

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610382

THOMAS BOUCHARD	CLAIMANT
C BEAN TRANSPORT SELF INSURED	RESPONDENT
COMPENSATION MANAGERS, INC. TPA	RESPONDENT

OPINION FILED **APRIL 29, 2008**

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

Claimant represented by CHARLES MULVEY, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by WALTER MURRAY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 15, 2008, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on July 25, 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. Immediately prior to the commencement of the hearing, the parties announced that they had agreed on the appropriate weekly compensation rates and these amounts were inserted in the pre-hearing order. A copy of the pre-hearing, with this amendment 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 all relevant dates in 2006, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$293.00 for total disability and \$220.00 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 a compensable injury to his back during July of 2006.
2. The claimant's entitlement to the payment of medical expenses.

In regard to these issues, the claimant contends:

"The claimant is a truck driver. In July 2006, the claimant was transferred to a different truck, which had a broken seat. The claimant suffered an injury to his back while driving the aforementioned truck. The claimant is entitled to reimbursement for medical treatment incurred."

In regard to these issues, the respondents did not make any written contentions.

#### DISCUSSION

\_\_\_\_\_The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his back during or about July of 2006. The burden rests upon the claimant to prove this alleged compensable injury.

In order to meet this burden, the claimant must prove that he sustained a physical injury to his back, which satisfies all of the definitional requirements of either Ark. Code Ann. §11-9-102(4)(A)(i) or §11-9-102(4)(A)(ii)(b). Under Ark. Code Ann. §11-9-102(4)(A)(i), the claimant must prove that this physical injury arose out of and occurred in the course of his employment, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal or external physical harm to his body, and required medical services or resulted in disability. Under Ark. Code Ann. §11-9-102(4)(A)(ii)(b), the claimant must prove that this physical injury arose out of and occurred in the course of his employment, caused internal or external physical harm to his body, and was in the form of an injury to his back or spine. If the claimant

proves that his physical injury meets all of the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(b), he must further show that this employment related injury was the "major cause" of his need for medical treatment or resulting disability, Ark. Code Ann. §11-9-102(4)(E)(ii).

In order to satisfy all of the definitional requirements of either of these categories of compensable injuries, the claimant must first prove that his alleged compensable injury arose out of and occurred in the course of his employment with the respondent. In order to prove this fact, he must establish the existence of a causal relationship between a physical injury to his back and his employment. However, he need not show the existence of this causal relationship to an absolute or even mathematical certainty. It is only necessary that the existence of this relationship is probable or likely. Further, the claimant need not show that the employment related cause of his injury was the sole or even "major cause" of such injury. Finally, the claimant is not limited to medical evidence in proving this causal relationship, but the existence of this relationship can be reasonably inferred from the evidence as a whole.

Although medical evidence is not absolutely required to prove causation in every case, it is certainly helpful in any case and can be a necessity in cases where causation is complex and not subject to general knowledge and ordinary reason. However, no expert medical opinion or causation can be considered, unless it is stated within a reasonable degree of medical certainty.

\_\_\_\_\_In the present case, essentially all of the medical reports and records contain a similar history. This history (taken from the claimant) was that his difficulties with his back and/or lower extremity began sometime after a change in the seat of the truck the claimant drove to at work. However, none of the claimant's various physicians expressly attribute the claimant's difficulties to

driving on this alleged defective seat. The only medical report directly addressing the issue of possible causation by the truck seat was authored by Dr. Capocelli's PA-C, John Hundley. This report dated March 9, 2007, states:

"The patient also stated that he wanted me to state that his problems could have been caused by a worn-out seat in his truck. The patient states that his problems did not start until he was given a truck with a worn-out seat that caused him to sit with his right hip canted much lower than his left. The patient states that after driving this truck for a couple of weeks that his lower back problems started. I told him that I had no knowledge of that, plus the pain in his back are longstanding degenerative changes. The patient states that he has secured the services of a lawyer as he feels that this injury is work related and workman's compensation has denied his claim. I told the patient that we will assist him in any way that we can and in this case however, there is no way to prove any acute injury other than provided signs and symptoms that he had that started after driving that truck."

A review of the record reveals that the claimant first sought medical treatment for his leg/back complaints on August 9, 2006, when he presented at the emergency room at St. Edwards Mercy Medical Center. At that time, the claimant made absolutely no complaints of pain or other difficulties with his back. On his admission form, the claimant's complaints are noted as pain in the right groin. In the initial nurse's triage records the claimant's complaints are noted as pain in the right groin area and into the right leg. The onset or duration of these complaints is given as 4 to 5 days. The emergency room physician's report noted the claimant's complaints as sharp pain in the right hip or buttock area that radiates into his foot. The duration of these symptoms was noted to be approximately one week. Curiously, no complaints of weakness, numbness, or paresthesias involving the leg were recorded. On physical examination, the claimant's neurological examination was normal, including straight leg raising tests. There was also no observation of tenderness or pain

upon palpitation of the back. Such a finding was only observed in the right buttock, in the area of the piriformis, and the right posterior thigh. The diagnosis made by the emergency room physician, on August 9, 2006, was piriformis syndrome and prostrate hypertrophy.

At the time of the claimant's discharge from the emergency room, he was instructed to schedule a follow up appointment with his primary care physician and to return to the emergency room if he noticed any worsening, changes, or new problems. The claimant did not return to the emergency room but was subsequently seen by his family physician Dr. Robert Baker, on August 21, 2006. At that time, Dr. Baker noted that the claimant had been seen at St. Edwards Mercy Medical Center for right leg pain, but erroneously indicated that this was on August 10, 2006. Dr. Baker also stated that the claimant had been told that he had an enlarged prostrate, at the time of his emergency room visit. Dr. Baker's evaluation and treatment on this visit appears to have been directed solely toward the prostrate problem. There is no indication of any further evaluation or treatment of the claimant's leg complaints. As with the initial emergency room visit there is no record of any complaints or symptoms directly involving the claimant's back.

On September 3, 2006, the claimant returned to the emergency room of St. Edwards Mercy Medical Center. At that time, his complaints were noted as pain from his right hip radiating around to and down his right leg. It was further noted that the onset of pain was one month ago, but that the pain was much worse today. Although this emergency room visit was only one day after the claimant initially reported a work related injury to the respondent, these are the only medical records that do not contain a mention of the truck seat. Instead, these records noted:

"This patient is a 54 year old white male who has a history of sciatica and yesterday sat down to clean a grave and has now developed severe pain, going now all the way down to his foot to the point where he can hardly ambulate it hurts so bad. Denies overt history of trauma. He did sleep on a bad bed last night. This is the second time he has had this event and presented here with the same, very similar pain."

This time, on physical examination, palpitation produced pain in the area of the sacroiliac joint on the right. The claimant was diagnosed as experiencing right sciatica and a lumbar MRI was recommended.

A lumbar MRI was ultimately performed, on September 11, 2006. However, this study appears to have been performed at the request of Dr. Terry Clark of the Cooper Clinic Occupational Medicine, rather than Dr. Hamby from the St. Edwards Mercy Medical Center's emergency room. For some reason, there is no report or record of any evaluation of the claimant by Dr. Clark, prior to the lumbar MRI.

The MRI was interpreted by Dr. William Hocott as showing:

"Small Schmorl's node is seen inferior end plate T11, superior end plate T12 and L1. Probable small hemangioma in posterior inferior mid aspect of L2. No definite marrow edema change. Conus unremarkable. Degenerative disc changes are seen at L5-S1 with bilateral L5 spondylosis with about 8 mm of anterolisthesis of L5 on S1. There is a broad uncovered disc mildly protruding more so right posterolateral and probably compressing the exiting L5 nerve root in the neural foramen on the right. Other levels unremarkable."

Based upon the results of this test, Dr. Clark recommended a neurosurgical evaluation.

Although the claimant was ultimately seen by a neurosurgeon, Dr. Anthony Capocelli, this evaluation was not performed upon referral of Dr. Clark, but upon referral from the claimant's family physician, Dr. Robert Baker. Dr. Baker had apparently been treating the claimant for his back/leg difficulties

with physical therapy, which (according to the claimant) made his complaints worse. Again, for some reason, no reports or records of Dr. Baker have been tendered by either party.

By the time the claimant saw Dr. Capocelli, on December 27, 2006, his complaints appear to have again changed to include actual low back pain that radiated into his right leg and all the way down to the top of his foot. There were also new complaints of numbness involving his right leg. X-rays taken at the request of Dr. Capocelli, showed Grade I spondylolisthesis and probable spondylosis with mild posterior element degenerative changes. Although the claimant related to Dr. Capocelli that his problems began after he drove a truck, at work, with a worn-out seat, he apparently neglected to mention the incident of cleaning the grave or sleeping on a "bad" bed. Following his evaluation, Dr. Capocelli referred the claimant for conservative treatment by Dr. John Swicegood, an anesthesiologist and chronic pain management specialist.

The claimant then saw Dr. Swicegood on January 23, 2007. Dr. Swicegood recorded complaints involving the S1 area of the claimant's spine that were in the form of pain and numbness running from the middle of the back through the buttock and down the back of the right thigh. He also noted complaints involving the L5 area of the claimant's back that were in the form of pain and numbness running from the middle of the back around the hip and down the front of the shin. Finally, he recorded complaints involving the L4 area of the claimant's back that were in the form of pain and numbness running from the middle of the back through the hip into the great right toe. On physical examination, Dr. Swicegood observed tenderness to palpitation just to the right of the midline in the claimant's lumbosacral spine, dermatonal

tenderness from L5 through S1 on the right, and lumbosacral tenderness upon flexion at 30 degrees.

Dr. Swicegood recorded a history of the claimant's symptoms as follows:

"Symptoms in the area occurred (possibly) as a result of bending forward, sitting on broken seat of truck with severe onset of pain."

This history of a sudden severe onset of pain would appear to coincide more with the difficulties described by the claimant on September 3, 2006, rather than those described on August 9, 2006. Curiously, Dr. Swicegood further noted that the claimant's symptoms had existed for 9 months, which would have placed their onset in April 2006.

Dr. Swicegood provided the claimant with conservative treatment in the form of a series of lumbar epidural steroid injections on the right side of the L5 and S1 levels. This treatment appears to have totally resolved the claimant's complaints.

The claimant testified that he never experienced any problems with his back prior to June of 2006, when he was changed from one truck to another. He stated that the seat on his new truck was "broken down" or worn out. As a result, he could not sit on the seat correctly, while driving and was required to constantly move around. He first testified that he began noticing problems with his back in July of 2006, and then subsequently testified that these problems started in August of 2006. It was his testimony that he told the respondent's shop manager about the broken seat but did not advise the shop manager that it was causing him any pain or problems with his back or any other portion of his body. He stated that the shop manager advised him that the seat would be replaced and that the seat was actually replaced during the first part of September of 2006. The claimant acknowledged that on September

2, 2006, he reported to the respondent that he sustained an injury to his back, as a result of the faulty truck seat, that occurred on September 1, 2006. However, he continued to maintain that he had actually hurt his back in July of 2006.

Obviously, the only direct evidence presented by the claimant to establish any causal relationship between driving on the faulty truck seat and his back difficulties, is his own testimony. Clearly, as Mr. Hundley recognized, in his report of March 9, 2007, the basic cause of the claimant's lower back and right lower extremity symptoms and difficulties were the longstanding developmental and degenerative defects involving his lumbar spine. It is certainly possible that the claimant's driving on a defective seat could have aggravated these defects and precipitated the onset of his symptoms. However, it is equally possible that any number of activities or events could have aggravated these defects and precipitated this onset of symptoms. These activities or events could have been of such a relatively minor and insignificant nature as to even escape the claimant's attention. In fact, the onset of the claimant's symptoms and complaints could have occurred merely as a result of the natural progression of his developmental and degenerative spinal defects, as part of the normal aging processes, without any precipitating traumatic activity or event. The evidence presented simply fails to show that the claimant's employment related activities of driving a truck with a defective seat was the more probable or likely cause of his subsequent onset of back and lower extremity complaints.

The evidence presented is contradictory concerning even the exact onset of the claimant's complaints. At the hearing, the claimant testified that these complaints began in either July or August of 2006. The initial emergency

room histories indicate that the claimant's complaints with his right leg began either 4 or 5 days or a week prior to his visit on August 9, 2006. The reports of Dr. Swicegood record a history that these complaints had been present for 9 months prior to January 23, 2007.

The medical evidence further indicates that the claimant's initial onset of complaints only involved his leg, were sporadic in nature, and diminished or possibly even resolved prior to September 1, 2006. It was not until after the claimant sat on the ground to clean a grave and slept in a "bad" bed, before his symptoms seem to have reappeared, increased in magnitude, and expanded to other portions of his body.

There is simply no evidence presented to directly connect the claimant's employment activities of driving on the worn-out seat with his lower back and right lower extremity symptoms and complaints or to distinguish this from the other potential causes. There is no evidence that the claimant's difficulties began while he was actually driving the truck with the defective seat or that he experienced any increase in symptoms while he was actually performing this activity (as opposed to any other activities of his day to day life). Even assuming that the claimant's symptoms first appear in July of 2006, he clearly drove on the defective seat, without complaints, for at least a month. The evidence further shows that even such activities as sitting on the ground, to clean off a grave and sleeping in a "bad" bed would appear to have the same type of potential causal connection with the claimant's symptoms, as driving on the defective seat. In fact, these activities would seem to have an even closer temporal relationship with the claimant's lower back and right leg symptoms on and after September 3, 2006, than his driving on the defective truck seat.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$293.00 for total disability and \$220.99 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 a "compensable injury" to his back during July of 2006. Specifically, the claimant has failed to prove that during this period he sustained a physical injury to his back that arose out of and occurred in the course of his employment with this respondent.

5. The respondents have denied the occurrence of a compensable injury to the claimant's back 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.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE