

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109113

THOMAS RODGERS, EMPLOYEE	CLAIMANT
LOMANCO, INC., EMPLOYER	RESPONDENT
AMERICAN ALTERNATIVE INSURANCE COMPANY / R.E.M., CARRIER	RESPONDENT

OPINION FILED JANUARY 15, 2004

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE JOSEPH H. PURVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on May 14, 2003, finding that the claimant sustained a compensable specific incident injury on July 23, 2001; that he was entitled to temporary total disability benefits from July 24, 2001, through January 14, 2002, and from February 14, 2002, through a date yet to be determined; and that the respondents were liable for all reasonable medical expenses arising out of the compensable injury, including the medical treatment rendered by Dr. Jordan. Based upon our review of the evidence in this

case, we find that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, we find that the Administrative Law Judge's opinion must be reversed, and that this claim must be denied and dismissed.

The 50-year-old claimant has worked for the respondent for approximately 27 years, primarily in the truck shop repairing forklifts, tractor-trailer rigs and trailers. The claimant's prehearing filing asserts that he sustained a gradual onset low back injury which began requiring treatment in June 2001, and that he also sustained a specific incident low back injury in July 2001 when he pulled himself up from beneath a forklift he was servicing.

The claimant testified that he sought treatment from Dr. Tracy and Dr. Rooney in 1998 for back problems that involved him "between and just below my shoulder blades." Discussing his treatment by Dr. Tracy in 1998 and 1999, the claimant stated that this was due to pain, "between my shoulder blades and just down below my shoulder blade. About middleways of my back." However, Dr. Tracy's clinic note from January 14, 1998, shows the claimant presenting with lower back pain that was worse in the morning and that

was gradually increasing. An office note from Dr. Tracy dated May 21, 1998, states that the claimant presented complaining of, "back pain knots between tailbone and spine started 8 yrs ago getting worse can't sleep constant pain 24° day 7 days wk." (Emphasis added.) Dr. Tracy referred the claimant to orthopedic specialist, Dr. Rooney. A letter from Dr. Rooney dated May 26, 1998, states:

[The claimant] is a 47 year old man complaining of a long history of mid thoracic and lower back pain, which more recently, has begun radiating into the back side of both thighs. It seems to be worse the morning after he's worked hard. . . . X-rays of the lumbar spine, which he brought with him, dated January 14, 1998, show degenerative changes, mild, throughout the lumbar spine with anterior bridging at T-11/12.

The claimant returned to see Dr. Tracy on June 28, 2001. He testified that he was having problems with his back and believed it was just his spurs giving him problems again. Dr. Tracy sent the claimant for an MRI of his lumbar spine on July 2, 2001. The MRI report indicated spondylosis and a possible disc bulge at L4-5, and Dr. Tracy scheduled an appointment for the claimant with Dr. Cathey, a neurosurgeon. Dr. Tracy's records reflect that the August 7,

2001 appointment to see Dr. Cathey was made by Dr. Tracy's office on July 9, 2001.

The claimant alleges that he sustained a specific incident injury to his low back during the course of his employment on July 23, 2001. The claimant testified that as he was getting out from underneath a forklift, he felt a sharp pain in his back and down into his legs. He stated that he had never had that kind of pain in his low back before, and testified that it was something totally different than the problems he had been having previously. The claimant informed his employer and he was sent to the company medical provider, Concentra Medical Center. The claimant received physical therapy from providers at Concentra Medical Center. However, the claimant kept his scheduled appointment to see Dr. Cathey on August 7, 2001. Dr. Cathey's letter to Dr. Tracy regarding his visit with the claimant on that date states:

[The claimant] began experiencing severe lower back pain while on the job on June 26, 2001. Although he does not remember any specific incident that precipitated his pain, he was doing a significant amount of bending, lifting, stooping, etc. while working that particular day. He has a previous history of lower back pain and was

diagnosed with "bone spurs" two years ago. . . . He is currently unable to work. He is not experiencing any radicular leg pain, sciatica, lumbar claudication, etc. . . . An MRI scan of the lumbar spine confirms the presence of degenerative disc disease at L4-5 and L5-S1. . . . I believe [that the claimant] is the victim of a musculoskeletal injury superimposed on preexisting degenerative lumbar disc disease and spondylosis. (Emphasis added.)

Dr. Cathey's August 7 note also contains the observation that the claimant had "mild paraspinous muscle spasm, particularly on the left side." Dr. Cathey took the claimant off work, referred him for epidural steroid injections with Dr. Krishnan, and scheduled a follow-up appointment on September 6, 2001. The referral to Dr. Krishnan was denied by the respondent's carrier. The claimant returned to Dr. Cathey for the follow-up on September 6, 2001, and the notes from that visit state:

[The claimant] has no sign of lumbar radiculopathy and straight leg raising is negative bilaterally. Although the patient moves about with a great deal of care and deliberation, no paraspinous muscle spasm was identified today. There is full range of motion of the lumbar spine. I again reviewed an MRI scan demonstrating pre-existing degenerative disc disease at L4-L5 and

L5-S1. Although there is a small, right paracentral disc protrusion at L4-L5, there is no canal stenosis or nerve root impingement.

The claimant went through his regular health insurance to obtain steroid injections from Dr. Reddy. The notes from Dr. Reddy's initial evaluation of the claimant on October 16, 2001, state that the claimant "gives a 10-year history of constant low back pain which has gotten worse over the last 2-year period. His present diagnosis related to his work-related injury is that of lumbar sprain/strain. . . . He realizes that at present this is not a work-related claim." (Emphasis added.) Dr. Reddy's conclusions included, "This gentleman's back pain is long standing. There are several factors contributing to it. Fortunately, no radicular symptoms are noted."

Dr. Reddy's treatment note from December 6, 2001, states that the claimant reported a 75% improvement after completing a series of three lumbar epidural steroid injections. Dr. Reddy wrote that he was encouraging the claimant, "to return to his original duties without any restrictions and see how he does there. He has a chronic

back condition which consists of degenerative disc disease, disc bulges, and also lumbar spondylosis."

The claimant followed-up with Dr. Cathey at a final visit on December 11, 2001. Dr. Cathey's physical examination showed no signs of lumbar radiculopathy, and he released the claimant to return to work on restricted duty as of December 12, 2001. The restrictions were to be lifted effective January 14, 2002, and the claimant returned to regular duty on that date. A follow-up visit note from Dr. Reddy dated January 10, 2002, shows that the claimant had returned to work. Dr. Reddy's impressions include the following, "Lumbar degenerative disc disease, with mild disc bulging and congenital sharp pedicles, causing bilateral L4-5 and L5-S1 neural foraminal narrowing."

Dr. Reddy's note from a visit on February 14, 2002, states that the claimant returned with increased back pain. The claimant has not worked since that date. A March 8, 2002, note from Dr. Reddy states, "[The claimant] underwent bilateral diagnostic medial branch blocks at L3 to L5 on 2/27/02. Unfortunately, these injections have made his back pain worse. For the last few days he has been unable to work. Today, he is complaining of increasing pain in his

back, shoulders and the hands. These, to me, appear to be generalized osteoarthritic pain." An MRI scan was performed on March 8, 2002. The findings included, "Changes of degenerative disc disease at L3-4, L4-5, and L5-S1. There is a small right paracentral disc herniation at L4-5. . . . A mild disc bulge is seen at L5-S1."

A letter from Dr. Cathy to the respondents' attorney dated March 22, 2002, states his opinion that the claimant "had reached maximum medical improvement at the time of his last evaluation here on December 11, 2001. I do not believe he has sustained any permanent impairment as a result of the industrial injury of June 26, 2001." The deposition of Dr. Cathey was taken on December 2, 2002. He testified that the MRI's obtained on July 2, 2001, and March 8, 2002, show the same degenerative processes and show no change.

Following his last treatment with Dr. Reddy, the claimant returned to Dr. Tracy. Dr. Tracy ultimately referred him to Dr. Jordan. A letter report from Dr. Jordan dated June 5, 2002, states that the claimant, "Reports onset of [a back pain] problem to 10 years ago. . . . He continued to work with the symptoms waxing and waning until last year

when he had an acute exacerbation following a work incident. . . . His last MRI was done March 08, 2002 which shows an HNPs at L4/5 and L5/S1 with some questionable instability." Dr. Jordan scheduled the claimant for a posterior lumbar interbody fusion at L4/5 and L5/S1. Dr. Jordan's follow-up notes subsequent to the surgery expressed the claimant reporting a reduction in his low back pain, and made repeated references to the claimant's leg symptoms being lessened and essentially resolving. (Dr. Rooney's May 1998 report is the only other record that reflects the claimant complaining of leg problems; and in fact, the other records specifically state the claimant was not experiencing any radiculopathy.)

The claimant testified that he returned to work on January 14, 2002, and worked through February 14, 2002; but stated that he has not worked since that time, and that Dr. Jordan has yet to release him from his care following his surgery in July 2002.

In order to establish the compensability of an injury, a claimant must satisfy all of the requirements set forth in Ark. Code Ann. §11-9-102(Repl. 2002). A claimant bears the burden of proving by a preponderance of the

evidence that he sustained an accidental injury as a result of a specific incident, identifiable by time and place of occurrence, which caused internal or external harm to the body, which arose out of and in the course of his employment, and which required medical services or resulted in disability or death. Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(E)(i). Ark. Code Ann. §11-9-102(4)(D) further requires that a claimant establish a compensable injury by medical evidence supported by objective findings, as defined in §11-9-102(16). Finally, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704. If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability the claim, compensation must be denied.

Based upon our review of the foregoing evidence, weighing that evidence impartially, and without giving the benefit of a doubt to either party, we cannot agree with the

Administrative Law Judge's finding that the claimant sustained a compensable specific incident back injury on July 23, 2001. The only testimony regarding the alleged incident occurring when the claimant crawled out from under the forklift comes from the claimant himself. The claimant's First Report of Injury or Illness filed with his employer, claiming an injury occurring on July 23, 2001, responds to the question of whether the injury occurred on the employer's premises in the following manner: "Not sure." When asked by the form to describe how the injury occurred, the following is written: "Not sure - employee has been seeing the doctor with back problems for some time. He has been diagnosed with spurs on his spine and 2 weeks ago he was diagnosed with 2 herniated discs." The claimant had his first visit with Dr. Cathey less than two weeks after the alleged injury; however, Dr. Cathey's records do not reflect that the claimant recounted this alleged event.

Despite the claimant's testimony otherwise, all of the medical evidence demonstrates that the claimant's low back problems were long-standing and pre-existed the alleged specific incident on July 23, 2001. All of the claimant's objective findings of injury pre-existed that alleged injury

date. MRI's obtained before and after the alleged injury date had identical findings. The problems which Dr. Jordan ultimately performed surgery to correct were long-standing degenerative problems. Accordingly, we cannot find that the claimant sustained any specific incident injury in July 2001. In our opinion, the claimant's testimony is not credible and the Administrative Law Judge's opinion is not supported by the medical evidence in this case. Therefore, we find that the opinion of the Administrative Law Judge must be, and hereby is reversed and this claim is dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority finding that the claimant failed to prove by a preponderance of the evidence that he sustained a

compensable back injury and denying his request for temporary total disability benefits.

I find that claimant should be awarded medical benefits and temporary total disability benefits for the specific incident injury he incurred while repairing a fork lift in July 2001. The record reflects that the claimant sustained a lumbar strain or sprain in July 2002 and immediately reported this sudden onset of severe pain to his supervisor. Dr. Cathey observed muscle spasms on the left side of claimant's back on August 7, 2001 and diagnosed claimant as having a lumbar strain or sprain, a musculoskeletal injury superimposed on a preexisting condition. While claimant had been treated for back pain prior to the July 2001 incident, the record reflects that the claimant's treating physicians had not observed any lumbar muscle spasms until after the July 2001 incident. Dr. Cathey later opined that Claimant had reached maximum medical improvement with respect to the lumbar strain/sprain on December 11, 2001. Dr. Cathey again confirmed these findings during his deposition.

Based on Claimant's credible testimony concerning the immediate onset of severe back pain while repairing a

fork lift in July, 2002, and the objective evidence of injury, I find that Claimant has proven by a preponderance of the evidence that he sustained a compensable back injury and is entitled to temporary total disability benefits. Accordingly, the opinion of the Administrative Law Judge should be affirmed.

SHELBY W. TURNER, Commissioner