

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F108229 & F109987

KIRK E. GRAY, EMPLOYEE	CLAIMANT
ACME BRICK CO., EMPLOYER	RESPONDENT
ST. PAUL FIRE & MARINE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT
HOT SPRING COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT	INTERVENOR
HEMPSTEAD COUNTY OFFICE OF CHILD SUPPORT ENFORCEMENT	INTERVENOR

OPINION FILED SEPTEMBER 7, 2004

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at  
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE JOSEPH E. KILPATRICK,  
JR., Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

This case comes on for review by the Full  
Commission on appeal by respondents from an opinion filed  
herein by an Administrative Law Judge on December 3, 2003.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation  
Commission has jurisdiction of the

parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to his neck on or about November 29, 1999; and his average weekly wage was \$429.00.
3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury on or about October 1, 1999.
4. The preponderance of the evidence shows that the claimant's August, 2001, surgery was reasonably necessary in connection with his compensable injury and was not the result of an independent intervening cause.
5. As a result of his compensable injury, the claimant has sustained permanent anatomical impairment in the amount of 10% to the body as a whole, consistent with the rating of Dr. Wilbur Giles.
6. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, payable one-half by the claimant and one-half by the respondents.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a

preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 3, 2003 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

## CONCURRING AND DISSENTING OPINION

I respectfully dissent in part, and concur in part from the majority opinion. The respondents appeal a decision of the Administrative Law Judge filed December 3, 2003, finding that the claimant's surgery in August of 2001 was reasonably necessary in connection with the claimant's November 29, 1999, compensable injury. The Administrative Law Judge also found that the claimant failed to establish a compensable injury of October 1, 1999. This finding was not appealed. Accordingly, I concur with that portion of the majority opinion finding that the claimant failed to establish a compensable injury of October 1, 1999. However, based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that his need for surgery in August of 2001 was causally related to his 1999 compensable injury. Accordingly, I must dissent from this finding.

The claimant was employed by respondents as a blending room operator which required the claimant to mix clay and additives to produce different colors for bricks. The claimant described his job as "pretty easy" primarily requiring him to push buttons to make the right colors. The claimant described two incidents in the fall of 1999 wherein he claimed to have injured his neck. The first alleged injury occurred on or about October 1, 1999, when the claimant bumped his head on a fence. The Administrative Law

Judge and the majority find that the claimant failed to establish the compensability of this alleged injury by objective medical findings. I concur in this finding.

The claimant sustained a compensable injury on November 19, 1999, which he described as follows:

Okay, Your Honor, I was driving my forklift. That was one of my main jobs, you know. And I was backing up, looking left and right, to make sure no one was behind me. And as I was looking left and right, something snapped, and I just felt a pain just shoot down my right side of my body. I didn't know what it was, you know, but I told Jimmy Gatlin about it, and, and he wrote up a report on that one.

As a result of this injury, the claimant received medical treatment on December 3, 1999, at the Hot Spring County Medical Center. The emergency room records from that visit reveal a complaint of having pulled a muscle in his neck for which he was requesting muscle relaxers.

Specifically, the claimant advised that he had been using heat on his neck and that it had gotten better but not completely gone. The claimant was diagnosed with muscle spasms, was provided medication therapy, and was referred for one week of physical therapy.

The claimant was seen by Dr. Ray Bollen on December 7, 1999, and an MRI was ordered. The MRI performed on December 7, 1999, revealed small disc herniations at C5-6 and C6-7, with mild spinal canal stenosis at both these

levels. The claimant continued to undergo physical therapy until he was again examined by Dr. Bollen on December 17, 1999. Dr. Bollen noted that the claimant stated at that time that he was 80% better. Dr. Bollen recommended that the claimant continue on his current medication but since the claimant had "improved to such a degree" a referral to a neurosurgeon would not be made at that time. However, Dr. Bollen placed a caveat in his recommendations stating, "If at anytime his neck pain starts becoming more problematic, we will refer him to neurologist for myelogram."

A review of the physical therapist's notes reveal the full extent of the claimant's recovery from this injury. In this regard, the therapist noted on December 17, 1999:

Pt has met all goals. Pt was only expected to achieve 45° cerv. rot, but has 60° to (r) & 58° to (L). Pt has no more radiculopathy. Pt expected to have 25° flex & ext, but now has 28° flex & 31° ext. Pt has ROM HEP in place. Pt can return to work, but not ready to begin full load.

The record reveals that the claimant did not miss any time from work as a result of this injury. The claimant reported to work while he was receiving medical treatment and received full pay. After being released from the doctor, the claimant returned to full duty where he continued to work until September of 2000. The claimant voluntarily left his employment with the respondents to seek work as a truck

driver earning more pay. The claimant worked as a truck driver until April of 2001.

The claimant sought additional medical treatment for his neck in April of 2001. This treatment followed an incident when the claimant was mowing his grass at home. The claimant testified that his right leg went out and he started to fall, then he kneeled down and placed his hands on the ground. However, the medical records reveal a different description of the fall. In this regard, the claimant provided a history which was recorded in the "chief complaint" section of the April 20, 2001, medical report as follows:

hurt back some time ago - fell & caught himself & thinks he reinjured back.

Likewise, under the "subjective" section the medical care report provided noted:

Hurt back last year felt "snap" in back. Slowly resolved. Treated ĉ [illegible] Reinjured back several d ago [illegible] stumbling. Now ĉ pain ® shoulder and neck (previously dx C5 bulging disc).

At that time the claimant was assessed with "neck pain" and was prescribed medication. An MRI performed on May 29, 2001 revealed "a small central bulging at C5/6 without significant impingement demonstrated at that level" and "a larger right herniated nucleus pulposus at C6/7 with extension into the right neural foramen causing some nerve

root impingement." The radiologist compared the 1999 and the 2001 MRI films and concluded that the herniated nucleus pulposus was "slightly larger" and "slight more prominent" in the 2001 study.

In June of 2001, the claimant came under the care of Dr. Paul Tucker. The claimant provided Dr. Tucker with a history of injuring his neck in 1999 and of being diagnosed with a herniated disc. Dr. Tucker further noted:

He was working at Acme Brick and saw the company doctor. He was sent to physical therapy where he had an MRI. They found a herniated disc. Physical therapy seemed to help at first but in April of this year, the pain returned. He saw Dr. Tilley and was again placed in physical therapy. This time, it did not help.

On July 25, 2001, the claimant was examined by Dr. Wilbur Giles, a neurosurgeon in Little Rock, Arkansas. The claimant provided Dr. Giles with a history of sustaining a work related injury in 1999 for which he was treated with medical and physical therapy, and "slowly improved." The claimant further advised Dr. Giles that "...he has had recently (sic) neck pain as well as bilateral shoulder discomfort..." Following his examination of the claimant, Dr. Giles recommended an anterior cervical diskectomy and arthrodesis at C5/6 and C6/7. The claimant underwent surgery on August 14, 2001.

In a letter to the claimant's attorney dated August 24, 2003, Dr. Giles wrote:

I am in receipt of your recent letter of April 18, 2003, concerning Mr. Kirk Gray and, indeed, the herniated discs at 5-6 and 6-7, as reported in the MRI scan of December 8, 1999, are the cause for the anterior cervical diskectomy and arthrodesis which was subsequently performed in August 2001...."

The parties deposed Dr. Giles on August 6, 2003. In his deposition, Dr. Giles testified that the claimant did not describe any other injuries or accidents following the compensable injury in 1999. Dr. Giles further testified that his opinion regarding the relationship between the compensable injury of December 1999, and the surgery performed in 2001 was based upon the history provided to him by the claimant. However, Dr. Giles agreed that the MRI studies showed a change from 1999 to 2001 with "the disc being completely blown from the space." When questioned further, Dr. Giles denied any knowledge of the fact that the claimant only had 10 days of physical therapy following the 1999 injury, that the claimant returned to full work for the respondents after the 1999 injury and continued to work for the respondents for a full year after the incident, or that the claimant did not seek any medical treatment for complaints of neck, shoulder or back pain from December 17, 1999, through April 20, 2001. Dr. Giles agreed that if the

claimant suffered an outright herniation prior to April 20, 2001, he would have required some medical treatment.

When he explained his causation opinion, Dr. Giles testified:

Because the history that he gave me is compatible with a neck injury in 1999, with shoulder and arm pain that went all the way to his hand. Even if it took ten days of therapy, he did improve with anti-inflammatory medications. An MRI scan at that time, showed that the 5-6 and 6-7 discs both significantly protruded. They were already, after that injury, showing manifestations compatible with his complaints. I think with treatment, he got over that. I think he subsequently re-injured a pre-existing lesion, which overtly herniated.

Dr. Giles further testified that the claimant reported a history of occasional shoulder pain following the 1999 compensable injury which indicated that the 1999 injury was still symptomatic. Then he testified:

They didn't - - they were not dysfunctional to him, but they bothered him to some degree. The cause of the fact that he had an MRI scan that was seen later, showed a marked progression of these two discs spaces. That makes it compatible, whether it's the same injury to me.

Finally, Dr. Giles offered the following testimony:

Q. Doctor, I think you told me earlier and I'll ask you again, but isn't your opinion that when he went back to Dr. Tilley in April 2001 and

reported that he re-injured his back that he had a new injury at that time?

A. I think it was an aggravation of the pre-existing injury.

Q. Okay. And the aggravation resulted in the frank herniation that he had after that time; isn't that correct?

A. I think it did.

Q. Yes, sir. And the frank herniation was the reason you did the surgery, isn't it?

A. Correct. (D-15)

Our analysis must begin with A.C.A. § 11-9-102(4)(F)(iii)(Supp. 2000), which states;

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 Arkansas Supreme Court held in Davis v. Old Dominion Freight Line, Inc., 341 Ark. 751, 20 S.W.3d 326 (2000), that this statute did not repeal prior law on the subject of intervening injuries, but instead codified pre-Act 796 case law. Accordingly, the question becomes whether the additional medical treatment was necessary, and directly

related and as a natural result of the compensable injury. Only if such causal relationship is established must a determination be made concerning the reasonableness of the claimant's actions. See Guidry v. J&R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984). Stated another way, "the overriding issue is whether there is a causal connection between the primary injury and the subsequent disability, and only if such a connection exists does the question of the claimant's conduct need to be addressed." Id.

The overwhelming evidence of record, in my opinion, reveals that the claimant's 1999 compensable injury resolved after 10 days of physical therapy and the claimant was able to return to work and to even begin a new career as a truck driver. Although the claimant advised Dr. Giles that he had shoulder pain from time to time, Dr. Giles noted that this pain was not disabling and it was consistent with the minimal bulging noted in the 1999 MRI. The claimant did not require medical treatment nor did he offer any complaints to his physicians about his neck or shoulder from December 17, 1999, until April 20, 2001, when he fell. Despite the claimant's attempt to minimize the seriousness of this fall in 2001, the claimant provided a history to Dr. Tilley of falling and catching himself which the claimant thought caused a "reinjury" to his neck. Dr. Tilley even described the claimant's history of an injury from "stumbling," not

from a controlled lowering of the body from a standing to a kneeling position as the claimant described during his testimony. After weighing the evidence, I find that the claimant's description of the events in April of 2001 when providing his physician with a medical history is more credible and logical than the claimant's self-serving hearing testimony.

I further find that the claimant suffered a new injury or aggravation in April of 2001 when he fell while mowing. An aggravation is defined as "a new injury resulting from an independent incident." Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). A recurrence is defined as "a natural and probable consequence of a prior injury." Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996). The Arkansas Court of Appeals has repeatedly held:

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. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, 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 Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

The claimant sustained a compensable injury in 1999, which resolved with conservative treatment. The medical records revealed that the claimant greatly improved with medication and physical therapy and that he quickly reached maximum medical improvement. The claimant was capable of returning to work at full duty and of continuing in this capacity until he voluntarily left his employment to seek more money as a truck driver. The record further reveals that the claimant was able to perform his duties as a truck driver until he "stumbled" and "fell" in April of 2001 resulting for the first time in a need for additional medical treatment. The medical evidence further establishes that after this fall in April of 2001, the claimant sustained a "frank herniation" in his cervical spine. Dr. Giles even described the claimant's condition as "an aggravation of a pre-existing injury." Finally, the medical evidence reveals that it was not until the claimant sustained this "frank herniation" that he needed surgery. Accordingly, I find that a preponderance of the evidence shows that the claimant sustained a new injury in April of

2001, which is supported by objective medical findings of a "frank herniation."

Having found that the claimant sustained a new injury or aggravation in April of 2001, I further find that the claimant has failed to prove by a preponderance of the evidence that the surgery in August of 2001 is causally related to the 1999 compensable injury. The claimant relies upon the opinion expressed by Dr. Giles that the claimant's bulging discs in 1999 are the reason why the claimant underwent surgery in 2001. However, a thorough reading of Dr. Giles's deposition testimony does not support the opinion expressed by Dr. Giles. First, Dr. Giles admits that his causation opinion is based upon the history of injury as provided to him by the claimant. However, Dr. Giles admitted that he was never made aware of material facts regarding the claimant's condition, including but not limited to the claimant's fall in 2001. Second, Dr. Giles testified that the surgery was related to the 1999 MRI findings because the 1999 MRI showed the same two discs were involved and one disc progressed to an overt herniation 14 months later. However, Dr. Giles admitted that the overt herniation did not result from the 1999 injury, but rather resulted from a reinjury or aggravation. Finally, Dr. Giles admitted that it was not until after the claimant developed the overt or frank herniation that the claimant needed or required surgery. Accordingly, when I weigh Dr. Giles's entire

testimony, I am not persuaded to find that a causal relationship exist between the 1999 compensable injury and the claimant's need for surgery. Rather, Dr. Giles's testimony establishes that the surgery is causally related to the claimant's overt herniation which was not present in 1999, but developed from a new injury or aggravation in April of 2001.

In light of the above evidence, I find that the claimant has failed to prove by a preponderance of the evidence that his need for surgery in 2001 is causally related to his 1999 compensable injury. Therefore, I must respectfully dissent from the majority opinion finding that claimant's surgery in August of 2001, was reasonably necessary in connection with the claimant's November 29, 1999, compensable injury.

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KAREN H. MCKINNEY, Commissioner