

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS G001688 & G002605

JEFF GLADISH, EMPLOYEE	CLAIMANT
AMERICAN RAILCAR INDUSTRIES, EMPLOYER	RESPONDENT NO. 1
HARTFORD/SPECIALTY RISK SERVICES, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SENTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED JULY 1, 2011

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

Claimant represented by the HONORABLE SCOTT HUNTER, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE MICHAEL MAYTON, 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 19, 2010. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. There was an employer-employee relationship on October 28, 2009 and again on February 8, 2010.

2. The compensation rates are \$431/323.
3. Hartford/Specialty Risk Services was on the risk on October 28, 2009.
4. Sentry Insurance Company was on the risk effective December 1, 2009.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable aggravation of his preexisting condition on February 8, 2010.
6. The claimant has proven that the medical treatment he has pursued after February 8, 2010 was reasonably necessary in relation to his compensable injury.
7. The claimant has proven that he remained in his healing period and was unable to earn wages from February 9, 2010 to a date to be determined.
8. Benefits awarded are to be apportioned between Respondent #1 and Respondent #2.
9. Respondents are entitled to an offset for group benefits paid pursuant to Ark. Code Ann. §11-9-411.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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 19, 2010, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant sustained an aggravation of his pre-existing condition on February 8, 2010 and apportioning the benefits awarded between both respondent No. 1 and respondent No. 2 equally. Based upon my de novo review of the record, I find that the claimant sustained a compensable recurrence on February 8, 2010. Therefore, respondent No. 1 is responsible for all of benefits awarded.

The claimant worked for the respondent employer for 11 years before the October 2009 incident. The claimant was an out man for interior painters. The claimant described the incident on October 28, 2009 as follows:

Well, on these particular cars, they had to have the interior painters inside the car; and they had these aluminum extension boards inside the cars so they could stand on them. My

job was - when they got off them boards, they would contract them and slide them out; and I had to pick them up from the ground and put them in a holding- something to hold them in.

Then I had to go to the top of the car and paint the hatch rings with a paint gun. When I was picking up one of the walk boards, I felt a pain in my back and going down my leg.

The claimant described the boards as aluminum that extend from 10 to 20 feet and weigh about 40 to 60 pounds. These are used inside the railcars to paint the top part of the hoppers. The claimant testified he would pick up about 56 boards per day. The claimant would stoop over and lift the board from the ground and place it in a rack that was about head level high. In addition to lifting the boards, he would paint the hatch rings on top of the cars, pick up trash from the floor and take that out and pull the cars with cables.

After the claimant picked up the board on October 28, 2009, he felt pain into his lower back and the pain continued down his left leg. According to the claimant, the pain was a sharp pain, almost unbearable. He reported this incident to his supervisor, Thomas Friar. The claimant was sent to see Dr. Williams who diagnosed the claimant with a lumbar strain and released him back to work with restrictions of no stooping,

bending or lifting. According to the claimant, Dr. Williams only did a range of motion test, but did not order an MRI, CT scan or x-rays. The claimant had no previous history of back problems.

The claimant returned to work, performed his assignments but continued to have pain. He took Naproxen. The claimant described his duties from the time of the first incident in October 2009 until the February 8, 2010 incident:

A. When I went to the old paint shop, I was taking gates off of railcars out back.

Q. Okay. Now describe those gates for us, if you will.

A. I had to get underneath the car with an impact and a wrench to take the bolts out. Then I had to get a forklift in there to catch the falling gate when you take the bolts out. Then you had to get in there with a loaded fire hose and wash the hoppers out. Then you had to shovel the grain that fell on the ground into the hopper.

The claimant testified that his job duties were not consistent with Dr. Williams' restrictions. The claimant described a hose that he had to use that was three to four inches in diameter and about 100 feet long. The claimant would drag this throughout the day

and this caused a strain on his back. His job involved knee walking and he explained that:

A. You had to paint the bottom half of the rail car; and to do that, you have to be on your knees and move from side to side and front to back, painting underneath the rail car.

Q. Is this what you were doing on that day in February when you felt a sharp pain in your back again?

A. Yes, sir.

The claimant testified that after he felt the sharp pain on February 8, 2010, he laid down under the railroad car to ease the pain. The claimant saw another employee, Matt Vincent, in the paint booth during this incident. The claimant finished painting the car and this took about 30 minutes. Once the claimant was finished, he retreated from the railcar and Mr. Vincent asked him if he was going to be all right. The claimant testified that he was limping. After the second injury, the claimant was having pains down both legs, more on the left side but also pain across his pelvic region and down the right leg. Mr. Vincent reported the incident to Robbie Gatlin and the claimant was asked to sit in the break room and he did so for about two and a half hours.

The claimant talked to Mr. Gatlin and was told that he would have to go see his own doctor.

The claimant saw his personal doctor, Dr. John Hines who ordered x-rays and a CT. Dr. Hines referred the claimant to Dr. Robert Abraham. Dr. Abraham prescribed pain medication and gave the claimant a return to work slip with no lifting over 20 pounds and light duty work. The respondent employer placed the claimant on medical leave.

Dr. Abraham ordered a myelogram that was paid for through the hospital low income funding. Dr. Abraham recommended surgery. The claimant reported this surgical recommendation to the Human Resource Manager for the respondent employer, but no action was taken. The claimant has not had the surgery because he does not have the money. The claimant testified that he is unable to perform any of the jobs he previously performed between October, 2009 and February, 2010. The claimant testified that he could hardly use his left leg after the February 2010, injury and he had pain every day.

The evidence demonstrates that the claimant drew some group disability benefits starting around July 2010, and group health has paid some medical. The claimant confirmed that he did see a doctor and was

prescribed some Vicodin and Flexeril for pain in his leg in October 2007.

The claimant testified that in October 28, 2009, he knew immediately that he had hurt his back when he felt a sharp pain in his low back and the pain went down his left leg. He sought some medical treatment and returned to work on light duty for a time. The claimant testified that the pain never went away. The claimant confirmed that his back continued to get worse and worse following the February 2010, incident. The claimant testified that his left leg pain worsened following the February 8, 2010, activities and he developed right leg symptoms that he had previously not experienced. The claimant stated that after walking on his knees and working on the rail cars on February 8, 2010, he was hardly able to walk afterwards. The claimant reported his problems of February 8, 2010 to his supervisor, Matt Vinson, and Mr. Vinson reported these to the Superintendent, Mr. Gatlin.

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.

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. Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000), Georgia-Pacific Corp. v. Carter, 62 Ark. App.

162, 969 S.W.2d 677 (1998), Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984).

If the aggravation/new injury is an accidental injury, it must meet the following criteria to establish compensability: it must be (1) an independent incident; (2) work-related; (3) caused by a specific incident identifiable by a time and place of occurrence. See Ark. Code Ann. § 11-9-102(4) (A) (i) (Supp. 2009); Farmland Ins. Co. v. DuBois, Supra. An injury does not have to be accidental in order to qualify as an aggravation/new injury; it must, however, fall within one of the definitions of a compensable injury as set forth in Ark. Code Ann. § 11-9-102(4) (A).

Both respondent No. 1 and respondent No. 2. have accepted that the claimant had a compensable event on February 8, 2010. What must be decided is whether that event was a recurrence or an aggravation of the October 28, 2009 injury. In my opinion, the evidence demonstrates that the February 8, 2010 incident was a recurrence of the October 28, 2009 compensable injury. First and foremost, there was no independent event that took place on February 8, 2010. The claimant was questioned regarding what happened on that date and he testified as follows:

Q Okay. Mr. Murphy was asking you questions first when your deposition was taken back on August the 13th of '10, and he asked you then if you felt like you got hurt on the job in February. Your answer to him was, "I felt it was a recurrence of the original injury and inflammation maybe." Is that pretty much what you told us?

A Yes, since the pain was still there.

Q And that's exactly what you said. You said, "Because the pain was still there, and it just got worse and worse."

A Yes, sir.

Q And you said that's the way it had been since October the 28th of 2009; is that correct?

A Yes, sir.

Q And he was saying like he did today, "But you kept working and even got back to working pretty much your normal job; and you say, "Yeah, I did. I did it, but I did it with pain."

A Yes. I was in pain every day.

Q Every day from October the 28th of 2009, even up to and including February 8th of 2010?

A Yes, sir.

Q He asked you also if your leg symptoms had ever gone completely away before February, after that October of

2009 incident; and you told him that they had not.

A No, they hadn't.

Q Okay. We were also asking you questions -- I think Mr. Stiles who sat in for me that day asked you if, after this October 2009 accident and before the February 2010 incident, you had ever told anybody out at American Railcar that you were still having problems with your back and your back continued to hurt? You said, yeah, you told them. They knew your back was continuing to hurt after that 2009 incident?

A Yes.

Q Mr. Stiles was asking you when he took your deposition in February of 2010, "I don't think it was a situation like in October of 2009 where you had an incident, hurt your back lifting that board and went and reported it to your supervisor Jeff --

A I'm Jeff. The first supervisor was Thomas Friar.

Q Okay. So you went and reported it to him. I think in this instance in February, Matt Vincent approached you to see if your were okay. Is that kinda how that came about?

A Yes, sir.

Q Rather than you going to report it to him, he came up to you because he could tell you were

having some issues. Is that kinda the way that was?

A Yes, sir.

Q Then Mr. Stiles asked you, "Did you actually have an accident or an injury; did anything necessarily happen where you had what we call a specific injury?" And you told him, "Well, it was really a situation where I was just doing my job; and while I was doing my job, my back was hurting and started hurting more."

A Yes, sir.

Q But it wasn't a specific thing like had happened back in October?

A Yeah. I think I remember as he put it, nothing fell or [sic] me and I didn't trip.

Q You didn't slip and fall or pick up something and feel it; it wasn't anything like that?

A No.

Q It was a continuation of doing your regular work out there, and your back started hurting while doing your work?

A Yes, sir.

Q He asked you, "Was there anything outside the ordinary course of business that happened to you on February the 8th, 2010?" And you said, "No. I was doing my job and my back was hurting." I think your back

had been hurting ever since
October of '09; had it not?

A Yes.

It is clear from this testimony that there was nothing that happened on that date that was an independent injury that was identifiable by time and place of occurrence as required for an aggravation. Further, the claimant testified that his pain got worse after the October 28, 2009 accident. The claimant credibly testified that his back pain never truly eased up and it stayed in his low back and down his legs. He stated via his testimony that it was going down into his legs before February 8, 2010. The claimant testified as follows regarding his ailments:

Q How did you fare when you went back to work and were sent to this new job?

A It was hard to do without pain. I was in pain every day.

Q Did the pain ever go away?

A No.

Q Could you do things that would alleviate the pain in some fashion and make it easier to work?

A I would -- like I do now, I would shift and stuff when I was sitting; but when I was working, I was just in pain.

Q So you actually had nothing done to alleviate the pain in your back except taking the Naproxen?

A That's right.

Q No treatment or therapy or anything like that?

A No, sir.

...

Q Okay. As far as you could tell, how was your back feeling from the time you injured it back in October 2009 until this time if February of 2010?

A It hurt every day.

Q Okay. Now, on the knee walking, is that what you were doing when you felt the sharp pain again?

A Yes, sir.

Q What did you do after you felt that pain?

A I laid down and extended myself, trying to ease the pain.

...

Q You were talking about taking the over-the-counter medication, and you told Mr. Stiles that you took it every day.

A Yes.

Q After this October 28, 2009 accident, you took that medicine every day?

A Yeah.

Q And he asked you, "Well, did that make the pain go away?" And you said no; is that correct?

A That's true. It might ease it up a little bit, but it didn't go away.

Q That's what you said. You said, "It stayed in my lower back, and I had that pain down my thigh, calf and into my foot on my left side; and on my right side, it felt like a cell phone going off."

A It was on my left side yesterday. It varies.

Q Really?

A [sic] But you said that before February the 8th of 2010, even though you were taking that medicine after October 28th of 2009, it stayed in your back, down your thighs, into your calf and your foot?

A Yes.

Q Then it felt like a cell phone ringing in one leg. You said you'd go back and work, but it continued to bother you the whole time?

A Yes, sir.

Q Okay. Mr. Stiles also asked you, prior to February the 8th of 2010, did that back pain every truly ease up?" and you said no, that it sometimes wasn't as bad as it actually was on the day of October the

28th, but it stayed there and continued hurting you.

A Yes, sir.

Q And he said, "Is it safe it stayed in your low back and down your legs?" And you said yes; is that correct?

A Yes, sir.

Q You told him that before February the 8th, it was primarily your left leg, but it also started going down in your right leg some too even before February the 8th of 2010?

A Yes.

Q Okay. There's a couple more things I wanted to ask you about. You did not have an MRI after that October 28th, 2009 accident; did you?

A No.

Q Okay. Did anybody ever tell you that you needed one or suggest one?

A No.

Q Why didn't you have one back then?

A I went and seen Doctor Williams, and he said I had a lumbar strain. I took his word and took the Naproxen and went back to work, and it just kept getting worse.

It is clear from the testimony of the claimant that he had no relief from his problems after the

October 28, 2009 incident, but that it grew worse. There was no specific incident that caused the claimant to have more pain, but it was consistently getting worse from the time of October 28, 2009, incident until the claimant could not stand it anymore in February of 2010. Therefore, it is clear that the claimant sustained a recurrence and not an aggravation of his pre-existing condition on February 8, 2010. Further evidence of a recurrence is that the claimant was a very good employee of the respondent employer. The claimant very rarely missed work and was an extremely responsible employee. The claimant worked through the pain and as time passed and it got worse, he simply could not tolerate it any more. The claimant being a conscientious employee worked until he could not possibly deal with the pain any longer.

Therefore, when I consider all the evidence of record, I find that the claimant sustained a recurrence of his compensable injury on February 8, 2010, and respondent no. 1 is solely liable for the claimant's benefits. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion apportioning the claimant's benefits between respondent no. 1 and respondent no. 2.