

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F502562

MITCHELL GARRETT, Employee	CLAIMANT
NORTH PACIFIC GROUP, INC., Employer	RESPONDENT
SAFECO/AMERICAN STATES INSURANCE, Carrier	RESPONDENT

OPINION FILED AUGUST 10, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by M. KEITH WREN, Attorney, Little Rock, Arkansas.

Respondents represented by GUY ALTON WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 12, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 1, 2006, and a pre-hearing order was filed on March 2, 2006. 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-carrier existed among the parties on December 21, 2004.

At the time of the hearing the parties agreed to stipulate that claimant earned an average weekly wage of \$431.00 which would entitle him to compensation at the rates of \$287.00 for temporary total disability benefits and \$215.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back on December 21, 2004.

2. Temporary total disability benefits from December 27, 2004 through a date yet to be determined.

3. Medical.

4. Attorney fee.

The claimant contends that on December 21, 2004 he sustained an injury to his lower back while lifting a motor. He returned to work on December 22 and 23, 2004. He has been unable to work since December 27, 2004 to a date yet to be determined. He requests temporary total disability, medical, and an attorney fee.

The respondents contend that the claimant failed and/or refused to report an injury occurring within the course and scope of his employment. Claimant's injury did not occur at work. The claimant refused to notify his employer of an alleged injury at work in an effort to avoid having to take a drug test.

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 March 1, 2006, and contained in a pre-hearing order filed March 2, 2006, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$431.00 which would entitle him to compensation at the rates of \$287.00 for temporary total disability benefits and \$215.00 for permanent partial disability benefits is hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable injury to his back while employed by the respondent.

FACTUAL BACKGROUND

The claimant was employed by the respondent in its maintenance department and was responsible for repairing and fixing various things in the respondent's mill. Claimant testified that on December 21, 2004 he and a co-employee, Ronny Trimbball, were changing out a motor that weighed some 200 to 300 pounds. Due to the location of the motor it was necessary for claimant and Trimbball to manually carry the motor some 15 to 20 feet. Claimant testified that after he set the motor down and knelt down to take the cover off he had "a bad back spasm." Claimant testified that he immediately informed Gary Snider, his supervisor who was present, that he had injured his back. Claimant also testified that he informed Trimbball that he had injured his back.

Claimant believed that he had pulled a muscle and continued to work the remainder of his shift. The next day claimant testified that he went to Snider's office and again informed him that his back was hurt and they decided to wait a few days to see if claimant's back condition improved. Claimant testified that he continued to work until the Christmas break which was approximately one week long. Claimant sought medical treatment from the emergency room on December 28, 2004 and was diagnosed as suffering from a low back strain. Claimant has not returned to work for respondent or any other employer since that date. In addition to the emergency room visit, claimant has also been evaluated by Dr. Brian Blair at the Marshall Family Practice. Dr. Blair eventually ordered an MRI scan of the claimant's lumbar spine which revealed a disc herniation at the L5-S1 level. Dr. Blair ordered physical therapy and recommended an evaluation by a neurosurgeon. As of the date of the hearing claimant had not yet undergone a neurosurgical evaluation due to a lack of funds.

Claimant has filed this claim contending that he suffered a compensable injury to his back while working for respondent on December 21, 2004. He seeks payment of

temporary total disability benefits beginning December 27, 2004 and continuing through a date yet to be determined, related medical, and a controverted attorney.

ADJUDICATION

The claimant contends that he suffered a compensable injury to his back as a result of lifting a heavy motor on December 21, 2004. The claimant's claim is for a specific incident injury. 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.

A preponderance of the evidence is the greater evidence when compared to that opposed to it. *Missouri Pacific Railroad Company v. Hancock*, 195 Ark. 414, 113 S.W. 2d 489 (1938).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent on December 21, 2004.

As previously noted, claimant testified that he developed pain in his back after lifting

a heavy motor with Ronny Trimball on December 21, 2004. Claimant testified that he immediately reported the injury to Gary Snider, his supervisor, and also to Trimball.

Trimball was present at the hearing and testified that claimant informed him at one point while lifting the motor that his back had popped. Trimball testified that the claimant appeared to be in pain and was holding his back. Trimball also testified that claimant informed Snider that he had injured his back. In assessing Trimball's testimony, it should be noted that he presently has a workers' compensation claim of his own pending against the respondent and that he no longer works for the respondent. Also testifying at the hearing was Walter Aulds, an electrician, who also testified that claimant mentioned injuring his back earlier that night. Aulds was not present at the time of the incident, he was not claimant's supervisor, and his testimony is dependent entirely upon claimant's statements to him.

Testifying on behalf of the respondent was Gary Snider, the mill manager for the respondent. Snider was claimant's supervisor and testified that at one point on the night of December 21 while claimant was in the process of working on the motor Snider was on a catwalk approximately three and a half to four feet above claimant. Snider admitted that the claimant did mention at one point that his back was hurting, but that he specifically asked claimant if he had injured it while moving the motor and claimant said "No," and attributed his back pain to moving.

Snider testified that after this conversation the claimant continued to work the rest of his shift. Snider also acknowledged that claimant came to his office on December 22nd and again indicated that his back was hurting. Snider testified that he again asked claimant if he had injured his back at work and claimant again indicated that the back pain was attributable to his moving. Snider testified that the claimant never indicated that he had injured his back at work even though he was asked on two separate occasions.

Obviously, there is testimony from both parties which would support their respective

positions. However, when one looks at the medical evidence I do not believe it supports a finding of compensability. Claimant did not seek medical treatment for his low back condition until December 28, 2004. The emergency room report contains a notation that claimant had a history of low back pain for several days. It also states, "Onset of back pain while lifting boxes and twisting @ same time". This history is more supportive of Snider's testimony that the claimant injured his back while moving since claimant was not lifting boxes and twisting on December 21, 2004.

Another portion of that same emergency room report gives a history of back pain due to lifting/twisting a heavy object. While this history is more supportive of claimant's testimony, the history still does not indicate that this occurred at work.

Finally, I note that on January 13, 2005 the claimant sought medical treatment from Dr. Blair at the Marshall Family Practice. Dr. Blair's medical report of that date contains the following history: "Pt reports hurt @ work but did not claim it as worker comp." This history would support claimant's contention that he did actually injure his back at work, but it contradicts claimant's testimony that he reported it to Snider as a workers' compensation injury.

In summary, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by the respondent. In this particular case, there is evidence in claimant's favor which would support a finding that claimant has met his burden of proof. On the other hand, there is also significant evidence in the form of Snider's testimony and the history contained in the medical records which do not support a finding of compensability. After reviewing the evidence in its entirety, I simply find that claimant has failed to meet his burden of proof by a preponderance of the evidence that he suffered a compensable injury to his back. Snider testified that he specifically asked claimant on two occasions if claimant had injured his back at work and claimant indicated that he had not, but instead attributed his back pain

to moving. The history contained in the initial emergency room record of December 28, 2004 indicates at one point that claimant's back pain began while lifting boxes and twisting and in another portion that claimant's back pain was due to lifting/twisting with a heavy object. Neither of these histories indicate that the history was work related and the first history is more supportive of an injury of moving.

Finally, the history in the medical report from the Marshall Family Practice on January 13, 2005 does indicate that claimant reported injuring his back at work, but it also states that claimant did not claim it as a workers' compensation injury. This contradicts claimant's testimony that he reported a workers' compensation claim to Snider on both December 21 and again on December 22. Based upon the foregoing, I simply find that claimant has failed to meet his burden of proof by a preponderance of the evidence.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while employed by the respondent. Claimant's claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE