

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F509979

RANDALL D. JAMES, EMPLOYEE

CLAIMANT

**L'OREAL USA PRODUCTS, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED JANUARY 24, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 was represented by Ms. Betty J. Hardy, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 29, 2007, the above captioned claim came on for a hearing in Little Rock, Arkansas. A prehearing conference was conducted on September 11, 2007, and a Prehearing Order was filed on that same day. A copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record without objection, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

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

RANDALL D. JAMES - F509979

- 2) The employee/self-insured employer relationship existed at all relevant times, including April 15, 2005.
- 3) The claimant's temporary total disability rate was \$328.00 per week and the claimant's permanent partial disability rate was \$246.00 per week.
- 4) The parties stipulated that if compensability is overcome, that the respondents would be entitled to an offset pursuant to A.C.A. § 11-9-411.
- 5) The parties stipulated that Chief Administrative Law Judge Greenbaum entered an Order of Dismissal without prejudice in this matter on April 19, 2007.

At the full hearing the parties agreed to litigate the following issues:

- 1) Whether the claimant sustained a compensable spinal injury by specific incident on April 15, 2005.
- 2) If compensability is overcome, whether claimant is entitled to all associated medical treatment, TTD benefits from 4/15/05 to a date to be determined, and attorney's fees.
- 3) Statute of Limitations.

At the full hearing, the claimant contended that he sustained a work related accident arising out of and in the course of his employment on April 15, 2005; that resulted in spinal surgery that was performed by Dr. Shahim, his treating neurosurgeon. The claimant contended that due to a failed back syndrome he was referred to Dr. Hart and Dr. Braswell. The claimant contends that he has been temporary and totally disabled since April 15, 2005. The claimant also contended at

RANDALL D. JAMES - F509979

the full hearing that this claim is not barred by the Statute of Limitations.

Respondents contended at the full hearing that the claimant cannot meet his burden of proof that he sustained a compensable injury arising out of and in the course and scope of his employment. Specifically, respondents assert the claimant's back complaints are due to a preexisting condition and not causally related to his work for L'Oreal USA. Respondents contended that the claimant's claim for benefits is barred by the Statute of Limitations. The claimant alleges a date of injury of April 15, 2005. On April 19, 2007, the claim was dismissed. Claimant did not refile his claim within the original Statute of Limitations time; therefore, the claim for benefits is barred.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable spinal injury while

RANDALL D. JAMES - F509979

employed by L'Oreal USA on April 15, 2005.

- 4) Since the claimant has failed to prove compensability, all other issues outlined herein are rendered moot.

DISCUSSION

The claimant, age 49, began working for L'Oreal USA in 1995. The claimant testified as follows regarding his alleged compensable event on April 15, 2005:

Q Well, what happened that day?

A The last night I worked we were running a product – having a little trouble with the machines. And after we got the machines running pretty good we were running the line. And I went to unload the line, to get the product off the line, and when I was loading the pallet I felt a pop in my back.

Q What part of your back?

A The lower part of my back.

Q And you had back trouble before that night; is that correct?

A Yes, sir.

(T. pg. 18, lines 13-23).

The claimant testified that prior to feeling his back pop on April 15, 2005, that he had previous back problems. The claimant's testimony and the medical records show that the claimant in fact had three back surgeries prior to April 15, 2005. The claimant testified that he had back surgery at the L4-5 and L5-S1 levels in October of 1990, which was performed by Dr. Cathey. The claimant also testified that Dr. Cathey

RANDALL D. JAMES - F509979

performed another back surgery in 2002 which was not related to his work at L'Oreal. (T. pg. 36, lines 5-10). The claimant testified that his surgery in 2002 from Dr. Cathey was on the L3-4 and L5-S1 levels. Then, the medical records show that the claimant underwent a third back surgery from Dr. Shahim on December 1, 2004. The operative report from Dr. Shahim indicates the claimant underwent the following procedures:

1. Lumbar laminotomy for decompression at right L3.
2. Lumbar laminotomy for decompression, right L4.
3. Lumbar discectomy, right L3-4.

(R. Ex. 1, pp. 181-182).

Following the claimant's December 2004 back surgery from Dr. Shahim, the claimant remained off work for several weeks and then Dr. Shahim on February 16, 2005, returned the claimant to work with restrictions of no lifting greater than forty pounds. (R. Ex. 1, pg. 189).

The medical records show the first medical treatment the claimant received following his alleged April 15, 2005, compensable event was at the John L. McClellan Memorial Veterans Hospital on April 21, 2005. At that time, claimant complained of low back pain, but did not attribute his pain to his work at that time. The claimant went back to see Dr. Shahim on April 25, 2005, regarding his worsening back symptoms. Dr. Shahim conducted an MRI of the claimant's lumbar spine on April 25, 2005, which showed degenerative disk disease at the L3-4, L4-5, and L5-S1 levels, as

RANDALL D. JAMES - F509979

well as impingement on the L5 nerve root. (R. Ex. 1, pp. 196-197). The claimant continued to treat with Dr. Shahim and on June 3, 2005, Dr. Shahim performed another back surgery on the claimant. Dr. Shahim's discharge summary dated June 5, 2005, states that the claimant underwent a posterior lumbar fusion at L3-4 and L4-5 for treatment of severe degenerative disk disease, mechanical instability. (R. Ex. 1, pg. 211). Following the claimant's surgery in June of 2005 with Dr. Shahim the claimant continued to treat with Drs. Shahim, Braswell, Hart, and Owings. Since the claimant's last back surgery, he has consistently complained of back pain to his treating physicians.

The claimant contends that he sustained a compensable back injury on April 15, 2005, and is entitled to TTD benefits from the alleged date of injury to the present and all associated medical treatment. To prove the occurrence of 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 the following:

- 1) that an injury occurred arising out of and in the scope 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) that the injury is established by medical evidence supported by objective findings as defined in A.C.A. § 11-9-102(16); and

RANDALL D. JAMES - F509979

- 4) that the injury was caused by specific incident and is identifiable by time and place of occurrence.

Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2nd 876 (1997).

I find that the claimant has failed to meet his burden of proof on two elements of compensability. First, I find that the claimant has failed to prove by a preponderance of the evidence that his injury was caused by a specific incident which is identifiable by time and place of occurrence. The evidence contained in the record now before the Commission leaves this examiner to doubt whether an incident actually occurred on April 15, 2005. The claimant testified that his back popped while lifting boxes on April 15, 2005; however, there was no report of injury or incident reported generated by the respondent on that date. The lack of report is interesting because the records show that a similar incident was reported and logged by the employer, L'Oreal USA, on September 2, 2004. The individual encounter report from L'Oreal USA dated September 2, 2004, contained at Respondent's Exhibit 1, page 138, shows that employee "states he was putting boxes of makeup remover on the pallet, turned and felt a pop." That incident sounds remarkably similar to the incident the employee claims happened on April 15, 2005; however, when questioned about the September 2004 incident the claimant had no recollection.

Q Do you recall going to Sherrie Darr in September of 2004 indicating that you felt like you might have hurt your back at work?

RANDALL D. JAMES - F509979

A No, ma'am, I don't.

(T. pg. 39, lines 6-9).

The claimant went on to testify that his problems in late 2004 began while playing with one of his grandchildren.

Q I believe you told me in your deposition the reason that you started having trouble in the latter part of 2004 is because something happened at home while you were playing, maybe one of your grandchildren or your children.

A Yeah.

Q Is that right?

A Yes, ma'am.

(T. pg. 39, lines 18-24).

To further question whether an incident occurred on April 15, 2005, at the first doctor's visit after the alleged April 15, 2005, incident, the claimant reported to the VA Emergency Room and did not give any history of an injury occurring at work:

Q You talked about going to the VA Emergency Room on April the 22nd of 2005. At that point in time you didn't give them a history of any kind of injury occurring at work, did you?

A No, ma'am.

(T. pg. 42, lines 4-7).

The claimant also testified that when he initially filled out is AR-C form with the

RANDALL D. JAMES - F509979

Workers' Compensation Commission, he listed his date of accident as February 15, 2005. The claimant then testified that the original date he listed of February 15, 2005, was a mistake:

Q I'm looking at the ARC that was filed back 2005. It lists the date of accident as February the 15th of 2005. Was that just a mistake or –

A Yes, sir, it was.

(T. pg. 51, lines 14-17).

It must be noted that the record is void of any medical reports stating that the claimant reported an injury date of April 15, 2005. In fact, the reports, of which there are many, usually refer to the claimant's back problems as chronic. It must also be noted that when the claimant first got on his short term disability in September of 2004, that the claimant indicated to Ms. Sherrie Darr, senior workers' comp analyst for L'Oreal USA, that the absence was not work related. (R. Ex. 2, pg. 39). Ms. Darr testified that the same procedure would be true when the claimant received a short term disability in April of 2005. Ms. Patricia Edwards, manager of employee health services for L'Oreal, from August 8, 1995, through September 15, 2007, testified that the first time Mr. Randall James notified her of an employment related condition concerning his back was on September 7, 2005. Ms. Edwards testified that she thought it was strange that Mr. Randall James waited nearly six months after the alleged compensable event of April 15, 2005, and until his short term disability had

RANDALL D. JAMES - F509979

nearly run out before making a claim for a work related injury.

For the reasons outlined above, I find that claimant has failed to prove by a preponderance of the evidence that he sustained a specific incident back injury which is identifiable by time and place of occurrence. The evidence leads this examiner to believe that if an incident regarding the claimant's back popping due to lifting two pound boxes did occur, it happened in September of 2004; however, it must also be noted that subsequent to that date the claimant got on short term disability and stated that his condition was not work related. The inconsistent dates of injury alleged by the claimant and the totally different account of what occurred on April 15, 2005, from the employer's perspective leads this examiner to find that the claimant has failed to meet his burden of proof with regard to an injury caused by a specific incident, identifiable by time and place of occurrence.

I also find that the claimant has failed to prove by a preponderance of the evidence that his spinal injuries arose out of and in the scope of his employment. I will not go into every medical report contained in the record that outlines the claimant's preexisting back conditions. However, suffice to say that the record is replete with hundreds of pages of medical that outline the claimant's preexisting back condition which included but was not limited to "advanced degenerative disk disease."

As outlined above, the claimant had three back surgeries prior to his alleged

RANDALL D. JAMES - F509979

compensable incident on April 15, 2005. Even after the claimant's back surgery by Dr. Cathey on April 12, 2002, Dr. Cathey discharged the claimant with a diagnosis of "Recurrent disc herniations L3-L4 and L5-S1 with resulting canal stenosis." (R. Ex. 1, pg. 67). It must be noted that the claimant had L5 nerve root impingement even prior to his surgery on April 12, 2002. There are hundreds of pages of medical reports contained in the record that show the claimant had disk degeneration at the L3-L4, L4-L5, and L5-S1 levels well prior to any alleged compensable event that may or may not have occurred on April 15, 2005. The record is clear that any procedures or treatment the claimant received after April 15, 2005, were all procedures or treatment that doctors had opined that claimant would need well prior to April 15, 2005. Any treatments or procedures that were not specifically mentioned, can all be attributed to the claimant's degenerative disk disease or conditions that existed prior to April 15, 2005. Dr. Cathey said as much in his November 21, 2002, report where he stated "I have indicated to Mr. James that I suspect he will always have chronic lower back pain since he has degenerative changes as well as surgical changes at L4-L5, L3-L4 and L5-S1." (R. Ex. 1, pg. 78).

The claimant testified that the first time there was any mention of a possible fusion on his low back was after April 15, 2005. (T. pg. 40, lines 8-13). However, Dr. Shahim in his December 14, 2004, report stated "He may ultimately require a

RANDALL D. JAMES - F509979

lumbar fusion at L3-4.” (R. Ex. 1, pg. 187). Dr. Shahim went on to state that he recommended a fusion surgery because the claimant had multilevel lumbar spondylosis. Dr. Shahim made that recommendation on December 14, 2004, well before the claimant’s alleged April 15, 2005, incident, and well before the claimant actually underwent the lumbar fusion in June of 2005.

Based upon the record now before the Commission, it is clear to this examiner that the claimant’s back condition after April 15, 2005, is causally related to the claimant’s back conditions that preexisted April 15, 2005. It is clear to this examiner that any treatment claimant needed after April 15, 2005, and any injuries that he may have had to his back after April 15, 2005, were due solely to the claimant’s numerous back surgeries and preexisting degenerative disk disease. Nothing in the record leads this examiner to find that the claimant’s back condition is related to any event that may or may not have happened on April 15, 2005. As such, the claimant has failed to prove by a preponderance of the evidence that his back/spinal injuries arose out of or in the course and scope of his employment. Therefore, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury as a result of a specific incident that occurred on April 15, 2005. Based on the findings recited herein, the other issues outlined are rendered moot.

RANDALL D. JAMES - F509979

ORDER

Based on the findings recited herein, claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his spine while employed by the respondent. Therefore, claimant's claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb