

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F803184

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|---------------------------------|------------|
| ROBERT HAYS, EMPLOYEE | CLAIMANT |
| REDDY ICE GROUP, INC., EMPLOYER | RESPONDENT |
| ESIS, INC., CARRIER | RESPONDENT |

OPINION FILED JULY 28, 2009

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

Claimant represented by HONORABLE KEN OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed December 1, 2008.

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

1. The stipulations agreed to by the parties at the prehearing conference conducted on July 10, 2008, and contained in a pre-hearing order filed July 11, 2008, are hereby accepted as fact.
2. The claimant proved the existence of objective findings related to his lower back, left ankle, and left knee.

3. The claimant failed to prove the existence of a causal relationship between his work related injury and the objective findings regarding his lower back, left ankle, and left knee.

4. The claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury or injuries on March 27, 2008.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission

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on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that he sustained a compensable low back injury when he turned his ankle stepping on a tennis ball sized chunk of concrete while performing employment services on March 27, 2008. I find that the claimant is entitled to reasonably necessary medical treatment for his low back injury, specifically a referral to a neurosurgeon as recommended by Dr. Vandegriff, and therefore, I must respectfully dissent.

HISTORY

_____The claimant worked for the respondent as an ice delivery man. The ice the claimant would deliver included 270-pound carving blocks of ice. The claimant would load the ice onto a truck or trailer for delivery. In addition

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to delivering ice, he delivered ice merchandisers which weigh several hundred pounds each. On March 27, 2008, the claimant and his helper, Jimmy Bright, were hooking a trailer up to the back of a pickup, when the claimant stepped out of the truck, walked around to view the trailer hook-up, and stepped on a tennis-ball-sized loose chunk of concrete. When the claimant stepped on the loose concrete, his left ankle rolled to the inside, twisted his knee, and twisted his body. The claimant grabbed the trailer to keep from falling, and immediately had pain in his left ankle and left knee, and pain in his back. The claimant reported the injury to the respondent and was sent to the emergency room at Washington Regional Medical Center in Fayetteville. After the ER visit, the claimant was sent to Dr. Vandegriff, whom he saw three or four times. After receiving the results of an MRI taken on May 13, 2008, Dr. Vandegriff recommended that the claimant see a back specialist. At this point, the respondent controverted any additional medical treatment.

The claimant testified that he is no longer experiencing pain in his left ankle or left knee, but that he is experiencing hard, severe back pain in his lower to mid back. The claimant testified that, prior to March 27, 2008, his back did not hurt, and he was not seeing any kind

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of doctor for back problems.

The medical records show that on March 27, 2008, the claimant reported left knee, left ankle, and low back pain at the Washington Regional Medical Center Emergency Room.

On April 7, 2008, Dr. Cathleen Vandegriff stated, "Mr. Hays states that he stepped on a chunk of concrete on March 26, 2008 (sic) and rolled his left ankle. He states he felt pain shoot up to the left knee and, about an hour later, felt sharp pain in the center of his low back." Dr. Vandegriff assessed the claimant as having "low back pain, left knee strain and left ankle sprain." An X-ray of the lumbar spine taken on April 7, 2008 showed no acute fractures or dislocations.

On April 21, 2008, Dr. Vandegriff noted that the claimant stated that his low back pain is "about to kill me." This report indicates that the physical therapist had been using a TENS unit and ice to treat the claimant's low back pain. Dr. Vandegriff's outlined the following plan:

He needs to finish his physical therapy and I wrote for a prescription of Percocet. I would like to check an MRI of his L-spine due to his reported significant pain. I will see him back in two weeks' time and he can return to work with the same restrictions.

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On May 7, 2008, Dr. Vandegriff notes that the claimant reports that his low back is "absolutely killing me." The claimant reported that the physical therapy has been of no help for his low back, and that his back is worse than it was two weeks ago. The claimant, who had attempted to undergo an MRI but was unable to tolerate the testing due to claustrophobia and pain, agreed to try again.

An MRI report dated May 13, 2008 states that the claimant has mild annular disc bulging at each level from L2 through S1 with probably small midline disc protrusions vs. asymmetric disc bulges at L4-5 and L5-S1.

On May 19, 2009, Dr. Vandegriff states:

We discussed the lumbar MRI today which showed a mild annular disc bulging at each level from L2-S1 with probably small, mid line disc protrusion versus asymmetric disc bulges at L4-L5 and L5-S1. He also had desiccation of intravertebral discs from L3-S1 and degenerative changes of the facet joints at each level with fluid in the facet joints at multiple levels but no demonstration of synovial cysts with nerve root impingement...
Assessment: Mild annular disc bulge L2-S1 with low back pain, left knee strain, left ankle sprain.
Plan: For his back, I will send him to neurosurgery for evaluation and treatment....

DISCUSSION

I. COMPENSABILITY

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997). First, I find that the claimant has proved by a preponderance of the evidence that he sustained a low back injury causing internal physical harm to the body that required medical services, supported by objective findings. The workers' compensation statutes provide that "[a] compensable injury must be established by medical evidence supported by objective findings...." Ark. Code Ann. 11-9-102(4) (D) (Supp. 2007). "Objective findings" are defined as "those findings which cannot come under the voluntary

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control of the patient." Ark. Code Ann. §11-9-102 (16) (A) (i) (Supp. 2007). Here, the claimant presented the May 13, 2008 MRI showing mild annular disc bulge at L2-S1, which satisfies Ark. Code Ann. §11-9-102 (16) (A) (i). The claimant has received medical treatment for his back at the direction of Dr. Vandegriff, consisting of physical therapy and prescription pain medication.

Second, I find that the claimant has proved by a preponderance of the evidence that his low back injury was a specific incident injury identifiable by time and place of occurrence arising out of and in the course of employment. The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W. 2d 263 (1962). While objective medical evidence is

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necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002).

Here, the Administrative Law Judge, affirmed and adopted by the majority, states: "The medical records initially show very little complaint from the claimant with regard to his back pain." This statement is simply incorrect. The very first medical report from the ER visit states, "Some Low Back Pain on L After He Twisted Ankle." The next medical record in evidence is a letter from Dr. Cathleen Vandegriff dated April 7, 2008, which states, "Mr. Hays states that he stepped on a chunk of concrete on March 26, 2008 (sic) and rolled his left ankle. He states he felt pain shoot up to the left knee and about an hour later, felt sharp pain in the center of his low back."

Additionally, the Administrative Law Judge, affirmed and adopted by the majority, bases the bulk of his opinion on findings relating to the claimant's left knee and left ankle injury. However, this is not a claim for benefits relating to the claimant's left knee or left ankle injury. The claimant testified that both of those injuries are

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healed. The claimant is only requesting benefits for a low back injury. In addition to apparently misunderstanding what this case is about, the Administrative Law Judge also apparently misunderstands what causal connection the claimant is required to prove. The Administrative Law Judge states: "The claimant certainly has objective findings of back difficulties but he cannot show any causal relationship between those findings and his alleged injuries." I am unclear as to exactly what the Administrative Law Judge means by this statement, but I believe that he may be requiring the claimant to prove a causal connection between his back injury and his left knee and left ankle injury. There is no basis for this in Arkansas workers' compensation law. The claimant credibly testified that on March 27, 2008, he got out of his truck and twisted his left ankle, left knee, and back, when he stepped on a tennis ball sized chunk of concrete. The medical records corroborate his testimony. The claimant has proved a causal connection between his low back injury and the specific incident that occurred on March 27, 2008.

Contrary to the conclusion of the Administrative Law Judge, affirmed and adopted by the majority, there is no evidence of record indicating that the claimant had suffered from prior back problems caused by "manual labor or other

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body trauma." The Administrative Law Judge's conclusion in this regard is based on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Furthermore, even if the claimant's objective findings are characterized as purely degenerative conditions, a pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Manf. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). Here, the claimant was asymptomatic, performing heavy lifting at his job without any back complaints until the rock-twisting incident on March 27, 2008. Therefore, due to the specific incident, any need for low back treatment now cannot be said to stem only from pre-existing degenerative changes. I find, based on the claimant's credible testimony and the corroborating medical record, that the claimant has met all

of the elements required for a finding of compensability for a low back injury sustained on March 27, 2008.

II. REASONABLY NECESSARY MEDICAL TREATMENT

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a) (Repl. 2002). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Here, all the claimant is requesting is a visit with a neurosurgeon, as recommended by his treating physician. Certainly, in light of the MRI findings and the treatment modalities already provided to the claimant, a neurosurgical consult is reasonably necessary medical treatment under the standard outlined above.

CONCLUSION

I find that the claimant has proved by a preponderance of the evidence that he sustained a compensable low back injury when he turned his ankle stepping on a tennis ball sized chunk of concrete while performing employment services on March 27, 2008. I find that the claimant is entitled to reasonably necessary medical treatment for his low back injury; specifically, a referral to a neurosurgeon as recommended by Dr. Vandegriff. For the aforementioned reasons I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner