

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310817

DARRELL THOMAS	CLAIMANT
EADES BROTHERS FURNITURE	RESPONDENT
CUNNINGHAM & LINDSEY INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2004

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

Claimant represented by GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by CHRIS PARKS, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 3, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on December 18, 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 claimant announced the exact date on which he was alleging his compensable injury occurred. A copy of the pre-hearing order with this information 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 all relevant dates including September 12, 2003 through September 16, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$172.00 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 compensable injuries to his neck and left shoulder on or about September 16, 2003.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from September 17, 2003 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained a compensable neck injury on September 9 (sic), 2003."

In regard to these issues, the respondents contend:

"The respondents will contend that the claimant's injury does not meet the definition of a compensable injury under the Arkansas Workers' Compensation Act. Without waiving other defenses, the respondents state that the claimant's injuries did not arise within the course and scope of his employment and that the claimant was not performing employment services at the time of his injury."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained "compensable" injuries to his neck and left shoulder on or about September 16, 2003. The burden rests upon the claimant to prove all of the elements necessary to establish this fact.

Pursuant to Ark. Code Ann. §11-9-102(4)(D), the claimant must first prove by medical evidence the actual existence of the physical injury or condition alleged to be compensable. The actual existence of this physical injury or condition must also be supported by "objective findings". The term "objective findings" is defined as the independent observation of physical findings which are beyond the claimant's voluntary control.

In the present case, the medical evidence clearly "establishes" the actual existence of a physical injury or condition involving the claimant's neck or cervical spine. This condition takes the form of cervical disc disease at C4-5, and C5-6, with resulting spinal

stenosis. This is the last diagnosis of the emergency room physician at Sparks Regional Medical Center (Respondent's Exhibit No. 1, page 25). The existence of this condition is supported by objective abnormalities shown on a cervical MRI study, which was performed on October 2, 2003 (Respondent's Exhibit No. 1, page 27). These abnormalities consist of diffuse posterior bulging of the C4-5 and C5-6 intervertebral discs with "moderate severe" narrowing of the spinal canal, that is more severe at the C5-6 level. There is also an indication of possible irritation of the spinal cord (or possibly a pulsation artifact).

At this point, I would note that the radiologist interpreting the MRI study as showing that the claimant may have a posterior annular tear of the intervertebral disc at C6-7. However, this statement is listed only in the report under the head note "Impression". There is no mention of any objective findings (noted on the accompanying section of the report described as "Findings") to support this conclusion. In fact, there is no description of any defect given in this section of the report that involves the C6-7 intervertebral disc. It is impossible to tell from the evidence presented whether the radiologist's second "Impression" (i.e. a posterior annular tear at C6-C7 level), was a clerical error in its entirety, was a clerical error in regard to the disc level stated, or was based upon the observation of some defect that for some reason was not described under the radiologist's "Findings". I would note, however, that the diagnosis of this condition is not included in the subsequent diagnosis made by the emergency room physician on that same date (Respondent's Exhibit No. 1, page 25).

In regard to the claimant's allegation of a compensable left shoulder injury, there is absolutely no medical evidence presented to support the actual existence of such a physical injury. There are also no "objective findings" to support the existence of any actual physical injury to the claimant's left shoulder. In fact, it appears from the medical evidence that any subjective symptoms the claimant has voiced, concerning his left shoulder and arm, have been attributed to possible radicular symptoms stemming from the diagnosed

injury or condition to his neck or cervical spine.

In summary, I find that the claimant has failed to establish by medical evidence, supported by objective findings, the actual existence of any physical injury to his left shoulder or arm. I do find that the claimant has established by medical evidence, which is supported by objective findings, the actual existence of a physical injury or condition to his neck or cervical spine. This injury or condition is in the form of cervical disc disease at C4-5 and C5-6 with resulting spinal stenosis. In regard to this cervical injury or condition, the claimant has satisfied the statutory requirements of Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that the medically established and objectively supported physical injury or condition involving his cervical spine satisfies all of the definitional requirements for a “compensable injury”. These definitional requirements are contained in Ark. Code Ann. §11-9-102(4)(A)(i).

- (1) The physical injury arose out of and occurred in the course of the employment.
- (2) The physical injury was caused by a specific incident.
- (3) The physical injury is identifiable by time and place of occurrence.
- (4) The physical injury caused internal or external physical harm to the claimant’s body.
- (5) The physical injury required medical services and resulted in disability.

The only direct evidence offered by the claimant to prove the first three of these definitional requirements is his own testimony. The claimant testified that on September 16, 2003, he completed the building of a queen sized mattress. He stated that he lifted this mattress, which weighed between 75 and 95 pounds, and put the mattress on his head, in order to move it to another work station. In doing so, he felt a “crick” in his neck. He stated that he immediately told “Burley” (Harold Moore, the plant manager) that he had

“got a crick or something” in his neck when he moved a particular queen sized mattress. He testified that Mr. Moore replied:

“Well, it’s the end of the day. Don’t worry about building no more (mattresses).”

According to his testimony, he finished out his shift, but only watched “Bryan” (Bryan Dyer, a co-employee) build “some kind of special mattress”. He stated that after clocking out, he went home, took some ibuprofen, and merely sat around. He testified that he did not go into work for the remainder of the week, but conceded that he did not contact anyone at the respondent to advise them that he was going to be absent from work or to inform them of any physical difficulties. Sometime during the following week he went into the respondent’s office to pick up his pay check. He told “Burley” that he was going to see the doctor for his neck. That same day, he sought medical treatment at the emergency room of Sparks Regional Medical Center. Finally, he testified that after the cervical MRI, on October 2, 2003, he went back to the respondent’s office and spoke with Bill Eades, president of Eades Brothers Furniture. He requested that the respondent send him to a specialist for treatment of his neck or cervical difficulties. Mr. Eades informed him that he would look into the matter.

In his testimony, the claimant also expressly stated that the first time he had experienced “any kind of problems” with his neck was on September 16, 2003. He repeatedly denied any prior injuries to his neck or that he had ever experienced any complaints with this portion of his body, prior to September 16, 2003. He stated that any prior difficulties he had experienced only involved his shoulder. He stated that these difficulties were clearly different from those he had experienced since the alleged incident on September 16, 2003. He describes these difficulties as pain and swelling in his neck that ran into his shoulder and all the way down his left arm. He further stated that he also experienced numbness and tingling in his left arm and shoulder.

In his testimony, Harold "Burley" Moore (the claimant's immediate supervisor) denied that on September 16, 2003, or any other date, the claimant reported to him any employment related accident or injury to any part of his body, including a "crick" in his neck. He stated that he first became aware that the claimant was contending that he hurt himself at work, when he was informed of this fact by Mr. Eades, a week or so after September 16, 2003. He stated that he had never observed any employee, including the claimant, carrying a mattress "on his head".

Mr. Moore also testified that, when the claimant did not appear for work on Wednesday (September 17, 2003), he and another employee, (Kelly Broadway) went to the claimant's apartment to find out the reason for the claimant's absence. He stated that Kelly Broadway knocked on the door of the apartment and no one answered. He and Mr. Broadway returned to the claimant's apartment on Thursday (September 18, 2003). Again, Mr. Kelly knocked on the claimant's door and again no one answered.

Brian Dyer was the claimant's "lead man" or immediate supervisor and worked in close proximity to the claimant during this entire period of employment. He was also an acquaintance of the claimant and had helped the claimant obtain his job with the respondent. Mr. Dyer testified that the claimant never told him of any job related injury or difficulties while working for the respondent. He further testified, that on September 15, 2003 or September 16, 2003, he and the claimant were sitting around while talking while on a break. During this conversation, the claimant told him about injuring himself on a previous job. He stated that he thinks this injury involved the claimant's back. The claimant also told him that he was taking pain medication for this prior injury. He also stated that he had never seen the claimant carry a mattress "on his head". Finally, Mr. Dyer testified that on Wednesday (September 17, 2003), he went by the claimant's apartment, after work, to see why the claimant had been absent from work. At that time, the claimant again told him about previously injuring his back, while he was working for another employer, and

attributed his absence to the effects of this prior injury.

Kelly Broadway, another employee for the respondent, was also called to testify. He essentially corroborated the testimony of Mr. Moore, concerning the two trips to the claimant's apartment and his inability to raise anyone at the apartment on these two separate occasions.

The medical evidence presented indicates that the claimant had experienced almost identical symptoms with his shoulder and neck as early as June 19, 1995. On that date, he reported at the emergency room of Sparks Regional Medical Center complaining of pain in the left side of his neck and his left shoulder. He attributed these difficulties to his then current employment duties which required him to keep his head bent over for extended periods. At that time, his difficulties were diagnosed as a cervical sprain. He was treated with medication and physical therapy. No MRI study was performed. In the physical therapy reports of June 26, 1995, the physical therapist again records the claimant's complaints of left sided neck pain with radiation into the shoulder and upper arm and also notes complaints of numbness and tingling of the arm.

The medical evidence also shows that, as late as May 9, 2003, the claimant sought medical treatment at the emergency room of St. Edwards Mercy Medical Center for complaints that not only involved his left shoulder, but also involved neck pain and headaches of several weeks duration. At that time, the claimant attributed these difficulties to his job activities at Hiram Walker, which required "a lot of lifting" of objects weighing between 30 and 50 pounds. Again, no MRI study was performed.

When the claimant sought medical treatment at the emergency room of Sparks Medical Center, on September 24, 2003, he again was voicing complaints of pain in his left shoulder and pain in his neck, essentially the same complaints he had made on his previous visit to the St. Edward emergency room four months prior. Although x-rays performed at that time showed a loss of normal cervical lordosis, which could be

attributable to either muscle spasms and merely positioning of the neck, there is no mention of the observation of cervical muscle spasms on his physical examinations. There is also no observation of any other findings indicative of a recent or acute injury. It is also important to note that the histories recorded during this visit contained no mention of any specific or particular incident or event as precipitating these symptoms. Instead, the histories seem to again indicate that the claimant attributed his symptoms to repeated lifting of mattresses during his employment with the respondent, much the same as he had previously attributed similar difficulties to his repeated lifting of 30 to 50 pound objects at Hiram Walker.

Clearly, the law provides that the testimony of a party (such as the claimant) is never considered "uncontradicted". However, this does not mean that such testimony can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Unquestionably, the claimant's testimony is legally competent to prove the occurrence of a specific employment related incident and to establish the existence of a close temporal relationship between such an incident and the onset of symptoms indicative of a physical injury to his neck or cervical spine.

However, in the present case, I do not find the claimant's testimony concerning these matters to be credible. His testimony concerning the lack of any previous injuries or difficulties with his neck or cervical spine is clearly contradicted by the medical evidence presented. In fact, the medical records of September 24, 2003, contradict the claimant's testimony concerning the occurrence of any specific incident on September 16, 2003.

The claimant's testimony that he immediately reported the incident and injury, on September 16, 2003, is expressly contradicted by the testimony of Mr. Moore and Mr. Dyer. The same is true concerning his description of the activity he was performing at the time of this alleged injury. I find the testimony of Mr. Moore and Mr. Dyer to be more credible.

The claimant offers no explanation for his failure to call in and request medical treatment for over a week following his alleged injury. He also offers no explanation for his failure to seek any type of medical treatment for over a week following his alleged injury. In fact, he offers no explanation as to his whereabouts or failure to answer the door during this period.

In fact, the greater weight of the credible evidence would indicate that the claimant's complaints with his neck and upper extremity, for which he is now seeking benefits from the respondent, were merely a continuation of his pre-existing and ongoing complaints that appear to have been present since 1995. Even if the claimant's period of employment with this respondent had some adverse effect on these pre-existing difficulties, the greater weight of the credible evidence fails to establish that this adverse effect was due to a "specific incident" or was the result of rapid repetitive motion. Thus, any possible adverse effect the claimant's employment with this respondent may have had on his pre-existing difficulties would not constitute a "compensable injury", within the meaning of Ark. Code Ann. §11-9-102(4).

In summary, I find that the claimant has failed to prove that his medically established and objectively documented defects with his cervical spine and any difficulties he has experienced with his neck or left upper extremity were the result of a physical injury that arose out of and occurred in the course of his employment with the respondent, that is identifiable by time and place of occurrence, and that was caused by a "specific incident" on September 16, 2003. There is also no evidence that the defects and resulting difficulties were in any way the result of employment related "rapid repetitive motion", as that term is used by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). Thus, the claimant has failed to prove that these defects or any resulting difficulties constitute a "compensable injury" as that term is defined by the Act.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 16, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On September 16, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$172.00 for total disability and \$154.00 for permanent partial disability.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained "compensable injuries" to his neck and/or left shoulder on September 16, 2003. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of a physical injury to his left shoulder that is established by the medical evidence and is supported by objective findings. He has also failed to prove the occurrence of a physical injury to his neck or cervical spine that arose out of and occurred in the course of his employment with this respondent, that is identifiable by time and place of occurrence, and that was caused by a "specific incident". Finally, he has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to this portion of his body that was caused by "rapid repetitive motion."
5. The respondents have denied the occurrence of any compensable injuries 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.

MICHAEL L. ELLIG
Administrative Law Judge