

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202267

TRACY CANADY, EMPLOYEE	CLAIMANT
VIRCO MFG. CORPORATION, EMPLOYER	RESPONDENT
UNITED STATES FIRE INS. CO., CARRIER	RESPONDENT

**OPINION FILED NOVEMBER 8, 2005**

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

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

Respondent represented by HONORABLE GAIL PONDER GAINES, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed February 1, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The employee-employer-carrier relationship existed on the applicable date.
2. Based on the claimant's average weekly wage, the applicable compensation rates are \$342 per week for total

disability and \$257 per week for permanent partial disability.

3. This claim has been controverted in its entirety.

4. The claimant has received short-term disability benefits which under Ark. Code Ann. § 11-9-411 would entitle the respondents to a dollar-for-dollar offset and would obligate the respondents to set aside money to reimburse the third-party payor if the claim is found compensable.

5. Mr. Canady has failed to prove by a preponderance of the evidence that his back problems at issue arose out of an injury sustained by either a specific incident or gradual onset caused by work activities at Virco Manufacturing in November or December of 2001.

6. Therefore, Mr. Canady has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury.

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

**DISSENTING OPINION**

The claimant appeals the decision of the Administrative Law Judge finding that he did not sustain a compensable injury. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own.

Based upon my de novo review of the record, I believe the Administrative Law Judge misinterpreted the

medical evidence and that his decision is in error. I believe that the claimant's testimony, when taken in conjunction with the medical records of his treating physician, is more than sufficient to establish the occurrence, of a compensable injury. For that reason, I would reverse the Administrative Law Judge and award the claimant his requested medical and disability benefits. Accordingly, I must respectfully dissent from the Majority opinion.

The claimant has alleged that he suffered a gradual onset back injury as a result of his job related activities. According to the claimant, he was employed as a "boxer" in the respondent's manufacturing facility. As part of his duties, he was required to, on a daily basis, box 100 to 200 pieces of furniture. His job required him to lift furniture items weighing between 30-100 pounds. It is the claimant's contention that this repeated lifting over a number of years caused him to develop his current back condition. He testified that back pain and radicular

symptoms forced him to seek medical treatment in December 2001.

The respondent contends that the claimant did not suffer any specific incident injury while in their employment and the claimant's back condition is not occasioned by his job related activities but instead, is the result of a non job related back injury for which the claimant received surgical treatment for in 1999.

After a hearing, an Administrative Law Judge found that the claimant had not satisfied his burden of establishing a compensable injury. In reaching that result, the Administrative Law Judge noted that, even though the claimant testified to a specific moment and time in which his back condition became symptomatic, he did not establish the occurrence of a specific incident injury. Further, the Administrative Law Judge indicated the claimant had not shown a gradual onset injury and noted that there was little objective evidence of an injury, specifically noting that the general practitioner who the claimant saw on or about December 5, 2001, did not note the history of a job related

activity and that the surgeon performing the claimant's back operation could not find any free disc fragments causing the claimant's symptoms. The Majority now relies on that decision in denying the claimant benefits.

The claimant had been employed by the respondent since 1993. During that time, the claimant was employed in a job requiring an extensive amount of heavy lifting. In 1999, he reported a job related injury to his employer, which they apparently refused to accept. The claimant, not contesting the respondent's position, sought medical treatment on his own relying upon group medical and disability insurance. The claimant eventually came under the treatment of Dr. Edward Saer, a Little Rock neurosurgeon. Dr. Saer diagnosed the claimant as having a herniated disc at L4-L5, which he surgically treated with a discectomy on January 24, 2000. The claimant eventually returned to his normal work duties and continued to perform them until December 2001.

The claimant testified that he had begun suffering back pain in his right buttocks which radiated into his leg and foot. He advised one of the company nurses of his back

pain in late November or early December 2001, and the nurse gave him Ibuprofen. However, he did not know the name of the nurse and she did not make any note in the log book regarding this report. The claimant did advise his immediate supervisor, Jackie Glover, of his back problem in December 2001. As a result of that notice, Mr. Glover prepared a handwritten note, documenting that the claimant advised him that he was having pain in his leg and that the pain was the same as he had the year before. Mr. Glover also noted that the claimant advised him that he was going to his doctor over Christmas to try to get the problem taken care of. The note is undated.

The claimant saw Dr. Kuhn at the Morrilton Medical Clinic on December 5, 2001. In a progress note of that date, Dr. Kuhn stated that the claimant was seeing him for an evaluation of right hip pain. While Dr. Kuhn does not relate the claimant's problem directly to his employment, he does state: "He does at Virco, have a lot of heavy lifting and stacking to do, sometimes in an overhead position. He is not aware of any specific incident where he began hurting all of

a sudden but it just happened gradually over the last couple of weeks." Dr. Kuhn also states: "I have cautioned him about heavy lifting, etc., at work."

The Majority, by adopting the decision of the Administrative Law Judge, emphasizes that Dr. Kuhn's progress note did not contain a history of a job related injury. However, it appears to me that Dr. Kuhn was clearly connecting the claimant's job related activities with his injury in that in two separate places in the report, he discussed the claimant's heavy lifting. Once again, it should be emphasized that the claimant is presently contending that his injury was not the result of a specific incident but that it was caused by continued trauma from his continued heavy lifting over a period of eight years at his job.

Dr. Kuhn directed the claimant to undergo an MRI scan following his December visit. The scan was performed on December 13, 2001. Because of the scan's results, the claimant was referred to Dr. Edward Saer for further evaluation and treatment. Dr. Saer saw the claimant on

December 26, 2001 and noted that the MRI scan had revealed a large recurrent disc herniation at L4-L5 on the right with an extruded fragment. According to Dr. Saer, the MRI scan also revealed a small right paracentral herniation at L3-L4. While Dr. Saer stated in his report that he did not believe that the L3-L4 herniation was clinically significant, he did attribute the claimant's pain and symptoms to the herniation at L4-L5. In order to treat this condition, Dr. Saer performed surgery on the claimant on December 28, 2001.

In evaluating Dr. Saer's operative note, the Administrative Law Judge, and now the Majority, focus on Dr. Saer's statement that he did not find a free fragment while performing the surgery. They also note that Dr. Saer discovered an extensive amount of scar tissue in the claimant's disc space. Based on that finding they apparently, conclude the claimant did not suffer any new injury or an aggravation of his prior back injury. However, in reviewing Dr. Saer's progress note, I draw a different conclusion. While it is true that Dr. Saer stated that he did not find the free fragment noted in the MRI scan, he

specifically stated that there was some leakage from the claimant's disc and he did remove some extruded disc material.

As Dr. Saer's operative note clearly demonstrates, the claimant did have a herniated disc at L4-L5. As the doctor stated, he removed extruded disc material even though he did not find a free fragment. Further, the claimant substantially improved following the surgery even though he was not able to return to heavy lifting involved in his past employment.

The respondent also relies upon the lack of documentation regarding any report of an injury. However, it appears to me that the testimony of the two witnesses called by the respondent provided ample explanation for this lack of documentation. One of the witnesses called by the respondent was Kathy Laughlin, who identified herself as the respondent's company nurse. She testified that in November and December 2001, there were four nurses who worked in the respondent's factory. She stated that all of them wore an identification badge indicating they were nurses and they

all wore nursing uniforms while on duty. The claimant testified that it was from one of these women that he received Ibuprofen from when he complained of back pain. However, there was no note made of this complaint. The respondent contends that this lack of documentation was because the claimant did not make such a report. However, during the cross examination of Ms. Laughlin, she was asked about reporting procedures when a worker did not identify a specific injury. In response, Ms. Laughlin testified that they would report any specific identifiable event as an injury. Then Ms. Laughlin was asked the following question by respondent's counsel:

Q. What if any employee is performing work that requires repetitive lifting, bending and twisting and reports that their back is hurting; would that be an injury in your mind?

A. We consider that an illness.

Later, Ms. Laughlin was further questioned about when an injury, if reported to a supervisor, would be referred to a nurse. Claimant's counsel read a portion of Mr. Glover's note to her and asked if she was aware of that

report. After Ms. Laughlin stated that she was not aware of it, the following exchange took place:

Q. Is that the kind of thing that you would think a supervisor would tell a nurse about an employee?

A. No, sir, not necessarily.

Q. Why not?

Q. There's some personal injuries that individuals at our company do not wish to discuss with anyone. So in this case if it's not work related, the supervisor doesn't have to send anyone to the Nurses Station.

Obviously, the management of the respondent did not consider gradual onset injuries to be job related. As Ms. Laughlin's testimony clearly establishes, the respondent's procedure was that only specific incident injuries were documented and only in those cases were the claimants referred to the respondent's physician for medical treatment. Under those circumstances, it is not surprising that the claimant's report of a gradual back injury would not elicit any response from his employer. In fact, it is significant that in the claimant's 1999 back complaint, he

was advised that such an injury was not compensable. The difference between that situation and the present injury is that here, the claimant has taken steps to enforce his rights under the Workers' Compensation Act.

In my opinion, the evidence offered by the claimant establishes that he suffered a gradual onset back injury which is compensable under the Workers' Compensation Act. As noted by the Arkansas Supreme Court in Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S. W. 2d, 522 (1999), the claimant must prove the following to establish a gradual onset injury:

1. The injury arose out of an in the course of his or her employment;
2. The injury caused internal or external physical harm to the body that required medical services or resulted in disability or death;
3. The injury was a major cause of the disability or need for treatment;
4. Objective medical evidence must establish the existence and extent of the injury, but is not essential to establish the causal relationship between the injury and the job.

In the present case, there is no dispute that the claimant had a job involving heavy and repetitive lifting. Clearly, this is the type of activity which could bring about a gradual onset back injury as alleged by the claimant. Also, objective medical evidence in the form of an MRI scan and the personal observation of disc material by Dr. Saer clearly establishes that the claimant had an injury to his body that required medical services. Lastly, it is clear that the major cause of the claimant's disability is his back injury. Therefore, I find that the claimant has met all of the requirements of a gradual onset back injury and that we should reverse the Administrative Law Judge and find that this claim is compensable. For these reasons, I respectfully dissent.

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SHELBY W. TURNER, Commissioner