

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502587

BEN LAMMERS, EMPLOYEE	CLAIMANT
HOME DEPOT, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 3, 2006

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE EMILY S. PAUL, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE ANDREW IVEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on February 14, 2006 in Little Rock, Arkansas. A prehearing order was entered in this case on November 21, 2005. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The employer-employee-carrier relationship existed on or about August 1, 2004.

2. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
3. The claimant's average weekly wage on August 1, 2004 was \$245, entitling the claimant to compensation for temporary total disability at \$164 per week and for permanent partial disability at \$154 per week if this claim is found compensable.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability.
2. Entitlement to medical benefits.
3. TTD benefits from 8/1/04 until a date yet to be determined.
4. Controverted attorney fee.

Respondents:

1. Whether the claimant sustained a compensable injury.
2. Whether the claimant is entitled to benefits in connection with his alleged injury.

The record consists of the February 14, 2006 hearing transcript and the exhibits contained therein, and the

reports of Dr. Steven Cooper from December 12, 2000 until September 3, 2004, which I received from Mr. Ivey on March 7, 2006 and which I have "blue-backed" to designate as part of the record.

DISCUSSION

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant became employed at Home Depot as a lot assistant on July 10, 2004. The claimant testified that on August 1, 2004, he picked up an 80 pound sack of concrete while helping load a customer's

truck and felt a "crack" in his back with a shooting, white hot pain.

The claimant testified that he had no prior back problems that did not heal up within an hour, and that he had never required treatment for any prior back problems. The claimant testified that he had been to a chiropractor, but not for his back. The claimant testified that he told Mark Niemeier about the incident on the day that it occurred.

Mark Niemeier, a former Human Resources Manager, with the Conway Home Depot store, testified that on August 1, 2004 the claimant came into Mr. Niemeier's office walking a little gingerly and stated that his back was hurting. Mr. Niemeier testified that the claimant indicated that he had injured himself playing rugby. Mr. Niemeier testified that he did not send the claimant to a company doctor on August 1, 2004 because the claimant told Mr. Niemeier that he had hurt himself playing rugby. Mr. Niemeier testified that Mr. Niemeier first learned that the claimant allegedly hurt himself lifting an 80 pound sack of concrete when he was provided this information by the claimant's father in September of 2004.

Ms. Kerrie Kellerman, also a former Human Resources Manager from the Conway Home Depot store, testified that she started work at the store in November of 2004, and by the time she started work at the store the claimant was employed as a cashier. Ms. Kellerman testified that she was not immediately aware that the claimant was having back problems. Ms. Kellerman testified that the claimant initially told her in December of 2004 that his back problem was a rugby injury, and that lifting concrete was aggravating that injury. Ms. Kellerman testified that she first learned that the claimant was reporting an allegedly work-related injury in March of 2005 when he advised he was going to require surgery.

In accessing the weight to accord the claimant's testimony that he had no prior back problems that did not heal up within an hour, and that he had never required treatment for any prior back problems (and that he had been to a chiropractor before but not for his back), I note the claimant treated with Dr. Steven Cooper, a chiropractor, both before and after August 1, 2004. Because Dr. Cooper initially only provided the attorneys in this case a copy of his medical reports for the period after August 1, 2004, by agreement of the parties, Dr. Cooper's clinical notes prior

to August 1, 2004 were obtained after the hearing and submitted as additional evidence.

Contrary to the claimant's hearing testimony that he had no back problems prior to August 1, 2004, and that he had been to a chiropractor previously but not for his back, I note with interest that when the claimant presented to Dr. Cooper for the first time after his alleged August 1, 2004 injury, the claimant rated his condition as 8/10. The claimant in fact reported symptoms in his spine, lower back, hips and knees. However, I also note from Dr. Cooper's reports that the claimant previously presented to Dr. Cooper's office on July 28, 2004, only several days before the alleged work injury, with low back pain, shooting pain and numbness in his hips, with a condition rated at 9/10 (i.e., more severe than after the alleged work injury). Similarly, the claimant presented to Dr. Cooper on June 1, 2004 for symptoms of low back pain; he presented on April 14, 2004 for hip and low back pain; and he presented on March 10, 2004 to Dr. Cooper with low back pain. In fact, the claimant presented to Dr. Cooper on August 29, 2003 for low back pain and the claimant presented to Dr. Cooper on August 25, 2003 for low back pain. Dr. Cooper's treatment

records between December 2000 and July 28, 2004, contain numerous clinical findings related to the lumbar spine.

In short, I find the claimant's testimony completely at odds with the testimony of Mr. Niemeier and of Ms. Kellerman, and completely at odds with Dr. Cooper's treatment records prior to August 1, 2004. Because I accord greater weight to the testimony of Mr. Niemeier and Ms. Kellerman, and to the treatment records of Dr. Cooper, than the weight that I accord to the claimant's testimony and the history that he has provided to his physicians, I find that the claimant has failed to establish by a preponderance of the evidence that his low back problems have in any way arisen out of his employment with Home Depot, Inc.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee-carrier relationship existed on or about August 1, 2004.

2. The Arkansas Workers' Compensation commission has jurisdiction over this claim.

3. The claimant's average weekly wage on August 1, 2004 was \$245, entitling the claimant to compensation for temporary total disability at \$164 per week and for permanent partial disability at \$154 per week if this claim is found compensable.

4. The claimant has failed to prove by a preponderance of the evidence that his low back problems at issue arose out of and during the course of his employment with Home Depot, Inc.

ORDER

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

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge