

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109345

MICHAEL HOLT,
EMPLOYEE

CLAIMANT

PORK GROUP, INC.,
EMPLOYER

RESPONDENT

TYNET CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 19, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE GARY DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE SHANNON FANT, Attorney
at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed January 28, 2003. The administrative law
judge found, among other things, "Claimant has failed to
prove that his right hip condition is causally connected to
the compensable low back and heat exhaustion injuries which
he sustained on August 8, 2001; and the Respondent has
proven by a preponderance of the evidence that the right hip
injury sustained by Claimant on May 1, 2002, was the result
of an independent intervening cause, namely, the negligence
of St. Mary's Rehabilitation Center in Russellville,

Arkansas, in failing to lock the wheels on the Claimant's hospital bed, and as such, the Claimant is barred from recovering any benefits from the Respondent relating to his right hip condition." After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge.

I. HISTORY

The parties stipulated that Michael Holt sustained a compensable injury "in the form of heat exhaustion" on or about August 8, 2001. Mr. Holt testified, "the last thing I can remember was getting pretty dizzy. I guess I blacked out and I hit the concrete sidewalk[.]" After initially controverting compensability for injuries related to the claimant's back, the respondents subsequently accepted compensability, providing indemnity benefits and medical treatment. The claimant was admitted to the Rehabilitation Unit at St. Mary's Regional Medical Center on April 17, 2002. He testified:

A. And I was almost ready to go home there, and I guess the - it was the - what do you call them, nurses' assistants or whatever, I think. Whoever changed my bed that day, I don't remember, but I was what you call independent. I could get into my wheelchair and get around. I could get from my wheelchair to my walker and use my walker or I could get from my wheelchair to the bed to get into bed. And I was trying to do that one day,

and I had my hands on it like this, on the side of my bed, to get myself up in there. And when I did, whoever changed my bed didn't lock my bed. And my whole bed rolled out from under me, and I went straight down and hit the concrete floor. And I hit myself on the right hip and the right spine, right side.

An x-ray of the pelvis was taken on May 1, 2002, with the impression, "Marked degenerative changes of the right femoral head with possible avascular necrosis."

Dr. Russell Allison reported on May 6, 2002:

Mr. Holt is a 43-year-old who has been in the hospital for approximately two and a half months. He apparently was at Baptist Hospital where he had a herniated disc and had discectomy performed. He apparently developed some discitis or possibly an infected disc at that time. Apparently two other operations were performed but he developed drainage of spinal fluid from his back and he was held in the hospital flat on his back with IV antibiotics for about four weeks. After that period of time, the surgeons returned and performed an anterior lumbar interbody fusion and he was sent to St. Marys rehabilitation for further physical therapy and medical management.

He has been doing fairly well and was at least able to walk some when he apparently stumbled and hurt his right hip. He has had a longstanding arthritis in that hip. He knows this but he had been able to tolerate it on a normal basis. Now it is much worse and over the last few days, he has been very painful with it. He states that the pain hurts deep within the hip itself and is worse when he tries to move the hip or walk....

X-rays were reviewed and he does have what appears to be osteonecrosis of the hip with arthritis and large osteophytes. There is some flattening of the femoral head and loss of joint space and

sclerotic areas. The left hip has some mild changes as well. His lumbar x-ray was reviewed and he does have an interbody fusion at the L4-5 space with what appears to be a large piece of Allograft femoral bone.

Dr. Allison assessed "Right hip degenerative joint disease from osteonecrosis." The claimant underwent a "Fluoroscopic right hip injection" on May 7, 2002. The claimant was discharged from Saint Mary's on May 15, 2002.

Dr. Dennis Berner authored a discharge summary:

Mr. Holt is a 43-year old male who has undergone extensive lumbar spine surgery and was admitted to Saint Mary's Regional Medical Center rehabilitation for aggressive physical therapy and occupational therapy.

During hospitalization, he had complications with the development of asthma which resolved with appropriate medications. He also had a fall approximately ten days prior to discharge with no definite abnormalities found on the series of followup x-rays and consultations but he did have increased pain that delayed his discharge.

He does have chronic degenerative arthritis of the right hip and this was injured and caused a flare in pain in the right hip. He received an injection of Cortisone in his hip with at least moderate resolution of his discomfort. He has progressed and at this time is able to ambulate with a walker and he is progressing on a daily basis with his endurance and strength....

Dr. Wayne L. Bruffett reported on August 1, 2002:

Mr. Holt returns four months status post anterior lumbar interbody fusion for a diskitis. He's really going quite well with regards to his back. He still has some right-sided low back and hip

pain. His main problem now, however, is that he has quite a bit of pain in his groin and all along his proximal hip area. He's had some x-rays done of his pelvis....

X-rays of his low back show his bone graft to be in good position and I think this is probably incorporating in nicely. X-rays of his pelvis show bone on bone changes of the right hip joint. This might be due to avascular necrosis with collapse.

Dr. Bruffett's impression was "1. Marked arthritis of the right hip" and "2. Status post anterior lumbar interbody fusion." Dr. Bruffett stated, "His x-rays look severe and I think he's going to need to have a hip replacement. I'll leave this up to a hip specialist. We'll try to get him over to see Dr. Barnes." The claimant was deposed on August 14, 2002, and the claimant testified that he had not yet undergone a hip replacement.

Mr. Holt claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to additional temporary total disability beginning January 9, 2002. The respondents contended that the claimant reached maximum medical improvement on December 26, 2001. The respondents contended that the claimant was not entitled to additional temporary total disability compensation, and that additional medical treatment was not reasonably necessary.

The parties agreed to litigate the following issues:

(1) Whether the claimant sustained a compensable injury to his right hip, "or as a compensable consequence of his compensable injury, or whether such is the result of an independent intervening cause";

(2) Reasonably necessary medical treatment;

(3) Temporary total disability compensation from January 9, 2002 until a date to be determined; and

(4) Attorney's fees.

Meanwhile, on October 23, 2002, Dr. Bruffett indicated that the claimant was scheduled for a hip replacement on December 6, 2002. Dr. Bruffett also wrote:

I think it is going to be another 6 months before all the dust settles here. At that point, Mr. Holt will probably be at MMI from my concerns, and I will calculate an impairment rating for him. He is going to continue to work with Dr. Barnes for his hip and Dr. Ackerman for pain management. With regards to his back, I think he probably is capable of returning to work to some extent. I would recommend a sedentary position, with no lifting, twisting, or bending significantly and probably no lifting over 20 pounds. He is going to probably be more limited by his hip than anything else. I am not sure that his employer would have a position for him, but I would release him with the above restrictions.

The matter was submitted to the administrative law judge without a hearing, and the administrative law judge filed an opinion on January 28, 2003. The administrative law judge found "that the Claimant has failed to prove by a

preponderance of the evidence that he sustained a compensable specific incident injury to his right hip, or that any right hip injury was a compensable consequence of his compensable low back and heat exhaustion injuries sustained on August 8, 2001; specifically, Claimant has failed to prove that his right hip condition is causally connected to the compensable low back and heat exhaustion injuries which he sustained on August 8, 2001; and the Respondent has proven by a preponderance of the evidence that the right hip injury sustained by Claimant on May 1, 2002, was the result of an independent intervening cause, namely, the negligence of St. Mary's Rehabilitation Center in Russellville, Arkansas, in failing to lock the wheels on the Claimant's hospital bed, and as such, the Claimant is barred from recovering any benefits from the Respondent relating to his right hip condition."

The claimant appeals to the Full Commission.

II. ADJUDICATION

The only issue argued by the claimant on appeal is the compensability of his hip condition. Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F), provides:

(i) When an employee is determined to have a compensable injury, the employee is entitled to

medical and temporary disability as provided by this chapter.

(iii) Under this subdivision (4) (F), benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment. A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.

The question of whether medical treatment is reasonably necessary is a question of fact for the Commission.

Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333

(2001). When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. K II Construction Company v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). The question, therefore, is whether there is a causal connection between the primary injury and the subsequent disability. If there is such a connection, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co, 11 Ark. App. 219, 669 S.W.2d 483 (1984). Not only can there be an independent intervening cause without negligence or recklessness on the claimant's part, but unreasonable

conduct on a claimant's part may create an independent intervening cause which would otherwise not exist. Ark. Code Ann. § 11-9-102(4)(F)(iii) was a codification of Guidry, supra. See, Davis v. Old Dominion Freight Line, Inc., 341 Ark. 751, 20 S.W.3d 326 (2000).

In the present matter, the claimant cites Preway, Inc. v. Davis, 22 Ark. App. 132, 736 S.W.2d 21 (1987). In that case, the claimant sustained a compensable back injury. The respondent-carrier directed the claimant to travel from her home in Paragould, Ark. to Memphis, Tenn. for additional medical treatment. The claimant's car wrecked while she was dropping off her son at his grandmother's on the way to Memphis, and the claimant suffered a broken ankle. The Commission awarded benefits, finding that the claimant was "in the course and scope of her employment when she was injured in an automobile accident while en route to a doctor for treatment of a prior compensable injury." The Court of Appeals affirmed the Commission. The Court cited 1 Larson, Workmen's Compensation Law, 13.13 (1985), which stated, "when an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable, although there is some

contra authority." The Court also noted Larson's "quasi-course of employment" doctrine which means "activities undertaken by the employee following upon his injury which although they take place outside the time and space limits of time employment, and would not be considered employment activities for the usual purposes, are nevertheless related to the employment in the sense that they are necessary or reasonable activities that would not have been undertaken but for the compensable injury. *Quasi-course activities in this sense would include, for example, making a trip to the doctor's office (our emphasis).*"

The Court of Appeals therefore held that the claimant in Preway, Inc. v. Davis "was engaged in activities rendered necessary by her compensable injury." The respondents assert that Preway, a case decided under the "quasi-course of employment" theory, is not relevant pursuant to a strict construction of Act 796 of 1993. The Full Commission notes, however, that Preway was decided post-Guidry, and the Arkansas Supreme Court held that the relevant provisions of Act 796 actually codified Guidry. See, Davis, supra. We therefore find that a "quasi-course of employment" theory is relevant to our adjudication of compensability pursuant to Act 796.

The Full Commission reverses the administrative law judge's opinion that the claimant's fall in the hospital on or about May 1, 2002 was an independent intervening cause absolving the respondents for liability for the claimant's right hip injury. But for the claimant's hospitalization as a result of his compensable back injury, the claimant would not have fallen and injured his right hip. We find that the quasi-course of employment theory espoused in Preway, Inc. v. Davis is relevant and comports with a strict construction of the statutory provisions of Act 796. The Full Commission notes the parties' "agreement" that St. Mary's Regional Medical Center negligently left the claimant's hospital bed unsecured, leading to his fall. However, St. Mary's was not a party to this "agreement." The hospital bed in fact might have been unsecured, but there is no probative evidence of this circumstance before the Commission, other than the claimant's uncorroborated testimony. In any event, we do not find that the claimant's activity on or about May 1, 2002 was unreasonable under the circumstances.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved that the claimant's right hip condition was a natural consequence of and was causally related to the claimant's compensable back

injury. The claimant's right hip injury occurred while he was receiving medical treatment for his compensable back injury, so that the claimant's right hip injury occurred during a "quasi-course of employment." The respondents are liable for reasonably necessary medical treatment provided in connection with the claimant's right hip injury. The Full Commission reverses the opinion of the administrative law judge. The claimant's attorney is not entitled to a controverted attorney's fee for the claimant's medical treatment. See, Ark. Code Ann. § 11-9-715(a)(1)(b)(2)(B)(ii)(Repl. 2002). The claimant's attorney is entitled to a fee of \$500 for prevailing on appeal to the Full Commission. Ark. Code Ann. §11-9-715(b)(2)(Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs.

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that his hip injury was a compensable consequence of his admittedly compensable injury. Based upon my de novo

review of the record, I would affirm the decision of the Administrative Law Judge.

In my opinion, a review of the evidence demonstrates that the claimant's hip condition was the result of an independent intervening cause. In the case of Preway, Inc. v. Davis, 22 Ark. App. 132, 736 S.W.2d 21 (1987), cited by the majority, the Court of Appeals found that where a claimant suffered injury in an automobile accident while driving to a doctor's office for treatment of a work-related injury, the second injury was compensable. Preway is a quasi-course of employment case and is often cited for the proposition that a trip to a doctors' office should be considered sufficiently causally related to the claimant's employment by the mere fact that the work-related injury was the cause of the journey. In my opinion, the theory implies a causal connection in quasi-course of employment cases regardless of any intervening and unrelated incidents that might occur. That is certainly not in line with the Legislature's mandate to strictly construe the provision of Act 796. Moreover, this is not a quasi-course of employment case in any event, and the Preway analysis is not the relevant point of inquiry.

In the case presently before us, the question is whether there is a causal connection between the claimant's compensable back injury of August 8, 2001, and his subsequent period of disability resulting from the claimant's hip condition. The threshold inquiry to be addressed is causal connection. Ark. Code Ann. § 11-9-102(4)(F)(iii), states in relevant part: "...benefits shall not be payable for a condition which results from a nonwork-related independent intervening cause following a compensable injury which causes or prolongs disability or a need for treatment..." The facts of this case fall squarely within the statute. As the medical records reflect, the claimant has right hip degenerative joint disease from osteonecrosis. That condition was not aggravated by his work related injury. The claimant had no treatment or complaints of hip pain prior to his fall on May 1, 2002. Therefore there is no clear causal connection between the claimant's primary compensable back and heat exhaustion injuries and his need for treatment relating to his right hop condition.

Moreover, by the claimant's own admission, he fell and injured his hip, thereby aggravating his pre-existing ostonecrosis and causing his second period of disability, because of the intervening negligence of St. Mary's

rehabilitation staff. That incident, which is clearly a nonwork-related, independent intervening event, in and of itself, is the sole cause of the claimant's second period of disability and need for treatment. It is well settled that causation is not broken by an intervening cause unless the latter if of itself sufficient to stand as the cause of the injury. See Larson Mach., Inc. v. Wallace, 268 Ark. 192, 600 S.W.2d 1, 9 (1980), citing Butler v. Ark. Power & Light Co., 186 Ark. 611, 54 S.W.2d 984 (1932). See also, Ark. Power & Light Co. v. Marsh, 195 Ark. 1135, 115 S.W.2d 825 (1938). The intervening cause must be such that the injury would not have been suffered except for the act, the conduct or the effect of the intervening agent. That is exactly what we have in this case. It is undisputed that the claimant's fall on May 1, 2002, alone aggravated his hip condition. That aggravation was caused by the intervening negligence of a third party - which alone brought about the claimant's second period of disability. Therefore, the claimant's contention that his hip injury is a compensable consequence must fail.

The claimant also cites the unpublished opinion of Tyson Foods, Inc. v. Adams, CA95-1269 (Op. delivered Sept. 18, 1996) and Carroll General Hospital v. Green, 54 Ark. 102

(1996) for the proposition that "neither medical negligence nor ordinary negligence of a third party is an independent intervening cause and thus will not bar the claimant's recovery." These cases dealt with either the natural consequence of a the claimant's compensable injury or complications directly arising from the compensable injury. Thus, the requisite causal connection was established between the primary injury and the second period of disability. That is not the case presented before us. To the contrary, the claimant's hip condition is not the natural consequence of his back injury; nor is it a complication directly arising from or attributable to his back injury. One has nothing to do with the other.

Therefore, based upon my de novo review of the record, I find that the claimant's hip injury was caused by a nonwork-related independent intervening cause. Accordingly, the opinion of the Administrative Law Judge should be affirmed.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner