

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301539

KEITH BLY, EMPLOYEE

CLAIMANT

**AFCO STEEL, INC., EMPLOYER
SELF-INSURED**

RESPONDENT

**CROCKETT ADJUSTMENT (TPA),
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 28, 2003

Hearing before Administrative Law Judge Dail Stiles on June 19, 2003, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Robert L. Henry, III, Attorney at Law, Little Rock, Arkansas.

A hearing was held on June 19, 2003, to determine the compensability of the claim filed herein.

It was stipulated that the employer/employee relationship existed on January 25, 2003, and that the claimant was earning wages sufficient to entitle him to a weekly temporary total disability benefit of \$360.00.

The claimant contends he sustained a compensable injury to his low back arising out of and during the course and scope of his employment on January 25, 2003. The claimant contends he is entitled to temporary total disability benefits from January 30, 2003 through April 7, 2003. The claimant contends he is entitled to an eight percent whole body physical impairment rating.

The respondents controvert the claim in its entirety contending the claimant did not sustain an injury arising out of and during the course and scope of his employment on January 25, 2003. The respondents further contend that no timely notice was given to the employer by the claimant.

STATEMENT OF THE CASE

The claimant's wife, Robin Bly, testified on his behalf. Ms. Bly testified that when she came home from work on Saturday, January 25, 2003, her husband was lying on the floor and told her he pushed a cart at work, and that his legs were cramping. Ms. Bly testified that some time that Saturday afternoon the claimant sneezed, and that he told her his leg pain was worse after he sneezed, and that the pain "shot through his leg."

The claimant said that he had worked a half-day shift for the employer on Saturday, January 25, 2003. The claimant said that he was pushing some steel beams on a cart which was on rails. The claimant estimated he pushed the cart some 30 to 40 feet on a slight incline. The claimant said that when he finished pushing the cart, he noticed, "that my muscles were, what do you want to call it? They felt worked real hard." The claimant said when he got home, he felt fatigued, and he lay down on the floor and began watching television. The claimant said while lying on the floor watching television, he sneezed and his muscles cramped, and the pain shot down to his legs and his foot.

The claimant said that his pain became progressively worse but that he continued to try to work. The claimant went back to work and worked Monday and Tuesday.

The claimant said that he was hurting so bad that he was lying on the floor at work when his supervisor, Beau Pearson, asked him what was wrong. The claimant said he told Beau Pearson about sneezing and overworking his muscles. The claimant said he didn't think that he talked to Beau Pearson about pushing the cart on Saturday but thought he told him that he had overworked his muscles and then had sneezed at home. The claimant said Beau Pearson told him he didn't think the insurance would let him claim anything from a sneeze.

Rudy Bischof, the claims manager who worked the claim for Crockett Adjustment, the third-party administrator, testified he took the claimant's recorded statement by telephone on January 29, 2003. Mr. Bischof testified that the claimant advised him that he had gone home feeling tired and was lying on the floor, sneezed and felt pain down into his buttocks and leg. Mr. Bischof testified the claim was denied, because the claimant did not convince him that he had done anything at work on that Saturday morning to cause an injury to his low back.

Beau Pearson, the claimant's supervisor, testified that he observed the claimant on Wednesday, January 29, 2003, squatting down beside his toolbox and could tell by looking at the claimant that he was in pain. Pearson said he asked the claimant what had happened, and the claimant responded that he had injured his leg. Pearson said he asked him if he had injured it at the plant that very morning, and the claimant responded in the negative and said that he was at home and sneezed and started having difficulties with pain.

The claimant was initially seen by Dr. Richard Hayes. Dr. Hayes' initial office notes of February 3, 2003, indicated that the claimant had had left leg pain for some 18 months and had pain radiating from the buttocks down his left leg to his foot with muscle cramps. In Dr. Hayes' notes of February 3, 2003, February 7, 2003 and February 10, 2003, there is no mention of the claimant telling Dr. Hayes that he began experiencing difficulty with his leg or back while pushing a cart at work on January 25, 2003.

The claimant was referred to Dr. Scott Schlesinger and first saw Dr. Schlesinger on February 14, 2003. The first line of the medical history in Dr. Schlesinger's letter to Dr. Hayes dated February 14, 2003, states that the claimant told him he hurt his back at work two weeks ago pushing an overloaded rail cart.

FINDING OF FACT

The claimant does not meet his burden of proving by a preponderance of the evidence that he sustained an injury arising out of and during the course and scope of his employment on January 25, 2003.

DISCUSSION

In order for a worker's disability to be compensable, there must be a causal connection between the accident and a risk which is reasonably incident to the employment. There must be affirmative proof of a distinctive employment risk as the cause of the injury. The connection with the employment cannot be supplied by speculation. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

In the instant case, the claimant is testifying that he felt fatigued, and that he had possibly overworked his muscles at work on the morning of January 25, 2003. The claimant's testimony went on to say that as he was lying on the floor and sneezed, he experienced immediate pain and cramping sensation in his leg.

I cannot conclude that the claimant's subsequent difficulties with his low back are the result of some work-related activity on the morning of January 25, 2003, or are rather the result of his lying on the floor at home and sneezing, or a combination of those two events. For me to attribute the claimant's subsequent disability and need for treatment solely to some job-related activity on the morning of January 25, 2003, would require conjecture and speculation on my part. It is well-settled that conjecture and speculation, no matter how plausible, does not take the place of proof. Dena Construction v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

The above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DAIL STILES
Administrative Law Judge