

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F302830

MICHAEL CASWELL	CLAIMANT
BLOCK ARK. DIVISION LLC	RESPONDENT
LIBERTY MUTUAL FIRE INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 17, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 5, 2003, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 13, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

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

2. On February 20, 2003, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$369.00 for temporary total disability and \$277.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury.
2. Related medical.
3. Temporary total disability from February 21, 2003, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he was injured on February 20, 2003, when he suffered a specific injury when he was pushing and pulling on 80-85 lb. blocks. He has received initial medical treatment and needs a surgical consult.

In regard to the foregoing issues the respondents contend that the claimant's back injury did not occur in the course and scope of his employment while working for the insured. The respondents contend that the claimant did not sustain a compensable specific incident injury while working for the insured. The respondents contend that the claimant did not sustain a gradual onset back injury in the course and scope of his employment with the insured. In the alternative, if this claim is somehow held compensable, the respondents contend that they are entitled to an off set for any group disability or health carrier payments made in regard to this matter. The respondents reserve the right to amend and supplement their contentions after additional discovery has been completed.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing ordered marked Commission's Exhibit No. 1. The respondents submitted documentary evidence marked

Respondents' Exhibit No. 1 and Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that he was 27 years old and lacked about one semester graduating from high school. The claimant testified that he was hired by the respondent on February 18, 1998, and had worked for them continuously up until February 20, 2003. The claimant testified that prior to February 20, 2003, he never had any problems or treatment for his back and he agreed that he was "pretty healthy and did not have to take of work." The claimant testified that he was hired by the respondent to be a cuber. The claimant explained that the respondent made cement blocks and it was his job as blocks came down a line of rollers, he would look for cracks or breaks and if a damaged or imperfect block was discovered he would take it off the line and stack it to the side but if they were good blocks he sent them on to the machine which finished the process. The claimant agreed that his work required him to stand, lift, bend and twist during the duration of his shift. The claimant testified that the numbers of blocks he has to lift off the line depends on the quality of the run being made and the amount of weight he is required to lift varies depending on the type of block that is being run that day. The claimant estimated that the average block which is run weighs approximately thirty to thirty-five pounds and the heaviest block which he would be lifting would be around seventy-five to eighty pounds. The claimant further explained that as the blocks came

down the line he would flip the blocks over and straiten them before they went into the machine. The claimant testified that the blocks as they come down the line, if they are not damaged, are pushed into the machine and the majority of his day is spent straitening and pushing these blocks into the machine. The claimant testified that on average he would remove about one hundred blocks a day off the line. The claimant testified that during the five or so years he has worked for the respondent he, for about one year, run a forklift and he also has run the cuber machine. The claimant testified that the forklift job as well as the machine operator job does not require the same lifting and standing requirements as that of being a cuber.

The claimant testified that on February 20, 2003, he was working as a cuber on the line when he felt a sharp pain go down his left leg. The claimant explained that they were working with anchor blocks which are the heaviest blocks which the respondent makes when he felt a very sharp sudden pain run down the back of his leg all the way down to his toes. The claimant agreed that the pain did not go away but he continued to work the rest of the day and even worked Friday, the following day. The claimant testified that he thought that he had a muscle cramp and did not tell anyone that he had hurt himself on the 20<sup>th</sup> or 21<sup>st</sup>. The claimant testified that the 22<sup>nd</sup> was a Saturday and they did not work on Saturday and Sunday. The claimant testified that on the 24<sup>th</sup>, which was a Monday, there was a big snow storm and he could not get to work. The claimant testified that over the weekend his problem kept

getting worse and all he was able to do was sit and watch TV. The claimant testified that he was experiencing extreme pain down his leg and his toes were numb. The claimant testified that on Monday he did call into work and talked with Travis Terry. The claimant testified that he did not report to Mr. Terry that he had any physical problems. The claimant testified that he went to work the next day but after he clocked in Jeff Haire, one of the supervisors, called in and told them to go home because of the weather. The claimant testified that they did not run blocks on that Tuesday.

The claimant testified that on Wednesday, February 26, he called in and he was seen by Dr. Salmon on the 27<sup>th</sup>, a Thursday. The claimant testified that he told Dr. Salmon that he felt extreme pain go down his leg when he was lifting seventy-five to eighty pound blocks at work. The claimant testified that he also told Dr. Salmon that about three years ago he had some back pain. When asked, the claimant agreed that this back pain several years ago resolved on its own.

The claimant testified that on the 27<sup>th</sup> he reported to Travis Terry that he had seen a doctor for his back. The claimant testified that he did not report to Mr. Terry the onset of his back problems and he did not ask to fill out a workers' compensation claim. The claimant testified that he had a note from Dr. Salmon taking him off work for the next four days. The claimant testified that he returned to work on Monday and was put to work on a laborer's job which was some different than the cuber's job. The

claimant testified that he worked for about an hour or so and then was told by Mr. Terry to go home because he was a liability. The claimant testified that he did not work from that date through March 7 when he had an MRI.

The claimant testified that he saw Dr. Gallaher in March and reported to him that he was experiencing pain down his leg, his toes were numb and he was unable to sleep. The claimant testified that he also told the doctor that his problems happened at work when he was lifting seventy-five to eighty pound blocks.

The claimant testified that he reported to Penny Burch that he thought that he hurt his back at work. The claimant testified that when he saw Ms. Burch he did not ask to fill out papers for workers' compensation benefits. The claimant agreed that he did fill out papers for group insurance benefits. The claimant agreed that he visited with Ms. Burch on March 13, 2003, which was after he had his MRI and had seen Dr. Gallaher. The claimant testified that he has medical benefits available to him as a five-year employee of the respondent. The claimant testified that both Dr. Salmon and Dr. Gallaher had given him restrictions and it was his understanding that he was not to do any lifting. The claimant testified that the respondent did not offer him any work which fell within his restrictions. The claimant testified that he was seen for treatment by Dr. Grote and reported to him that on May 6 he had slept on the floor not that he slipped on the floor. The claimant testified that he is still experiencing pain and numbness but not as severely as he has been. The claimant testified that he does

not feel that he is able to return to the type work he was doing for the respondent nor could he return to the type work he was doing for Wal-Mart working in the deli because standing causes his pain to return.

On cross examination, the claimant agreed that his health insurance paid some but not all of his medical bills. The claimant also agreed that he had been receiving disability short term benefits in the amount of \$272.00 per week but now he is receiving long term disability and thinks that he is receiving \$1,084.32 per month. The claimant testified that he paid into his short term disability program but the respondent had paid for his long term disability program. The claimant also agreed that he did not report his injury on February 20, 2003, and in fact worked the next day. The claimant agreed that the company handbook sets forth that injuries are to be reported immediately. The claimant agreed that he talked to Mr. Haire as well as Mr. Terry before he was seen by the doctor and on both of these occasions he did not report to them that he was hurt or that he even had back problems. The claimant testified that he told Mr. Travis Terry that he did not know how he was hurt. The claimant agreed that Mr. Terry asked him how he did get hurt and the claimant did not report to him anything about this incident. The claimant agreed that if Mr. Terry and Mr. Haire testified that the claimant never told them about this particular incident that they would be telling the truth. The claimant agreed that when he first met with Ms. Burch he did not tell her about this particular incident and when he had testified earlier that he

told Ms. Burch that he had gotten hurt the other day it was not correct. The claimant testified that when he got the disability papers from Ms. Burch he took them to his physician to be filled out. The claimant testified that he had not had back pain for at least three years prior to his February incident. The claimant also testified that he did not receive treatment from the doctor for his back pain but had been given pills and that was it. The claimant testified that since he has not been working for the respondent he was called for an interview at the Highfill Airport but once he heard a description of the possible job he did not go to the interview.

On redirect examination, the claimant testified that the treatment he had received in March 2002 was for his right leg and that the problems he is currently experiencing are with his left. The claimant also agreed that he continued to work for the respondent from March 2002 until February 20, 2003. The claimant agreed that whenever he filled out the short term disability forms he had not even had his MRI nor had he seen Dr. Gallaher. The claimant agreed that on March 13 when he was filling out papers with Ms. Burch she indicated to him that he had the right to fill out a claim from workers' compensation but he did not do it at that particular time. The claimant agreed that his disability forms were filled out by three different people on three different dates. The claimant agreed that he filled out his part and signed it on March 6, Dr. Salmon filled out his part and signed it on March 11 and Penny Burch filled out her part and signed it on March 13.

Travis Terry testified on behalf of the respondents stating that he had been an employee of the respondent for approximately fourteen years. Mr. Terry testified that he was the plant manager and was the claimant's immediate supervisor. Mr. Travis testified that the smaller blocks which are run by the respondent weigh approximately twenty-eight to thirty-four pounds and the larger blocks would weigh probably up to seventy-five pounds. Mr. Travis testified that the normal block that they run is the smaller block. This witness testified that depending on the quality of the run of blocks would depend on the amount of lifting the cull blocks from the line an employee would have to do. Mr. Terry testified that when the claimant brought him in a doctor's note releasing him from work for a couple of days, he asked the claimant how he hurt his back and the claimant told him that he did not know. Mr. Travis testified that he did speak with the claimant on Tuesday by telephone to report that he, Mr. Terry, would not be in and there was nothing discussed about an injury. This witness testified that the claimant had not and has not discussed his injury with him but that he has learned about the claimant's injury from another source.

On cross examination, Mr. Terry stated that when the claimant brought a doctor's note in excusing him from work for two days the claimant did not tell him he hurt himself lifting blocks. Mr. Terry testified that after the claimant returned to work after being released for a couple of days, he was not offered work that required him to lift less than fifty to one hundred pounds

frequently. This witness testified that he did not observe nor was he aware of any problems which the claimant was having prior to February 20. Mr. Travis testified that he was unaware of the claimant contending that he had a work related injury for at least a couple of weeks.

On redirect examination, Mr. Terry testified that when the claimant brought the note in excusing him from work two other employees, James Hall and Travis Wood, were in close proximity to their conversation.

James Ray Hall testified on behalf of the respondents, stating that he has been an employee with the respondent for a little over ten years. Mr. Hall stated that he has worked for the respondent as a laborer but right now was a cuber operator. This witness testified that he heard the claimant tell Travis Terry that he did not know how he had hurt his back.

The respondent called Jeff Haire to testify. Mr. Haire stated that he has worked for the respondent for two and one half years but had worked at that same location for about eighteen years. Mr. Haire stated that he is operations manager and safety director and is the one that reminds the employees to keep the safety guards in place and to be sure they are wearing their protective equipment. Mr. Haire testified that injuries are to be reported to the employee's immediate supervisor and then reported to him and paperwork is then started. Mr. Haire testified that he spoke with the claimant by telephone on February 25 concerning the weather conditions and, at that time, the claimant did not report to him

any work related injury. Mr. Haire testified that all employees are given a handbook which informs them about reporting job related injuries. This witness stated that each employee is to verify that they have read this information. Mr. Haire testified that about the second or third week in March Penny called him to report that the claimant was saying that his injury was work related. Mr. Haire stated that when he talked with the claimant he learned that the claimant was contending that he hurt himself the day they were running anchor blocks. On cross examination, Mr. Haire testified that it was not until the claimant brought in his short term disability papers that he learned that he was claiming that his problems were work related. Mr. Haire testified that when he talked with the claimant concerning his injury, the claimant told him that, "he was told that it might be workers' compensation."

Penny Burch testified on behalf of the respondents stating that she had been employed by the respondent for about one year but was currently unemployed. Ms. Burch testified that the respondent pays for part of the employee's health insurance but they fund 100 percent the long term disability policies for their employees. Ms. Burch testified that on February 27 the claimant came into her office to get his paycheck. Ms. Burch stated that the claimant told her that he was hurting and he was walking all bent over obviously in pain. Ms. Burch testified that she asked the claimant what had happened and he told her that he did not know. Ms. Burch testified that the claimant, on March 5, was given paperwork to file for his short term disability benefits. Ms. Burch testified

that the short term disability benefits are payed for 100 percent by the employee. Ms. Burch testified that when the claimant picked up his short term disability paperwork she explained to him that every box had to be checked correctly and he had to sign the form. She also instructed him as to having his physician fill out the physician's statement correctly. This witness was asked why she did not fill out workers' compensation claim forms on the 27<sup>th</sup> and Ms. Burch responded, "there was no mention of on the job injury, whatsoever. He stated three different occasions to me he did not know how he hurt his back." Ms. Burch testified that on March 12 when the claimant brought back his paperwork, he reported to her, "some people have told me this should be workers' comp." This witness testified that she reminded the claimant that he had told her that he did not know how he hurt his back and the claimant responded, "well, people have told me its workers' comp." Ms. Burch testified that she then called Jeff Haire. Ms. Burch testified that the reason she checked the box on the claimant's paperwork as his injury not being work related was because she had asked the claimant and he told her he did not know how he hurt his back. Ms. Burch testified that she talked with the claimant twice concerning his disability papers and that he never discussed with her any particulars about his incident. This witness was asked when employees are to report workers' compensation claims and Ms. Burch responded, "immediately." On cross examination, Ms. Burch testified that the reason she checked on the disability form that the claimant's injury was not work related was because she asked

him while he was standing at her desk and the claimant responded, "I don't know." Ms. Burch stated that she told the claimant that she would have to put no if he told her he did not know how it happened. Ms. Burch testified that the claimant told her that they did not know how he had hurt it and it was a sciatic nerve problem.

On rebuttal, the claimant testified that the first time workers' compensation was mentioned was on March 13. The claimant testified that on February 27 he did not tell any of the respondent's employees where he hurt himself, he just told them that he hurt himself and thought he did it at work.

The medical records set forth that the claimant was seen by Dr. James Salmon on February 27, 2003. Dr. Salmon writes that he has seen the claimant for complaints of extreme pain radiating down his left leg noting that the claimant states a history of sciatica about three years ago but which improved on its own. Dr. Salmon notes that the claimant denies any knowledge of doing anything that would worsen the area. The doctor sets forth that the claimant reports that he is having problems sleeping as a result of the pain and he has some numbness and tingling in his foot. The x-ray taken revealed mild loss of the distance between the fifth vertebrae of the sacrum and the coccyx as well as the fourth and fifth. Dr. Salmon writes that he suspects that the claimant has some possible mild HNP and recommended that he refrain from any heavy lifting over the next four days, prescribed him medications and to start home exercises. Dr. Salmon saw the claimant again on March 6, 2003, where the doctor notes that the claimant is still having

considerable back pain but is a little better. Dr. Salmon recommended that the claimant refrain from working, continued his medications and ordered an MRI as well as gave him a release from work. The claimant underwent an MRI of his lumbar spine on March 7, 2003, which revealed a left parasagittal disc extrusion at the L4-5 level causing left lateral recess stenosis and posterior displacement of the left L5 nerve root. It is also noted that there is minimal defused annular bulge of the L3-4 level without significant mass effect. Dr. Regan Gallaher writes on April 14, 2003, in response to the claimant's attorney that the claimant does have a large herniated disc but is getting better and may continue to do so over several months. Dr. Gallaher recommended conservative treatment until it is proven that these are not improving the claimant's symptoms. Dr. Gallaher writes that these conservative measures include physical therapy, epidural steroid injections and time. The doctor writes that if the claimant should get to the point where he no longer is able to get back to work, then a diskectomy could possibly help him with his left lower extremity pain syndrome. Dr. Gallaher notes that the claimant does not have progressive neurologic deficit nor severe intractable pain, therefore, the decision for surgery would be totally up to the claimant. Dr. Walton Grote writes on May 8, 2003, that he has given the claimant two previous lumbar steroid epidurals and he is in for a third lumbar sterol epidural. Dr. Grote notes that the claimant was doing extremely well following the first two lumbar epidurals and was having almost no pain in his leg or back but two

nights ago he slipped on the floor at friends, sleep the night there and woke the next morning being very stiff and being almost unable to walk. Dr. Grote notes that the claimant presents this date with complaints of pain in his left leg extending all the way down to his foot and lower back. Dr. Grote administered a third lumbar steroid epidural. Dr. Gallaher writes in response to the claimant's attorney's letter on July 2, 2003, concerning the claimant. Dr. Gallaher writes that he cannot date when the claimant experienced his herniated nucleus pulposus as documented by his MRI. Dr. Gallaher also states that viewing the MRI he cannot state with certainty how long the claimant's herniated nucleus pulposus has been present. The doctor writes that the claimant should be able to perform his job at work with a herniated disc, noting that people can have herniated discs that look large on an MRI and be completely asymptomatic. Dr. Gallaher writes that most likely the claimant has had his herniated disc for some time and whatever occurred one week prior to seeing Dr. Salmon, when the patient injured himself at work, is most likely a reinjury either from stretching the nerve root over the disc or to a slight further disc extrusion which enlarged the disc and compressed the nerve even further.

After review of this entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a back injury while working for the respondent on February 20, 2003. It is not questioned that this claimant does heavy manual labor and it is not questioned that his MRI indicates

that he has a herniated disc in his low back. I do find it improbable, however, that if he sustained a sudden onset sharp pain on February 20, 2003, while working that he would fail to or forget to report such an instance to his employer and even to report such an instance to Dr. Salmon when he first saw him on February 27, 2003. Dr. Salmon, in his note dated February 27, 2003, sets forth that the claimant denies any knowledge of doing anything that would worsen the area, meaning the claimant's low back. Numerous witnesses have testified that the claimant reported to them several times that he did not know how he hurt his back and it was not until it was suggested to him that he might have a workers' comp claim that he began to claim a work related injury and this did not occur until March 13. Therefore, this claim should be denied in its entirety.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On February 20, 2003, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a compensation rate of \$369.00 for temporary total disability and \$277.00 for permanent partial disability.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury while working for the respondent on February 20, 2003. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury while working for the respondent on February 20, 2003. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE