

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509313

DANA HICKS, EMPLOYEE	CLAIMANT
ANTIQUE WAREHOUSE OF ARKANSAS, EMPLOYER	RESPONDENT
WESTPORT INSURANCE CORPORATION, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 10, 2007

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Conway, Faulkner County, Arkansas.

The claimant was represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on October 18, 2006 in Conway, Arkansas. A prehearing order was entered in this case on August 17, 2006. 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 in the prehearing order and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The Employer-Employee-Carrier relationship existed on August 18, 2005, and at all pertinent times hereto.
3. The claimant was making an average weekly wage of \$425.75, which equates to a TTD rate of \$284.00. That this is based on a 52 week earning of \$22,139.00.
4. The claim has been 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. Compensability.
2. TTD.
3. Medical expenses.
4. Attorney's fees.

The record consists of the October 18, 2006 hearing transcript and the exhibits contained therein.

DISCUSSION

The claimant was employed by Antique Warehouse of Arkansas to operate a lacquer booth and to move furniture as needed. The claimant contends that he sustained a low back injury on August 17, 2005. On August 17, 2005, the

claimant had been employed by Antique Warehouse of Arkansas for two years and ten months.

During his normal work week, including the week of August 17, 2005, the claimant was scheduled to work Monday through Thursday, to be off Friday and Saturday, and work Sunday afternoons.

The claimant testified that he felt a pull and a twinge in his back on Wednesday, August 17, 2005, while lifting a heavy bookcase and trying to slide a dolly out from underneath. The claimant testified that he did not feel like he was seriously injured at the time and did not report an injury to management that day or the next day. However, the claimant testified that immediately after unloading the bookcase with Jimmy Weaver and Braun Rhoda, he had the following exchange with Mr. Weaver:

Q. What did you tell him?

A. I said, "That really got my back."

Q. Is that all you said to him?

A. He said "What?" And I said, "That really got my back." He said, "Well, we both just lifted twice our weight."

At the hearing held on October 18, 2006, Mr. Weaver denied that the claimant told Mr. Weaver on August 17, 2005 that he had back problems after lifting the bookcase. Mr.

Weaver testified that he has worked at Antique Warehouse for 14 years. Mr. Weaver testified that he did not recall the claimant ever saying "That one really got my back" or words to that effect. Mr. Weaver testified that Mr. Weaver did not know until the following Monday when their supervisor, Mr. Gary Wolf, said something about it, that the claimant was claiming that he injured himself at work.

Gary Wolf testified that the claimant telephoned Mr. Wolf on Mr. Wolf's cell phone on Saturday, but that Mr. Wolf could not talk with the claimant at that time because Mr. Wolf was at the Batesville Speedway, and the noise was too loud. Mr. Wolf testified that he requested the claimant call him back on Sunday morning, which the claimant did, and at that time the claimant told Mr. Wolf that he had injured himself moving furniture at work on Wednesday afternoon.

With regard to his symptoms, the claimant testified that he did not report an injury to any supervisor on August 17, 2005 because he did not realize that he was hurt. (T. 14) The claimant testified that he also did not report any injury to his wife that evening, and that he walked his dog one and one-half miles that evening.

The claimant testified that on Thursday his back was doing okay. He testified at one point that his leg was a

little weaker and at another point that both legs felt weak (T. 16 and 39). At any rate, the claimant testified that he had worked all week, so it was not something that he would have been concerned about. The claimant testified that it was usual for his legs to feel weak at the end of the week.

The claimant testified that his left leg began to go numb on Friday morning, began to burn on Friday afternoon, and then got worse. The claimant testified that by Friday evening he realized that he had a serious injury.

The claimant first saw a doctor on Monday, August 22, 2005. Dr. Rajesh Sethi's impression of a lumbar MRI performed on December 1, 2005, included among other findings, an acute inferior left paracentral disk extrusion at L5-S1. The claimant contends that he sustained a compensable back injury on August 17, 2005, and seeks an award of temporary disability compensation, medical expenses and attorney's fees. The respondents contend that the claimant did not sustain a compensable injury, and that the claimant was offered light duty work within his restrictions if he did sustain a compensable injury. The claimant asserts that the respondents are liable for Dr. Gray's services rendered on August 31, 2005, regardless of whether this claim is otherwise found compensable.

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, I find that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable back injury on Wednesday August 17, 2005. In this regard, I find credible Mr. Weaver's testimony that on August 17, 2005, the claimant did not say anything about his back after lifting the bookcase. Even the claimant concedes that he did not experience any degree of problems on either Wednesday or Thursday at work sufficient to report any injury. To whatever degree that the claimant was experiencing leg weakness as of Thursday at the end of the

work week, he has acknowledged that leg weakness was not unusual at the end of his work week. The claimant has also acknowledged that the burning in his leg did not start until Friday - his day off - two days after lifting the heavy bookcase. In addition, no doctor has rendered an opinion stating that the sequence of events described by the claimant are indicative that he sustained a back injury on Wednesday which caused his leg to begin burning on Friday. On this record, I find that it would require speculation and conjecture on my part to conclude that the claimant's leg and back symptoms at issue were caused by lifting a bookcase on August 17, 2005. I therefore find that the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable low back injury.

However, I also find that Antique Warehouse of Arkansas is estopped from denying liability for Dr. Gray's August 31, 2005 treatment. The Court of Appeals identified the elements to prove estoppel in Southern Hospitalities v. Britain, 54 Ark. App. 318, 925 S.W.2d 81 (1996):

(1) the party to be estopped must know the facts; (2) he or she must intend that his or her conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the

estoppel must rely on the other party's conduct to his or her injury.

The Court in Britain affirmed a Commission finding that an employer was estopped from denying treatment for an authorized treating physician's treatment under the facts of the case:

The employer is estopped from denying responsibility for the cost of treatment rendered by Dr. Smith notwithstanding the fact that Ms. Britain's back injury was ultimately deemed to be noncompensable. Southern Hospitalities directed Ms. Britain to visit a specific physician and represented that it was accepting her injury as compensable, thus prompting Britain to visit Dr. Smith and incur medical expenses.

In the present case, there appears to be no dispute that Dr. Reddy was supposed to be the company physician for workers' compensation. The claimant testified that after his second visit to Dr. Reddy, Lynn Keathley wanted the claimant to try an acupuncturist in Leslie, Arkansas. The claimant testified that he called and talked to Lynn Keathley, and Mr. Keathley made arrangements for the claimant to instead see Dr. Gray. Dr. Gray's undated letter in the record states that Dr. Gray's "office spoke to Mr. Dana Hick's employer, Lyn (sic) Keathley of the Antique Warehouse, and that Antique Warehouse would be responsible for services rendered on August 31, 2005."

After hearing the live testimony and observing the demeanor of the witnesses, I accord greater weight to the testimony of the claimant and to Dr. Gray's letter than the weight I accord Lynn Keathley's testimony regarding whether Lynn Keathley did or did not arrange and agree to pay for Dr. Gray's August 31, 2005.

Consequently, I find that a preponderance of the credible evidence establishes that Lynn Keathley arranged for the claimant's August 31, 2005 treatment by Dr. Gray, and that Lynn Keathley agreed on behalf of Antique Warehouse to pay for that treatment. Consequently, consistent with the Court's conclusions in Britain, I find that Antique Warehouse of Arkansas is estopped from denying liability for Dr. Gray's August 31, 2005 services.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The Employer-Employee-Carrier relationship existed on August 18, 2005, and at all pertinent times hereto.

3. The claimant was making an average weekly wage of \$425.75, which equates to a TTD rate of \$284.00 based on a 52 week earning of \$22,139.00.

4. The claim has been controverted in its entirety.

5. The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable low back injury on August 17, 2005.

6. Respondent employer, Antique Warehouse of Arkansas, is estopped from denying liability for Dr. Gray's services provided on August 31, 2005.

ORDER

Antique Warehouse of Arkansas is directed to pay for Dr. Gray's August 31, 2005 medical services. In all other respects, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge