

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505235

ANTHONY BEACH,
EMPLOYEE

CLAIMANT

CITY OF NORTH LITTLE ROCK,
EMPLOYER

RESPONDENT

MUNICIPAL LEAGUE WC TRUST,
CARRIER

RESPONDENT

OPINION FILED JANUARY 20, 2006

Hearing before Administrative Law Judge Barbara Webb on October 19, 2005 in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Terence Jensen, Attorney at Law, Benton Arkansas.

Respondents represented by Mr. J. Chris Bradley, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on October 19, 2005 to determine whether claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Law.

A prehearing conference was conducted in this case on September 7, 2005, and a Prehearing Order was filed on September 20, 2005. At the hearing, respondents amended the first stipulation to remove the reference to an injury and to read that an employee/employer relationship existed at all relevant times in this proceeding, including on or about March

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7, 2005. The parties announced that the stipulations, as amended, and issues, together with their respective contentions, were properly set out in the Prehearing Order. A copy of the Prehearing Order was introduced as Commission's Exhibit 1.

It was stipulated that the employment relationship existed between the parties at all relevant times, including on or about March 7, 2005; that claimant earned sufficient wages to entitle him to a compensation rate of \$351 per week for temporary total disability and \$263 per week for permanent partial disability in the event the claim was found compensable; and that respondents had controverted the claim in its entirety.

By agreement of the parties, the primary issue presented is a determination concerning compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that he sustained an injury to his back and spine which arose out of and during the course of his employment, and that respondents are responsible

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for all outstanding medical and related expenses, together with continued reasonably necessary medical treatment; that he is entitled to temporary total disability benefits beginning March 7, 2005 and continuing to a date yet to be determined; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that claimant did not sustain a compensable injury. Alternatively, respondents contend that claimant did not provide notice of the injury until April 5, 2005 and that claimant would not be entitled to benefits prior to April 5, 2005.

Claimant testified on his own behalf. Eric Smith was called as a witness for claimant. May Gunnells and Debra S. Velez were called as witnesses for the respondents. The record is composed solely of the transcript of the October 19, 2005 hearing containing numerous exhibits. 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

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conclusions of law are made in accordance with Ark. Code Ann.

§ 11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. Claimant failed to prove by a preponderance of the evidence the elements of a compensable injury under the Arkansas Workers' Compensation laws.
4. The respondents controverted the claim in its entirety.

DISCUSSION

Claimant, Anthony Beach, testified in his own behalf. Claimant is forty-five (45) years old. He has been employed by the City of North Little Rock as a truck driver in the sanitation department for approximately four years. He grew up on a farm and has performed heavy labor since he was 18. In addition to working for the City of North Little Rock, he also performed mechanic work, construction work, landscaping, and other side jobs which involved physical labor. His job involved heavy work, including a lot of lifting. Claimant

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testified that prior to March the 7th of 2005 he had no problem performing his job duties and also working his side jobs. He explained that on that day, he was operating a garbage truck known as a boom truck with a co-worker, Eric Smith. He described "booming" as the process in which a pile of brush, refrigerators, washing machines, or other items left out on the curb, would be picked up and loaded into the truck, either with a boom or manually.

Claimant described his activities on March 7, 2005, immediately preceding the alleged injury as follows:

As I proceeded out of the truck to grab this bag, I grabbed it and snatched it and got up just about to my chest, and that's when I sprung whatever I did to my back. And I dropped the bag and Eric goes are you all right? I said, no, I just hurt myself. I said you're going to have to drag me to the barn. So he proceeded to carry me back to the barn. (T. 13-14).

He testified that after arriving at the barn, he reported the injury to May Gunnells, a supervisor for the garbage crew. He did not return to work and testified that he was experiencing pain in the middle of his back to the side of his back and in his posterior on the right side. He explained that the pain proceeded from his right hip into the back of

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his right leg. On the following day, claimant sought medical treatment at Argenta Health Care Services, a designated treatment center for city employees. He was treated conservatively with prescription drugs, i.e., Lortab, Motrin, and Flexeril. He received a work release slip for the period of March 8, 2005 until March 10, 2005, which he delivered to the main office. Although he admitted that he did not fill out any workers' compensation forms until April 5, 2005, claimant contended that he reported the injury to the superintendent of the sanitation department at the main office at that time.

Claimant returned to Argenta on March 10, 2005. At that time, he was seen by an advanced nurse practitioner, Debra S. Velez. At the request of Velez, an MRI was performed on claimant on March 10, 2005. He received a work release slip for the period of March 10, 2005 until March 16, 2005, which he delivered to the main office. On March 15, 2005, he returned to Argenta and was referred to Northside Therapy Center for evaluation. He was released to return to work on March 22, 2005. On March 16, 2005, he was evaluated and

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received physical therapy. On March 22, 2005, he returned to Argenta. At his request, he was referred for follow-up treatment to his former doctor, Ronald Williams, a neurosurgeon, and released to return to work on March 29, 2005. On March 29, 2005, he was seen by Dr. Williams. Dr Williams prescribed a series of epidural injections and continued physical therapy. The claimant returned to Argenta on March 31, 2005 and on April 5, 2005. At the hearing, claimant explained that he had not had the epidural injections because he could not get authorization through either his private health insurance through the Municipal Health League or through Workers' Compensation.

Claimant testified that he had seen Dr. Williams in 1997 after experiencing a back injury resulting from a car wreck. He explained that he was unable to work following that injury for two years but returned to work in 1999. He explained the only prescription medication he had been taking during the last four years of his employment was for a broken foot. He stated he has passed six physical exams for the City. He further stated he had no problems with back pain on the day in

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question or for the time period prior to the day in question, but has experienced back pain every day since the injury. He denied that the injury occurred while performing any of his side jobs and denied that he had ever complained about back pain at work. Claimant testified that his last day at work was March 7, 2005.

Eric Smith also testified for claimant. He explained that he had worked with claimant off and on over the past 14 years and that they were close friends. He noted that he had never noticed claimant with any back pain or leg pain. He testified that he was working with the claimant when the claimant hurt his back as he lifted and threw a bag on the truck. He testified that he took claimant back to the barn where the sanitation department was housed and dropped him off and continued to the landfill. He witnessed claimant talking to May Gunnells and overheard the conversation in which claimant informed Gunnells that he had hurt his back and needed to go to a doctor.

On cross-examination, Smith testified that he did not see claimant when he got hurt, but heard him scream out and

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hollered out that he had hurt his back. He then looked through the window and saw him holding his back and trying to throw the bag up into the air.

The respondents offered the testimony of May Gunnells, a supervisor for the sanitation department of the City of North Little Rock. She testified that on the day in question she was in her office when claimant appeared in the hallway at the end of the shift. She described the conversation as follows: "May, tell Jason that I won't be in tomorrow. I am going to the doctor, try to get a shot in my back. I said okay." (T. 92). She explained that she saw claimant at work the next morning. Claimant told her that he did not have a way to Argenta and requested that he be put down as sick. He did not fill out any paperwork and did not tell her that he had gotten hurt on the job. She testified that she had heard claimant complain about his back on numerous occasions, including the week before. She explained on the day in question claimant was assigned to be on the same truck as Eric Smith because he could not sit down because his back was hurting. She testified that she observed claimant going in the main office

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two to three weeks later. She further testified she talked with claimant when she contacted him to perform some construction work on her house in April of 2005.

The respondents also offered the testimony of the advanced nurse practitioner, Debra Velez. Velez is a nurse practitioner who provides primary care and is licensed to write prescriptions. She testified that she first saw claimant on March 10, 2005. At that time, she indicated on a written progress report that claimant denied that it was a workers' compensation injury. She recalled meeting with claimant and interviewing claimant and asking him if the injury was work related. She testified she specifically recalled claimant telling her that the injury was not a workers' compensation injury. She noted that conversation on the medical record. After evaluation, she referred claimant for physical therapy and an MRI.

The medical records reflect that claimant sought treatment at Argenta on March 8, 2005. The progress note reflects that claimant indicated that he was having lower back pain radiating into leg pain over the weekend, and numbness

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and tingling in the top right thigh which started Wednesday at work. The progress report further reflects "(Ø workers' comp filled out)" and "HX: MVA97[with]multiple disc herniations." (Respondent's Exhibit 1, p. 22)

Claimant returned to Argenta on March 10, 2005. The progress note reflects that claimant "denies w/c injury." (Respondent's Exhibit 1, p. 20). The MRI was performed on March 10, 2005 and reflects "Degenerative changes involving the lumbar spine with a tiny disc protrusion involving L4-5 interspace level." (Respondent's Exhibit 1, p. 19). A physical therapy evaluation was performed by Northside Therapy Center on March 16, 2005. The notes reflect claimant stated that he had injured his back in a motor vehicle accident in 1997, at which time he had physical therapy that didn't resolve the symptoms, saw two physicians (including Dr. Williams) that recommended surgery, but had returned to work after three years. He further stated the pain "would go away but was now consistent". (Respondent's Exhibit 1, p. 12). Progress notes from Argenta reflect that claimant was seen

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again on March 22, 2005 and requested a referral to return to treatment with Dr. Williams. (Respondent's Exhibit 1, p. 10).

Claimant was seen by Dr. Ronald Williams on March 29, 2005. Dr. Williams' report notes that he saw claimant in 1998. He states, "He has some epidural steroid injections then, and that produced some benefits. He tells me he has never been completely relieved of the pain." (Respondent's Exhibit 1, p. 3). On the following day, a progress note from Argenta reflects that claimant had seen Dr. Williams, was diagnosed with "arthritis," and scheduled for a follow-up appointment for steroid injections. Claimant requested another opinion. (Respondent's Exhibit 1, p. 2).

The progress note from Argenta on April 5, 2005 reflects that a follow-up visit would be scheduled with Dr. Cathey after review of information from Dr. Williams. Subsequent notations reflect that "Dr. Cathey eval. states based on the MRI results, plan of care will be same." (Respondent's Exhibit 1, p. 1).

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accident injury to prosthetic

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appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

In the present case, I find that claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. In support of his claim, Claimant testified that immediately after he attempted to lift a bag of trash, he experienced pain and sought medical attention. He further contends that he was unable to return to work. However, I find that claimant's testimony is contradicted by his own previous statements and other evidence in the case. Significantly, the initial

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medical report of March 8, 2005, reflects that claimant stated that he was having lower back pain which had begun almost a week prior to the alleged incident. Further, the progress note indicates that no workers' compensation forms had been filled out, and that he had a 1997 motor vehicle accident in which he had a multiple disk herniation. Moreover, two days later, the claimant denied that he had a workers' compensation injury when specifically questioned by medical personnel at Argenta whether the symptoms he complained of arose from a workers' compensation injury. In addition, notes from the initial interview with the claimant from the physical therapy evaluation do not reference any alleged work-related incident. In fact other than a reference that some of his symptoms began at work on the initial Argenta progress note, the only medical records which reflect that the claimant incurred an injury while lifting at work was almost three weeks later when he sought treatment from his prior neurosurgeon, Dr. Williams. The evidence is even more compelling in light of the findings of the March 10, 2005 MRI that claimant had "degenerative changes involving the lumbar spine."

Claimant's testimony regarding his lack of pain until the incident is further contradicted by his statements to Dr.

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Williams that he had never been completely relieved of the pain from his treatment in 1998. Likewise, claimant's supervisor testified that she had heard claimant complaining of back pain for a period of time, had previously cautioned him to see a doctor, and also had assigned him to work in the truck with Eric Smith due to his complaints of continued pain. She further testified that claimant did not tell her he had been hurt on the job and merely requested time off to see a doctor, which was reflected on his time sheet as sick leave.

Dr. Williams notes that claimant indicated that he had done some lifting at work which was followed by non-radicular pain. As noted by Williams, the MRI of the lumbar spine showed a small central disc protrusion at L4-5 but no nerve root compromise and degenerative changes elsewhere. In addition, the progress note at Argenta on the day following the claimant's visit to Dr. Williams, reflects claimant's statement that Dr. Williams had told him that he had arthritis and scheduled him for follow-up steroid injections. It was not until after claimant learned that he would be off work for a period of time and required epidural injections that he subsequently filled out a workers' compensation claim form on April 5, 2005. On that form, the claimant again

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inconsistently described the injury as "twisted back when I got out of the boom truck", rather than lifting heavy trash bags.

I am further persuaded by the testimony of Debra Velez, from the Argenta Health Care Center who specifically recalled the statements of the claimant, as follows:

Q. What about the part that has this asterisk and denies w/c injury, how did it come to pass that you wrote that down?

A. I asked him if -- if he thought this injury was a result of a workers' comp injury.

Q. Why did you ask him that question?

A. Because of the type of work he does and the department he was in and his complaints.

Q. You have seen prior sanitation workers present with claims of injury as a result of working in the sanitation department, right?

A. Yes.

Q. So is that why you asked that question of people similarly situated in the sanitation department?

A. Yes. And from his previous day's visit -- the visit before that.

Q. That would be the March 8th visit?

A. Yes.

Q. What was there on the March 8th form that suggests that you might want to ask that question?

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A. That it started Wednesday at work and to ascertain if it was precipitated by an act, something at work, or if it had anything to do with the history on here of a previous motor vehicle accident.

Q. Well, the form from March 8th shows a parenthesis, then the null sign, then w/c filled out, which would suggest that no workers' comp filled out. Would that be a prompt then to do some follow-up on that?

A. Yes.

Q. And that's what you, in fact, did on March 10?

A. Yes.

Q. So how did that -- you asked Mr. Beach whether he had hurt himself at work, and how did he respond?

A. He said that it wasn't a workers' comp injury.

Q. Did you ask him anything further, like well are you sure or how do you know?

A. Yeah, I did ask him if he was sure.

Q. And so he repeated again?

A. He denied that it was workers' comp.

Q. Did he attribute it to something other than work?

A. We talked about his previous injuries and his disk problems, and that's when I got where he was treated.

The only evidence offered by the claimant to corroborate his testimony is that of his co-worker and close friend, Eric

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Smith. On cross-examination, Smith admitted that he did not actually see the alleged incident but only heard the subjective verbal complaints of pain from the claimant. Moreover, the credibility of Smith's testimony is dubious in light of his statements that he had never seen the claimant in pain prior to the incident, in light of the claimant's statements of continued pain to Dr. Williams, and the testimony of May Gunnells.

In regard to claimant's contentions that he has not returned to work, there is evidence in the record that claimant has continued to perform construction work on the side and has not sought the recommended medical treatment recommended by Dr. Williams and Dr. Cathey.

Finally, from a review of the medical evidence offered in this case, I am convinced that any objective medical findings and need for medical treatment are consistent with degenerative and arthritic conditions of the claimant identified by Dr. Williams rather than a specific work-related incident which is identifiable by time and place of occurrence.

Accordingly, after considering the evidence submitted in the record and observing the demeanor of the witnesses during

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their testimony at the hearing conducted in this matter, I find that the greater weight of evidence fails to support a conclusion that claimant sustained an injury arising out of and in the course of his employment.

In addition, claimant attempts to assert a fall-back position of an aggravation of a preexisting condition. However, the Prehearing Order filed September 20, 2005 in this case does not reflect that claimant made any contention of an aggravation of a preexisting condition and such contention should not be allowed without proper notice. Alternatively, an aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regalware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). Therefore, for the reasons set forth above, I would find that claimant has failed to prove by a preponderance of the evidence that any aggravation of a previous condition occurred at work. This is especially true in light of the evidence that claimant performed other work during the same relevant time, including mechanical, construction, landscaping, and other side jobs which involved physical labor.

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Finally, respondents contend that even if this claim were compensable, claimant failed to provide notice as required by the Arkansas Workers' Compensation laws. While it is not necessary for me to address this issue in light of the findings above, I would note that it is undisputed that claimant did not fill out any workers' compensation forms until 30 days after the alleged date of injury and clearly indicated he did not believe he was suffering from a work-related injury until his March 29, 2005, visit to Dr. Williams. Although claimant asserts that he also notified the superintendent and secretary of the Sanitation Department of this alleged work-related injury, neither of those individuals were called to testify at the hearing.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge