

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212238

ROBERT MUSI	CLAIMANT
BUTTERBALL TURKEY	RESPONDENT
SEDGWICK JAMES, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 30, 2003

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

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

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 5, 2003, in Springdale, Arkansas. The depositions of Jim Gilbert and Rick Bertrand were taken on May 21, 2003. These depositions have been admitted subsequent to the hearing as Respondent's Exhibits No. 3 and 4.

A pre-hearing order was entered in this case on December 23, 2002. 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, the parties agreed on the appropriate weekly compensation rates, as reflected by stipulation No. 2, and the claimant amended his request for temporary total disability benefits to cover only the period of September 9, 2002 through December 4, 2002, amending issue No. 2. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted to Commission for its consideration:

1. On September 8, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$425.00 for total disability

and \$319.00 for permanent partial disability.

3. The claim is controverted in its entirety.

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 back.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from September 9, 2002 through December 4, 2002.

In regard to these issues, the claimant contends:

"Claimant was injured on September 8, 2002, when he stepped down off of a piece of conveyor belt to step down on the floor. The floor drain covers were off and his foot went down into the floor drain. Directly after, he felt a sharp, excruciating pain in the lower left side of his back."

In regard to these issues, the respondents contend:

"The respondents contend the claimant did not sustain a compensable injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his back, while in the employ of this respondent. The burden of proof on this issue rests on the claimant.

In order to meet this burden, the claimant must first satisfy the requirements of Ark. Code Ann. §11-9-102(4)(D). This requires that the claimant prove by the greater weight of the medical evidence the actual presence or existence of the physical injury alleged to be compensable and that the actual presence or existence of this physical injury is further supported by "objective findings", as that term is defined in Ark. Code Ann. §11-9-102(16).

The medical evidence does reveal the presence of physical defects involving the

claimant's lumbar spine. These defects take the form of disc dessication (dehydration) at multiple levels, at the L5-S1 level, moderate annular bulging centrally into the right, which abuts and could slightly impinge upon the right S1 nerve root, annular bulging to the left which does not appear to involve any neural elements (nerve roots or spinal cord), at L3-4 and L4-S1, disc space narrowing and mild annular bulging which does not appear to involve any neural elements. The presence or existence of these physical defects is supported by and based upon purely "objective findings" shown by an MRI study performed on October 11, 2002. This same study was interpreted by Dr. Michael Morse as showing a possible annular tear at L4-S5, but no neural element compromise.

In addition the medical evidence "establishes" the actual presence or existence of another physical injury, in the form of a lumbar strain. It is this physical injury, which the claimant's treating physicians (Dr. Myshka and Dr. Morse) have opined to be the cause of his current symptoms and complaints. This initial diagnosis was made by Dr. Myshka on September 10, 2002, and was reaffirmed by Dr. Morse on October 17, 2002 (after the MRI study was performed). This diagnosis is based upon and supported by "objective findings" in the form of muscle spasms in the lower lumbar spine, noted by Dr. Myshka on his initial evaluation.

It is my opinion that the medical evidence presented is sufficient to satisfy the requirements of Ark. Code Ann. §11-9-102(4)(D), in regard to both the physical defects involving the claimant's various lumbar discs and the diagnosed lumbar strain. The actual presence or existence of both of these types of physical injuries or conditions is "established" by medical evidence, which, in turn, is supported by "objective findings".

The claimant must next prove that one or more of these medically established and objectively documented physical injuries or conditions involving his lumbar spine satisfies the definitional requirements for a "compensable injury" contained in Ark. Code Ann. §11-9-102(4)(A). As the alleged compensable injury involves the claimant's back or lumbar

spine, two separate sets of definitional requirements are potentially applicable.

The first of these sets of definitional requirements is found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) That the physical injury or condition arose out of and occurred in the course of the employment;
- (2) That the physical injury or condition was caused by a specific incident;
- (3) That the physical injury or condition is identifiable by time and place of occurrence;
- (4) That the physical injury or condition resulted in internal or external physical harm to the claimant's body;
- (5) That the physical injury or condition required medical services or resulted in disability.

The second definitional requirements is found in Ark. Code Ann. §11-9-102(4)(A)(ii)(b). These definitional elements or requirements are:

- (1) That the physical injury or condition must arise out of and in the course of the employment';
- (2) That the physical injury or condition must cause internal or external physical harm to the body;
- (3) That the alleged physical injury or condition must be to the "back".

For injuries falling under the definition of this subsection, the claimant must also prove that the alleged compensable injury is the "major cause" of the need for medical treatment or any disability sustained, Ark. Code Ann. §11-9-102(4)(E)(ii). The term "major cause" is also specifically defined in Ark. Code Ann. §11-9-102(14).

One requirement common to both of these categories of "compensable injuries" is that a physical injury or condition must "arise out of and occur in the course of the employment". This phrase has been interpreted by a long line of Appellate decisions to require the claimant to prove by the greater weight of the credible evidence the existence of a causal relationship between the employment and the physical injury or condition alleged to be compensable.

After consideration of all the evidence presented, I find that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his employment and the various physical defects revealed by the MRI study. As previously noted, both Dr. Myshka, the claimant's primary treating physician, and Dr. Morse, who performed the neurological evaluation of the claimant at Dr. Myshka's request, do not attribute the claimant's current symptoms and complaints to any of these documented defects. Instead, they have opined that the claimant's current symptoms and complaints are due to a simple lumbar strain. Both Dr. Myshka and Dr. Morse have particular expertise in the area of lumbar injuries and conditions, including lumbar strains and discal defects. The various defects noted on the MRI study are generally considered to be degenerative in nature and evolve over a considerable period of time, rather than a result of a specific traumatic incident or employment activities over a relatively brief period of time. Finally, while it would appear that the symptoms voiced by the claimant are not particularly indicative of or compatible with these objectively demonstrated defects.

Clearly, degenerative changes at multiple levels of the claimant's lumbar spine would not be unusual or unexpected. The record reveals that the claimant sustained a substantial work related injury to this portion of his anatomy some 10 years prior to his employment with the respondent. This injury appears to have resulted in a 30% permanent physical impairment to his portion of his body and substantially limited him in regard to this type of employments he could pursue. The evidence further reveals that this injury required the claimant to undergo periodical chiropractic treatment since the 1992 injury. The medical evidence indicates that the claimant had been receiving ongoing chiropractic treatment for his lower back difficulties by a Dr. Guiterrez through June of 2002, which would be immediately prior to his employment with this respondent (Respondents's Exhibit No. 1, page 3).

After consideration of all the evidence presented, it is my further opinion that the

claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his current lower back difficulties, diagnosed as a lumbar strain, and any employment related incident or activity occurring while in the employ of the respondent particularly an employment related incident on or about September 8, 2002. The only direct evidence presented by the claimant to establish this causal relationship is his own testimony concerning the onset of his own current episode of low back complaints. It is well established that the testimony of a party is never considered uncontroverted. However, this does not mean 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 identify the time and place of the onset of his current lower back difficulties and the temporal relationship between this onset and any employment related incident or activity. However, it is simply my finding that, in the current case, the claimant's testimony is not sufficiently credible to establish a reasonably close temporal relationship between any specific employment related incident or activity in general and the onset of the claimant's current back difficulties.

As previously noted, the claimant had been experiencing periodic episodes of difficulties with his lower back since the significant, apparently employment related, injury to this point of his body in 1992. The evidence also indicates that the difficulties which he has experienced following the 1992 injury were essentially the same as his current difficulties and involved the same area of his anatomy. The claimant testified that the only difference was that his current episode of difficulties also involved his left leg, whereas his prior difficulties had involved both legs.

The evidence further shows that the claimant misrepresented his physical condition around the time of his initial employment with the respondent. In a medical history questionnaire he completed on July 16, 2002, he indicate that he had never seen a doctor for pain and symptoms in his back or pain and symptoms in his legs, that he had never

experienced any type of injury to his back, including strain, sprain, or disc injury. He also denied that he had ever experienced any pain, aching, cramping, numbness, tingling, or stiffness in his lower back, right hip/upper leg, left hip/upper leg, right knee/lower leg, and left knee/lower leg. Although the respondents have not presented sufficient information to avail themselves of the Shipper's Transport defense, this intentional misrepresentation certainly affects the claimant's credibility.

The claimant testified that his current episode of lower back and left leg difficulties began when he was climbing off a piece of machinery and stepped down into an uncovered drain hole. Carolyn Wages, another supervisory trainee, who worked the same shift and the same area as the claimant, testified that she observed the claimant step into the drain hole. However, at the time he was holding onto the machinery and did not appear to jar or twist his body. Following this incident, the claimant exhibited no visible signs of injury or difficulties involving his lower back. It appears undisputed that the claimant finished his shift.

Randy O'Brien, the claimant's supervisor, testified that one morning, following the completion of his shift, the claimant complained that he had stepped off a stand into an open drain and was "sore". For some reason, Mr. O'Brien elected not to complete an incident report or employee's first report of injury. Mr. O'Brien testified that the next day the claimant advised him that he was going to the doctor, but was going to file the charges on his group insurance (which apparently he did). Again, Mr. O'Brien elected not to complete an incident report or employee's first report of injury.

In their testimony, Ms. Wages and Mr. O'Brien described prior occasions on which the claimant had complained with his lower back. Ms. Wages testified that the claimant had complained with his back prior to stepping in the drain and attributed his complaint to moving furniture. Mr. O'Brien testified that the claimant had previously reported back complaints to him and attributed these to planting trees.

It even appears that the claimant was somewhat uncertain concerning the cause of his current episode of back difficulties, when he initially consulted Dr. Myshka. In a form completed for Dr. Myshka, on September 10, 2002, the claimant indicated first that his difficulties were the result of a "recent accident" and then crossed his response out, indicating that it was not the result of a recent "accident". To this same question, he also gave the following puzzling response:

"9-8-02 stepped in hole twisted back I think",(Emphasis mine)

In another form completed for Dr. Myshka on that date, the claimant gives the following description of his difficulties:

"Severe pain in lower left side of back three days left leg pain."
Last episode was 9-10-02."

However, in response to the next question, the claimant responded:

"Related accidents and dates-none."

In this form, the claimant further indicated that he was treated by other doctors for his current condition, specifically Dr. Guiterrez with ongoing treatment into June of 2002.

These contradictions and conflicts in regard to claimant's testimony concerning the onset of his current episode of lower back difficulties must be considered light of the other events occurring approximately at this same time. The record reveals that the claimant had only recently accepted an employment position with the respondent and at the time of the employment related incident and the alleged onset of his lower difficulties, he had been in the respondent's employ for less than two months. To take this position, the claimant had been required to move from California to the Huntsville, Arkansas area. The respondent had advanced the claimant approximately \$50,000.00 to enable him to make this move. If the claimant worked for the respondent two years, he would not be required to pay back any of this advance. If he worked for the respondent more than year, but less than two years, he would be required to pay back one-half of this advance. If he left the respondent's employ prior to one year, he would be required to pay back the entire

advance. The evidence presented, including the claimant's own testimony, clearly shows that the claimant was substantially dissatisfied with the employment position he was given, and apparently feels that he was somewhat misled by the respondent when initially hired. Clearly, the occurrence of a compensable injury which would prevent him from performing this position might provide him with a convenient excuse to terminate his employment with the respondent without being liable for the repayment of the advance for moving expenses.

The evidence further shows that the claimant made little attempt to return to limited or light duty employment for the respondent, following his alleged injury. Although he was repeatedly released by Dr. Myshka to return to limited or light duty employment, and was paid his regular salary through October 27, 2002, he only actually worked approximately two to two and a half weeks between September 10, 2002 and October 27, 2002.

I am also puzzled by the claimant's strong desire to determine what type of physician evaluated or treated him for his alleged employment related injury. The claimant was obviously aware of the difference between workers' compensation and group health insurance. The evidence reveals that the claimant reputedly refused the respondent's offer to provide him with medical services under workers' compensation, at least in the form of an evaluation, by an appropriately authorized physician. This refusal is even more difficult to understand, once it appears from Dr. Myshka's records that the claimant was receiving no significant benefit from continued chiropractic care. However, by this action the claimant did effectively preclude the respondent from at least having him evaluated by a physician of their choosing soon after the alleged employment related injury.

The claimant's testimony also shows that he is no novice to the workers' compensation system or employment litigation in general. He has personally been involved in at least one prior workers' compensation claim (i.e. the 1992 back injury) which he settled for a substantial amount. He also testified that prior to taking the job with the respondent he had collected money for a wrongful discharge claim, while in California.

Finally, he stated that his wife was receiving workers' compensation benefits for a California claim, when he relocated to take his job with the respondent, and that she continued to draw these benefits until sometime in January of 2003. These benefits terminated approximately the same time that the claimant returned to work for another employer at somewhat less wages that he had contracted for with the respondent.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that his current episodes of difficulties with his back is in any way causally related to either a specific employment related incident on September 8, 2003 or to his employment activities in general. As the claimant has failed to prove this causal relationship, his current episode of back difficulties would not be the result of an injury "arising out of and in the course of his employment" with this respondent. Thus, the claimant has failed to prove the occurrence of a "compensable injury" to his lower back or lumbar spine within the meaning of either Ark. Code Ann. §11-9-102(A)(i) or §11-9-102(4)(A)(ii)(b).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including September 8, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On all appropriate dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425.00 for total disability and \$319.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight by the credible evidence that he sustained a "compensable injury" to his back within

the meaning of either Ark. Code Ann. §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(b). Specifically, the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between his most recent episode of lower back difficulties and any specific employment related incident occurring on September 8, 2002 (or any other date) or as a result of his employment activities, in general, for this respondent during his period of employment.

5. The respondents have denied the occurrence of any “compensable injury” to the claimant’s lower back and 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