

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400996

ROGER MASSENGALE,
EMPLOYEE

CLAIMANT

PACE INDUSTRIES, INC.,
EMPLOYER

RESPONDENT

SAFETY NATIONAL CASUALTY CORP.,
CARRIER

RESPONDENT

OPINION FILED AUGUST 25, 2005

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE JAMES D. SPOTT, Attorney at Law, Harrison, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on December 8, 2004, finding that the claimant failed to establish by a preponderance of the evidence that he sustained a compensable back injury by a specific incident arising out of and in the course of his employment on November 15, 2003. After conducting a de novo review of the record, we find that the Administrative Law Judge's opinion should be reversed.

At the time of the claimant's injury, he had been employed by the respondent employer for 16 years. All of that time he had been employed in their Maintenance Department performing repairs and general maintenance functions on the machinery used in the respondent's dye cast operation. In late 2003, the claimant was assigned to work on a crew which was installing various safety devices and equipment pursuant to a directive from OSHA. On November 15, 2003, the claimant was installing a safety rail, a task which required him to drill holes in a piece of metal using a magnetic drill. The claimant testified that the drill weighed at least 50 pounds. Testimony from the respondent's witnesses suggest that the drill in fact weighed at least 80 pounds. The claimant testified that he was attempting to lift one of these drills when he felt a burning in his back which went into his left hip. According to the claimant, this injury occurred near the end of his shift after he had been "working pretty hard all day."

The next day was a Sunday, which was also a scheduled work day for the claimant. The claimant testified that he completed his shift on Sunday even though he was in substantial pain. On Monday, he reported to work and testified that he advised his immediate supervisor, Danny Alford, that he had injured his back the previous Saturday.

Mr. Alford also testified at the hearing and stated that the claimant did notify him that he had injured his back but that it was his understanding that the claimant's back injury had occurred at home. Mr. Alford also stated that he was advised of this on either November 18 or November 19 (which would have been a Tuesday or a Wednesday). Mr. Alford also testified that he kept a small notebook which he used to make notes to himself in order to "keep things straight." The notebook, a copy of which was made part of the record, does contain a notation which states, "Roger Massengale absent hurt back at home 11-19-03, 20, 21, 22-24-03, will not be in until Monday."

Mr. Alford, as well as other witnesses for the respondent testified that the normal procedure when a job related injury was reported is that the employee's supervisor would make a note in a "band-aid book" where reports of injuries were documented. Mr. Alford testified that he had reviewed his band-aid book prior to the hearing and there was no report of an injury to the claimant noted therein.

Another respondent witness who testified was Mr. Olen Marshall. Mr. Marshall stated that he was the maintenance supervisor for the respondent employer. He also stated that he had known the claimant since he had first

become employed. Mr. Marshall stated that he had a discussion with the claimant (apparently in November 2003) about the claimant's back injury. When asked by respondent's counsel whether the claimant had related his back injury to a job related incident, Mr. Marshall replied, "No, not directly. No.". When later asked what he meant by the statement that the injury had not been "directly" related to an employment related accident, Mr. Marshall became very evasive. He eventually admitted that he and the claimant had discussed how the heavy lifting at the job could cause back problems. However, Mr. Marshall did state that the claimant had related to him an incident in which he had injured his back at home.

During his testimony, the claimant acknowledged an incident which occurred on Monday evening at a cabin he owned near his home. The claimant stated that when visiting the cabin Monday evening he had noticed a soda pop can laying in the yard. He testified that when he bent over to pick up the can, he felt a burning pain in the back of his left calf. He compared the pain to that of being stung by an insect. However, when the claimant examined the back of his calf, he did not note any mark or any other injury.

The claimant first received medical treatment for his back condition from Dr. Thomas Leslie, a general

practitioner in Harrison, Arkansas. In a progress note of that date, Dr. Leslie made the following statement:

The patient comes in today with pain in his left hip and lower back which started about three or four days ago. It started when he bent over to pick something up at his cabin in Compton. He has never had any real back problems before. He states that his back itself is not really hurt. . .

Dr. Leslie saw the claimant again on November 26, 2003 and in the progress note of that date Dr. Leslie stated that the medication had not helped the claimant and diagnosed him with having a disc problem with radiculopathy. Dr. Leslie then stated his intention to arrange for the claimant to have an MRI and a referral to a neurosurgeon. In a follow-up progress note dated January 5, 2004, Dr. Leslie indicated that the claimant was referred to Dr. Gallaher, a Fayetteville neurosurgeon.

The claimant did in fact see Dr. Regan Gallaher on January 7, 2004. In his report of that date, Dr. Gallaher stated:

The patient is a very healthy, active 42 year old male with a history of intermittent low back pain, which has always resolved on its own. This has been going on for about the last ten years, however, recently, over the last month and a half, he had the acute and then persistent pain syndrome of left buttocks, anterior thigh, and lateral calf pain. He does not feel that he has

gotten significantly better over time, and is here for a neurosurgical evaluation. The patient has tried Vicodin, Skelaxin, and intramuscular steroid injections.

Dr. Gallaher concluded the report by recommending the claimant undergo epidural steroid injections and, if those are not successful, to perform a discectomy.

When questioned as to why did not report the November 15, lifting incident at work to Dr. Leslie, the claimant explained that the doctor had not specifically asked him about injuring his back. The claimant also stated that when he saw Dr. Leslie he was suffering from an intense pain in his leg which felt like it was on fire. He related the incident in his cabin because that was the first time he felt the stinging sensation in his leg. The claimant also testified that he did not initially associate the leg pain with the back pain he had begun suffering after the lifting incident at work.

The Administrative Law Judge did not find the claimant's testimony to be credible enough to satisfy his burden of establishing a compensable injury. Our review of the testimony convinces us otherwise.

In our opinion, the claimant's testimony was believable and in accord with the type of work he was doing and the type of injury he sustained. We also find the

claimant's explanation as to why he did not relate a history of a job related accident to Dr. Jackson understandable. We also find it significant that the claimant did not attempt to obtain surgery and other medical treatment through his group health insurance even though it was available to him. The claimant, beginning in January 2004, consistently asserted that his problems were job related and that he wanted workers' compensation benefits. In this regard, we note that on numerous occasions this Commission has relied upon health insurance or group disability claims to impeach a claimant's credibility because receipt of those benefits were frequently conditioned upon a claimant denying that his injuries were job related. Here, the claimant followed a course of action in accord with those cases and did not pursue a claim for group insurance benefits.

Had the claimant simply been seeking a payment source for a non-job-related injury, as asserted by the respondent, he could easily have obtained coverage for his medical treatment, and presumably disability benefits as well, through his health insurance program. That the claimant did not choose to do so strongly suggests to us that the claimant sincerely believed that his injury was job related and that medical and disability benefits should be provided to him pursuant to the Workers' Compensation Act.

We also find suspect the testimony of the respondent's witnesses. The Administrative Law Judge placed great credence upon Mr. Alford's testimony and the fact that Mr. Alford had attempted to document his conversation with the claimant. The notebook obtained by Mr. Alford does contain the notation that the claimant injured his back at home. However, we are not as convinced by the notebook as the Administrative Law Judge. First, we note that in addition to the date of 11/19/03, several following dates appear. This means that either this notation was made several days after November 19th or that the notation was added later. This is in fact suggested by the apparent attempt to squeeze the dates into the margin. An inspection of the notation also shows that the phrase "at home" which follows the statement about the claimant's absence because of a hurt back also appears to be squeezed into the margin. Lastly, the notation refers to the claimant being absent because of a hurt back. The claimant did not begin missing work until the date he saw the doctor on November 19th. It appears to us that this notation, rather than a contemporaneous note made by Mr. Alford was in fact made later after the claimant began missing work because of his back problems. It also appears to us that the phrase about the claimant's back injury being "at home" was added some

time later. Of further interest is that a notation below that referring to the claimant has apparently been scratched out.

The editing of Mr. Alford's notebook causes us to question his credibility as a witness. In fact, the changes suggest to us that, far from being a contemporaneous record, the notation regarding the claimant was made well after his conversation with Mr. Alford about his back injury. It is further apparent to us that the notebook has been altered which suggests Mr. Alford was attempting to avoid the consequences of not having properly followed through on the claimant's report of an injury.

If Mr. Alford's testimony is placed in question, the testimony of the other respondent witnesses also becomes doubtful. All of those witnesses base their testimony that the claimant was injured at home on information received from Mr. Alford. Therefore, we do not believe that much credibility can be attached to their testimony.

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.

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b)(6)(A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The

flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

As indicated above, we find the claimant's testimony to be credible and believable and we find that it is more than sufficient to establish the occurrence of a job related accident on November 15, 2003. We therefore find that the Administrative Law Judge's decision should be reversed and the claimant should be awarded appropriate benefits.

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 (Repl. 2002). Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (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).

The respondents are directed to pay benefits in

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accordance with the findings of fact set forth herein.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.