

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214666

BEN ASHLOCK

CLAIMANT

DALE ASHLOCK ROOFING

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 26, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith,  
Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 21, 2003, in Fort Smith, Arkansas. The deposition of Dr. Thomas E. Trow was taken on October 27, 2003. It has been admitted by subsequent to the hearing, as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on August 20, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. I to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. On December 21, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$312.00 for total disability and \$234.00 for permanent partial disability.
3. On December 21, 2002, the claimant sustained compensable injuries to his left foot and ankle and to his left chest wall in an employment related fall.
4. There is no dispute over the payment of medical expenses or temporary total disability benefits for these injuries through May 1, 2003, and all such

benefits have been paid.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant also sustained compensable injuries to his right knee, left shoulder, and back in the same employment related incident (i.e. fall) on December 21, 2002.
2. The claimant's entitlement to benefits for these alleged compensable injuries in the form of the payment of medical expenses and temporary total disability benefits from July 16, 2003 though a date yet to be determined.
3. Appropriate fees for claimant's attorney.

In regard to these issues, the claimant contends:

"The claimant is currently temporarily totally disabled as of July 16, 2003, and continues to be. The claimant is entitled to continuing reasonable and necessary medical treatment as provided by Dr. Atwood, Dr. Johnson, or any other doctor to which the claimant may be referred by the above, and a statutory attorney fee."

In regard to these issues, the respondents contend:

"Respondents will contend that the claimant did not sustain a compensable injury except those to his left ankle and foot and his left chest wall in the area of his left nipple and that all appropriate compensation benefits to which the claimant is entitled as a result of his injury of December 21, 2002, have been voluntarily accepted and paid by the respondents."

### DISCUSSION

\_\_\_\_\_ It is undisputed that the claimant was involved in a specific employment related accident or incident, while he was employed by the respondent on December 21, 2002. This incident occurred when the roof of a carport, on which the claimant and other employees were standing, collapsed causing the claimant and the other employees to fall to the ground. The respondents concede that this employment related accident or incident resulted in injuries to the claimant's left foot/ankle and his left chest. The dispute arises

over whether the claimant also sustained injuries to other areas of his body in this same employment related accident or incident, specifically injuries to his right knee, left shoulder, and low back. The burden rests upon the claimant to prove that this employment related accident or incident produced “compensable injuries” to these other areas of his anatomy.

In order to meet this burden, the claimant must not only prove that this employment related accident fall also caused physical injuries to his right knee, left shoulder, and low back, he must further prove that these physical injuries satisfy all of the various requirements for a “compensable injury” set out in the Act. These requirements are found in A.C.A. §11-9-102(4)(A)(i), and §11-9-102(4)(D).

Under A.C.A. §11-9-102(4)(D), the claimant must prove by medical evidence the actual existence of the physical injuries or conditions alleged to be compensable. Further, the claimant must show that the actual existence of these physical injuries or conditions is based upon or supported by “objective findings” (i.e. the independent observation of findings beyond the claimant’s voluntary control).

A.C.A. §11-9-102(4)(A)(i) sets out five definitional requirements, which must also be proven in order to establish a “compensable injury” as defined by this subsection. These definitional requirements are:

- (1) That the physical injury or condition arose out of and occurred in the course of the employment;
- (2) That the physical injury or condition was caused by a specific incident;
- (3) That the physical injury or condition is identifiable by time and place of occurrence;
- (4) That the physical injury or condition resulted in internal or external physical harm to the claimant’s body;
- (5) That the physical injury or condition required medical services or resulted in disability.

## I. RIGHT KNEE

The record shows that over twenty years prior to the incident on December 21, 2002, the claimant had experienced an injury to his right knee that resulted in an arthroscopy of this knee. The medical evidence implies that the claimant has continued to experience some degree of difficulties with his right knee thereafter. Following the accident on December 21, 2002, the claimant complained of increased discomfort in the area of his right knee and a sensation that the knee would “give way”. However, clinical examinations and x-rays performed on the claimant’s right knee failed to reveal any “objective findings” to substantiate these increased subjective complaints. The various physical examinations performed on the claimant’s right knee failed to note any bruising, swelling, erythema, crepitus, or instability of the knee joint. The x-rays performed on the claimant’s right knee were interpreted as normal. Solely on the basis of the claimant’s history of a prior knee injury and his subjective complaints, a diagnosis was made of a “contusion” to the claimant’s right knee superimposed on “patellofemoral osteoarthritis” from his prior injury.

The prescribed treatment for this diagnosed condition was medication, rest, and physical therapy. Curiously, when the claimant was initially seen for physical therapy involving his right knee and other portions of his body, the therapist noted that the claimant refused any treatment on his right knee. In his handwritten notation of February 3, 2003, Dr. Patrick Gannon notes that the claimant reported his right knee to be “okay”. In his narrative report of that same date, Dr. Gannon describes the claimant’s right knee symptoms, “as back to baseline”.

After consideration of all the medical evidence presented, it is my opinion that this medical evidence may be sufficient to “establish” a physical injury to the claimant’s right knee, in the form of a contusion. However, the expert medical opinion “establishing” the existence of such an injury is not shown to be based on any “objective findings”. Rather,

this diagnosis appears to be based solely on the claimant's history and subjective complaints. Thus, although the claimant may have satisfied a portion of the requirements of A.C.A. §11-9-102(4)(D), he has failed to satisfy all of the requirements imposed by this subsection. The claimant's failure in this regard prevents a finding that he sustained a "compensable injury" to his right knee in the employment related accident of December 21, 2002.

## II. LEFT SHOULDER

The medical evidence reveals that the claimant was initially seen at the McAlester Regional Health Center emergency room on December 22, 2002. There is no record of any reported difficulties involving the left shoulder joint. There is also no note, in any of these emergency room records, of any objective findings to support the occurrence of a physical injury in the area of the claimant's left shoulder (i.e. bruising, swelling, crepitus etc.). At the time of this initial emergency room visit, no injury to the claimant's left shoulder was diagnosed.

The first mention in the medical evidence of any complaints involving the claimant's left shoulder is found in the initial evaluation by Dr. Patrick R. Gannon, on January 2, 2003. In this report, Dr. Gannon notes that the claimant is complaining of shoulder pain. Dr. Gannon also notes that these complaints began at the time of the claimant's fall on December 21, 2002. He further records that, in this fall, the claimant "had a cable rub against his left chest wall and go into his left axilla (armpit)". However, on physical examination no bruising or abrasions were noted in the axilla or armpit area. The only bruise observed was to the claimant's left chest "adjacent to his left nipple". This was also the only bruise originally noted by the personnel at the emergency room of the McAlester Regional Health Center. The remainder of the physical examination of the claimant's left shoulder was also essentially normal or negative, except for reports of "some mild discomfort with Jobe's test". X-rays performed on the claimant's left shoulder showed no

evidence of any fracture or dislocation. These x-rays also showed that the acromioclavicular interval of the claimant's left shoulder joint was "maintained". The only abnormality noted in these x-ray studies were incidental findings of "mild AC (acromioclavicular) joint arthrosis (arthritic changes)". At the time of this evaluation, Dr. Gannon diagnosed the existence of a left shoulder "strain". Subsequent evaluations and testing also failed to reveal the presence of any objective findings of an acute or recent physical injury to the claimant's left shoulder, and the diagnosis of the etiology of his left shoulder complaints has remained that of a left shoulder "strain".

After consideration of all the medical evidence presented, it is my opinion that the greater weight of this evidence may be sufficient to "establish" a physical injury to the claimant's left shoulder. However, the only "objective findings" involving the claimant's left shoulder joint is the presence of "mild AC joint arthrosis". These mild degenerative arthritic changes clearly pre-existed the employment related incident on December 21, 2002. There is no indication that these "objective findings" played any role or formed any basis for Dr. Gannon's diagnosis of a left shoulder strain. Instead, it appears that this diagnosis is based solely upon the claimant's subjective complaints, the claimant's description of the mechanics of the fall on December 21, 2002, and the claimant's history that his shoulder difficulties appeared contemporaneously with this fall. The mild arthritic changes in the claimant's acromioclavicular joint would appear to be merely an incidental finding.

As the greater weight of the credible evidence fails to "establish" the actual existence of a physical injury to the claimant's left shoulder, which is supported by "objective findings", the claimant has failed to satisfy all of the statutory requirements of A.C.A. §11-9-102(4)(D). Thus, the claimant has failed to prove that his left shoulder difficulties constitute a "compensable injury", as that term is used in the Act.

### III. LOW BACK

In regard to the claimant's low back or lumbar spine difficulties, the medical evidence does "establish" the actual existence of a physical injury or condition involving the claimant's lumbar spine. The medical evidence further shows that the existence of this physical injury or condition is amply supported by "objective findings". A lumbar MRI on July 7, 2003, revealed the presence of various defects involving this portion of the claimant's spine. These defects involve disc dehydration or desiccation (a common form of degenerative disc disease) of the intervertebral discs at the L4-L5 and L5-S1 levels. Hypertrophy of various apophyseal joints was also noted. This condition was described as being "fairly marked" at the L3-L4 joint, but without evidence of any definite encroachment on the exiting nerve roots at this level. At the L4-L5 joint a central disc bulge, as well as the apophyseal joint hypertrophy, was noted. These defects were observed to produce some narrowing of the neural foramina, bilaterally, but without any actual nerve root impingement at this level. At the L5-S1 level, there was again "fairly marked" hypertrophy of the apophyseal joint with the lamina of the vertebral bodies appearing "somewhat deformed", particularly on the left side of the vertebra. These defects were observed to not only narrow the neural foramina, but were also actually compressing or impinging on both of the exiting nerve roots, where they passed through the neural foramina. This compression is noted to be the result of "boney impingement" from the arthritic changes and spurring of the vertebra, rather than any defect of the intervertebral disc (i.e. a disc bulge or herniation).

After consideration of the medical evidence presented, it is my opinion that the claimant has presented sufficient medical evidence to "establish" the actual existence of the foregoing physical injuries and conditions involving his lumbar spine and that the actual existence of these injuries or conditions is amply supported by "objective findings". Thus, in regard to these foregoing injuries or conditions, the claimant has satisfied all of the

requirements imposed by A.C.A. §11-9-102(4)(D).

However, the claimant must next prove that these medically established and objectively documented physical injuries or conditions satisfy all of the definitional requirements for a “compensable injury” found in A.C.A. §11-9-102(4)(A)(i). In regard to the first three of these requirements, the claimant must show that there is a causal relationship between these medically established and objectively documented physical injuries or conditions and the employment related fall on December 21, 2002.

The only direct evidence presented by the claimant to prove the existence of this causal relationship is his own testimony that there was a close temporal relationship between his fall and the initial onset of his current back difficulties. Although the testimony of a party is never considered uncontradicted, this does not mean that it can be simply disregarded. If credible, the testimony of a party may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant’s testimony would be legally competent to address the temporal relationship between the employment related fall on December 21, 2002 and the onset of lower back difficulties which would be indicative of an injury to this portion of his body.

It is not entirely clear from the claimant’s testimony exactly how soon after the fall he began experiencing complaints with his lower back and radicular symptoms involving his left lower extremity. However, the claimant testified that these symptoms were present by the time of his initial visit with Dr. Gannon, on January 2, 2003. He stated that he advised Dr. Gannon of these complaints on his initial visit. The claimant also admitted that shortly before the fall he had sought medical treatment from Dr. Sasser. However, he stated that the difficulties for which he saw Dr. Sasser were “totally different” than his back difficulties after the fall. It was his testimony that at the time he saw Dr. Sasser, his complaints actually involved only his right hip and that he just “thought” these difficulties had “something to do” with his back.

However, the medical evidence presented contradicts this testimony. The progress notation by Dr. L. Gordon Sasser, III, dated December 17, 2002, notes that the claimant's primary complaint is low back pain. It further records a history that these symptoms have been present for three to four weeks with no precipitating trauma or injury. Dr. Sasser also notes a history of a previous injury to the claimant's low back, some ten years prior. Dr. Sasser does record complaints of intermittent "twinges" of pain radiating into the right hip and leg. However, in describing the claimant's primary complaint of back pain, he notes that the claimant describes a particular sensation in his lower back that "feels like its rubbing 'bone on bone'". This is almost exactly the same description of the symptoms, which the claimant gave to Dr. Trow on June 27, 2003. In a clinic notation of that date, the claimant described his back symptoms as feeling like "bones are rubbing together". The subsequent lumbar MRI revealed findings which indicate that this description may be entirely accurate.

The medical record evidence also show that when the claimant was initially seen at the emergency room of the McAlester Regional Health Center, he made no complaints with his lower back or radicular symptoms into either of his lower extremities. The initial evaluation by Dr. Gannon also fails to record any symptoms involving the claimant's lower back or any radicular symptoms involving either lower extremity. The first mention in Dr. Gannon's records of pain or other symptoms involving the claimant's back does not appear until a handwritten notation, dated January 23, 2003. This notation appears to have been made as the result of a phone call by the claimant to Dr. Gannon's office, in order to obtain pain medication.

On January 7, 2003, the claimant began to receive physical therapy for his various complaints upon referral by Dr. Gannon. No physical therapy appears to have been prescribed by Dr. Gannon for any back complaints. A review of the physical therapy initial evaluation and subsequent progress reports fails to record any mention by the claimant of

symptoms and complaints involving his lower back or lower extremities at the time of his initial visit on January 7, 2003, or on his follow up visits on January 8, January 10, January 13, January 15, January 17, January 20, January 22, and January 24, 2003. The first mention in the physical therapy reports of any complaints involving the claimant's back does not appear until the visit on January 28, 2003.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence fails to prove the existence of a reasonably close temporal relationship between the claimant's employment related fall on December 21, 2002, and the onset of any difficulties involving his lower back or lumbar spine, which would be indicative of the occurrence of a physical injury to this portion of his body. The claimant's failure to prove the existence of this close temporal relationship must further be considered in light of the actual nature of the physical defects which are likely producing his back and radicular complaints. The defects shown by the lumbar MRI, performed on July 7, 2003, are all most likely degenerative in nature, including the intervertebral disc bulge at L4-L5.

Clearly, the various boney hypertrophic changes of the claimant's apophyseal joints are the result of longstanding degenerative arthritis involving these areas, which would have pre-existed the claimant's employment related fall on December 21, 2002. It would further appear from the MRI study that it was these degenerative boney changes at the L5-S1 level which are the likely cause of any radicular complaints due to nerve root impingement. As previously noted, this MRI study showed that the claimant's description of his symptoms as "bone rubbing on bone" is likely entirely accurate. These difficulties are most likely the result of the hypertrophic changes or boney arthritic spurring of his lumbar vertebra interfering with the mobility of his lumbar vertebra and impinging on various associated structures, including exiting nerve roots. These objectively documented defects would not reasonably be the result of any recent or acute injury on December 21, 2002.

In support of his argument that his current back difficulties are the result of an injury sustained in his employment related fall on December 21, 2002, the claimant has offered the narrative report of Dr. T. E. Trow, a family practitioner. This report is dated August 1, 2003, and addressed to the claimant's attorney. In this narrative report Dr. Trow states:

"We are in receipt of a letter dated July 24, 2003, in regards to the above named patient and requesting our opinion that the patient's complaints are indeed the result of an injury sustained on the job.

He first consulted us for problems on June 27<sup>th</sup> of this year. On that occasion, he complained of pain in several anatomic sites, but his back was predominant. All of this discomfort, including the back discomfort, evolved after an accident sustained in December of 2002. He apparently fell through a roof while functioning as a roofer. Physically at that time, he was moderately tender to direct palpitation on the left, at levels of L4, L5 (sic), and S1. He also had a strongly positive straight leg test on the left when the leg was passively extended with the patient sitting. This was felt to be due to sciatic irritation, which in turn was most likely due to lumbar disc injury. He was treated with a Prednisone taper and muscle relaxers. At follow up on the 30<sup>th</sup> of June, he had enjoyed some symptomatic improvement with treatment, but continued to have good clinical evidence of radiculopathy in the left lower extremity. I believe you are familiar with the results of the subsequent MRI of his lumbar spine. This study demonstrated some degenerative changes which most certainly annotated (?) the injury; however, it would defy logic to label all the changes as pre-existing, particularly the disc bulge with compromised neural foramina. There is a clear clinical correlation with the injury and the development of the pain syndrome for which he sought our help. The patient demonstrates no attitudes or mannerisms, which suggest malingering. This observation is well supported by his exemplary work history. I have no hesitation in stating that the fall and the present complaints are causally related."

In his deposition, Dr. Trow testified that his opinion on the existence of a causal relationship between the employment related fall on December 21, 2002, and the claimant's back and radicular difficulties presumes that these difficulties were "most likely" related to the disc bulge at L4-L5 and that the claimant experienced the onset of these difficulties within a reasonable period of time following the employment related fall. In his

deposition, Dr. Trow acknowledges that the disc bulge reflected by the MRI study of July 7, 2003, could be the result of either purely progressive degenerative changes, without the necessity of any specific traumatic event or could be the result of specific trauma sustained in the employment related fall. However, he opines that this disc bulge was the result of trauma produced by the employment related fall based solely on the claimant's history that his lower back and radicular symptoms first appeared within a reasonable period of time after this fall.

After consideration of all the evidence presented, I find that the claimant has failed to prove by the greater weight of the credible evidence that there was a reasonably close temporal relationship between the employment related fall of December 21, 2002 and the onset of his lower back and radicular symptoms. As previously noted, the onset evidence to establish this fact is the claimant's own testimony. The claimant's testimony in regard to this relationship is sufficiently impeached by other more credible evidence presented so as to destroy its credibility.

The claimant has also failed to prove that there is no other reasonable explanation for the medically established and objectively documented conditions involving his lower back or lumbar spine and his resulting difficulties. Clearly, the medically established and objectively documented defects involving his lumbar spine could reasonably be the result of progressive degenerative changes, rather than any specific trauma. In fact, the evidence shows that the most likely cause of the claimant's current difficulties is the irritation and inflammation of the surfaces of the vertebral bodies and nerve root compression at L5-S1 produced by degenerative arthritic changes to the bony ends of the claimant's vertebra. This would be unrelated to any specific traumatic event. This would explain both the claimant's episode of difficulties before the fall and the reappearance of these complaints weeks after the fall.

I find that I can give no weight and credit to the opinion expressed by Dr. Trow, in regard to a causal relationship between the claimant's current lower back and radicular difficulties and the employment related fall of December 21, 2002. The opinion of Dr. Trow is clearly based upon mistakes of material fact.

His assumption that the claimant's employment related fall played a causal role in producing a central bulge of the L4-L5 disc is based solely on the claimant's history regarding the initial onset of his lower back and radicular symptoms. This history by the claimant is contrary to the greater weight of the credible evidence presented and therefore cannot be taken as fact.

Dr. Trow's opinion that the claimant's current symptoms are the result of the central disc bulge at L4-L5, rather than the boney encroachment caused by degenerative arthritic changes of the L4-S1 vertebra, is also based on the claimant's history of the initial onset of his lower back and radicular symptoms. Based upon the claimant's history of a sudden onset of these symptoms, Dr. Trow apparently concludes that they must have been the result of some contemporaneous specific traumatic event, rather than progressive degenerative changes at other levels. As the only objectively documented defect which could possibly be caused by a specific traumatic event would be the central disc bulge, then Dr. Trow concludes that this defect must be the source of the claimant's current complaints. In applying this somewhat circular logic, Dr. Trow disregards the most probable cause of the claimant's difficulties, as shown by the MRI study. This study does show some narrowing of the neural foramina (bilaterally) due to the central disc bulge at L4-L5. However, it fails to show any actual impingement or encroachment on the exiting nerve roots at this level. This study also shows both narrowing of the neural foramina (bilaterally) and actual impingement on the exiting nerve roots at the L5-S1 level. This later defect is caused solely by the arthritic boney changes to the L5-S1 vertebral bodies and is not the result of any recent trauma.

As the claimant has failed to prove that the medically established and objectively documented defects involving his lumbar spine and his resulting symptoms occurred within a reasonable period of time following the employment related fall on December 21, 2002 and has further failed to prove that there is no other reasonable explanation for these medically established and objectively documented defects, he has failed to prove the existence of a causal relationship between these defects with their resulting symptoms and the employment related accidental fall on December 21, 2002, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2<sup>nd</sup> 263(1962); Eddington v. City Electric Company, 237 Ark. 804, 376 S.W. 2<sup>nd</sup> 550(1964). The claimant's failure to prove the existence of this causal relationship precludes a finding that these medically established and objectively documented defects or conditions arose out of and occurred in the course of his employment, were caused by a specific incident, and are identifiable by time and place of occurrence. Thus, these defects or conditions would not represent a "compensable injury", as defined by A.C.A. §11-9-102(4)(A)(i).

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 21, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On December 21, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$312.00 for total disability and \$234.00 for permanent partial disability.
4. On December 21, 2002, the claimant sustained compensable injuries to his left foot/ankle, and to his left chest, in an employment related fall.
5. The claimant has failed to prove by the greater weight of the credible evidence that he also sustained "compensable injuries" to his right knee and

left shoulder in the employment related fall on December 21, 2002. Specifically, he has failed to establish the actual existence of any physical injuries or conditions involving his right knee and left shoulder in the manner required by A.C.A. §11-9-102(4)(D).

6. The claimant has failed to prove by the greater weight of the credible evidence that he also sustained a “compensable injury” to his lower back or lumbar spine in the employment related fall on December 21, 2002. Specifically, he has failed to prove that on that date he sustained a physical injury to his lower back or lumbar spine that satisfies all the definitional requirements for a “compensable injury” contained in A.C.A. §11-9-102(4)(A)(i).
7. There is no dispute over the payment of medical expenses or temporary total disability benefits attributable to the claimant’s compensable left foot/ankle, and left chest wall injuries through May 1, 2003, and all such benefits have been paid. Any issues concerning the claimant’s entitlement to additional benefits for these compensable injuries is reserved for future determination, if necessary.
8. The respondents have denied that the claimant sustained compensable injuries to his right knee, left shoulder, and lower back or lumbar spine on December 21, 2002, and have controverted the claimant’s entitlement to any benefits attributable to such injuries.

#### ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny any claims for benefits attributable to any difficulties which the claimant may have experienced with his right knee, left shoulder, and lower back or lumbar spine.

The respondents continue to be liable for appropriate benefits, under the Act, for the claimant's compensable left foot/ankle and left chest wall injuries.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge