BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704110

JOHN T. MORGAN	CLAIMANT
McCOY TREE SURGERY COMPANY	RESPONDENT
COMPANION PROPERTY & CASUALTY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 2, 2008

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

Claimant represented by NEAL HART, Attorney, Little Rock, Arkansas.

Respondents represented by BILL BIRD and JOSEPH PURVIS, Attorneys, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 23, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in the case on August 8, 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. Prior to the commencement of the hearing, the parties announced the appropriate weekly compensation rates and the claimant modified his contentions to reflect that he was only seeking temporary total disability benefits for the period of April 17, 2007 through May 15, 2007. A copy of the 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 April 16, 2007, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are $358.00 for total disability and $269.00 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 low back on April 16, 2007.

2. The claimant's entitlement for medical services and temporary total disability from April 17, 20076 through May 25, 2007, and attorney's fees.

In regard to these issues, the claimant contends:

> "Claimant suffered a compensable back injury on the above date, and is entitled to receive medical and TTD benefits related to same. Claimant's attorney is entitled to receive the maximum statutory attorney's fee on all controverted benefits."

In regard to these issues, the respondents contend:

> "That the claimant's injuries were a combination of his pre-existing problems and the result of horseplay and that the claimant did not sustain a compensable injury."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a compensable injury to his back, as the result of a specific employment related incident or accident on April 16, 2007. The burden rests upon the claimant to prove that he sustained a physical injury to his lower back, on April 16, 2007, that satisfies all of the statutory requirements imposed by the Act for a "compensable injury".

As the claimant has alleged that this compensable injury was caused by a specific incident, he must further prove that this injury satisfies all of the definitional requirements for a "compensable injury" that are found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

(1) The injury must arise out of and occur in the course of the employment.

(2) The injury must be caused by a specific incident.

(3) The injury must be identifiable by time and place of occurrence.

(4) The injury must cause internal or external physical harm to the claimant's body.

(5) The injury must require medical services or result in disability.

Based upon the respondents' contentions, it must also be determined whether any injury sustained by the claimant was caused by "horseplay". Under the provisions of Ark. Code Ann. §11-9-102(4)(B)(i), such injuries are expressly excluded from the category of "compensable injuries". However, this issue of "horseplay" is essentially a part of and included in the issue of whether the injury arose out of and was in the course of the claimant's employment. Clearly, horseplay would not comprise a part of the services for which the claimant had been hired. Nor would horseplay benefit the employer, either directly or indirectly.

Four individuals were present at the time of the incident or alleged accident, on April 16, 2007. Three of these individuals,

the claimant, Eric Scott Jones, and Sean Badeaux testified at the hearing. The fourth individual, James (Bubba) Samuels, did not testify. The testimony of the claimant, concerning the events and circumstances surrounding the accident, substantially conflicts with the testimony of both Mr. Jones and Mr. Badeaux.

The testimony of all of the witnesses indicate that, shortly before noon on April 16, 2007, they ceased working and went to lunch. In doing so, they proceeded down a logging road from their job site back to where their work truck was parked. They were all riding in a small six-wheel all terrain vehicle, a John Deere "Gator". This is essentially a two passenger vehicle, but has a bed on the back. Mr. Badeaux was driving the vehicle. The claimant was in the passenger section to Mr. Badeaux's right. Mr. Jones and Mr. Samuels were sitting in the bed of the vehicle. However, on the more critical matters, the testimony of these witnesses differ.

The claimant describes the events as follows: As he and the three other workers were driving down the logging road they went down a steep hill, hit a creek at the bottom of the hill, and splashed water all over the vehicle and its occupants. They then proceeded to the top of the opposite hill, turned around, went back down that hill, struck the creek, and again splashed water all over the occupants and the vehicle. At that time, he told Mr. Badeaux, the driver, that he was driving too fast, that this was unsafe, that he could hit a tree, and to slow down. No one else in the vehicle said anything and Mr. Badeaux did not slow down. At that point, he told Mr. Badeaux to stop. He got out and advised everyone

that he would just walk back to the truck. The others then urged him to get back on, and Mr. Badeaux told him that he would slow down. When he got back in the vehicle, he did not sit down in the seat because it was wet. Instead, he was partially standing up and was turned a little bit to the left. He was holding on to the roll bar and headlight of the vehicle. Mr. Badeaux then turned left "real fast" at an intersection on the road, and he was slung off the vehicle. He struck the ground on his stomach and experienced a severe burning in his back and loss of feeling in his feet. Mr. Badeaux stopped the vehicle and backed up to where he lay. Some unidentified occupant or occupants of the vehicle told him to get up and to get back into the vehicle. He advised the others that time, that he couldn't get up and that he was in severe pain. At that point, Mr. Jones made the comment to just run over his leg and he would get up. After waiting a couple of minutes, the rest of the individuals departed in the vehicle and just left him lying on the ground. Approximately twenty minutes later, Mr. Jones returned. He again told Mr. Jones that he was hurt and an ambulance was called. He was initially taken to the emergency room at the Mena hospital, then subsequently to St. Michaels Hospital in Texarkana.

Eric Scott Jones describes the events differently. He recalled that they crossed the creek only one time on the way back to the truck. However, he agreed that, when they crossed the creek, water splashed on the vehicle and its occupants. At that time, the claimant got mad, stepped out of the vehicle, stood by the side of the road, and lit a cigarette. Mr. Badeaux talked the claimant

into getting back onto the vehicle, but when he got in, the claimant stood up and would not sit back down. When Mr. Badeaux subsequently turned left at a T-intersection in logging road, the claimant was still standing up and appeared to merely "bale off" the vehicle. Mr. Badeaux stopped the vehicle, everyone got off the vehicle, and he asked the claimant if he were hurt. In response, the claimant just "giggled around" and lay on the ground with the cigarette in his mouth. He testified that they then got back onto the vehicle and when the claimant did not get up, they proceeded back to the truck for lunch. It was his testimony that when the claimant did not arrive at the truck, after ten to fifteen minutes, he sent Mr. Bandeaux to get him. Mr. Badeaux came back and advised him that the claimant was still lying in the same place. He stated that he and Ron Gilbert, another supervisor, took the Gator and went back to the claimant's location. At that time, he asked the claimant if he were really hurt. He testified that when the claimant advised him that he was hurt, he called for an ambulance and the claimant was transported from the scene. It was his opinion that the claimant was not accidently thrown from the vehicle, but either jumped off or threw himself off. It was also his opinion that Mr. Badeaux was not driving fast or in an unsafe manner. He further denied that he heard the claimant tell Mr. Badeaux to slow down. It was also his testimony that he did hear the claimant tell Mr. Badeaux to "just hit a tree so he could get paid". However, he conceded that he had never seen the claimant do anything like this before or anything else that he would consider "horseplay".

Finally, it was his opinion that the vehicle in which they were riding would only travel five to fifteen miles per hour.

Mr. Badeaux testified that when they crossed the creek, water splashed up on the vehicle and its occupants. He stated that at that time, the claimant got off the vehicle and told him that he was driving crazy, lit a cigarette, and then got back onto the vehicle. He stated that when the claimant got back on the vehicle, he stood up rather than sitting down on the seat. Mr. Badeaux testified that, although he told the claimant to sit down, the claimant continued to stand up. It was his testimony that when he subsequently made the left hand turn, the claimant either fell or jumped off, landing on his feet and then onto his stomach. He stated that he then stopped the vehicle and got out and asked the claimant if he was hurt. It was his testimony that the claimant merely “chuckled” a little but did not say anything. He stated that everyone, except the claimant, then got back on to the vehicle and then left. He testified that some twenty to thirty minutes later, he and Mr. Samuels returned and found the claimant still laying on the ground. He stated that, at that time, the claimant told him that he was hurt and couldn’t feel his legs. Mr. Badeaux testified that he proceeded back to the truck, advised his foreman (Mr. Jones) and an ambulance was called. It was Mr. Badeaux’s opinion that the “Gator” would run five to ten and possibly fifteen miles per hour.

The initial history, taken at the Mena emergency room, recited that the claimant was thrown from a slow moving ATV and lay on the

ground for several hours. The next history was recorded, on April 17, 2007 by Dr. Muhammad Khalil. This history noted that the claimant had a roll over on a six-wheeler. Finally, on April 23, 2007, Dr. Lee Buono notes that the claimant was thrown out of a six-wheeler at work.

If the claimant were positioned as he describes, partially standing up, turned slightly to the left, and holding on to the roll bar and headlight of the vehicle, it would seem physically impossible for him to be thrown face forward in the opposite direction of the vehicle. If he were accidently ejected from this position, it would be reasonably expected that he would be thrown backward from the vehicle and would have landed on his back, rather than his stomach if the claimant were accidently ejected from the vehicle, in the manner that everyone describes, if he were standing and turned facing to the right of the vehicle. It is also difficult to conceive that he could be thrown or ejected from the vehicle if he were grasping the roll bar and headlight as he describes. Clearly, none of the other individuals, including Mr. Jones-who was merely sitting behind the claimant in the bed of the vehicle, were ejected from the vehicle or even thrown about.

After consideration of all the evidence presented, it is my opinion that the greater weight of the evidence fails to establish that the claimant accidently fell or was ejected from the six-wheel drive vehicle on which he was riding on April 16, 2007. Rather, the greater weight of the credible evidence shows that he voluntarily jumped from this vehicle. At the time he voluntarily

jumped from the vehicle, he was not performing his regular employment duties and was on his way to lunch. More importantly, his actions in jumping from this vehicle was not accidental, or a matter of necessity, and was in no way incidental to or in furtherance of his employment. Clearly, such a voluntary act would be considered “horseplay” under Ark. Code Ann. §11-9-102(4)(B)(i).

However, even had the incident on April 16, 2007, been proven to be accidental it is my further opinion that the claimant has failed to prove by the relationship between the incident, and any physical injury to his low back or lumbar spine. Such a causal relationship is an absolute necessity to satisfy the requirement that the injury arise out of and be in the course of the employment.

The medical evidence presented shows that the claimant had experienced significant injuries to his lumbar spine, prior to April 16, 2007. The severity of these injuries was such that surgical intervention was required. The claimant’s last surgery was only some seven months prior to the incident on April 16, 2007. The claimant appears to have drawn workers’ compensation benefits for both of these two prior injuries. The testimony of the claimant’s co-employees reflect that he had continuing difficulties with his back and had continuing limitations on his physical activities after the last surgery. The various radiographic studies performed on the claimant, on and after April 16, 2007, show extensive arthritic and degenerative changes in his lumbar spine, primarily at the level of his prior injuries. However, none of

these tests reveal the presence of any objective findings to support a new or recent traumatic injury. In fact, the various physical examinations performed on the claimant, on and after April 16, 2007, failed to show any objective evidence of recent trauma anywhere on the claimant's body, such as bruising, lacerations, swelling, spasms, etc.

The only evidence of any additional injury, as the result of the incident on April 16, 2007, is the claimant's subjective complaints of increased pain in his back and the rather bizarre symptoms of bilateral paralysis or weakness and loss of feeling in his legs and feet.

In his report of May 7, 2007, Dr. Buono described these arthritic changes, as follows:

> "He (the claimant) has horrible endplate changes at L5-S1`, which is causing his pain."

For these symptoms, Dr. Buono recommended additional surgery that would be in the form of a vertebral fusion with a placement of "hardware" at this level. This is the same level of the claimant's lumbar spine that had been damaged in the prior injuries and was the subject of the two previous surgeries.

In response to the letter from the claimant's attorney, Dr. Buono responded to three proffered multiple choice questions by indicating that the recommended surgery was reasonably necessary in relation to the claimant's work injury and that the claimant's surgery was directly related to the work injury. He also checked the response indicating that this opinion was within a reasonable degree of medical certainty. However, Dr. Buono has offered no

explanation as to how these extensive or "horrible" arthritic changes to the endplates of the claimant's L5 and S1 vertebra were causally related to trauma occurring only three weeks prior to the observation of these defects. Obviously, such extensive degenerative changes would reasonably be expected to only occur over a substantial period of time, rather than a three week period. I also find it highly extraordinary that the day following this report, May 15, 2007, Dr. Buono released the claimant to return to work with no restrictions and at full duty.

After consideration of all the evidence presented, I find that I cannot place any weight or credibility on Dr. Buono's opinion that the claimant's recommended surgery and presumably his current difficulties are directly related to the incident on April 16, 2007. This opinion is simply inconsistent with his prior statement that the claimant's difficulties are attributable to extensive degenerative arthritic changes to an area of the claimant's lumbar spine that has been damaged by two prior injuries and two prior surgeries.

I further find that I cannot place sufficient credibility on the claimant's testimony that his current difficulties occurred contemporaneously with the incident on April 16, 2007, to establish the existence of a causal relationship between this incident of a new or additional injury to his lower back or lumbar spine. The evidence establishes that this incident was intentionally precipitated by the claimant, shortly after he had commented to co-employees about a desire to again be injured on the job. Again, or

previously noted, the claimant's testimony concerning a sudden recent onset of these extensive subjective complaints, including essentially paralysis of both legs, would be inconsistent with the total lack of objective findings that would be indicative of recent trauma and resulting injury.

In summary, it is simply my opinion that the claimant has failed to prove by the greater weight of the credible evidence that he sustained a physical injury to his lower back or lumbar spine that arose out of and occurred in the course of his employment with this respondent on April 16, 2007. Thus, he has failed to establish a "compensable injury", as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i).

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On April 16, 2007, the relationship of employee-employer-carrier existed between the parties.

3. On April 16, 2007, the claimant earned wages sufficient to entire him to weekly compensation benefits of $358.00 for total disability and $269.00 for permanent partial disability, should such benefits have been appropriate.

4. The evidence presented establishes that the claimant's alleged injury occurred when the claimant was engaged in "horseplay". Thus, it would be expressly excluded from the definition of a "compensable injury" by Ark. Code Ann. §11-9-102(4)(B)(i).

5. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a “compensable injury” to his lower back or lumbar spine on April 16, 2007. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of any physical injury to his lower back or lumbar spine, on April 16, 2007, that arose out of and occurred in the course of his employment with the respondent.

6. The respondents have denied the occurrence of a compensable injury to the claimant’s low back on April 16, 2007, and have controverted this claim in its entirety.

<u>ORDER</u>

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim.

IT IS SO ORDERED.

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MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE