

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507261

LANCE LAY	CLAIMANT
PINNACLE FOODS CORPORATION/FAYETTEVILLE SWANSON	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 1, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by TIMOTHY MYERS, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 6, 2006, in Springdale, Arkansas.

A pre-hearing order was entered in the case on March 27, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties agreed on the exact amount of the weekly compensation rates and an error was corrected, in regard to the date of the alleged injury. A copy of this pre-hearing order with those amendments noted thereon was made Commission's Exhibit No. 1.

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

1. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are \$451.00 for total disability and \$338.00 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 cervical spine and shoulders on or about February 28, 2005.
2. The claimant's entitlement to the payment of medical treatment, temporary total disability benefits from March 1, 2005 through a date yet to be determined, and attorney's fees.
3. whether the claimant is barred from receiving benefits under Shipper's Transport of Georgia v. Stepp.

In regard to these issues, the claimant contends:

- (a) The employee-employer relationship existed at all relevant times and on or about February 28, 2005.
- (b) That at all relevant times, the claimant suffered an injury to his neck/back and shoulders arising out of and in the scope and course of his employment with the respondent-employer causing his need for medical treatment and his inability to work from February 28, 2005 to a date yet to be determined.
- (c) That the claimant is entitled to a controverted attorney's fee on all amounts awarded.

In regard to these issues, the respondents contend:

1. The respondents contend that the claimant's claim for benefits should be barred by the shipper's defense.
2. The respondents contend that the claimant did not sustain a compensable injury in the course and scope of his employment.
3. The respondents contend that the claimant's problems are simply a recurrence of his pre-existing condition.
4. In the alternative, the respondents contend that the claimant merely sustained a temporary aggravation of his pre-existing condition.
5. The respondents contend that they are entitled to an offset for any group health carrier and/or disability carrier payments made to or on behalf of the claimant.

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his cervical spine and/or shoulders on or about February 28, 2005. The burden rests upon the claimant to prove all of the facts necessary to establish these alleged "compensable injuries".

The first facts necessary to establish a "compensable injury" are contained in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence, the actual existence of the physical injury or condition that is alleged to be compensable. The claimant must further prove that the actual existence of these alleged compensable injuries are supported by

“objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

In regard to the alleged employment related injuries to the claimant’s shoulders, the medical evidence presented clearly fails to “establish” the actual existence of any injury or condition involving the claimant’s shoulders. Although the medical evidence records complaints of pain in the area of the claimant’s shoulders, there is no medical evidence indicating the presence of any injury or physical damage that directly involves these portions of the claimant’s anatomy. There is also no record of any “objective findings” that would support or indicate the presence of injury or physical damage to these portions of the claimant’s anatomy.

Therefore, in regard to the alleged compensable injuries to claimant’s shoulders, the claimant has failed to satisfy the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D). The claimant’s failure to satisfy the statutory requirements of this subdivision precludes a finding of any compensable injury to the claimant’s shoulders, on February 28, 2005, or any other date.

In regard to the alleged employment related injuries to the claimant’s neck or cervical spine, the medical evidence presented does “establish” the actual existence of physical injuries or conditions involving the claimant’s cervical spine. Further, the medical evidence presented notes the presence of various abnormal “objective findings” to support the existence of a physical injury or condition involving the claimant’s cervical spine.

Therefore, the claimant has “established” by medical evidence the actual existence of the cervical injury or condition that is alleged to be compensable. He has also proven that the existence of this physical injury or condition is supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i). Thus, the claimant has satisfied the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant alleges that his compensable cervical injuries occurred as the result of a specific employment related incident on February 28, 2005. Therefore, he must next prove that the medically established and objectively documented physical injuries or conditions that involve his cervical spine also satisfy the definitional requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

1. that the physical injury or condition must arise out of and occur in the course of the employment;
2. that the physical injury or condition must be caused by a specific incident;
3. that the physical injury or condition must be identifiable by time and place of occurrence;
4. that the physical injury or condition must result in internal or external physical harm to the claimant’s body, and

5. that the physical injury or condition must require medical services or result in disability.

The record clearly shows that the claimant had experienced a serious injury to his cervical spine in 2000. This injury or injuries were also alleged to be work related and occurred when a falling object struck the claimant in the head, neck, and back (first a ladder and subsequently glass from a door). The claimant's recorded symptoms were almost identical with the symptoms he now attributes to the alleged 2005 employment related injury. At that time, the claimant was diagnosed as experiencing herniated discs at the C5-6 level and C6-7 level and extensive degenerative arthritic changes (i.e. osteophyte formation). Laminectomies were carried out on the C5-6 and C6-7 discs, and an accompanying fusion of the cervical spine from the C5 vertebrae through C7 vertebrae.

The claimant was released with a permanent physical impairment of 17% to the body as whole and various permanent restrictions, on November 13, 2001. However, the medical evidence shows that the claimant continued to experience significant problems with his neck and upper extremities. He continued to be treated by his primary physician, a Dr. James Ogsbury, through at least December of 2001. Dr. Ogsbury's last notation indicated that the claimant continued to worsen and was experiencing stabbing pain in his neck that at times radiated down one arm and at times both arms. Dr. Ogsbury recommended a repeat MRI. Unfortunately, no further follow up records from Dr. Ogsbury have been provided.

The next medical evidence provided are records from the Arkansas Veterans' Administration facilities. These records show that the claimant was complaining of muscle spasms in his neck and radicular pain down his left arm into his left hand in January of 2003. They further reveal that the claimant continued to complain of cervical and radicular symptoms for which he received various testing and treatment. An MRI study performed on April 10, 2003, showed extensive degenerative changes in the claimant's cervical spine, including spondylosis at C4-5, with a disc herniation at that level. Radiographic testing performed on December 2, 2003, showed extensive degenerative changes at C4-5, including an anterior osteophyte that caused narrowing of the nerve exit foramina at C4-5 and osteophytes at the C5-6 level causing some narrowing of the nerve exit foramina at that level. On October 5, 2004, the claimant was complaining of chronic neck pain that was unchanged over time. On January 23, 2005, the claimant was noted to be experiencing chronic cervical nerve neuropathy involving the left arm. On February 18, 2005 (10 days before the claimant's alleged employment related accident and injury), the claimant again underwent radiological studies of his cervical spine that continued to show degenerative arthritic changes with neuroforaminal narrowing of the nerve root exits from C4 through C7.

However, the mere fact that the claimant had extensive pre-existing cervical damage and difficulties would not, in and of itself, bar his claim. Employment related aggravations of pre-existing conditions can still constitute a "compensable injury"

under the Act. However, such an employment related aggravation must be proven.

The only direct evidence to establish the occurrence of a specific employment related incident, on February 28, 2005, and to associate this incident with the claimant's cervical difficulties after that date, is the claimant's own testimony. Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient in and of itself, to prove any fact that it 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 to establish the existence of a close temporal relationship between such an incident and the onset of the claimant's subsequent cervical and radicular difficulties.

However, in the present case, I do not find the claimant's testimony to be sufficiently credible to prove either the occurrence of a specific employment related incident or to establish the existence of a causal connection between such an incident and any cervical difficulties that he may have experienced on and after February 28, 2005.

At the hearing, the claimant testified that he was performing his regularly assigned employment tasks on February 28, 2005. He stated that these tasks involved the moving and stacking of metal cabinets. It was his testimony that while attempting to move one of these cabinets, it fell and struck him across the right side of

his neck. He stated that following this incident, he was a little sore, but that the next morning he was sore all over. It was his testimony that he attempted to report the injury and incident to the respondent and to request medical services. However, he contends that he was unable to do so and subsequently consulted a Veterans' Administration physician on his own.

The claimant's testimony concerning the onset of his difficulties on February 28, 2005, differs substantially from the history recorded when the claimant initially sought medical treatment from Dr. Priti Palvadi, at the Veterans' Administration facility. In his progress note of March 4, 2005. Dr. Palvadi recorded the following history:

"53 year old man with history of headaches, cervical fusion C4-7, myoclonic jerks-returns for follow up. Patient has been working in maintenance and has been doing heavy lifting-about 4 days ago developed severe pain in left shoulder radiating into left arm and hand-with tingling and numbness that was exacerbated."

There is no mention of the claimant being struck by any object at work. In fact, it would appear that the primary reason for the claimant's visit on that date was to be seen in follow up for the cervical difficulties that he had been experiencing at the time of his January 23, 2005 and February 18, 2005 visits to the Veterans' Administration facility.

Although the claimant appears to have been seen sometime after March 4, 2005, by Dr. Vincent Runnels (a neurosurgeon in the Fayetteville area), no reports or records of Dr. Runnels have been introduced. It further appears that an MRI study was performed on

the claimant, at an independent facility in Bentonville, Arkansas. Again, no interpretation of this study has been introduced.

In fact, there are no further medical reports or records until the claimant underwent a neurological consultation at the Veterans' Administration facility on August 5, 2005. The neurologist, Dr. Daniel Dagen, recorded the following history of the claimant's cervical and radicular complaints:

"The patient has had right-handed numbness for two to three months. His whole hand gets numb and he drops things. It aches a little in the median distribution. He has severe radicular pain in the left arm since a lifting injury working in maintenance on February 29 of this year. It aches down the arm of the median aspect of the wrist. He is unable to reach up or work over his head. He has been unable to work because of his pain. He had a fusion at two levels with cadaver bone and hardware in Colorado in 2000 following an on the job injury. He is tremulous and is vague on when this started, but probably this year after this pain started." (emphasis mine)

Again, there is no mention of the claimant being struck by any object at work on February 28, 2005. It is also curious that the claimant indicated to Dr. Dagen that his tremulous started after the onset of his arm pain. Clearly, these difficulties were present and were noted by Dr. Palvadi in early 2003.

The voluminous and poorly organized Veterans' Administration reports make a review of the medical evidence difficult. However, a complete review of every medical record introduced fails to show that the claimant ever reported his difficulties as being connected with an employment related blow to his shoulder, neck, or head on February 28, 2005 or any other date. The only such blow recorded

in the medical evidence is the employment related blow or blows in 2000.

It must also be noted that the operative records of the Veterans Administration facility, concerning the procedure performed on the claimant on November 8, 2005, note a post operative diagnosis of chronic cervical radiculopathy C5, secondary to ossified disc at C4-5. During the surgical procedure, the impingement producing the claimant's radicular symptom was noted to be the result of a large osteophyte along the posterior aspect of the body of the C5 vertebra. Clearly, these findings would indicate that the claimant's cervical nerve impingement and resulting difficulties were not the result of any specific recent traumatic incident, but were instead the result of a natural progression of degenerative arthritic changes, possibly accelerated by the claimant's prior fusion.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that any of the medically established and objectively documented physical injuries or conditions involving his cervical spine were in any way causally related to a specific employment related incident as described by the claimant as occurring on February 28, 2005. Therefore, the claimant has failed to prove that his cervical difficulties represent an injury that arose out of and occurred in the course of his employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence, as required by Ark. Code Ann. §11-9-

102(4)(A)(i). His failure to prove these necessary requirements prevents a finding that he sustained a “compensable injury” to his cervical spine on February 28, 2005.

As previously noted, the claimant has failed to establish by medical evidence, which is supported by objective findings, the actual existence of any physical injury to his shoulders, as required by Ark. Code Ann. §11-9-102(4)(D). Thus, he has also failed to prove the occurrence of a “compensable injury” to this portion of his body.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On February 28, 2005, the relationship of employee-employer-carrier existed between the parties.

3. On February 28, 2005, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$451.00 for total disability and \$338.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained “compensable injuries” to his cervical spine and/or shoulders on or about February 28, 2005. Specifically, he has failed to prove by the greater weight of the credible evidence that any physical difficulties he may have had with his cervical spine on and after February 28, 2005, was in any way, causally related to the alleged specific employment related incident on or about that date. Rather, the greater weight of the

credible evidence shows that the claimant's subsequent cervical difficulties were merely a natural continuation or progression of his prior injuries and degenerative arthritic changes. The claimant has also failed to prove by medical evidence, which is supported by objective findings, the presence of any physical injury to his shoulders.

5. As a result of the claimant's failing to prove the occurrence of any compensable injuries to his cervical spine or shoulders, it is unnecessary to determine if the Shipper's Transport Doctrine is applicable to this claim.

6. The respondents have denied the occurrence of the compensable injury to the claimant's neck or shoulders and have controverted this claim in its entirety.

ORDER

Based upon my foregoing 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