

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F212985**

**JACKIE W. HICKS**

**CLAIMANT**

**LEXICON, INC.**

**RESPONDENT EMPLOYER**

**LIBERTY MUTUAL**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED OCTOBER 1, 2003**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE SCOTT HUNTER, Attorney at Law,  
Jonesboro, Arkansas.

Respondents represented by the HONORABLE JOSEPH H. PURVIS, Attorney at Law,  
Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Jonesboro, Arkansas on July 24, 2003. A prehearing conference was held on March 12, 2003 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on October 28, 2002.
2. The compensation rate is \$345.

The claimant contends that he sustained a compensable back injury on October 28, 2002. The claimant contends that he is entitled to medical benefits and temporary total disability benefits from the date of the injury to a date to be determined. The claimant also requests some mileage when he was seeking medical treatment.

The respondents contend the injuries the claimant may or may not have sustained on or about October 28, 2002, are not compensable pursuant to *Shippers Transport v. Steppe* and other case law from our courts. The claim has been controverted in its entirety.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on October 28, 2002.
2. The compensation rate is \$345.
3. The claimant proved by a preponderance of the evidence that he sustained a specific incident injury on October 28, 2002.
4. The respondents have satisfied the requirements that the affirmative defense set out in *Shippers Transport of Georgia, supra*, acts as a bar to the claim for benefits.

**DISCUSSION**

The claimant, 34 years old, began his employment with the respondent employer in January 2002 and on October 28, 2002, he was working as an operator for the mill service. According to the claimant, he was the lead man of a crew of about eight guys that were cleaning up the furnace deck. The claimant testified that he picked up a

piece of slag weighing approximately 200 pounds. The claimant testified that he felt something pop in his back and pain ran down his side and he fell over the ball of slag. According to the claimant, he immediately reported the incident to John Hall, his supervisor, and to Randy Lewis, the superintendent of mill service. The claimant took some ibuprofen and tried to work the remaining two hours on his shift. According to the claimant, he went home and laid down for a short time and then was taken to the hospital and admitted for about five days. The claimant worked one day for the respondent after being released from the hospital and has not worked since.

The claimant came under the care of Dr. Kenneth Eubanks and underwent fusion surgery on January 10, 2003. The claimant verified that he had a prior back injury in August 2000, while working for another employer and had a discectomy.

The claimant was questioned about two employment applications he had completed for the employer and were part of the evidence. The claimant verified that he had indicated on the application that he had never had any back trouble. The claimant explained that Todd Barnard told him not to indicate any previous back problems even though he had told Mr. Barnard about his back surgery. The claimant told Mr. Barnard he was fine now. The claimant testified that he worked at Prospect Steel for about two months doing very physical work and his supervisor was Kerry May. After about two months at Prospect, there was a layoff and the claimant was laid off. Kerry May then contacted the claimant about working a shut down and that involved about 87 hours in one week. According to the claimant, Kerry May was aware of his previous back problems and being shot in the stomach. Also, the claimant testified that

Kerry May referred him to Robert Johnson at the respondent employer for a position there.

The claimant was questioned about a form he completed for employment where he indicated he was taking the pain medication, Loratab. The claimant verified that Todd Barnard's signature was at the bottom of this form and the claimant testified he told Mr. Barnard that the medication was for pain related to his back. The claimant testified that Todd Barnard told him to not worry about that, no physical is required, this may never come up again. The claimant was hired by Robert Johnson as a millwright after receiving a good recommendation from Kerry May. The claimant worked in maintenance and was able to do that type work.

The claimant testified that Todd Barnard was discussing safety tips in a safety meeting and was discussing how to lift and bend and proper technique when he told the guys that they did not want to hurt their back like Jackie did. The claimant stated that Todd Barnard was a safety coordinator for the respondent employer and he had known Todd for about 15 years.

The claimant testified that he was sent to Texas by his employer to work on a cooling bed system and he had to complete another application. The claimant testified that he did not indicate that he had prior back trouble; however, on the first application he checked yes to the question about having had a workers' compensation claim.

According to the claimant, he worked eight or nine months for both Prospect and Schueck before his October 28, 2002, injury. According to the claimant, he told Kerry May, Robert Johnson, Boyd Johnson, Randy Lewis and Todd Barnard about his prior back problems. The claimant testified that he was 6 feet 7 inches tall and weighed

about 318 pounds and was a former ex-wrestler and there was discussion about him being shot in the stomach in a domestic disturbance. All these things contributed to discussions about what he could and could not do as far as work.

Under cross examination, the claimant verified that he had a prior back injury on August 15, 2000 and had pain until his surgery on March 15, 2001. The claimant confirmed that he was involved in a July 24, 2001, automobile accident and he complained of lower back pain afterwards. The claimant admitted that he answered no to the question of whether he had pled guilty, no contest or been found guilty of a crime. The claimant admitted that he had, in 1995, pled guilty to receiving stolen goods. The claimant admitted that his dates of employment with B.J. Titan Corporation on his application were incorrect and that he did not list Motor Appliance as an employer on his application. The claimant admitted that he did not mention his back surgery on the health form he completed for the respondent and he stated he was told not to list the back problem. The claimant testified that Todd Barnard told him to answer no to any questions about his back.

The claimant was cross examined about his application in August 2002, when he went to Jewett, Texas to work. Again, the claimant did not mention any back problems on this health form or application and, in fact, answered no to some questions relating to previous back problems or hospitalization.

Brian Elliot, brother-in-law of the claimant, testified that he recommended the claimant for a job. He spoke both to Kerry May and Mike Bishop and told them that the claimant had previous back problems but also that the claimant was a big guy with

previous work experience in steel. Mr. Elliott testified that he also overheard the claimant discuss his back surgery with Mike Bishop and Kerry May.

Jimmy Freeman, former employee of Schueck Steel, testified that he worked with the claimant and the work sometimes involved heavy work and lifting. Mr. Freeman testified it was common knowledge that the claimant had previous back problems, as it was mentioned in a safety meeting and was a common subject of discussion.

Todd Barnard, safety manager for the respondent employer, testified that he is in charge of drug testing and reviewing the medical forms completed by applicants. Mr. Barnard testified that he knew the claimant before he came to work for respondent but he was unaware of any previous back problems the claimant might have had. Mr. Barnard denied telling the claimant not to worry about the previous back problems on his application or to be untruthful on the medical application. Mr. Barnard testified also that Mr. Elliott did not report any back problems of the claimant when he recommended him for employment. Mr. Barnard testified that he did see that the claimant was taking Loratab and this was noted on the medical information or drug testing information. Mr. Barnard did not inquire why the claimant was taking this drug or for what condition.

The claimant contends that he sustained a compensable specific incident injury on October 28, 2002. In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical

evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury when he picked up the approximately 200-pound piece of steel. The claimant presented credible testimony about how the injury occurred when he and a crew were cleaning up the furnace deck. The claimant sought medical treatment at the Baptist Memorial Hospital Emergency Room on October 29, 2002 and reported the lifting incident and feeling a pop in his back and feeling severe pain. Diagnostic tests revealed recurrent left L4-5 herniated disc with severe degenerative disc disease, L4-5, L5-S1 with discogenic pain both levels. The claimant underwent surgery on January 10, 2003. A January 26, 2003, report from Dr. Eubanks indicated the claimant was doing well post operatively and had complete resolution of his pre-op pain except for some right hip pain. Dr. Eubanks also opined in that report that after considering the injury and the history of the claimant and the type work, the injury was a clear-cut work injury. Cl. Exh. No. 1, p. 14.

The respondents contend the claimant is not entitled to benefits pursuant to the affirmative defense set out in the case of *Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979). Specifically, the respondents stated the claimant

misrepresented the fact that he had a prior injury to his L4-L5 disc and that he had undergone previous disc surgery at that level that resulted in an impairment rating to his whole body. The respondents also contend that the claimant's subsequent injury was related to his prior injury and the employer relied upon the false representation in the hiring of the claimant.

The Shippers' defense was originally set out in *Shippers Transport of Georgia v. Stepp, supra*. In that case, it was held that a false statement in an employment application will bar benefits under the following condition:

1. The employee must have knowingly and willfully made a false representation as to his physical condition.
2. The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring.
3. There must have been a causal connection between the false representation and the injury.

Subsequent cases have held that the Shippers' defense is an affirmative defense and that the respondents must prove each element by a preponderance of the evidence before a claim will be barred. *Tahutini v. Tasty Bird Foods*, 18 Ark. App. 82, 711 S.W.2d 173 (1986); *West v. Tyson Foods, Inc.*, Full Commission Opinion, May 8, 1997 (No. E408320).

The claimant testified that he applied for employment in January 2002 for the respondent and prior to that he sustained a back injury in August 2000, with a herniated L4 disc requiring surgery. The claimant also verified that he returned to Dr. Robertson on August 6, 2001, following up on his complete hemilaminectomy at L4-5 for excision

of an L4 left HNP and decompression of severe lumbar spinal canal stenosis at the L4-5 level and was given a release to return to work. The claimant testified that the doctor did not tell him that he had a 30-pound lifting limitation, although his report does say that.

The claimant admitted that he did not mention his back surgery on the health questionnaire he completed for the respondent employer on January 15, 2002. Question No. 1 asks, "Have you seen a doctor for treatment of any illness (work related or not) in the past 2 years?" The claimant admitted he only mentioned carpal tunnel syndrome and testified that Todd Barnard advised him not to list the back problem. Question No. 5 asks, "Have you ever had or do you now have any of the items listed below," with the first item being "back trouble, pain, or injury." The claimant verified that he answered, "No." Question No. 15 asks, "Have you ever been hospitalized as a result of a back problem?" The claimant verified that he answered, "No." The claimant verified that he settled his back injury workers' compensation case with the August 2000 injury in February 2002 for \$8,000.

The claimant next verified that he completed a second health questionnaire when he went to work on a project for the respondent employer in Jewett, Texas. On August 16, 2002, the claimant completed the health questionnaire and verified that he left blank Question No. 2 on the form, which asks, "List all operations and hospitalizations including year of occurrence." The claimant verified that he answered "No" to Question No. 5, which asks, "Have you ever had or do you now have any of the items listed below," with "A" being "back trouble, pain or injury." The claimant again

verified that he answered “No” to Question 15, which asks, “Have you ever been hospitalized as a result of back problems?”

The claimant testified that he hurt his back on October 28, 2002, while lifting a 200-pound ball of slag. The claimant sought medical treatment from Dr. Kenneth Eubanks who diagnosed a re-herniated L4-5.

Steve Deneen, corporate safety director for respondent, testified that the medical questionnaire is given after a conditional offer is made and had the claimant answered truthfully, he would not have been hired for fear of a re-injury or injuring someone else.

Todd Barnard, safety manager, testified that he was unaware of any back problems of the claimant and emphatically denied telling the claimant to be untruthful on his application and health form.

Dr. Kenneth Eubanks testified in a deposition on July 11, 2003, that he preoperative diagnosis of the claimant was a left recurrent L4-5 herniated disc. Dr. Eubanks was questioned:

Q. [Mr. Purvis] And would I be correct in that with his history of having previously had the herniated disc before, it would make again it susceptible to have a recurrence at that area?

A. [Dr. Eubanks] Correct.

Q. All right, sir. And you note also that severe degenerative disc disease at L4-5, which is that same area all the way through L5-S1.

A. Correct.

Q. Looking at your procedure, you wound up redoing the left L4-5 discectomy, did you not?

A. Correct.

Q. All right, sir. And wound up doing a fusion from L4-5 through L5-S1?

A. Correct.

Q. Now, the L4-5, you also performed an interbody prosthesis there.

A. Correct. (Resp. Exh. No. 3, p. 12, lines 9-25.)

After considering the testimony and credible evidence presented, I find that the claimant did sustain a compensable injury arising out of his employment on October 28, 2002. However, I find the claim is barred by the Shippers' defense. I find the evidence was clear that the claimant did knowingly and willfully make false representations as to his physical condition on his employment applications and medical health questionnaire. With the nature of the respondents' business being the steel industry with heavy work, the physical health of applicants is most important and the safety director testified that the health questionnaire and applications are considered before placing applicants in their industrial jobs. The safety director testified the claimant would not have been placed in the job he held had he correctly and truthfully answered the health questions in the employment process. Lastly, the claimant had a previous back injury with surgery at disc L4-5 and on October 28, 2002, he sustained a re-injury of L4-5, requiring additional surgery. Dr. Eubanks testified that the claimant's history of having a herniated disc increases the chances of having a recurrence. I find the respondents have satisfied the requirements that the affirmative defense set out in *Shippers Transport of Georgia, supra*, acts as a bar to the claim for benefits herein.

## **ORDER**

The claimant proved by a preponderance of the evidence that he sustained a specific incident injury on October 28, 2002. The respondents have satisfied the requirements that the affirmative defense set out in *Shippers Transport of Georgia, supra*, acts as a bar to the claim for benefits. The claim for benefits is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**