

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613700

JIMMY BALL	CLAIMANT
WORKSOURCE, INC.	RESPONDENT
EMPLOYERS' INSURANCE OF WAUSAU, INSURANCE CARRIER	RESPONDENT

OPINION FILED **APRIL 21, 2008**

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

Claimant represented by MARK FORD, Attorney, Fort Smith, Arkansas.

Respondents represented by JEFFREY RICKARD, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on December 18, 2007, in Fort Smith, Arkansas. The deposition of Dr. Joseph Queeney was taken on October 22, 2007. This deposition has been admitted as a Joint Exhibit in this case.

A pre-hearing order was entered in this case on July 31, 2007. 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. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates between November 16, 2006 and December 1, 2006, the relationship of employee-employer-carrier existed between the parties.
2. 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 a compensable injury to his back as the result of a specific incident on November 29, 2006.
2. The claimant's entitlement to medical services, temporary total disability benefits from November 29, 2006 through a date to be determined, and attorney's fees.
3. The effect of Ark. Code Ann. §11-9-102(4)(B)(iv).
4. The appropriate weekly compensation rates.

In regard to these issues, the claimant contends:

"a. The claimant contends that he sustained a compensable injury as a result of his November 29, 2006 accident.

b. The claimant contends that he is entitled to temporary total disability benefits from November 30, 2006, until a date yet to be determined and reasonable and 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:

"The respondents will contend that the claimant did not sustain a compensable injury which arose out of and in the course of his employment with WorkSource. Without waiving other defenses, the respondents will contend that the claimant's accident was substantially occasioned by the use of alcohol or illegal drugs."

DISCUSSION

I. COMPENSATION RATES

_____The first issue to be addressed is the question of the appropriate weekly compensation rates. In this regard, the claimant has presented a contract of hire which provided for compensation in the amount of \$1,650.00 per month. This compensation was to be paid in the form of \$1,400.00 per month in cash and a \$250.00 a month discount on a two bedroom townhouse, in which the claimant was required to live. This property was customarily rented for

\$450.00 per month. This would translate to an average weekly wage of \$380.77. The respondents have offered absolutely no evidence to indicate that this document does not accurately depict the claimant's contract of hire.

Therefore, I find that, under the written contract of hire at the time of the claimant's alleged accident and injury, he was receiving an average weekly wage of \$380.77. This average weekly wage would produce appropriate weekly compensation rates of \$254.00 for total disability and \$191.00 for permanent partial disability.

II. COMPENSABILITY

The central issue in this case is whether the claimant sustained a "compensable injury" to his back on November 29, 2006. This issue also includes the question of whether any injury that may have been sustained by the claimant on that date would be expressly excluded from the Act's definition of a "compensable" injury by the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv).

The first matter to be addressed is the statutory requirement of Ark. Code Ann. §11-9-102(4)(D). This subsection mandates that a claimant prove by medical evidence the actual existence of some type of physical injury or damage. This subsection further requires that the actual existence of this physical injury or damage 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, I find that the claimant has satisfied this requirement. The medical evidence presented is sufficient to "establish" the actual existence of a compression fracture of the T12 vertebra with resulting moderate compromise of the spinal canal, mild scoliosis of the mid and upper thoracic spine, degenerative disc changes of the lower cervical spine and

upper thoracic spine, a small central disc protrusion of the L4-5 disc, and a small left lateral disc protrusion of the L3-4 disc. All of these physical defects are based upon or supported by purely objective radiographic findings.

The burden next falls upon the claimant to prove that one or more of these medically established and objectively documented physical injuries or damage to his back satisfy all of the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury or damage arose out of and occurred in the course of the employment.
- (2) The physical injury or damage was caused by a specific incident.
- (3) The physical injury or damage is identifiable by time and place of occurrence.
- (4) The physical injury or damage caused internal or external physical harm to the claimant's body.
- (5) The physical injury or damage was sufficient to require medical services or result in disability.

Should the claimant fail to prove even one of these definitional requirements, he will have failed to prove that he sustained a "compensable" injury.

At this point, it becomes necessary to address the effect of the provisions of Ark. Code Ann. §11-9-102(4)(B)(iv). Under this subsection, a physical injury is expressly excluded from the statutory definition of a "compensable" injury, if the accidental injury was substantially occasioned by the claimant's use of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders. This subsection further provides that the mere presence of any of these substances in the claimant's body creates a rebuttable presumption that the accident or injury was substantially occasioned by the use of such a substance. This subsection provides no threshold percentages or amounts, and the presence of these substances in any amount is sufficient to

raise the presumption, Flowers v. Norman Construction Company, 341 Ark. 474, 175 S.W. 3d 472 (2000)..

In the present case, the emergency room records, from November 29,2006, note that the claimant stated that he had consumed alcohol that day. In his testimony, the claimant related that he had drank one beer within a hour or two prior to the alleged accident and injury. The emergency room records also show that the claimant exhibited somewhat unusual behavior upon his admission. This included cursing, yelling, and removing himself from the backboard against medical advice.

I find the evidence presented sufficient to prove that the claimant had some amount of alcohol in his body at the time of his alleged employment related accident and injury. Thus, the presumption provided by §11-9-102(4)(B)(iv)(b) has been raised. Therefore, the claimant would also have the burden of proving that the presence of alcohol in his body on November 29, 2006, did not play any causal role in his alleged employment related accident or injury.

Essentially, the claimant's own testimony is the only direct evidence that he has offered to prove that any of the medically established and objectively documented physical injuries or defects involving his back arose out of and occurred in the course of his employment with this respondent. His own testimony is also the only direct evidence offered to prove the occurrence of an employment related incident or accident on that date and to prove a causal relationship between this incident and his back difficulties. After consideration of all the evidence presented, I do not find the claimant's testimony to be sufficiently credible to prove these facts.

The claimant testified that the accident occurred while he was standing at the top of a ladder and attempting to make repairs to the edge of the roof on the maintenance shop for the apartments. He described the mechanics of the accident as follows:

"So I put a new fascia board back up there, about 15 foot long, and then started trying to wrap the tin over the edge of the building, and as I was wrapping the tin over, I put me a board on there for leverage on top of the tin and under the tin and put a drywall screw across through it and used it for leverage to pry the tin down, and was putting a screw in with my other hand that I had already started through the tin and tried to reach the wood with it, and the board that I was using, too, for leverage, the head of the screw pulled through it and let the tin come flying back out and it pushed me backwards, and I reached and grabbed the edge of the tin, caught maybe an inch of the tin with my fingers, and slipped off of it and as I was going back, I seen I was going to fall on a pipe that was laying on the ground underneath the ladder, so I kicked off with my feet to get away from that, and when I did, I landed in the middle of my back." (T11-12)

The claimant further testified that he fell close to 15 feet and landed flat on his back where there was "kind of a humped up spot on the ground".

However, the initial emergency room record noted a different description of the alleged accident. The nurse's triage records stated:

"Stepped back off a ladder and twisted back' per patient."

The physician's emergency room report by Dr. Patric Anderson also gave a different description. In his report he stated:

"The patient is a 43 year old who presents with lower back pain secondary to a fall off a ladder. He fell about 5-6 feet."

The claimant testified that these descriptions were inaccurate and that he had no idea where the nurse and the physician obtained the descriptions of the accident that was contained in their reports. However, the nurse's notes clearly show that the history she recorded was obtained from the claimant,

himself. There is also no indication in the record that anyone else could have given the doctor the description he recorded.

The claimant was apparently next seen by a Dr. Donald Samms. However, no reports or records from Dr. Samms have been introduced.

Ultimately, the claimant was seen by Dr. Joseph Queeney. Dr. Queeney is a neurosurgeon and saw the claimant upon referral from Dr. Samms. Dr. Queeney recorded a history that the claimant's difficulties began after a 12 foot fall off a ladder at work.

Not only is the claimant's description of the alleged employment related accident, given at the hearing, inconsistent with the history he related when initially seeking medical treatment, it is also somewhat illogical. The natural instinct of any individual that had began to fall would be to attempt to grab hold of something, such as the ladder. This would be especially true of an individual who was about to experience a fall of 15 feet. However, according to the claimant's testimony, he did not attempt to grab hold of the ladder or one of its rungs, but instead pushed himself off the ladder and essentially dove backwards from this height. His explanation for this bizarre action was that he did not want to land, apparently even feet first, on some pipe that was located at the base of the ladder. The photographs of the scene made by the claimant (Claimant's Exhibit No. 2, page 12), show a few 1 inch metal pipes, which are laying essentially flat on the ground and extend for approximately a foot from the base of the ladder. These would not appear to logically present a risk great to cause a reasonable person to dive backward from a height of 15 feet.

The claimant's description of the accident, given in his testimony, is also inconsistent with the various physical findings observed and noted. On the initial emergency room records, there is no indication of any abrasions, bruises,

redness, or swelling involving any portion of the claimant's anatomy, particularly his back. It is difficult to believe that the claimant could have fallen from a height of 12 to 15 feet and landed flat on his back on a "hump spot" on the ground without any visible evidence of trauma to the soft tissues of his back.

The medically established and objectively documented physical injuries or defects to the claimant's back also appear incompatible with the mechanics of the injury described by the claimant. In his deposition, Dr. Queeney indicated that the compression or "burst" fracture of the T12 vertebra could have resulted from a fall on November 29, 2006. However, his opinion is clearly based upon the assumption that the claimant landed on his buttocks, not flat of his back. As Dr. Queeney indicated a compression or "burst" fracture occurs when axial pressure (i.e. pressure from top to bottom or bottom to top) is applied to the spinal column. This is not the type of trauma that would have been produced by the fall described by the claimant, either in his testimony or in the initial history he related to personnel at the St. Edwards Mercy Medical Center emergency room. The force or trauma that would have been produced by the fall described by the claimant would have been lateral trauma, or force applied to the spinal column from the side.

The medical evidence also shows that the claimant has experienced difficulties with his back for a period of years prior to November 29, 2006. In fact, some of these prior difficulties have also been attributed by the claimant to employment related injuries.

However, Dr. Queeney, in his deposition, expressed the opinion that the claimant's compression or burst fracture of the T12 vertebra had only been present for no more than six months prior to the MRI on December 5, 2006.

He based this conclusion on the presence of edema within the T12 vertebral body that was shown on the MRI and subsequent changes of the actual fractures that was shown when testing performed in December of 2006, May 25, 2007, and on July 21, 2007, were compared. I find Dr. Queeney's expert opinion to be convincing. However, I do not find it sufficient to support a finding that this fracture was due to a fall that occurred on November 29, 2006.

The evidence shows that in September of 2006, the claimant experienced a non employment related accident, when a 4-wheeler which he was riding fell off a ramp. The record reveals that the claimant's complaints and symptoms following this accident are essentially identical to those he made after the alleged accident on November 29, 2006. Clearly, the mechanics of the 4-wheeler accident would be compatible with causing the subsequently observed compression or burst fracture of the T12 vertebra. The occurrence of this incident would also place it within the six month period given by Dr. Queeney.

Curiously, following the alleged employment related accident on November 29, 2006, the claimant made no complaints with his back in the area of the T12 vertebra. In fact, it was noted that he was not even tender when pressure was applied directly to this area. Even Dr. Queeney recognized that this would be highly unusual and he recalled only one instance where a similar lack of complaints was exhibited.

In summary, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that the medically established and objectively documented physical injuries or defects involving his back were causally related to any specific employment related incident on November 29, 2006. If, in fact, such an employment related accident, as the claimant describes, actually occurred, the claimant has further failed to prove that this

accident was not substantially occasioned by the presence of alcohol in his body. For the foregoing reasons, I find that this claim must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On November 29, 2006, the relationship of employee-employer -carrier existed between the parties.

3. On November 29,2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$254.00 for total disability and \$191.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove that he sustained a "compensable injury" to his back on November 29, 2006. Specifically, he has failed to prove the occurrence of a physical injury to this portion of his body that arose out of and occurred in the course of his employment with the respondent, was caused by a specific incident, and is identifiable by time and place of occurrence.

5. The greater weight of the credible evidence presented establishes that the clamant has alcohol in his body, at the time of his alleged accident and injury on November 29, 2006. The claimant has failed to prove by the greater weight of the credible evidence that any accident and injury he sustained on that date was not substantially occasioned by the presence of this alcohol in his system.

6. The respondents have denied that the claimant sustained a compensable injury to his back on November 29, 2006, 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