

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210347

PHOUKHONG AROUNNOTHAY,
EMPLOYEE

CLAIMANT

OK FOODS,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MAY 18, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE R. SCOTT ZUERKER,
Attorney at Law, Fort Smith, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Claimant appeals an opinion and order filed by the
Administrative Law Judge on July 8, 2003 finding that
claimant failed to prove by a preponderance of the evidence
that he sustained a compensable back injury as a result of
his employment with respondent.

Claimant has the burden of proving by a
preponderance of the evidence that he is entitled to
compensation. Jordan v. Tyson Foods, Inc., 51 Ark. App.
100, 911 S.W.2d 593 (1995). Questions of credibility and
the weight and sufficiency to be given evidence are matters
within the province of the Workers' Compensation Commission.

Swift-Eckrich, Inc. v. Brock, 63 Ark. app. 118, 975 S.W.2d 857 (1998). After our de novo review of the entire record, we find that claimant has met his burden of proof and, accordingly, reverse the opinion of the Administrative Law Judge.

BACKGROUND

Claimant is a Laotian refugee who relocated to the Fort Smith area in 1981. He has no formal education, and speaks very little workable English. He began work in the sanitation department of OK Foods in 1981, and continued in that capacity until his most recent back injury at issue which occurred in June of 2002. Claimant's wife also works at OK Foods.

Not only does claimant speak very little English, but his lead person at OK Foods, Panya Hansana, also a Laotian, like claimant, required an interpreter in order to testify at the hearing held on June 9, 2003. Claimant's shift supervisor, Oth Kennedy ("Captain"), apparently speaks good English and testified without an interpreter.

Prior to the most recent back injury at issue, claimant suffered a work-related back injury which required surgery at the L4-5 level of the spine in 1993. After recuperating from that surgery, claimant took no medication

and returned to work until he experienced a second injury in 1998. After that injury, claimant returned to work and required no additional medications until he experienced his third injury in June of 2002. In his deposition, claimant indicated that his treatment for the 1998 injury was also paid by insurance, although he does not recall whether or not the insurance was workers' compensation insurance or some other type of insurance.

On the date claimant became injured in 2002, he was not performing his regular work duties of cleaning equipment in sanitation. Instead, he became injured trying to move three stacks of pallets which cumulatively, he has estimated, included between 50 and 80 pallets.

For its part, respondent's brief asserts that claimant is not a credible witness, that claimant did not give proper notice of his injury, that the evidence does not support a conclusion that his current problems occurred at work, and that the disk abnormality identified by MRI testing in 2003 preexisted any alleged work injury and, in fact, was previously identified in a 1998 MRI. We have the following observations regarding these arguments.

COMPENSABILITY AND NOTICE

As a threshold matter, we note that respondent asserts, through inconsistencies in claimant's hearing testimony and deposition testimony, that claimant is essentially attempting to fabricate a work-related injury. We point out that claimant is a 20-plus year employee of OK Foods, that claimant is not even aware of who paid for his 1998 back treatment, that claimant testified at the deposition and the hearing through an interpreter, and that many of the answers given by both claimant and by Mr. Panya Hansana through an interpreter appear to be essentially non-responsive to the questions asked. In other words, we agree with claimant's attorney's point on appeal that a significant portion of the perceived inconsistencies in the testimony appear to be related to the use of an interpreter in this case.

At any rate, there is an abundance of evidence in the record which indicates that claimant experienced a back injury at work in June of 2002 moving pallets as he asserts. The evidence supporting claimant's contention in this regard includes (1) claimant's deposition testimony, (2) claimant's hearing testimony, (3) claimant's daughter's hearing testimony as to what she observed when claimant came home

from work on the day in question, (4) that portion of Dr. Hoang's June 26, 2002 progress note which contains abbreviations indicating that claimant had been experiencing low back pain for one week, (5) Dr. Hoang's February 19, 2003 letter stating in relevant part "I remember that Mr. Arounothay's daughter, as interpreter, did indeed tell me about her father having complaining of his low back pain after he had lifted heavy pallets at the OK Foods plant about one week before the medical visit dated 6/26/2002", (6) that portion of Mr. Hansana's testimony on page 51 of the hearing transcript wherein he indicated that Mr. Arounothay did tell Mr. Hansana that he had hurt his back lifting pallets at OK Foods, and (7) that portion of Mr. Hansana's testimony on page 52 of the hearing transcript indicating that claimant told Mr. Hansana that he had hurt his back before claimant took his vacation.

Furthermore, we note that Ms. Treat, the plant nurse, testified at page 64 of the hearing transcript that an employee can report an injury to either his lead, to his supervisor, or to the plant nurse. There appears to be no dispute that Mr. Hansana was claimant's lead during the period in question. Therefore, claimant has also

established that he gave the respondent proper timely notice of his injury at the time that the injury occurred.

Not surprising, in light of the language barrier and the period of time that had passed, claimant was apparently not able to identify the exact calendar date on which the injury occurred either during his deposition or during his hearing testimony. Respondent seems to place great weight on his inability to do so. We point out that there would be no question at this time as to when the injury occurred had Mr. Hansana either filled out a report of injury himself, or sent claimant to someone else to fill out a report of injury when the injury occurred. Therefore, respondent on appeal is hardly in a position to equitably lament the fact that claimant has such a difficult time identifying the exact calendar date when the incident occurred.

On this point, we also note that according to the Arkansas Supreme Court in Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001), Ark. Code Ann. § 11-9-102(4)(A)(i)(Supp. 2003) does not require claimant to identify the exact date on which his injury occurred. The statute instead only requires that the injury be identifiable by time and place of occurrence. In the

present case, claimant's contemporaneous wage records indicate that claimant last worked on Friday, June 21, 2002, and did not work thereafter. As we interpret the testimony of claimant and his daughter, claimant did not return to work for any shift after moving pallets caused his intense back pain. Therefore, a preponderance of the evidence in the record indicates that the pallet lifting at issue occurred on the shift beginning June 22, 2002.

The respondent next asserts that claimant's back injury sustained in the course of moving three stacks of pallets cannot be an accidental injury within the meaning of Act 796 of 1993, unless claimant can identify specifically which pallet he was lifting when his intervertebral disk was injured. Notably, in Brooks v. Stone Mountain Iron Works, Full Commission Opinion filed May 22, 2003 (F103344), a majority of the Full Commission found that an injured worker did not experience an injury caused by a specific incident identifiable by time and place of occurrence under circumstances where he lifted 10 to 15 empty pallets and his back began hurting after he got done with the pallets. (We note that the Full Commission decision was appealed to the Arkansas Court of Appeals, but was remanded to an Administrative Law Judge for consideration of a joint

petition, which was subsequently approved.) On the other hand, the Arkansas Court of Appeals has in Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002) concluded that a heart attack sustained while working in extreme heat for seven or eight hours constitutes an "accident" i.e., a specific incident identifiable by time and place of occurrence. The Full Commission has likewise indicated that when more than one specific incident occurs on a single shift, and an injury is attributable to one or more of these specific incidents, the combined incidents at work can constitute "accidental injury" within the meaning of Act 796 of 1993 in light of the Court of Appeals' decision in Huffy Service First v. Ledbetter, supra. See Moody v. Beverly Healthcare, Full Commission Opinion filed October 18, 2002 (F105139); Creech v. Reliance Well Service, Full Commission Opinion filed October 24, 2002 (F100288). (Although Creech was appealed to the Arkansas Court of Appeals, we note that Creech was also remanded for consideration of a joint petition, which was subsequently approved.)

In the present case, claimant's daughter testified that to her recollection, claimant initially advised her that he experienced a pop in his back at work, and Dr.

Johnson, claimant's treating neurosurgeon after the 1993 injury, indicated in a June 5, 2003 letter that "It is likely the patient experienced recurrent disk herniation after lifting a wooden pallet at work that weighed approximately 40 to 60 pounds resulting in the patient having to undergo treatment..." Since claimant's pain in the present case began during the course of lifting pallets, and not after completing the activity, we believe that this case is distinguishable from Brooks v. Stone Mountain Iron Works, supra.

OBJECTIVE FINDINGS

All parties appear to agree on appeal that the Administrative Law Judge was mistaken in finding that the medical reports indicate that claimant had the same L4-5 disk abnormality in 2002 that was identified in 1998. In this regard, the 1998 MRI revealed a herniated disk at L4-5 on the left. On September 19, 2002, Dr. Johnson documented a disk herniation at L4-5 on the right. Therefore, on their face, the reports do not indicate the same disk abnormality in 2002 as existed in 1998.

For its part, respondent seems to assert that there is some type of typographical error somewhere in the medical records and that both the 1998 and the 2002 medical

reports ought to indicate abnormalities on the same side (either on the left or on the right). Even if respondent's conclusion is correct, we respectfully point out that in 2002, Dr. Johnson diagnosed a free fragment extending over the body of the L5 vertebra. Nothing in the 1998 MRI or in Dr. Landheer's December 1, 1998 interpretation of that MRI says anything about a free fragment extending over the body of the L5 vertebra in 1998. Therefore, claimant has established by a preponderance of the credible evidence that he has a new objective finding in 2002, even if the abnormality identified by Dr. Johnson in 2002 and the abnormality identified by MRI in 1998 are in fact on the same side of L4-5.

TTD

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Claimant's deposition testimony indicates that he was still under active medical treatment immediately prior to the hearing. No doctor has ever released claimant to return to work, and as far as we can tell, claimant has yet to be fully evaluated for the possibility of additional surgery to alleviate his present L4-5 disk fragment abnormality. Therefore, a preponderance of the evidence establishes that claimant remains within a healing period for his 2002 injury and is totally incapacitated to earn wages as of the date of the hearing.

CONCLUSIONS

For all of the reasons discussed herein, we find that claimant has proven each of the elements necessary to establish a compensable accidental injury, and we find that claimant has established by a preponderance of the credible evidence that he is temporarily totally disabled from the time he last worked through the date of the hearing and continuing to a date yet to be determined. We also find that claimant's attempt to report his injury to his lead person on the date the injury occurred excuses claimant's failure to give a written notice thereafter until September 2002. Further, respondent is obviously liable for all

reasonably necessary medical services in connection with the compensable injury.

The respondent is directed to comply with the award set forth herein. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since claimant's injury occurred after July 1, 2001, claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion. I find that the claimant fails to meet his burden of proof in terms of both specific injury and gradual onset injury requirements. First, the claimant's testimony from his hearing of June 9, 2003, is often inconsistent, confusing, vague, and contradictory to other evidence presented in this claim. For example, during direct testimony the claimant testified that he had been lifting wooden pallets and vats of chicken weighing approximately fifty (50) to seventy-five (75) pounds when he hurt his back. Specifically he stated, "I was lifting pallets and it caused my back to be injured and I could not lift my leg on one side in order to walk." Co-worker and "lead man," Panya Hansana, testified that although he was occasionally required to move them out of his way by using a "hand jack," lifting pallets was not part of the claimant's "regular job." Even if the claimant had occasionally lifted pallets out of his way, Mr. Hansana testified that, at most, these pallets would not weigh over fifteen (15) pounds. Mr. Hansana later testified that the claimant was "at times" required to move vats of chicken out of his way to clean, but the claimant's supervisor, Mr. Kennedy, testified that lifting pallets and vats of chicken was not the claimant's job. In fact, Mr. Kennedy

said that four other workers were specifically assigned to the task of moving the vats of chicken. "When the chicken goes out from there [the machine]," stated Kennedy, "we call them condemned chicken, so I have four men to pick it up." The following example illustrates the claimant's vague responses to questions concerning the particulars of his injury:

Q. Mr. Arounnothay, do you remember giving your deposition on December 11 of 2002 in Mr. Walker's office?

A. Yes, I remember.

Q. Did you ever during your deposition tell me that you were having to lift vats of chicken?

A. Yes. And pallets.

Q. In your opinion, lifting the pallets over the course of several months, is that what injured your back or was it lifting pallets on one particular shift?

A. That was caused by lifting the heavy items, and I went to tell my supervisor that I was in pain and that my back was hurting, but still I had to do that work and that's what caused my back to hurt.

Q. Did you hurt it on one particular day or was it lifting over the course of weeks?

A. The injury happened at one time and that is why I asked for my vacation time because I was unable to work,"

Later, when pressed for a specific date of injury, the claimant confirmed having stated in his deposition that the injury occurred at 1:30 a.m. on June 25. Moreover, the claimant was equivocal in his testimony regarding the ongoing nature of his back condition. For example, the claimant testified that his back had "completely healed" after his surgery of 1993, but later stated that it has gotten progressively worse since that time. And, in contradiction to medical records indicating otherwise, the claimant flatly denied ever telling doctor Lenington that he refused to take medication.

The claimant admitted confusion about certain facts pertaining to events immediately surrounding his alleged injury, but displayed little difficulty remembering other details. For instance, the claimant readily offered details regarding doctors he had seen prior to June of 2002, even as far back as 1991, and conversations they had regarding his condition and treatment. But when it came to remembering details like the number of pallets he had to move out of his way for cleaning, the claimant seemed hopelessly confused. The claimant blamed his confusion and poor memory on both the medication he was taking, and on a language barrier problem. For example, when asked why he never reported his injury to the plant nurse, the claimant

responded, "I couldn't talk to the nurse because of the language barrier." The nurse later testified as follows:

Q. You don't speak Laotian, do you?

A. No, sir.

Q. What would you do if Mr. Arounnothay showed up and was trying to tell you something?

A. Get a translator. Usually it would have been Captain, Oath Kennedy.

Q. Do you have the ability to call him [Captain] on a walkie-talkie?

A. Yes, sir.

Q. Did that ever happen in Mr. Arounnothay's case.

A. No, sir.

The claimant appeared especially confused and forgetful about the chain of events immediately following his alleged injury. When asked when he first saw Dr. Hoang after his injury, the claimant testified that his daughter had scheduled the appointment and that he could not remember the exact date or day.

In her testimony, the claimant's daughter testified that she had first become aware of the claimant's condition upon having returned home from school on the afternoon after her father had worked the previous night shift. Although she could not recall the specific date, she

reasoned that the claimant was injured on or before June 24, because this date was just prior to his taking three weeks vacation, and she recalled his being hurt "a day or two" prior to taking this leave from work. She further testified that no more than three (3) days passed before the claimant saw Dr. Hoang for his back injury, but stated, "It [the appointment] wasn't the day after it happened because we had to set an appointment, and Wednesday was the only day that he had available for us." The medical records reveal that the claimant saw Dr. Hoang on the 26th day of June in 2002. Although workers' compensation supervisor for the respondent, Charlotte Willhite, admitted during the hearing that the claimant's time sheet for the period ending July 1, 2002, may have contained an error on June 30, 2002, she testified that this record accurately reflects that the claimant began his vacation leave on Monday, June 24, 2002. Furthermore, this record shows LD marked beside Sunday, June 23, 2002, which according to Ms. Willhite means the production line was down that day and, therefore, the claimant would not have worked. The record reveals that on July 11, 2002, the claimant was approved for FMLA leave commencing on June 25, 2002, through July 15, 2002. Under the description of medical facts that supported his request for leave was written, "low back pain; left leg pain; post

laminectomy of lumbar spine." The claimant's supervisor, Oth Kennedy, plant nurse, Brandy Treat, and lead man, Hansana, each testified concerning the proper procedure for reporting a work-related injury, and each claimed that the claimant failed to report his alleged injury to them at or during that time that it supposedly occurred.

Aside from the testimony, the weight of the substantial evidence does not support a finding that the claimant suffered a specific injury on June 25, 2002. At best, the claimant may have suffered a gradual onset lower back injury; however, given his long history of serious back problems and degenerative disease process, the medical evidence does not support this theory either. The claimant testified and the record confirms that he dealt with chronic back pain due to a herniated disc from the time of his first surgery in 1993. The claimant may or may not have lifted heavy items over a course of time that caused his condition to worsen, but his testimonial account of his injury is weak and inconsistent and there is no other credible evidence to corroborate his testimony. While the claimant may have problems with language, his lead man and supervisor speak both English and Laotian, and there is no plausible excuse for the claimant having not properly reported his injury to either of them.

Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained either a specific injury or, in the alternative, that he sustained a gradual onset injury. In my opinion, the facts presented in this claim do not establish a sufficient causal connection between his injury and his employment, based upon medical evidence supported by objective findings.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner