

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700339

JAMES R. ANDERSON,
EMPLOYEE

CLAIMANT

FEDEX FREIGHT EAST, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED APRIL 1, 2008

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on February 4, 2008, in Little Rock, Arkansas. A Prehearing Order was entered in this case on August 14, 2007. This Prehearing Order and a supplement filed by Mr. Davis on September 4, 2007, set out the issues to be litigated and resolved at the present time. A copy of the these documents were made Commission's Exhibits No. 1 and 2 to the hearing record.

The following stipulations were submitted by the parties in the Prehearing Order and are hereby accepted:

1. The employment relationship existed at all pertinent times including January 4, 2007.

2. The claimant is entitled to the maximum compensation rates if this claim is found compensable.

The issues to be litigated and resolved at the present time are limited to the following:

1. Compensability.
2. Temporary total disability.
3. Medical treatment and related expenses.
4. Controverted attorney's fees

The record consists of the transcript of the February 4, 2008, hearing and the exhibits contained therein.

DISCUSSION

The claimant, Mr. James Anderson, contends that he sustained a compensable low back injury on January 4, 2007, as a result of lifting delivery freight at Windsor Door for his employer, FedEx. Following his onset of severe low back pain on January 4, 2007, Mr. Anderson received treatment and remained off work until January 30, 2007. The respondents contend that the claimant's injury is not work-related since his symptoms began as he was walking from the back of his truck to the cab. The respondents also contend that the claimant's alleged injury is not established by medical evidence supported by objective findings.

1. Evidentiary Objection

A Prehearing Order filed in this case by Administrative Law Judge Richard Calaway states that only evidence disclosed by prehearing filings or by agreement of the parties will be admitted into evidence. That Order also requires that all supplemental prehearing filings be furnished to the opposing counsel and the Commission no later than 20 days before the hearing. However, the Arkansas Court of Appeals has previously indicated that this type of mandatory evidence exchange cannot apply to rebuttal evidence. Bryant v. Staffmark, Inc., 76 Ark. App. 64, 61 S.W.3d 856 (2001).

In the present case, the respondent proffered testimony from the claimant regarding information contained in a Manager's Injury Investigation Report which was not provided to the claimant's attorney through either discovery answers or prehearing filings.

In light of Mr. Davis' objection, I find that Mr. Ryburn's questions and Mr. Anderson's answers on page 34, line 1 through page 35, line 11 will not be considered in rendering a decision. In this regard, I note that the non-disclosed report cannot be considered rebuttal evidence since Mr. Ryburn and Mr. Anderson agreed that the

information in the report was consistent with Mr. Anderson's hearing testimony. (T. 34 L. 19-20) I note that the report was prepared far in advance of ALJ Calaway's 20 day deadline, and the respondents offered no explanation for the document's non-disclosure.

2. Compensability

To prove 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) an injury arising out of and in the course 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) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (4) (A) (i) (Suppl. 2005). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Alternatively, a claimant seeking benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for medical treatment. Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001); Freeman v. Con-Agra Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). In addition, as with injuries caused by a specific incident identifiable by time and place of occurrence, objective medical evidence is necessary to establish the existence and extent of the compensable injury. Wal-Mart v. Leach, supra; Wal-Mart Stores v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

With regard to the possible objective findings of a back injury in the record, the Arkansas Courts have recognized many types of findings adequate to satisfy the "objective findings" requirement of Act 796 of 1993. For example, passive range of motion testing (but not active range of motion testing) is by definition an objective finding. Hayes v. Wal-Mart Stores, 71 Ark. Code Ann. 207, 29 S.W.3d 751 (2000). Muscle spasms observed by a physician

or a physical therapist are objective medical findings.

Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). A fibrous mass observed by a physician is an objective finding. Daniel v. Firestone Building Products, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Diagnostic test results are objective findings. Thus, soft tissue swelling in the hip indicated by x-ray is an objective finding. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1990). Straightening of the normal lordotic curvature of the spine, indicative of muscle spasm, is an objective finding. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Disk abnormalities identified on diagnostic testing are objective findings. Aeroquip, Inc. v. Tilley, 59 Ark. App., 954 S.W.2d 305 (1997).

However, a physical therapist's report of "muscle tightness" is not equivalent to a physical therapist's observation of "muscle spasms" since muscle tightness can come under the voluntary control of the patient. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). Likewise, a physical therapist's observation of muscle spasms is distinguishable from a physical therapist's notation of muscle spasms based on symptoms reported by the claimant since the claimant's report of symptoms comes

within the voluntary control of the patient. See e.g., Continental Express, Inc. v. Freeman, supra.

In Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), the Arkansas Supreme Court determined that a prescription for Valium "as needed for muscle spasm" qualified as an objective medical finding. In Fred's Inc. v. Jefferson, 361 Ark. Ark. 258, 206 S.W.3d 238 (2005), the Court found that a prescription for Flexoril and physical therapy, under the chronology of the case, also met the statutory requirement. In Rodriguez v. M. McDaniel Co., Inc., 98 Ark. App. 138, ___ S.W.3d ___ (2007), the Court determined that a prescription for Robaxin was not an objective finding of a compensable injury in light of a physician's testimony that Robaxin can be prescribed in the absence of muscle spasm as a prophylactic measure.

The Arkansas Court of Appeals has concluded that a notation of muscle "guarding" can reflect either a subjective observation, i.e., a voluntary response within the patient's control, or an objective observation, i.e., a patient's involuntary response to pain. The Commission must make a finding of fact on a case-by-case basis whether a notation of guarding is objective or subjective. The Steak

House v. Weigel, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 19, 2007).

In the present case, I find that the record lacks objective medical findings supporting the existence and extent of the claimant's low back injury. Based on the decisions noted above, the various medical references in the record to pain, tenderness, and active range of motion testing have previously been deemed by the Courts to be subjective not objective.

While the claimant's physicians have prescribed various medications orally and by injection, I note that Dr. Carle initiated Celebrex, Skelaxen and Flexeril on January 4, 2007, when he also documented, "No involuntary muscle spasm as identified by provider." In light of Dr. Carle's statements indicating an absence of detectable muscle spasm on both January 4, 2007, and on January 8, 2007, I find that the medication was prophylactic and therefore does not satisfy the objective findings requirement as also occurred in Rodriguez v. M. McDaniel Co., Inc., supra.

Finally, I note that Mr. Anderson's physical therapist noted guarding in the right "piriformis" on January 15, 2007, and guarding in the right "glute medius" on January 22, 2007. The claimant has the burden of proof in

establishing a compensable injury. Ark. Code Ann. § 11-9-102(4)(E). In the present case, I do not detect any information in the record from which to infer through the use of reasoning and/or common sense that the therapist's notations of guarding in this case were more likely notations of an involuntary response rather than notations of a voluntary response. The claimant has therefore failed to establish that the therapist's notations of guarding represent objective findings.

Because Mr. Anderson has failed to establish that the existence and extent of his back injury is supported by objective medical findings, I find that he has failed to establish that he sustained a compensable injury under the Arkansas Workers' Compensation Law. Because Mr. Anderson has failed to establish that he has sustained a compensable injury, I find that the remaining issues in this case are moot.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employment relationship existed at all pertinent times including January 4, 2007.
2. The claimant is entitled to the maximum compensation rates if this claim is found compensable.

3. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury. Specifically, the claimant has failed to establish by a preponderance of the evidence that the existence and extent of his injury is supported by objective medical findings.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge