

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308477

JOHNNY JACOBS, EMPLOYEE	CLAIMANT
WOODRUFF COUNTY NURSING HOME, EMPLOYER	RESPONDENT
COMMERCE & 8INDUSTRY INSURANCE CO. C/O AIG CLAIMS SERVICES INC., CARRIER	RESPONDENT

OPINION FILED MARCH 14, 2006

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

Claimant represented by HONORABLE BEN E. RICE, Attorney at Law, Jacksonville, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, 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 June 1, 2005.

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

Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on October 9, 2002, while acting within the course and scope of his employment, or that any work-related injury he may have sustained was the major cause of his condition.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 finding 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

I must respectfully dissent from the majority's opinion affirming and adopting the Administrative Law Judge's June 1, 2005 opinion, which held that the claimant had failed to prove by a preponderance of the evidence that he sustained a compensable back injury on October 9, 2002.

_____ In my opinion, the claimant was a credible witness and his testimony in regard to his fall is corroborated by contemporaneous statements made to his medical providers and in written declarations filed with his employer, their group disability carrier, and with this Commission. Based upon my de novo review of the testimony and medical evidence

contained in the record, it is my opinion that the Administrative Law Judge's decision should be reversed.

The respondents have controverted this claim in its entirety. Their contention is that the claimant did not suffer a compensable injury on the date in question. Neither statements from the respondents' counsel at the hearing or the written contentions in the Prehearing Questionnaires make it clear whether the respondents are denying the fall happened or whether they are contending that the claimant's condition is the result of a preexisting injury and did not occur as the result of the fall. However, in her Opinion of June 1, 2005, the Administrative Law Judge seems to conclude that the claimant's fall did not occur. She also finds that, if it did happen, the claimant did not sustain any injuries sufficient to constitute an aggravation of his preexisting condition or that any such injury would have been the major cause of any disability or treatment in this claim.

The claimant has alleged that he suffered a compensable injury to his lower back on October 9, 2002. At the time of his injury, the claimant was employed as a

janitor in the respondent's nursing home. The claimant testified that the injury occurred when he slipped while stripping a floor. He further stated that his immediate supervisor, Doris Wright, was present at the time of the injury and that, after filling out an accident report, she referred him for treatment to the McCrory Health Clinic.

Medical records from the McCrory Health Clinic indicate that the claimant was seen on October 9, 2002 at approximately 9:20 a.m. The report states that the claimant "fell at work and hurt right side." Later, the form states that the accident happened at approximately 8:25 a.m. that morning when the claimant fell on a stripped floor. Lastly, the report noted that there were contusions on the right side of his body.

_____The claimant was treated initially by Dr. Fred Wilson, a general practitioner in McCrory, Arkansas. Later, Dr. Wilson referred the claimant to Dr. Carl Covey, a Little Rock neurologist, specializing in the treatment of spinal injuries. The claimant was eventually diagnosed with, among other things, a herniated disc at L4-L5. Later, the claimant

came under the treatment of Dr. Harold Chakales, a Little Rock orthopedist who performed surgery on the claimant's lower back on May 28, 2003.

_____As indicated above, the claimant was seen at the McCrory Health Center on October 9, 2002, the date the claimant alleges he fell. The medical report generated by that visit documents that the claimant advised personnel at that facility that he fell at work, and indicates that the claimant was being seen at 9:28 a.m. and that the fall had happened at 8:25 a.m.

_____Since this visit was clearly during work hours, it seems unlikely that the claimant would have gone to this clinic had he not been directed there by the employer. That conclusion seems even more probable when it is considered that his regular family physician was Dr. Fred Wilson, (who he later saw), and that the claimant did not have any treatment history with the McCrory Health Center and he was seen there within an hour of his accident. Further, the claimant provided a history to this medical facility of a job related accident, (a history he also provided to

Dr. Wilson and Dr. Chakales). Those factors convince me that the respondent employer sent him to their company physician, something that would not have happened unless they were aware of the injury reported by the claimant.

_____I also note that in December 2002, the claimant, who was by this time totally disabled and not receiving any workers' compensation benefits, filed a group disability claim with his employer. In that form, which is dated December 23, 2002, the claimant indicates that the accident happened at work when he fell while stripping a floor. He also stated that the fall injured his lower back. In making those representations on the form, the claimant was taking a position against his interest in that he would not be eligible for these benefits if the injury was job related. I believe that it is highly unlikely that the claimant would have stated in this form that his injury was job related if it was not the truth, since such a statement would effectively prevent him from receiving much needed income.

In finding that the claimant did not establish that he suffered a fall at work, the Administrative Law

Judge noted the second application for group disability benefits in which the claimant indicated that he had not had a job related accident. However, this second application, which is dated May 23, 2003, was prepared when the claimant had gone several months without any income. He also indicated on the forms that his claim was for illness and his illness was not job related. I do not attach a great deal of weight to this insurance applications in which claimant indicated that his infirmity was not job related. By the time this application was made, the claimant had been unable to work for several months and, since the employer had controverted his workers' compensation claim, he had no source of income. Financial distress can be a powerful, coercive force and I find it hard to fault this claimant, or any other, for trying to find some way to provide an income for himself and his family.

For the reasons set out above, it is my opinion that the claimant suffered an injury to his back when he fell at work on October 9, 2002. His contemporaneous statements to his medical providers clearly reflect a

history of a job related accident, and the insurance claim form prepared slightly over two months later also reflects that he was injured in a job related accident. Further, the respondents have not offered any evidence to the contrary even though the claimant named his immediate supervisor as a witness to the fall. Since the claimant provided credible testimony as to the occurrence of the injury and this injury is supported by contemporaneous statements made to his medical providers and other reports prepared by him, it is my opinion that the claimant fell at work on October 9, 2002, while stripping a floor.

The next issue which must be considered is whether the claimant aggravated his preexisting back condition in this fall. In my opinion, the medical evidence supports a finding that claimant sustained an aggravation of his preexisting back condition.

In arguing that the disability that the claimant accrued and the medical treatment he received were occasioned by his preexisting back condition, the respondents point to the claimant's 1998 automobile accident

and an MRI which was performed in 1999. However, a comparison of the 1999 MRI with the first MRI subsequent to the claimant's injury in October 2002, clearly indicates that the claimant suffered an additional traumatic injury to his back.

The MRI performed on the claimant on February 16, 1999 noted the following defects:

"Dorsal herniation of disc materia at L4-5 is present, disc fragment flattening ventral aspect of the thecal sac but not causing any obvious stenosis of spinal canal or foramina. No other disc herniations are seen. No intrathecal abnormalities."

Significant differences were noted in the MRI taken of the claimant's lumbar spine on November 15, 2002, slightly over a month following his accident. That MRI report reads as follows:

Significant changes of spondylosis appear at L4-5. Disk space narrowing and subchondral changes are seen. Left paracentral herniation of bulging disk at L4-5 is found causing indentation on ventral aspect of thecal sac and encroachment on left lateral recess. There also appears to be some right posterolateral herniation of this disk

with encroachment on right neural foramen.

Minimal disk bulge, L5-S1 does not create any significant impression.

The 1999 MRI showed only a dorsal disc herniation which did not cause any encroachment or flattening of the thecal sac. However, the 2002 MRI showed the presence of a paracentral herniation, something not present on the earlier MRI and this new herniation caused an indentation of the thecal sac and encroached the left lateral recess. The herniation found in 1999 was noted in the 2002 MRI in the form of a posterolateral herniation. However, even this herniation was noted to encroach the neural foramen. Lastly, the later MRI also found a small disc bulge on L5-S1. While that bulge was not causing any serious problems, it was clearly not present in the exam from 1999.

In determining whether an accident which is superimposed on a preexisting condition is compensable, the Court of Appeals has stated that a new injury which accelerates or aggravates a preexisting condition is sufficient to establish an entitlement to benefits. See

Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Another case which has facts similar to the present claim is Pollard v. Meridian Aggregates, ___ Ark. App. ___, ___ S.W.3d ___, (Arkansas Court of Appeals, September 29, 2004). In Pollard, the claimant had a preexisting back condition which had not been effecting his ability to work and which was essentially asymptomatic. The Commission held that, because the claimant had a preexisting degenerative condition, he could not establish that the major cause of his disability or need for treatment was his compensable injury. The Court of Appeals reversed, holding that an aggravation of a preexisting would be sufficient to entitle the claimant to receive benefits.

In my opinion, the medical evidence undeniably and objectively establishes that the claimant suffered an aggravation of his preexisting condition as a result of his October 9, 2002 fall at work. The November 2002 MRI showed a disc herniation which was not present in 1999 and showed that the herniation that was present then has gotten larger.

It also found a new disc bulge (at L5-S1) which did not exist at the time of the first MRI.

Further, the claimant's condition substantially worsened following his accident in October 2002. Prior to that time, the claimant had been able to maintain full duty employment with the respondent and had not missed any work because of his prior back problems. However, after the October accident, he began missing work and was only able to work, for a limited time, in a light duty capacity. He later became totally disabled and was forced to undergo back surgery in an attempt to correct his problems.

The sudden worsening of the claimant's symptoms not only supports the conclusion that his condition was markedly worse by November 2002, it also supports his testimony that he suffered a fall on October 9, 2002. Prior to that time, he had a good work record and had been performing his duties with no apparent problems. However, after the fall, he was no longer able to carry out his prior job duties and eventually had to undergo back surgery. That is undeniably more extensive treatment than the claimant had

ever received for his preexisting back condition and strongly suggests that his condition substantially worsened as a result of his job related accident.

Based upon my review of the evidence, I find, contrary to the Administrative Law Judge, that the claimant did sustain a job related injury in a fall occurring on October 9, 2002. I further find that the injury sustained from that fall constitutes a compensable aggravation of a preexisting condition and entitles him to receive appropriate disability and medical benefits. I would therefore reverse her previous decision and award the claimant his requested medical and disability benefits subject to a credit for any past benefits or wages the respondent has paid to the claimant subsequent to his injury.

Based upon my review of the evidence, it is my opinion, that the claimant did sustain a job related injury in a fall occurring on October 9, 2002. I further find that the injury sustained from that fall constitutes a compensable aggravation of a preexisting condition and

entitles him to receive appropriate disability and medical benefits. I would therefore reverse the Administrative Law Judge's previous decision and award the claimant his requested medical and disability benefits subject to a credit for any past benefits or wages the respondent has paid to the claimant subsequent to his injury.

SHELBY W. TURNER, Commissioner