

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F208824

RANDY P. BENSON

CLAIMANT

L.A. DARLING CO.

RESPONDENT EMPLOYER

CONSTITUTION STATE SERVICES

RESPONDENT CARRIER

OPINION FILED JANUARY 6, 2004

Hearing before Administrative Law JUDGE ANDREW L. BLOOD, on October 17, 2003, at Jonesboro, Craighead County, Arkansas.

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

Respondent represented by the HONORABLE RICHARD LUSBY, Attorney at Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-styled claim to determine claimant's entitlement to workers' compensation benefits.

On July 22, 2003, a prehearing conference was conducted in this claim from which a prehearing order was filed. The prehearing order reflects stipulations entered by the parties, the issues to be addressed in the course of the hearing, and the parties' respective contentions relative to the issues. The prehearing order is herein designated as a part of the record as Commission Exhibit No. 1.

The testimony of Randy Benson, the claimant, Cindy Benson, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Randall Perry Benson, the claimant, with a date of birth of September 22, 1954,

is a high school graduate who commenced his employment with respondent on June 20, 1997. The claimant worked in the Corning facility of respondent-employer.

Respondent-employer manufactures metal shelves store fixtures.

After graduating high school from Emporia High School in Kansas, the claimant secured employment with Santa Fe Railroad in 1974. The claimant remained in the employment of Santa Fe Railroad until 1988. Following a workforce reduction, claimant's job or craft was purchased by the employer. The claimant used the money from the purchase of his job to go into business with his brother a Sonic restaurant in Poplar Bluff, Missouri, where claimant served as owner-manager from 1989 until 1997. The claimant acknowledged that as the owner-manager of the restaurant he provided workers' compensation insurance coverage for his employees and that he was aware of the importance of reporting work-related injuries. (T. 44.)

On June 2, 1997, claimant commenced employment with respondent. The testimony of claimant reflects that as part of the employment process with respondent, he underwent a pre-employment physical by the company doctor. The claimant denies that he had any physical limitations or physical problems before commencing his employment with respondent. Additionally, claimant denies that he ever had problems with his lower back or ever sought treatment for his low back prior to his employment with respondent.

At the time claimant commenced his employment with respondent in June 1997, he worked on the paint line. In describing the mechanics of his job duties on the paint line, claimant testified:

We would be at the end of an operation after production that

the parts are painted. We would stack them, wrap them, and get them ready for shipping. So that would be the paint line. (T. 26.)

In May 2001, claimant requested and received a job in Department 5, a robotic technician job. The claimant performed the robotic technician job from May 2001 until July 18, 2002. The claimant described the mechanics of his job duties as a robotic technician:

There was quite a bit of movement. It's very fast, extremely fast. But the movement consisted of a frame that we would load parts into, clamp down or fix on the frame, initiate a start sequence, and that side of the robot would weld. And while that's going on, you go to the other side, remove the already welded part, skid it, and go get new parts and repeat the process, clamping, making sure everything is in there correctly, clamping it, initiate a start sequence, and back and forth, back and forth. (T. 28.)

The claimant's testimony reflects that the weights of the separate parts that were placed into the robotic machine were not significant; however, claimant testified:

Going out, you might have a piece that might weigh up to 25, 30 pounds, and you're bent over at the back pulling it out of the frame to get it out of those frames. Some of the frames are extremely tight. (T. 30.)

The testimony presented by the claimant and his wife, Ms. Cynthia Gay Benson, reflects that the claimant's general medical doctor for a period of two to three years prior to April 2002, has been Dr. Stephen Nagy, a Poplar Bluff, Missouri internal medicine specialist. Ms. Benson's testimony reflects with respect to claimant's physical activity prior to April 2002:

He was very active. He was big swimmer. We have a coliseum in Poplar Bluff, and he would go at least four days a week and swim for at least an hour each day. (T. 12.)

The claimant explained the reason he selected Dr. Nagy as a physician to see on April 24, 2002:

He's my attending physician. He had been with me through my heart, so he's - - I trust him. (T. 38.)

The claimant's testimony reflects that he had been going to Dr. Nagy for general health problems for about three years prior to April 24, 2002. The claimant further testified that prior to April 22, 2002, he was a swimmer and swam approximately four times a week for one hour at the coliseum in Poplar Bluff, Missouri. With respect to the duration of his swimming prior to April 2002, claimant's testimony reflects:

Oh, probably two years, and before that it was running. At Darling, I was getting a little beefy from all the lifting, so I thought I'd low impact, high endurance training. (T. 39.)

The claimant asserts that on April 22, 2002, a Monday, he suffered an injury to his low back while discharging his employment duties for respondent. The claimant maintains that prior to April 22, 2002, he had never requested or worn a back brace at work. Claimant's testimony reflects that on April 22, 2002, he was working an eight-hour day, and that his shift began at 6:00 A.M. Claimant's testimony reflects, with respect to the April 22, 2002, date:

That's when I asked for the back brace. That's where I pulled muscle, hurt my lower back, on side one of robot number three, pulling the fixture off. And that's when I noticed and heard the pain, and I went ahead and initiated the start sequence, went to side two, knelt down and didn't do anything else until I contacted - or I saw Randy Dunlap standing in front of me, basically. (T. 29.)

The claimant maintains that the incident occurred close to 8:00 a.m. The testimony in the record reflects that Randy Dunlap was the claimant's immediate

supervisor during the pertinent time period. The claimant testified that the incident occurred prior to the first break, which is at 9:00. The claimant maintains that he continued to work following the point in time that he experienced pain in his low back, as he was taking the parts off of the machine. The claimant explained, with respect to his continued working following the incident:

We have rate to make. That job literally is – is very fast. I mean, you just keep going. And I had cut myself in there before and taped myself up and kept going. Pain wasn't that unusual. But I did keep going until I got to a stopping point. (T. 31.)

While the claimant testified that he had never been instructed on what to do if he was hurt on the job, he testified that he knew that he should tell his immediate supervisor, who was Randy Dunlap. Claimant testified:

I went to Randy Dunlap and told him I was hurting. And, we might have discussed the pain or whatever, but I made the decision to go get the back brace. And I asked them. (T. 37.)

The claimant testified that the back brace was retrieved from the nurse's station by Beth Johnson, one of the secretaries of respondent-employer. Claimant's testimony further reflects that an entry was made in the log by Randy Dunlap relative to the furnishing of the back brace.

During direct examination, claimant testified that when he received the back brace on April 22, 2002, he disclosed the incident to Mr. Dunlap, his supervisor:

That I had pulled a muscle and my lower back was hurting. (T. 34.)

At another juncture, claimant was questioned regarding the specific terms or words he used in reporting the incident to his supervisor:

Knowing me, I probably said I probably pulled a muscle. I probably self-diagnosed myself. (T. 34.)

On September 15, 2003, the claimant's deposition was obtained. Claimant conceded that during the course of his deposition he testified that he did not tell Randy Dunlap that he had hurt his back as a result of a specific incident on the robotic machine while discharging his employment duties, but rather that his lower back was hurting and he needed a back brace. (T. 64.)

The claimant's testimony reflects that after being furnished a back brace on April 22, 2002, he continued to discharge his employment duties and completed his shift. Claimant maintains that the back brace did not afford him any relief from his symptoms of low back pain. The claimant did wear the brace the remainder of his shift and, in fact, wore the back brace home. Claimant's testimony reflects that over the course of the next two days he reported for work and discharged his employment duties; however, his symptoms and complaints grew progressively worse. Claimant described his symptoms as low back pain, pain in his left buttock, which radiated down into his left thigh. As a consequence of the afore, claimant, on April 24, 2002, sought treatment under the care of Dr. Stephen Nagy.

The testimony of the claimant's wife, Cynthia Gay Benson, was corroborative of that of the claimant with respect to the April 22, 2002, date. Ms. Benson testified regarding her recollection of the April 22, 2002, date:

Because he came home from work that day, and he was in a lot of pain. He was wearing a back brace. He was complaining of pain in his lower back and down in his left buttock. (T. 13.)

Ms. Benson testified that when the claimant left for work the morning of April 22,

2002, he was not complaining of low back pain or any physical limitations. Further, Ms. Benson denies that the claimant registered complaints of low back pain or limitations on March 11, 2002, or any date prior to April 22, 2002. (T. 14.)

The testimony presented by the claimant reflects that on April 24, 2002, claimant came home from work early and was seen at the office of Dr. Stephen Nagy. Claimant's testimony reflects that at the time he was seen at the office of Dr. Nagy his symptoms included low back, stabbing and frequent numbing and stinging down the leg. (T. 34.) On April 24, 2002, claimant was not seen by Dr. Nagy but by his nurse practitioner, Patrick Kreulen. The claimant asserts that he probably told the nurse practitioner that he had pulled a muscle and relayed the complaint of stinging and other symptoms that he was experiencing. (T. 34.) During the April 24, 2002, visit to Dr. Nagy's office, x-rays were obtained. Claimant testified that he was provided a release to return to work following the April 24, 2002, visit to the office of Dr. Nagy.

The testimony of claimant reflects that as he continued to discharge his employment duties subsequent to April 22, 2002, his condition progressively worsened. On July 12, 2002, pursuant to the direction of Dr. Nagy, claimant underwent an MRI of his lumbar spine. The testimony of the claimant reflects that on or about July 19, 2002, he learned the results of the MRI, which included a herniated disc, and that he informed his supervisor of same. Claimant's testimony reflects with respect to his conversation with Randy Dunlap, his supervisor, on July 19, 2002:

I specified that it was a, the disk. That it was ruptured or herniated, I still don't know the medical terminology that well, even what the doctor did to me I couldn't tell you exactly, the exact names. But, yes I told him I had to leave and things were changing that it was going to now be handled

differently, that I was sorry. (T. 68.)

The claimant acknowledged that up to the point of the diagnosed herniated disc, his medical bills had been filed on his health insurance.

The medical in the record reflects that on April 24, 2002, claimant was seen by Patrick Kreulen, a nurse practitioner in the office of Dr. Stephen Nagy, with complaints of pain in his left buttock, low back pain radiating into the left buttock and down midway of the left thigh. X-rays were obtained during the April 24, 2002, visit and the claimant's complaint was assessed as myospasm and sciatica. The claimant had previously been seen at the office of Dr. Nagy on March 4, 2002. (Jx. 1, p. 1.) The claimant was next seen at the office of Dr. Nagy on June 6, 2002. Dr. Nagy assessed his complaint as possible lumbar radiculopathy. Arrangements were made for the scheduling of an MRI of the claimant's lumbar spine during the June 22, 2002, visit. (Jx. 1, p. 3.) On July 12, 2002, the MRI of the claimant's lumbar spine was obtained pursuant to the direction of Dr. Nagy. Thereafter, claimant was referred by Dr. Nagy to Dr. Kenneth Tonymon, a Jonesboro neurosurgeon. (Jx. 1, p. 4.)

On August 5, 2002, claimant underwent surgery under the care of Dr. Tonymon at St. Bernard's Medical Center in Jonesboro, Arkansas for the diagnosed left L5-S1 herniated nucleus pulposus. Dr. Tonymon performed a left L5-S1 hemilaminotomy and discectomy. (Jx. 1, pp. 6-10.) A September 30, 2002, report of Dr. Tonymon relative to an office visit of the claimant of the same date reflects, in pertinent part:

. . . At the time of surgery, it appeared the disc was quite degenerated and even more so than I had expected preoperatively on the MRI. As it turns out, he was a heavy smoker until about 5 years ago and I think the effect of cigarette smoking probably accounts for some of the

degeneration that was experienced at surgery. (Jx. 1, p. 11.)

The September 30, 2002, office visit was the first followup visit by the claimant with Dr. Tonymon following the August 5, 2002, surgery. Due to the claimant's continued complaints and symptoms, Dr. Tonymon directed that the claimant undergo another MRI. After obtaining the results of the MRI, claimant was referred by Dr. Tonymon to Dr. Gregory F. Ricca, an associate, for consultation and further treatment.

On November 19, 2002, claimant was initially evaluated by Dr. Ricca pursuant to the above referral. A November 19, 2002, report of Dr. Ricca relative to the claimant reflects, in pertinent part:

HPI: Mr. Benson is a 48 year old gentleman who is status-post diskectomy L5-S1 left by Dr. Tonymon on 08/05/02. The patient had improved in his symptoms but never had complete relief. His pain has now worsened. The pain is clearly in the posterior midline of the left thigh and leg and this is his greatest amount of pain. His pain is mechanical in nature. He is taking OxyContin and Tylox. He has no right lower extremity complaints.

* * *

After a long discussion, we agreed to proceed with discography and following this will probably proceed with a PLIF at L5-S1 and possibly also at L4-5. All his and his wife's questions were answered and they seemed to understand. (Jx. 1, pp. 11-12.)

On December 3, 2002, claimant was admitted to St. Bernard's Regional Medical Center where he underwent a provocative discogram under the care of Dr. Calin A. Savu pursuant to the referral of Dr. Ricca. (Jx. 1, pp. 14-22.)

The claimant underwent some conservative treatment in the forms of various injections by Dr. Savu. Ultimately, however, claimant, on January 21, 2003, underwent an interbody fusion with instrumentation at L5-S1 under the care on Dr. Ricca. During

the course of his September 11, 2003, deposition, Dr. Ricca testified regarding the extent of his contact with the claimant, medical treatment rendered to and on behalf of the claimant, by him. Dr. Ricca, during his deposition, had access to medical records relative to the claimant's medical treatment under the care of Dr. Stephen Nagy, and medical providers in Jonesboro and at St. Bernard's Regional Medical Center. Dr. Ricca rendered an opinion during the course of his deposition regarding the nexus between the claimant's employment and the herniated disc which resulted in surgical treatment by Dr. Tonymon and himself. (Jx. 2.)

The claimant denies that he suffered complaints relative to his low back prior to April 22, 2002. Further, claimant maintains that he did not obtain the back brace at work until the April 22, 2002, incident wherein he injured his back while unclamping and unloading a part from the robotic welding machine. Claimant does acknowledge that at the time he secured the back brace an entry was made in the first aid log by his supervisor, Randy Dunlap. The testimony of claimant's wife is corroborative of that of the claimant with respect to the afore. Nonetheless, the Corning plant first aid log reflects an entry of March 11, 2002, at 9:00 a.m., that a back support was requested by the claimant for low back pain. The Corning plant first aid log does not reflect a similar entry relative to the claimant for either March 24, 2002 or April 22, 2002. (Rx. 1.)

In his May 9, 2003, correspondence to the claimant's attorney, Dr. Stephen Nagy noted that the claimant was a patient in his internal medicine clinic. The May 9, 2003, correspondence further reflects:

Mr. Benson worked for the LA Darling Company plant and back in April of 2002 while performing his line duty, which involved lifting up to 40 pound weights with bending,

stooping and twisting presented to my office and was evaluated for back pain. His pain persisted despite medical treatment necessitating an MRI of his LS spine performed on July 12, 2002. This demonstrated evidence of a herniated disc at L5-S1 on the left side and bulging versus herniated discs at the L2-3 level. In retrospect it was felt that he probably herniated his disc back in April of 2002 as his radicular symptoms noted by history were probably due to the L5-S1 herniated disc. (Jx. 2, Exh. No. 8.)

Dr. Nagy concluded his May 9, 2003, correspondence by noting, in his medical opinion, the claimant's work activities were responsible for the herniated disc.

After thorough consideration of all the evidence in this record, to include the testimony the witnesses, a review of the medical reports, and application of the appropriate statutory provisions, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Throughout the pertinent time period, the relationship of employee-employer existed between the parties.
3. At all times pertinent, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$321/\$241 for temporary total disability/permanent partial disability benefits.
4. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment caused by a specific incident identifiable by time and place of accident.

CONCLUSION

The claimant was employed by respondent and discharged employment duties from June 2, 1997, through July 18, 2002. The claimant asserts that on April 22, 2002, while discharging employment duties as a robotic technician, he suffered an injury to his low back as he was unclamping and removing a part from the machine. The claimant maintains that after the injury he secured a back brace from his supervisor and later sought medical treatment on April 24, 2002. Thereafter, claimant asserts he continued to discharge his employment duties until July 19, 2002, at which time he was rendered totally incapacitated from engaging in gainful employment as the result of the injury. Further, claimant asserts that on July 19, 2002, he informed supervisory personnel of respondent that he would be unable to work and under the care of a physician for the April 22, 2002, injury. The claimant has since undergone two surgical procedures relative to herniated disc in his lumbar spine. The claimant asserts entitlement to workers' compensation benefits, to include medical and indemnity benefits, as well as a controverted attorney's fee.

Respondent denies that the claimant suffered a compensable injury within his employment. Respondent has controverted this claim in its entirety.

The present claim is one governed by the provisions of Act 786 of 1993, in that claimant asserts entitlement to workers' compensation benefits as the result of an injury having been sustained subsequent to the effective date of the afore provision. Specifically, claimant asserts that he sustained a specific injury identifiable by time and place of occurrence.

In the present claim, claimant maintains that he suffered his injury on April 22, 2002, while performing employment duties for the respondent. Claimant and his wife deny that the claimant experienced limitations, restrictions, or required medical treatment relative to his low back prior to April 22, 2002. Further, claimant maintains that on the date of the accident, April 22, 2002, he requested a back brace from his supervisor; that the same was furnished by the supervisor; that an entry was made in the first aid log of the Corning facility where he worked; and that he wore the back brace home at the conclusion of his shift.

The claimant and his wife further testified that the date of the occurrence of the injury was on a Monday, and that after claimant's symptoms had not improved two days following the occurrence, claimant was seen at the office of Dr. Stephen Nagy on April 24, 2002. The claimant maintains that prior to the April 22, 2002, injury, he had participated in a swimming program where he swam up to an hour four days a week. Subsequent to the incident, claimant's testimony reflects that he was unable to continue the exercise program.

In order for the claimant to establish a compensable injury as the result of a specific incident which is identifiable by time and place of occurrence, the requirements of Ark. Code Ann. §11-9-102(4)(A)(i) must be established; (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 physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective medical findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4)

proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim and compensation must be denied. *Mickel v. Eng. Specialty Plastic*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The Arkansas Supreme Court, in *Eden v. Superior Marble & Glass*, 346 Ark. App. 487, 58 S.W.3d 369 (2001), held that a claimant was not required to prove the exact date upon which the injury was received, and noted that the requirements of Section 11-9-102(4)(A)(i) have been met when the claimant proves that he was injured as the result of a specific incident and the occurrence of the injury is susceptible to identification as to time and place. In the instant claim, the claimant is unequivocal with respect to the date of the incident asserted as the basis for the present injury. Specifically, claimant asserts that the injury occurred on a Monday and that within two days of the injury medical treatment was had under the care of Dr. Nagy's nurse practitioner. The evidence does, in fact, reflect that April 22, 2002, was a Monday. Further, medical records of the office of Dr. Nagy do reflect that claimant was seen on April 24, 2002, with complaints of low back pain with radiation into the left buttock and down the left thigh. The claimant also maintains that a back brace was secured from the first aid station after he reported his complaint of low back pain to his supervisor. The evidence in the record does reflect an entry in the Corning plant first aid log relative to a back support being furnished the claimant at 9:00 a.m because of lower back pain. However, the entry in the Corning plant first aid log was had on March 11, 2002, which

was also a Monday.

The claimant denies that he secured the back brace on March 11, 2002, or that the incident which serves as the basis of the present claim, removing a part from the machine at work, occurred on March 11, 2002. There is no evidence in the record to reflect that the claimant sought or obtained medical treatment relative to complaints of low back pain between March 11, 2002 and April 23, 2002. While the medical records reflect that on April 24, 2002, claimant was seen by Patrick Kreulen, a nurse practitioner in the office of Dr. Stephen Nagy, with complaints of pain in his lower back radiating into the left buttock and down the left thigh, the same does not reflect that claimant attributed the complaints to his employment with respondent or a specific incident that occurred while discharging employment duties with respondent.

The credible evidence in the record reflects that claimant did not relay to his supervisor, Randy Dunlap, or the plant secretary, Beth Johnson, that his back pain for which he was requesting a back brace was the product of a specific incident at work or his work activities. While the May 9, 2003, correspondence of Dr. Nagy attributes claimant's herniated disc to claimant's work activities, this assessment is based upon the nature of claimant's job duties over a period of time. As previously noted, in the instant claim, claimant denies that his injuries are the product of a gradual onset injury but rather a specific incident identifiable by time and place of occurrence.

During the course of his deposition, Dr. Ricca testified, regarding the nexus of the claimant's herniated disc to a specific incident:

I believe if I exclude all assumptions I would say there's a greater probability that it was not a single incident that caused his disc to rupture based on the information I have.

I'm a little hesitant to push that very far forward because again I was not with him at the time he ruptured it. I do not know a lot about his work activities other than what I read in Dr. Nagy's note. And so there is a possibility I'm missing information that would lead me to say this is definitely it. (Jx. 2, pp. 34-35.)

At another juncture, Dr. Ricca testified:

Based on my training, my expertise in my field, the understanding of the anatomy I have through the surgeries I do on people, I believe I'd probably have a better perspective or understanding of the degeneration of the spine. I don't know I could go as far as saying that I would clearly or surely know better about the cause of the patient's symptoms as Dr. Nagy has an advantage of knowing that patient better than I do. But I do believe I understand the pathology of the spine better and the degeneration and nature of the spine problems. (Jx. 2, p. 36.)

In the instant claim, the claimant has failed to sustain his burden of proof by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with respondent on April 22, 2002. The claimant was a heavy smoker until approximately five years prior to 2002. Dr. Kenneth Tonymon, the initial treating neurosurgeon, attributed the afore to the degeneration of the claimant's disc. During the course of his deposition, Dr. Ricca also listed smoking as a probable culprit for the claimant's degenerative disc disease. Claimant did not report a work-related injury to supervisory personnel of respondent on April 22, 2002, April 24, 2002, or March 11, 2002. While the claimant testified that he experienced severe pain in his low back with stabbing and stinging sensation in the buttock and leg, which he attributed to the specific incident or injury in removing the part from the robotic machine, he nonetheless did not report a work-related injury to supervisory personnel of respondent nor did he disclose same to the medical provider on April 24, 2002, when

he sought treatment relative to the symptoms. When claimant's testimony presented before the Commission is compared with that of his September 15, 2003, deposition testimony, the first aid logs of the Corning plant of respondent, and the history contained in the medical records, I find the claimant's credibility to be wanting. This claim is respectfully denied and dismissed.

IT IS ORDERED.

**ANDREW L. BLOOD
ADMINISTRATIVE LAW JUDGE**