

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H010320

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| GLENN CARTER, Employee | CLAIMANT |
| GEA NORTH AMERICA, INC., Employer | RESPONDENT |
| SENTRY INSURANCE CO., Carrier | RESPONDENT |

OPINION FILED SEPTEMBER 29, 2021

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by MATTHEW J. KETCHAM, Attorney, Fort Smith, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 8, 2021, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 9, 2021 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on November 24, 2020.

3. The claimant was earning an average weekly wage of \$1,320.00 which would entitle him to compensation at the weekly rates of \$711.00 for total disability benefits and

\$533.00 for permanent partial disability benefits.

At the hearing the parties also agreed to stipulate that respondent had paid temporary total disability benefits and medical benefits through March 22, 2021.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back on November 24, 2020.
2. Medical.
3. Temporary total disability benefits.
4. Attorney's fee.

The claimant contends that he was injured on November 24, 2020 when he was rear-ended. He requests payment of medical benefits, temporary total disability benefits, and an attorney's fee. The claimant reserves all other issues.

The respondents contend that the evidence available at this time does not establish the existence of a compensable low back injury by a preponderance of the credible evidence. Alternatively, to the extent claimant can establish the existence of a compensable injury, the treatment being requested with Dr. Jones is not reasonable, necessary, or causally related to the events of November 24, 2020.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted

on June 9, 2021 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. The parties' stipulation that respondent paid temporary total disability benefits and medical benefits through March 22, 2021 is also hereby accepted as fact.

3. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on November 24, 2020.

FACTUAL BACKGROUND

Claimant is a 67-year-old man, living in Rogers, who began working for respondent as a traveling service tech on June 15, 2015. Claimant testified that 90% of his job consists of performing inspections on ammonia compressors used in food processing for various companies such as Tyson, Cargill, ConAgra, and Smithfield. Respondent's primary office is in York, Pennsylvania with regional offices in Texas and California. Claimant and other service techs work out of their homes. Their work day begins when they leave their home and does not end until they return home. The service techs also travel to out of town locations, staying in hotels.

During the week of November 24, 2020, claimant was working out of his home in Rogers and was traveling to Fayetteville to inspect compressors in a Tyson plant. On Tuesday, November 24, 2020, claimant left the Tyson plant at approximately 5:00 p.m. and drove towards his home in Rogers. While still on travel time (for which he was paid) claimant was within two and a half blocks of his home and was sitting in the center lane to make a left-hand turn when he was struck from behind by another vehicle. His company provided vehicle automatically called 9-1-1 and EMS personnel arrived at the

accident scene. Claimant was asked if he needed treatment or needed to be taken by ambulance to the emergency room. Claimant declined treatment at that time. At the hearing, he testified as follows:

They asked me if I needed to be treated or if I needed to go in the ambulance. I did not feel at the time that I needed to be treated.

The other vehicle was inoperable and towed away. Claimant was able to drive his damaged truck home, and upon arriving home claimant sent an email to his supervisor and safety manager reporting the accident.

Claimant testified that the next morning, Wednesday, November 25, he woke up with left shoulder pain. He completed an accident form that had been emailed to him and informed respondent that his shoulder was hurting and he was going to seek medical treatment. After working at the Tyson plant until 1:30 or 2:00 p.m., claimant left and went to the Mercy emergency room in Rogers. The emergency room report indicates that claimant gave a history of left shoulder pain that began after a motor vehicle accident the night before. X-rays of the claimant's left shoulder revealed degenerative changes with no evidence of acute displaced fracture or findings of traumatic malalignment. Claimant was diagnosed with shoulder pain and given prescription medication.

Claimant was not scheduled to work on Thursday, Friday, Saturday, or Sunday because of the Thanksgiving weekend. Claimant testified that he woke up on Thanksgiving Day and was hurting in his low back and right leg. On Friday, he talked with his supervisor and learned that the next week he was scheduled to work in Broken Bow, Oklahoma. On Monday of that next week claimant drove a rented truck to Broken

Bow to inspect thirteen compressors. He performed his job that week and finished up on Thursday or Friday. He testified:

It was a difficult week. I knew at that point that I was hurt, that I - - you know, I was having trouble not necessarily climbing ladders, but I was hurting in my low back, my right leg. The shoulder by that time was - - had pretty well cleared up.

Claimant testified that on December 5, 2020, he woke up and his left leg was numb down through the toes. He returned to the Mercy emergency room with complaints of low back pain with numbness and shooting pain down both legs. He attributed the pain to the accident of November 24. Claimant was diagnosed with back pain of the lumbar region with sciatica and muscle spasm and was given pain medication.

On December 11, 2020, claimant was seen by Dr. Chris Carter, his primary care physician, for complaints of pain in shoulders and low back. Carter diagnosed claimant's condition as degenerative disc disease and acute bilateral low back pain with sciatica. Dr. Carter also prescribed medication.

On December 15, 2020, claimant was evaluated by Dr. Dominic Jacobelli for right-sided low back pain. Dr. Jacobelli diagnosed claimant's condition as acute right-sided low back pain without sciatica and spondylosis without myelopathy or radiculopathy of the lumbar region. Dr. Jacobelli treated claimant with medication and he also prescribed physical therapy. Dr. Jacobelli also ordered an MRI scan and in a report dated February 5, 2021, stated:

I have personally reviewed the MRI images of the lumbar spine done on 2/3/2021 showing significant moderate to severe lumbar spinal stenosis most significant at L3-L4 there is also mild to moderate spinal stenosis at L4-5

with bilateral neuroforaminal narrowing. There is fluid within the right facet joint.

Following the MRI scan Dr. Jacobelli referred claimant for an epidural steroid injection. That injection provided no benefit and claimant eventually came under the care of Dr. Charles Jones, neurosurgeon, who performed an L3/4/5 fusion procedure on June 15, 2021.

As previously noted, respondent paid claimant temporary total disability benefits and medical benefits through March 22, 2021. When respondent denied further benefits, claimant filed a claim with his group health insurance which paid for his surgery. Claimant has filed this claim contending that he suffered a compensable injury to his low back on November 24, 2020. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant is 67 years old and testified that he began receiving chiropractic treatment when he was a young man. Claimant testified that he began receiving treatment at the Hines Chiropractic Clinic when he moved to Rogers in 1983. The documentary evidence in this case contains numerous medical records from the Hines Chiropractic Clinic. Claimant's chiropractic treatment included treatment for low back complaints. There appears to be no question that claimant had pre-existing low back complaints prior to November 24, 2020. However, an employer takes an employee as it finds him and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150

(2003). An aggravation of a pre-existing non-compensable condition by a compensable injury itself is compensable. *Oliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W. 3d 336 (1999). 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).

Claimant contends that he suffered a compensable injury as a result of a motor vehicle accident that occurred on November 24, 2020. His claim is for a specific injury identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

After reviewing the evidence in this case impartially, and without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered an injury to his low back or an aggravation of a pre-existing condition.

Initially, it is important to note claimant's extensive low back complaints prior to November 24, 2020. Claimant attempted to distinguish his low back complaints before the accident and after the accident. With respect to his complaints prior to November 24, claimant testified that those included:

Anywhere from neck injury, hurting between the shoulder blades, middle back, and when I say “low back”, I’m talking about the area above my beltline.

Claimant went on to testify that his prior low back pain was in the upper low back area whereas his low back pain after the accident of November 24 was much lower. Claimant also testified that to his knowledge he had never complained of back pain running down his right leg and that any prior complaints of leg pain were to his left leg. However, the medical records do not support claimant’s testimony. In a report from Dr. Berestnev dated March 11, 2002, claimant was seen after slipping and falling on ice while carrying a 30-pound box. Dr. Berestnev noted that claimant had pain in his neck, mid back, low back, and low back area and indicated that the claimant “says the pain actually radiates down to his knees and he has [muscle] tightness in his anterior thighs.” This would indicate that claimant had pain radiating down to both of his knees since knees is plural.

Thereafter, medical reports from Dr. Terri Hines beginning on January 27, 2012 indicate that claimant was complaining of pain which radiated bilaterally down his buttocks. This complaint is reflected in multiple reports from Dr. Hines including January 27, 2012; February 8, 2012; June 20, 2013; August 5, 2013; August 23, 2013; and September 23, 2013.

More importantly, beginning in her medical report dated December 15, 2014, Dr. Hines’ medical report contains the following:

General Assessment: lumbo sacral subluxation with radicular pain in to R leg (Emphasis added.)

This same assessment of radicular pain into the right leg is also noted in Hines' medical reports of January 12, 2015; January 19, 2015; March 11, 2015; April 22, 2015; August 21, 2015; March 14, 2016; January 16, 2017; April 7, 2017; and July 5, 2017.

On August 1, 2018, claimant was evaluated by Dr. Hines for complaints involving his upper back and low back after jumping off a bridge into a river on vacation. Dr. Hines' medical report indicates that she provided treatment at various levels, including L5. Dr. Hines' medical report of August 6 also indicates that claimant's L5 area was treated.

Thus, claimant's testimony that his "low back complaints" involved only the upper portion of his low back as opposed to the lower portion of his low back and his contention that he did not make any complaints of radiating pain into his right leg is contradicted by the medical records.

Prior to the November 24, 2020 accident, claimant's last visit at the Hines Chiropractic Clinic occurred on August 20, 2018. Although the medical records were not submitted into evidence, claimant admitted that in the calendar year 2020 prior to his accident he continued to receive chiropractic care from Dr. Josh Jones and that this treatment included treatment for his low back.

Claimant testified at the hearing that after the accident it felt like he had been hit in the back with a sledge hammer. Claimant testified that when he awoke the next day he had complaints of left shoulder pain and sought medical treatment at the emergency room for left shoulder pain. Despite his testimony that he felt like he had been hit in the back with a sledge hammer, claimant did not make any complaints at the emergency room on November 25 of back complaints. The emergency room record indicates that other than claimant's shoulder complaints "He has no other injuries or complaints." Furthermore,

the musculoskeletal examination indicates that it was negative for back pain. Claimant admitted that at the emergency room on November 25 his only complaint was left shoulder pain. Claimant was asked on cross examination about his failure to report any low back complaints at the emergency room on November 25:

Q Do you maintain that you had pain and discomfort in your low back and pain radiating into either one of your legs on the 25th and you just completely failed to tell the ER physicians about it?

A Very possibly, yes. Probably.

As previously noted, following that emergency room visit on November 25 claimant was off work for the Thanksgiving weekend. The next week he went to work inspecting compressors in Broken Bow. Claimant did not seek any additional medical treatment until December 5, 2020. On that date the claimant sought additional medical treatment from the Mercy emergency room with complaints of low back pain which he attributed to the motor vehicle accident of November 24. This medical treatment was eleven days after the accident had occurred.

While claimant's treating physicians, including Dr. Jacobelli, have attributed his low back complaints to this motor vehicle accident, those opinions are based in part upon a belief that claimant had back pain immediately after the November 24 accident. For instance, in his initial medical report dated December 15, 2020, Dr. Jacobelli indicated that claimant presented the day after his accident to the emergency room with shoulder pain and low back pain. For reasons previously discussed, claimant did not make any complaints of low back pain at the emergency room on November 25.

In short, I simply find that claimant has failed to meet his burden of proving by a

preponderance of the evidence that he suffered a compensable injury to his low back as a result of the November 24, 2020 motor vehicle accident. Claimant has an extensive history of low back complaints for which he has received medical treatment. In contrast to claimant's testimony, the medical evidence indicates that claimant has had radicular complaints of low back pain involving his right leg. Although claimant had a pre-existing injury, claimant can prove an aggravation of a pre-existing condition. I find that he has failed to meet that burden of proof. Although claimant testified that immediately after the accident he felt like he had been hit in the back with a sledge hammer, claimant sought medical treatment at the emergency room the next day only for complaints of left shoulder pain. The emergency room report indicates that claimant had no other injuries or complaints and indicates that the examination was negative for back pain. By claimant's own admission his only complaint at the emergency room on November 25 was left shoulder pain. Claimant did not seek any medical treatment for low back complaints which he attributed to the November 24 accident until December 5, 2020, some eleven days later. Given this evidence, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on November 24, 2020.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his low back on November 24, 2020. Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondent is responsible for paying the court reporter her charges for preparation of the hearing transcript in the amount of \$788.00.

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IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE