

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F608592

CHARLES WAYNE SCOTT, EMPLOYEE

CLAIMANT

**LIBERTY SUPPLY, INC.,
EMPLOYER**

RESPONDENT NO. 1

**MASSACHUSETTS BAY INS. CO.,
INSURANCE CARRIER/TPA**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED FEBRUARY 7, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 was represented by Mr. Guy A. Wade, 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

A hearing was conducted on November 14, 2007, in El Dorado, Arkansas, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this matter on September 10, 2007, and a Prehearing Order was filed on that same day. A copy of the Prehearing Order was introduced into the record, without objection, as Commission Exhibit "1", subject

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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 over this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including July 31, 2006.
- 3) The parties agree to compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability.
- 4) The parties also stipulate that the employee-employer-carrier relationship also existed on or about November of 2005.

The parties agreed at the full hearing to litigate the following issues:

- 1) Whether the claimant sustained a compensable gradual onset back injury while in Respondent No. 1's employ.
- 2) If compensability is overcome, whether claimant is entitled to all associated medical treatment, permanent partial disability benefits, wage loss disability benefits, and attorney's fees.
- 3) Second Injury Fund liability.
- 4) Notice defense.

At the full hearing, the claimant contended the following:

- 1) That he sustained compensable injuries to his back which occurred over time as a result of the daily lifting and carrying associated with his job during the course of his employment.
- 2) That the medical treatment he has received to date has been reasonable, necessary, and related to his compensable injuries.

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- 3) The additional medical treatment being recommended is reasonable, necessary, and related to the claimant's compensable injuries.
- 4) Claimant should be awarded a 7% anatomical impairment rating and wage loss disability over and above that anatomical rating.
- 5) Respondents should be ordered to pay attorney's fees as permitted by law.

At the full hearing, Respondent No. 1 contended the following:

- 1) That claimant cannot prove "major cause."
- 2) That any back problems claimant has are due to preexisting conditions.
- 3) Respondent No. 1 affirmatively raises the notice defense.
- 4) If compensability is overcome, Respondent No. 1 contends that the Second Injury Fund is liable for any wage loss.

At the full hearing, Respondent No. 2 contended the following:

- 1) If the claim is found not to be compensable, then of course there would not be any Second Injury Fund liability.
- 2) If there is no anatomical impairment found, then as a matter of law in Workers' Compensation there is no right to wage loss disability from either respondents.
- 3) Respondent No. 1 cannot prove that there is Second Injury Fund liability in this case.
- 4) That claimant cannot prove that he is entitled to any degree of wage loss disability.

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- 5) That there is no combination of disability or impairment.
- 6) That claimant cannot prove the major cause of his impairment or wage loss, if any, is a result of the gradual onset injury.
- 7) That there is no objective finding of new physical injury.

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 over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury while in the respondents' employ.
- 4) Since the claimant has failed to prove compensability, all other issues outlined herein are rendered moot.

DISCUSSION

The claimant, age 62, began working for the respondent employer around February 15, 2005. The claimant testified that his job duties at Liberty Supply, Inc.

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consisted of making deliveries and stocking the warehouse.

The claimant testified that sometime in October or November of 2005, Liberty Supply, Inc. received a large shipment of fittings. The claimant testified that the large shipment of fittings came in big boxes that would require him to lean over and pick up the fittings with his back and arms. The claimant testified that for approximately ten days to two weeks of constantly lifting the fittings out of the large boxes he started having severe back and leg pain. The claimant testified that the fittings would weigh anywhere from between two pounds and fifty pounds. The claimant testified that his back pain would go all the way down to his left leg and foot, and the pain caused him to go see Chiropractor Rob Butler.

The medical records show that claimant first saw Chiropractor Rob Butler on November 11, 2005. (Cl. Ex. 1, pp. 9-15). The medical records from Chiropractor Butler on November 11, 2005, indicate that claimant complained of bilateral lower back pain and stiffness, radiating into his lower extremity and left side hip pain and stiffness which also radiated into his lower extremity. The medical records reflect the claimant returned to Chiropractor Butler on November 14, 2005, November 16, 2005, and then again on May 24, 2006, when at that time a referral was made to Dr. Wayne Bruffett. The medical records indicate that claimant first began treating with Dr. Wayne Bruffett on June 19, 2006. In Dr. Bruffett's June 19, 2006, report, Dr. Bruffett

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makes the following impression: “Degenerative spondylolisthesis at L5-S1 with foraminal stenosis and L5 radiculopathy down the left leg.” (Cl. Ex. 1, pg. 31). At that time Dr. Bruffett recommended a nerve root block at L5 on the left. Dr. Bruffett again saw the claimant on November 13, 2006, and formulated the same impression as indicated in his previous report from June 19, 2006. Dr. Bruffett again recommended a selective nerve root block at L5 on the left. (Cl. Ex. 1, pg. 42). Dr. Bruffett then referred the claimant back to his primary treating physician, Dr. Franks, to facilitate the nerve root block at L5. The claimant contends that his back condition is attributed to a compensable gradual onset back injury that occurred while he was working at Liberty Supply, Inc.

When a claimant requests benefits for an injury characterized by gradual onset, A.C.A. § 11-9-102(4)(A)(ii) controls, defining “compensable injury” as follows:

“An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is: (b) A back or neck injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence ...”

A claimant seeking benefits for a gradual onset injury must prove, by a preponderance of the evidence, that the injury 1) arose out of and in the course of his or her employment; 2) that injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and, 3) the injury was

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a major cause of the disability or need for treatment. A.C.A. § 11-9-102(E)(ii). In addition, objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and the job. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

Having reviewed the facts of this case, and having applied them to the relevant sections of the Arkansas Workers' Compensation Act, I find that claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury. As stated, the claimant must prove by a preponderance of the evidence that his injury arose out of and in the course of his employment. The medical records contained herein show that Dr. Bruffett has consistently diagnosed the claimant with "spondylolisthesis at L5-S1 with foraminal stenosis." The medical records also show that the claimant was diagnosed with "first degree spondylolisthesis at L5-S1" back in 2002. (Cl. Ex. 1, pg. 4). The medical records show that the claimant was having back pain and radiating left leg pain in July of 2002. (Cl. Ex. 1, pg. 3).

Dr. Robert Parkman on July 22, 2002, submitted a radiology report which stated as follows: "The apophyseal joints demonstrated degenerative changes consistent with osteoarthritis. There was a first degree spondylolisthesis at L-5 - S-1.

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This was felt to be due to accelerated degenerative changes and associated appendages.” (Cl. Ex. 1, pg. 4). Dr. C. Dwayne Daniels with South Arkansas Orthopaedics and Sports Medicine Center stated in his September 4, 2002, report after reviewing the claimant’s MRIs of his cervical and lumbar spine, stated the following: “He does have some degeneration at L5-S1 in his L-spine.” (Cl. Ex. 1, pg. 8).

Then, on June 19, 2006, another MRI was conducted of the claimant’s lumbar spine that gave the following impression: “Degenerative disk disease as described. The findings are most pronounced at the L5-S1 level. At this level there is grade I anterolisthesis of L5 on S1 which I believe is due to facetar osteoarthritis. There is diffuse bulge of the disk at this level with evidence for bilateral L5 foraminal stenosis.” (Cl. Ex. 1, pp. 22-23). Following the claimant’s work with Liberty Supply in October or November of 2005, when the claimant testified he had to lift fittings for approximately ten to fourteen days straight, the claimant stated he developed low back pain and left leg pain. It is clear to this examiner that the complaints the claimant had during and after his work with Liberty Supply were the exact same problems he was complaining of in 2002 as is shown by the 2002 medical reports contained in the record herein.

The medical records after the claimant began working for Liberty Supply are replete with findings of “osteoarthritis,” “degenerative disk disease,” and

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“spondylolisthesis at L5-S1.” All of these findings were also present when the claimant was seeking medical care for his back and left leg in 2002. It is clear to this examiner that the claimant’s back and left leg condition did not arise out of or in the course of his employment with Liberty Supply, but rather were preexisting conditions that were present in 2002, well before the claimant went to work for Liberty Supply. Dr. Bruffett says as much in his November 13, 2006, report, wherein he states: “Mr. Scott has a history of spondylolisthesis at L5-S1 with foraminal stenosis.” (Cl. Ex. 1, pg. 42). It is also interesting that Dr. Bruffett notes that at that November 13, 2006, visit, the claimant stated that his problem initially began after an injury at work in October of 2005. However, Dr. Bruffett states in his report “He really did not indicate this on his initial paperwork.” (Cl. Ex. 1, pg. 42).

It is clear to this examiner that Dr. Bruffett’s primary diagnosis of the claimant at this time is spondylolisthesis at L5-S1 with foraminal stenosis, which is the same diagnosis the claimant received in July of 2002. It is clear to this examiner that the claimant’s degenerative disk disease and spondylolisthesis did not arise out of or in the course of the claimant’s employment with Liberty Supply but rather were preexisting conditions the record shows the claimant had in 2002.

Any evidence of causation is clearly lacking in this case. Other than the claimant’s testimony that he lifted fittings for approximately ten to fourteen days,

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there is no evidence that this lifting resulted in degenerative disk disease or spondylolisthesis. It is true that claimant had a very minimal diffuse bulge at the L4-L5 level and L5-S1 level; however, it is just as likely that the bulge was due to the claimant's degenerative disk disease, arthritis, and etcetera that was preexisting as opposed to this lifting the claimant did for approximately fourteen days around October or November of 2005. Accordingly, I find that the record fails to prove by a preponderance of the evidence that the claimant's current back condition and need for treatment arose out of and in the course of his employment with Liberty Supply. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury while working for Respondent No. 1.

ORDER

For the reasons outlined herein, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury while in Respondent No. 1's employ, and therefore find that this claim must be respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb