

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704496

EDDIE DAY	CLAIMANT
ALPHA UTILITIES, INC.	RESPONDENT
OHIO CASUALTY, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 26, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by ANDREW IVEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 16, 2007, in Fort Smith, Arkansas. The deposition of Thomas Patrick Gleason was taken on November 14, 2007 and was admitted subsequent to the hearing as Claimant's Exhibit No. 2.

A pre-hearing order was entered in this case on September 10, 2007. Immediately prior to the hearing, the parties announced that they could now agree on the appropriate weekly compensation rates. The claimant also announced that he was only seeking temporary total disability benefits for the period of March 29, 2007 through July 18, 2007 (rather, than through a date yet to be determined). A copy of the pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On January 3, 2007, and March 28, 2007, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$384.00 for total disability and \$288.00 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 compensable injuries to his right hip on either or both January 3, 2007 and/or March 28, 2007.
2. The claimant's entitlement to medical services, temporary total disability benefits from March 29, 2007 through July 18, 2007, and attorney's fees.
3. The effect of Ark. Code Ann. §11-9-701 on any benefits accruing prior to March 28, 2007.

In regard to these issues, the claimant contends:

"a. The claimant contends that he sustained an injury to his right hip on or about January 3, 2007 arising out of and in the course of his employment. He contends that his condition substantially worsened while he was performing job duties on March 28, 2007 but he does not know whether those activities actually caused a new injury or simply caused a flare up of the injury that he sustained on or about January 3, 2007.

b. The claimant contends that he is entitled to temporary total disability benefits from March 29, 2007 until July 18, 2007 and reasonably necessary medical treatment.

c. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues the respondents contend:

“Respondents contend that the claimant is not entitled to the requested benefits because the claimant cannot establish that he sustained accidental injuries resulting in objective findings of injury to his right (or left) hip, which arose out of and in the course of his employment with the respondent-employer, on or about January 3, 2007. Respondents further contend that the claimant is not entitled to the requested benefits because the claimant cannot establish that he sustained an aggravation injury to his right (or left) hip, which arose out of and in the course of his employment with the respondent-employer, on or about March 28, 2007.”

DISCUSSION

_____The central issue in this case is whether the claimant sustained compensable injuries to his right hip on either January 3, 2007 and/or March 28, 2007. The burden rests upon the claimant to prove that his right hip difficulties represent a “compensable injury” under the Act.

In the present case, the claimant alleges that his right hip difficulties are the result of a specific incident or injuries that occurred on either or both January 3, 2007, and/or March 28, 2007. He makes no contention, whatsoever, that his right hip difficulties are the result of a cumulative trauma injury that was related to the performance of employment activities overtime. As a result, the claimant must prove the occurrence of an injury to his right hip that satisfies all of the definitional elements for a “compensable injury”, as defined by Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements elements:

- (1) The injury must arise out of and occur in the course of the employment;
- (2) The injury must be caused by a specific incident;
- (3) The injury must be identifiable by time and place of occurrence;
- (4) The injury must cause internal or external physical harm to the claimant's body;
- (5) The injury must require medical services or result in disability.

In order to prove the first three of these definitional elements, the claimant must establish the existence of a causal relationship between his right hip difficulties and a specific employment related incident. Essentially, the only direct evidence that was presented by the claimant to prove the existence of this relationship is his own testimony. Although the testimony of a party is never considered uncontradicted, this does not mean that it may simply be disregarded. If such testimony is credible, it is sufficient, in and of itself, to prove any fact that the testimony is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident and the existence of a reasonably close temporal relationship between this incident and the initial onset of symptoms and complaints indicative of the occurrence of an injury to his right hip.

The claimant testified that on January 3, 2007, he was working down in a muddy, rocky trench laying a 6-inch water line. He stated that while performing this activity, he twisted his body and

his hip "gave out" on him. He further testified that when this occurred, he fell to the ground. He stated that a co-employee, Chris Hancock, saw this incident occur and tried to help him up. It was also his testimony that Bill Hood was also present at the time of this incident and that he complained to Mr. Hood that he had hurt his hip. According to his testimony, he also immediately advised his foreman, Tom Gleason, of the accident and injury to his hip and was told that an accident report would be filled out. He testified that he subsequently informed Tom Harris, the owner of the respondent, about the accident and injury to his hip and was told that he would be provided with medical treatment. Finally, he stated that when such treatment was not provided within a couple of weeks, he sought treatment on his own from his family doctor.

The foregoing testimony of the claimant is not substantiated by the testimony of Chris Hancock. Mr. Hancock testified that, prior to January 3, 2007, the claimant complained to him of difficulties with his back and hips on various occasions and told him that these difficulties were due to injuries from a previous cave in at work. Mr. Hancock remembered working with the claimant in a muddy ditch in January of 2007, laying 8-inch pipe. He also recalled that the claimant made complaints, at that time, with his back or hips. However, he did not recall observing the claimant fall in January of 2007. Nor did he recall that the claimant attributed his back or hip complaints in January of 2007, to any recent employment related injury.

The claimant's testimony is also contradicted by the testimony of William Hood. Mr. Hood testified that throughout the period of time he worked around the claimant, the claimant would complain of various aches and pains. However, he stated that he did not observe any accident or incident or hear the claimant complain of any employment related injury to his right hip in January of 2007, March of 2007, or at any other time during the claimant's employment.

The testimony of Thomas Gleason, the claimant's supervisor and also his brother-in-law, would at best be only marginally supportive. Mr. Gleason testified that on one occasion he observed the claimant get out of a muddy ditch, that the claimant was limping, and that the claimant complained about his leg. He also testified that he had never heard the claimant complain with his leg before that time. However, he initially testified that this event occurred in March of 2007, but subsequently described this event as occurring in December of 2006, either shortly before or around the time the claimant failed a random drug screen test. According to Respondents' Exhibit No. 2, this random drug screen was performed on December 11, 2006. At that time, the claimant tested positive for the presence of hydrocodone, a narcotic pain medication.

The claimant's testimony is also contradicted by the testimony of Jett Harris, the owner of the respondent. Mr. Harris testified that neither the claimant nor anyone else advised him that the claimant had sustained a job related injury on January 3, 2007. He

stated that the first he knew of any alleged injury in January of 2007, was when he received notice of the filing of the claimant's workers' compensation claim, several months later.

Most important of all, the claimant's testimony is directly contradictory to the initial history recorded in the medical evidence. When the claimant first sought medical treatment for his right hip difficulties, he consulted his family physician, Dr. Robert C. Williams. This visit occurred on January 15, 2007. In his initial clinic notes, Dr. Williams recorded a history of pain in the claimant's right hip, thigh, and groin area that had been present for three weeks. Dr. Williams also specifically noted "no injury". In his testimony, the claimant stated that he expressly informed Dr. Williams of the January 3, 2007 on the job injury and denied that he told Dr. Williams that his complaints occurred without any injury. I find it difficult to believe that Dr. Williams would overlook such relevant and significant information or make up the history of "no injury".

When the claimant was subsequently seen by Dr. David Sudbrink at the River Valley Musculoskeletal Center, he was required to complete a patient history. In this patient history, the claimant indicated that he had experienced difficulties in his right upper thigh, right knee, and lower back. He further stated that his right leg had been hurting for almost a month and would give out on him. While he indicated a date of injury as January 3, 2007, he described the injury as occurring from "lifting heavy pipe and jumping on and off heavy equipment". In response to the inquiry:

“Where did it occur?”, the claimant gave a somewhat cryptic response: “I believe at work, if injury not (illegible)”. It is apparent that the claimant did not relate any specific incident, such as that described in his testimony. In fact, the progress notes of Dr. Sudbrink simply record that the claimant was experiencing activity related pain and that the more he does, the more it hurts. Dr. Sudbrink did note that certain positions could cause the claimant’s hip to give way very suddenly and that the claimant has actually fallen a couple of times because of this. Dr. Sudbrink summarized the claimant’s right hip difficulties as follows:

“He (the claimant) considers himself to have a bit of a bad back although he does this heavy lifting in awkward positioning. He is trying to do more of that with his legs but the more of this bending and squatting he does with his legs the more it is aggravating this problem with his right hip. So this is what is worrying him that he feels like the way that he has been able to get by in the job is to rely on his legs and now he is not able to rely on the right leg and has had these give way episodes, night pain and certain positions during the day are extremely painful to him.”

Clearly, these statements are not supportive of the occurrence of any specific or particular employment related incident, such as that described by the claimant in his testimony, as precipitating the claimant’s initial onset of symptoms with his right hip.

The subsequent reports of Dr. Sudbrink also fail to identify any specific incident, employment related or otherwise, as the cause of the claimant’s right hip difficulties. In his progress notation of February 12, 2007, Dr. Sudbrink states:

“I discussed that this MRI does not disclose any serious pathology other than the fact that we think that we have a young guy that is very active in working underground pipelines that has a progressive degenerative hip condition.”

The only history contained in the medical evidence that in any way resembles the description of the January 3, 2007 incident given by the claimant in his testimony is found in the initial report of Dr. James Tucker. In his report of February 28, 2007, Dr. Tucker records:

“He (the claimant) indicates that it (right hip pain) started about a month ago. He was carrying a heavy water pipe when he (sic) leg gave out and he felt a catch and locking sensation.” (Emphasis mine)

However, the date of the incident and the actual mechanism of the injury, which is recorded by Dr. Tucker, is still substantially different than the incident described by the claimant, as occurring on January 3, 2007.

At the hearing, the claimant also testified that, on March 28, 2007, he was operating an excavator, which apparently came in contact with some electric lines. He stated that when this occurred, he leapt from the excavator transversing a lateral distance of 5 feet and a vertical distance of 5 feet. He testified that he struck the ground, he again hurt his right hip and leg, causing him to limp around. He testified that he immediately advised his foreman, Bruce McGahey, of the incident and injury and that Mr. McGahey instructed him to sit down and wait for the “head boss”. He denied that Mr. McGahey told him that he was going to be

drug tested. He stated that he waited around awhile and then called his father to come and get him.

James Brewer, the claimant's stepfather, testified that on March 28, 2007, he went to a job site and picked up the claimant. He testified that at that time, the claimant was limping and that this was "unusual".

While the testimony of Mr. Brewer would be supportive of the claimant's testimony concerning this second incident, it would not be particularly supportive of the claimant's testimony that he initially injured his right hip on January 3, 2007, and began limping at that time. Curiously, no inquiry was made of Mr. Brewer, by either side, concerning any difficulties which he may have observed the claimant experiencing prior to March 28, 2007.

Bruce McGahey testified that the claimant did report an incident to him, when he allegedly jumped off the excavator in March of 2007. However, Mr. McGahey further testified that he informed the claimant that he would have to undergo a drug test, because this was company policy in the event of the occurrence of any accident. Mr. McGahey also stated that he advised the claimant that he would be terminated if he did not do so.

The claimant's testimony concerning this second accident is clearly contrary to the fact that there is no mention in any of the medical reports and records of any employment related incident occurring on March 28, 2007, which caused the claimant to experience any onset or increase in difficulties with his right hip. In fact, the records of Dr. Tucker, after March 28, 2007, not

only note no such event, but also fail to note any change or increase in the claimant's right hip difficulties. The only mention of "jumping off" heavy equipment is the apparently prophetic statement made by the claimant in the February 5, 2007 patient history that he completed at the request of Dr. Sudbrink.

After consideration of all the evidence presented, I find that the claimant has failed to prove by the greater weight of the credible evidence that his right hip difficulties arose out of and occurred in the course of his employment with this respondent, were caused by a specific incident, and are identifiable by time and place of occurrence. The claimant's testimony is simply not sufficiently credible to prove either the occurrence of a specific employment related incident or the existence of a causal relationship between such an incident and his difficulties with his right hip. His testimony in regard to the occurrence of a specific incident and existence of a close temporal relationship between such an incident and the initial onset of difficulties indicative of a physical injury to his right hip is contradicted by the testimony of other more credible witnesses, the histories that he gave to his various medical providers, and to his own subsequent actions. I have also considered the fact that the greater weight of the medical evidence indicates that the claimant's right hip difficulties are essentially the result of progressive degenerative changes in his right hip joint, including the formation of bone spurs. These findings would not be particularly supportive of the occurrence of a recent specific traumatic incident or event. I

would also note that the claimant's first alleged specific injury seems to have occurred shortly after or in conjunction with an employment related disciplinary action and the second shortly after he learned of the severity of his condition and the likelihood of extensive treatment.

As the claimant has failed to prove three of the necessary definitional elements of a compensable injury, as set out in Ark. Code Ann. §11-9-102(4)(A)(i), he has failed to prove that his right hip difficulties represent a "compensable injury" as that term is expressly defined by this subsection. Therefore, this claim must be denied and dismissed in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On January 3, 2007 and March 28, 2007, the relationship of employee-employer-carrier existed between the parties.

3. On the foregoing dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$384.00 for total disability and \$288.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained "compensable injuries" to his right hip on either January 3, 2007 and/or March 28, 2007, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). Specifically, the claimant has failed to prove by the greater weight of the credible evidence the occurrence of a physical injury to his right hip on

either of these dates, that arose out of and occurred in the course of the employment with the respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury to the claimant's right hip and have controverted this claim in its entirety.

ORDER

Based upon my forgoing 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