

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301880

GEORGE MANN

CLAIMANT

DAY & NITE CLEANERS

RESPONDENT

WESTFORT INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 12, 2004

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by CAROL WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 25, 2003, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on June 11, 2003. This pre-hearing order attempted to 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 now agree on the appropriate compensation rates and also requested that the second issue be changed to more accurately reflect the period of alleged temporary total disability. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

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

1. On November 15, 2002, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$197.00 for total disability and \$154.00 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 a compensable injury to his low back on November 15, 2002.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from February 1, 2003 through August 26, 2003.
3. The effect, if any, of the notice provisions of Ark. Code Ann. §11-9-701 on all benefits accruing prior to February 26, 2003.

In regard to these issues, the claimant contends:

"The claimant contends that during and within the scope of his employment on November 15, 2002, the claimant up the stairs in the back stairway at Store No. 2 of Day & Nite Cleaners & Laundry located at 1217 South Waldron Road in Fort Smith, Arkansas. As a result of his fall, he sustained a low back injury. The claimant last worked on February 1, 2003, to a date yet to be determined. The claimant seeks medical treatment with Dr. Arthur Johnson, neurosurgeon with River Valley Musculoskeletal Center. The claimant further requests attorney's fees and all benefits controverted."

In regard to these issues, the respondents contend:

"Respondents contend that claimant did not suffer a compensable injury on or about November 15, 2002. Further, respondents contend the claimant's current need for medical treatment is associated with pre-existing problems and not any work related injury. Lastly, respondents contend they failed to receive notice of any alleged injury until the claimant filed his form AR-C with the Arkansas Workers' Compensation Commission on or about February 20, 2003. As such, respondents contend they should not be liable for benefits prior to receipt of actual notice."

## DISCUSSION

\_\_\_\_\_The central issue in this case is the question of whether the claimant sustained a “compensable injury” to his low back or lumbar spine, as the result of a specific employment related incident (i.e. a fall) on November 15, 2002. The burden rests upon the claimant to prove the occurrence of this alleged compensable injury.

The only direct evidence presented by the claimant to prove the occurrence of this alleged compensable injury is his own testimony. In this regard, the claimant testified that at approximately 1:00 p.m. on a Friday afternoon, he was carrying some laundry on hangers, up the back steps of the respondent’s Waldron Road store. He either slipped or tripped and fell forward onto the stairs. Although he is not certain of the exact date of this fall, he is certain that it occurred on a Friday “around Thanksgiving” of 2002. In this fall, he “skinned” his right shin and experienced a sudden sharp “sensation” in the “small” of his low back and into his leg. It was his further testimony that a co-employee, Robert Johnson, was present in the immediate vicinity of the fall and should have witnessed the fall. He further testified that after the fall, he got up and completed his task of carrying the clean laundry into the store. He proceeded to complete the remainder of his assigned shift.

He stated that the following Monday he reported the incident or fall to Nancy Green, the respondent’s office manager, and to Robert Johnson, the owner of the business. However, at that time he was only “hurting a little” and did not report any actual injury to his back as a result of the fall. It was his testimony that although he continued to perform his regular employment activities through January 27, 2003, his difficulties with his lower back and leg progressively worsened.

Finally, the claimant testified that immediately prior to seeking medical treatment on January 28, 2003, he advised Nancy Green that he was experiencing significant difficulties with his back and leg. However, he stated that he could not remember if he told her that these difficulties were attributable to the prior fall.

Robert Johnson testified that he was present at the time the claimant experienced a fall on the steps of the rear entrance of the Waldron Road store. His description of this incident coincides with that given by the claimant. However, it was his testimony that this fall occurred some time in the summer of 2002. He stated that it could not have occurred “around Thanksgiving” of 2002, or on November 15, 2002, because he did not work for the respondent from September 11, 2002 through December 31, 2002. Thus, it would have been impossible for him to have witnessed any fall in November of 2002. He also testified that after the fall, he asked the claimant if he were okay. He does not relate the claimant’s response, but stated that the claimant “looked like he was kind of limping or sore or shaken up”. Finally, he testified that the claimant never subsequently complained of any difficulties with his back or leg, but indicated that he and the claimant “never talk”. However, he did not indicate that he observed the claimant experiencing any difficulties when he would subsequently see him come and go from the Waldron Road store.

Sandra McCarley, another co-employee at the Waldron Road store, testified that she recalled the claimant coming in the store, and telling her that he had fallen the previous day, while carrying laundry into the store. However, she could not recall the date and stated that she did not remember the claimant making any complaints with any portion of his body as a result of the fall. Finally, she testified that after this conversation, the claimant continued to work and she did not remember him voicing any complaints with his back or leg, nor did she observe him having any physical difficulties with his back or leg in performing his job.

Nancy Green testified that the claimant never reported to her any employment related fall or injury prior to January 28, 2003. She also testified that she observed the claimant every day and that he continued to perform his assigned employment duties without any visible difficulties or verbal complaints. She stated that the first knowledge she received of any alleged employment related injury to the claimant’s back was when she

took a call from the emergency room of Sparks Regional Medical Center on January 28, 2003. At that time, she was informed by the personnel at Sparks Regional Medical Center that the claimant was at the emergency room seeking treatment for what he claimed to be a work related injury to his back and that the hospital was requesting confirmation. Finally, she stated that shortly after January 28, 2003, the claimant came by the main office and filled out a workers' compensation "form", which she forwarded to the workers' compensation insurance company.

The record unquestionably shows that the claimant sought no medical treatment for any difficulties with his back or lower extremity, until he was seen at the emergency room of Sparks Regional Medical Center on January 28, 2003. At that time, the claimant gave a history of worsening low back and hip pain beginning with a fall at work around Thanksgiving of 2002. X-rays, performed at that time, showed the presence of degenerative changes involving most of the claimant's lumbar discs.

A lumbar MRI was subsequently performed on February 4, 2003. This test showed multiple defects, most of which are clearly degenerative in origin. These defects included arthritic facet changes from L2 through L1, multiple disc bulges of L3-4, L4-5, and L5-S1 and a posterior herniation of the L5-S1 disc. This test also indicated the possibility of "compromise" or pressure on the S1 nerve roots.

The claimant was subsequently referred to Dr. Arthur Johnson, a neurosurgeon. Dr. Johnson also records a history of a fall at work and indicates that this occurred on November 15, 2002. Dr. Johnson's records note multiple symptoms, which involved not only the claimant's low back, but also both of his upper and lower extremities. Clearly, the claimant's upper extremity difficulties would not be attributable to some type of lower back injury. His lower extremity complaints further failed to show any distinct neurological pattern. At Dr. Johnson's direction, a discogram was performed on the claimant's lumbar spine. This test is recognized as being the most diagnostic indicator for the presence of

discal injury. However, Dr. Johnson interpreted this test as “non-concordant” for any discal injury and showed only degenerative disc disease with anterior bulging at the L3-4, L4-5, and L5-S1 levels. At that time, Dr. Johnson opined that the claimant’s difficulties were not amendable to any type of further treatment other than medication for symptomatic relief and discharged the claimant from his further care. However, he did assign the claimant a permanent physical impairment of 8% to the body as a whole, apparently for his lower back condition.

After consideration of all the evidence presented, it is my opinion that the greater weight of the credible evidence does establish that the claimant was involved in a “specific incident”, in the form of a fall and that this fall occurred while he was performing his usual employment related activities for this respondent. However, the greater weight of the credible evidence shows that this employment related fall did not occur on or about November 15, 2002, or even “around Thanksgiving” of 2002. Rather, the greater weight of the credible evidence proves that this fall occurred in the “summer” of 2002, or at least some time prior to September 11, 2002.

Clearly, the claimant’s failure to report any actual physical injury to his back for months after this would be inconsistent with this fall playing any causal role in the subsequent lower back difficulties and his ability to continue to perform his regular employment duties for the respondent, without complaints or visible difficulties, are also inconsistent with this employment related fall playing any causal role in producing his subsequent lower back or lumbar spine difficulties. These inconsistencies must also be considered in light of the fact that the medical evidence shows that the majority, if not all, of the objectively documented defects involving the claimant’s lumbar spine are degenerative in nature. Thus, the difficulties which they may be producing could have occurred spontaneously and without any specific traumatic event.. However, if trauma did play any role in the onset of the claimant’s symptoms, one would reasonably expect a

closer temporal relationship between the trauma and the onset of symptoms sufficient to cause the claimant to realize he had experienced a physical injury, to cause him to reasonably seek medical treatment, and to interfere with his ability to perform his employment for this respondent (which unquestionably involved extensive lifting and carrying of significant weights).

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that he experienced a physical injury to his low back or lumbar spine that arose out of and in the course of his employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence. The claimant's failure to prove these three necessary definitional elements for a "compensable injury", as defined by Ark. Code Ann. §11-9-102(4)(A)(i), is fatal to his claim. For the foregoing reasons, his claim 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 all relevant dates, including November 15, 2002, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$197.00 for total disability and \$154.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove that he sustained a "compensable injury", as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i), to his low back or lumbar spine on November 15, 2002, or any other date. Specifically, the claimant has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his low back or lumbar spine that arose out of and occurred in the course of his employment with this

respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury to the claimant's low back or lumbar spine and 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.

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MICHAEL L. ELLIG  
Administrative Law Judge