

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613876

HUONG NGUYEN, Employee	CLAIMANT
FM CORPORATION, Employer	RESPONDENT
S.B. HOWARD & COMPANY, INC., Carrier	RESPONDENT

OPINION FILED APRIL 15, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 18, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 29, 2007, and a pre-hearing order was filed on November 30, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the parties on November 9, 2006.
3. The claimant was earning an average weekly wage of \$539.20 which would entitle him to total disability benefits at the rate of \$359.00 per week and permanent partial disability benefits equal to \$270.00 per week.
4. Respondent has controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's back on November 9, 2006.

2. Medical.

3. Temporary total disability benefits from December 21, 2006 through a date yet to be determined.

4. Attorney fee.

The claimant contends he suffered a compensable injury to his back on November 9, 2006. He requests medical, temporary total disability benefits, and an attorney fee.

The respondents contend that claimant did not suffer a compensable injury on November 9, 2006.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 29, 2007, and contained in a pre-hearing order filed November 30, 2007, are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while employed by respondent on November 9, 2006.

#### FACTUAL BACKGROUND

\_\_\_\_\_The claimant is a 52-year-old man who came to the United States from Vietnam in 1980. After working as a machinist in Texas the claimant moved to Northwest Arkansas and has worked for the respondent approximately 23 years as a painter on its production line using a pressurized paint gun.

Claimant testified that on the morning of November 9, 2006 he had been squatting down for approximately 30 to 45 minutes cleaning the paint gun and as he started to get up felt pain in his lower back which radiated into both feet. As this occurred a co-employee came into the room and claimant asked the co-employee to report the problem to Tony, claimant's supervisor. Claimant reported the incident to Tony and was taken by ambulance to the emergency room at St. Mary's in Rogers. The medical reports indicate that claimant's complaints at that time included both chest and low back pain. Claimant underwent testing on his heart and his low back. With respect to claimant's low back, claimant underwent an MRI scan which revealed degenerative disc disease and canal stenosis. Claimant was hospitalized and evaluated by Dr. Raben, neurosurgeon, who referred claimant to Dr. Umbarger for a lumbar epidural steroid injection. Dr. Umbarger diagnosed claimant's condition as spinal stenosis with intractable pain. Approximately three days later claimant was discharged by Dr. Raben and referred for physical therapy.

After claimant's hospital discharge he was sent by the respondent to Dr. Moffitt. Dr. Moffitt diagnosed claimant's condition as a strain superimposed on degenerative disc disease and osteoarthritis. He prescribed medication and work restrictions. Dr. Moffitt eventually ordered physical therapy and when claimant's condition did not improve referred him to Dr. Brown and eventually to Dr. Standefer, neurosurgeon. Dr. Standefer recommended surgery for canal stenosis and a possible lumbar disc protrusion. Surgery was performed on April 25, 2007 and the post-operative report revealed canal stenosis with no evidence of a disc protrusion. Dr. Standefer subsequently released claimant with work restrictions.

The respondent initially accepted claimant's injury as compensable and paid some compensation benefits, including medical treatment. When respondent controverted the claim, claimant filed his claim contending that he suffered a compensable injury and requesting medical benefits, temporary total disability benefits, and a controverted attorney

fee.

### ADJUDICATION

\_\_\_\_\_ Claimant contends that he suffered a compensable injury to his low back when he was getting up after squatting down for a significant period of time while cleaning a paint gun on November 9, 2006. Claimant's claim is for an injury caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical 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;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidenced that he suffered a compensable injury. This finding is based upon the significant conflicting evidence presented in this case.

First, it should be noted that claimant has difficulty communicating due to the fact that he speaks Vietnamese and very little English. However, the fact that claimant has difficulty communicating does not preclude him from having to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury. Here, there are simply too many inconsistencies present to find that claimant has met his burden of

proof.

First, claimant acknowledged at the hearing that prior to November 9, 2006 he had been having some pain in his upper back area for which he was taking Tylenol on an occasional basis prior to coming to work. Claimant also denied having any low back pain prior to the incident on November 9. At claimant's deposition he initially gave that same testimony. However, claimant subsequently indicated that he was having low back pain prior to November 9.

Q. Specifically, within a week or two of this incident happening, were you taking any over-the-counter medication to control pain for your low-back?

A. Yes, I did. I went to Wal-Mart, and I took some Tylenol and it helped relieved the pain, and then I went back to work.

Q. And this is before the incident occurred, then, right?

A. Before the incident, I was taking the medication because I was in pain, but I was able to go back to work because it wasn't that severe.

MR. BASSETT: Tell him I'm going to try to summarize what he just said there.

Q. Within a week or two of the incident that we're here to talk about, you were having some pain in your low-back and you were taking medication for it, but you were still able to work?

A. Yeah.

There are also other inconsistencies in the claimant's testimony. For instance, at the hearing claimant denied having taken Tylenol on the morning before he went to work. However, at claimant's deposition he indicated that he took Tylenol before he went to work on the morning of November 9. At the hearing claimant also denied having been treated for chest pain on November 9. However, the medical evidence indicates that claimant was complaining of chest pain on that date and in fact was given Nitroglycerin by the EMS

personnel. He also underwent testing at the hospital for his complaints of chest pain.

After claimant was taken to the hospital by ambulance he was evaluated and treated by Drs. Umbarger and Raben. Dr. Umbarger's medical report of November 9 indicates that claimant's back pain has existed for several weeks:

The patient is a 50-year-old Asian man who we were consulted by Dr. Raben for intractable pain secondary to spinal stenosis. The patient has had pain over his back for the last few weeks and it has slowly gotten worse. He states the pain has increased to the point where he has not been very mobile and has been hard to get under control with p.o. pain medication.

Furthermore, Dr. Raben's discharge report of November 10, 2006 refers to claimant's complaints of "chronic low back pain".

For completeness, it should be noted that there are other medical reports which contain a history of claimant's complaints having begun on November 9, 2006. Again, the evidence presented is conflicting.

Finally, I believe it is significant to note the findings of Dr. Standefer, the neurosurgeon who performed surgery on claimant's lumbar spine. Initially, in addition to claimant's degenerative condition, Dr. Standefer believed that claimant's findings and the testing were suspicious for a disc protrusion. However, Dr. Standefer's post-operative report indicates that a disc protrusion was not present. Instead, the post-operative diagnosis was lumbar canal stenosis. This is significant in that it indicates that claimant's condition is a culmination of a degenerative process, not an acute injury. Obviously, if this degenerative condition had been aggravated by claimant's employment claimant would have a compensable injury. However, the conflicting evidence indicates that claimant's back pain existed prior to November 9, 2006. This would indicate that claimant did not suffer an aggravation of his pre-existing condition on November 9, 2006.

In summary, I acknowledge that claimant has difficulty communicating due to his

limited understanding of English. However, claimant's difficulty with communicating does not preclude him from the burden of proof. In this particular case, claimant has testified that he did not have low back pain prior to November 9 and he has also testified that he did have low back pain prior to November 9. Furthermore, the histories contained in the medical evidence are also conflicting. The histories contained in the medical reports from Drs. Umbarger and Raben during claimant's hospitalization indicate that claimant's back pain had existed for some period of time and that it was chronic in nature. With respect to those medical reports, it should be noted that claimant's sons were interpreters when he received this medical treatment.

While it is certainly possible that claimant suffered an aggravation of a pre-existing degenerative condition while employed by respondent on November 9, 2006, there is also sufficient evidence indicating that claimant's low back complaint had existed prior to that date according to claimant's testimony and the histories contained in the medical reports of Drs. Umbarger and Raben. Given the conflicting evidence presented, I simply find that claimant has failed to meet his burden of proof by a preponderance of the evidence.

#### ORDER

\_\_\_\_\_ Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his low back while employed by respondent on November 9, 2006. Therefore, his claim for compensation benefits is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$360.50.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE