

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308906

MICHAEL PHILLIPS	CLAIMANT
OSMOSE HOLDINGS	RESPONDENT
ACE, USA INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 8, 2004

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

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondents represented by MICHAEL MAYTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 10, 2004, in Fort Smith, Arkansas. The deposition of Robbie Yates was taken on February 4, 2004 and has been admitted as Respondent's Exhibit No. 2. The deposition of Larry Frahmman was taken on February 4, 2004 and has been admitted as Respondent's Exhibit No. 3.

A pre-hearing order was entered in this case on October 30, 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. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On June 24, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$440.00 for total disability and \$330.00 for permanent partial disability.
3. The claimant has received group disability benefits and a portion of his medical expenses have been paid by group medical insurance.
4. 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 back or lumbar spine on June 24, 2003.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from July 25, 2003 through a date yet to be determined, and attorney's fees.
3. The effect of the notice provisions Of Ark. Code Ann. §11-9-701, on all benefits accruing prior to September 10, 2003.

In regard to these issues, the claimant contends:

"On or about June 24, 2003, the claimant suffered an accidental injury to his lumbar spine arising out of and in the course of his employment. Claimant is entitled to medical benefits, temporary total disability from approximately July 15, 2003 through a date yet to be determined; maximum statutory disability rates on all benefits awarded; and, a maximum attorney's fee on all benefits awarded."

In regard to these issues, the respondents contend:

1. The claimant did not sustain a compensable injury while employed by the respondent employer on or about June 24, 2003.
2. The claimant is not entitled to any benefits.
3. The claimant's physical problems, if any, preexisted his employment with the respondent employer and are in no way related to or caused by his employment with the respondent employer.
4. In the event it is determined this case is compensable, the claimant's medical expenses have been paid by his group health carrier, and the respondents request a setoff for all benefits paid by the group health carrier.
5. In the alternative, in the event it is determined this case is compensable, the claimant has received short term disability benefits, and the respondents request a setoff for all short term disability benefits paid to the claimant.

6. In the alternative, if it is determined the claimant sustained a compensable injury, the respondents did not have notice of the alleged injury until September 10, 2003, and are not responsible for any benefits prior to that time.”

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a “compensable injury” to his back or lumbar spine on June 24, 2003. The burden rests upon the claimant to prove all of the facts necessary to establish a “compensable injury”.

First, he must prove, by medical evidence, the actual existence of the physical injury or condition he alleges to be compensable. Further, he must prove that the actual existence of this physical injury or condition is supported by “objective findings”. Ark. Code Ann. §11-9-102(4)(D). The term “objective findings” refers to the independent observation of findings which are beyond the claimant’s voluntary control, Ark. Code Ann. §11-9-102(16).

In the present case, the medical evidence is sufficient to satisfy the requirements of Ark. Code Ann. §11-9-102(4)(D). The reports and records of Dr. Michael Cheyne and Dr. Arthur Johnson clearly “establish” the actual existence of a physical injury or condition involving the claimant’s lumbar spine. This injury or condition is in the form of disc herniations, extrusions, or protrusions, at multiple levels (particularly defects involving the intervertebral disc at the L4-5 level). Both of these physicians are very competent specialists in the area of medicine associated with back injuries and conditions. Further, their medical opinions concerning the existence of these physical injuries or conditions is clearly supported by multiple objective findings, particularly those noted on the MRI scan, performed on August 4, 2003.

Next, the claimant must prove that these medically established and objectively documented physical injuries or conditions satisfy all of the definitional requirements for a “compensable injury”, as set out in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional

requirements are:

1. The physical injury or condition must arise out of and occur in the course of the claimant's 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.

The only direct evidence presented by the claimant to prove the first three of these definitional requirements is his own testimony. Although it is commonly accepted that the testimony of a party is never considered uncontradicted, this does not mean that this testimony can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Undoubtedly, the claimant's testimony would be legally competent to prove the time and place of the initial onset of physical symptoms and complaints, which would be indicative of the occurrence of a physical injury to his lumbar spine. This testimony would also be legally competent to describe the activities and events that surround this onset of difficulties, so as to prove the existence of a close temporal relationship between the employment activities or events and the initial onset of his complaints.

At the hearing, the claimant testified that toward the end of his shift (approximately 2:00 p.m.) on June 24, 2003, he was carrying a "jig" back to the tool truck. When he turned to put the jig into the tool box, he felt a "pull" and some "throbbing" pain in his low back in the area of his belt line. He stated that he asked a co-employee, by the name of John, to come over and take the jig and put it into the tool box. He testified that this co-employee complied with his request. He then stated, that shortly after this incident, he advised his

foreman, Danny Miles, about the incident, his resulting back complaints, and his need to see a doctor for these complaints. He further testified that at that point, Mr. Miles asked him if he wished to fill out an accident report, to which he responded “no.” He testified that after he finished work that day, he called Robbie (Yates) and asked for the name of a physician that he could see for his back complaints, under his group insurance. He stated that when Ms. Yates inquired as to what had happened to his back, he told her about the employment related incident and the onset of his difficulties. He states that Ms. Yates then asked him if he needed to file a workers’ compensation claim. He told her that he did not “at that time”. He gave as his reason for not filing a workers’ compensation claim that he did not want to jeopardize his crews safety record.

The claimant did not call the co-employee, named John, who allegedly helped him place the jig into the tool box. Thus, there is no independent evidence to support the occurrence of these events he has described.

The claimant’s testimony concerning his immediate reporting of the incident and injury to his foreman, Danny Miles, is expressly contradicted by Mr. Miles. In his testimony, Mr. Miles stated that he became aware, by the claimant’s actions, that he was experiencing difficulties with his back on June 24, 2003. However, he expressly denied that the claimant told him about any employment related incident or injury to his back on that date. He stated that, later that day, he was a party to a three way conversation between the claimant, Robbie Yates, and himself. He recalled that in this conversation, Ms. Yates specifically asked the claimant if he wanted to fill out an accident report and that the claimant said no. He again denies that, at that time, the claimant made any statements concerning any employment related incident causing his back complaints. Finally, he testified that the claimant continued to work for approximately a month, following June 24, 2003, and that at no during this period did the claimant ever inform him of any employment related injury to his back, while in the employ of the respondent. He did recall the claimant mentioning

that he had previously hurt his back while employed for Union Pacific.

The claimant's testimony concerning the immediate reporting of the employment related incident and his resulting back difficulties is further refuted by the testimony of Robbie Yates. Ms. Yates testified that on June 24, 2003, the claimant did call her to obtain the name of a physician that was within his group insurance network. When she learned that his problems involved his back, she expressly inquired as to whether he had injured it on the job or whether he felt that these difficulties were in any way work related. She testified that in response to this direct inquiry, the claimant stated:

“No. Nothing happened at work. I know exactly what my problem is. I've had it before. I just need to get a shot.” (D.8)

She further testified that in order to insure that the claimant's difficulties were in no way work related, she arranged a three way telephone conference between herself, the claimant, and the claimant's supervisor (Danny Miles). She testified that during this three way conversation she again inquired as to whether or not the claimant's back difficulties were in any way related to anything that occurred on the job. She testified that in response to this inquiry, the claimant stated:

“Absolutely not. This is just something I deal with every now and then. Absolutely not related to work.” (D.12)

The respondents have also offered the testimony of Larry Frahmman. Mr. Frahmman was the claimant's overall supervisor. The testimony of Mr. Frahmman again contradicts the claimant's testimony that he consistently and repeatedly reported the occurrence of an employment related incident and injury to his back on June 24, 2003. Mr. Frahmman stated that he was in contact with the claimant by phone on a weekly basis and that the claimant never advised him of any employment related incident or resulting injury to his back. He testified that, in fact, the claimant never mentioned in these weekly conversations that he was even experiencing any difficulties with his back. He testified that he first learned that the claimant was having back difficulties from the project supervisor. He

stated that the next time the claimant called in, he specifically asked the claimant if he was experiencing difficulties with his back and also expressly asked if these difficulties were in any way "job related". He stated that the claimant did concede that he was having back difficulties, but emphatically denied that these difficulties were in any way the result of any accident or injury sustained while in the employ of the respondent.

The claimant does not deny that he did, in fact, initially file his medical expenses under his group insurance policy through the respondent. He continued working for the respondent, in his usual position, through July 23, 2003, when he did cease work for the respondent. He also filed for and drew group disability benefits. He continued to receive medical and short term group disability benefits and made no attempt to file any workers' compensation claim until late August of 2003. The only reason he gives for this action is that he did not realize how "serious" his back difficulties were. This is obviously the same time he learned that his back difficulties might require prolonged and extensive medical services as well as prolonged and possibly permanent disability for which his group insurance would not be adequate.

It is also curious to note that the primary reason given by the claimant for taking off work, after July 24, 2003, was a numbness that had developed in his hand or hands. This symptom is also mentioned in his initial visit to the River Valley Orthopaedic Clinic on July 29, 2003. Clearly, this symptom or complaint would in no way be related to any lumbar defect, including a discal defect noted at L4-5.

The claimant also conceded that he had experienced prior difficulties with his back, which required medical treatment. However, he states that these back difficulties were simply "muscle strains". The record does not support this latter conclusion. It is apparent that the symptoms and difficulties that the claimant experienced with his back on and after June 24, 2003, were similar to those that he had previously experienced. Such a conclusion would be supported by the claimant's conduct in repeatedly advising the

respondent that he knew what was wrong with his back, that it was not related to his employment with the respondent, and that it was related to an injury that preceded his current two month period of employment with the respondent. This conclusion is further supported by the various histories recorded in the records of the White River Health System emergency room where the claimant initially sought medical treatment on June 24, 2003. These records note a long history of prior chronic low back pain that merely worsened on June 24, 2003.

I would also note that, following the claimant's initial evaluation at the White River Health System emergency room, he apparently failed to mention these longstanding chronic back problems to any of his subsequent physicians. There is no mention of any longstanding back problems in the reports and records of either Dr. Cheyne or Dr. Johnson. Finally, in the history of the hospital records of Dr. John Ed Chambers Memorial Hospital (where the claimant sought treatment in October of 2003), it is specifically noted that there is no past history of similar symptoms or problems.

Afer consideration of all the evidence presented, it is my opinion that the testimony of Danny Miles, Robbie Yates, and Larry Frahmann is credible and is supported by the other evidence present. This credible testimony refutes that of the claimant in regard to the reporting of a specific employment related incident and resulting injury to his back or lumbar spine on June 24, 2003. This evidence shows that the claimant not only failed to report such an incident and injury, but repeatedly denied that his back difficulties were in any way caused by an employment related injury. I find that the claimant's explanation for any failure to report the job related injury to be unreasonable. The only reasonable explanation for the claimant's conduct in failing to report any employment related injury and specifically denying the occurrence of such an injury, would be that he did not experience the contemporaneous initial onset of symptoms with a specific employment related incident on June 24, 2003. Thus, he reasonably believed that these difficulties were simply a

continuation or reoccurrence of his pre-existing chronic back complaints. It was not until he realized that substantial and expensive medical services might be required to correct his difficulties and that these difficulties might result in significant permanent restrictions and resulting disability, which would not be adequately covered by his group insurance, that he concluded that these difficulties must in some way have been caused by his employment with this respondent and therefore covered under workers' compensation benefits. Regardless of the sincerity of the claimant's current belief concerning the cause of his current back difficulties, it is not a substitute for adequate proof.

Therefore, it is my opinion that the claimant's testimony is not sufficiently credible to prove that the medically established and objectively documented injuries or defect involving his lumbar spine, along with any symptoms or difficulties with this portion of his body, are in any way causally related to his employment with the respondent and more specifically were, in any way, caused by a specific incident occurring on June 24, 2003, or by any employment related injury that is identifiable by time and place of occurrence. The claimant's failure to prove these three necessary requirements of Ark. Code Ann. §11-9-102(4)(A)(i) prevents his medically established and objectively documented physical injury or condition from representing a "compensable injury" within the meaning of this subdivision. In summary, he has simply failed to prove the occurrence of a "compensable injury" to his lumbar spine on June 24, 2003. His claim for benefits attributable to such an injury must be denied and dismissed.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 24, 2003, the relationship of employee–employer-carrier existed between the parties.
3. On June 24, 2003, 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 presented that he sustained a “compensable injury” to his lumbar spine on June 24, 2003. Specifically, he has failed to prove the occurrence of a physical injury to his lumbar spine on that date that arose out of or occurred in the course of his employment, 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 lumbar spine on June 24, 2003, and have controverted this claim in its entirety.

ORDER

Based upon my foregoing finding 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