

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211324

JAMES H. GOFFIN, EMPLOYEE	CLAIMANT
WACKENHUT CORPORATION, EMPLOYER	RESPONDENT
CAMBRIDGE INTEGRATED SERVICES GROUP, CARRIER	RESPONDENT

OPINION FILED JULY 31, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on June 6, 2003, at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE ROBERT L. DEPPER, JR., Attorney at Law, El Dorado, Arkansas.

Respondents represented by the HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on June 16, 2002, at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$223.00/\$167.00 in the event this claim is found to be compensable. This claim has been

controverted in its entirety.

The claimant contends he sustained a compensable injury as the result of a specific incident identifiable by time and place of occurrence on or about June 16, 2002. He seeks payment of medical expenses, temporary total disability benefits from June 17, 2002, to a date yet to be determined, and attorney's fees.

The respondents contend that the claimant did not sustain an injury arising out of and during the course of his employment with Wackenhut Corporation.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript along with the deposition of Dr. Joe Wharton. The claimant's objection to questioning based on information obtained in a recorded statement by the adjuster was sustained. The recorded statement was not identified as an exhibit, therefore the claimant had no opportunity to question the adjuster either by deposition or by calling her as a witness.

The following witnesses testified at the hearing: the claimant and supervisor, Boyd Atkinson. I found the claimant to be a poor historian and unconvincing witness.

The claimant, age 59 (D.O.B. April 23, 1944) has a high school education and work experience in law enforcement (Warren Police and Department of Corrections). His health history includes problems with mental stress, and a prior back injury at a casino.

The claimant had been employed as a security guard for the respondent-employer one year. He was patrolling a lumber plant using a golf cart on June 16, 2002, when he injured his back and right hip after the battery of the golf cart died and he had to push it. The claimant did not report an injury to his co-worker, Gary Barnes or to his shift supervisor, Sgt. Bardley, although they were

both aware of the incident with the golf cart (Tr. p. 8-16). The claimant continued to work from June 16 to July 7, 2002. He stated he reported an injury to Sgt. Bardley two or three days later when he knew he needed time off from work.

Initially, the claimant did not think he was seriously injured. When his condition worsened, he went to his general practitioner, Dr. Wharton. He did not attribute his symptoms to a work related injury until after he spoke with Dr. Reding, a neurosurgeon. Surgery was performed in August, 2002.

Supervisor Boyd Atkinson testified he spoke with the claimant on July 29 about his back problems. The claimant told him he wasn't sure when it happened or if it was job-related.

MEDICAL EVIDENCE

For reasons unknown, the claimant has included in his exhibit packet irrelevant medical records (heart condition, depression, ankle, foot, blood pressure, bladder, cough and sinus condition, shoulder, hand, abdomen) some of which predate the alleged injury at work. Accordingly, pp. 6-12, 25, 29-31, 34, 35-37, 40, 42-49 and 51-59 will not be discussed.

The respondents' exhibit contains medical records from a April 29, 1998 fall at a casino. The claimant was diagnosed with a lumbar strain, prescribed medication, and taken off work for two days. X-rays showed degenerative changes in the neck but no bony abnormalities of the back. A July 27, 1998 MRI scan was interpreted as negative. Dr. Wharton treated the claimant from May 1998 to September 1998 for back pain related to the fall a few "years" ago at a casino. The claimant also reported back pain with activity (standing and walking on concrete) and at rest (getting out of bed in the mornings).

In two handwritten and one typed report, the claimant described right flank, hip and leg pain to Dr. Wharton. The reports specifically quote the claimant's history of injury:

Dr. Wharton's Office Note of 6-20-02:

Right flank and hip pain, radiates down to his toe. Has been present for about 3 months. Worse over the last 2 weeks. He says 1 day I just rolled over in the bed and this started. I feel like it has been going on for a while and just the action of rolling over in the bed was what precipitated it.

7-19-02 Cervical/Lumbar Evaluation

History

1. How did your problem start? Onset 2-3 months, unknown origin. 'I woke up one morning and had to roll out of bed.'

Despite these 3 separate reports, Dr. Wharton authored a retraction dated 9-19-02, after Dr. Reding's August 9, 2002 report described a work-related injury:

It was erroneously dictated by me that the patient had had this particular problem over the last three months. My intent in this comment was that the patient had had a sacroiliitis over the three months. He did not have lumbar disc disease. He did not have sciatica until he developed an acute exacerbation on 6-16. Therefore, I do think that his lumbar disc disease and all of the associated treatment for same were workman's comp related.

An MRI scan taken July 16, 2002 was interpreted as showing a large central and right paracentral L4-5 disc herniation with a bulge at L5-S1. After the scan, Dr. Wharton's records list the diagnosis as an herniated nucleus pulposus and lumbar disc disease. Dr. Wharton prescribed medication and physical therapy and referred the claimant to Dr. Reding.

The first mention of a work-related injury appears in Dr. Reding's report of August 9, 2002, two months after the alleged accident:

This is a 58 year old man with severe pain in his back and right leg for about 2 months. He works as a security guard and had to push a

golf cart when the battery ran down. There was a significant strain on his back, but he didn't really notice an injury at that time. It was 3-4 days later that he noted stiffness and pain in his back which rapidly progressed to typical sciatica pain down the right leg.

Surgery was performed on August 21, 2002 at L4-L5, L5-S1 on the right. The surgery did not alleviate the claimant's symptoms and further testing (CT/myelogram/MRI) was conducted on October 8, 2002 and November 8, 2002. Dr. Reding felt the claimant's pain in his big toe was unrelated to his back condition and x-rays revealed arthritis (see reports of October 4, 2002, November 1, 2002 and December 13, 2002). Dr. Reding found no explanation for the claimant's continued hip and thigh pain stating, "the exact cause for his pain remains uncertain, but probably related to lumbar degenerative disc disease."

The claimant returned to Dr. Reding's office on January 17, 2003 and was seen by an associate, Dr. Shahim who commented, "his pain does not seem entirely disabling, although he surely still has discomfort. He seems most content with continuing a conservative approach and using analgesics such as Extra Strength Excedrin."

In his deposition, Dr. Wharton explained that he had treated the claimant since 1988. He saw the claimant in May, 1998 for treatment of a back injury at a casino including numbness in the great toe. Dr. Wharton diagnosed mild irritation of the sciatic nerve which resolved. The claimant returned in July 1998 reporting back pain after walking on concrete with paraspinal muscle spasm on the right and positive straight leg raising test on the right. An MRI scan shows some degenerative changes. The claimant returned in August with some improvement and again in September 1998 with new complaints of pain when he arose each morning. He did not see the claimant to treat his back from September 1998 to June 20, 2002.

On June 20, 2002 the claimant complained of right flank and hip pain radiating to his toe. Dr. Wharton conceded that his notes make no mention of a work-related injury. He learned of the golf cart incident after reading Dr. Reding's August 9, 2002 note (Depo. 13, 15-21). Dr. Wharton cannot specifically recall why he issued the September letter clarifying the claimant's history of injury (Depo. p. 23-26). He has no independent recollection of any discussion with the claimant yet he testified the golf cart incident caused the claimant's back problems within a reasonable degree of medical certainty (Depo. p. 39-42).

On cross-examination, Dr. Wharton explained that desiccated discs are more susceptible to bulging or herniation. Dr. Wharton reiterated that the first MRI scan taken in July 1998, before the alleged incident at work was negative except for degenerative changes while the second scan taken in July 2002 after the alleged accident was positive for herniation and bulging.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993.

The provisions of Act 796 of 1993, are to be "strictly" construed, Ark. Code Ann. §11-9-704, §11-9-717. All prior case law contrary to or in conflict with Act 796, has been repealed, Section 35 of Act 796. Under Act 796 of 1993, the claimant has the burden of proving the following requirements, as defined in Ark. Code Ann. §11-9-102, (Cum. Supp. 1993), by a preponderance of the credible evidence of record, which means "evidence of greater convincing force, "Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment (Ark. Code Ann. §11-9-102(5)(A)(i); Ark. Code Ann. §11-9-102(5)(E)(i); Ark. Code Ann. §11-9-401(a)(i));

- (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 (Ark. Code Ann. §11-9-102(5)(A)(i));
- (3) Medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury (Ark. Code Ann. §11-9-102(5)(D)).

‘Objective findings’ are those findings which cannot come under the voluntary control of the patient. When determining physical or anatomical impairment, neither a physician... (or) the Workers’ Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine,...range-of-motion tests shall not be considered objective findings. Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;

- (4) proof by a preponderance of the evidence that the injury was caused (a) by a specific incident and is identifiable by time and place of occurrence (Ark. Code Ann. §11-9-102(5)(A)(i));

or

- (b) proof by a preponderance of the evidence that the injury was caused by rapid repetitive motion (Ark. Code Ann. §11-9-102(5)(A)(ii)(a) and proof by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment (Ark. Code Ann. §11-9-102(5)(E)(ii)).

“Major cause” means more than fifty percent (50%) of the cause... (Ark. Code Ann. §11-9-102(14));

In precedent set by the Full Commission, if the claimant fails to establish by a preponderance of the evidence, any of the definitional requirements of the Act, the claimant has failed to establish the compensability of the claim, and compensation must be denied, Cater v. Aid Temporary Services, (Opinion of May 12, 1995)(E404813). I find that the claimant has failed to prove by a preponderance of the evidence of record that he sustained an injury arising out of and in the course of his employment.

The evidence in this case shows that the claimant has been bothered by back pain since 1998 either as a result of a fall or as a result of progressive degenerative disc disease. Degenerative disc disease makes the spine more susceptible to bulging or herniated discs.

On June 16, 2002 the claimant pushed a golf cart and reported the incident but did not mention any injury to his co-worker, supervisors or general practitioner. The history given to Dr. Wharton suggests a gradual onset or specific injury at home. The claimant continued to work until July 7, 2002, when he realized his condition would require time off from work and he had no sick leave. He spoke with his supervisor on July 29, 2002, but could not identify a work-related injury by time or place of occurrence. The claimant did not relate his back condition to a work-related incident until he spoke with a neurosurgeon two months later.

Based on my assessment of the claimant's credibility and the initial medical records showing no work-related injury, I find the claimant has failed to meet his burden of proof.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employee-employer-carrier existed among the parties on June 16, 2002, at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$223.00/\$167.00. This claim has been controverted in its entirety.

2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge