

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406372

LONNIE BENNETT	CLAIMANT
WALDRON PUBLIC SCHOOLS	RESPONDENT
RISK MANAGEMENT RESOURCES INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 6, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on April 7, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 5, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On June 10, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$189.00 for temporary total disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury of June 10, 2004.

2. Related medical.

3. Temporary total disability from June 10, 2004, to a date to be determined.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he is entitled to continuing medical treatment, as well as continuing TTD after September 20, 2004. The claimant is also entitled to a statutory attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury on June 10, 2004, which arose out of and in the course of his employment with the respondent employer. The respondents did voluntarily pay medical expenses and indemnity benefits through September 20, 2004; we do not seek reimbursement of the benefits previously paid but do request that credit be given for benefits voluntarily paid in the event the Commission determines the compensability issue favorably to the claimant.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical records marked Claimant's Exhibit No. 1. The respondents submitted medical records marked Respondents' Exhibit No. 1, a video tape marked Respondents'

Exhibit No. 2, the deposition of the claimant marked Respondents' Exhibit No. 4 and a hand written note from Vicki Cox marked Respondents' Exhibit No. 5. The respondents had previously submitted a letter from Dr. Birky which was withdrawn (see page 50). All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was forty-one years old and had been employed by the respondent for approximately two years. The claimant testified that on June 10, 2004, he was moving a bookcase which was approximately nine feet long and four and a half feet high when it began to fall over, he grabbed and in the process he twisted and hurt his back. The claimant testified that he was working by himself at this time. The claimant testified that in fact he was trying to lift one end of the bookcase to put it on a dolly and in this process it began to fall and he hurt himself. The claimant testified that he also hurt his hand as he was trying to hold on to the bookcase. The claimant testified that his hand did not bleed but it was red like a rash where the bookcase had pulled against it. The claimant testified that as the bookcase was falling, it pulled him to his knees and that was when he immediately felt pain in his back. The claimant testified that he finally picked himself up and it took a minute or two to pull himself together. The claimant testified that he then proceeded to get the bookcase back on the dolly, this time he was successful and he was able to move it. The claimant testified that this event happened around 2:00 in the afternoon and he continued to finish

the remainder of his shift. The claimant testified that they were in the process of cleaning carpets at the school since it was during summer break and he spent most of his time going around and checking the different rooms to see if they had dried. The claimant remembered that he gets off at 3:30. The claimant testified that after his injury he continued to work and his symptoms began to ease up a little and he thought that he was not hurt particularly bad perhaps just having pulled a muscle.

The claimant testified that Vickie Cox works for the respondent as a part time custodian and that she was working the day of his injury. The claimant remembers that after he had moved the bookcase he was walking down a hall and saw her down one of the hallways. The claimant testified that he was kind to teasing with her and told her that he though he had hurt his back because she did not help him move the bookcase.

The claimant testified that the next morning he could not get out of bed and that his wife called the respondent. The claimant testified that the respondents sent him to see Dr. Bennett. The claimant stated that the doctor was unable to see him until the 14th of June. The claimant testified that he was not able to work from the day after his injury up through June 14. The claimant agreed that after he saw Dr. Bennett the doctor took him off work for two weeks and then released him to return back to work at light duty. The claimant testified that he returned to work and was asked to wash windows. The claimant testified that raising his hands over his head and washing the windows caused him so much pain in his mid

back that he had to stop after approximately thirty minutes. The claimant testified that he told the respondent that there was no way that he could do this job. The claimant testified that he went to the emergency room on June 29 and they took him off work and he has been off work ever since. The claimant also agreed that he underwent an MRI at St. Edwards Hospital on June 24 at the direction of Dr. Bennett.

The claimant testified that Dr. Bennett ultimately referred him to Dr. Martimbeau and Dr. Birky. The claimant testified that Dr. Birky recommended that he undergo a cervical MRI and wanted him to see a neurosurgeon but neither one of these recommendations have been followed. The claimant testified that Dr. Martimbeau recommended he use a stimulator which he has been using and is still using because it is the only thing that helps his pain. The claimant agreed that both Dr. Martimbeau and Dr. Birky recommended that he stay off work and that Dr. Martimbeau also recommended that he be evaluated by a neurosurgeon but the appointment which was made for him was subsequently canceled by the insurance company prior to his evaluation. The claimant testified that his doctors have not released him to return to work and he has not sought employment to date.

The claimant testified that he is still experiencing pain in his mid back. The claimant agreed that he has reviewed the video tape taken of him by a private investigator. The claimant explained that the large trash can that he is moving had wheels and his wife was helping him move it. The claimant explained that he

and his wife had been evicted from their home and they were in the process of moving and he was trying to help as much as he could. The claimant stated that eventually his sister was called in to help them move so they could get the job finished.

On cross examination, the claimant stated that on June 10, 2004, when he was trying to load a bookcase and it began to fall, he twisted around and he hurt his back and hand. The claimant further testified that the next morning when he could not get out of bed he hurt all over his entire body. The claimant agreed that as far as which injury was bothering him the most at the time of his accident it was his back and not his hand. The claimant agreed that following his accident he was able to go ahead and complete the task of moving the bookcase onto the dolly. The claimant also agreed that after his accident he completed his shift and spent his time checking rooms to see if the carpet had dried. The claimant testified that the reason he was able to finish his shift was because he did not have to do any lifting, only monitor the carpet. The claimant testified that his back was hurting and if he had to do any lifting or clean any carpets or anything like that, he would not have been able to do it. The claimant testified that when he got off work he went home and stayed in his recliner. The claimant further remembers that he took a bath to soak in hopes of it relieving his discomfort.

Continuing on cross examination, the claimant stated that he was aware that work related injuries are to be reported to the respondent. The claimant stated that his supervisor, Mr. Yates,

was not at the school because if he had been there he would have talked to him. The claimant testified that at the time of his injury he did not think that it was going to be a problem. The claimant testified that on June 10, 2004, he also had poked a nail in his hand earlier in the day when he picked up an item that had a nail in it. The claimant was asked about the light duty work which the respondent offered to him when he was released to light duty and the claimant agreed that washing windows was considered to be light duty. The claimant also agreed that the respondent did not send him home after thirty minutes but it was his decision, based on the fact that he was hurting so badly, to go home. The claimant testified that his current physical problems are sitting for any length of time or standing for any length of time. The claimant testified that he is a pastor of a local church but that he is not able to participate in the maintenance of the grounds nor does he mow the yard around the church. The claimant testified that he does try to help his wife carry in some of the groceries but that she will not let him carry very much. The claimant stated that he would carry in a loaf of bread or something like that to try and help her. The claimant testified that his pain is in his mid back which radiates down into his low back and that at times he has had some numbness down into his legs. The claimant testified that he can drive and does drive but he normally has someone with him because he gets lost real easy. The claimant agreed that his memory problem caused him to file a claim for social security in 2003 and that his memory is still a problem.

Vickie Cox testified that she worked for the respondent and was a custodian as well as a cook. This witness stated that she met the claimant when he began working for the respondent. Ms. Cox stated that during the school year she works part time in the cafeteria as well as part time as a custodian but in the summer she works as a custodian. This witness testified that she and the claimant had similar duties although they would have different rooms assigned to them, however, they would work together moving things and shampooing. Ms. Cox stated that she was working for the respondent on June 10, 2004. Ms. Cox stated that the claimant told her in the afternoon that he had cut his hand. Ms. Cox testified that she had seen the claimant moving a bookcase but it was a small one indicating that it was approximately three to four feet by about three feet wide. When asked about the problem with the claimant's hand, Ms. Cox stated that it looked like a scratch, that it was not bleeding and that he did not mention anything about his back. Ms. Cox testified that Mr. Yates, their supervisor, was in his office on that day. This witness testified that after the claimant showed her his hand, he helped her move a computer table that had three computers on it out of the speech room. Ms. Cox testified that she picked up one end of the wooden table and the claimant picked up the other end of the wooden table and they moved it. Ms. Cox was asked if the claimant made any complaints to her before or after they moved the table and she responded no. Ms. Cox testified that she also observed the claimant on his knees in one of the rooms using a little shampooer to go along the baseboards.

Ms. Cox stated, "That was after we moved the table." This witness testified that on June 10, 2004, she did not observe the claimant exhibit any type of physical difficulty. Ms. Cox was shown a piece of paper which she identified as having her writing and signature on it. Ms. Cox also agreed that it was dated June 11, 2004, and that everything on the piece of paper was accurate. This piece of paper was offered and admitted as Respondents' Exhibit No. 5 without objection. Ms. Cox testified that the claimant did not return to work the next day but he did return to work later on in the summer and worked approximately thirty minutes. This witness testified that she was working this day and observed the claimant washing windows in one of the hallways. Ms. Cox testified that the claimant was having to do some bending in order to wash the windows but, from what she observed, he did not appear to be having any trouble. Ms. Cox testified that she has seen the claimant around town after the washing windows event. Ms. Cox testified that she has seen the claimant mowing the church lawn twice when she was on her way to her daughter's house. Ms. Cox stated that she also has seen the claimant at the grocery store putting groceries in the back of his truck and then she observed him get a jug of water, lift the hood of his truck and put the water in his truck. This witness stated that the claimant was alone and that no one was there helping him with the groceries, with lifting the hood of his truck or lifting the jug of water. Ms. Cox testified that she has also seen the claimant at Wal-Mart and McDonalds and that he did not appear to have any physical restrictions as to his activities.

On cross examination, Ms. Cox testified that prior to the claimant's accident, he did not miss work all the time nor complain about his back bothering him. Ms. Cox testified that she and the claimant did not particularly get along and that she in fact tried to avoid him. Ms. Cox testified that the second day she knew the claimant, he went over her head because she asked him to do something. This witness was asked if she held this against him every since and she responded no, not really. Ms. Cox testified that the school does have bigger bookcases and that she guessed that they might have them as long as nine feet by four feet. This witness testified that she does not know whether the claimant moved any of these bookcases during the day. Ms. Cox testified that the reason that she knew that the supervisor was present at the school on June 10, 2004, was that because she has to talk to him everyday about different projects. This witness did admit that she cannot say for certain that Mr. Yates was present at the end of the day before she and the claimant left the building.

The medical records set forth that the claimant was seen by Dr. Bennett on June 14, 2004, for complaints of mid and low back pain which radiated into his hips. The claimant's history sets forth that his symptoms began last Thursday when he was lifting a shelf at school. After examination, the claimant was diagnosed with mid and low back pain probably secondary to a strain and rest, physical therapy, off work for one week and medications were prescribed. The radiology report dated June 14, 2004, of the claimant's lumbar and thoracic spine were negative. Dr. Bennett

writes on June 21 that the claimant is getting around better but is still having pain in his mid and low back radiating into both his lower extremities. Again, after examination, the claimant was diagnosed with persistent mid and low back pain with radiation into his lower extremities. Dr. Bennett recommended that the claimant continue with this physical therapy and to undergo an MRI of his thoracic and lumbar spine. On June 24, 2004, the claimant underwent an MRI of his lumbar spine which was normal. The MRI of the claimant's thoracic spine on that same day did reveal a small left sided disc herniation at the T8-T9 level with mild spondylitic ridging at the T9-T10 and T3-T4 levels. There was also mild scoliotic curvature of the thoracic spine. On June 28, 2004, Dr. Bennett writes that the claimant reports that he is not doing any better and that he is still having some pain in his low back and occasionally into his legs. Dr. Bennett returned the claimant to light duty. The claimant was seen at the St. Edwards Medical Center emergency department on June 29, 2004, with complaints of back pain and a burning sensation in the middle of his low back with numbness in his legs and a headache. Medical imaging of the claimant's lumbar spine on June 29 revealed that there was no significant lumbar spine abnormality. Tests of the claimant's thoracic spine, done on that same date, revealed mild upper thoracic levoscoliosis. The ER doctor on June 29, 2004, reports that the claimant's thoracic spine and lumbar spine series shows some mild degenerative joint disease changes and osteophytic lipping but nothing really significant and diagnoses the claimant,

after examination, with thoracic strain with spasm and lumbago. The doctor recommends that the claimant return to work on July 3, 2004, and prescribed medications for his muscle spasms. Dr. Bennett writes on July 1, 2004, that he has reviewed the claimant's MRI of his lumbar spine which was normal and that the MRI of the claimant's thoracic spine showed a small left sided disc herniation at T8-T9. The doctor writes that the claimant reports that he is in pain and, after examination, recommended that the claimant be referred to an orthopedic specialist for their opinion and that the claimant should remain off work.

The claimant was seen by Dr. Claude Martimbeau on July 19, 2004. Dr. Martimbeau writes that the claimant reports mid back pain with a burning sensation but there is no radiation to the lower extremities and that there are no neurological symptoms. Upon examination, Dr. Martimbeau notes that the claimant exhibits pain over the midline of the thoracolumbar spine with no induration and no muscle spasm. Dr. Martimbeau diagnosed the claimant with having muscle strain to his mid back and gave him an injection of cortisone as well as prescribed Celebrex. Dr. Martimbeau further recommended that the claimant remain off work for one month. On August 18 Dr. Martimbeau writes that the claimant has recently had a recurrence of his mid back pain and again upon examination he notes pain, no induration, no spasm, no redness and no warmth. Dr. Martimbeau diagnosed the claimant with having facitis with mid back pain and repeated an injection of cortisone and released the claimant to return to work with a restriction of no heavy physical

work. The claimant was seen by Dr. Duane Birky on August 17, 2004, for his complaints of back pain resulting from a work related incident. The claimant also reports that he has been having headaches for the past several weeks and that there is pain in the back of his neck that radiates up into his head. The claimant reports that he had some of this neck pain prior to his accident and that it has not significantly changed. Upon examination, Dr. Birky diagnosed the claimant with thoracic back pain with herniated disc and a questionable left C8 radiculopathy. The doctor notes that he would like to review the claimant's MRI test and did not recommend any treatment until those tests were reviewed. Dr. Claude Martimbeau writes on September 13, 2004, that the claimant received an injection of cortisone a few weeks ago with only a few days of relief for his back pain. Dr. Martimbeau recommended an inflammatory profile as well as a bone scan and further recommended that he be off work. Dr. Martimbeau writes on September 27, 2004, that the claimant's inflammatory profile was normal as well as the bone scan. Dr. Martimbeau notes that the claimant remains with pain over the mid part of his thoracic spine but there are no signs of inflammation, warmth and no redness. Dr. Martimbeau recommended a spine stimulator and for the claimant to remain off work. The claimant was seen on October 25, 2004, by Dr. Martimbeau where it is noted that the claimant continues to have back pain even after different modalities, including a stimulator, have been used but without any real improvement. Dr. Martimbeau notes that even though the claimant's bone scan and inflammatory profile were

normal, the MRI of his thoracic spine did show a small left sided disc herniation at T8-T9 with mild spondylitic ridging at T9 and T10. Dr. Martimbeau recommended that the claimant be evaluated by a neurosurgeon and to remain off work.

After review of Respondents' Exhibit No. 2 which was a video of the claimant it is noted that the claimant was moving clothing and items back and forth from his truck into a residence or taking items from a residence and putting them into his truck. In the claimant's deposition, he testified that after he had fallen with the bookcase on June 10, 2004, he remembered seeing one of the other maintenance ladies and he said to her, "Man, I hurt my back when I moved that bookcase." The claimant testified that at the time he said this to the co-employee, he was still having severe mid back pain. The claimant testified that after he had the event with the bookcase and he then successfully did move the bookcase, he did not do any other physical labor for the rest of his shift stating, "I don't think I would have been able. It took all I could do to move the bookcase."

After a complete review of this entire record, I find that the claimant has failed to prove by a preponderance of the credible evidence that he sustained a work related injury to his mid and low back on June 10, 2004, while working for the respondent. The claimant has testified to an event which, in his words, caused him to experience severe pain to the point where he would not have been able to carry out any physical activities for the rest of his shift. He also testified that he told his co-worker that he had

hurt his back while moving a bookcase. His co-worker, Vickie Cox, in a written statement dated June 11, 2004, sets forth that the claimant did move some bookcases but he did not report to her any type of back injury and that his activities were not limited in any way. Ms. Cox also testified that the claimant helped her move a table with computers on it from one room into another and that she observed him using a hand shampooer around the baseboards in one of the rooms. The video tape, which has been introduced into evidence, was not particularly revealing but it did not appear that the claimant was having any physical problems with the activities which he was carrying out. The medical records do set forth that the claimant has a mild herniated disc on the left side at T8-T9. Several of the claimant's doctors from June 29 forward were aware of his MRI. The claimant has seen several doctors and none of them seem to have been very concerned or alarmed by this finding and the indication was that the claimant's symptoms either did not match up or were much greater than what this test revealed. The claimant has undergone several other tests and examination, all of which were negative.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On June 10, 2004, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a weekly compensation rate of \$189.00 for temporary total disability.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a work related injury while working for the respondent on June 10, 2004. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury to his low and mid back on June 10, 2004, while working for the respondent. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE