

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F706221/F706231

ROBERT SCHOUTESE, Employee	CLAIMANT
GREAT PLAINS COCA-COLA BOTTLING, Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED MAY 8, 2008

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 16, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 15, 2007, and a pre-hearing order was filed on that same date. 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-carrier relationship existed among the parties at all relevant times.

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

1. Compensability of injury to neck and upper back on June 1, 2006 (F706221).
2. Compensability of injury to upper back on June 1, 2007 (F706231).
3. Medical for both injuries.
4. Temporary total disability benefits from June 1, 2007 through a date yet to be determined.

5. Attorney fee.

At the time of the hearing the claimant withdrew as an issue his request for temporary total disability benefits.

The claimant contends that he had a gradual onset injury to his neck and upper back around June 1, 2006. On June 1, 2007, he had a specific injury to his upper back when he reached above his head with his right hand to move a case of Coke. Claimant contends he is entitled to related medical benefits.

The respondents contend the claimant did not suffer compensable injuries.

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 August 15, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a gradual onset injury to his neck and upper back or a specific injury to his upper back on June 1, 2007.

FACTUAL BACKGROUND

_____The claimant is a 27-year-old man who was hired by the respondent in September 2005. Claimant's initial job for the respondent required him to drive a truck and deliver Coca-Cola products to gas stations and small grocery stores. This job required claimant to load and unload small cases of Cokes onto a dolly and transport them from his truck to

the store. Claimant performed this job for almost a year before he was moved to another job in bulk transport. In bulk transport the claimant delivered pallets of product instead of individual cases.

Claimant testified that while he was performing the first job for the respondent he began having back pain in January 2006. When his back pain did not improve he sought medical treatment on his own from Dr. Tuttle who in turn referred claimant to Dr. Kaplan, neurologist. Dr. Kaplan ordered an MRI scan of the claimant's cervical spine which was read as normal.

When claimant informed respondent that he was seeking medical treatment for an alleged on-the-job injury he was sent by respondent to Dr. Lewis' clinic where he was evaluated by Daniel Briley, a physician's assistant. In addition to those physicians, claimant has also been evaluated by Dr. Lewis and Dr. Weilert. Claimant has been diagnosed with scoliosis and has been treated conservatively with medications, physical therapy, and injections.

Claimant has filed this claim contending that he suffered a compensable injury to his neck and back in June 2006 as well as an injury to his upper back on June 1, 2007. He requests medical treatment for both injuries.

ADJUDICATION

_____ Claimant contends that he suffered a gradual onset injury to his neck and back as a result of job duties he was performing for the respondent delivering cases of Coke to gas stations and small grocery stores beginning in September 2005 and continuing for almost one year. A claimant seeking benefits for a gradual-onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability; and (3) the injury was a major cause of

the disability or need for treatment. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001); *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App.231, 48 S.W. 3d 540 (2001). In addition, claimant must offer objective medical evidence establishing the existence of an injury. *Wal-Mart Stores v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999).

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 prove by a preponderance of the evidence that he suffered a compensable injury. Specifically, I find that claimant has failed to prove by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with the respondent.

The claimant testified that his back problems began in January 2006 after he began working for the respondent delivering cases of product to gas stations and small grocery stores. When his back pain continued he sought medical treatment from various treating physicians. Although claimant testified that the back pain began in January 2006, the medical records indicate that claimant's back pain was longstanding in nature. Claimant initially sought medical treatment from Dr. Tuttle on June 22, 2006 and his report indicates that claimant had upper back pain for "x yrs." He also noted that claimant developed back pain between his shoulder blades as a result of a fight several years earlier.

Claimant was evaluated by Dr. Kaplan on September 11, 2006. While Dr. Kaplan indicated that claimant's pain had been worse since January 2006, he also indicated that it had existed before that time: "It has been going on for quite some time, but it has been somewhat worse since 01/2006."

Claimant was eventually referred to Daniel Briley, a physician's assistant. In his report of September 20, 2006, Briley stated that claimant had complaints of upper back and neck pain "for a long period of time." He also stated: "The patient states there is no specific injury that occurred to cause his back to start hurting that he can remember; this

has been a longstanding injury.”

The documentary evidence also contains a neurosurgery questionnaire which was completed by claimant on October 26, 2006. Claimant indicated on that form that he was having pain in his back, neck, leg, and arm. When asked how long he had had the symptoms claimant responded, “Since I can remember.”

Finally, claimant was evaluated by Dr. Weilert on September 17, 2007 and his report also indicates that claimant had a long history of upper back pain.

The patient states that he has been having pain off and on for a couple of years. He has a long-standing history of pain in his cervical spine as well as in his upper back and lower back.

Thus, in contrast to claimant’s testimony at the hearing that his problems began in January 2006, the medical records and documentary evidence indicate that claimant had been suffering from upper back and cervical spine pain for a period of time prior to that date.

I believe it is also important to note that at claimant’s deposition he testified that he had not suffered any skateboard accidents. However, claimant informed Dr. Kaplan that he had had a number of falls: “.... he has had a number of falls while skateboarding and he has had a number of episodes while working under an RV where he has gone to sit up and his head hit a hard barrier and he felt his spine get compressed. This happened twice.”

I also note that the testing in the form of MRI scans on the claimant’s cervical and thoracic spine have been read as normal. Claimant has been diagnosed as suffering from scoliosis. While Dr. Armstrong in a letter dated October 3, 2007 indicated that claimant’s scoliosis could be made worse by heavy lifting, he also indicated that claimant has a history of scoliosis and he is not sure when this began. According to other medical records it was a longstanding condition. Finally, claimant was evaluated by Dr. Richard

Kyle, neurosurgeon, on July 2, 2007. Dr. Kyle has opined that claimant's pain is the result of a progressive scoliotic deformity and not the result of a work-related injury.

In summary, claimant has the burden of proving by a preponderance of the evidence that he suffered a compensable gradual onset injury to his neck and upper back as a result of his employment with the respondent. While claimant testified that his problems began in January 2006, the medical and documentary evidence indicates that claimant had longstanding upper back and cervical complaints of pain. In addition, while claimant denied having suffered skateboard accidents, he reported a history of skateboard accidents to Dr. Kaplan as well as a history of compressing his spine while working on RVs. Finally, testing on claimant's cervical and thoracic spine in the form of MRI scans have been read as normal. Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury or an aggravation of a pre-existing condition to his cervical or thoracic spine as a result of a gradual onset injury.

Claimant also contends that he suffered a specific injury to his upper back on June 1, 2007 while lifting a case of product to scan a bar code. Claimant testified that as he performed this activity he felt instant pain between his spine and shoulder blade. 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 evidence that he suffered a compensable injury to his upper back on June 1, 2007. The medical evidence indicates that on June 1, 2007 claimant was evaluated by Daniel Briley on a follow up for his prior back complaints. Despite claimant's testimony that he had increased pain that day as a result of the incident of lifting a case, Briley stated: "There is no change from the previous exam." Furthermore, Briley's medical report does not contain any history of a new injury having occurred earlier that day. Likewise, subsequent medical reports from claimant's treating physician do not reflect a history of a new injury having occurred at work on or about June 1, 2007 while claimant was lifting a case.

Based upon the foregoing evidence, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his upper back on June 1, 2007.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a gradual onset injury to his neck and upper back while employed by the respondent. Furthermore, claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his upper back while employed by respondent on June 1, 2007. 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 \$382.75.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE