

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307525

J. D. WOODRUFF,
EMPLOYEE

CLAIMANT

ALLEN CANNING COMPANY,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 30, 2004

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

Claimant represented by HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE COURTNEY GILBERT,
Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed January 21, 2004. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The stipulations agreed to by the parties at
the pre-hearing conference conducted on
September 17, 2003, and contained in a pre-
hearing order filed that same date, are
hereby accepted as fact.
2. Claimant has proven by a preponderance of the
evidence that he suffered a compensable
injury to his low back while working for
respondent on July 7, 2003.

3. Claimant is entitled to temporary total disability benefits beginning July 8, 2003 and continuing through July 18, 2003.
4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury.
5. There is insufficient evidence that claimant willfully intended to injure himself; therefore, A.C.A. § 11-9-401 has no application to this claim.
6. Claimant's claim for compensation benefits is not barred by the *Shippers'* defense.
7. Respondent has controverted claimant's entitlement to all unpaid disability benefits.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

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 the claimant's injury occurred after July 1, 2001, the 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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part from the principal opinion. Specifically, I concur with the findings in the principal opinion. I must respectfully dissent, however, from the failure to award Claimant

additional temporary total disability benefits from July 18, 2003, to a date yet to be determined.

I find that Claimant is entitled to additional temporary total disability benefits from July 18, 2003, to a date yet to be determined because Claimant remained in his healing period and was incapacitated from earning wages. Claimant testified that he did not return to physical therapy after July 18, 2003, because he could not afford to continue to pay for the therapy. His testimony is corroborated by the fact that Respondents were not paying for the therapy and the physical therapist's August 8, 2003 note stating that subsequent appointments and treatment were cancelled. Additionally, Dr. Westbrook's clinic note of July 25, 2003, and proposed treatment plan therein supports a finding that Claimant remained in his healing period after July 18, 2003. I, therefore, find that Claimant is entitled to additional temporary total disability benefits from July 18, 2003, to a date to be determined with an appropriate offset for unemployment compensation benefits he received during that period.

For these reasons, I find that Claimant is entitled to additional temporary total disability benefits.

Accordingly, I concur in part and dissent in part from the principal opinion.

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion, wherein it was found, in relevant part, that the claimant sustained a compensable low back injury on July 7, 2003. Commensurate with this finding, the claimant was awarded temporary total disability benefits beginning July 8, 2003, and continuing through July 18, 2003. Based upon my de novo review of this claim, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

_____At approximately 8:30 a.m. on the morning of July 7, 2003, the claimant was loading boxes of shoestring potatoes onto a truck when he reportedly began experiencing a "popping" sensation accompanied by pain in his lower back, and a shooting pain down his right leg. The claimant testified that these boxes measured approximately 2 feet by 2 feet, and weighed about 20 pounds each. The claimant stated that he was working alone at the time of this

incident, but that he reported the incident to a forklift driver who reported it to the warehouse manager. Upon his arrival to the scene approximately 10 minutes later, the warehouse manager directed the claimant to a less strenuous task, that of placing plastic lids on containers on a conveyor line. The claimant continued to work until lunch, at which time he informed his manager that he needed to go home due to his increasing pain. No accident report was filled out on the day of his alleged injury. A post-accident interview was conducted on July 9, 2003, however, and on July 11, 2003, the claimant sought treatment from Dr. Fareed Kannout for low back pain. A report by Dr. Kannout from that visit reveals that the claimant was "well known" to him for prior workers' compensation related back injuries.

Dr. Kannout referred the claimant for evaluation and treatment at the Cooper Physical Therapy Clinic. The claimant received four physical therapy treatments consisting of "electrical muscle stimulation, moist heat, and diathermy," from which significant improvement was noted. A discharge summary report from the Cooper Clinic dated August 8, 2003, notes that the claimant did not return for subsequent treatments after his appointment of July 18,

2003, and was, therefore, "discharged pending further orders."

In my opinion, the facts of this claim fail to support a finding that a causal connection exists between the claimant's alleged injury and his employment, or more specifically, that a new injury, or an aggravation, occurred on July 8, 2003. Instead, the facts here establish that the claimant suffered a recurrence of a pre-existing, work-related injury which he sustained at least over a decade earlier. The Arkansas Court of Appeals in Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), differentiated between a recurrence and an aggravation as follows:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468.

The test to determine if a subsequent episode is a recurrence or an aggravation, is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000). The Administrative Law Judge in this case was correct in that the claimant's work related incident of July 7, 2003, is identifiable by time and place of occurrence. However, evidence reveals that the claimant's injury was not a "new" injury, as defined above. Instead, it was clearly another period of incapacitation resulting from a previous injury, and was a natural and probable consequence of that prior injury.

The claimant sustained his first compensable back injury on March 20, 1992, while employed with the Don Youngblood Trucking Company. A consultation report dated August 8, 1992, from Dr. A.D. MacDade, states:

I noticed that past MRI scan done here back in 4/92 is said to show subligamentous herniation of nucleus pulposus at L2-3, L3-4, and a bulge at L4-5. ... If there are remarkable changes on his current MRI scan, I would suggest LESI and strict conservative care. I have told him to stop smoking and why.

On April 9, 1993, an MRI of the claimant's lumbar spine revealed the following:

Mild dessication of the L2, L3, and L4 discs compatible with early degenerative disc disease without significant disc space narrowing. Mild extradural defects at L1, L2, and L4 levels consistent with mild disc bulges. These appear most prominent at the L1-L2 level in the left paramedian region and are minimal at the L2 and L4 levels centrally.

The claimant's condition at that time was not regarded as one for which surgery was required, so the claimant followed a course of conservative treatments instead. On May 5, 1993, the claimant's attending physician, Dr. Douglas W. Parker, Jr., reported that the claimant had

reached a "treatment plateau" regarding his March 20th injury. In his clinic report of May 5, 1993, Dr. Parker specified that the claimant could not return to a job which required "heavy lifting, pushing, pulling, or repetitive bending." On that same date, neurosurgeon, Dr. Ronald N. Williams, assigned the claimant with a 9% permanent partial disability rating according to AMA guidelines for bulging discs at L1-2, L2-3, L3-4 and L4-5.

The claimant received over 58 weeks of temporary total disability benefits, plus permanent partial disability and medical benefits for his claim of March 20, 1992, which was eventually settled by joint petition. During his hearing of December 22, 2003, regarding his most contemporary claim, the claimant initially testified that he thought his back had completely healed from his 1992 injury. He later recanted his earlier testimony as follows:

Q. Mr. Woodruff, wouldn't you agree that your condition really hasn't changed from the time that you were employed with Don Youngblood until today?

A. At the time I thought it had changed, yes.

Q. But wouldn't you agree now that it hasn't changed?

A. No.

Q. You wouldn't agree to that?

A. Yeah, I would agree to it.

Q. And you wouldn't disagree if I told you that your medical records show problems in your lumbar region from the time you started working at Don Youngblood until today; isn't that correct?

A. Yes.

The record further reveals that after his claim in 1992, the claimant made a claim against K&J Trucking Company, on June 12, 1995, when he reportedly "hopped out of [his] truck trailer after cleaning it" and injured his lower back. Employment documents furnished by K&J showed that the claimant was not working on June 12, 1995, but the record does not reveal the outcome of that claim.

Subsequent to the above-described claims, the claimant made two (2) work-related claims against Wal-Mart. On September 28, 2001, the claimant claimed injury to his lower back from "dragging pallets," and again on July 20, 2002, while "lifting boxes." Extensive medical reports from that period of time include an MRI taken October 12, 2001, which revealed disc herniations at L1-L2, L2-L3, L3-L4, and L4-L5. In progress notes dated October 9, and October 16,

2001, the claimant's current treating physician, Dr. Kannout, made the following comments:

Patient to continue with limited duty and he was instructed to follow those instructions. Otherwise, his back will never get better, which includes no pulling, pushing or heavy lifting more than five pounds, no standing over two hours per day.

In subsequent progress reports, it was noted that the claimant was not believed to be following his light duty mandates from Dr. Kannout, and therefore his condition was predictably worsening. For example, in a report dated July 29, 2002, Dr. Kannout made the following comments regarding the claimant's progress:

As far as limited duty, apparently he is not doing limited duty as I asked him to. ... I explained to the patient that he really needs to avoid any heavy lifting. Otherwise, he is going to end up with an emergency surgery due to probably aggravating his herniation. All of the above has been explained to the patient in a fair amount of detail and as per request.

On August 19, 2002, Dr. Kannout released the claimant to return to full regular duty, noting that the claimant's "low back pain and muscle spasms" had resolved through physical therapy and medications. His final

diagnosis in that report of the claimant's condition, however, included "old herniated disc of lumbar spine."

Upon cross-examination during his hearing of December 22, 2003, the claimant testified that he continued to have "slight" back pain "once or twice" a month after his employment with Wal-Mart, and prior to his employment with the respondent employer. The claimant denied, however, experiencing any severe symptoms during that time. And although the claimant had previously been prescribed pain medications and muscle relaxers for the alleviation of his symptoms, he denied using anything stronger than aspirin during that period of time. In earlier testimony, however, the claimant was asked why he believed that the respondent employer should be liable for his back injury of July 7, 2003, to which he responded:

I was employed by them [respondent] and I got hurt on the job at the time, and I was released from the doctors from my previous injury and I had never had a problem up until when I got hurt.
(Emphasis added)

When pressed about statements that he had made in his deposition, the claimant admitted that he knew prior to his employment with the respondent employer that lifting and bending worsened his back condition.

In Shipper's Transport of Georgia v. Stepp, 265 Ark. 365, 578 S.W.2d 232 (1979), our Supreme Court held that a false representation on an employment application bars recovery under our workers' compensation law when three factors are established: (1) the employee must have knowingly and wilfully made a false representation as to his physical condition; (2) the employer must have relied upon the false representation, and this reliance must have been a substantial factor in the hiring; and, (3) there must have been a causal connection between the false representation and the injury. St. Vincent Infirmary Med. CTR. v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The above stated "Shipper's defense" is applicable in the present case for the following reasons. First, the claimant knew that he had a serious back condition, namely several herniated discs, and he knew that he must limit his physical activities in relation thereto. In her testimony, director of claims services for the respondent employer, Jody Yoakum, explained that, as a matter of general policy, applicants are asked to list information about physical conditions and limitations on their applications in order to ascertain if the applicant has any work-limiting conditions or special accommodation needs. The claimant did not disclose information about his

herniated discs or his limited physical capacity, including his 9% impairment rating, on his employment application with the respondent employer. Moreover, according to the testimony of the claimant's dock supervisor, Mr. Thomas Deters, and warehouse manager, Mr. Don James, the claimant did not disclose information about his back problems or physical limitations to them until the incident of July 7th. Specifically, Mr. Deters stated that he was unaware that the claimant had any sort of condition that would make him "unable to lift or perform lifting duties at work." Referring to the date of the claimant's incident, Mr. James stated:

I went to talk to J.D. to see what took place, you know, how his back was doing. And anyway, I got to talking to him about it and J.D. was telling me that it wasn't such a big deal, that it happens two or three times a year, that he had to get some pills from a doctor to get it relaxed or whatever. And in our conversation he said it's happened before, he had hurt his back previous at Wal-Mart picking pallets up.

Finally, there is no indication from the record that the respondent employer was aware at the time of his hiring that the claimant had an open claim against Wal-Mart for prior work related back injuries, which was settled by

joint petition three days after his alleged injury with the respondent employer. It is obvious, therefore, that the respondent employer relied upon claimant's false representation regarding his physical limitations when hiring him for a general labor position.

In my opinion, the evidence in this claim overwhelmingly supports the conclusion that at the time of his alleged injury of July 7, 2003, the claimant knew that he should not engage in heavy lifting, pulling, pushing, bending, or any other activity that would compromise his herniated discs. Furthermore, the claimant should have disclosed his physical limitations to the respondent employer at hiring. The claimant's failure to disclose his physical limitations on his employment application shows willful intention on his part to hide his condition from his employer. Had the respondent employer been aware of the claimant's physical problems and limitations, it appears likely that the claimant would either not have been hired for a general labor position or that the respondent would have implemented the necessary safety precautions to insure that the claimant would not sustain another injury to his back. Thus, the Shipper's defense is relevant to this claim

and should be upheld to bar any compensability of this claim.

I further find that this claim fails due to the fact that the claimant's incident was a recurrence, not an aggravation, of his underlying condition. The respondent, therefore, is not liable for any benefits asserted by the claimant in this case. Moreover, questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. In reviewing the conflicting evidence in this claim, it is more likely than not that the claimant was less than honest regarding his symptoms between the time of his employment with Wal-Mart and the respondent employer. Based upon the severity of his back condition, (for which he received a 9% impairment rating), and the number of back

related workers' compensation claims filed by the claimant, it is inconceivable that the claimant was essentially symptom free from August 19, 2002, and July 7, 2003. Add to this the fact that the claimant failed to report his back condition to his employer until *after* his alleged injury, and the logical conclusion here is that this claimant is not a credible source of information, and that his testimony should be given little weight. It is perhaps unfortunate that the claimant chose to settle his previous workers' compensation claims, and is, therefore, barred from recovering against his former employers for the compensability of the recurrence of his injury on July 7, 2003. This, however, does not make the respondent employer responsible for what amounts to nothing more than another period of incapacitation resulting from a previous injury, which was a natural and probable consequence of that prior injury.

For the above stated reasons, I find that the claimant has failed to establish the compensability of this claim. Therefore, for all the reasons set forth herein, I respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner