

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F706384

WILLIAM WHITTINGTON	CLAIMANT
GATES CORPORATION	RESPONDENT
GALLAGHER BASSETT, TPA	RESPONDENT

OPINION FILED JANUARY 10, 2008

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by ADRIENNE MURPHY, Attorney, Fayetteville, Arkansas.

Respondent represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 5, 2007, in Springdale, Arkansas. The deposition of Gary Dunlop was taken on November 13, 2007, and has been admitted subsequent to the hearing as Respondent's Exhibit No. 1.

A pre-hearing order was entered in this case on September 25, 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 that they had agreed on the appropriate weekly compensation rates. A clerical error was also discovered in what was labeled issue #3. The pre-hearing order was amended to include the appropriate weekly compensation rates and to delete what was erroneously indicated as issue #3. A copy of this pre-hearing order, with these amendments noted thereon, was made Commission's Exhibit No. 1.

The following stipulations were offered by the parties and are hereby accepted:

1. On May 15, 2007, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation rates are \$416.00 for total disability and \$312.00 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 lumbar spine on May 15, 2007.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from May 16, 2007 through a date yet to be determined, and attorney's fees.
3. whether any benefits accruing prior to June 11, 2007 are barred by Ark. Code Ann. §11-9-701.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained an injury to his lumbar spine on May 15, 2007 while in the course and scope of his employment. Specifically, the claimant will testify that he was working in his position as a tire builder when he hoisted a spool of rubber onto his shoulder and was jerked back because the safety catch did not come completely loose from the u-shaped brackets to which it was attached. An MRI was performed on May 29, 2007 revealing a herniated disc at the L4-5 level, providing objective findings of his compensable injury. The claimant also contends that he is entitled to temporary total disability from May 16, 2007 to a date

yet to be determined, as he is still in his healing period.”

In regard to these issues, the respondent contends:

“The respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers’ Compensation Act. In addition, the respondents contend the claimant did not timely and properly report this injury, and in the event this is determined to be a compensable injury, which is denied by the respondents, that the claimant should not be entitled to benefits until he properly reported the injury.”

DISCUSSION

_____The central issue in this case is whether the claimant sustained a “compensable injury” to his low back or lumbar spine, as the result of a specific incident on May 15, 2007. The burden rests upon the claimant to prove all of the facts necessary to establish the occurrence of a compensable injury.

First, the claimant must satisfy the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injury or condition, which is alleged to be compensable. In addition, the claimant must prove that the actual existence of this physical injury or condition is supported by “objective findings”, as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

In the present case, the medical reports and records of Dr. Robert Hoffman, Dr. Wojciech Dulowski, and Dr. David Malone all “establish” the actual existence of a physical injury or defect involving the claimant’s lumbar spine. Further, the medical

evidence reveals that the existence of this physical injury or defect, in the form of a protrusion or herniation of the L4-S1 intervertebral disc, is clearly supported by “objective findings”. These objective findings consist of abnormalities noted on the May 29, 2007 MRI study and visual observations made by Dr. Malone during the June 5, 2007 corrective surgery.

Thus, the claimant has satisfied the statutory requirements for a “compensable injury” that are found in Ark. Code Ann. §11-9-102(4)(D). He has “established” the actual existence of a physical injury or defect involving his lumbar spine by medical evidence, which is supported by objective findings.

Next, the claimant must prove that this injury meets all of the definitional requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury must arise out of and occur in the course of the claimant’s employment.
- (2) The physical injury must be caused by a specific incident.
- (3) The physical injury must be identifiable by time and place of occurrence.
- (4) The physical injury must cause internal or external physical harm to the claimant’s body.
- (5) The physical injury must require medical services or result in disability.

In order to satisfy the first three of these definitional requirements, the claimant must prove the existence of a causal

relationship between his medically established and objectively documented physical injury to his lumbar spine and a particular, identifiable employment related incident. However, he is not required to prove the existence of this causal relationship to an absolute or even mathematical certainty. Rather, he need only prove that the existence of this causal relationship is likely or probable. Further, he need not prove that this specific employment related incident is the sole or even major cause of his current lumbar difficulties.

In the present case, the claimant's own testimony is the only direct evidence he has offered to prove both the actual occurrence of a specific employment related incident and the existence of a causal relationship between this incident and his subsequently diagnosed back injury. Although the testimony of a party is never considered uncontradicted, this does not mean that it can be simply disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Obviously, the claimant's testimony would be legally competent to prove both the occurrence of a specific employment related incident and the existence of a reasonably close temporal relationship between this incident and the initial onset of difficulties which would be indicative of the occurrence of the medically established injury to his lumbar spine.

At the hearing, the claimant described in considerable detail the specific activity he was performing when he experienced the initial onset of symptoms involving his low back and lower

extremities. He testified that he was attempting to remove an empty spool, weighing 40 to 70 pounds, off a metal bar. He acknowledged that a mechanical hoist was available to perform this activity, but he elected not to use it. He stated that, as he was pulling on the spool, the spool stuck and pulled him forward in a “twisting” motion. He stated that he felt a sudden and immediate onset of pain and a burning sensation.

However, he did not report this incident or his difficulties, at that time. Instead, he completed the remainder of his shift (approximately two hours). However, he stated that for the remainder of his shift, he did not bend over or lift.

It was his testimony, that when he awoke the next day, his back was sore and stiff, and he did not feel that he could work. He testified that prior to the start of his shift, on the evening of May 15, 2007, he placed a call to his facilitator or foreman and left a message that he had hurt his back and would not be at work.

In his deposition, Gary Dunlop, the claimant’s “facilitator” or lead man, testified that he did receive a message from the claimant, wherein the claimant stated that he had hurt his back and wouldn’t be in to work his shift. However, he further testified that the claimant did not indicate, at that time, that the injury to his back was related to his employment with the respondent. In fact, Mr. Dunlop denied that the claimant ever reported an on the job back injury to him.

Doris Ann Trospher, the claimant’s mother, testified that she saw the claimant before he went to work, on the evening of May 14,

2007, and the claimant was feeling fine. She further testified that on the morning of May 16, 2007, the claimant called her and advised her that he had hurt himself "last night". She testified that, when she next saw the claimant, he could hardly get around. She stated that she had to drive him to the doctor.

In his testimony, the claimant conceded that he never requested the respondent to provide him with medical treatment. He admits that on May 16, 2007, he sought medical treatment on his own from Dr. Robert R. Hoffman, a chiropractor.

The records of Dr. Hoffman reveal that on May 16, 2007, the claimant completed an initial history form for Dr. Hoffman. In this form, the claimant wrote that he was experiencing back and left hip pain that first appeared four days prior to May 16, 2007. On this form, the claimant gave no indication that his difficulties were in any way work related, even though the form expressly requested such information. Curiously, four days prior to May 16, 2007, would have been a Saturday and there is no evidence that the claimant worked on that date. The claimant also gives no reasonable explanation as to why he indicated that his difficulties began four days prior to May 16, 2007, or why he failed to indicate that he felt his difficulties were due to a work related accident.

The records of Dr. Hoffman further reveal that he treated the claimant on a regular basis through May 24, 2007. However, there is no indication in any of these subsequent records that the claimant ever advised Dr. Hoffman that he believed his difficulties to be work related, in any way.

The medical evidence shows that the claimant subsequently consulted a Dr. Wojciech Dulowski, on May 23, 2007. Again, the claimant concedes that he consulted Dr. Dulowski on his own and without consulting or advising the respondent. Apparently, Dr. Dulowski practices in a clinic where the claimant's mother is employed.

The records of Dr. Dulowski reveal that he initially saw the claimant on May 23, 2007. On that date, the claimant was complaining of significant back pain that radiated into his right lower extremity. Curiously, all of the records of Dr. Hoffman, including diagrams (one of which was completed by the claimant, himself), show the claimant's symptoms as left sided lower back pain radiating down the back of his left leg. Dr. Dulowski noted that these symptoms had been present for "a few days". He also recorded that the claimant "was lifting belts at work on 05/15/07." However, he does not record any specific incident such as that described by the claimant, nor does he even indicate that the initial onset of the claimant's current symptoms was sudden and immediate and occurred contemporaneously with his lifting these belts at work on May 15, 2007.

On May 29, 2007, an MRI study was performed at the Stillwell Memorial Hospital upon request by Dr. Dulowski. The hospital admission records for this test noted that the claimant was complaining of back pain radiating down his right leg for the past two weeks. This admission record further stated: "No known injury."

The evidence shows that from May 15, 2007 through May 28, 2007, the claimant was providing the respondent with off work slips from Dr. Hoffman and Dr. Dulowski. During this period, the claimant applied for and received medical benefits and disability benefits under a group insurance policy provided through the respondent. However, during this period of time, the claimant took no action to request the respondent to provide him with medical services or disability benefits for a work related injury. In his testimony, the only explanation the claimant offered for this course of action was that he didn't think his back problem was that bad.

The record reveals that the first action the claimant took to obtain benefits for his back difficulties under the Arkansas workers' Compensation Act on May 29, 2007. On that date, the advised Jesse Vanpool, the respondent's human resource manager, that he believed his back difficulties to be work related. It would appear that this action was taken by the claimant contemporaneously with his discovery that his back condition was, in fact, serious and would likely require extensive medical treatment and a prolonged period of recovery.

The first record of any specific employment related incident, similar to that described by the claimant in his testimony, as the cause of his back difficulties does not occur until June 1, 2007. This history was noted in the initial report of Dr. David Malone, a neurosurgeon. Dr. Malone further recorded that this alleged incident occurred "on or about the 15th of May".

Clearly, an incident such as that described by the claimant in his testimony, could have produced a herniation of his L4-5 intervertebral disc. However, it is equally probable that this herniation could have been produced by a multitude of activities or events, employment related or otherwise. Herniations of lumbar discs do not require significant trauma and can be caused by such relatively and innocuous activities as arising from a chair or bending over to pick up bar of soap.

In the present case, the only direct evidence to connect the claimant's disc herniation with the described employment related event on May 15, 2007, is the claimant's testimony. After consideration of all the evidence presented, it is my opinion that the claimant's testimony is not supported by the other evidence presented and is not sufficiently credible to prove this causal nexus.

The claimant's testimony is totally inconsistent with the initial history he gave Dr. Hoffman. It is also inconsistent with the subsequent history he related to Dr. Dulowski. It is further inconsistent with the history recorded at the Stillwell Hospital, immediately prior to his May 29, 2007 MRI. Further, the claimant's history of the onset of his back difficulties would be inconsistent with his actions in failing to report any incident or injury on the night it allegedly occurred and his completion of that shift. Further, his testimony would be contrary to his actions in failing to take any steps to obtain medical treatment or disability benefits from the respondent for this employment related injury

until May 29, 2007, and his election to obtain benefits for this injury under his group insurance policy. In fact, the greater weight of the evidence presented is more supportive of the conclusion that the claimant experienced his onset of back difficulties some time prior to May 15, 2007, and that the onset of these difficulties occurred without any particular precipitating event or activity.

In reaching my decision, I am aware that Dr. Malone has given his opinion that the claimant's herniated disc and resulting difficulties were work related. However, it is this Commission's function to determine whether an employment related injury occurred, not Dr. Malone. The opinion of Dr. Malone is clearly based upon his assumption that the history given him by the claimant, concerning the onset of his back difficulties, is accurate. The greater weight of the evidence fails to show this history to be accurate. Therefore, the opinion of Dr. Malone is based upon a mistake of material fact and is not entitled to any weight and credit.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On May 15, 2007, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On May 15, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$416.00 for total disability and \$312.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his lumbar spine, as the result of a specific employment related incident on May 15, 2007.

5. The respondent has denied the occurrence of a compensable injury and have controverted this claim in its entirety.

ORDER

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE