

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309837

WORKENTH BERIHUN

CLAIMANT

S T S HOLDINGS INC.

RESPONDENT

COMMERCE & INDUSTRY INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 30, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG, in Fort Smith,
Sebastian County, Arkansas.

Claimant not represented by counsel.

Respondents represented by SCOTT MORGAN, Attorney, Pine Bluff, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 24, 2004, in Fort Smith, Arkansas. The deposition of T. J. Scott was taken on February 6, 2004, and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on December 16, 2003. 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. Immediately prior to the commencement of the hearing, the parties announced that they could agree that the claimant would be entitled to the maximum compensation rates in effect in June of 2003, should such benefits be appropriate. A copy of the pre-hearing order with that amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations are offered by the parties and are hereby accepted:

1. On June 3 and June 4, 2003, the relationship of employee-employer-carrier-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are the maximum of \$440.00 for total disability and \$330.00 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 compensable injuries to his neck and lower back on June 3 and June 4, 2003, either as the result of a specific incident or as the result of cumulative trauma.
2. The claimant's entitlement to the payment of medical expenses, and temporary total disability benefits from June 5, 2003 through a date yet to be determined.

In regard to these issues, the claimant contends that he sustained compensable injuries to his neck and lower back on June 3 and June 4, 2003. He further contends that these compensable injuries have and continued to require medical services and have caused him to be temporarily totally disabled from June 5, 2003 through a date yet to be determined.

In regard to these issues, the respondents deny the occurrence of any compensable injuries to the claimant's neck or lower back.

DISCUSSION

The central issue in this case is the question of whether the claimant sustained "compensable injuries" to his lower neck and lower back on or about June 3, 2003 and/or June 4, 2003. The burden rests upon the claimant to prove the occurrence of these alleged "compensable injuries".

According to the records of Dr. Gary Moffitt, the claimant initially complained of difficulties in the form of pain in his neck, upper back, chest, and lower back. The claimant attributed these complaints to his employment duties that required him to work bent over in a confined space over an extended period of time. Dr. Moffitt's physical examination revealed no objective abnormalities involving the affected portions of the claimant's anatomy. Plain x-rays conducted by Dr. Moffitt, revealed only minimal degenerative

arthritic changes at multiple levels of the claimant's cervical spine. Dr. Moffitt diagnosed the claimant's symptoms as being attributable to a strain of the musculature in the cervical/thoracic area. He further opined that this strain could logically and reasonably have resulted from the claimant's described employment activities.

The claimant continued under the care of Dr. Moffitt through June 26, 2003. During this time, Dr. Moffitt provided the claimant with treatment, which was in the form of oral medication, physical therapy, and restrictions on the use of the muscles in the claimant's neck and back.

It would appear from the AR-3 (completed by Dr. Moffitt on June 26, 2003) that on that date the claimant exhibited some type of symptoms or signs indicative of radicular difficulties. At that time, Dr. Moffitt noted the possibility of a neurological involvement and recommended that an MRI study be performed. The claimant was also instructed to return for a follow up visit in one week. However, it appears that the respondents' refused to authorize such testing. At this point, the claimant's treatment by Dr. Moffitt came to an end.

The claimant was next seen and treated by a Dr. John E. Freeman, a chiropractor in Dallas, Texas. Apparently, the claimant was seen by Dr. Freeman in contemplation of a workers' compensation claim being made in this case under the laws of the State of Texas. At the time of this evaluation, the claimant was complaining not only of pain in the cervical, thoracic, and lumbar areas of his spine, but also insomnia, a burning sensation in both feet, and numbness, tingling, and weakness of both hands. In his physical examination, Dr. Freeman purports to observe numerous "objective" abnormalities, these include muscle spasms and swelling (bilaterally) in the upper, middle, and lower trapezius muscles, the suboccipital muscles, the pectoralis muscles, the deltoid muscles, the rhomboid muscles, the lumbar erector spinae muscles, the gluteus maximus muscles, and the tensor fascia latae muscles. He noted abnormalities involving the claimant's reflexes in his upper and lower extremities. These included abnormal reflexes for the biceps, radial,

wrist, and triceps which were noted to be “1+ sluggish”. Lumbar reflexes were noted to be “1+ sluggish” in the left patellar and absent in the right patellar and Achilles. In addition to these multiple “objective” abnormalities, Dr. Freeman relates various other extensive subjective abnormalities during his physical examination of the claimant. Dr. Freeman also noted numerous abnormalities in the x-ray study previously performed by Dr. Moffitt. Dr. Freeman describes the cervical x-rays as showing “alordosis and anterior gravitational syndrome” of the entire cervical spine, “left antalgia” of the C5-T6 vertebrae, “right lateral flexion” of the C5-6 vertebrae on the C6 vertebra, “right body rotation” of the C2 vertebra, “moderate discospondylosis” of the C4-C7 vertebrae, and “minimal spurring anteriorly” of the C2 vertebra and C3 vertebra. He interpreted the thoracic x-rays as showing a “right single ‘C’ shaped anterior posterior curve with the apex at T10.” In regard to the lumbar x-rays, Dr. Freeman observes a “aberrant vertebral body rotation of L2-L4”.

Based upon his multitude of findings, Dr. Freeman opined that the claimant was experiencing a vast array of physical maladies involving his cervical, thoracic, and lumbar spine. He diagnoses the existence of cervicobrachial syndrome, headaches, edema of both pectoralis muscles, lumbosacral neuritis, neuralgia, and bilateral radicular syndrome, hypokinesia, kinesiologia, right shoulder enthesopathy, and myospasms.

The claimant appears to have continued under treatment by Dr. Freeman, utilizing various chiropractic modalities, for approximately one month. When Dr. Freeman could not obtain payment for his services, he apparently ceased providing the claimant with further treatment.

The claimant was then seen on one occasion by Dr. Richard Keene, a medical doctor in Dallas, Texas. How the claimant came about seeing Dr. Keene is not clear. There is also no indication as to whether or not Dr. Keene has any specialty certification.

In his report of July 31, 2003, Dr. Keene recorded complaints in the form of neck pain, pain in both hands, loss of strength in both hands, numbness in the bottom of both

feet, headaches, and burning pain on the left side of the neck and scalp. He also recorded an unusual and differing history of the claimant's difficulties.

"The patient was injured in Arkansas working over a period of 10 months on the lower body floor of an airplane constantly in a stooped position in extreme heat crawling under tables not having adequate ventilation. He had noticed the situation gradually getting worse for the last six months."

Dr. Keene's physical examination does not record the observation of any "objective findings". He noted only the claimant's subjective responses to various tests. He recorded no observation of muscles spasms, abnormal reflexes, muscle swelling or muscle atrophy.

His primary assessment was a cervical strain or sprain (similar to the diagnosis of Dr. Moffitt's). However, he also apparently concluded (without giving the basis for this conclusion) that the claimant had a herniated cervical disc. He also failed to indicate the exact disc level. Finally, he opined that the claimant had a bilateral upper extremity radiculopathy. Dr. Keene ordered nerve conduction studies to verify the existence of any radiculitis and an MRI, although apparently not to determine whether the claimant actually had a herniated cervical disc, but only to determine if it required surgical correction. None of these tests appear to have been performed.

Ultimately, the claimant sought treatment through the Dallas County Hospital District. His first visit to the facility was on September 23, 2003. At the time of this visit, the claimant's difficulties were initially diagnosed as being attributable to a cervical and lumbar spondylosis. However, this diagnosis was clearly not supported by cervical and lumbar x-rays, which were taken on that same date. These studies were interpreted by the radiologist as showing only mild degenerative joint disease with minimal disc space narrowing and spur formation at the C4-C5, C5-6, and C6-7 levels (essentially the same defects as observed by Dr. Moffitt, following the x-rays taken on June 5, 2003). The radiologist interpreting this study expressly stated that it showed "no malalignment" (spondylosis) of any of the cervical vertebrae. The lumbar x-rays taken on that date were

interpreted as entirely normal.

The claimant has periodically continued to be seen at the Dallas County Hospital District. The records of this facility indicate that his difficulties have ultimately been diagnosed as being attributable to degenerative disc disease, at multiple levels of his cervical spine. It is worthy to note that none of the records of this facility note the observation on physical examinations of any “objective” abnormalities, particularly the multiple muscular and neurological defects similar to those noted by Dr. Freeman.

In his testimony, the claimant described continuous pain in his neck, shoulders, lower back, right hip and thigh. He also describes numbness and loss of strength in his hands. In his opinion, he has gained no significant benefit out of any of the treatment he has received, and has been unable to perform any type of regular gainful employment since the onset of his difficulties. He continues to attribute all of these persistent and unresponsive difficulties to his employment activities on June 3 and June 4, 2003, which required him to maintain the same posture with his body flexed forward at the waist, and his arm extended over his head, for an extended period of time.

The claimant may well be sincere in his belief that his employment activities on June 3 and June 4, 2003, have produced his varied, extensive, and persistent symptoms. However, such a belief no matter how sincere, is no substitute for proof. The claimant must prove by the greater weight of the credible evidence that his varied difficulties, for which he has sought medical treatment and which he contends has resulted in disability, are the result of physical injuries that satisfy all of the statutory requirements for a “compensable injury”, which are set out in the Act.

The first of these requirements are found in Ark. Code Ann. §11-9-102(4)(D). This requirement is common to all the various categories of “compensable injuries” provided by Ark. Code Ann. §11-9-102(4)(A). This subdivision requires that the claimant prove by the greater weight of the credible medical evidence, the actual existence of the physical

injury or condition which is alleged to be compensable. He must further prove that the actual existence of this physical injury or condition is supported by “objective findings”, (i.e. the independent observation of physical findings that are beyond the claimant’s voluntary control).

As previously indicated, the medical evidence shows that the claimant’s various physicians have diagnosed a possible multitude of varied physical injuries or conditions. Dr. Moffitt diagnosed the presence of a soft tissue or muscular strain or sprain to the claimant’s cervical and thoracic spine with minimal diffuse degenerative osteoarthritis of the cervical spine and a possible radiculopathy. Dr. Freeman has diagnosed the existence of cervicobrachial syndrome, headaches, edema of both pectoralis muscles, lumbosacral neuritis, lumbosacral neuralgia, bilateral radicular syndrome, hypokinesia, kinesiologia, right shoulder ethesopathy, and myospasms. Dr. Keene has diagnosed the existence of a cervical strain/sprain, a cervical disc, and bilateral upper extremity radiculopathy. The physicians at the Dallas County Hospital District have diagnosed cervical and lumbar spondylosis and degenerative joint disease of the cervical spine with disc space narrowing and spur formation.

After consideration of all the evidence presented, it is my opinion that the credible evidence shows that only one of these diagnosed physical injuries or conditions is supported by “objective findings”, as required by Ark. Code Ann. §11-9-102(4)(D). This is the diagnosis of minimal diffuse degenerative osteoarthritis or degenerative disc disease with disc space narrowing and arthritic spur formation at multiple levels of the claimant’s cervical spine, apparently C4-C7. The actual existence of this physical condition is clearly supported by purely “objective” abnormalities, as noted on various radiographic studies.

It is apparent, that Dr. Moffitt’s diagnosis of a soft tissue muscle strain or sprain is based solely upon the claimant’s subjective complaints. He fails to record no muscle spasms, swelling, abnormal lordosis, or any other objective findings commonly associated

with this type of physical injury. It is also apparent that his diagnosis that the claimant is experiencing neurological or radicular symptoms involving his right upper extremities, is also based solely upon the claimant's subjective complaints. He notes no abnormal reflexes or muscle atrophy to support the diagnosis. There is simply no objective evidence of any neurological compromise or neurological dysfunction to support this diagnosis.

I recognize that Dr. Freeman purportedly observed numerous "objective findings" to support his vast array of diagnoses. However, I simply find that I can not afford the reports and records of Dr. Freeman any weight or credit. While it would appear from his signature on his narrative report that he is apparently entitled to a number of capital letters after his name and a substantial number of titles, the record fails to show any real evidence concerning his qualifications and level of abilities or expertise. I find it impossible to believe that he would be the only medical provider capable of observing this vast array of physical abnormalities. None of the other medical experts who have evaluated the claimant (both before and after Dr. Freeman), have noted any of these physical abnormalities. I also find it impossible to believe that all of these medical experts would have failed to note such obviously relevant physical findings, should they have been present. It is also impossible to believe they would have failed to record such obviously relevant findings had they been observed. In fact, the reports and records of these other medical experts specifically note the observation of findings that are contradictory to those recorded by Dr. Freeman.

Dr. Keene's diagnosis of a cervical strain or sprain appears to have also been made based solely upon the claimant's subjective complaints. Just as did Dr. Moffitt, he does not record the observations of any objective findings (such as muscle spasms, swellings, or abnormal lordosis of the cervical spine), to support this diagnosis. His reports and records also contain no note of any abnormal objective findings (such as abnormal reflexes, muscle atrophy, etc.), on physical examination or any abnormalities noted on radiographic studies or nerve conduction studies to support his diagnosis of a herniated

cervical disc or a bilateral radiculopathy. It can only be assumed that his diagnosis concerning the existence of these conditions was also based solely on the claimant's subjective complaints and his subjective responses to various clinical tests.

The reports and records of the Dallas County Hospital District failed to note any basis for the initial diagnosis of cervical and lumbar spondylosis. In fact, purely "objective" radiographic findings on studies that were performed at that facility, specifically and completely refute this diagnosis. These x-ray studies were expressly interpreted as showing "no malalignment" of the cervical spine and an entirely normal study of the lumbar spine. The claimant must next show that his medically established and objectively supported physical injury or condition involving his cervical spine satisfies all of the statutory requirements of either Ark. Code Ann. §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(a). Should he fail to prove even one of the definitional requirements provided by these subdivisions, then he has failed to prove a "compensable injury" as defined by that subdivision.

Clearly, the claimant's minimal diffuse degenerative cervical osteoarthritis or degenerative joint disease with minimal disc space narrowing and arthritic spur formation is a longstanding progressive condition and was in existence long before the claimant's employment activities on June 3 and June 4, 2003. However, an aggravation of such a pre-existing condition, may still constitute a "compensable injury" within the meaning of the Act.

In order to prove a "compensable injury" to his neck or cervical spine, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i), the claimant must prove by the greater weight of the credible evidence that his pre-existing cervical condition was aggravated by a "specific incident". In his testimony, the claimant states that his difficulties began on June 3, after he was required to work in a kneeling position with his torso bent and twisted and his arm outstretched for approximately eight hours of his ten hour shift. He testified that

his difficulties increased after continuing to remain in this posture for the remaining two hours of his shift on June 3 and for another entire eight hour shift on June 4. However, he apparently related a June 4 injury date to Dr. Moffitt. When he consulted Dr. Freeman, the claimant gave, as an accident date, June 4, 2003, and described the accident as follows:

“I have been twisted and bend the whole my body especially the neck alway down lower back with such confined place for ten hours after I went home, I couldn’t sleep, full of pain, numbness.”

When he filed his claim with the Texas Workers’ Compensation Commission, the claimant gave an accident date of June 4 , 2003 and attributed his injury to “repetitive bending”. As previously noted, Dr. Keene records a history of the claimant’s difficulties appearing after a period of ten months of being in a constantly stooped position, in extreme heat, crawling under tables, and not having adequate ventilation. Dr. Keene also recorded that the claimant’s complaints had been gradually getting worse for the last six months.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove the occurrence of any physical injury to his cervical spine that was caused by a “specific incident”. If the claimant’s testimony is accepted as accurate, the employed related activities to which the claimant attributes his injury were somewhat limited in time and at scope. However, these activities are not sufficiently limited to constitute a “specific incident”, when that term is given its common or usual meaning. The term “specific incident”, given its common and usual meaning, implies a singular event or impact of trauma. See Marcoe v. Bell International, 45 Ark. App. 888 S.W. 2nd 663 (1994)- Decision under prior law.

Therefore, even if the claimant’s cervical difficulties were caused by the employment activities he describes, he has failed to prove by the greater weight of the credible evidence that he sustained any physical injury to his neck or cervical spine that was caused by a “specific incident”. His failure to prove this necessary requirement of Ark. Code Ann. §11-9-102(4)(A)(i) prevents a finding of a “compensable injury”, as that term is defined by

subsection.

Again, assuming that the claimant's cervical difficulties were caused by the employment activities that he describes, it is equally apparent that these employment activities did not involve any "rapid repetitive motion" , as that term would logically or reasonably be construed. In fact, the claimant's testimony indicates that these activities involved a total lack of motion.

Thus, the claimant has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his cervical spine that was caused by "rapid repetitive motion" related to his employment. The claimant's failure to prove this necessary requirement of Ark. Code Ann. §11-9-102(4)(A)(ii)(a) prevents a finding that he sustained a "compensable injury", as that term is defined by the subsection.

At this point, I would note that it has been previously held that the neck or cervical spine is not part of the "back", as that term is used in Ark. Code Ann. §11-9-102(4)(A)(ii)(b). Thus, the provisions of this subsection would be inapplicable to a claim for a neck or cervical injury. As previously held in this opinion that the claimant has failed to prove by credible medical evidence, which is supported by objective findings, the actual existence of any physical injury or condition to his lower back or lumbar spine, as required by Ark. Code Ann. §11-9-102(4)(D). Thus, it is unnecessary to address the issue of whether he has satisfied the requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(a) in regard to his lower back injury.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier-TPA existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to

weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability, should such benefits have been appropriate..

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained “compensable injuries” to his neck or lower back on or about June 3 or June 4, 2003, either as the result of a specific incident or as a result of cumulative trauma. Specifically, the claimant has failed to “establish” by the credible medical evidence, supported by “objective findings”, the actual existence of any physical injury or condition involving his lower back, as required by Ark. Code Ann. §11-9-102(4)(D). He has also failed to prove by the greater weight of the credible evidence that he sustained any physical injury to his neck or cervical spine that was caused by either a “specific incident”, as required by Ark. Code Ann. §11-9-102(4)(A)(i), or by “rapid repetitive motion”, as required by Ark. Code Ann. §11-9-102(4)(A)(ii) (a).
5. The respondents have denied the occurrence of any “compensable injuries” to the claimant’s neck or lower back and have controverted this claim in its entirety.

ORDER

Based upon the 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

