

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311733

GARY MILLER, EMPLOYEE	CLAIMANT
NABHOLZ CONSTRUCTION, EMPLOYER	RESPONDENT
ACIG INSURANCE CO., INSURANCE CARRIER	RESPONDENT
RISK MANAGEMENT RESOURCE, TPA	RESPONDENT

OPINION FILED FEBRUARY 16, 2005

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

Claimant represented by the HONORABLE DON ELLIOTT, JR.,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of administrative law judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 21, 2004. The administrative law
judge found that the claimant sustained compensable injuries
on October 15, 2003 and October 23, 2003. After reviewing
the entire record *de novo*, the Full Commission affirms the
opinion of the administrative law judge.

I. HISTORY

Gary Lee Miller testified that he began working for Nabholz Construction in July 2003. The parties stipulated that the employment relationship existed on October 15, 2003. The record indicates that the claimant was working for the respondent-employer in Ozark, Missouri on that date. The claimant testified that a scaffolding board "slipped off the pipe and just threw me against the scaffolding and just twisted my back a little bit."

Travis Strickland testified that he was on the job site in Ozark, Missouri. Mr. Strickland testified that he did not witness the accident, but that the claimant "did complain about his back hurting....I don't know if he fell onto the scaffolding or getting down or what happened, but that's all I remember, that it happened something about the scaffolding." Following the accident, "he acted like his back hurt, as far as grabbing your back or kind of walking with a limp or something."

Sean Sites testified with regard to the Ozark job, "I never witnessed him injuring himself, but I do remember him complaining about his back was hurting and stuff."

The parties stipulated that the employment relationship existed on October 23, 2003. The claimant testified that he

was working for the respondents that day in Pittsburg, Kansas. The claimant testified:

Q. Tell us what happened while you were carrying that steel beam with Andrew Cummings.

A. Well, the first one, we walked outside to pick them up and I was wanting to carry it like low on my hip and he said, "Let's put them on our shoulders," and it was really a little bit too much to be going that way. But we put it up on our shoulders and started walking, and then I heard him say, "Wow, I can't hold it," and by the time I turned around, he had already dropped his end and I just let it slip down. It was like a pinch in the hip and that was about all.

Q. What did you do after that?

A. Well, we stood there for a minute and picked the beam up and carried it inside, leaned it up on the first step of the scissor lift, and Ray Garrison was in the scissor lift, and Andrew and I was supposed to pick it up and scoot it up far enough for him to get a hold of it, and then I'd get in the lift and I'd get a hold of it and he'd raise the lift up and we'd stand it up straight.

Q. What happened?

A. Well, when I went to pick it up, I guess Andrew wasn't ready at the same time and when I got my shoulder under it, went to stand it up, that's when my back popped.

Q. Did you hear it pop, a physical pop, or feel it?

A. Sounded like it was inside my head, it did; it felt like - I could see lights and everything else.

Andrew R. Richard Cummings, III testified that he worked with the claimant in Pittsburg, Kansas. Mr. Cummings testified, "I stepped on an uneven spot there on the construction site and it kind of got me a little jolt in my knee and I tried to holler at Gary to set the steel down because I - you know, it went down, and he took the full brunt of it....He tried a little bit, but he got hit, like he done something to his back and whatnot, and he really wasn't right after that. And the next day, he couldn't hardly get up out of the bed."

Another co-worker, Ray Garrison, testified:

Q. Now, while you were up in Pittsburg, Kansas, tell me what you remember about anything that happened to Gary Miller as far as health.

A. I think he got hurt twice, once carrying steel and somebody dropped an end or something that they were carrying, and he was left with the load. And then the other, he was helping me - I was up in the scissor lift; he was helping me lift a 20-foot beam on the side of a column to be tack welded, and I believe he pulled his back then as well....He, you know, he was hurt. I mean he handed me rods and he was helpful in that way, as far as, you know, going and getting stuff from the trailer, but as far as lifting or anything like that, he was done....The guy was hurt, for crying out loud.

Travis Strickland testified that he had worked at the Pittsburg site, and that he had heard of the alleged

incident involving the steel beam. Mr. Strickland testified, "He could just barely get around, just hobbling around. Like I said, he couldn't sit down. I believe it was the next day he didn't work."

Benjamin F. Deboard testified that he had been foreman at the Pittsburg job site. The claimant's attorney examined Mr. Deboard:

Q. And was Gary Miller here, was he working for you up there at Pittsburg?

A. Yes.

Q. Did he report to you an injury up there?

A. Not from Pittsburg.

Q. What did he report to you?

A. What he had told me was he had slipped on a scaffold at Ozark high school, but I was told by my boss that he had an injury from home....

Q. When did he tell you he slipped on a scaffold in Ozark?

A. At the time that he apparently dropped the steel with Dewayne or Darren or Doyle or - I can't remember his name.

Q. You're talking about Andrew Cummings?

A. Andrew. At that time is when he said that he had hurt himself at Ozark.

THE COURT: Did he also tell you that it hurt him when they dropped the steel?

THE WITNESS: Yes.

THE COURT: Okay.

THE WITNESS: But it wasn't a hurt that he needed to file a report on.

Q. (By Mr. Elliott) And why do you say that?

A. Because he said so.

Q. Did he tell you he was hurt - the question is: Did he tell you he was hurt from the incident where Andrew Cummings dropped the steel?

A. No.

Q. He didn't tell you that?

A. Not that it was enough to - not to file a report on.

Q. I'm not trying to be picky here, but did he tell you -

A. He told me it did hurt when he dropped the steel, but that it was always - it was a continuous of prior injuries.

Q. And the prior injuries being when he slipped on the scaffold at Ozark?

A. Correct.

The claimant treated at St. Mary's Hospital on October 26, 2003, where he complained of "back pain" and an "injury." The history indicated that the claimant reported "stumbling at work 2 weeks ago - Also lifting injury recently." It was written on a Patient Assessment Sheet,

"Slipped sideways on a scaffold 2 weeks ago - then injured self again - c/o low back pain radiating down lt leg." It was indicated that physical exam revealed "spasm" in the claimant's back. The clinical impression was "acute myofascial strain," lumbar, and acute low back pain.

The claimant completed a WCC Form N on October 27, 2003, on which he discussed the cause of injury:

10-15-03 on job site in Ozark Mo. (High School). Slipped on scaffold when walk board slid apart. Twisted back, but could continue work, but caused minor discomfort. Then on 10-23-03 I was carrying a length of steel with a new employee when he dropped his end from shoulder height, causing me to twist to the left and drop my end. The pain set in with sharp pain and muscle spasm.

The claimant presented to Dr. R. Doug Foster on November 5, 2003:

Gary Miller is a 52-year-old male who presents today with pain in his left buttock and thigh that occurred 3 weeks ago when he was twisting and lifting something heavy in Ozark, Missouri. He injured his back....

Lumbar spine films obtained today at St. Mary's and reviewed show degenerative changes at L4/5 but no evidence of a fracture.

IMPRESSION at this time is L4/5 discogenic injury.

The impression from a radiology report on November 5, 2003 was "Mild spondylosis at L4-5 associated with mild

arthritic change involving the apophyseal joints to the lower lumbar spine. No evidence of ligamentous instability on flexion or extension lateral views."

Dr. Foster planned conservative treatment and kept the claimant off work beginning November 5, 2003 until November 20, 2003.

A physical therapist evaluated the claimant on November 13, 2003:

Patient reports that he suffered three recent injuries to his lumbar spine. All three occurred with job activities. Patient notes that the first injury occurred while working on 10-5-2003 at which time he was standing on some boards working overhead when the boards shifted causing him to twist backwards. Patient notes that he continued to work and pain levels subsided after approximately 1 week but with lasting soreness in back. Patient reports next injuries occurred around 10-23-2003 while working in Pittsburg, Kansas. Patient reports that both times he was working with steel beams. He injured his back one time when a partner that was carrying steel with him dropped steel and he twisted his back again. Patient notes that the last injury occurred when he was carrying steel on shoulders. A partner again dropped steel which caused steel to impact his shoulder and compress his spine....

Dr. Foster's impression on November 19, 2003 was "Degenerative disc disease (DDD) at L4/5." Dr. Foster planned to obtain an MRI of the claimant's lumbar spine, and he kept the claimant off work.

Dr. Foster noted on November 26, 2003, "it appears that Mr. Miller's work injury is being denied per Lonnie Finney, L.P.N., conversation with Misty at Risk Management. This is somewhat puzzling as claim had been accepted previously and treatment had been covered in addition to disability payments being made. Patient notes that he is unaware of his claim now being denied and will be contacting Risk Management to further discuss this. Patient notes additionally that when he originally injured himself while working in Kansas for his current employer he was told to stay in his hotel room as his claim was not going to be reported. Mr. Miller needs to proceed with an MRI of his lumbar spine; however, he is unable to pay for this out of his own pocket at this time. He continues to worsen and continues to require pain medication for his back pain....Once insurance issues are settled, we will proceed with studies as recommended."

A pre-hearing order was filed on February 2, 2004. The parties agreed to litigate the following issues: "1. Whether the claimant sustained compensable injuries to his low back on either or both October 15, 2003, and October 23, 2003. 2. The claimant's entitlement to the payment of

medical expenses, temporary total disability benefits from November 8, 2003 until a date yet to be determined, and attorney's fees."

After a hearing before the Commission, the administrative law judge (ALJ) found that the claimant sustained compensable injuries on October 15, 2003 and October 23, 2003. The ALJ found that claimant proved he was entitled to medical services received at St. Mary Rogers Hospital and medical services provided by Dr. Foster. The ALJ found that the claimant proved he was entitled to temporary total disability compensation from November 8, 2003 through "at least November 26, 2003." The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

The claimant contends that he sustained compensable injuries on October 15, 2003 and October 23, 2003. Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental"

only if it is caused by a specific incident and is 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 claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

In the present matter, the Full Commission finds that the claimant proved he sustained a "compensable injuries" on October 15, 2003 and October 23, 2003. The Full Commission finds that the claimant was a credible witness. The claimant testified that the first injury occurred in Ozark, Mo. on October 15, 2003, when he twisted his back after being thrown against a scaffolding. Although no other employees personally witnessed the specific incident, two co-workers corroborated the claimant's testimony of back pain related to the specific incident. Travis Strickland testified that the claimant walked "with a limp."

The claimant contended that the second compensable injury occurred in Pittsburg, Ks. The claimant testified that his back "popped" after carrying a steel beam with a co-worker. Three co-workers corroborated the claimant's

credible testimony of acute back pain following the October 23, 2003 specific incident. A fourth employee, Benjamin Deboard, the claimant's foreman, testified that the claimant informed him, "it did hurt when he dropped the steel, but that it was always - it was a continuous (sic) of prior injuries." The "prior injuries" referred to by Mr. Deboard was the specific incident occurring in Ozark, Mo. on October 15, 2003.

The medical records from St. Mary's Hospital, from Dr. Foster, and from the physical therapist all corroborate the claimant's testimony. It was indicated at St. Mary's on October 26, 2003 that physical exam revealed "spasm" in the claimant's back. "Spasm" constitutes an objective medical finding. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). In the present matter, therefore, the claimant established his compensable injuries on October 15, 2003 and October 23, 2003 by medical evidence supported by objective findings. The Full Commission therefore affirms the administrative law judge's finding that the claimant sustained compensable injuries on those dates.

B. Temporary disability

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood based on medical evidence, age, education, experience, and other matters reasonably expected to affect the claimant's earning power. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981), citing Rooney & Travelers Insurance Co. v. Charles, 262 Ark. 695, 560 S.W.2d 797 (1978). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Breshears, *supra*. Ark. Code Ann. §11-9-102(12) defines "healing period" as "that period for healing of an injury resulting from an accident[.]"

The parties agreed in the present matter to litigate the claimant's entitlement to temporary total disability compensation "from November 8, 2003 until a date yet to be determined." The administrative law judge found that the claimant proved he was entitled to temporary total disability "beginning November 8, 2003, and continuing through, at least November 26, 2003. The issue of the claimant's entitlement to additional temporary total disability benefits, after November 26, 2003, is reserved

for future determination, in the manner heretofore set forth in this Opinion." Neither party contends on appeal that the administrative law judge improperly reserved the issue of temporary total disability after November 26, 2003.

In any event, the Full Commission has affirmed the administrative law judge's finding that the claimant sustained compensable injuries on October 15, 2003 and October 23, 2003. The claimant was diagnosed with "acute myofascial strain" on October 26, 2003. The evidence currently before the Commission does not indicate that the claimant sustained an acute injury to a disc, or that the claimant would otherwise require surgery. The Full Commission recognizes Dr. Foster's impression on November 5, 2003, "L4/5 discogenic injury." Nevertheless, Dr. Foster also noted on November 5, 2003, "Lumbar spine films obtained today at St. Mary's and reviewed show degenerative changes at L4/5 but no evidence of a fracture." Dr. Foster's impression on November 19, 2003 was "Degenerative disc disease (DDD) at L4/5."

The Full Commission finds that the claimant entered a healing period for his compensable injuries no later than October 26, 2003, when he was diagnosed with "acute

myofascial strain." Dr. Foster kept the claimant off work beginning November 5, 2003, and there is no report from Dr. Foster returning the claimant off work after that date. Additionally, there is no subsequent report from Dr. Foster indicating that the claimant's acute myofascial strain had resolved. The claimant's testimony at hearing indicated that he had not returned to work for any employer. The claimant contended that he was entitled to temporary total disability beginning November 8, 2003. The Full Commission therefore affirms the administrative law judge's finding with regard to temporary total disability compensation.

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 compensable injuries on October 15, 2003 and October 23, 2003. The Full Commission affirms the administrative law judge's finding that the claimant proved he was entitled to temporary total disability compensation "beginning November 8, 2003, and continuing through, at least November 26, 2003." We note that the administrative law judge "reserved" the issue of the claimant's entitlement to temporary total disability after November 26, 2003. Pursuant to Ark. Code Ann. §11-9-

508(a), the Full Commission affirms the administrative law judge's finding that the claimant proved he was entitled to treatment he received at St. Mary's Hospital, in addition to conservative, non-operative treatment provided by Dr. Foster. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(a) (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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.