

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408480

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| JAMES L. MITCHELL, EMPLOYEE | CLAIMANT |
| GEORGIA-PACIFIC CORPORATION, EMPLOYER | RESPONDENT |
| SELF-INSURED, (SEDGWICK CLAIMS MANAGEMENT SERVICES, TPA), INSURANCE CARRIER | RESPONDENT |

OPINION FILED AUGUST 3, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on April 14, 2006, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Eddie H. Walker, Attorney at Law, Fort Smith, Arkansas.

Respondents represented by Ms. Susan M. Fowler, Roberts Law Firm, P.A., Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 14, 2006, before Administrative Law Judge Cynthia Estes Rogers. Subsequent to the hearing, the case was transferred to this Administrative Law Judge for all further proceedings, including the decision in this case. A Pre-hearing Order was entered in this case on December 13, 2005. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as stated on the record are hereby accepted:

1. The employer/employee relationship existed on August 10, 2004.
2. Compensation rate: \$453.00 –TTD; \$340.00 – PPD

3. Some medical benefits were paid by respondents on August 10, 2004, and continuing through some short period of time before respondents controverted the claim.

By agreement of the parties, the issues to be litigated are:

1. Compensability of claimant's alleged low back and thoracic injury as well as claimant's alleged cervical spine injury;
2. Claimant's entitlement to TTD benefits, related medical benefits, and attorney's fees.

The record consists of a one volume transcript of the April 14, 2006, hearing, consisting of the testimony of Dale Thomas, James Mitchell, James Kazee, Bill Wray and all documentary evidence consisting of claimant's Exhibit No. 1-3 (medical records and deposition testimony of Dr. Reza Shahim) and respondents' Exhibit No. 1-3 (health care documents, medical records, and videotape). In addition, the Post-hearing Brief filed by Respondents on April 24, 2006, has been blue-backed and will be made part of the record of this case.

FACTUAL BACKGROUND

The claimant alleges that he sustained a compensable injury to his back and neck on August 10, 2004, while performing his regular work duties at Georgia-Pacific Corporation. The respondents initially accepted the low back/thoracic injury and paid benefits through September 28, 2004. The respondents now controvert the entire claim contending that there is no objective evidence to support an injury to the claimant's back or neck, as alleged, or to establish that the claimant's herniated cervical disk arose in or out of the course of his employment with Georgia-Pacific.

The claimant (b.11-27-57) worked for Georgia-Pacific since April of 1984 in various jobs. At the time of the alleged incident, the claimant was working forty

hours a week as a full-time Deck Operator. Claimant's job as explained by Dale Thomas, a vocational specialist, was to be stationed at a control panel and monitor logs as they were moved down a conveyer belt and lifted up on a jack ladder and then into a lathe where the bark is stripped and then the cores are sent down another conveyor belt. If the logs are not correctly stripped, the operator would take the log off and feed it back into the process. In addition, the operator monitors the logs as they go in and out the lathe to make sure there is no jam and there is a smooth flow.

It is undisputed that on August 10, 2004, a detached and movable catwalk traversing a "river" of logs moved from its placed position towards the claimant's work station and fell over onto the jack ladder of the lathe machine. The claimant testified at the hearing that he was standing to the right of the control panel, and in front of the jack ladder, when he was struck by the catwalk in his mid-back knocking him down to the floor on his hands and knees. The claimant and his supervisor, Bill Wray, both testified that the claimant continued to work for several hours after the incident but left work before the end of his shift reporting that his back hurt. Wray further testified that the claimant appeared to continue working without difficulty in performing his normal job functions when he would observe him. Wray testified that he visually inspected the claimant's back both at the time of the incident and several hours later and saw no bruise or welt in the location where the claimant described the catwalk struck him.

On August 11, 2004, the day following the alleged fall, the claimant called in to report the incident to the Safety Director and requested medical treatment. The claimant was first seen by Dr. Gresham with the Family Clinic of Ashley County, the company doctor, on August 12, 2004. The claimant reported pain in the lower part of his back and neck from being hit in the back by some type of catwalk. Dr.

Gresham further noted "On talking with the supervisor apparently this catwalk did land on him, but apparently not with its whole weight . . . he continued to work for five hours afterwards". Dr. Gresham specifically noted in his record of the examination that he observed no abrasions, no ecchymosis or swelling, and no muscle spasms. He diagnosed the claimant with a strain and released him back to work recommending over-the-counter medication and ordered him to return if he continued to have problems.

The claimant testified that he was unhappy with Dr. Gresham's treatment and went to the emergency room at Ashley County Medical Center later the same date, August 12, 2004. The emergency room physician made no note of any swelling, bruising or abrasions and prescribed Flexeril for "spasms of which claimant complained by history".

The claimant continued to see Dr. Benjamin Walsh at the Family Clinic of Ashley County, another company doctor until August 25, 2004, at which time Dr. Walsh released the claimant to full-duty work. Dr. Walsh made no objective findings and based his treatment solely on the history provided by the claimant. Although Dr. Walsh stated that he thought there was indication of muscle tightness, muscle tightness is not an objective finding as it can be controlled by the claimant. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). This is even more significant in light of the fact that Dr. Walsh's records indicate that he believed the claimant was showing signs of symptom magnification.

The claimant testified that he continued to work light duty after his accident through September 28, 2004, when he was first seen by Dr. Massenelli, a neurosurgeon, by referral by Dr. Walsh. Dr. Massenelli's clinic notes reflect that x-rays of claimant's cervical spine reflected significant degenerative disc disease with disk space narrowing and osteophyte formation at C6-7 and C7-T1. X-rays of the

lumbar spine were negative. Dr. Massenelli ordered an MRI which was performed on September 30, 2004. The results of the MRI reflect:

1. Multilevel mid-and lower cervical disc degeneration with posterior disc/osteophyte complexes and resultant spinal and foraminal stenoses. . .
2. No acute fracture, bony destruction, or spinal cord abnormality is identified.”

Clinic Notes from October 5, 2004, reflect that Dr. Massinelli reviewed the MRI findings with the claimant and told him that the changes on his MRI were chronic and were not caused by any work-related injury, noting that the claimant needed physical therapy for his cervical spine and possible cervical fusion. In a letter to Dr. Walsh dated October 5, 2004, Dr. Massenelli opined that the findings noted on the claimant’s MRI were chronic degenerative changes of his cervical spine and not caused by the work-related accident.

The claimant was unhappy with Dr. Massenelli and testified that he began treating on his own with Dr. D’Orsay Bryant, an orthopedic surgeon. The medical records submitted by both parties show that, while the claimant complained of neck pain, the primary treatment and concern of the claimant and Dr. Bryant was an unrelated condition of bilateral carpal tunnel syndrome. The claimant underwent two surgical procedures, the last in January 2005, for which he was taken off work for periods of time after September 28, 2004. Dr. D’Orsay Bryant signed several “Statements of Continuing Disability” for claimant’s disability carrier during this time period for his neck and carpal tunnel. In each of these statements, Dr. Bryant states that the claimant’s neck condition is not work related.

Dr. Bryant referred the claimant to Dr. Reza Shahim in Little Rock, Arkansas, in February 2005, almost six months after his alleged accident of August 10, 2004. Dr. Shahim’s records indicate that the claimant related to him that he was “struck in the back of the neck and in between his shoulder blades” which is contrary to his

testimony in this matter. Dr. Shahim's records indicate that he believed the previous MRI read by Dr. Massenelli was of poor quality, but he did read what he thought to be a herniation at C4-5 on this MRI. Dr. Shahim recommended another MRI which showed the same findings as the previous MRI.

Dr. Shahim stated that any opinion he could form regarding the cause of the herniated disk in the claimant's neck would be based solely on the claimant's verbal history. Dr. Shahim also acknowledged that the claimant never shared his significant history of neck problems with him, that the claimant did not inform him he had another accident prior to the alleged accident in this case, that herniations can be caused by degenerative disk disease, and "the majority of patients have the rupture unrelated to any trauma". Although Dr. Shahim indicated that the occurrence of symptoms immediately following an accident could result in an aggravation of a pre-existing condition, he admitted that there was no objective evidence to verify causation without a comparison of a MRI prior to the accident with an MRI after the accident. At best, based on Dr. Shahim's statements, any opinion regarding causation, if any, are speculative at best. Claimant's lack of credibility concerning his pre-existing conditions further diminishes the likelihood of the accuracy of Dr. Shahim's opinions since they were based on the patient's history.

Medical records from February 25, 1999 until June of 2002 reflect that claimant did have a significant history of prior neck and back complaints, including an assessment for degenerative disc disease. Claimant's prior neck complaints included pain, numbness and radicular type symptoms into his arms and legs. An Office Note from Dr. Barry Thompson on June 27, 2002, reflects that claimant was assessed with degenerative disc disease in both the cervical and lumbar area with right sciatica and that the claimant would be referred to a pain clinic if the symptoms did not resolve in two weeks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Claimant was employed by Georgia-Pacific on August 10, 2004.
3. Claimant has proven by a preponderance of the evidence that he was hit by a falling catwalk while performing employment services on August 10, 2004.
4. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on or about August 10, 2004, in that Claimant has failed to prove by a preponderance of the evidence that the alleged injury is established by medical evidence supported by objective findings.
5. Claimant has failed to prove by a preponderance of the evidence that the work-related incident was the cause of the need for his medical treatment.

DISCUSSION

I. COMPENSABILITY

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 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.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, there is dispute over whether a specific incident occurred on August 20, 2004, at work. The claimant testifies that he injured his back when he was struck from behind by a falling catwalk. He testified that he reported the incident immediately to his supervisor and remained at work. The respondents contend that the video and other evidence depicting a visual of the catwalk in relation to the claimant demonstrate that the catwalk would have landed on the jack ladder prior to striking the claimant and could not have struck him in his mid-back area. His supervisor testified that he could not find anyone who had witnessed the incident as described by the claimant. He further testified that the claimant continued to work without any difficulty performing his job duties.

Based on my review of the credible evidence, I find that claimant has proven by a preponderance of the evidence that he was hit by a falling catwalk while performing employment services for Georgia-Pacific on August 20, 2004. This is

supported not only by the testimony of the claimant, but also the testimony of his co-worker, James Kazez, who observed the “catwalk down” and the claimant “struggling, trying to get up” immediately after the fall. In addition, the notes by Dr. Gresham reports that a supervisor confirmed that the claimant was struck by the falling catwalk.

II. OBJECTIVE FINDINGS

The employee must prove by a preponderance of the evidence that he sustained a compensable injury. In addition, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the claimant does not establish a compensable injury by medical evidence supported by objective findings.

A review of the medical records offered in this case reflect there is no objective medical evidence that the claimant sustained any injury to his back or neck as a result of this incident. Although the doctors diagnosed the claimant with a “muscle strain,” he did not report any findings of swelling, bruising, muscle spasms, or any other objective medical findings. Further, the objective findings of the MRI, as reported by Dr. Massenelli, was that it was a normal study showing evidence of degenerative conditions.

In Lockett v. Cooper Tire & Rubber Co., 2005 AWCC 123 (June 21, 2005), the Commission found that the claimant had failed to meet his burden of proof when his MRI reflected normal findings. Similarly, in Overstreet v. Pontiac Coil, Inc., 2004 AWCC 194 (November 2, 2004), while finding that an on-the-job incident happened, the Commission held the claimant failed to meet her burden in that there was no medical evidence offered supported by objective findings of injury in the

record. In the case of Hassler v. Thomas & Betts Corporation, 2005 AWCC 215 (October 19, 2005), the claimant contended that she sustained an injury to her right shoulder when she heard it “pop” while lifting parts. In reviewing the evidence, the Commission noted that the “mild tendinosis” and “small amount of fluid” shown on the MRI were not objective findings sufficient to establish a compensable injury to the claimant’s shoulder. Further, the Commission noted that the doctor did not report any findings of swelling, bruising, or any other objective medical findings.

III. CAUSATION

In the instant case, it has been established that an incident involving the claimant occurred at work. It is equally clear from the medical evidence that objective medical evidence established the claimant’s need for surgery to his back. The primary dispute is whether claimant has established a causal connection between his compensable injury and the surgery and other medical treatment given the fact that claimant suffered from a preexisting back problem prior to the work-related incident. In a workers’ compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). This is not a case where the claimant must prove that the back injury had to be the major cause of the need for the medical treatment in order for it to be covered by workers’ compensation. That analysis is not applicable since this is a case involving a specific injury and request for medical treatment as opposed to a gradual onset injury or an award of permanent disability benefits. See, Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 145, 923 S.W.2d 883, 885 (1996). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

In the instant case, it is clear that claimant suffered from degenerative disc disease and that his complaints of back and neck pain preceded the alleged incident. The facts further reflect that the claimant was not diagnosed with a herniated disk until six months following the alleged incident at work, notwithstanding examination and treatment from several doctors, including x-rays and an MRI. If a disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the Commission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1961).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). However, an aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

Claimant contends that he sustained a herniated disc to his cervical spine which necessitated surgery by Doctor Shahim. Claimant's supervisor testified that the claimant continued to work after the accident for almost five hours with no apparent problems. He also inspected the claimant's back on two separate occasions that evening and did not visibly observe a bruise or welt or other obvious indication of an acute injury as claimed. Dr. Reza Shahim, the claimant's physician, stated that he could offer no opinion regarding the cause of the claimant's back condition absent the claimant's own history. This arguably makes any opinion of Dr.

Shahim speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. In addition, Dr. Shahim acknowledged that the claimant failed to relate his prior history of similar complaints and that his condition could also be degenerative in nature versus the result of an acute injury.

Medical reports from the company doctor and a letter from the emergency room physician who saw the claimant on August 12, 2004, both deny any indication of an injury of the sort alleged such as bruises, or swelling or other marks. The claimant claimed he was hit by this heavy catwalk hard enough to knock him down onto his hands and knees. Medical records through October 2004 show no muscle spasm or any other obvious indication of an acute injury as claimed. In fact, Dr. Walsh, the company doctor, made numerous notes indicating he believed the claimant to be magnifying his symptoms. In October 2004, Dr. Bryant did note the claimant complained of muscle spasms. However, despite the claimant's claims of terrible neck pain, he treated with Dr. Bryant primarily for carpal tunnel syndrome. Also, Dr. Bryant signed several disability forms for the claimant in which he stated the claimant's neck condition was not work related. In addition, respondents presented medical evidence indicating that the claimant required medical treatment for severe neck pain complaints and radicular symptoms prior to this accident with symptoms very similar to those after his accident. Dr. Massenelli and Dr. Bryant opined that all findings were pre-existing. Medical records from February 25, 1999 until June of 2002 reflect that claimant did have a significant history of prior neck and back complaints, including an assessment for degenerative disc disease. Claimant's prior neck complaints included pain, numbness and radicular type symptoms into his arms and legs.

Based on my review of the entire record, I find that claimant failed to prove that the work-related incident was the cause of the need for his medical treatment.

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