

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306713

CRYSTAL BARR, EMPLOYEE	CLAIMANT
EXCEL CORPORATION, A SELF INSURED EMPLOYER	RESPONDENT
CRAWFORD AND COMPANY, TPA	RESPONDENT

OPINION FILED JUNE 15, 2005

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

Claimant represented by HONORABLE MICHAEL HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondent represented by HONORABLE LES EVITTS, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 25, 2004.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$293.00 for total disability and \$220.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove that she sustained a "compensable injury" to her back or lumbar spine during her employment with this respondent. Specifically, she has failed to prove the occurrence of a physical injury to this portion of her body that "arose out of and occurred in the course of" her employment with his (sic) respondent, in that she failed to prove by the greater weight of the credible evidence that her employment activities for this respondent likely caused or aggravated the physical injuries or conditions involving her lumbar spine. She has also failed to show by the greater weight of the credible evidence that her employment activities were the "major cause" of her need for medical treatment or of any disability she has experienced.
5. The respondents have controverted this claim in its entirety.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The claimant has alleged that her job-related activities caused her to develop a gradual onset injury to her lower back. An Administrative Law Judge found that the claimant did not establish, by a preponderance of the evidence, that her back problems were related to her employment activities. The Majority has affirmed and adopted those findings and is denying the claim. I find that the Administrative Law Judge did not apply the correct legal standard or accurately interpret the facts in this case. I

therefore respectfully dissent from the decision reached by the Majority.

In order to establish her entitlement to benefits for a gradual onset back injury, the claimant must meet the requirements of the Workers' Compensation Act set out in A.C.A. §11-9-102 (4). In summation, those evidentiary requirements are as follows:

- 1) The claimant must have suffered an actual physical injury to her back;
- 2) The nature and extent of the physical injury must be supported by objective findings;
- 3) The injury must cause internal or external physical harm to the claimant's body; and,
- 4) The claimant's must arise out of and in the course of her employment.

There is no question that the medical evidence in this case satisfies the first three requirements. A series of CT scans and MRI scans conducted on the claimant's lower back in 2001 and 2003 establish that the claimant had a disc herniation at L4-L5 and L5-S1 in her lower back. Further, a lumbar discectomy was performed on the claimant on September 22, 2003, and Dr. Arthur Johnson, a Fort Smith

neurosurgeon, documented that he visually observed the disc herniation in his operative report of that date.

The dispute in this case concerns whether the claimant's job activities were the major cause of her lower back condition. In finding that they were not, the Administrative Law Judge, whose Opinion the Majority is adopting, found that there was no "reasonably close temporal relation" between the claimant's job duties and the development of her back condition, and that the claimant did not show that a causal connection between her job activities and her injury was "likely or possible." Since neither of those requirements are in the Workers' Compensation Act, I believe that the Judge erred as a matter of law in holding the claimant to a standard higher than that statutorily provided. However, I find that the facts of the case entitle the claimant to receive benefits even under the higher standard imposed by the Judge.

The claimant testified that she began working for the respondent employer in 1998. She stated that this job involved heavy lifting and frequent bending, stooping, and twisting. Significantly, after about a year of this employment, the claimant first sought medical treatment for

what would become chronic back pain. In a clinical report dated June 15, 1999 from Dr. Michael Miranda, the claimant's treating physician, the doctor states as follows:

"She presents with mild low back. Has bothered her for the last week. She cannot recall any direct trauma, though her work involves some lifting and twisting at the waist. . . There was some discomfort or pressure over the left para-spinal area level of L4-5, but no other significant findings. . ." (Emphasis added).

Dr. Miranda prescribed the claimant certain medication and referred her to physical therapy. A spinal x-ray conducted on December 7, 1999, demonstrated mild L5-S1 narrowing which the radiologist possibly related to underlying disc disease. The physical therapy notes dated December 8, 1999, reflect that the claimant discussed her work activity with the physical therapist and advised that, while she continued to work, her pain worsened.

Obviously, the claimant began suffering problems with her lower back shortly after becoming employed. It should also be noted that, at 27 years of age, degenerative disc disease and chronic back pain is not normally a problem. However, the claimant's back continued to grow

worse as reflected by her chronic pain complaints and diagnostic testing.

After another bout of back pain, the claimant returned to Dr. Miranda in the summer of 2001. In a CT scan performed at Dr. Miranda's direction on June 22, 2001, the claimant was found to have a broad disc bulge at L3-L4 and a left para-central protrusion at L4-L5. A moderate size right para-central disc protrusion was found at L5-S1 which might have been compressing the right S1 nerve root in the lateral recess.

As a result of those findings, the claimant was referred to Dr. John Landherr, a Fort Smith neurosurgeon, for an evaluation. In a report dated November 21, 2001, Dr. Landherr reviewed the claimant's physical condition, including her recent MRI and recommended that she undergo conservative treatment in the form of epidural steroid injections and physical therapy. However, the claimant continued to have ongoing back pain throughout 2002 and into 2003. Because of these continued complaints, the claimant underwent another MRI on April 26, 2003. This MRI discovered a disc herniation at L4-L5 and a moderate central disc herniation at L5-S1. In reviewing this MRI, Dr. Miranda

noted that there was a progression from her MRI in 2001. Consequently, he referred her to Dr. Arthur Johnson, another Fort Smith neurosurgeon, for additional treatment. Eventually, Dr. Johnson performed a lumbar discectomy on September 22, 2003. The claimant's condition improved following the surgery, and after a period of convalescence, she returned to work with the respondent employer.

In denying the claim, the Administrative Law Judge relied heavily upon his conclusion that the claimant did not relate her injury to her employment when she was seeing her doctor. The Judge also noted that the claimant had injured her leg in a three wheeler accident in August 2000, and in October 2001 had reported to Dr. Miranda that her back began hurting after lifting a box at home.

The Administrative Law Judge also placed considerable emphasis on the fact that the claimant had not consistently related her back complaints to her employment. Lastly, it was also noted that the claimant, in applying for and receiving short term disability benefits from her employer's group disability carrier, had filled out some forms stating that her back problems were not job related.

In my opinion, the items relied upon by the Administrative Law Judge are not sufficient to rebut the overwhelming evidence that the claimant's back injury was the result of prolonged lifting, bending, and other back intensive labor at her employment. The claimant testified that during the five years of employment prior to her back surgery, she was required to frequently lift tubs of meat weighing 50 to 100 pounds. She was also occasionally required to push racks containing tubs of meat and these racks, when fully loaded, weighed approximately 1,000 pounds. Another job the claimant was assigned was in the respondent's Sanitation Department. She testified that this employment was very strenuous duty requiring her to turn over 80 to 100 pound gondolas (apparently some type of large, wheeled container) while washing them out. She stated that this job required her to remain in a bent or stooped position much of the shift in addition to having to wrestle around the heavy containers. I also note that this latter activity occurred in 2003, shortly before she resumed seeing the doctor for treatment of her back pain. The medical reports at this time documents that she had a significant increase in symptoms in April 26, 2003.

I attach little weight to the group disability paperwork which the claimant filled out in order to obtain short term disability benefits. The claimant testified that when she previously reported her back pain to the company nurse, she had been told that she could not pursue a workers' compensation claim on that type of injury. Consequently, the claimant, who was a single mother of three children, had no other way to support herself and her family when her back pain became so severe she was not able to work.

In denying this claim, the Judge noted that the claimant's problems were "essentially degenerative in nature" and naturally progressed over time with the stress and trauma produced by the activities of daily life. The type of cumulative trauma the Judge noted being present in the claimant's life were a three wheeler accident, prolonged sitting when the claimant was driving, lifting boxes at home, and doing household chores. He then concluded that, because the claimant was involved in these type of activities, she could not establish that the major cause of her injury was her job related activities.

In my opinion, the Judge's conclusion in this regard is simply not logical. The claimant was only 27 years old when the beginnings of degenerative disc disease in her spine was first noted. That is a very young age for someone to begin having chronic back pain from that disease. If it is possible for someone of the claimant's relative youth to begin developing this condition as a result of driving a car, doing housework, and similar routine activities, then job duties such as lifting 50 to 100 pound tubs of meat on a regular basis, frequently bending, stooping, and lifting, 100 pound containers to wash them out using a power hose, would be even more likely to cause the kind of problems the claimant suffered. Also, it is important to note that the three wheeler accident which the Judge mentioned on several occasions in his Opinion, occurred over three years prior to the claimant's back surgery. Of even more significance is that in Dr. Miranda's treatment note of August 3, 2000, two days after the accident, he stated that the claimant's injuries did not include any new neurological deficits. Further, all of the medical treatment the claimant received following this accident was to her legs.

It should also be noted that both Dr. Miranda and Dr. Johnson opined that the major cause of the claimant's back condition was her job related activities. The Judge rather cavalierly ignores these opinions and concludes that they were based upon mistaken facts. However, the only mistaken fact which the Judge is able to cite is the temporal relationship referred to earlier in this dissent. As noted above, the Judge's conclusion in this regard is clearly wrong since the claimant's back complaints in 1999 were related to her employment activities and, most importantly, the significant increase in the claimant's symptoms and problems in the spring of 2003, occurred at the same time the claimant was assigned duties in the respondent's Sanitation Department working with the gondolas.

As explained above, I do not believe that the Administrative Law Judge applied the correct legal standards in determining the outcome of this claim. I also believe the facts of this case, when objectively reviewed, clearly establish that the heavy lifting and other strenuous activities on the claimant's job resulted in her developing the back condition for which she is seeking medical and

disability benefits. For those reasons, I respectfully dissent from the Majority's decision.

SHELBY W. TURNER, COMMISSIONER