

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512453

TERRY CASSADY	CLAIMANT
WILLIS SHAW EXPRESS/COMCAR INDUSTRIES	RESPONDENT
BIRMINGHAM FIRE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT
GALLAGHER BASSETT SERVICES, TPA	RESPONDENT

OPINION FILED AUGUST 30, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by CONRAD ODOM, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 26, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on February 13, 2006. 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 respondents withdrew their request to litigate the issue of whether the claimant was barred from receiving benefits under the doctrine announced in Shipper's Transport of Georgia v. Stepp. A copy of the pre-hearing order with this amendment noted thereon, was made Commission Exhibit No. 1 to the hearing.

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

1. On September 1, 2005, the relationship of employee-

employer-carrier-TPA existed between the parties.

2. The appropriate weekly compensation rates are \$466.00 for total disability and \$350.00 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 neck and back on September 1, 2005.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from September 2, 2005 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends that the employee/employer relationship existed on or about 9/1/05. On that date, claimant sustained a compensable injury to his neck and upper back. The claim has been controverted in its entirety.

In regard to these issues, the respondents contend that the claimant did not sustain a compensable injury in the course and scope of his employment, as the "major cause" of his problems or condition are a result of his pre-existing condition and not causally connected to his work related activities for the insured. If the claimant is asserting other gradual onset injuries besides his back and neck, the respondents would contend that the claimant's job duties were not rapid and repetitive in nature. The respondents contend that the claimant merely sustained a recurrence

of his pre-existing condition and problems. In the alternative, the respondents contend that the claimant, at most, sustained a temporary aggravation of his pre-existing condition for which he has, or should have, resumed his baseline condition. In the alternative, if this claim is held compensable, the respondents would contend that the claimant would not be entitled to any benefits prior to the date the respondents received notice on or about November 15, 2005. The respondents would reserve the right to join the Second Injury Fund at a later date, if or when wage loss becomes an issue. The respondents contend that they would be entitled to an offset for any group health carrier and/or disability carrier payments made to or on behalf of the claimant.

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained “compensable” injuries to his neck and back on September 1, 2005. The burden rests upon the claimant to prove all of the statutory requirements necessary to establish a “compensable” injury.

The first of these requirements are contained in Ark. Code Ann. §11-9-102(4)(D). This subdivision requires the claimant to prove by medical evidence the actual existence of the physical injuries or conditions alleged to be compensable. Further, the claimant must show that the actual existence of these physical injuries or conditions is supported by “objective findings,” as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

In the present claim, the medical evidence presented “establishes” the actual existence of a physical injury or defect to the claimant’s neck or cervical spine. Two board certified neurosurgeons have opined that the claimant has and is experiencing difficulties with his cervical spine that are in the form of a fracture of a bracing device that was surgically implanted to treat a previous employment related injury. Dr. David Malone, one of the two neurosurgeons and the claimant’s current treating physician, has also diagnosed a pseudoarthrosis or failure of the C5 vertebra to form a bony fusion of the C6 vertebra. The prior surgery had attempted to create a two level fusion, which included the C5-6 interspace, in order to treat the previous cervical injury.

The medical evidence presented further shows that the actual existence of the fracture of the previously implanted “hardware” and the pseudoarthrosis are supported by purely “objective findings.” These findings were visibly noted on radiographic studies, including both plain x-rays and an enhanced myelogram/CT scan. Therefore, the claimant’s cervical injury or defect, which is alleged to be compensable, satisfies the statutory requirements for a “compensable” injury under Ark. Code Ann. §11-9-102(4)(D).

However, the only record in the medical evidence of any injury or condition involving the claimant’s “back” is a passing mention in the December 23, 2005 office note of Dr. Malone, which states:

_____ “He is having low back pain today.”

The medical record fails to show the actual existence of any diagnosed injury, condition, or defect involving the claimant’s

“back.” Even more importantly, the medical record contains absolutely no evidence of any “objective finding” to support the actual existence of any physical injury or defect involving the claimant’s “back.” Therefore, in regard to the claimant’s alleged “back” injury, he has failed to satisfy the statutory requirements of Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that his medically established and objectively documented physical injury or defect involving his neck or cervical spine satisfies all of the definitional requirements for a “compensable injury,” under one of the categories set out in Ark. Code Ann. §11-9-102(4)(A). Two of these categories could be applicable. These are the categories of “compensable injuries” defined by §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(b). These two subdivisions both contain the same initial requirement that the physical injury must “arise out of and occur in the course of the employment.”

The Appellate Courts have consistently held that the term “arising out of” the employment refers to the origin or cause of the accident and resulting injury, and the term “in the course of” the employment refers to the time, place, and circumstances under which the accident and injury occurred, Deffenbaugh Industries v. Angus, 313 Ark. 100, 852 S.W. 2nd 804(1993). In order to “arise out of the employment,” the accident and resulting injury must be a normal and reasonable incident of the employment and a natural consequence of one of its risks, J&G Cabinets v. Hennington, 269 Ark. 789, 600 S.W. 2nd 916(Ark. App. 1980). An injury occurs “in

the course of the employment,” when it occurs within the time and space boundaries of the employment and while the employee is carrying out the employer’s purpose or advancing the employer’s interests directly or indirectly, Howard v. Arkansas Power and Light Company, 20 Ark. App. 98, 724 S.W. 2nd 193(1987).

The claimant testified that “a little after noon” on September 1, 2005, he was performing his assigned employment activities of driving his tractor trailer truck. He had been performing these activities for some 6 to 7 hours that day. Suddenly, he experienced a sharp pain in his neck and arms. At the same time, his hands went numb. He immediately stopped his vehicle. After resting for 15 minutes or so, the pain and numbness in his arms and hands subsided, and he resumed his driving activities. However, he stated that some degree of pain has constantly remained in his neck, since September 1, 2005. He conceded that this pain in his neck was to the same area as the pain that he experienced following a prior employment related injury in 1996. It was this injury that resulted in the laminectomy and two-level fusion in 1997. However, he testified that his prior difficulties were significantly relieved by the 1997 surgery, that he had not required medical services for any neck difficulties since 1997 or 1998, and that he was not experiencing any significant difficulties or symptoms with his neck or cervical spine prior to the September 1, 2005 onset of complaints.

The claimant testified that the tractor or truck, which he was driving on September 1, 2005, was a manual shift freight liner and

“rode rough.” However, he expressly stated that, at the time of his onset of neck and arm difficulties on September 1, 2005, he was just driving down the road and that there was no contemporaneous jar, bounce, jerk, or any unusual stress or trauma involving his neck.

This testimony is the only evidence the claimant has presented to establish the existence of the necessary causal relationship between his medically established and objectively documented cervical injuries or defects and his employment with the respondent. Although the testimony of a party is never considered uncontradicted, this does not mean that 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. Clearly, the claimant’s testimony would be legally competent to establish the initial onset of his neck or cervical complaints and to show the activities or events surrounding the onset of symptoms.

However, even if the claimant’s testimony is deemed to be credible, I do not find it sufficient to prove that the medically established and objectively documented physical injury to the claimant’s cervical spine “arose out of and occurred in the course of” the claimant’s employment with this respondent. The pseudoarthrosis observed at the C5-6 level is simply the result of the failure of the 1997 surgery to produce a bony union or fusion of the C5-6 vertebral bodies. Clearly, this condition, itself, is in no way traumatic in origin and could not have been caused by the

claimant's employment related activities for this respondent. The medical evidence further fails to note any objective findings to support an aggravation of or increased damage to the failed C5-6 fusion. Most importantly, there is no evidence of any damage that would be traumatic in origin, such as a recurrent disc herniation or a slippage of one vertebral body upon another (spondylolisthesis).

In regard to the "fractures" of the hardware or appliances that had been implanted in the claimant's neck or cervical spine in the prior corrective surgery in 1997, there is no expert medical opinion attributing these "fractures" to the claimant's employment activities on September 1, 2005, or any other date. In fact, there is no expert medical opinion that attributes these fractures to any specific stress or trauma (employment related or otherwise). In his testimony, the claimant described no noticeable employment related stress or trauma at the time of the initial onset of difficulties with his neck and upper extremities on September 1, 2005. It was his further testimony that, since he had ceased employment with the respondent, he has apparently experienced another fracture of this "hardware" or "appliance" and again failed to observe any type of trauma or stress to this area that occurred contemporaneously with this second fracture.

There is also no expert medical opinion offered to indicate that it was likely or probable that the actual fracture of the hardware occurred contemporaneous with the initial onset of the claimant's neck and upper extremity symptoms. Thus, it is equally

possible that this objectively demonstrated defect may have also predated September 1, 2005. It would appear that this defect was likely not present, when the claimant underwent a post-surgical cervical myelogram for continued difficulties with his neck, shortly before September 5, 1997. Dr. Malone noted no abnormality with the hardware or bracing appliance, at that time. However, the January 28, 1998 report of Dr. Michael Farrar, mentioned two incidents, which apparently occurred subsequent to the September 1997 follow up myelogram, that significantly increased the claimant's symptoms and could have reasonably caused the subsequently observed fracture of the hardware. This possibility must also be considered in light of the testimony of Debbie Jenkins the respondent's fleet manager. She stated that the claimant advised her on November 4, 2005, that the knot or lump on his neck had been present for approximately 3 years and was not work related.

Even if the claimant's testimony, concerning the events surrounding the onset of cervical and upper extremity difficulties on September 1, 2005, is credible, it would only be sufficient, at best, to show that his neck or cervical difficulties "occurred during the course of his employment." It would not be sufficient to prove that these difficulties were causally related to or "arose out of" his employment. In order to establish a compensable injury, the claimant must prove both of these factors by the greater weight of the credible evidence. The fact that a physical injury may occur while the claimant is engaged in his assigned

employment activities does not create a presumption that the employment caused that physical injury.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove with any degree of certainty that his medically established and objectively verified cervical effects were in any way caused, contributed to or aggravated by his employment activities on September 1, 2005, or any other date. Therefore, he has failed to prove the occurrence of a physical injury to his neck that arose out of and occurred in the course of his employment with this respondent. His cervical difficulties would not represent a "compensable injury" as that term is defined in the Act.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On September 1, 2005, the relationship of employee-employer carrier-third party administrator existed between the parties.
3. On September 1, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00 for total disability and \$350.00 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 either his neck or back on September 1, 2005.

Specifically, he has failed to establish by medical evidence, which is supported by “objective findings,” the actual existence of any physical injury or damage to his back, as required by Ark. Code Ann. §11-9-102(4)(D). The claimant has also failed to prove by the greater weight of the credible evidence presented that, on September 1, 2005 or any other date, he sustained a physical injury or damage to his neck or cervical spine that “arose out of” his employment with the respondent, as required by either Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(A)(ii)(b).

5. The respondents have denied the occurrence of any compensable injuries to the claimant’s neck or back 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