He applied for unemployment benefits in August, 2007 and drew \$270.00 weekly until the end of January, 2008. On February 28, 2008 he began employment with H & L Poultry sanitizing equipment. He is able to perform the work but bending to clean under machinery bothers his back. At H & L Poultry, the claimant earns \$8.00 an hour for a forty hour week plus 8 hours of overtime per week.

#### **MEDICAL EVIDENCE**

Dr. Connelly's report of February 13, 2007 indicates the claimant was treated conservatively for a work-related right knee injury.

There are some internal inconsistencies in the reports. I am interpreting the information at the top of the report to be in the nurse's handwriting while the bottom of the report is the doctor's handwriting. On Monday, April 23, 2007, the claimant saw Dr. Connelly for left hand pain and swelling with difficulty moving the third finger. A nurse's note indicates the symptoms began on Saturday morning without any injury. His blood pressure was 148/92. Dr. Connelly ordered x-rays, an MRI scan of the lumbar spine and prescribed Keflex, an antibiotic for the hand injury. There is also a notation in the doctor's handwriting for LBP-RLE, which I am interpreting as low back pain and right lower extremity pain.

A drug screen was performed on April 23, 2007 at 3:00 p.m. The May 17, 2007 results were positive for opiates. The claimant attributes this finding to prescription medication from Dr. Connelly.

In follow-up on April 25, 2007, the nurse wrote "L hand still swelled and painful. States was 'mashed between 2 blocks' @ work (April 19, 2007)." Dr. Connelly diagnosed cellulitis.

In the April 30, 2007 report the nurse recorded the back injury for the first time with a history of injury last Monday (April 23, 2007) lifting at work. A notation on the report indicates Glenda Andrew, the human resource representative for the respondent-employer, approved the doctor's request for diagnostic testing.

A hospital report dated May 7, 2007 indicates the lumbar spine injury was a workers' compensation claim. The MRI scan revealed degenerative changes, a herniated nucleus pulposus at L5-S1 with significant stenosis, and bulging at L4-L5 with mild to moderate stenosis.

On May 17, 2007 the claimant consulted Dr. Cathey giving a history of work-related back

and radiating right hip and leg pain becoming increasingly severe over the last 3-4 weeks.

Dr. Cathey performed surgery at L5-S1 on May 23, 2007. He commented, "His neurological examination is consistent with an S1 nerve root entrapment syndrome."

A follow-up report dated June 25, 2007, indicates the surgery was successful and the claimant no longer needed pain medication. Dr. Cathey released the claimant to return to work at full duty on July 9, 2007.

On September 19, 2007 the claimant saw Dr. Burt who prescribed Celebrex which the claimant did not find helpful. A notation shows decreased back pain and decreased ROM.

### **FINDINGS AND CONCLUSIONS**

The respondents have denied the back injury, contending the injury is not the major cause of disability or the need for medical treatment.

The claimant has the burden to establish the elements of proof for a gradual-onset injury:

1. the injury arose out of and in the course of his employment
2. the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death
3. the injury was a major cause of the disability or need for treatment.

Although the claimant had worked for the respondent-employer for 11 years with no need for medical treatment to his back, his job duties had recently changed and he had complained to his supervisor that the work and lack of help from a co-worker were causing him back pain. The claimant did suffer from some degenerative changes and a bulging disc with stenosis and his work was strenuous. Also, his supervisor never responded to the claimant's request for a new work partner. Then in April, 2007, the claimant was working alone as the plant was shorthanded.

This is when his pain increased which correlates with the herniated disc found through diagnostic testing. Based on this history, I find a causal connection between the claimant's job duties and injury which appears to be a hybrid of a gradual aggravation of a preexisting condition until a specific incident in April. Of course, a specific incident does not require a major cause analysis.

Although the claimant reported a problem to his supervisor, he was told that if he didn't finish his shift, he shouldn't bother coming back to work. The claimant said the office was closed and there was no way to fill out a notice of injury anyway. This raises questions about the employer's reporting procedures. I also noticed in the medical records that the claimant had used his own family doctor in the past to treat a work-related knee injury. And no witnesses from the respondent-employer were called to refute the claimant's testimony about reporting his back pain. Even assuming, arguendo, that this claim is not compensable, Glenda Andrews' authorization of diagnostic testing would make the respondents liable for those medical expenses, Lori Brittain v. Southern Hospitality, 925 Ark App. 318, 925 S.W.2d 810 (1996 ).

With regard to disability, permanent benefits are awarded only when the compensable injury is the major cause of disability. "Major cause" means more than fifty percent of the cause. The claimant's surgery was limited to the herniated disc which is the sole cause of impairment.

Apparently, no one wrote Dr. Cathey and asked him to comment on the impairment rating. In Professor Larson's treatise and in the preface to the AMA Guidelines, "anatomical impairment" is assessed by the physician while "disability" (how the claimant's age, education, work experience, injury and work restrictions affect his ability to return to the work force) is assessed by the Commission. However, the court has held that the Commission may assess impairment. Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003).

Based on Table 75, I find the claimant's impairment is 8% based on a surgically treated

disc lesion without residual signs or symptoms based on Table 75 of the AMA Guidelines at page 113.

With regard to cellulitis, defined by Dorland's Illustrated Medical Dictionary, 28<sup>th</sup> Edition at page 295, as inflammation usually caused by an infection, it is unclear how that is causally related to the claimant's hand injury without further explanation from a physician. Therefore, I find the hand injury is not compensable.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during 2006 and 2007, at which time the claimant earned sufficient wages to be entitled to a compensation rate of \$358.00/\$269.00.
2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable left hand 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 claimant gradually developed back pain in December 2006 as a result of his job duties which he reported to his supervisor. In April, 2007 he developed increased pain in a specific incident resulting in surgery for a herniated disc. 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.
4. The respondents are directed to pay all medical expenses within 30 days of receipt pursuant to Rule 30, reimbursing the claimant for out-of-pocket

expenses.

5. The respondents are directed to pay temporary total disability benefits from April 22, 2007 to July 9, 2007, as the claimant remained in his healing period, unable to work.
6. The respondents are directed to pay permanent partial disability benefits equivalent to a 8% rating to the body as a whole.
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.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

### **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.

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ELIZABETH W. HOGAN  
Administrative Law Judge