

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310443

BILLY DUNCAN, JR.	CLAIMANT
WAL MART ASSOCIATES, INC. SELF INSURED	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 30, 2004

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 21, 2004, in Fort Smith, Arkansas. The deposition of the claimant was taken on May 26, 2004, and has been admitted as Respondent's Exhibit No. 5.

A pre-hearing order was entered in this case on April 28, 2004. 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, both parties announced that they could not agree on the appropriate weekly compensation rates. Therefore, this matter was added to the issues to be litigated. A copy of the pre-hearing order with this amendment added thereto has been made Commission's Exhibit No. 1 to the hearing.

The following stipulations have been submitted by the parties and are hereby accepted:

1. On September 23, 2003, the relationship of employee-self insured -third party administrator existed between the parties.
2. 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 cervical spine as the

result of a specific incident on September 23, 2003.

2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from September 24, 2003 through a date yet to be determined, and attorney's fees.
3. The appropriate weekly compensation rates.

In regard to these issues, the claimant contends:

- a. The claimant contends that he sustained a compensable injury on September 23, 2003, while specifically lifting a case of product.
- b. The claimant contends that he is entitled to temporary total disability benefits from September 24, 2003, until a date yet to be determined, and reasonable and necessary medical treatment.
- c. The claimant contends that his attorney is entitled to an appropriate attorney' fee.

In regard to these issues, the respondents deny that the claimant sustained an accidental injury to his cervical spine at its place of business on September 23, 2003. Respondents specifically deny the claimant's small disc herniation noted on MRI scanning without evidence of cord or nerve root impingement was caused by the alleged lifting incident at the respondent's work place on September 23, 2003.

DISCUSSION

I. COMPENSATION RATE

The claimant testified that he was hired to work a 40 hour week. However, he subsequently testified that he averaged approximately 38 hours per week, but on some weeks worked overtime. The payroll records of the respondent even contradict this testimony. The payroll records show that at no time, during the 52 week period prior to September 23, 2003, did the claimant work any overtime. These records further show that during this 52 week period (excluding weeks the claimant did not work or worked very little), the claimant averaged only 29.88 hours per week. There is no indication that during this period, the claimant ever worked 40 hours

during any one work week. I find the payroll records to be more accurate than the claimant's testimony.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence establishes that the claimant earned an average weekly wage of \$398.90. This would result in appropriate weekly compensation benefits of \$266.00 for total disability and \$200.00 for permanent partial disability. I have arrived at this determination by taking the average hours worked per week by the claimant (29.88 hours) and have multiplied this figure by his hourly rate on September 23, 2003 (\$13.35).

II. COMPENSABILITY

The central issue in this claim is the question whether the claimant sustained a "compensable injury" to his cervical spine, as the result of a specific incident on September 23, 2003. The burden rests upon the claimant to prove all of the elements necessary for such a "compensable injury."

The first of these requirements are found in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injury alleged to be compensable. It further requires that the actual existence of this physical injury or condition must be supported by the independent observation of physical findings beyond the claimant's voluntary control (i.e. "objective findings").

In the present case, the medical evidence does "establish" the actual existence of a physical injury or condition involving the claimant's cervical spine. This injury or condition takes the form of a small right sided herniated disc (HNP) at the C6-7 level. The medical evidence further shows that the actual existence of this physical injury or condition is supported by objective findings observed on an MRI study, performed on September 24, 2003. Therefore, in regard to this right sided disc herniation, the claimant has satisfied the statutory requirements of Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that this medically established and objectively documented physical injury or condition satisfies all of the definitional requirements of Ark. Code Ann. §11-9-

102(4)(A)(i). These definitional requirements are:

1. The injury or condition must arise out of and occur in the course of the employment;
2. The physical injury or condition must be caused by a specific incident;
3. The physical injury or condition must be identifiable by time and place of occurrence;
4. The physical injury or condition must result in internal or external physical harm to the claimant's body;
5. The physical injury or condition must require medical services or result in disability.

It is necessary that the claimant prove that his alleged employment related injury satisfies all of these necessary requirements. Should he fail to prove even one, then his physical injury or condition would not represent a "compensable injury" as that term is defined by this subsection.

The claimant's own testimony is the only direct evidence presented to prove both the actual occurrence of a specific employment related incident on September 23, 2003, and its causal role in producing the medically established and objectively documented defect involving his cervical spine. In this regard, the claimant testified that when he reported to work at 4:30 a.m. on September 23, 2003, he was experiencing no difficulties with any portion of his body. However, he stated, that at approximately 6:30 a.m., he was holding a 45 pound container in his arms, in order to move it from a raised pallet to another pallet. He further stated that he suddenly lost feeling and control in his entire right side and experienced a heavy sensation in his right side. He subsequently testified that he also experienced sudden pain radiating from his neck down his entire right side. He testified that, at that point, he dropped the container and went directly to the break room. According to his testimony, he then called either his wife, the Johnson County emergency room, or both. After which, he proceeded directly to the Johnson County Regional Medical Center emergency room for evaluation and treatment, as he was concerned that he was having a stroke.

In his testimony, the claimed conceded that he had previously experienced "numbness" in his right side for approximately 2-3 months, prior to September 23, 2003, and had even reported

this to his supervisor. However, he testified that this was “nothing like” the sensation he experienced on September 23, 2003.

Finally, he testified that on September 22, 2003, he had attempted to get up from his chair, at home, and had experienced a tingling sensation in his right leg, like it was “asleep.” However, he denied that he fell and stated that after moving around for approximately 4-5 minutes, this sensation went away.

Although the testimony of the parties is never uncontradicted, this does not mean that it can be arbitrarily disregarded. Such testimony, if found to be credible, may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant’s testimony would be legally competent to prove the actual occurrence of a specific employment related incident and to prove the existence of a close temporal relationship between such an incident and the onset of symptoms that would be indicative of the occurrence of the small right sided disc herniation at C6-7. However, after consideration of all the evidence presented, it is my opinion that the claimant’s testimony is not sufficiently credible to prove the existence of a reasonably close temporal relationship between his holding and moving a box, while at work on September 23, 2003, and the occurrence of any documented physical injury or condition involving his cervical spine.

First, the claimant’s testimony that he experienced the sudden and immediate onset of his symptoms, while he was lifting and twisting with the box on September 23, 2003, is inconsistent with the histories he related to his initial medical providers. The initial histories of the onset of the claimant’s symptoms are recorded in the records of the Johnson County Regional Medical Center emergency room as follows:

“Numbness in hands blood pressure up.”

“Chief complaint, periodic numbness right side upper and lower extremities. Fell at home last night and dropped box at work this a.m. Whole right side numb and heavy, headache.”

“Complains of numbness/heaviness on right side since yesterday. Fell at home last night and dropped box at work today. Headache.”
(Emphasis mine)

None of these records note any complaints involving the claimant's neck or cervical spine, particularly no complaints of pain radiating from his neck down into his right side while lifting at work. In fact, these records expressly note no complaints of pain, except for the claimant's headaches.

In his narrative report (dictated on September 23, 2003) Dr. Joseph C. Kradel records the following symptoms and history:

"He presents this morning and the emergent problem is acute neurologic problems. He was at work and he was actually holding something and he couldn't hold it. However, it has been sort of starting the last couple of days, particularly last night. He was asleep and he got up from sleep and his whole right side was numb and that includes his right leg. His right side still feels heavy. He has still had a littler bit of a headache." (Emphasis mine)

Again, no mention was made of any symptoms or complaints involving the claimant's neck or cervical spine. Nor is the initial onset of any of the claimant's complaints particularly associated with his "holding something" while at work

It was only after the MRI revealed the presence of a small right sided disc herniation at C6-7 that the claimant began attributing the initial onset of his symptoms and complaints to some event that occurred, while at work, on September 23, 2003. In the notice of injury completed for the respondent, on September 26, 2003, the claimant described his difficulties as follows:

"At 6:30 a.m. I went to lump a case on a pallet, I lost feeling in right arm and became dizzy."

Although there is no mention of difficulties prior to this employment activity, there is still no mention of any complaints or symptoms involving the claimant's neck or cervical spine, particularly symptoms in the form of pain radiating from the neck into the right upper extremity.

The claimant was then seen by Dr. Marshall (the company physician) on September 26, 2003. At that time, the following history was taken:

"Billy presents to the clinic today because he was sitting on a fork lift and he was putting another pallet in the slot and once the pallet was put into place, his right arm then went numb. He states that he really couldn't grasp with his right hand."

In this report there is no record of any symptoms or complaints involving the claimant's neck or cervical spine. A physical examination of the claimant's cervical spine noted it to be "supple" (i.e. no rigidity, muscle spasm, or loss of range of motion). Again, the onset of the claimant's symptoms is not particularly attributed to any specific employment event.

The claimant was next seen by Dr. Dunham (his family physician) on September 30, 2003.

At that time, Dr. Dunham recorded:

"Right upper extremity weakness that occurred while at work. He had moved a pallet with his fork lift and got off to lift a 24 pound box and restack it when his right upper extremity gave way. He tried again and he was still weak."

Again, no mention is made of any pain or symptoms involving the claimant's neck or cervical spine. There is also no indication that any abnormalities were noted on physical examination of this area, (i.e. muscle spasms, rigidity, or loss of range of motion of the cervical spine).

The first mention of any complaints of pain, is contained in the report of Dr. Reginald Rutherford, dated October 14, 2003. In this report, Dr. Rutherford notes:

"On September 23, when at work he noticed sudden loss of control of the right arm. There was accompanying numbness of the arm and pain posterior right shoulder and arm. This was accompanied by right sided headache and dizziness characterized by light headedness. Headache was described as throbbing nature."

However, there is still no mention in this report of complaints, involving the claimant's neck or cervical spine. In his physical examination, Dr. Rutherford noted no clinical findings indicative of a neck or cervical injury, such as pain, muscle spasms, loss of range of motion, etc. Specific clinical tests were performed by Dr. Rutherford, during his examination to investigate the possibility of an acute cervical injury. These tests were negative for the presence of such an injury.

The medical record does show that the claimant had previously complained of pain in his neck or cervical spine following a motor vehicle accident on July 16, 1998, when he was rear ended. The medical record also shows that he was experiencing difficulties with his neck and shoulders in 2001 (which he attributed to steering his fork lift while working for the respondent). Finally, these medical records show that the claimant was complaining of pain from his right shoulder down into

his arm with periodic right hand numbness. He gave the onset date of these complaints as March 28, 2001, and again attributed these complaints to his day to day operation of the fork lift for the respondent.

Secondly, the greater weight of the credible evidence simply shows that the claimant's symptoms, for which he sought medical treatment on September 23, 2003, are not compatible with or indicative of the occurrence or aggravation of a small right sided disc herniation at C6-7. Such a relatively minor defect would not be reasonably expected to produce such a wide constellation of symptoms involving the claimant's entire right side, including both right side extremities. The medical evidence shows that these wide spread complaints were initially thought to be a cerebral origin by both the claimant and his initial physician. It was only after this possibility had been discounted (although apparently not completely), that the possibility of a radicular etiology was investigated. When the defect at C6-7 was found, a tentative diagnosis was made that the claimant's right upper extremity complaints were radicular in origin. At that point, the claimant's complaints suddenly became limited on his right upper extremity, and his lower extremity and other right sided complaints seem to have vanished.

However, this tentative diagnosis of a radicular etiology for the claimant's upper right extremity complaints were made only by general practitioners. All of these physicians recommended an evaluation by a specialist in this area to further investigate the possibility of such an etiology.

However, both Dr. Rutherford and the radiologist (who initially interpreted the MRI), opined that this study in no way indicated any impingement of the claimant's spinal cord or the exiting nerve roots by this disc herniation. Clinical testing, performed by Dr. Rutherford during his physical examination of the claimant, also discounted the possibility of a radicular cause for the claimant's right upper extremity complaints. Finally, nerve conduction studies performed by Dr. Rutherford further discounted the possibility that the claimant's right upper extremity complaints were not radicular in origin or in any way attributable to the C6-7 defect. However, these studies did show

the presence of a right sided carpal tunnel syndrome, which could reasonably cause at least some of the claimant's difficulties with his right upper extremity.

Neither party has introduced any reports or records from Dr. Schlesinger. Dr. Schlesinger, is a board-certified neurosurgeon, who evaluated the claimant sometime in October of 2003. However, Dr. Rutherford's reports indicate that following his evaluation, Dr. Schlesinger was of the opinion that the defect at C6-7 did not merit his taking any further action. Such a fact would clearly not support the conclusion that this defect was in any way the cause of the claimant's reported extensive and severe right upper complaints.

The only indication in the medical evidence which would indicate that the claimant's disc herniation was playing any causal role in his right upper extremity complaints is the claimant's testimony that an injection in this area (performed at the request of Dr. Rutherford) provided him with some degree of temporary relief. Clearly, this evidence would be based solely on the claimant's qualified subjective response. I do not find that this evidence is sufficient to overcome the other evidence presented and to establish that the objectively documented defect at C6-7 is the cause of any of the claimant's subjective complaints involving the claimant's right upper extremity.

In summary, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that any difficulties which he has experienced, on and after September 23, 2003, are the result of the objectively documented herniated cervical disc at C6-7. It is my opinion that the greater weight of the evidence shows this defect to be merely an "incidental" finding that has played no role in his upper extremity complaints. I further find that had this defect had some causal role in these complaints, the claimant has still failed to prove by the greater weight of the credible evidence that this cervical disc was in any way caused or aggravated by a specific employment related incident that occurred on September 23, 2003. Thus, the claimant has failed to prove that he sustained a "compensable injury" to his neck or cervical spine, on September 23, 2003. His claim for benefits attributable to such an injury must be denied and dismissed in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 23, 2003, the relationship of employee-self insured employer existed between the parties.
3. On September 23, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$266.00 for total disability and \$200.00 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 a "compensable injury" to his cervical spine as a result of a specific incident on September 23, 2003. Specifically, the claimant has failed to prove the occurrence of a physical injury to his cervical spine on September 23, 2003, that arose out of and occurred in the course of his employment with the respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
5. The respondents 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