

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309388

JAMES BALDWIN,
EMPLOYEE

CLAIMANT

ECONOMY HEAT & AIR OF ARKANSAS, INC.,
EMPLOYER

RESPONDENT

FIRSTCOMP INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 18, 2005

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

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

Respondents represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed November 3, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed upon by
the parties are reasonable and are
approved.
2. The relationship of employee-employer-
carrier existed on June 20, 2003, the date
upon which Claimant sustained a compensable
injury.
3. Claimant's compensation rate for

temporary total disability is \$404.00 per week; his compensation rate for permanent partial disability is \$303.00 per week.

4. Respondents have accepted a 7% impairment rating.

5. There is a causal connection between Claimant's June 20, 2003 compensable injury and his subsequent January 2004 episode. Claimant's small recurrent disc herniation occurred at the same level as his prior surgery, within a time frame of heightened susceptibility following that prior surgery. Dr. Wilson testified that, without Claimant's prior compensable injury and resulting surgery, the chance of Claimant hurting his back by twisting "would have been remote."

6. Claimant's activity of working under his car the weekend prior to his January 29, 2004 appointment does not constitute an independent intervening cause. Since Claimant had been released to return to work without restrictions, this activity is not unreasonable under the circumstances.

7. Claimant's January 2004 episode does not result from an independent intervening cause, and therefore is not an aggravation. As Dr. Wilson testified, had Claimant simply twisted his back, without his preexisting compensable injury and surgery, the chance of Claimant being hurt would have been "remote."

8. Claimant is entitled to reasonably necessary medical treatment in connection with his compensable injury and subsequent episode. Claimant's January 2004 episode is causally connected to his compensable injury; the medical records and testimony reflect that Claimant is in continuing need of medical treatment.

9. Claimant is entitled to temporary total

disability benefits from January 29, 2004 through April 21, 2004, when Claimant was released to return to work with restrictions. Claimant was (and still is) within his healing period; he had not been released to return to work. Claimant did not sustain his burden of proving by a preponderance of the evidence that he was totally incapacitated from earning wages subsequent to April 21, 2004.

10. Claimant's entitlement to temporary total disability benefits has been controverted.

11. Claimant's attorney is entitled to the statutorily prescribed attorney's fee found in Ark. Code Ann. § 11-9-715 on any indemnity benefits due or to become due to Claimant.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 3, 2004 decision 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 on appeal.

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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a

preponderance of the evidence that there is a causal connection between the claimant's June 20, 2003, compensable injury and his subsequent episode in January, 2004.

My de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that the episode he experienced with his back in January of 2004 was causally connected to his compensable work injury some five months earlier. The evidence presented in this claim reveals that it is more likely than not that the claimant experienced an aggravation (or, new injury) of his back condition in January, as opposed to a recurrence.

First, the claimant underwent a laminotomy at L4-5 with a partial discectomy on August 28, 2003. Dr. John Wilson, the claimant's surgeon, reported that the claimant recovered "beautifully" from this surgery. On October 20, 2003, Dr. Wilson assigned the claimant with a 7% permanent physical impairment to the body as a whole, and he released the claimant to unrestricted work duty.

On January 29, 2004, the claimant sought additional medical treatment for complaints of stiffness

and severe leg pain. Concerned that the claimant may have "extruded an end plate," Dr. Wilson took the claimant off of work, referred him for physical therapy, and ordered an MRI. The MRI, which was conducted on February 6, 2004, confirmed that the claimant suffered from a "small recurrent disk herniation at the left L4-5 level, at the site of his prior surgery." The claimant was given an epidural injection of steroids, and by February 16th, Dr. Wilson noted improvement in the claimant's condition.

In a letter dated February 16, 2004, Dr. Wilson opined that the claimant's current medical problems were related to his compensable injury of June 20, 2003. Dr. Wilson specifically noted in this letter that the claimant had experienced no "intervening insults." In a subsequent letter dated June 21, 2004, Dr. Wilson reaffirmed his earlier opinion that the claimant's current condition was causally related to his compensable injury one year earlier.

In his deposition, Dr. Wilson stated that "People with central disk herniation tend to have more recurrences than people without," Dr. Wilson testified that he had operated on both sides of the claimant's disk in order to try to avoid a

"reoccurrence" and further surgery. Dr. Wilson stated that after his examination of the claimant in October of 2003, he felt the claimant had recovered from his surgery well enough to return to his normal activities.

Q. How would you rate his recovery from the surgery?

A. I felt it was good.

Q. Did you put any restrictions on him?

A. No.

Q. When you put restrictions on somebody, is that usually to keep them from reinjuring themselves?

A. Either that or they're not completely recovered and won't completely recover, and you've tried to work within the abilities that they have as far as their back is concerned.

Q. In this case, you felt like he was well enough that he could go back to his normal activities and hopefully not reinjure himself?

A. Yes.

Dr. Wilson agreed that something as simple as a twist can cause disk herniation. Dr. Wilson testified that the amount of time after which symptoms of a herniated disk begin varies, but that more immediate, severe symptoms are normally a sign of a more serious problem. Dr. Wilson agreed that the claimant had not told him about his having worked on a car over the weekend prior to his sudden onset of pain and stiffness.

Dr. Wilson admitted a twisting movement can cause a herniation.

Q. ... First of all, can a twist, such as if you're under a car, cause a disk to extrude?

A. Sure.

Q. And did you have any history like that from him?

A. No.

The claimant was seen by Dr. Scott Schlesinger for an independent medical evaluation on February 17, 2004. The testimony of Dr. Schlesinger was largely consistent with that of Dr. Wilson. For example, Dr. Schlesinger explained that by "recurrent disk herniation," he meant that the claimant's herniated disk was at the same level as his previous herniation; not necessarily that the claimant had suffered a "recurrence" in the legal sense. Dr. Schlesinger stated that people who have had the type of surgery that the claimant had are at a higher risk of experiencing a recurrent herniation of the disk that was operated on. "You've cut out part of the annulus. So there's a place for a piece [of disk material] to escape from," explained Dr. Schlesinger. Dr. Schlesinger testified that recurrent herniation can be caused by "anything" that "puts a lot of stress on the back," such as

lifting, sneezing, coughing, or twisting the wrong way. Dr. Schlesinger further testified that the recurrence rate on an operated disk is around 12 to 15 percent. Furthermore, Dr. Schlesinger stated that one of the first symptoms of a recurrent disk herniation is pain. Dr. Schlesinger agreed that full recovery for the type of surgery that the claimant underwent should occur within about three months.

No. Three months out, they should be able to do what they want to do. That's when we let them go back to regular duty work and that kind of thing.

Dr. Schlesinger testified that, based upon a review of the medical records, it did not appear that Dr. Wilson had left any fragments in the claimant's disk space that might account for his current problems. Further, Dr. Schlesinger stated that, based in part on his activities after his surgery, the claimant's operation appeared to have been successful. Dr. Schlesinger testified that had he known that the claimant may have twisted his back while working on a car, there is a "high likelihood" that he would have attributed the claimant's current problems to that incident.

Q. Well, let me ask you, Doctor. If you have somebody who is released in October and tells Doctor Wilson he did beautifully for that five

months. He's working at home and twists. The next morning he could hardly get out of bed and had pain and weakness. With that history, what would you relate his new disk herniation to?

A. The working on the car and twisting.

Dr. Schlesinger admitted that because the claimant had recovered from his surgery and had remained asymptomatic for a period of about five months, it was likely that "something else had happened to him" to cause his new onset of symptoms.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. Id. at 130, 10 S.W.3d at 468.

An aggravation is a new injury with an independent cause and, therefore, must meet the

requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine 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 Const. 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), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

The claimant made an excellent recovery from his surgery of August, 2003, and reportedly experienced no residual symptoms. After he was released to return to work following his surgery, the claimant began working for a new employer. The claimant's new job duties

included climbing into attics, onto roofs, and under houses. The claimant was able to work for his new employer without problems up until one morning in January of 2004, when he awoke stiff and in pain. The claimant testified that he had worked on an automobile over the weekend prior to this sudden onset of stiffness and pain. Concerning this activity, the claimant testified in his deposition:

I think I twisted wrong. I think what happened was I might have been laying down working on something or under the car and I might have twisted wrong and just twisted something.

Both Dr. Schlesinger and Dr. Wilson testified that such an activity could have caused the injury from which the claimant now suffers. Both of these doctors denied having any knowledge that the claimant had engaged in such an activity prior to his current complaints.

Based upon the above and foregoing, I find that the claimant has failed to prove that his second complication is a natural and probable consequence of his prior injury. Rather, it is more likely than not that the claimant's second injury is a new injury caused by twisting his back while working on an automobile. Therefore, because the claimant has failed to prove that there is a causal connection between his compensable

injury and his subsequent episode, I would respectfully disagree that the claimant is entitled to additional benefits related to his current condition.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner