

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306711

BRUCE BELL

CLAIMANT

KENNAMETAL

RESPONDENT

AMERICAN ZURICH INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 10, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale,
Washington County, Arkansas.

Claimant represented by ANDREW HATFIELD, Attorney, Rogers, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 27, 2003, in Springdale, Arkansas. The deposition of Dr. Andrew J. Lueders was taken on October 14, 2003. This deposition has been admitted as Respondent's Exhibit No. 3.

A pre-hearing order was entered in this case on September 9, 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. Prior to the commencement of the hearing, an additional stipulation was added. This stipulation concerned the claimant's receipt of certain group benefits. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On April 25, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$394.00 for total disability and \$296.00 for permanent partial disability.
3. The claim is controverted in its entirety.

4. The claimant's medical expenses, to some extent have been paid by group insurance maintained through the respondent. The claimant has received group insurance short term disability for the period of May 5, 2003 through July 6, 2003 at the weekly rate of \$322.56 and from July 7, 2003 through the present rate of weekly rate of \$331.20.

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 sustained a compensable injury to his neck or cervical spine on April 25, 2003.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from April 26, 2003 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured 4-25-03 when he was lifting a tub higher than he usually had to and felt pain in his shoulder and arms."

In regard to these issues, the respondents deny:

"That the claimant sustained a compensable injury arising out of and during the course of his employment on April 25, 2003. The respondents add an alternative contention that the claimant has received short term disability benefits from May 5, 2003 through July 6, 2003 at the rate of \$322.56 per week. Further, from July 7, 2003 through the present time the claimant has received short term disability benefits at the rate of \$331.20 per week. The short term disability benefits are funded solely by the employer, Kennametal. Further, the employer's group health insurance has paid claimant's medical expenses relating to his alleged injury. If claimant's claim is held compensable, respondents are entitled to credit for those payments."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his neck or cervical spine on April 25, 2003. The burden rests upon the claimant to prove all of the elements necessary to establish this fact.

In order to prove a “compensable injury” to his neck or cervical spine, the claimant must present sufficient medical evidence to “establish” the actual existence of the physical injury or condition, which he has alleged to be compensable. The actual existence of this physical injury or condition must further be supported by the independent observation of abnormal findings beyond the claimant’s voluntary control (i.e. “objective findings”).

In his report of June 18, 2003, Dr. James Blankenship opined that the claimant’s difficulties with his neck or cervical spine and his left upper extremity are being caused by a left sided disc herniation at C6-7 that “fills the neural exit foramen” at that level, a disc bulge at C5-6 that “extends into the neural exit foramen” at that level, and a myofascitis of the musculature of the claimant’s neck. All of these diagnosed conditions are supported by “objective findings”. These “findings” are in the form of defects visually noted on the cervical MRI study and the visual observation of swelling involving the musculature of the claimant’s anterior neck noted on Dr. Blankenship’s physical examination.

Dr. Blankenship is a highly competent neurosurgeon. He possesses considerable expertise in the area of medicine associated with these types of conditions. I find that his expert opinion is sufficient medical evidence to “establish” the existence of these diagnosed conditions, as required by Ark. Code Ann. §11-9-102(4)(D). Dr. Blankenship’s opinion is further shown to be based upon and supported by “objective findings”, as is further required by this subsection. Therefore, it is my opinion that the claimant has satisfied all of the requirements for a “compensable injury” imposed by this subsection.

Next, the claimant must prove that these medically established and objectively documented injuries or conditions involving his neck or cervical spine satisfy all of the definitional requirements for a “compensable injury” contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury or condition must arise out of and occur in the course of the employment;

- (2) The physical injury or condition must be caused by a specific incident;
- (3) The physical injury or condition must be identifiable by time and place of occurrence;
- (4) The physical injury or condition must cause internal or external physical harm to the claimant's body;
- (5) The physical injury or condition must be of such a nature or magnitude as to require medical services or result in disability.

The claimant's own testimony is the only direct evidence he has presented to prove the occurrence of any physical injury to his neck or cervical spine that arose out of and occurred in the course of his employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence. The testimony of a party is never considered uncontradicted. However, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it 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 establish the events or activities that were occurring when he experienced the initial onset of symptoms indicative of the occurrence of the medically established and objectively documented physical injuries or defects involving his cervical spine.

The claimant testified that at approximately 9:30 or 10:00 a.m. on April 25, 2003, while performing his assigned employment tasks, he lifted a tub of parts onto a shelf that was above shoulder height. He stated that while performing this activity, he experienced a "sharp pain" and a "twinge", "stretch", or "pull" in his left shoulder. However, his testimony indicates that these events actually occurred the day before his visit to Dr. Lueders which would be April 24, 2003, rather than April 25, 2003. He stated that he called his wife, soon after this incident, and described to her what had happened. However, he conceded that he did not report the incident or any injury to any employee of the respondent. He indicated his shoulder complaints disappeared and he finished his

regular shift (which ended at approximately 2:00 to 2:30 p.m) without difficulty. He apparently experienced no further difficulties with his left shoulder until later on the night of April 24, 2003. He stated that, after throwing a basketball to his son for a period between five to twenty minutes, he began experiencing intense or severe pain in his left shoulder that “felt like he had torn the rotator cuff in his left shoulder”. He then stated that several minutes later, he could hardly move his arm and began experiencing a tingling sensation in his left arm and hand.

The claimant testified that on the morning following these difficulties, he called into the respondent’s place of business and advised the respondent that he had hurt his shoulder. He was not certain whether he actually talked to a “live” individual at the respondent or merely left a message on a recording machine. He also stated that he did not recall if he informed the respondent that the injury to his shoulder occurred at work.

The claimant stated that he then sought medical treatment from Dr. Andrew J. Leuders, his family physician. He stated that he informed Dr. Leuders of the nature and extent of his difficulties and further told him about both the employment related incident and basketball incident.

Janet Evans, the Human Resource Coordinator for the respondent, testified that on April 25, 2003, the claimant left a message on an answering machine in which he stated that he had injured his left shoulder. However, she further testified that on this message the claimant related that the shoulder injury occurred while he was playing basketball and made no mention of any employment related cause for his complaints. In this message, the claimant also requested a vacation day to cover this absence.

In his office notation of April 25, 2003, Dr. Leuders records complaints involving the claimant’s left shoulder and the following history of these complaints:

“The patient is here today for left shoulder pain which he developed after he was playing basketball. “

There is no mention of any employment related incident or event as playing any causal role

in the onset of the claimant's symptoms. Curiously, Dr. Leuders also specifically observes that the claimant is experiencing no radicular symptoms into his left arm, such as radiating pain or numbness. The claimant was seen again by Dr. Leuders on May 7, 2003. At that time, the claimant was seen for follow up of both his chronic high blood pressure and his left shoulder complaints. Again, no history of any employment related cause of these shoulder complaints is recorded.

Upon referral from Dr. Leuders, the claimant was next seen by Dr. Mark Powell, an orthopaedic surgeon on May 12, 2003. In his office records of that date, Dr. Powell notes complaints of left shoulder pain, pain radiating down the claimant's left arm, numbness in the fingers of his left hand and some neck pain. In the history he received concerning the onset of these various complaints, Dr. Powell states that the claimant related that he was lifting tools above his head onto his shelf but that he did not experience any pain or discomfort at that time and that his various complaints only began later that day. Curiously, Dr. Powell records no history of the basketball incident. Following his evaluation and testing, Dr. Powell appears to have opined that the claimant's difficulties were not attributable to any actual injury to his left shoulder, but were rather radicular symptoms resulting from an injury or defect to his cervical spine.

After this evaluation by Dr. Powell, the claimant appears to have contacted the respondent and requested to make a claim for workers' compensation benefits. According to the testimony of James Gray, the respondent's Human Resource Manager, this occurred on May 21, 2003. Mr. Gray further testified that he confronted the claimant with Dr. Leuders' history that these difficulties began following the non-employment related activity of playing basketball. At that time the claimant advised Mr. Gray that he still wished to file for workers' compensation because he had been advised that his treatment would be expensive and that a nurse at the doctor's office or hospital had informed him that there was no co-pay or deductible for medical services in a workers' compensation case.

The claimant was ultimately seen by Dr. James Blankenship, a neurosurgeon. In his report of June 18, 2003, Dr. Blankenship records the following history of the onset of the claimant's various symptoms:

"Mr. Bell is a 51 year old gentleman who relates that three months ago he was at work in a chronic flexed position when he went to an extension position to reach something over his hand (sic) and had an acute onset of neck pain and left arm pain. He exacerbated this while playing ball later but states that the etiology and the origin of this pain (sic) while he was working."

Dr. Blankenship diagnosed the claimant's difficulties as being attributable to the objectively documented defects involving his cervical spine and has recommended surgical intervention.

The claimant testified that after his deposition, he went back to Dr. Leuders (at the suggestion of his previous attorney), and "reminded" Dr. Leuders that he had also initially reported an employment related onset of his difficulties. As a result, Dr. Leuders authored his report of September 11, 2003 (Claimant's Exhibit No. 1, page 1). In this report, Dr. Leuders states:

"Initially, on my dictation of 4-25-03, I stated that his symptoms began after a basketball game. The patient informed me, however, that his symptoms had been present long before then and it had been exacerbated by the basketball activity."

Curiously, Dr. Leuders still does not mention any specific employment related incident or event, occurring on April 24, 2003, as precipitating these symptoms.

Upon reviewing Dr. Blankenship's records and reports, Dr. Leuders apparently concluded that Dr. Blankenship was attributing the claimant's cervical difficulties to chronic work activity, rather than any specific employment related incident. Based upon the nature of the claimant's defects, Dr. Leuders then concurred with what he believed to be the opinion of Dr. Blankenship. In his deposition, it continues to be evident that Dr. Leuders is still unaware of any specific employment related incident as the precipitating or causal

event of the claimant's difficulties. Any opinion he has expressed concerning the employment relatedness of the claimant's cervical defects appears to be based upon supposed cumulative or chronic trauma produced by the claimant's general day to day work activities.

After consideration of all the evidence presented, I find that the claimant's testimony concerning the onset of his various symptoms and the numerous histories he related to his various medical providers is totally inconsistent and contradictory. According to the description of his symptoms contained in his testimony, the claimant only experienced a brief transient sharp pain, twinge, stretch, or pull limited only to his left shoulder. These described symptoms would not be particularly indicative of the occurrence of a physical injury to his neck or cervical spine, particularly one in the form of a herniated or bulging disc with nerve root impingement. It would also be unlikely, had such defects occurred at that time, that these symptoms would have gone away and the claimant would have continued to be physically able to perform his regular employment activities for another four to five hours without any returning discomfort. According to the claimant's own testimony, his episode of severe unabated symptoms, including radicular type symptoms (tingling and inability to move his left arm) did not occur until following the non employment related basketball incident. Curiously, according to the claimant's own testimony, he experienced no symptoms which actually involved his neck or cervical spine until two days after he had been given a cortisone injection into his left shoulder by Dr. Powell.

According to the history related by Dr. Leuders, all of the claimant's symptoms began following the non-employment related basketball incident. However, these symptoms again appear to involve only the claimant's left shoulder with no particular radicular symptoms noted. In fact, Dr. Powell specifically records the absence of any pain or numbness radiating into the claimant's left arm.

Dr. Powell records a history that the claimant did lift tools above his head onto the

shelf while at work. However, he specifically notes that the claimant experienced no symptoms at that time, but that his symptoms began “later that day”. Dr. Powell, describes these symptoms as not only involving the claimant’s left shoulder but also including radicular symptoms involving his entire left arm and actual pain in his neck. It would appear from Dr. Powell’s report that the claimant failed to relate the non-employment basketball activity. Thus, it is impossible to determine whether the history recorded by Dr. Powell that symptoms began “later that day” meant that these symptoms occurred before or after the basketball activity.

An entirely different history of the onset of symptoms is recorded in the evaluation of Dr. Blankenship. According to the history he received, the claimant experienced an “acute” or immediate onset of neck pain and entire left arm pain when he moved his neck from a “chronic flexed position” to an extension position at work. There is also no indication that he was informed that these symptoms resolved prior to the claimant’s playing basketball.

The claimant’s actions on and immediately following the alleged employment related accident of April 24, 2003, are inconsistent with the occurrence of the medically established and objectively documented physical injuries and defects involving his cervical spine while performing his assigned employment activities on that date. Had the claimant experienced a herniated or bulging disc, as a result of the employment related incident he describes, his symptoms would not be reasonably expected to disappear and he would not be reasonably expected to be capable of performing his assigned employment related duties for approximately five hours without difficulty. The evidence further shows that the claimant was well aware of the appropriate reporting procedure for employment related injuries and the appropriate procedure for obtaining medical treatment for such injuries. However, in the present case the greater weight of the credible evidence presented establishes that the claimant failed to report any employment related injury or to request

appropriate medical treatment for such an injury from the respondent for over a month after the alleged occurrence of this injury. In fact, the greater weight of the credible evidence shows that initially the claimant expressly reported to the respondent that his difficulties were non-employment related.

Had there been a specific employment related event precipitating the claimant's complaints it is difficult to conceive that the claimant would have failed to have reported such an employment related injury to his initial treating physician, Dr. Leuders. However, it is even more difficult to conceive that Dr. Leuders would have failed to note such an important fact, had it been reported. It must also be noted that even when the claimant finally mentioned an employment event to Dr. Powell, some three weeks later, he still specifically denied the onset of any symptoms contemporaneous with this event.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between any specific employment related incident on April 24, 2003 (or any other date) and the subsequently medically established and objectively documented physical injuries or defects involving his cervical spine. Thus, he has failed to prove that these medically established and objectively documented physical defects involving his cervical spine constitute physical injuries that arose out of and occurred in the course of his employment, that were caused by a specific incident, and that are identifiable by time and place of occurrence. The claimant's failure to prove these three necessary requirements of Ark. Code Ann. §11-9-102(4)(A)(i) prevents these physical injuries or defects from constituting "compensable" injuries as that term is defined by this subsection.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including April 24 and April 25, 2003, the relationship

of employee- employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation rates of \$394.00 for total disability and \$296.00 for permanent partial disability.
4. The claimant has failed to prove that he sustained a “compensable injury” to his neck or cervical spine on April 24 or April 25, 2003 (or any other date). Specifically, he has failed to prove the occurrence of a physical injury to this portion of his body that arose out of and occurred in the course of his employment with the respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
5. The respondents have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge