

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304735

ROBERT SOWELL	CLAIMANT
CONAGRA POULTRY COMPANY, EMPLOYER	RESPONDENT
SELF-INSURED, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 15, 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.

Respondent represented by the HONORABLE MIKE MAYTON,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

_____ Claimant appeals the March 12, 2004, opinion of
the Administrative Law Judge finding that claimant had not
met his burden of establishing a compensable injury and
denying and dismissing the claim. The claimant has alleged
that he suffered a gradual onset injury to his lower back as
a result of his employment with the respondent. The
respondent has denied this allegation and controverted the
claim in its entirety.

After conducting a de novo review of the entire
record, we find that claimant sustained a compensable
gradual onset injury arising out of the course and scope of

his employment in the form of a ruptured disc at L5-S1 and L4-L5 with radiculopathy at L5-S1. We, therefore, find that the claimant has established all of the elements of a compensable gradual onset injury to his lower back.

Accordingly, we reverse the decision of the Administrative Law Judge and award medical and temporary total disability benefits as set out below.

The claimant has been employed with the respondent on two separate occasions. The first instance was from 1974 until 1987, and again from 1998 until March 31, 2003. It is the second employment period with which we are concerned here.

Shortly after returning to work for the respondent, the claimant was assigned lead man duty in the paw room ("paw" in this case is referring to chicken feet which were being processed for use in animal feed). This job required a considerable amount of heavy lifting. Some of the lifting occurred during the set up period in which the claimant, as lead man, was required to arrange the work area. However, the task that required the most prolonged effort was shoveling ice.

According to the description given by the claimant and his corroborating witnesses, a conveyor belt carried the chicken feet into the paw room where they were dropped into

a large vat of water. The water temperature had to be kept below 40 degrees. In order to accomplish this, a steady supply of ice was shoveled into the vat. The ice shoveling was primarily the claimant's responsibility. He obtained the ice in another part of the plant where an "ice auger" deposited crushed ice into a large tub. The tub was described as being approximately five feet high in rectangular shape and three or four feet on each side. Edward Powers, a witness who testified at the hearing, estimated that each tub would hold "a ton of ice." After the tub has been filled, it was moved into the paw room using an electric powered jack. Once the claimant had moved the ice tub into position, he would begin shoveling the ice from it, using a large scoop shovel. This process had to be repeated frequently in order to keep the water sufficiently chilled. Claimant estimated that he spent approximately half of each shift shoveling the ice.

The testimony of the claimant and his corroborating witnesses was that the ice shoveling was a very demanding physical activity that placed a substantial strain on the back. It is this heavy straining that the claimant contends was the cause of his gradual onset back injury. In support of that contention, the claimant relies upon the medical evidence and opinions developed during his

course of treatment with Dr. Harry Starnes and Dr. John Waller.

Dr. Starnes, a general practitioner in Clinton, Arkansas, saw the claimant on February 24, 2003. In a treatment note of that date, he states that the claimant had told him that his back had begun hurting on Sunday and that the claimant attributed it to shoveling ice at work. Dr. Starnes diagnosed the claimant as suffering from a back strain and provided him medication. Dr. Starnes continued to treat the claimant and, in a report of April 1, 2003, Dr. Starnes noted that the claimant's condition had worsened and that he was now complaining of pain and numbness in his legs, most specifically, on the left. Dr. Starnes directed the claimant to undergo an MRI. An open MRI was performed on the claimant on April 2, 2003. The MRI report noted the presence of minimal diffused annular bulging at the L2 through L5 levels. It also stated that the bulging had flattened the interior surface of the thecal sac without focal nerve root displacement, and at the L5-S1 level, there was diffuse spondylosis or annular bulging with moderate compromise of the L5-S1 foramen. No disc protrusions or herniation were seen. Dr. Starnes then referred the claimant to Dr. John Waller, an orthopedist in Heber Springs.

On April 11, 2003, Dr. Waller reviewed the claimant's MRI and interpreted it as showing "a bulging disc at L5-S1 on the left side" and narrowing in L4-L5. Dr. Waller opined that claimant had a "ruptured disc at L5-S1 and L4-L5, left with L5 and S1 radiculopathy." Dr. Waller's pre-operative diagnosis was "ruptured or bulging disk at L5-S1 and L4-5 with left-sided radiuclopathy, prominently S1 root." Dr. Waller performed a two level laminectomy on May 15, 2003. In an operative report of that date, Dr. Waller described the procedure and stated that he discovered protruded disc material at L5-S1 which he removed.

Both Dr. Starnes and Dr. Waller gave an opinion on the causation of the claimant's injury. In a letter dated July 22, 2003, Dr. Starnes made the following comment:

Mr. Sowell is a patient in this office and has been seen with low back pain, which eventually required surgical intervention. It is my opinion, within a reasonable degree of medical certainty, that this was ultimately related to his job duties of continued heavy activity.

Dr. Waller had a similar opinion which he set out in a letter dated July 30, 2003. In his letter, he made the following statement:

In response to your question regarding the cause and effect of Mr. Robert Sowell's back injury date of 3/13/2003, please be advised that with the limited information and history that I have from

Mr. Sowell, it would appear, within a reasonable degree of medical certainty, that Mr. Sowell's back condition is as a result of his job at ConAgra which caused his injury of 3/13/2003.

In regards to any questions concerning impairment, Mr. Sowell is still undergoing evaluation and its [sic] is too early for me to give any kind of statement regarding future impairment.

On August 29, 2003, Dr. Waller recommended that Claimant continue with physical therapy and medication to improve his range of motion in the lumbar spine.

The respondent offered some medical evidence to demonstrate that the claimant's lower back problems had predated his second round of employment with the employer. The record reflects that the claimant sought medical treatment on four separate occasions between January 1995 and May 1996. On January 17, 1995, the claimant saw Dr. Krishna Reddy, a general practitioner in Clinton, Arkansas. In a progress note of that date, Dr. Reddy noted the claimant's complaints of lower back pain without radiation as well neck and shoulder pain. In regard to the claimant's lumbar spine, Dr. Reddy stated that there was a mild tenderness and that a straight leg test was negative and that the claimant's reflexes were within normal limits. The doctor also commented that an x-ray of the claimant's lumbar spine showed mild arthritis. Dr. Reddy saw the claimant

again on October 8, 1995 for neck and shoulder pain. An examination of the claimant's back once again demonstrated only mild tenderness with normal reflexes and a negative straight leg test. The doctor diagnosed the claimant as suffering from arthritis of the lumbar spine and possibly fibromyalgia. As with the prior visit, Dr. Reddy treated the claimant with medication.

The claimant did not see Dr. Reddy again until April 18, 1996. Once again, the claimant complained of lower back pain. According to the doctor's note, the claimant also complained that the pain was radiating down his left leg. Dr. Reddy prescribed additional medication and suggested that the claimant use moist heat for his back area. Dr. Reddy also referred the claimant to Dr. Robert McCarron, an orthopedist.

Dr. McCarron saw the claimant on May 7, 1996. Dr. McCarron noted that the claimant was suffering from pain and stiffness in his neck. In regard to the claimant's back, the doctor noted that there was no superficial tenderness but that the claimant was uncomfortable. The doctor also stated that the claimant appeared to be very stiff. He also found that the claimant's spinal x-rays showed slight degenerative changes at L5-S1. The diagnosis was that the claimant was suffering from chronic pain syndrome and

recommended that he continue to treat his problem with medication. Neither Dr. McCarron nor Dr. Reddy provided the claimant any further treatment.

This claim is controlled by Ark. Code Ann. §11-9-102 (4) (A) (ii) (b). That statutory section defines a compensable injury as follows:

- (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or not identifiable by time and place of occurrence, if the injury is:
 - (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence.

Also relevant is Ark. Code Ann. §11-9-102 (4) (D). This section provides a compensable injury must be established by medical evidence supported by objective findings. Objective findings are defined in Ark. Code Ann. §11-9-102 (16) as findings which cannot come under the voluntary control of the patient.

Lastly, Ark. Code Ann. §11-9-102 (4) (E) (ii) requires that, for compensable injuries governed by Ark. Code Ann. §11-9-102 (4) (A) (ii), claimants can meet their burden of proving a compensable injury by a preponderance of the evidence only if the alleged compensable injury is the

major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102 (14) (A) defines major cause as more than 50% of the cause.

The claimant contends that his employment duties during the five year period from 1998 to 2003 caused his lower back to deteriorate in such manner so as to cause him to suffer a compensable, gradual onset back injury. The issue in this case is whether the claimant has met his burden of proving each of the above elements in order to establish a compensable injury. Having reviewed the facts of this case, and having applied it to the relevant sections of the Workers' Compensation Act, we find that the claimant has proved by a preponderance of the evidence that he incurred a compensable gradual onset back injury.

Initially, we find that the claimant's back condition is verified by objective medical findings. The MRI report of April 2, 2003, clearly denotes the type of anatomical changes that would be associated with the type of injury alleged by the claimant. Further, Dr. Waller, in his operative notes, documented his visual observation of protruded disc material in the claimant's spinal canal. We, therefore, find that the claimant has established his physical injury with objective findings.

The next requirement is that the injury must have arisen from the claimant's employment. The claimant is alleging that the heavy physical activity involved in shoveling the ice and other similar activities in his job as lead man in the paw room caused him to gradually develop a debilitating condition in his lumbar spine, causing disability and a need for medical treatment. Since those activities were clearly part of the claimant's job duties, any injuries sustained as a result of their performance would have arisen from the claimant's employment. Therefore, if the claimant can establish a causal connection between those activities and his current condition, he would have satisfied this criteria.

We now consider that the central issue of this case is whether the claimant can establish that the heavy lifting and shoveling of ice caused his condition to develop. We find that claimant has proved by a preponderance of the evidence that his back injury is causally related to his employment with respondent.

The claimant testified that his employment with the respondent from 1974 through 1987 involved working on the processing line and did not require him to engage in the type of heavy lifting and straining as was required by his job duties between 1998 and 2003. His employment activity

between his two stints with the respondent involved house painting and custodial supervision at a vacation resort. It does not appear that either of these two jobs would have consistently required the type of prolonged and sustained back strain as required by being the lead man in the respondent's paw room.

The respondent contends that the claimant's receipt of medical treatment for low back pain in 1995 and 1996 indicates that his back problems preceded his second employment with the respondent and undercut his contentions that his back condition was occasioned by his employment with the respondent. However, our review of the medical reports relating to the claimant's 1995 and 1996 back complaints show that they were of a minor nature and did not cause the type of disability or extensive medical treatment required by the claimant in 2003. Specifically, Dr. Reddy's first two progress notes indicate that the claimant was only suffering from back pain and some tenderness. There is no mention of radicular symptoms nor did the doctor feel it necessary for the claimant to undergo an MRI on either occasion. Over one year later, the claimant again sought medical treatment from Dr. Reddy with similar complaints. This time, Dr. Reddy referred the claimant to a specialist, Dr. McCarron. This doctor also failed to find any radicular

symptomology present and he likewise did not feel an MRI was necessary. Based upon the record introduced at the trial, it did not appear that the claimant sought any further medical treatment for his back until he first saw Dr. Starnes in May of 2000, a period of four years. Significantly, this visit was after the claimant had returned to work for the respondent and had begun performing the paw room lead man duties.

Dr. Starnes' progress notes indicate that when the claimant began seeing him, in February 2003, the claimant's complaints were of a materially different nature than they had been when he began seeing Dr. Reddy in 1995, some eight years before. Also, the x-rays taken at the direction of Dr. Reddy only showed mild degenerative disc disease at L5-S1. Otherwise, the x-rays were normal. However, the MRI scan from April 2003 demonstrated significant changes in the claimant's spine, including what Dr. Waller would later determine was protruded or disc material in the spinal canal. This is a markedly different condition than what existed during the claimant's previous employment.

We also find that both Dr. Waller and Dr. Starnes opined that the claimant's employment had brought about his condition. The Administrative Law Judge chose to disregard the opinions of both doctors because of his belief that the

claimant had imparted an inaccurate history to Dr. Waller. In our opinion, this determination was in error. In the first place, we note that Dr. Waller did mention the claimant's past history of juvenile arthritis. Obviously, the claimant did impart some of his past history to Dr. Waller. There is no reason to believe that Dr. Waller was not aware of the claimant's back treatment in the middle 1990s. However, even if he were not, we do not think this omission would have been significant. The nature of the claimant's problem when he sought treatment from Dr. Waller was far more severe than the symptoms that caused him to seek treatment from Dr. Reddy and later Dr. McCarron. Also, the fact that the claimant sought medical treatment on four occasions in the middle 1990s, the most recent of those occasions, approximately seven years prior to seeing Dr. Waller, is not particularly significant. We also note that during these visits with Dr. Reddy and Dr. McCarron, the claimant had other problems, specifically, in his shoulder and neck which was also a factor in his seeking treatment. Accordingly, we find that the claimant has established a causal connection between his present condition and his job related activities with the respondent employer beginning in 1998.

We must also determine whether the major cause of the claimant's present disability or need for medical treatment was his job related activities. In reviewing the claimant's past medical and employment history, we have no doubt that his job related activities with the respondent employer during the period of 1998 to 2003 are the major cause of his present disability and need for medical treatment. As indicated above, we do not believe that the claimant's back condition in the middle 1990s is in any way comparable to the severity of the problem which he is now complaining of. Further, it does not appear that his employment prior to 1998 involved the type of heavy lifting and straining which caused his condition to develop.

While it may be true that the claimant did have some degenerative back disease in 1998, when he became re-employed with the respondent, this condition does not obviate the present claim. As was recently held by the Arkansas Court of Appeals, the major cause provisions of the Arkansas Workers' Compensation Act do not prevent a claimant with pre-existing degenerative disc disease from obtaining benefits in gradual onset spinal injuries. See Parker v. Atlantic Research Corporation, ___ Ark. App. ___, ___ S. W. 3d ___ (June 30, 2004).

We find that claimant has proved by a preponderance of the evidence that he sustained a compensable gradual onset back injury in the form of a ruptured disc at L5-S1 and L4-L5 with radiculopathy at L5-S1, which arose as a result of his job related activities. Claimant has proven that as a result of this injury, he is entitled to medical treatment related to that injury.

Another issue that we must address is claimant's entitlement to temporary total disability benefits. Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo

Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984).

Claimant testified that the last day that he worked for respondent was March 31, 2003. Dr. Waller's opinion dated July 30, 2003 and office note of August 29, 2003, state that claimant was still undergoing evaluation and treatment. Claimant testified that Dr. Waller released him to return to work with restrictions in October, 2003. Claimant also gave undisputed testimony that upon giving the return to work release to respondent, he was sent home and told by a representative of the respondent that they would contact him when they found a job that he could perform. It is also undisputed that the following day the day shift nurse, Pam Duncan, informed claimant that respondent could not return him to work at that time. Claimant gave undisputed testimony that LaDonna Gilmer, a company nurse, currently had the restricted return to work release. The record shows that Claimant drew short term disability benefits from April 9, 2003, through June 6, 2003.

We find that claimant is entitled to temporary total disability benefits from April 1, 2003 to a date yet to be determined. After reviewing Dr. Waller's post-operative opinions and the record as a whole, we find that there is insufficient evidence that claimant has reached the

end of his healing period. While claimant testified that he has been released to return to light duty work, it is undisputed that respondents did not return claimant to work. Accordingly, there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. See Sanyo Manufacturing Corp., supra. We, therefore, find that claimant is entitled to temporary total disability benefits from April 1, 2003 to a date yet to be determined.

In sum, we find that the claimant has established all of the elements of a compensable gradual onset injury to his lower back. The decision of the Administrative Law Judge is accordingly reversed. As such, we find that claimant is entitled to reasonably necessary medical treatment related to his compensable injury and temporary total disability benefits from April 1, 2003, to a date yet to be determined.

Respondents are directed to comply with the award of benefits set forth herein. 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, the claimant's attorney is awarded the sum of \$500.00, with one-half of that amount to be paid by the respondent and the balance to be withheld from the compensation payable to the claimant.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury for which he is entitled to medical benefits as well as temporary total disability from March 31, 2003, and continuing through a date yet to be determined. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the

credible evidence that he sustained a gradual onset back injury which is the major cause of his disability or need for treatment. Alternatively, I find that even if the claimant sustained a compensable injury, a finding I specifically do not make, I find that the claimant is not entitled to temporary total disability beyond October of 2003, when by the claimant's own admission he was released from his doctor's care.

On or about February 24, 2003, the claimant sought medical treatment from his family physician for complaints of low back pain. When the claimant's complaints failed to improve with conservative treatment, an MRI was ordered and the claimant was referred to a neurosurgeon. The MRI revealed minimal diffuse annular bulging at L2-3 and L3-4 and mild diffuse annular bulging at L4-5 none of which was found to produce canal compromise or nerve root displacement. At L5-S1 mild diffuse spondylosis and/or annular bulging to the left was noted. This finding was thought to produce moderate compromise of the left L5-S1 foramen. However, no definite focal disc protrusion or herniation was noted by the radiologist. Nevertheless, Dr. John Waller, the claimant's neurosurgeon interpreted these films to reveal a ruptured disc at L5-S1 and L4-5. Dr. Waller recommended epidural steroid injections prior to

proceeding to surgery. When the steroid did not provided lasting relief, the claimant underwent a laminectomy on May 15, 2003. The operative report from the surgery performed by Dr. Waller on May 15, 2003, states in pertinent part:

I then used a large Kerrison rongeur to carry out a partial laminectomy of the upper edge of the S1 and the inferior edge of L4 and a complete laminectomy on the left of L5. I then continued out laterally and did a neural foraminotomy of the L5 root and the S1 root. This then gave complete direct vision of the nerve root of L5 and S1. I probed this with a malleable probe and found the neural foramen to be completely open. There was disk material laying in the disk area right next to the pedicle laterally. The laminectomy was accomplished and there was no significant bleeding, so no bone wax was used. There were no cerebrospinal fluid leaks as a result tested by double Valsalva maneuver. I then went into the L5-S1 disk after we had taken a localization film to confirm this space and removed a small amount of disk material out laterally and then cleaned out the disk space which was fairly empty....

Dorland's Illustrated Medical Dictionary, 27th edition, defines laminectomy as an "excision of the posterior arch of a vertebra." The arcus vertebrae is defined by Dorland's as "the bony arch composed of the laminae and pedicles of a vertebra; called also arch of vertebra."

As noted above, Dr. Waller did not identify the presence of a herniated or even a bulging disc at L4-5 in his operative report. Moreover, the disc material he did identify in the L5-S1 disc space was not removed by Dr. Waller. This hardened disc was identified in a subsequent post-surgery MRI. In his July 25, 2003, clinical report, Dr. Waller noted that this was a "hardened disc which was not removed intentionally. I do not think it is causing him any problems with radicular pain at this point in time." Despite the surgery, the claimant testified that his condition has not improved.

The presence of this hardened disc supports the finding that the claimant has had back problems for a very long period of time. The claimant denied receiving treatment for any such back problems from Dr. Reddy, his family physician prior to 2003. However, the medical records do not support this self-serving testimony. The claimant was seen as far back as 1996 with complaints of lower back pain radiating down into his left leg. The history the claimant provided to his orthopedist at that time was of very bad pain in his legs for about five years. After his re-employment with the respondents in 1998, the claimant continued to seek medical treatment for these same complaints over the years. Accordingly, when I weigh all

the evidence, it is clear that the claimant has suffered from degenerative disc disease, lower back pain, and radiating pain even prior to the claimant's return to work for respondents in 1998. The claimant's disability and need for treatment in 2003 resulted from this pre-existing condition and not the claimant's work. Therefore, I cannot find that a gradual onset back injury arising out of the claimant's work is the major cause the claimant's disability and need for treatment. Despite Dr. Waller's finding of a herniated disc on the MRI which might account for a gradual onset injury, Dr. Waller's operative report did not confirm the presence of a disc herniation other than the clearly degenerated hardended disc which was not even removed. Moreover, the disc material removed from the L5-S1 disc by Dr. Waller was never described as being extruded or herniated disc material, as he had to go into the disc to clean it out.

In short, the evidence reveals that the claimant suffers from degenerative disc disease and has suffered from this condition for an very long time. The herniated disc identified by Dr. Waller on the MRI prior to surgery was determined during surgery to be of a long standing nature and did not require surgical removal. Accordingly, I find that the preponderance of the evidence does not support a

finding of a gradual onset back injury arising out of and in the course of the claimant's employment which was the major cause of the claimant's disability or need for treatment.

I further find that the claimant failed to prove by a preponderance of the evidence that he remained within his healing period and thus entitled to temporary total disability benefits after he was released by his treating physician and given a release to return to work with restrictions in October of 2003. In this regard, the claimant specifically testified that he was released by his doctor in "October, November, somewhere around in there" and that he is no longer under the doctor's care. An injured employee is entitled to temporary total disability compensation during the period of time that he is within his healing period and totally incapacitated to earn wages.

Arkansas State Highway & Transportation Dept. V. Breshears, 272 Ark. 244, 613 S.W.2d (1981). The "healing period" is defined as the period necessary for the healing of an injury resulting from an accident. Ark. Code Ann. § 11-9-102(13) (Supp. 1997). The healing period continues until the employee is as far restored as the permanent character of her injury will permit. When the underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has

ended, and the claimant is no longer entitled to receive temporary total disability compensation or temporary partial disability compensation, regardless of her physical capabilities. Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). By the claimant's own admission, he was released by his treating physician and is no longer under the doctor's care. This release clearly indicates that nothing further will improve the claimant's condition. Regardless of whether the respondent's provided the claimant with light duty within the restrictions set forth by the claimant's physician, I find that the claimant's healing period ended when he was released by his doctor. Therefore, I find that the claimant has failed to prove entitlement to temporary total disability beyond his healing period, which I find to have ended in October of 2003.

Accordingly, for those reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner