

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513626

VICENTE GUTIERREZ	CLAIMANT
TYSON POULTRY, INC.	RESPONDENT
TYNET CORPORATION INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 21, 2006

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

Claimant represented by STEPHEN SHARUM, Attorney, Fort Smith, Arkansas.

Respondents represented by MELISSA LEE, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on July 28, 2006, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on April 28, 2006. 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 September 16, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left knee on September 16, 2005.

4. The claimant is entitled to a weekly compensation rate of \$274.00 for temporary total disability and \$206.00 for permanent partial disability.

5. Medical expenses have been paid on the claimant's knee.

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

1. Compensability of the claimant's low back injury on September 16, 2005.

2. Related medical.

3. Temporary total disability from November 7, 2005, to a date to be determined.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained a compensable injury to his left knee and to his lumbar spine as a result of a fall when the claimant slipped near a metal drain that was wet. The claimant was sent for medical treatment by the respondent and was returned to work by the medical provider with restrictions. The claimant was unable to perform the job duties required by the employer that were beyond the restrictions of the claimant. The claimant moved to Mission, Texas to live with his family and to obtain additional medical treatment. The claimant has continued his medical treatment in Mission, Texas. The claimant is entitled to medical treatment and temporary total disability benefits from November 7, 2005, to a date yet to be determined. The claimant is entitled to attorney's fees on all controverted benefits for the period of temporary total disability

benefits due and all benefits in the future, since they have been controverted in their entirety.

In regard to the foregoing issues the respondents contend that they have controverted the claimant's alleged back injury as it was never reported. The respondents contend that they have accepted the claimant's left knee injury. The respondents contend that the claimant is not entitled to receive benefits in the form of medical treatment for a back injury, temporary total disability as to authorized treating physician has taken him off work, or attorney's fees. The respondent reserves the right to supplement the contentions upon the completion of pre-trial discovery.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted medical evidence marked Respondents' Exhibit No. 1, non medical marked Respondents' Exhibit No. 2 and the deposition of the claimant marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified through a translator that he began working for the respondent in February 2005 working cutting wings. The claimant testified that he worked cutting wings for a few weeks or months and then he was assigned to moving boxes. The claimant explained that these boxes weighed approximately sixty to eighty pounds and contained chicken. The claimant testified that he would take these boxes and tubs and dump them into a shout. The claimant

testified that the respondent would occasionally put him in other parts of the plant to stack boxes.

The claimant testified and it has been stipulated by the parties that he sustained a compensable injury to his left knee on September 16, 2005. The claimant testified that on that day he had been cutting wings and was called to go dump a box. The claimant testified that after he dumped the box he turned around and walked four or five steps and tripped on a steel pipe. The claimant testified that he was pushing a small cart when he was walking and he slipped. The claimant testified that he used the cart to move the boxes and at this time the box was empty. The claimant testified that when he slipped he was still holding onto the cart and that his right leg slipped out from under him and that he landed on his left knee on the concrete as the cart continued to go forward. The claimant testified that he fell on his left side and agreed that this motion twisted his back. The claimant testified that when he fell he got wet demonstrating that his left arm got wet. The claimant testified that when he fell and hit his left knee he immediately felt pain in the left leg. The claimant was asked if shortly after that did anything else hurt? The claimant responded, "My--my wrist or my back." The claimant pointed to his left side about belt level demonstrating where his back pain was located. The claimant agreed that he felt immediate pain in his low back after getting up. The claimant testified that at the time he reported to the nurse that he injured his left knee he also told her that he hurt his back. The claimant testified that the nurse

said he could put a cold pack on his knee, she instructed him to go back to work and also encouraged him to go by the machine to get some pills. The claimant agreed that the respondent has a machine that dispenses aspirin and ibuprofen and he followed the nurse's instruction and bought some medication. The claimant testified that he continued working for the respondent from September 16, 2005, to October 22, 2005. The claimant testified that during this period of time his back hurt a lot and he complained about having low back pain which he reported to the nurse. The claimant testified that he reported his low back about two times during each month and the nurse did not say anything. The claimant testified that he did not receive any treatment from the nurse during this period of time and that he continued to get medicine out of the machine every day. The claimant testified that he was able to do his job stacking boxes, cutting wings and lifting boxes. The claimant testified that after work he would go home and rest.

The claimant testified that on October 27, 2005, he went to the emergency room at the Waldron Hospital with complaints of low back pain and agreed that he told the doctor that he fell about a month ago and injured his left knee. The claimant was read from the ER notes where it sets forth that the claimant reported pain in his lower back some time and the claimant responded, "No, I told him it hurt all the time." The claimant testified that he had x-rays taken of his lower back but not of his left knee. The claimant agreed that the doctor gave him a slip setting forth his limitations which was taken to the respondent. The claimant

testified that he never went back to work for the respondent. The claimant testified that he called his daughter, Sylvia, who lives in Mission, Texas, to come get him. The claimant agreed that he has continued to be treated by doctors in the Mission, Texas, area and that they have recommended that he undergo back surgery. The claimant testified that he has been taking pain medications as prescribed by his doctors. The claimant testified that since he has been in Mission, Texas, he has continued to let the respondent know where he was. The claimant further testified that prior to September 16, 2005, he had not had any prior back problems.

On cross examination, the claimant testified that after September 16, 2005, he would see the nurse in the break room and talked with her. The claimant testified that when he would talk to the nurse in the break room, she would tell him to go get some pills. The claimant testified that on the day of his accident the nurse put ice on his knee and that was all. The claimant agreed that he told the nurse he had injured his back. The claimant testified that the nurse he made this report to was "a little heavy set lady with long hair." The claimant was asked if he reported his injuries to his supervisor and he responded, "No." The claimant testified that on the night of his fall his supervisor was Teresa and that she sent him to the nurse's station. The claimant was asked if he ever asked to go to a doctor and he responded, "No." The claimant testified that he has been receiving social security for the past twelve years and that some of his medical bills have been paid by Medicare. The claimant testified that he

stayed in touch with the respondent by having his daughter call but that he never called the respondent or his supervisor himself. The claimant testified that the times his daughter called in and reported that he was in the hospital, he was there for x-rays and another time when she called in and reported that he was sick, it was due to his back and knee pain. The claimant testified that after he was taken to the hospital in Arkansas, his daughter came and picked him up a couple of days later. The claimant testified that he continued to work for the respondent after his fall on September 16, 2005. The claimant agreed that he worked all day on October 26, 2005, doing his regular job of picking up boxes and cutting wings. The claimant agreed that he did not go to work on October 27, 2005, because he did not feel good, noting that all the night before he could not sleep. The claimant testified that he did not call the respondent before he went to the emergency room nor did he call them after he went to the emergency room.

On redirect examination, the claimant agreed that the boxes which he was required to move were filled by various people on the lines and he had no control over how full each of the boxes would be filled. The claimant testified that the social security benefits which he has been receiving are for retirement not for disability.

Silvia Ozuna testified that she lived in Mission, Texas, and was the claimant's daughter. Ms. Ozuna testified that her father let her know about his September injury two to three days after his fall. This witness testified that her father continually

complained about his knee as well as his back and that he was instructed to get some pills. Ms. Ozuna testified that when she learned that her father had been to the hospital and was taken off work she came to get him because there would have been no one to take care of him. This witness testified that when she first saw her father he was in pain, could not straighten up, could not walk, could not get out of bed and she had to help him with all of his personal needs. Ms. Ozuna testified that prior to this time she had never known of her father of having low back problems. This witness testified that she takes her father to all of his doctor's appointments and has been in the examination room with him and is aware of the recommendations his doctors are making for him. Ms. Ozuna testified that her father is on a lot of different medications. This witness testified that her father has not worked since October 27. Ms. Ozuna testified that she contacted the respondent in October 2005 to make them aware that her father had gone back to Texas, that he was under the doctor's treatment and would not be able to come back to work. This witness testified that she was told that they would need a doctor's excuse so she had the claimant's doctor fax papers indicating that he could not work. Ms. Ozuna testified that she has not sent the respondents any of the claimant's off work slips because the doctors were going to send them for her.

Christi Combs testified that she was employed by PRN Medical Staffing. This witness testified that she has worked for PRN for three years as an LPN. Ms. Combs testified that she works where

PRN contracts and that she does have some private duty at different hospitals. Ms. Combs testified that she has been a contract nurse working for the respondent for the past three years but noted that it was difficult to set out a schedule because she did fill in work. Ms. Combs testified that she was familiar with the claimant and had reviewed his nursing file. Ms. Combs testified that she made the note entry on September 16, 2005, at approximately 11:10 p.m. This witness read from the claimant's nurse file, noting that on September 16, 2005, the claimant fell and hit his left knee, noting further that it was work related. This witness testified that the claimant did not indicate to her that he had injured any other part of his body and that she had specifically asked him this question. Ms. Combs explained that if she has seen a client who was in need of hospitalization or treatment by a doctor, she would have sent them on immediately and then done the paperwork. Ms. Combs testified that in the claimant's incident she did not feel this was necessary. Ms. Combs testified that the claimant never talked to her again about his injuries because if he had she would have put it in his chart. Ms. Combs testified that if the treatment required of a client rose above the level that she could provide, she would have called Cindy Dorr. This witness testified that she never received any telephone calls from the claimant or any of his family members regarding any injury he had nor did he come back and complain to her in person about any injuries.

On cross examination, Ms. Combs testified that if the claimant had reported to the nurse's station and was told to just take some

medication and go back to the line that should have been noted in his file. Ms. Combs testified that right outside the nurse's station near the break room there is a medication machine which is accessible to all the employees. Ms. Combs testified that besides ibuprofen and Tylenol there are medications in this machine such as Imodium, Pepto Bismol and other over the counter medications. Ms. Combs testified that the nurse's station does not dispense medications. This witness agreed that if she has seen a patient and feels they are in need of medication she will make a recommendation that they go to the machine and purchase it. Ms. Combs testified that if the claimant had come in and complained about his knee after September 16, 2005, she would have charted it in the nurse's notes even if it had just been a discussion about what medication to purchase out of the machine. This witness testified that she is not sure as to how many days she worked for the respondent between September 16, 2005, and October 26, 2005.

Cindy Dorr testified that she currently is working for Sparks Primary Care as the director of occupational medicines. Ms. Dorr testified that prior to working for Sparks, she worked for the respondent for over twelve years as the plant nurse in their Waldron unit. Ms. Dorr testified that she left the respondent's employment on April 8, 2006, so she was working for the respondent on or about September 16, 2005. Ms. Dorr testified that she does not recognize the claimant but that she has reviewed his records. Ms. Dorr testified that Chrsi Combs was a contract nurse who filled in when they were having staffing issues. Ms. Dorr

explained that Ms. Combs protocol was when a client came in who required minor medical treatment she would take care of that inside the plant but if outside treatment was required, she would see that the client was transferred to outside medical care and then she would call to report this event. Ms Dorr testified that Ms. Combs did not contact her regarding the claimant. Ms. Dorr testified that Ms. Combs was a patient advocate and would do what was in the best interest of the patient regardless of the respondents' protocol. Ms. Dorr testified that she has never spoken to the claimant regarding his injury but that she has spoken with the claimant's daughter. Ms. Dorr testified that when the claimant's daughter called her she had no information personally concerning the claimant so she pulled the claimant's file. Ms. Dorr testified that she told the claimant's daughter that the file would have to be reviewed by the adjusters and she gave the claimant's daughter a number and a reference name to contact. Ms. Dorr was uncertain as to when she received this call but believed it to be several weeks after his alleged injury. Ms. Dorr testified that there was nothing in the nurse's notes to indicate that the claimant had injured his back but she did agree that the respondent had completely accepted the claimant's knee injury.

On cross examination, Ms. Dorr testified that she has nothing to do with filling out requests for leave from the respondent's business. Ms. Dorr also testified that the claimant's file does not reflect that he had gone to the emergency room in Waldron and she was unaware if the respondents had paid for this ER visit. Ms.

Dorr did testify that she did see a note where the claimant did go to the emergency room.

Teresa Morris testified that she was employed by the respondent and had been working for them for thirteen and a half years. This witness testified that she currently is a supervisor and has been in this position for a year and eight months. Ms. Morris testified that on September 17, 2005, she was in her supervisor's position but in a different line. This witness explained that when one supervisor is absent the other supervisors will fill in and help. Ms. Morris testified that she does recognize the claimant and remembers that she was his supervisor in the debone for several months. Ms. Morris testified that on September 16, 2005, Bobby Ammons would have been the claimant's supervisor. Ms. Morris testified that on September 16, 2005, Mr. Ammons was filling in for another supervisor in another department and she was standing in for Mr. Ammons. Ms. Morris testified that the claimant was working in wing salvage. Ms. Morris testified that usually the person who is doing the wing salvaging takes the tub to the scales once the tub is full. This witness testified that there is a cart which can be used. Ms. Morris testified that due to the claimant's poor eye sight he was not rotated off of this salvage line but that he would give the stacker a break at various times or would fill in for the stacker if they were late coming back from break. Ms. Morris explained that the stacker moves the tubs when they are full, weighs them and then stacks them on a pallet. Ms. Morris estimated that the claimant would work no

longer than thirty minutes at a time at the stacker position. Ms. Morris testified that between September 16, 2005, and October 26, 2005, she did not observe the claimant having any difficulty with his job nor did he ever come to her to let her know that he got hurt on any job. Ms. Morris testified that she was unaware that the claimant had been hurt on September 16, 2005, and that she did not send him to the nurse's station nor did anyone tell her that he had gotten hurt that night.

On cross examination, Ms. Morris testified that it was possible that someone came up to her on September 16, 2005, and reported that the claimant had gotten hurt but she just does not remember it. Ms. Morris testified that if she had been told that the claimant got hurt she sent him to the nurse's office but she just does not remember. Ms. Morris testified that the claimant was a good employee and helpful to the other co-workers.

Joseph Diaz testified that he has been working for the respondent for nine years and for the past seven years has been the complex human resource manager. Mr. Diaz testified that he is not familiar with the claimant but is familiar with his record. Mr. Diaz testified that the claimant worked at least forty hours and some overtime prior to September 16, 2005, and for the weeks following that date. This witness testified that on the last week the claimant worked specifically October 24, 25 and 26 he worked eight hours as well as some overtime. Mr. Diaz agreed that the claimant did not work past October 26, 2005. Mr. Diaz testified that on October 29 they received a call reporting that the claimant

was in the hospital so a leave of absence form was generated. This witness testified that at the time the claimant quit working for the respondent, he was entitled to at least three months of leave before termination. Mr. Diaz testified that the claimant was granted three months of leave and at the end of this period of time was notified that his leave was expiring and no word was received from the claimant so he was terminated. Mr. Diaz testified that during the period of time the claimant worked for the respondent he had a perfect attendance record as set forth on Respondents' Exhibit No. 2, page 18. Ms. Diaz testified that he had no personal knowledge of the claimant having a work related injury in September 2005.

On cross examination, Mr. Diaz testified that he was setting forth the claimant's work record based on the records themselves, not on any personal observation. Mr. Diaz agreed that if the claimant was having problems doing his work he would not be aware of it. Mr. Diaz testified that the claimant was granted extensions based on what could have been someone calling in requesting such action. Mr. Diaz agreed that there has to be some action taken for extensions to be granted such as a call in or documentation. Mr. Diaz testified that notification was sent to the claimant of his pending termination at his Waldron address. This witness testified that he was unaware that the respondent had knowledge that the claimant had moved to Mission, Texas, after October 27. This witness testified that he was in the hearing room and heard Ms.

Cindy Dorr testify that she received a call from the claimant's daughter concerning the claimant being in Mission, Texas.

The medical records set forth that the claimant was seen at the nurse's station on September 16, 2005, reporting that he had hurt his left knee. Christi Combs notes that there is a half dollar sized reddened area on the claimant's left knee for which she applied a cold pack and returned the claimant to work. The claimant was seen at the Waldron Hospital on October 27, 2005, where it is noted that he fell a month ago and injured his left knee, is complaining of pain from his mid thigh to mid calf and also has pain in his lower back sometimes. Tests of the claimant's left hip made on October 27, 2005, indicate that his left hip is normal and the tests made of his lumbar spine set forth osteoarthritis and slight disc space narrowing at L1-2 and L3-4. The claimant was given a restriction of no lifting, pushing or pulling or standing on both feet for one week. The claimant began being seen by Dr. Nelson Kalaf in Mission, Texas, on November 17, 2005, for his complaints of muscle or joint pain, back ache and limitation of motion and activity. Dr. Kalaf indicates that the claimant fell at work on September 17, 2005, and was assessed with lumbar pain, leg spasm and high blood pressure. Dr. Kalaf took the claimant off work for two weeks. The claimant underwent an MRI on December 12, 2005, which revealed a large left paracentral disc herniation at L5-S1, degenerative disc and joint disease at the L3-L4 and L4-5 levels. The claimant was then seen by Dr. Humberto Tijerina on December 21, 2005. The doctor notes that after

examination and review of the claimant's MRI results, he has a herniated nucleus pulposus at L5-S1 on the left and suggests surgical intervention. Dr. Tijerina also prescribed pain medications. Dr. Nelson Kalaf faxed a letter to the respondent on January 6, 2006, setting forth that the claimant was under his care for muscular skeletal pain, limited range of motion of the back and lower extremities noting that he will be further examined on January 9, 2006, to see if he can resume his regular activities. The claimant was seen by Dr. Jose R. Carreras on January 12, 2006. The doctor notes that the claimant reports having pain to the left lower extremity as well as inflammation of his great toe. After physical examination and review of the claimant's tests, Dr. Carreras notes that the claimant does have a huge herniated disc pushing the nerves on the left side of the L5/S1 as well as gout of the great toe. Dr. Carreras recommended a lumbar laminectomy of the L5 S1 and referred the claimant back to Dr. Kalaf for surgical clearance. The claimant continued to be followed by Dr. Kalaf through January and March. Dr. Carreras writes on April 11, 2006, that he has seen the claimant for follow up on his left lower extremity pain, noting that his pain goes to his left hip and waist area. After examination, the claimant was diagnosed with facet joint pain secondary to mild spinal stenosis and a repeat MRI was recommended. Dr. Carreras writes on May 11, 2006, that the claimant does have problems with spinal stenosis which is secondary to his herniated disc. Dr. Carreras notes that the claimant would benefit if they would remove the disc at the L5-S1 level and he is

doing fine as to his knee but needs to have a decompression laminectomy and possible fusion at that level. The claimant was again seen by Dr. Carreras on May 30, 2006, where a MRI was discussed. Dr. Carreras writes that the claimant has a herniated disc on the left side and a review of his EMG/NCV study showed chronic radiculopathy at L5. Surgery was again discussed but at this time the claimant was not eager to go through the recommended surgery. The claimant was seen by Dr. Kalaf on June 26, 2006, where after examination he was assessed with lumbar disc disease and was awaiting surgery. Dr. Kalaf writes on July 18, 2006, that the claimant continues with lumbar pain radiating to the left lower extremities, noting that this pain has persisted since his fall on September 17, 2005, while he was working. Dr. Kalaf notes that the claimant has been treated medically and with physical therapy without improvement and that an MRI performed in December 2005 of his lumbar spine revealed a large left paracentral disc herniation at L5-S1. Dr. Kalaf notes that the claimant has been evaluated by an orthopedist as well as a neurosurgeon and both have recommended surgical intervention.

After a complete review of this case, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back while working for the respondent on September 16, 2005. The respondents have accepted a compensable injury to the claimant's left knee on this date and the claimant has testified that at the time he fell and hurt his left knee he also twisted his back which he reported to the plant nurse along

with the complaints of his left knee. It must be remembered that the claimant does not speak much, if any, English and communication is always a problem. The claimant testified that he did continue to work until October 27 when he was taken to the hospital for complaints of severe pain in his low back radiating down into his left leg. X-rays taken of the claimant's back at that time revealed osteoarthritis as well as disc space narrowing at L1-2 and L3-4. The claimant was released from work on that day with a restriction of no lifting, pushing or pulling or standing on both feet for one week. The claimant then began being seen in Mission Texas, by the doctors there for complaints of lumbar pain noting that he fell at work on September 16. Again, the claimant was taken off work on November 7, 2005, by Dr. Nelson Kalaf and after being seen by Dr. Carreras in December, underwent an MRI which revealed a large left paracentral disc herniation at L5-S1. This MRI also revealed degenerative disc disease at several joints. There was much said about the claimant continuing to work after his initial fall on September 16, 2005, but it is noted that the claimant has a outstanding attendance record prior to this fall and obviously has a strong work ethic. The claimant's testimony was that he went to work although it was very difficult and he was in pain the entire time and continued to purchase medication from the machines there at the respondent's plant. The claimant, therefore, should be entitled to medical treatment for his low back problems as well as temporary total disability from November 7, 2005, to a date to be determined.

FINDINGS & CONCLUSIONS

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

2. On September 16, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left knee on September 16, 2005.

4. The claimant is entitled to a weekly compensation rate of \$274.00 for temporary total disability and \$206.00 for permanent partial disability.

5. Medical expenses have been paid on the claimant's knee.

6. The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on September 16, 2005. See discussion above.

7. The respondents should pay for all reasonable and necessary medical treatment for this claimant's low back injury.

8. The claimant is entitled to temporary total disability from November 7, 2005, to a date to be determined.

9. The respondents have controverted this claim in its entirety.

10. The claimant's attorney should be entitled to statutory attorney's fees based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on September 16, 2005.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable low back injury.

The respondents should pay temporary total disability to this claimant from November 7, 2005, to a date to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE