

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F307525

J.D. WOODRUFF, Employee

CLAIMANT

ALLEN CANNING COMPANY, Self-Insured Employer

RESPONDENT

OPINION FILED JANUARY 21, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

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

Respondents represented by COURTNEY GILBERT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On December 22, 2003, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on September 17, 2003, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer existed between the parties on July 7, 2003.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$276.00 for total disability benefits and \$207.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant suffered a compensable injury to his back on July 7, 2003.
2. Temporary total disability benefits from July 8, 2003 through a date yet to be

determined.

3. Medical.
4. Attorney fee.
5. Applicability of §11-9-401.
6. *Shippers'* defense.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "The claimant contends he suffered an accidental injury to the lumbar spine in the course of his employment on July 7, 2003. Claimant is entitled to medical benefits, temporary total disability benefits from the date of the injury to a date yet to be determined and an attorney's fee."

The respondent's contentions as set forth in its pre-hearing questionnaire are as follows: "Claimant has had continuous treatment for his back problems beginning in the 1980's. The MRI scans over the years indicate that he has several herniated discs at multiple levels. He has been paid TTD and PPD benefits over the years for these back injuries. Claimant cannot prove that this incident was anything more than a recurrence of his pre-existing injury, and in fact, at the time of this alleged injury plaintiff was two days away from settling his most recent back injury claim with Wal-Mart by way of Joint Petition. Furthermore, claimant applied for unemployment benefits which bars him from receiving TTD benefits for the same period of time. Lastly, claimant is barred from receiving benefits under Ark. Code Ann. §11-9--401 as he intentionally misrepresented his ability to perform the essential functions of his job, upon which the respondent relied, or alternatively, intentionally brought about any alleged harm for which he now seeks compensation."

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact

and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 17, 2003, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on July 7, 2003.

3. Claimant is entitled to temporary total disability benefits beginning July 8, 2003 and continuing through July 18, 2003.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.

5. There is insufficient evidence that claimant willfully intended to injure himself; therefore, A.C.A. §11-9-401 has no application to this claim.

6. Claimant's claim for compensation benefits is not barred by the *Shippers'* defense.

7. Respondent has controverted claimant's entitlement to all unpaid disability benefits.

FACTUAL BACKGROUND

The claimant is a 48-year-old man with an extensive history of prior back problems. The evidence indicates that claimant initially injured his back while working as a truck driver for Don Youngblood on March 20, 1992. As a result of that compensable injury the claimant was off work for more than one year. Claimant was treated conservatively following that injury but was assigned a permanent physical impairment rating in an amount equal to 9% to the body as a whole. Claimant's workers' compensation claim against Don

Youngblood Trucking was joint petitioned on June 24, 1993 for \$16,000.00. The documentary evidence also reflects a claim for a second low back injury against Youngblood on June 12, 1995.

Claimant also suffered two compensable injuries to his low back while employed by Wal-Mart. These injuries occurred on September 28, 2001 and on July 20, 2002.

Documentary evidence indicates that although claimant has primarily been treated conservatively with injections, medication, and physical therapy, that objective testing has revealed degenerative disc disease in multiple levels of the claimant's lumbar spine as well as small disc herniations at multiple levels as well.

Following claimant's most recent compensable injuries at Wal-Mart he was primarily treated by Dr. Kannout. A medical report from Dr. Kannout dated August 19, 2002 indicates that he released the claimant to return to work as of that date. Prior to that release the claimant's employment with Wal-Mart had been terminated.

At some point the claimant went to work for the respondent through a temporary agency and subsequently became employed by respondent as a full time employee. In July 2003 the claimant primarily performed job functions in food safety and as a ligger on a shoestring potato line.

On July 7, 2003, the claimant was assigned a job of loading 20-pound boxes of shoestring potatoes in a truck. Claimant testified that while he was loading these boxes he felt a pop in his back along with severe pain. Claimant testified that he reported the incident to Thomas Deter, the dock supervisor, who in turn informed Don James, the warehouse manager for respondent, of this incident. Claimant testified that after reporting the incident to James he performed another job on the shoestring line before going home at lunch with back pain. Thereafter, claimant sought medical treatment from Dr. Kannout who prescribed medication and physical therapy. Claimant attended four physical therapy treatments before terminating the therapy. Claimant has not worked for the respondent

or for any other employer since July 7, 2003.

Claimant has filed this claim contending that he suffered a compensable injury to his back on July 7, 2003. He seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee. Respondents contend that claimant is barred from receiving compensation benefits by application of A.C.A. §11-9-401 and the *Shippers'* defense.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his low back while lifting boxes while working for respondent on July 7, 2003. Therefore, claimant's claim is for an injury caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by respondent on July 7, 2003.

Initially, I note that claimant has an extensive history of low back problems dating back to 1992. While claimant apparently did not miss much work as a result of his injuries at Wal-Mart, the evidence indicates that claimant missed more than one year of work following his injury in 1992. Form AR-4 completed by the workers' compensation carrier at that time showed payments of temporary total disability benefits for a period of 58 weeks. As a result of that compensable injury the claimant was assigned a permanent physical impairment rating in an amount equal to 9% to the body as a whole. That claim was subsequently joint petitioned on June 24, 1993 for \$16,000.00.

As previously noted, the medical evidence also indicates that claimant apparently had a second claim for a low back injury against Don Youngblood on June 12, 1995. Most recently, claimant suffered work related injuries to his low back while working for Wal-Mart on September 28, 2001 and July 20, 2002. These claims against Wal-Mart were joint petitioned on July 10, 2003, only three days after the alleged injury in this case.

Over the course of claimant's treatment, objective testing has revealed that claimant suffers from degenerative disc disease and small disc herniations at multiple levels.

Given all of this evidence, there can be no question that claimant suffered from significant low back problems over the course of more than ten years. Following claimant's most recent injuries with Wal-Mart his primary treating physician was Dr. Kannout. In a report dated August 19, 2002, Dr. Kannout indicates that claimant's condition has resolved and that he may return to full regular duty.

Mr. Woodruff is here today as recommended for follow-up of his back injury. He states that he feels a lot better and he denies any pain in his back. He denies any limited range of motion and denies any weakness or numbness in his lower extremities.

BACK: There is no tenderness and no muscle spasm. He has full range of motion to flexion, extension, and trunk mobility. He is neurologically intact. Reflexes are 2+ bilaterally. Sensation is intact, with motor function

of V/V in the lower extremities and his gait is normal.
He is able to walk on his toes and heels without difficulty.

DIAGNOSIS: Low back pain and muscle spasm, resolved.
Old herniated disc of the lumbar spine.

TREATMENT PLAN: The patient may return to full
regular duty on 08/19/2002.

Thus, even though the claimant had a significant history of low back pain extending over the course of more than 10 years, Dr. Kannout, the claimant's primary treating physician, opined on August 19, 2002 the claimant's low back pain and muscle spasm had resolved. Furthermore, he released the claimant to full regular duty work as of August 19, 2002.

Claimant testified that he did not seek any additional medical treatment or take any medication other than an aspirin between his release from Dr. Kannout and his injury with respondent on July 7, 2003.

As previously noted, claimant testified that he felt a popping and pain in his low back while lifting 20-pound boxes of shoestring potatoes on July 7, 2003. Claimant testified that he reported this incident to the forklift driver who in turn informed the warehouse manager to whom claimant also reported the injury. Claimant's testimony regarding the reporting of an injury was corroborated by Thomas Deter and Don James. Deter is the dock supervisor for respondent who is responsible for overseeing the loading and unloading of trucks. Deter testified that on July 7 claimant informed him that his back was hurting. As a result, Deter informed Don James, the warehouse manager for respondent. James likewise testified that Deter came to him on July 7 and told him that claimant had a problem with his back while unloading a truck. James testified that claimant informed him that he had problems with his back approximately two or three times a year. As a result of claimant's complaints, claimant was placed back on the label line working the ladder.

I also note that the medical reports introduced into evidence subsequent to July 7,

2003 indicate that claimant gave a history of injury consistent with his testimony.

Based upon the foregoing evidence, I find that claimant has offered proof by a preponderance of the evidence that he suffered an injury to his low back which arose out of and in the course of his employment with respondent on July 7, 2003. I also find that claimant has offered proof by a preponderance of the evidence that the injury was caused by a specific incident identifiable by time and place of occurrence. While claimant had a history of prior low back problems, a claimant alleging an injury caused by a specific incident identifiable by time and place of occurrence does not have the burden of proving by a preponderance of the evidence that the specific injury was the major cause of his disability or need for medical treatment. *Farmland Insurance Company v. Dubois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996). Following claimant's most recent prior compensable low back injury he was released by Dr. Kannout on August 19, 2002, with notations that his low back pain and muscle spasm had resolved. In addition, claimant was released to return to regular full duty. It was not until the incident on July 7, 2003 that claimant developed additional back problems. Given this evidence, I find that claimant has satisfied these elements of compensability.

I also find based upon the evidence presented that claimant has met his burden of proving by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services or resulted in disability and that claimant has offered medical evidence supported by objective evidence establishing an injury. Here, the medical reports of Dr. Kannout indicate that he evaluated the claimant on July 11, 2003. Dr. Kannout's medical report of that date indicates that he diagnosed claimant's condition as low back pain and muscle spasm. In addition to medication, Dr. Kannout referred claimant to physical therapy. The physical therapist's report of August 8, 2003 indicates that claimant was referred for physical therapy for low back pain and muscle spasm. Muscle spasms are considered an objective finding sufficient to satisfy

compensability. *Continental Express v. Freeman*, 339 Ark. 142, 4 S.W. 2d 124 (1999); *UAMS v. Hart*, 60 Ark. App. 13, 958 S.W. 2d 546 (1997).

Based upon the foregoing, I find that claimant has satisfied all elements of compensability. Therefore, I find that claimant suffered a compensable injury to his back on July 2, 2003.

Having found that claimant suffered a compensable injury to his low back, I find that respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's low back injury.

I also find that claimant is entitled to temporary total disability benefits beginning July 8, 2003 and continuing through July 18, 2003. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remained within his healing period and that he suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, even if I were to find that claimant remained within his healing period, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages subsequent to July 18, 2003. Submitted into evidence is the August 8, 2003 discharge summary report of Sandra Atkinson, the physical therapist. In a report of that date Atkinson indicates that claimant received only four physical therapy appointments before he canceled his next appointment and did not return for additional treatment. However, Atkinson stated that at the time claimant was last seen on July 18, 2003, "significant improvement was noted." I also note that shortly after this date the claimant filed for and began receiving unemployment compensation benefits. Claimant testified that he began receiving unemployment compensation benefits as of July 27, 2003. I also note that claimant testified at the hearing that he believed he could return to some of the jobs at the respondent's plant and that he had inquired about employment with various employers. Finally, I note the absence of any medical evidence indicating

that claimant was totally incapacitated from working after July 18, 2003. Given all of this evidence, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a total incapacity to earn wages subsequent to July 18, 2003.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from July 8, 2003 through July 18, 2003.

The next issue for consideration involves respondent's contention that claimant's claim for compensation benefits is barred by the provisions of A.C.A. §11-9-401. Subsection (a)(2) of that statute states that compensation shall not be payable for injuries which were "substantially occasioned by the willful intention of the injured employee to bring about compensable injury or death." Respondent contends that claimant intentionally misrepresented his ability to perform his job by not disclosing his prior back condition. Therefore, respondent contends that this intentionally brought about claimant's injury. I find no merit to this argument. In short, I find insufficient evidence in this case that the claimant willfully intended to bring about a compensable injury as required by A.C.A. §11-9-401(a)(2). Therefore, I find that this statute has no application to this claim.

Finally, respondent also contends that this claim for compensation benefits is barred by application of the *Shippers'* defense. The *Shippers'* defense was adopted by the Arkansas Supreme Court in *Shippers' Transport of Georgia v. Steppe*, 265 Ark. 365, 578 S.W. 2d 232 (1979). The Court in that case held that a false representation on an employment application will bar recovery of workers' compensation benefits if the employer can prove the following three elements: (1) the employee knowingly and willfully made a false representation as to their physical condition; (2) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and (3) that there is a causal connection between the false representation and the injury.

An employer has the burden of proving each and every element of the *Shippers'*

defense by a preponderance of the evidence. *Tahutini v. Tasty Bird Foods*, 18 Ark. App. 82, 711 S.W. 2d 173 (1986).

Here, I find that respondent has failed to prove each element of the *Shippers'* defense by a preponderance of the evidence. Specifically, I find that respondent has failed to prove that claimant knowingly and willfully made a false representation as to his physical condition on his employment application.

The claimant's extensive history of low back problems has previously been discussed. With that history in mind, claimant completed an employment application for the respondent which requested some physical and medical data. Claimant described his general health as being good. Furthermore, the application also asked the following question: "Do you have any physical or mental conditions which may limit your ability to perform certain kinds of work?" Following this question are boxes to be checked either "Yes" or "No." The employment application appears to have the "No" box checked. Although claimant denies checking this box, I find that even if claimant did in fact check the box that this question in and of itself is insufficient to prove that claimant knowingly and willfully made false representation as to his physical condition.

In order to prove that a false representation on a job application has been made, the Courts have held that more than a general health question calling for an opinion rather than factual information is required. In *College Club Dairy v. Carr*, 25 Ark. App. 215, 756 S.W. 2d 128 (1988), the Court of Appeals upheld a decision from the Commission finding that the *Shippers'* defense was not applicable where claimant had answered "no" to the question, "Do you have any physical defects?" The Commission and the Court in that case noted that the question posed to the prospective employee was too general and broad.

The type of question to be asked on an employment application for purpose of the *Shippers'* defense was again discussed in *Knight v. Industrial Electric Company*, 28 Ark.

App. 224, 771 S.W. 2d 797 (1989). In that particular case, the Court noted that it was not unreasonable to require questions on employment applications calling for factual information rather than an opinion. For instance, the Court noted that whether an individual has ever had a workers' compensation claim or lost work because of an on-the-job injury are questions which are not hard to understand or difficult to answer. In *Knight*, the question asked on the employment application was as follows: "Do you have any physical condition which may limit your ability to perform the job applied for?" Under the doctrine previously announced in *College Club Dairy*, the Court of Appeals noted that the question in *Knight* was too broad and general to support the *Shippers' Transport* defense.

The question on the employment application in this case is essentially the same as the question asked in *Knight* which was considered too general and broad to support the *Shippers' Transport* defense. Based upon the Court's holdings in *College Club Dairy* and *Knight*, I find that the question on the employment application is too general and too broad to support the *Shippers' Transport* defense. Accordingly, I find that this claim for compensation benefits is not barred by the *Shippers' Transport* defense.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on July 7, 2003. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable low back injury. Claimant is entitled to temporary total disability benefits beginning July 8, 2003 and continuing through July 18, 2003. Respondent has controverted claimant's entitlement to all unpaid disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This

fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE