

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202144

ERNEST R. WOLF

CLAIMANT

HAWORTH, INC.

RESPONDENT EMPLOYER

FEDERAL INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED AUGUST 11, 2003

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law,
Jonesboro, Arkansas.

Respondents represented by the HONORABLE DAVID D. HOFFMAN, Attorney at Law,
Monticello, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Jonesboro, Arkansas on July 8, 2003. A prehearing conference was held on October 23, 2002 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 and prior to the hearing, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on February 9, 2002.
2. The temporary total disability rate is \$296.

The claimant contends that he sustained a compensable injury to his back and/or left leg during the course and scope of his employment with the respondent

employer. The claimant contends that the back injury was a gradual onset injury. The claimant contends he is entitled to medical benefits and attorney's fees.

The respondents contend that the claimant did not sustain a compensable injury arising in the course and scope of his employment. 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 February 9, 2002.
2. The temporary total disability rate is \$296.
3. The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment.
4. The claimant has proven that he remained in his healing period and unable to earn wages for a nine-week period.
5. The respondents are liable for the difference in his temporary total disability benefits and the family medical leave paid by the company for the nine-week period.

DISCUSSION

The claimant, 46 years old, has been employed with the respondent for four years. The claimant testified that he worked on the core line where he kept the machines going with forklifts loading the machines. About the middle of December 2001, the claimant was asked to work in another department, on the wood side, doing some different type work activities. The claimant testified that he continued to work in that department through January 2002 and then he returned to his regular department and worked a few days and then the plant shut down to do some cleaning and painting. The claimant described his job during December 2001 and January 2002:

A flat piece of table top laminate material like that, the size of that table right there (gesturing) would come down the line. And they would put laminate on one side of it or a piece of, like this material that's on here (gesturing) on the side of it. Run it down the machine, glue it on and press it. And there was a little turn table at the end on rollers. And you had to take and pull it, push it around, and push it back down the conveyor so the operator could do the other side of it. And it was that twisting and everything being that much shorter than what I am as far as bending over is what, I think, caused part of the injury. (T., p. 9, lines 13-21.)

The claimant testified the production of this product was between 200 and 300 per day with some lifting up to 80 pounds.

According to the claimant, when he returned to his old job, he helped clean and paint more than the normal cleaning. The claimant testified that his back just started getting tight from all the stooping and bending. He had been taking Tylenol and putting heating pads on his back but his back got worse. According to the claimant, he began to have numbness and he limped around for a few days and he reported his back problem to Charlie Clay, the safety inspector but did not go to the doctor then. About a

month and a half later, an appointment was made for the claimant with the company doctor. The claimant saw Dr. Michael Lack and he ordered a MRI, which revealed two herniated discs in the claimant's back. The claimant did testify that 25 years ago he had some back pain and he saw a chiropractor for about six years. He further testified that his back problem resolved with no further problems.

The claimant testified that he treated with Dr. Robert Lawrence and was referred to Dr. Edward Cooper, an orthopedic surgeon. Dr. Cooper recommended physical therapy and, according to the claimant, he was off work for nine weeks. He has returned to work for the employer and is doing well.

According to the claimant, the doctor recommended light-duty work for him; however, the employer took him off work and he went on family medical leave for nine weeks and drew 60% of his salary.

The claimant also used his group health insurance to pay his medical expenses and the company paid his deductible and co-pays.

The claimant verified that he spoke to Charlie Clay, the safety coordinator, around the end of December 2001 or middle of January 2002 about his back hurting and the table being too low where he was working but did not ask to see a doctor. The claimant testified he thought he had pulled a muscle and would get accustomed to the different type work. However, when the claimant's leg became numb, he reported this problem to his supervisor, Heath Nix, and advised he needed to see a doctor. The claimant testified he first saw Dr. Lack on February 12 or 13, 2002, and he took x-rays. The claimant testified that he saw Dr. Lack two times, had x-rays and a MRI. According to the claimant, the company paid for Dr. Lack's visits and he filed the MRI on his Blue

Cross group health insurance. The company paid the deductible and co-pays. The claimant paid his co-pay when he saw his family doctor, Dr. Lawrence. He also saw Dr. Edward Cooper about four occasions. The claimant contends that Dr. Lawrence took him off work for a total of nine weeks.

Since the claimant in the present claim alleges that he sustained a gradual onset back injury, the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(b) (Repl. 2001) are controlling and the following requirements must be satisfied:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (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;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish the compensability of the claim and compensation must be denied. See, *Jerry Reed v. ConAgra Frozen Foods*, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744).

The claimant has proven by a preponderance of the evidence that he sustained a gradual onset injury in the course of and arising out of his employment. The claimant presented credible testimony of his work situation and what he was doing when he first noticed back pain and how his back pain progressed to numbness in the leg. The

claimant has a steady work history with having worked 4 years for the respondent employer and 21 years for his former employer. The claimant had no history of back problems preventing him from working and had noted some back problems 25 years ago that resolved. The medical packet was not complete, since the initial visit from Dr. Lack was not included. Dr. Lack's report dated March 5, 2002, does corroborate the claimant's testimony that there was no specific incident but his pain developed over time. This record from Dr. Lack is the same testimony the claimant presented at the hearing. Dr. Lack did order a MRI on March 2, 2002 and this revealed:

1. Small broad-based left paracentral HNP which may impress upon the descending left S1 nerve root.
2. Moderate-sized central HNP at L4-L5 without significant spinal canal or neuroforaminal stenosis. (Cl. Exh. No. 1, p. 4.)

The claimant also presented testimony that he sought treatment with his family doctor, Dr. Lawrence, and was referred to Dr. Edward Cooper and received conservative treatment. Dr. Cooper's records were not available at the hearing but have been proffered.

I found the claimant to be a hard working, credible witness who candidly and clearly identified his back problems when they first started, thought these problems were minor and related to a job duty change, but later started having numbness in the leg. The claimant reported the problems to his supervisor, sought medical treatment, followed a conservative care program and returned to work. I find the claimant has proven by a preponderance of the evidence that he sustained a gradual onset injury to his back while working for the respondent and this arose out of and in the course of his

employment. The respondents are responsible for all reasonable and necessary medical care the claimant has pursued.

The claimant testified that he remained off work for nine weeks while pursuing physical therapy at the direction of Dr. Edward Cooper. The claimant testified that Dr. Cooper actually placed him on light duty; however, the company took him off work and placed him on family medical leave and paid him 60% of his salary. In order to be entitled to temporary total disability benefits, the employee must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, I find the claimant did remain in his healing period and was totally unable to earn wages for a nine-week period. The claimant remained under the care of Dr. Cooper and was pursuing conservative treatment in the form of physical therapy for his back condition of two herniated discs in order to avoid surgery. While pursuing that treatment, the company placed the claimant on family medical leave; therefore, he was unable to work. I find the claimant is entitled to the difference in the appropriate temporary total disability benefits and the family medical leave paid by the company for the nine-week period the claimant remained off work at the company's direction.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment. The claimant has proven that he remained in his healing period and unable to earn wages

for a nine-week period. The respondents are liable for the difference in his temporary total disability benefits and the family medical leave paid by the company for the nine-week period.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**