

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611849

CHRIS WOODS	CLAIMANT
KOPCO	RESPONDENT
CINCINNATI CASUALTY INSURANCE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 16, 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 WILLIAM FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 22, 2007, in Fort Smith, Arkansas. The deposition of Dr. Anthony Capocelli was taken on April 20, 2007, and has been admitted as Joint Exhibit No. 1.

A pre-hearing order was entered in this case on January 25, 2007. Prior to the commencement of the hearing, the parties offered an additional stipulation concerning the claimant's receipt of unemployment benefits and amended the issues to reflect that the claimant was seeking temporary total disability benefits only through January 24, 2007. A copy of this 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 October 12, 2006, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$403.00.00 for total disability and \$302.00 for permanent partial disability.
3. The claim is controverted in its entirety.
4. The claimant received unemployment benefits at the weekly rate of \$350.00 for the period of November 1, 2006 through January 14, 2007.

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 a compensable injury to his back on October 12, 2006, under either §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(b).
2. The claimant's entitlement to medical services, temporary total disability from October 13, 2006, through January 24, 2007, and attorney's fee.

In regard to these issues, the claimant contends:

- a. The claimant contends that he sustained a compensable injury to his back when he fell at work on October 12, 2006. The claimant acknowledges that he had back pain and treatment regarding his back prior to the October 12, 2006 incident; however, it is the claimant's belief that the fall constitutes a specific identifiable injury. However, the claimant contends that if for some reason it is determined that the fall does not constitute a specific identifiable injury, his back condition is still job related and is the result of the physical nature of his work activity.

b. The claimant contends that he is entitled to temporary total disability benefits from October 13, 2006 until January 24, 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 contended in their prehearing questionnaire:

"The claimant was initially injured in September of 2001. The claim was initially handled by CNA. The claimant was injured when he was struck in the back by a log chain. Subsequent to this, the claimant began to go to the doctor in September of 2006. He indicated to his family doctor that he had bilateral hip and leg pain with decreased pin prick sensation to the L5-S1 level. He also told the doctor that he had been having pain over the last couple of weeks, and that it had gotten progressively worse. There was also an x-ray that showed a disc narrowing at L5-S1. On October 9th, the claimant went to the doctor indicating that he was still having trouble with his back. He indicated that the muscle relaxers would help but that they were not relieving his symptoms. It was recommended that he have an MRI. There was also an indication in the medical records that he was being seen for chronic back problems which was related back to the incident that occurred in 2001.

Subsequent to this, he went in for a fall and indicated that he was already having chronic pain. The claimant had an MRI which showed a disc herniation. It is the respondents understanding that the claimant has apparently had some type of surgery. It is anticipated that two witnesses named Jerry Seymour and Pacual Del Rio Dian, will testify that when the claimant fell he told them that he was okay, and continued to work for two weeks without any incident. It also appears that the claimant has filed for unemployment benefits."

However, at the prehearing conference the respondents in essence denied that the claimant sustained any compensable injury to his back after September of 2001, as the result of either a specific incident or cumulative trauma, and controvert this claim in its entirety.

DISCUSSION

_____The initial issue to be addressed is the question of compensability. The claimant has the burden of proving that he sustained a “compensable injury” to his back or lumbar spine. In order to meet this burden, the claimant must prove that his alleged employment related injury to his back satisfies all of the statutory requirements for a “compensable injury” that are contained within the Act.

The first of these requirements are found in Ark. Code Ann. §11-9-102(4)(D). This subsection mandates that the claimant prove by “medical” evidence the actual existence of the physical injury or condition alleged to be compensable. Further, it requires that the actual existence of this physical injury or condition must be supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

In the present case, the medical evidence clearly establishes the actual existence of physical injuries or damage involving the claimant’s lumbar spine. These consist of disc herniations of the intervertebral discs at both the L4-5 and L5-S1 levels. Degenerative arthritic changes of the actual vertebra were also noted at the L5-S1 level. The medical evidence further shows that

the actual existence of these physical injuries or damage is supported by purely “objective” radiographic findings and visual observations made during the subsequent corrective surgery. Thus, the claimant has satisfied the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

Next, the claimant must prove that these medically established and objectively documented physical injuries or damage further satisfies the definitional requirements for a “compensable injury”, which are contained in Ark. Code Ann. §11-9-102(4)(A). Based upon the claimant’s contentions, the relevant definitional requirements would be those contained in either subdivision (i) or subdivision (ii)(b) of section 11-9-102(4)(A).

One definitional requirement is common to both of these subdivisions, and perhaps the most fundamental element necessary for any “compensable” injury. That requirement is that the physical injury or damage must arise out of and occur in the course of the employment. In order to satisfy this requirement, the claimant must prove the existence of a causal relationship between his employment and the physical injury or damage to his lumbar spine. Although he need not show the existence of causal relationship to an absolute or mathematical certainty, he must prove that the existence of such a relationship is likely or probable.

In the present claim, the only direct evidence presented by the claimant to prove the existence of this necessary causal

relationship is his own testimony. While the testimony of a party is never considered uncontradicted, this does not mean it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address.

At the hearing, the claimant testified that on October 12, 2006, he was performing his regular employment duties for the respondent. As part of these duties, he and some fellow employees were moving an air conditioner base, weighing between 3,000 and 4,000 pounds, that was mounted on rollers, or "skates". While performing this activity, he tripped and fell backwards, landing on his buttocks and back. However, at that time, he experienced no pain or complaints with his back or legs. He got up from the floor, picked up and threw the object he had tripped over. He continued to perform his regular employment activities on that date without experiencing any pain or difficulties.

He next testified that approximately a week or so before his fall, he had started experiencing sharp pains in his leg, while at work. However, he did not recall what he was doing at the time.

Finally, he testified that on the morning following the fall (Friday, October 13, 2006), he woke up with severe pain in his back and leg. He also stated that this was the first time his legs were numb. At that time, he sought medical treatment at the emergency room of St. Edwards Mercy Medical Center. He stated that he told the various personnel at the emergency room about the fall on the previous day.

This testimony by the claimant, concerning the events and time frame surrounding the inception of his back and radicular difficulties and its subsequent progression is contradicted by the other evidence presented. I find this other evidence to be more credible.

The medical reports and records of Carmen Oxford, a nurse practitioner, reveal that she initially saw the claimant for complaints of pain in his back, which radiated into his hips and posteriorly down his legs to his toes on September 26, 2006. She also recorded complaints of numbness in the claimant's lower extremities involving this same area. At that time, she took a history of a prior back injury with a fork lift and logging chain some two years prior. She further noted that the claimant's back pain had gotten worse over the past few weeks and was worse following sitting. Although she observed that the claimant did quite a bit of lifting, crawling, turning, and bending at work, she did not record any increase in the claimant's difficulties when performing any of these activities. Finally, she also took a history of a motor vehicle accident and the claimant falling out of a tree at some time in the past. She noted no history that the claimant's current episode of difficulties had begun at work or were precipitated by any of his work related activities. X-rays taken at that time were interpreted as showing mild anterior wedging of the T12 vertebra and disc space narrowing of the L5-S1 disc.

The claimant returned to nurse Oxford on October 9, 2006. His complaints were again recorded as continued significant pain in his lower back radiating down into his hips and lower extremities with numbness and tingling in his lower extremities. Again, the only activities noted as making his symptoms worse was sitting. At that time an MRI study of his lumbar spine was ordered. This test was apparently scheduled to be performed at St. Edwards Mercy Medical Center on the afternoon of October 13, 2006.

However, shortly before noon on October 13, 2006, the claimant appeared at the emergency room of St. Edwards Mercy Medical Center. At the time, a history was initially noted of:

“Complains of low back pain-chronic pain-hurt again two d(days) ago.”

Subsequently, a history was taken of chronic back pain from an incident when the claimant was hit in the back with a logging chain some 3 years prior. However, it was also noted that the claimant reported that he “fell yesterday” and experienced new complaints of pain. Curiously, neither of these histories note that this “new” injury or fall (either two or one day prior) occurred at work. X-rays taken at that time appear to coincide with the x-rays previously taken at the request of nurse Oxford on September 26, 2006. Later that day the claimant underwent the MRI that had been scheduled by nurse Oxford.

Following the MRI study, which revealed the claimant’s herniated discs, the claimant returned to nurse Oxford. This visit occurred on October 17, 2006. Most curiously, no history of any “new” accident or fall was noted on this visit. At that time,

nurse Oxford did note that the claimant has apparently requested that the medical services be processed under workers' compensation. However, in her clinic note of that date, she stated:

“We are also in the process of working with him to file this under workmen's comp. This most likely did happen when he was at work due to the heavy lifting he performs on a day to day basis.”

From this statement, it would appear that nurse Oxford was unaware, at that time, that the claimant was contending that these difficulties were due to a work related fall on October 12, 2006.

Some time after the October 17, 2006 visit, the claimant appears to have given nurse Oxford a history that his difficulties were now attributable to a fall at work on October 12, 2006. In a November 1, 2006 accidental injury claim form, signed by nurse Oxford, the claimant's difficulties are attributed to a fall at work on October 12, 2006.

In her subsequent report of November 7, 2006, nurse Oxford again attributed the claimant's difficulties, after October 12, 2006, to this fall. She gives as her basis for this opinion, that the claimant “developed new complaints” after the fall. However, the evidence presented shows that the claimant's complaints were essentially the same, after the fall, as before. The only “new finding” that is identified by nurse Oxford is that the claimant required the use of a cane for ambulation on October 17, 2006. Curiously, there is no evidence in the medical record that any medical professional had prescribed the claimant's use of this cane. When he was seen at the emergency room, which would have been shortly after his fall but shortly prior to his MRI, the claimant's

voiced complaints and clinical examination were essential identical to those previously performed by nurse Oxford on September 26, 2006, and October 9, 2006.

The claimant was seen for a neurosurgical evaluation by Dr. Anthony Capocelli on November 1, 2006. At that time, Dr. Capocelli noted complaints of low back pain with pain and numbness into both lower extremities (with a left lower extremity complaints being worse than the right). These were essentially the same complaints that had been present since September 26, 2006. Dr. Capocelli also recorded the history of the onset and progression of the claimant's complaints as follows:

"This patient is a 40 year old male who apparently had problems beginning roughly in 2001 when he apparently was hit by a log chain that had broke loose from a fork lift. He was hit in the back at that time and at that time began to notice ongoing problems with low back pain. According to the patient, the pain has progressed significantly over the past 5 years to the point that he was getting low back pain with radiation into his legs, the left worse than the right. He was not having any numbness in his extremities; however, his pain level was fairly maintained until a fall suffered October 12, 2006, in a job that he reports that while lifting a floor and stepping back, he tripped and fell. He subsequently had a significant increase in pain in his back and leg associated with numbness in the left leg. Since the time of injury on October 12, 2006, he had had essentially 9-10 pain in his back and legs."

Dr. Capocelli noted that this pain was exacerbated by any kind of activities. Curiously there appears to be no mention of an onset of increased difficulties two weeks prior to the alleged fall, either at work or otherwise. There is also no mention that the

claimant did not experience any change or increase in his symptoms contemporaneously with the fall. The history that the numbness in the claimant's lower extremities only occurred following the fall would be clearly contradictory to the complaints noted by nurse Oxford prior to the fall.

The claimant's testimony concerning the fact that an employment related fall actually occurred and his description of this fall is corroborated by the testimony of two co-employees, Jerry Wayne Seymour and Pacual Del Rio. However, both of these employees stated that this fall occurred approximately two weeks prior to the claimant's last day of work on October 12, 2006. Both of these witnesses also testified that, not only did the claimant appear to experience no physical difficulties immediately following the fall, but he also showed no difficulties performing his regular employment activities for the two week period thereafter.

Clearly, it is possible that the claimant could have experienced the subsequently diagnosed herniated discs while lifting at work. He could have also experienced the herniation of these discs as the result of trauma in the employment related fall. However, it is equally possible that he could have experienced these herniated discs as the result of stress or trauma from non employment related events or activities, even relatively minor stress or trauma, such as picking up his shoes. As indicated by Dr. Capocelli, the only way to determine the more likely or probable cause is to examine the temporal relationship between the onset of neurological symptoms that would be indicative of a nerve

root compression from the disc herniation and a particular physical event or activity. It is also important to note that in his deposition, Dr. Capocelli also opined that the claimant would not have been physically capable of performing his regular assigned employment activities for even a few minutes with the disc herniations of the magnitude that he had observed on the MRI and during the corrective surgery.

The greater weight of the credible evidence presented simply fails to prove the existence of a close temporal relationship between any employment related activities or event and the initial onset of the claimant's radicular symptoms. All of the evidence presented, including the claimant's own testimony, shows that the onset of his symptoms was sufficient to prevent him from performing his employment activities and did not occur until some time after he had ceased working on October 12, 2006. After consideration of all the evidence presented, it is simply my opinion that the greater weight of the credible evidence fails to prove the existence of a causal relationship between the claimant's herniated lumbar discs and resulting nerve root impingement and any employment related activity or specific employment related incident, particularly the described fall. Thus, the claimant has failed to prove that these injuries or defects arose out of and occurred in the course of his employment with this respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, including October 12, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitlement to weekly compensation benefits of \$403.00 for total disability and \$302.00 for payment 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 a compensable injury to his back or lumbar spine on October 12, 2006, or any other date during his employment with this respondent. Specifically, he has failed to prove that he sustained an injury to his back or lumbar spine that arose out of and occurred in the course of his employment with this respondent.

5. The respondents have denied the occurrence of any compensable injury to the claimant's back or lumbar spine 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