

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F210347

PHOUKHONG AROUNNOTHAY, Employee

CLAIMANT

OK FOODS, Self-Insured Employer

RESPONDENT

OPINION FILED JULY 8, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On June 9, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 13, 2002, and a pre-hearing order was filed on November 14, 2002. A copy of the pre-hearing order has been marked 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 relationship of employee-employer existed between the parties at all relevant times.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$227.00 for total disability benefits and \$170.00 for permanent partial disability benefits.

4. Respondent has controverted this claim in its entirety.

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

1. Compensability of injury to claimant's back in June 2002.
2. Temporary total disability benefits from June 27, 2002 through a date yet to be

determined.

3. Medical expenses.

4. Attorney fee.

Prior to the hearing the respondent also raised as an issue claimant's failure to provide notice and in addition the claimant modified his contentions to include, alternatively, a gradual onset injury as a result of repetitive heavy lifting.

The claimant contends that in June of 2002 he sustained an injury to his back while lifting pallets. Alternatively, claimant contends that he suffered a gradual onset injury as a result of heavy lifting. Claimant contends he is entitled to temporary total disability benefits from on or about June 27, 2002 until a date yet to be determined and reasonable and necessary medical treatment. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

The respondents contend that the claimant did not sustain a compensable injury as that term is defined by Act 796.

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 witnesses and to observe their 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 the pre-hearing conference conducted on November 13, 2002, and contained in a pre-hearing order filed November 14, 2002, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back as a result of his employment with respondent.

### FACTUAL BACKGROUND

The claimant is a very nice 55-year-old Laotian man who immigrated to the United States in 1981 and began working for the respondent in its sanitation and clean-up department. Claimant was responsible for cleaning various machines in the respondent's plant. It was claimant's testimony that in order to perform this job duty it was necessary to move large vats of chicken and pallets in order to reach the areas to be cleaned. Claimant testified that at some point in time the individual who was helping him clean and move items was reassigned resulting in claimant having to perform the job by himself.

In 1993 the claimant apparently suffered a compensable injury to his back for which compensation benefits were paid. Claimant was diagnosed as suffering from a herniated disc at the L4-5 level and surgery was performed by Dr. Landherr. Subsequently, in 1998 claimant again complained of additional back problems and sought medical treatment. At that time, claimant received injections for his back condition.

Claimant contends that his most recent back problems arose out of an incident which occurred at work in June 2002 before he began a vacation on June 24, 2002. Claimant testified that on this particular day he was moving heavy pallets in order to perform his job of cleaning and felt a pop in his back. Claimant testified that he reported the incident to his supervisor. Claimant's daughter subsequently made an appointment for claimant to be evaluated by his family physician, Dr. Hoang. Following an MRI scan, Dr. Hoang diagnosed the claimant as suffering from a herniated disc at the L4-5 level and referred claimant to Dr. Landherr who had previously treated claimant. Given that Dr. Landherr had retired from the practice of medicine, Dr. Hoang referred claimant to Dr. Johnson who diagnosed claimant as suffering from a recurrent disc herniation at the L4-5 level. Dr. Johnson recommended physical therapy and injections.

Claimant has filed this claim contending that he suffered a compensable injury to his back as a result of the lifting of pallets at work for the respondent. Alternatively,

claimant contends that his back condition is causally related to repetitive lifting at work. Claimant seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

### ADJUDICATION

The initial issue to be considered is claimant's contention that he injured his back while lifting pallets at work on a particular date in June 2002. This claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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(16), establishing the injury;
- (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.

After reviewing the evidence in this case impartially, 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 a compensable injury. Specifically, I find that claimant has failed to offer medical evidence supported by objective findings establishing an injury in June 2002.

As a result of claimant's complaints of pain, an MRI scan was performed on claimant's lumbar spine. According to the progress note of Dr. Arthur Johnson dated

September 19, 2002, the MRI scan shows a recurrent disc herniation at the L4-5 level. The MRI scan also reveals canal stenosis and epidural fibrosis. Obviously, these are objective findings. However, two of these objective findings were already present in 1998. As a result of claimant's back complaints at that time an MRI scan was performed on the claimant's lumbar spine on October 6, 1998. That MRI scan revealed severe canal stenosis and also the possibility of a chronic disc fragment at the L4-5 level. That MRI scan was also reviewed by Dr. Landherr, the neurosurgeon who performed claimant's surgery in 1993. In his report of December 1, 1998, Dr. Landherr stated:

**REVIEW OF STUDIES:** An MRI scan of the lumbar spine is reviewed which shows a lumbar herniated disc at L-4-5 on the left.

**DIAGNOSIS:** Lumbar herniated disc at L4-5 on the left.

Thus, objective findings in 2002 of a herniated disc at the L4-5 level with a fragment and canal stenosis were present in 1998. Therefore, these objective findings do not serve to establish a new injury in June 2002.

The other objective finding subsequent to June 2002 is epidural fibrosis. Fibrosis is defined in *Tabor's Cyclopedic Medical Dictionary*, 15<sup>th</sup> Edition, as an abnormal formation of fibrous tissue. First, I note that there is insufficient evidence linking this finding to the specific incident in June of 2002. Furthermore, there is insufficient evidence that this condition is causing claimant's back problems or is being actively treated by his treating physicians. In a letter dated June 5, 2003, Dr. Johnson indicates that claimant is being treated for a disc herniation at the L4-5 level and canal stenosis. Dr. Johnson does not even mention the epidural fibrosis.

In summary, in order to prove compensability of a specific incident identifiable by time and place of occurrence, claimant must offer medical evidence supported by objective findings establishing an injury. Here, claimant has been diagnosed as suffering from a

herniated disc, canal stenosis, and epidural fibrosis. A review of the evidence reveals that the herniated disc with a fragment and the canal stenosis were present in 1998, before any incident in June 2002. Furthermore, with respect to the epidural fibrosis, there is insufficient evidence indicating that this condition was caused or aggravated by an incident in June 2002. Furthermore, there is no indication that the epidural fibrosis is the cause of claimant's back pain or his need for medical treatment. Given this evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury as a result of a specific incident identifiable by time and place of occurrence.

Alternatively, claimant contends that his back condition is the result of his job duties which have included repetitive heavy lifting. A claimant seeking benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App. 231, 48 S.W. 3d 540 (2001); *Freeman v. Con-Agra Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001). In addition, objective medical evidence is necessary to establish the existence and extent of an injury. *Wal-Mart Stores v. Leach*, *supra*; *Wal-Mart Stores v. VanWaggoner*, 337 Ark. 443, 990 S.W. 2d 522 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a gradual onset injury to his back as a result of his employment with respondent. First, I believe it is extremely important to note that throughout his testimony claimant indicated that his current back condition was attributable to a specific incident of lifting pallets on a particular day in June 2002. In fact, claimant was specifically asked whether he had injured his back on one particular day or over the course of several

weeks.

Q. Did you hurt it [back] on one particular day or was it lifting over the course of weeks?

A. The injury happened at one time and that is why I asked for my vacation time, ....

Likewise, at claimant's deposition he also testified that his back condition was the result of a specific incident, not a gradual onset.

Q. I want to make sure that I am clear. Your back injury, it is your belief that it happened as a result of this one particular shift, it was not a result of lifting one particular pallet and it was not a result of weeks or months or lifting pallets, it was one particular shift; is that correct?

A. Yes, that is right, one shift.

Accordingly, based upon claimant's testimony at his deposition and at the hearing that his back condition was the result of an incident lifting pallets on one particular shift on one particular day, I initially find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a gradual onset injury which arose out of and in the course of his employment with respondent. In short, there is insufficient evidence that claimant's day to day activities led to his current back condition. To the contrary, claimant attributed his back condition to a popping which occurred while he was lifting pallets on one particular day.

In addition, when proving a gradual onset injury, claimant has the burden of offering medical evidence supported by objective findings establishing an injury. Here, as previously discussed, the objective findings in the form of a herniated disc and canal stenosis were present in 1998. Furthermore, the finding of epidural fibrosis while objective does not appear to be the cause of claimant's current condition such that it has required medical services or resulted in disability.

Accordingly, for the foregoing reasons, I find that claimant has failed to prove by a

preponderance of the evidence that he suffered a gradual onset injury to his back as a result of his job activities with the respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while employed by the respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE