

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407224

NATHAN WELSH

CLAIMANT

BLAKE CONSTRUCTION COMPANY

RESPONDENT

BITUMINOUS CASUALTY CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 25, 2005

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

Claimant represented by JOE BYARS, Attorney, Fort Smith, Arkansas.

Respondents represented by SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 7, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on September 8, 2004. 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 parties announced that they could agree on the appropriate weekly compensation rates. A copy of the pre-hearing order with that amendment noted thereon, has made Commission's Exhibit No. 1 to the hearing.

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

1. On June 12, 2004, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$297.00 for total disability and \$223.00 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 June 12, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from June 12, 2004 through a date yet to be determined, and attorney's fees.
3. The effect of Ark. Code Ann. §11-9-701, on all benefits accruing prior to June 30, 2004.

In regard to these issues, the claimant contends:

"The claimant, Nathan L. Welsh, contends that he suffered a compensable injury arising out of and in the course of his employment with the respondent. The respondent-employer failed to pay temporary total disability from June 12, 2004, through a date yet to be determined. On June 12, 2004, Nathan L. Welsh was performing employment services for his employer and injured his back, which constituted an accidental injury and the major cause of Nathan L. Welsh's temporary total disability and the need for additional medical treatment. Nathan L. Welsh's compensable injury is the major cause of his temporary and/or permanent disability and need for treatment."

The claimant, Nathan L. Welsh, suffered an accidental injury arising out of and in the course of his employment with the respondent, Blake Construction, when his back injury occurred, as described in Mr. Welsh's medical record."

In regard to these issues, the respondents contend:

"Respondents contend that the claimant did not sustain a compensable injury as that term is defined by Act 796".

DISCUSSION

The central issue is whether the claimant sustained a "compensable injury" to his low back on June 12, 2004. The burden rests upon the claimant to prove all of the elements necessary to establish a "compensable injury" to this portion of his

body.

Ark. Code Ann. §11-9-102(4)(A)(i) contains five of these necessary elements.

These definitional elements are:

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

If the claimant fails to prove even one of these elements, then he has failed to prove a "compensable injury," as that term is defined by this subdivision.

The only direct evidence offered by the claimant to prove the first three of these definitional elements is his own testimony. In this regard, the claimant testified that approximately one to two hours before his regular quitting time on a Saturday, which he believes to have been June 12, 2004, he and a co-employee picked up a roll of fabric and placed it on a bulldozer blade or bucket. Although the various witnesses offered differing opinions on the weight of this roll of fabric, it was unquestionably heavy (Jim Holden, the job superintendent, testified that the exact weight of the roll of fabric was exactly 467 pounds). The claimant testified that while he was lifting this roll of fabric, he felt pain or some type of unusual "sensation" in his lower back and down his left leg. However, he further stated that he completed this task and continued to perform his regular employment activities for the remainder of the shift. The claimant conceded that he did not report the incident or injury on that day and signed his time sheet, which expressly stated that he sustained no job related injury on that date. His only explanation for this action was that he thought he had just "pulled a muscle" and that this had happened before

without any long term consequences.

The claimant testified that he did inform his brother of the incident and his resulting difficulties on the ride home from work that day. In this regard, the claimant's testimony is corroborated by that of his brother.

The following day, June 13, 2004, was Sunday and no work was scheduled. The claimant testified that he reported for work on Monday, June 14, 2004, and worked his full shift. He stated that at some time during this shift, he informed Wayne Lyons, the respondent's safety coordinator, that he was having a strange "sensation" in his back since lifting a roll of fabric on the previous Saturday. In this regard, the claimant's testimony is corroborated by the testimony of Mr Lyons. The claimant's brother also testified to overhearing a conversation between the claimant and Mr. Lyons. However, from the description of this conversation, it was most likely a subsequent conversation that occurred on June 23, 2004, rather than on June 14 or June 15, 2004.

In his testimony, the claimant described a subsequent conversation with Jim Holden (Jimbo), the respondent's project supervisor. The claimant stated that during this conversation he advised Mr. Holden of the lifting incident and the onset of his back difficulties. According to the claimant, that this conversation took place on June 16, 2004 (a Wednesday). However, the claimant also testified that he worked an entire shift on the date of this conversation. The time records indicate that work was "rained out" on June 16, 2004, and that the employees were only paid for one hour's show up time. The testimony of Jim Holden, corroborates the claimant's testimony concerning the occurrence of this conversation and its subject matter, but places the conversation on June 23, 2004.

All of the evidence shows that the claimant did not seek medical treatment for any difficulties with his back or left lower extremity, until June 21, 2004. On that

date, he consulted Dr. Bert N. Corley, a general practitioner, in Sallisaw, Oklahoma. The record indicates that the claimant had seen a number of physicians for previous difficulties with his lower back and left lower extremity, but had never been seen by Dr. Corley. No explanation is given as to why the claimant selected Dr. Corley.

In his initial report of June 21, 2004, Dr. Corley recorded a history of an employment related lifting incident as the etiology of the claimant's current complaints. However, he also indicated that the date of this employment related lifting incident was Saturday, June 19, 2004. Dr. Corley further noted a past medical history of "one prior back injury." His recorded description of this injury is as follows:

"This (the prior employment related injury) bruised his back and he was a little uncomfortable for a few days, but recovered completely. He has not had previous back strains."

In his testimony, the claimant denied giving Dr. Corley this history of his prior lower back difficulties. Clearly, even the rather sketchy medical evidence presented shows a far more severe situation than the history recorded by Dr. Corley. In fact, the medical evidence shows at least three separate employment related injuries to the claimant's back. The first of these allegedly occurred when the claimant was struck at work by a forklift on August 17, 2001. The second of these allegedly occurred when the claimant was lifting heavy boxes on October 12, 2001. The third allegedly occurred when the claimant was carrying a box and twisted his back on November 2, 2001. These medical records further show that following the incidents on October 12, 2001 and November 2, 2001, the claimant exhibited symptoms that were essentially identical with those he described following the alleged incident giving rise to this claim. These included left lower back pain, pain radiating into his left leg, and numbness into his left leg. Finally, the medical records show that the claimant was under active medical treatment for these injuries, through at least

November 20, 2002. The claimant testified that as a result of these prior injuries, he was off work for approximately one year. He also testified that these cases were ultimately settled on November 21, 2002, for \$12,747.40. Of this amount, he stated that he actually received \$9,000.00.

In his testimony, the claimant described still another employment related back injury that occurred in 1999 or 2000. He stated that this injury occurred when he lifted the tongue of a trailer, in order to block it up. However, his testimony indicates that his symptoms did not begin until he stepped out of a truck, some time later, and felt a real bad strain and pull in his back. At that time, he went to the emergency room somewhere in Kansas, where he was diagnosed as having "some kind of herniated disc." He also explained:

"Well, the way they put it is that I probably done it lifting on the tongue of the trailer, and after your muscles go to relaxing is when you actually feel the pain or the injuries."
(T. 25)

In regard to this injury, he stated that he only recalled missing "a few weeks" of work. While it would appear from the evidence presented that this claim was accepted as compensable, there is no evidence of the ultimate outcome of this case.

In light of the claimant's obvious experience with prior employment related back injuries and familiarity with the workers' compensation system, his failure to immediately report his injury and the onset of his difficulties is inexplicable. It is even more inexplicable that he would expressly indicate on his daily time sheet for that day that no job related injury had occurred.

It is also somewhat unusual that when the claimant did decide to seek medical treatment for his difficulties, he did not return to any of the various physicians or medical facilities that had previously provided him treatment for his prior back difficulties. Instead the claimant elected to seek treatment from Dr. Corley, who he had never seen before and who had no prior knowledge of the claimant's medical

history.

It is even more unusual that Dr. Corley recorded an obviously incorrect history of the claimant's prior back difficulties. Minor mistakes may not be unusual in medical histories (such as Dr. Corley noting one of the claimant's prior injuries as occurring when he was struck by a crane, rather than a fork lift). However, it is inconceivable that Dr. Corley would have failed to note prior injuries or episodes of difficulties that produced symptoms that were identical with the claimant's current complaints (some of which had been diagnosed as being in the form of a herniated disc). The claimant testified that he did not recall even giving Dr. Corley a history of any prior back difficulties and injuries and that he had no idea where Dr. Corley got this information. However, it is even more unbelievable that Dr. Corley would have merely made up the history he recorded in his initial report.

There is also the matter of the obvious conflict between the claimant's testimony, the July 9, 2004 report of Dr. Corley, and the July 15, 2004 report of the Hastings Indian Medical Center Adult Walk In Clinic. In his report of July 9, 2004, Dr. Corley noted that the claimant was "much improved" with only "a little bit of back pain," no leg pain, and only occasional minor tingling in his left thigh. In this report, Dr. Corley stated that the claimant was to return for a recheck in a week, when he anticipated that the claimant would be released to return to work. It is apparent from Dr. Corley's records that the claimant did not return for this scheduled visit. At the hearing, the claimant testified that he received no benefit from the treatment of Dr. Corley and that his severe debilitating complaints had remained essentially unchanged through the present time.

The records of the Hastings Indian Medical Center Adult Walk In Clinic reflect that on July 15, 2004, the claimant appeared for treatment of back and lower extremity difficulties. At that time, the following history of the claimant's

complaints was recorded:

"25 year-old male complains of low back pain, chronic, worse over the last three weeks, brought in x-rays and CT scans. Was seeing private physician prior to this visit."

"Bad pain times two weeks, radiculopathy left leg."

No history of the employment related onset of these complaints was noted. In his testimony, the claimant denied giving the history recorded in the Hastings Indian Medical Center Walk In Clinic records. It was his testimony that he informed the personnel at this Clinic that his difficulties had been present since an employment related injury on June 12, 2004.

Finally, it is of some interest that the claimant testified that he has continued to experience severe debilitating complaints with his back and left lower extremity, through the date of the hearing. However, he has sought no further medical treatment for these complaints since his visit at the Hastings Indian Medical Center Walk In Clinic, on July 15, 2004. The medical evidence does show that the claimant has subsequently sought medical services from the Sequoyah Memorial Hospital emergency room on September 13, 2004. However, this visit was only for sinus or flu like symptoms and no mention was made of any difficulties involving the claimant's back and lower extremities.

Although the testimony of a party is never considered uncontradicted, this does not mean it 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. However, after consideration of all the evidence presented in this case, it is my opinion that the claimant's testimony is not sufficiently credible to prove the existence of a causal relationship between a specific employment related incident on June 12, 2004, and his subsequent lower back and left lower extremity complaints.

Thus, the claimant has failed to prove that his lower back and left lower extremity complaints are the result of a physical injury 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. The claimant's failure to prove these three necessary definitional elements of Ark. Code Ann. §11-9-102(4)(A)(i) prevents a finding that he sustained a "compensable" injury to his back on June 12, 2004.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 12, 2004, the relationship of employee-employer-carrier existed between the parties.
3. On June 12, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$297.00 for total disability and \$223.00 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 that he sustained a "compensable injury" to his low back on June 12, 2004. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of a physical injury to his low back on that date that arose out of and occurred in the course of this employment within 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 lower back on June 12, 2004, 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