

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F209046

**RANDY LEE ALLEN,
EMPLOYEE**

CLAIMANT

**MORSE AUTOMOTIVE CORP.,
EMPLOYER**

RESPONDENT

**NATIONAL SURETY CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED DECEMBER 16, 2004

Hearing conducted September 23, 2004, before Administrative Law Judge Richard B. Calaway in Malvern, Hot Spring County, Arkansas, with

Mr. C. Burt Newell, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant and

Mr. Michael J. Emerson, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over characterization of the claimant's back condition as the result of either a compensable injury at work or pathology and surgery that pre-existed the employment.

The claimant contended that his condition is the result a compensable injury to his low back that occurred August 13, 2001, for which he should be awarded benefits, including temporary total disability benefits from the date of injury until the present, as well as reasonably necessary medical and related expenses. An attorney's fee for controversion was also requested, while other possible issues were reserved.

The respondents contended that the claimant did not sustain a compensable injury; that he suffered from pre-existing pathology; that a compensable injury cannot be established by medical evidence, supported by objective findings; that the alleged injury was not timely reported; and that

the alleged injury was not the major cause of any disability or need for treatment the claimant may have experienced, if the injury is considered to have occurred by gradual onset.

The record was closed at the conclusion of the hearing and included the testimony of the claimant, Cheryl Allen, Billy Darren Burrow, and Chuck Atkinson, as well as documentary evidence, such as the deposition of Dr. Dan Martin taken November 24, 2003.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed on August 13, 2001, when the claimant's average weekly wage was \$207.00.

3. The preponderance of the evidence fails to show that the claimant suffered a compensable injury arising out of and in the course of his employment on or about August 13, 2001.

DISCUSSION

Beginning in March, 2001, the claimant was employed by Morse Automotive, first, as a machine operator, and, then, in the warehouse where he lifted heavy boxes, separating them from pallets, ran a forklift, and worked on the loading dock. His wife, Cheryl Allen, also worked there. He contends that he injured his back there August 13, 2001. However, the claimant has a significant history of similar back problems.

For example, as early as March 22, 1994, the medical record indicates the claimant had gone to the doctor complaining of sudden onset of lumbar pain radiating to both thighs, positive straight

leg raising on the right, and was diagnosed with lumber strain for which he was advised to get bed rest, take medication, and return to work Monday. Later, the medical record indicated that the claimant had a history of back pain starting around Thanksgiving, 1997, while lifting something at work and that he thought he had pulled a muscle but the pain became relative constant in the right buttock and down the right leg into the calf, where he also reported occasional numbness. At that time, he had epidural steroid injection therapy, a positive straight leg raising on the right and an MRI was reported to show a small herniation at L5-S1 with inferior extrusion of disc material causing pressure on the S1 nerve root. On March 20, 1998, Dr. Edward H. Saer, III, performed surgery, a laminotomy and disc excision at L5-S12 on the right. As Dr. Saer followed the claimant after surgery, his notes indicated some continuing problems the claimant experienced. For example, on April 1998, Dr. Saer noted that the claimant had gone back to work, but was doing some bending and twisting when he developed pain in his back and also felt some tearing with some pain down the right lower extremity. At that time, the claimant also reported swelling in his back. The next month on May 28, 1998, Dr. Saer noted that the claimant strained his back and pulled some muscles recently, apparently while carrying water jugs and was off work a couple of days. He indicated that the claimant should be careful with his bending, lifting, and twisting.

Notes from the claimant's family physician, Dr. Dan Martin, indicate that the claimant was having low back problems and positive straight leg raising on the right prior to January 26, 1999. On that date, Dr. Martin's notes indicate that the claimant was having lumbar pain, radiating down his left thigh and positive straight leg raising on the left. On April 28, 1999, Dr. Martin's note indicates that the claimant had lumbar symptoms radiating to his left thigh and the positive straight leg raising on the left, which was attributed to lifting steel and the claimant's lumbar disc disease.

Dr. Martin's note in February, 2000, indicates that the claimant had complained of pain radiating into his left calf and had a positive straight leg raising on the left. Similar symptoms were noted for the claimant's left leg in June, 2001, August, 2001, when the claimant saw Dr. Martin twice and received an epidural steroid injection. In November, 2001, Dr. Martin's note indicates that the claimant had lumbar pain radiating to both knees and sciatica. An MRI scan December 20, 2001, indicated postoperative changes at L5-S1, narrowing of that disc space with disc bulge and spur, possible epidural scarring that may partially involve the left SI nerve rootlet, mild facet hypertrophy.

Dr. Martin's deposition was taken November 24, 2003. He testified that he saw the claimant on four occasions in 2001. The first occasion was June 6 when the claimant indicated that he had a seven day history of pain going into his left leg. Dr. Martin indicated that the claimant related this to driving a forklift and bending and starting a lawnmower. He also stated that the claimant did not indicate a particular injury or event. Dr. Martin indicated that there was no clear event and that was not unusual with back problems. Dep. at 9.

He stated that he also saw him August 20, 2001, and that his current diagnosis was lumbar disc disease. He noted that the claimant had recurrent sciatica now involving the left leg, instead of the right. Dr. Martin noted that the claimant had previous left-sided symptoms going back at least to January, 1999, but also mentioned April 3, 2000. He also testified that he could not relate the findings of an MRI scan taken in December, 2001, to an exact time but his symptoms relate back to 1999 concerning his left leg. Dep. at 16. He also testified that the only two things he had in his chart that might have contributed to the claimant's back, riding a forklift and starting the lawnmower. He stated he could not pinpoint an event or a date or a time. Dep. at 17.

At the hearing, the testimony of the claimant, his wife, and Billy Darren Burrow indicated that on August 13, 2001, the claimant suffered an injury while lifting a dock plate at work. The claimant testified that this injured his back, causing symptoms down his right leg, instead of his left. On cross-examination, he also admitted that he had previously testified in a deposition that his back condition was related to accumulative heavy work and that the dock plate finished it off. Tr. at 46. He further indicated that he had discussed transferring to a different job because of the condition of his back. However, the testimony of Dr. Martin and his records are not consistent with the occurrence of such an injury at work on or about August 13, 2001, involving lifting or lifting a dock plate or symptoms going down the claimant's right leg. In light of the claimant's history of low back problems and the need for Dr. Martin to understand the proper source of the claimant's pathology, it would be necessary to resort to speculation and conjecture in order to find that the claimant's low back problems were the result of a compensable injury on or about August 13, 2001, instead of a continuation of his pre-existing pathology.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge