

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F107011 & F304582

CLEVELAND OSBORN, EMPLOYEE	CLAIMANT
ANDERSON ENGINEERING, EMPLOYER	RESPONDENT NO. 1
ONE BEACON INSURANCE CO., CARRIER	RESPONDENT NO. 1
TRANSPORTATION INSURANCE CO., CARRIER	RESPONDENT NO. 2
SECOND INJURY FUND	RESPONDENT NO. 3

OPINION FILED JUNE 1, 2005

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

Claimant represented by HONORABLE KRISTOFER RICHARDSON, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Vacated in part; and affirmed in part.

OPINION AND ORDER

Respondent No. 1 appeals and Respondent No. 2 cross-appeals a decision of the Administrative Law Judge filed on February 9, 2004, wherein the Administrative Law Judge found that the claimant sustained a compensable recurrence of his admittedly compensable June 1, 2001, low

back injury in 2002 for which Respondent No.1 is on the risk. Respondent No.1 has not appealed this finding.

However, with regard to Respondent No.1, the Administrative Law Judge also rendered the following findings:

5. On June 1, 2001, the claimant sustained a injuries to his low back, elbows, head and neck, arising out of and in the course of his employment when he fell approximate 9 ft. into a foot of water within a pipe. In 2002, claimant suffered a recurrence of the June 1, 2001, lumbar injury and was rendered temporarily totally incapacitated from engaging in gainful employment for a period of approximately one month, and for which he is entitled to payment of temporary total disability benefits.
6. Medical treatment rendered to the claimant relative to his neck and elbows subsequent to June 1, 2001, to include diagnostic studies, medication, and surgery, is reasonably necessary medical treatment for the compensable June 1, 2001, injuries sustained in the employment of respondent-employer during the workers' compensation coverage period of respondent #1.

Respondent No.1 appeals these findings contending that the only issue for determination at the hearing was

whether the claimant sustained a new injury, aggravation or recurrence of his June 1, 2001, low back injury.

The Administrative Law Judge also found that the claimant sustained a new injury or aggravation on March 10, 2003, for which Respondent No.2 is liable. Respondent no. 2 appeals this finding, contending that the claimant's March 10, 2003, injury was a recurrence of the admittedly compensable July 1, 2001, injury for which Respondent no. 1 is liable. Alternatively, Respondent No.2 appeals the Administrative Law Judge's finding that the claimant earned sufficient wages at the time of the March 10, 2003, injury to entitle him to the maximum compensation rates.

Based upon our de novo review of the record, and without giving the benefit of the doubt to any party, we find that the decision of the Administrative Law Judge must be vacated in part, and affirmed in part. Specifically, we find that the compensability of claimant's neck and elbow complaints arising out of the July 1, 2001, injury was not an issue for determination at the October 31, 2003, hearing. Nor do we find that the calculation of the claimant's average weekly wage at the time of his March 10, 2003, injury to be an issue for determination. Therefore, we find

that the findings with regard to the compensability of and benefits for the claimant's neck and elbow complaints and the claimant's average weekly wage in March of 2003 must be vacated and set aside. We further find that the findings with regard to Respondent No.1's liability for a 2002 recurrence of the July 1, 2001, injury, and Respondent no. 2's liability for the March 10, 2003, new injury or aggravation are correct and should therefore be affirmed.

A. Neck and Elbow Complaints

Although the claimant offered testimony regarding the injuries to his neck and elbows, a review of the parties prehearing questionnaire filings reveals that the only issue for determination at the October 31, 2003, hearing was whether the claimant sustained a new injury, aggravation or recurrence of his July 1, 2001, admittedly compensable back injury in March of 2003. The Administrative Law Judge framed the issues for litigation in his Prehearing Order as "aggravation/recurrence; medical benefits; and TTD benefits." Likewise the parties listed the issues in their Prehearing Questionnaire filings as aggravation versus recurrence, and carrier liability. Since Respondent No.1 only offered to stipulate to an admittedly compensable low

back injury in 2001, there is no indication that the parties were prepared to litigate the compensability of other injuries arising out of the 2001 incident. Consequently, the parties did not develop the medical evidence with regard to the compensability of the claimant's neck and elbow injuries. Accordingly, we find that the compensability of the claimant's neck and elbow injuries was not an issue for determination at the October 31, 2003, hearing, and that any finding with regard to the compensability and benefits of these injuries are hereby vacated and set aside.

B. Average weekly wage

Likewise, we find that the calculation of the claimant's average weekly wage was not an issue for determination at the October 31, 2003, hearing. A review of the parties' prehearing filing reflects that Respondent no. 1 stipulated to the maximum compensation rates for the 2001 injury, which at the time was \$410.00 for temporary total disability and \$315.00 for permanent partial disability. Respondent No.2 stipulated that as of March of 2003 the claimant earned approximately \$11.00 per hour. In his Prehearing Order filed August 21, 2003, the Administrative Law Judge apparently combined Respondent

no. 2's stipulation of \$11.00 per hour with the June 1, 2001, injury date when he set forth the parties stipulations. However, neither the Prehearing Order nor the parties' prehearing filings reflect that the calculation of the claimant's average weekly wage at the time of the 2003 incident was an issue in dispute. Since this was not listed as an issue, the parties were not prepared to litigate this issue at the time of the hearing. Aside from soliciting some testimony from the claimant, the parties did not fully develop this issue nor did they introduce any documentary evidence regarding this issue. Accordingly, we find that the Administrative Law Judge's finding with regard to the claimant's average weekly wage in 2003 was not an issue for determination at the October 31, 2003, hearing, and must, therefore, be vacated and set aside.

C. 2002 Recurrence

With regard to the claimant's period of total incapacitation in 2002, Respondent No.1 does not appeal the finding that the claimant sustained a recurrence of his July 1, 2001, injury in 2002. Therefore, we find that the evidence preponderates in favor of finding that the claimant sustained a recurrence of his July 1, 2001, injury in 2002,

for which he is entitled to one month of temporary total disability.

**D. The March 10, 2003, Incident
Aggration/Recurrence**

With regard to the Administrative Law Judge's finding that the claimant sustained a new injury or aggravation in March of 2003, we find that a preponderance of the evidence supports this finding. Accordingly, we find that this finding of the Administrative Law Judge is hereby affirmed.

On March 10, 2003, the claimant was involved in an incident at work when he was moving concrete cylinders from one table to another. The claimant lifted one cylinder and turned to place it on a table which caused a burning sensation in his lower back. Claimant testified that he had never felt this burning sensation in his lower back before. The day after this incident, the claimant found it extremely difficult to move, so he advised the secretary that he was going home and he sought immediate medical attention. Following this incident the claimant complained of pain radiating into his left leg.

Claimant's medical records following his July 1, 2001, compensable injury, and 2002 recurrence reveal that

the claimant continued to seek medical treatment for lower back pain through September 23, 2002. On February 7, 2003, the claimant sought treatment from his family physician for complaints of numbness and tingling in his right arm, right shoulder pain and neck pain. Absent from this report is any complaint of lower back or lower extremity pain.

Accordingly, pursuant to the medical records, the claimant did not require any medical treatment for his lower back problems after September 23, 2002. This is further confirmed by the medical record just one month prior to the March 10, 2003, incident when the claimant sought medical treatment for neck and upper extremity complaints, not his lower back.

A review of the claimant's diagnostic studies fails to reveal a herniated disc in the lumbar spine prior to the March 10, 2003, incident. Specifically, the claimant underwent a Lumbar myelogram and post myelogram lumbar CT scan on September 6, 2001. While these tests revealed degenerative disc disease and a compression fracture at L1, the radiologist did not detect any evidence of a focal herniated disc on the myelogram. Likewise, on the post myelogram CT scan, the radiologist noted, "examination demonstrates degenerative spondylolytic change with disc

degeneration and vacuum disc phenomna at the 5-1 level. There was no evidence of focal canal stenosis or disc herniation."

Following the March 10, 2003, injury, a CT scan of the lumbar spine performed on March 13, 2003, demonstrated the following:

Fracture of the L/1 vertebral body is identified correlating with plain radiographys and mild compression of T/12 superior end plate is identified. The pedicles are intact. No spinal canal compromise is seen. At L/1-2 a mild broad-based annular bulge is seen but this does not appear to displace the nerve roots nor significantly efface the thecal sac. AT the L/3-4 level an annular bulge is present. Nerve roots are not displaced. Thecal sac is not effaced. **At L/4-5 central disc bulge is present.** Vacuum phenomenon is present at L5/S1. Post op change on the right is seen at this level. Sclerotic change of the articulating facts appears at the lower two levels with hypertrophy. (Emphasis added)

A lumbar spine myelogram performed on April 7, 2003, likewise revealed in pertinent part:

The nerve roots on the AP view of the lumbar spine study appear to be slightly edematous on the left side as they pass over the L4 vertebral body, towards the L4-L5 neural foramen on the left. More definitive findings will be described on the CT study post omnipaque myelogram.

The Post-myelogram CT of the lumbar spine demonstrated the following:

There is some bulging of disc at L1-L2 and L2-L3 with some narrowing of the thecal sac in this AP diameter at L2-L3. L3-L4 are unremarkable, **whereas there is some bulging and minimal protrusion of the disc below the disc level at L4-L5 and there is some asymmetrical bulging of disc and spurring which causes some asymmetry to the anterior surface of the thecal sac on the right side with some displacement of the transing nerve root at L5-S1.** (Emphasis added)

After reviewing the claimant's testimony describing the mechanics of his March 10, 2003, injury, the medical records displaying a lack of lower back treatment for over five months, and this diagnostic medical evidence, we find that the claimant sustained a new injury or aggravation on March 10, 2003, for which Respondent No.2 is on the risk.

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).

As noted by the Court of Appeals in Davis v. Old Dominion Freight Line Inc., 69 Ark. App. 74, 13 S.W.3d 171 (2000):

the overriding issue in cases involving subsequent injury of disability 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.

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 fo a prior injury." Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(E)(i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of

the requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

Despite Respondent No.2's argument that the claimant sustained a herniated disc as a result of the June 2001 injury, we find that the overwhelming evidence of record reveals that the claimant sustained a new injury or aggravation on March 10, 2003, when he was involved in a specific incident when he felt a new sensation of burning as he lifted a cylinder and twisted to place the cylinder on the table. A preponderance of the medical evidence demonstrates that this injury caused internal harm to the body, required medical services and resulted in disability. In addition, this new injury is supported by new objective medical evidence of a herniated disc.

Our review of the diagnostic studies persuades us to find that the claimant did not suffer a disc herniation until after the March 10, 2003, lifting incident. In reaching this finding, we are aware of the claimant's testimony that he believes all of his back problems arise out of the original injury. However, no matter how sincere a

claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249).

Accordingly, after weighing the evidence, we find that the claimant sustained a new injury or aggravation on March 10, 2003, for which Respondent No.2 is liable.

Therefore, for those reasons set forth herein, we find that the decision of the Administrative Law Judge must be vacated in part and affirmed in part.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

The Majority is affirming an Administrative Law Judge's decision that the claimant suffered compensable injuries to his back on June 1, 2001 and on March 10, 2003.

The Majority further finds that Respondent No.1 is liable for all benefits accruing from the injury on June 1, 2001 and Respondent No. 2 is liable for all benefits in connection with the injuries sustained on March 10, 2003. I specifically concur with that portion of the Majority's opinion. However, the Majority also vacates the Administrative Law Judge's finding that the claimant sustained injuries to his neck and elbow in the accident on June 1, 2001 and that Respondent No. 1 is liable for medical benefits associated with those injuries. Additionally, the Majority has vacated a finding of the Administrative Law Judge that the claimant's disability rate in the 2003 injury was the same as it was at the time of his injury in 2001. For the reasons set out below, I respectfully dissent from the Majority in regards to the portion of the decision vacating the above referenced portions of the Administrative Law Judge's decision.

In their briefs, both respondents contend that the only issue presented for determination was whether the March 10, 2003 accident was a new injury or an aggravation of the claimant's previous condition and, consequently, whether the medical and disability benefits the claimant

incurred following that accident were the responsibility of Respondent No. 1. Respondent No. 1 contends that the Administrative Law Judge improperly awarded the claimant medical benefits based upon injuries to his neck and elbows. Respondent No. 2 contends that the Administrative Law Judge should not have determined the benefit rate on any benefits due after March 10, 2003. I believe the record refutes both of those conclusions.

In considering Respondent No. 1's argument, I note that its Prehearing Questionnaire lists these issues for determination:

- A. Whether the claimant sustained a new injury in March 2003.
- B. Whether the claimant is entitled to any additional benefits from carrier No. 1.
- C. Attorney's fees.

Clearly, at the time the pre-hearing information was filed, Respondent No. 1 was wanting the Administrative Law Judge to determine what additional benefits they were obligated to pay. Further, in the claimant's Prehearing Questionnaire, his attorney listed as a Contention:

"The claimant further contends that he is entitled to temporary total

disability benefits for dates to be provided, all *reasonable related medical expenses*, and an attorney's fee." (Emphasis Added).

Even more significantly, the Prehearing Order filed by the Administrative Law Judge on August 21, 2003, stated:

"A hearing of a two hour duration shall be conducted on this claim on the issue of aggravation/recurrence; *medical benefits*; and TTD benefits. . ." (Emphasis Added).

In addition, the record also contains the original claim form filed by the claimant which alleges that he suffered a fall "sustaining injuries to back, neck, head, elbows, nose, and fingers on right hand." I also note that following his injury, the claimant received medical treatment for his neck, including medication and a CT scan of the cervical spine on June 19, 2001. The medical reports also refer to bruising on the claimant's elbows and forearms. The respondent would have had to be aware of this treatment since they apparently paid for it.

I do not believe that Respondent No. 1 should be allowed to defer and possibly avoid liability for medical treatment the claimant received to his neck and elbows on the theory that their liability for these aspects of the

claimant's injury were not presented for determination. Respondent No. 1 specifically stipulated that the claimant sustained compensable injuries in his June 1, 2001 fall and they clearly were aware that the injuries included damage to the claimant's elbows and neck. Further, both their Prehearing Questionnaire and the Prehearing Order specified that the respondent's obligation for future benefits, including medical benefits would be an issue. I find that the Judge's decision awarding the claimant reasonable and necessary medical benefits associated with injuries to his neck and elbows was appropriate and should be affirmed.

I also believe that Respondent No. 2 does not have any basis for their contention that the claimant's benefit rate was not before the Judge. In Respondent No. 2's Prehearing Questionnaire, one of the proposed stipulations was that the claimant was earning "approximately \$11.00 hourly." Further, as quoted above, the Prehearing Order entered in this case stated that one of the issues would be temporary total disability benefits. Before TTD benefits can be awarded, it must be determined what the correct benefit rate is. In this regard, I also note that the Prehearing Order sets out a stipulation as to the amount of the

claimant's benefit rate. This stipulation was discussed at the hearing when the ALJ referred to the stipulated amount of the claimant's benefit rate. At that time, he was corrected by the attorney for Respondent No. 1, who said that the correct benefit rate for the claimant's 2001 injury was the maximum for injuries occurring in that year. Later, the ALJ asked Respondent No. 2's attorney what the benefit rate was relative to the 2003 injury. The attorney stated:

"I can certainly try to figure it out, when I question this witness because his wage rate didn't go down after 2001, so it is just a question as to how many hours per week he worked."

Considering that the parties were well aware that the claimant's entitlement to TTD benefits was going to be a disputed issue and since the parties discussed benefits rates at the hearing, I do not see how it can be said at this time that Respondent No. 2 did not expect the issue of benefit rates to be discussed, or were in any way placed at a disadvantage because of the Judge's ruling on that issue. I believe that the parties either knew or should have known that the issue would be in contention and I believe that the Administrative Law Judge was correct in determining that the claimant's benefit rate had not changed since his earlier

injury, based upon the testimony provided by the claimant and the statement of Respondent No. 2's counsel that his wage rate had not changed.

Vacating the Judge's decision in regard to the claimant's elbow and neck injuries, and his determination as to the benefit rate applicable in the 2003 injury, will only guarantee that we will litigate those issues again. In regard to the compensability issues as to the claimant's elbow and neck, I do not see that there is any additional evidence that would be developed at a future hearing on this question. In vacating that portion of the Administrative Law Judge's Order, we are, at best, requiring the re-litigation of an issue in which all of the relevant evidence has already been submitted or, at worse, giving the respondent another chance to try this case and avoid liability for what certainly appear to be compensable injuries.

I also believe that vacating the Judge's finding in regard to the benefit rate in 2003, would cause a considerable amount of confusion. We are finding that Respondent No. 2 is liable for benefits arising from a compensable injury or aggravation in 2003, which will require them to pay certain disability benefits. However,

since we have not determined the rate at which those benefits will be paid, we have created a significant possibility that there will be delays and confusion in paying any past due or future disability benefits.

For the reasons set out above, I respectfully dissent from the Majority's Order vacating the portions of the Administrative Law Judge's decision referred to above.

SHELBY W. TURNER, Commissioner