BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202144

ERNEST R. WOLF, EMPLOYEE	CLAIMANT
HAWORTH, INC., EMPLOYER	RESPONDENT
FEDERAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 22, 2004

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

Claimant represented by HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by HONORABLE DAVID D. HOFFMAN, Attorney at Law, Monticello, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's order and opinion filed August 11, 2003. The administrative law judge found that the claimant proved he sustained a compensable gradual-onset back injury. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

Ernest Ray Wolf, age 47, testified that he became employed with Haworth in May 1999. The claimant described several different work stations during his employ with the

respondents. The claimant testified, "At the time that I was having, started having back problems, I'd been asked to go to work in another department, on the wood side, doing some different work that I hadn't been doing over the past three or four years. And that's when my back started giving me problems." The parties stipulated that there was an employment relationship on February 9, 2002. The claimant testified:

> Q. What was your principal job duties over there?
>
> A. A flat piece of table top laminate material like that, the size of that table right there (gesturing) would come down the line. And they would put laminate on one side of it or a piece of, like this material that's on here (gesturing) on the side of it. Run it down the machine, glue it on and press it. And there was a little turn table at the end on rollers. And you had to take and pull it, push it around, and push it back down the conveyor so the operator could do the other side of it. And it was that twisting and everything being that much shorter than what I am as far as bending over is what, I think, caused part of the injury.
>
> Q. Were you seated or standing in this job?
>
> A. I was standing.
>
> Q. All day long?
>
> A. All day long....
>
> Q. Did this job entail any lifting?
>
> A. Occasionally, yes, because the boards would come, before they got to the machine, on a pallet

> of about 20 or so. And you had to take and pick them up and flip them over. Usually, you just picked up the edge and then let it fall over, but you did have to pick up to get it to fall....
>
> Q. Would you say that your routine weight that you would have had to have lifted and turned was at least 50 pounds?
>
> A. Pretty close, yes.
>
> Q. Okay. And you're doing between 200 and 300 of these a day?
>
> A. Right....
>
> Q. Okay. Tell me what happened with your back.
>
> A. Well, like I said earlier, you know, after I went back, we did our cleaning, like I say, above and beyond our normal cleaning duties. I was asked to come in on Saturday and help paint, stripe lines on the floor. I was one of the second or third group that was employed there since they opened in October. And I had worked on weekends helping paint the floors before, so they asked me to come in and help do that. And just the stooping and bending, and, and it just got tight. Prior to it, I had been taking Tylenol and putting heating pad on it, thinking I had pulled a muscle doing a different job than I'd not normally, not normally been doing. And it just kinda got worse. That's when the numbing and - I limped around for about three days before I finally said, that's enough, I got, gotta do something else.

The claimant testified that he presented to the company physician, Dr. Michael Lack, on or about February 12, 2002. An MRI of the lumbar spine was taken on March 2, 2002, with the following conclusion:

1. Small broad-based left paracentral HNP at L5-S1 which may slightly impinge on the descending left S1 nerve root.
2. Moderate-sized central HNP at L4-L5 without significant spinal canal or neuroforaminal stenosis.

Dr. Lack reported on March 5, 2002:

> Pt states that he didn't do anything specific that would cause the pain in his back. He said that over the course of time from him painting and scraping and taping at work. He thinks that, may have caused the pain to start. He said it hurts now and sitting on the table he has a numbing sensation in his back and down his left leg.

Dr. Lack assessed "sprain/strain, lumbar region" and "neuralgia/neuritis." Dr. Lack indicated on March 5, 2002 that the claimant could return to restricted work back on February 13, 2002. Dr. Robert O. Lawrence reported on March 8, 2002 that the claimant complained of "pinched nerve lower back." Dr. Lawrence reported, "HNP documented by MRI scan. L4-5 and L5-S1. It is the latter that is causing his left lower ext sx likely."

Mr. Wolf claimed entitlement to worker's compensation, and a pre-hearing order was filed on October 23, 2002. The claimant contended that he sustained a compensable gradual-onset back injury. The claimant contended that he was entitled to reasonably necessary medical treatment, and temporary total disability compensation. The respondents

contended that the claimant did not sustain a compensable injury.

Hearing before the Commission was held on July 8, 2003. The claimant testified:

Q. How is your back now?

A. Doing pretty good, really.

Q. Okay. Are you still working at Haworth?

A. Oh, yes.

Q. Okay. Did, and we can clear up one item right here. Did any of these doctors take you off work for any length of time?

A. No. Doctor Lack told me that he would, he would recommend light duty. And when I went and saw Doctor Cooper, he said, you know, you can do light duty work, sit down when you need to, stand when you need to, if you get stiff. But he said, he, he wouldn't take me off work. It was the company that made me leave work because they told me that it wasn't a work related injury, therefore, they couldn't justify keeping me there.

Q. Okay. So you're no longer employed there?

A. I'm employed there, yes.

Q. Well, they made you leave work. How long, how long did they make you leave work for? That's what I'm not clear on.

A. I was off for nine weeks. I was off for nine weeks. I had to take family medical leave....

Q. How were you paid during that period?

A. I mean, how - 60% of my salary is what they paid me.

The administrative law judge filed an order and opinion on August 11, 2003. The administrative law judge found, "The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment." The administrative law judge also found, "The claimant has proven that he remained in his healing period and unable to earn wages for a nine-week period. The respondents are liable for the difference in his temporary total disability benefits and the family medical leave paid by the company for the nine-week period." The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4)(A) defines compensable injury:

> (ii) 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 injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The burden of proof shall be by a

preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4)(E)(ii).

In the present matter, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable gradual-onset injury. The claimant, who the Full Commission expressly finds was a credible witness, had worked for the respondents since May 1999. The claimant's credible testimony indicated that in about February 2002, he felt "tightness" in his back after stooping and bending while painting the respondents' floors. The claimant continued to work but finally sought medical attention after limping and feeling worsening pain in his lower extremity. An MRI on March 2, 2002 showed herniations at L5-S1 and L4-L5. The March 5, 2002 report of Dr. Lack, the company physician, corroborated the claimant's credible testimony. Dr. Lack noted that the claimant's symptoms arose "over the course of time from him painting and scraping and taping at work." Dr. Lack's assessment included "sprain/strain" of the lumbar region.

The claimant therefore proved by a preponderance of the evidence that he sustained an injury causing physical harm

to the body which was not caused by a specific incident and was not identifiable by time and place of occurrence, pursuant to Ark. Code Ann. §11-9-102(4)(A)(ii). The claimant established a compensable injury supported by objective findings, namely the objective findings shown on the March 2, 2002 MRI scan. In addition, the claimant's compensable injury was the major cause of the claimant's disability and need for medical treatment.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury. The Full Commission also affirms the administrative law judge's finding that the claimant proved he remained in his healing period and was unable to earn wages for a nine-week period. We therefore affirm in its entirety the opinion of the administrative law judge. The claimant's attorney is entitled to fees for legal services as provided by Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(2)(Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner Turner concurs.

CONCURRING OPINION

I concur with the principal opinion affirming the Administrative Law Judge's award of benefits and finding that Claimant's gradual onset back injury is compensable.

In December 2001, Claimant was working on the "Core Line" overseeing the operation of machinery, which did not require heavy lifting. Claimant agreed to work on the production line on or about December 15, 2001. This new position required Claimant to push and pull 200 to 300 wood laminate table tops per shift. Each laminate table top weighed 50 pounds. It is undisputed that during the last week of December 2001 or first part of January 2002 Claimant informed Charlie Clay, the company's safety inspector, that he was experiencing back pain that he thought was related to the performance of his tasks on the production line:

> Q: ...[W]hen do you think [the pain] became a problem that it was

pronounced enough for you to report it to somebody?

A: When it got so I couldn’t feel my left leg. It kinda, I noticed it then, that that was a definite problem. Before then --

Q: Were you at work?

A: Yes.

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Q: Did you report this to anybody in authority?

A: Charlie Clay, the safety inspector, came by one day and I mentioned to him. And he told me, you know, probably the height of the table and doing that all day was probably the reason why I was hurting. He told me, you know, that we couldn’t, you now, we couldn’t adjust it for everybody’s height, that I just needed to take it easy and do the best I could with it.

Q: Did anybody offer to send you to the doctor?

A: Not at that time, no.

Q: Okay. Did anybody at Haworth ultimately send you to a doctor?

A: Yes.

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Q: ....You claim that you hurt in the month of December 2001?

A: Probably the last part of December, yes, ‘cause it took a weeks before, I guess, before it actually started getting tight.

Q: You also claim that you hurt in January 2001{sic]?

A: Yes.

Q: Who did you tell that you were hurting during any of that time?

A: Other than another employee, no one, and except for Charlie, when he came by, and I talked with him.

Q: Now, all that time, did you believe that it was something having to do with work?

A: I more than likely believed more than anything at that time that it was work that I wasn't accustomed to doing and I had pulled a muscle.

Q: But nevertheless, at that point, in your mind, yourself, you believed that it was work related?

A: That there was, yeah, but I thought that it would go away because once you got used to doing something, when muscles get used to doing something like that, they do quit hurting.

Claimant testified that he believes that the back pain was brought about while twisting and bending over the production line at a work station that was positioned too low for his height. Claimant testified that the back pain gradually increased and eventually he also experienced numbness in his left leg.

Claimant worked on the production line until the beginning of February 2002. Claimant testified that on February 9th, 11th, 12th, and 13th, he painted stripes on the plant floor during a plant shutdown to clean the building. Claimant further testified that on Wednesday, February 13, 2002, he informed his supervisor, Heath Nix, that he needed to discuss his pain problem with Mr. Clay. Mr. Clay sent

Claimant to the company doctor, Dr. Lack. An MRI taken of Claimant's lumbar spine revealed two herniated discs. Dr. Lack's March 5, 2002 report describes the numbing sensation claimant felt in his back and down his left leg as being work-related. Claimant testified that he did not have any back pain prior to being assigned to the production line in December 2002 other than a back injury that occurred 25 years ago while working for another employer.

The undisputed record also shows that Respondent knew that Claimant requested and received treatment for his back due to alleged work-related pain. Despite an apparent controversion of the claim, the undisputed record further shows that Claimant was instructed to use his health plan benefits to pay for medical treatments relating to his back injury but that Respondent's safety director reimbursed Claimant for his co-pays and deductibles. Nevertheless, when Claimant's physician restricted him to light-duty work for nine weeks, the Respondent informed Claimant that he could not work a light-duty position and had to instead use FMLA leave because it did not believe that Claimant's injury was work related.

Respondents argue that Claimant's testimony is not credible and that no credible evidence exists to support a

finding of compensability. I disagree and find that Claimant credibly testified that he experienced an onset of back pain within the course and scope of his employment after being assigned to the production line in December 2001, that this back pain gradually increased in severity and led to numbness in Claimant's left leg, and that he informed Mr. Clay within a few weeks of the beginning of his assignment on the production line that he was experiencing back pain. Further, I find Respondents' argument very weak and unpersuasive in light of the fact that it is undisputed that the Respondent-Employer reimbursed Claimant for co-pays and deductibles incurred during the course of seeking medical treatment for this injury.

I also find that the medical evidence supports a finding of compensability in favor of Claimant. It is well established that "it is within the Commission's province to weigh all the medical evidence and to determine what is most credible." Ester v. National Home Centers, Inc., 335 Ark. 356, 981 S.W.2d 91 (1998). As for Respondents' argument that the medical records do not support Claimant's contention that he experienced back pain in December 2001 and January 2002 associated with his new employment position, I find that Claimant credibly testified that he

relayed his pain history to the physicians. The Court of Appeals has recognized that a Claimant is not to be penalized for a physician's failure to include a detailed account of the history Claimant relays to the physician: "Just as the Act does not require an immediate diagnosis, it also does not require that the claimant insist that the doctor's history contain the gory details of the occurrence." Siders v. Southern Mattress Co., 240 Ark. 267, 398 S.W.2d 901 (1966). I attach significant weight to Dr. Lack's findings and find that the medical records support Claimant's testimony regarding the onset of his back pain and injury.

For the foregoing reasons, I concur with the principal opinion that Claimant has proven by a preponderance of the evidence that he incurred a compensable gradual onset back injury.

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a compensable gradual

onset back injury for which he is entitled to benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof, and that this claim should be denied and dismissed.

Claimant contends that he injured his back when he was working in another department in December and January of 2000 and 2001 and was required to twist and bend and stoop over a table or work surface that was too short for his height. Claimant testified that while working in this capacity his back muscles felt tight which required him to take Tylenol and use heat on his back. After being moved back to his normal department, the plant shut down on February 8th and 9th for cleaning. Claimant worked during this cleaning period climbing over and around machines to clean them and painting and striping the floor. According to the claimant, it was not until after this intense cleaning that his leg began to feel numb and he could not function normally.

Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between his injury and his employment by medical evidence supported by objective findings and he must establish that his injury is the major cause of his

disability or need for treatment. I find that the claimant in the present case has simply failed to meet his burden of proof on these issues.

Claimant testified that he injured his back from working in an awkward position while working with the laminate boards, pulling and pushing board on the conveyor. According to the claimant's testimony, working in this position caused his back to tighten up for which he had to take Tylenol for pain. However, the claimant did not relate these facts when he sought medical treatment for an alleged work related injury. There is no mention in the medical records of the gradual onset injury from working with the laminate boards, or of developing pain on or around February 8th or 9th. In fact, the claimant's medical evidence dates the onset of claimant's pain as occurring towards the end of February, a few weeks after he stopped working with the laminate boards, and a few weeks after having cleaned the plant. In this regard, Dr. Robert Lawrence's March 13, 2002, First Care report in pertinent part, "pt is in today for eval of back pain...this has been going on now for about 3 weeks..." Moreover, in his report dated March 5, 2002, Dr. Michael Lack records the following history:

> pt states that he he didn’t do anything specific that would cause the pain in his back. he said that over the course of time from him painting and scraping and taping at work he thinks that may have caused the pain to start.

I simply do not find the claimant to be a credible witness. Had the claimant’s pain begun in December or even January from working in the new and awkward position with the laminate boards, one would expect the claimant to, at least, mention this fact to his treating physician when he sought medical treatment for his back pain. Instead, the claimant reported that he did not do anything specific that would cause him to have pain and he offered a speculative cause when asked. The claimant identified co-workers to whom he reported his alleged pain, yet he did not call these co-workers as witnesses to support or corroborate his own self-serving testimony. Since a claimant's testimony is never considered uncontroverted, such corroborative testimony would carry great weight. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

Since I do not find the claimant’s testimony regarding the onset of his pain to be credible, I am

likewise unable to find that the claimant sustained a compensable gradual onset injury. The only evidence which establishes a causal connection between the claimant's back pain and his work, is the claimant's self-serving testimony. Conceivably, the claimant's injury arose out of and in the course of his employment, but I am unable to reach this conclusion as I do not find the claimant's testimony as to causation or the date of onset of his pain to be credible. Consequently, I find that the claimant has failed to meet his burden of proof.

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

KAREN H. McKINNEY, Commissioner