

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500019

TEDDY SELBY, EMPLOYEE	CLAIMANT
PTB CONCRETE, LLC, EMPLOYER	RESPONDENT NO. 1
HANOVER INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED SEPTEMBER 12, 2006

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

Claimant represented by HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE TERRY PENCE, 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 March 1, 2006.

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

1. The stipulations agreed to by the parties at the pre-hearing conference

conducted on November 2, 2005, and contained in a pre-hearing order filed November 3, 2005, are hereby accepted as fact.

2. The parties' stipulation that claimant was earning sufficient wages to entitle him to the maximum compensation rates in effect for 2004 of \$453.00 for temporary total disability benefits and \$340.00 for permanent partial disability benefits is likewise accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while working for respondent on December 15, 2004.

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 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

I must respectfully dissent from the Majority opinion finding that the claimant did not sustain a

compensable injury on December 15, 2004. I find that the claimant provided credible, consistent testimony regarding the occurrence and reporting of his injury. In my opinion, the medical evidence indicating that the claimant's injury occurred on December 15, 2004, while lifting at work lends further credence to his testimony. As such, I find that the claimant sustained a compensable injury and that he should be entitled to the requested temporary total disability benefits, impairment rating, and wage loss benefits.

The claimant worked for the respondents as a concrete finisher. The claimant testified that he worked for the respondents on multiple occasions, and that his last round of employment began in October 2004. The claimant testified that on December 15, 2004, he and two other workers were left at a job site. He said that the respondents were short-handed and that as a result, he was required to help lift a heavy piece of equipment called a trowel. The claimant said that after lifting the trowel, he experienced severe pain in his back and numbness in his leg.

The claimant testified that prior to being hired in October 2004, he disclosed he had undergone a back surgery in 2003. As a result of the surgery, the claimant was unable to lift more than 50 pounds. Due to these restrictions, the respondents agreed that the claimant would not be required to perform heavy lifting. However, despite these assurances, the claimant, would on occasion be required to lift heavy machinery.

The claimant testified that while he typically was not required to lift equipment, when the respondents were short-handed, he was expected to help as needed. Specifically, the claimant said that while Bobcats were available to load trowels (a machine weighing some 250 to 300 pounds), in instances where the concrete had been poured, the trowel had to be moved or the concrete would dry and damage the work. He indicated that because of time constraints, they would be unable to go across the work-site in order to get a Bobcat. The claimant further indicated that it would take more than one person to lift a trowel.

The claimant indicated that on December 16, 2004, he told Bob Saylor, Owner, and Roger Bride, Superintendent, he had injured himself the day before while lifting a trowel. He said that he assured them he was all right because he believed he had just pulled a muscle. The claimant testified that when his pain did not subside, he sought medical attention at the emergency room. He further indicated that he called Saylor around four or five days later and told him he was filing a workers' compensation claim.

Saylor testified that he supplied the claimant equipment to assist him with lifting and that he could ask other workers for help, but indicated, "Now, I knew his back - - he had the back thing before, but we supplied people to move stuff for him and he helped them move it, too." Saylor testified that his employee, Steve Bride, had informed him that the claimant, Rafie, and himself had loaded a trowel on December 15, 2006. He further indicated that more than one person was needed to lift the machine.

Saylor denied speaking with the claimant about his injury on December 16, 2004, or at a later time by telephone. Saylor initially indicated that he did not learn of the claimant's injury, "until Christine called me in California and said Teddy filed a workmen's comp claim." He said Christine was the office manager and that he was on vacation from around December 20, 2004, until January 2-5, 2005. Later, however, during Roger Bride's testimony, Saylor asserted that the insurance company notified him of the claimant's injury.

Bride testified that the respondents provided people to move machinery for the claimant, but also indicated that the claimant was instructed that he would be required to move machines in order to fulfill his job duties. He further indicated that he did not recall the particulars of what work was performed on the date in question. Finally, he indicated that he did not learn the claimant had sustained a work-related injury until after the claim had been filed.

The claimant had a history of having back problems. In September 2003, these problems resulted in the claimant having surgery. The surgery was to correct disc protrusions at levels L4 and L5. There is no indication that the claimant was given an impairment rating after the surgery, but the claimant testified he was prohibited from lifting more than 50 pounds. Prior to the incident in question, the claimant's last received treatment for his back was in October 2003.

After October 2003, the next medical record referencing the claimant's back is dated December 16, 2004, the day after the claimant alleges injuring his back at work. The report indicates that the claimant sustained the injury while lifting at work and was suffering from pain in his low back, and pain and numbness in his right leg. The report further provides that the claimant reported having back surgery a year and a half before the incident.

On December 18, 2004, the claimant was treated by Dr. Jeffrey R. Baker. Baker indicated,

This is only the 2nd outpatient VA encounter here since after the 6/2003 surgical followup. He was on a pain contract up to 10/2003 for morphine po. He was given percocet in August 2004 for an ankle injury. With this event he had been doing well with the lighter work at the concrete work sites, but with a shorthanded shift had needed to help lift some equipment (sic), and had an acute exacerbation with pain and dysthesia below the right knee and motor dysfunction in dorsiflexion.

The claimant was diagnosed with, "re-exacerbation of Right L5/S1 radiculopathy s/p discectomy".

On March 18, 2005, Dr. Vincent B. Runnels indicated that he treated the claimant on February 4, 2005, and that at that time he suspected the claimant suffered from a herniated disc. He further indicated that an MRI was subsequently performed and that it showed, "a rather massive herniated disc and free fragment." He indicated that the claimant's injury was sustained while lifting a, "heavy 300 lb machine that finishes concrete." He recommended the claimant undergo surgery and opined that the claimant would be unable to resume work in his former occupation. He

further indicated that the claimant intended to file for Social Security and that in his opinion, it should be granted. Finally, he indicated that the claimant might be able to pursue vocational rehabilitation depending on the outcome of his surgery.

On August 10, 2005, Dr. Runnels indicated that the claimant's leg pain had been relieved as a result of the surgery. He indicated that the claimant still suffered from, "residual weakness of is anterior tibia". He opined that he believed the claimant's injury occurred at work and that the claimant would be unable to return to his previous occupation. Finally, he assessed a 9% impairment rating and recommended the claimant undergo retraining for a new occupation.

In the decision affirmed and adopted by the Majority, the Administrative Law Judge found that the claimant did not sustain a compensable injury on December 15, 2004. In affirming and adopting the Administrative Law Judge's decision as their own, the Majority reasons that the claimant did not provide

consistent, credible testimony regarding when he notified his injury. They further opine that the claimant suffered from chronic back pain and that when this was considered in conjunction with the claimant's alleged failure to report his injury, he was not credible, and therefore did not sustain a compensable injury.

After reviewing the record, I find that the preponderance of the evidence shows that the claimant did sustain a compensable injury on December 15, 2004. I further find that the claimant provided notice of that injury on December 16, 2004. However, even if the claimant did not provide such notice until January 2, 2005, as alleged by the respondents, that does not necessitate a finding that the claimant did not sustain a compensable injury.

The Majority first opines that the claimant suffered from a long history of back problems. They call attention to the fact that there were numerous notations that the claimant suffered from chronic back pain and indicated that, "Medical records from the VA taken shortly after the surgery indicate that the claimant was still

complaining of pain which was not controlled by medication.” Finally, they call attention to the claimant’s testimony that he suffered from occasional back pain even after his surgery in 2003.

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See, Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Conway Convalescent Center v. Murphree, 266 Ark. 985, 585 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. Murphree, supra. Employment circumstances that aggravate preexisting conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. Id. An aggravation is a new injury resulting from an independent incident. Id. An aggravation, being a new injury with an

independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. Id.

I find that the evidence is clear that the claimant sustained an aggravation to his pre-existing back condition. The medical records indicate that the claimant's surgery in 2003 was due to having herniated discs at levels L3-4 and L4-5. The radiographic studies from that time period further indicate that the claimant suffered from degenerative disc disease and osteoarthritic changes. However, the medical records also show that after the surgery in 2003, the claimant was able to return to work and did not seek further treatment until his injury with the respondents. I note, in particular, the doctor's report from Dr. Runnel indicating that the claimant had only received outpatient care on two occasions since his followup treatment for his 2003 surgery. I also note the absence of doctor's reports indicating that the claimant received treatment for his back between October 2003 and December 2004.

Additionally, I note that there are objective changes in the claimant's condition from the time period after his 2003 surgery and his injury with the respondents. Dr. Runnels indicated that the claimant's MRI, performed after sustaining the injury in 2004, revealed a "rather massive herniated disc and free fragment." He later indicated that he believed the claimant had sustained this injury while working for the respondent. Given the change in the claimant's medical condition, I find that the claimant sustained an aggravation to his pre-existing back condition.

I further find that this aggravation was sustained during the course and scope of employment. The Majority argues that the claimant did not provide notice to management, that he gave contradictory evidence regarding when he gave notice, and that accordingly, his testimony that he sustained the injury during the course and scope of employment is not reliable. I am not persuaded by these arguments. Instead, I find that the claimant provided consistent, credible testimony regarding how his injury occurred and how he reported his injury. Furthermore, the

medical records corroborate the claimant's testimony regarding how the injury occurred.

From the onset of his injury on December 15, 2004, the claimant consistently and repeatedly reported to physicians that his injury occurred due to lifting heavy equipment at work. Likewise, he disclosed his previous surgery and back condition, indicating that he was being forthright with his physicians. In my opinion, this lends credence to the claimant's testimony regarding how his injury occurred. Likewise, Saylor admitted that the claimant was lifting trowels on the day in question, and that he was able to perform his work duties before, which further corroborates the claimant's testimony regarding how the injury occurred.

The Majority argues that the claimant's testimony is contradictory, in that he allegedly gave two varying accounts of whether he reported his injury on December 16, 2004, or not. The claimant testified as follows,

Q. And did you tell anybody on that day that you had injured yourself the day before?

A. I believe I walked up and they asked me if I was going to be any good today at work, and I said, "Well, I hurt my back, and I need to keep working. I'll be all right." I was sitting around on the job kind of a little bit, and Bob doesn't like it when you're sitting around on the job, so I tried to keep going because I need work. I didn't think that I was wounded, you know.

Q. So Bob was there that day?

A. He was just there and then he left.

Q. When did you actually notify Bob that you had an on-the-job injury?

A. About four or five days later I called him and he was on vacation.

Later, the claimant expanded on his earlier testimony, indicating that on the 16th, he told the respondents how his injury occurred. While the claimant did indicate that he told Saylor of his on-the-job injury some four to five days later, I still find his testimony to be reliable, particularly since he originally testified that he reported the injury on the day after the accident and continued to maintain such throughout the hearing. Furthermore, since he testified that he originally believed his injury was minor,

only to later realize the condition was more severe, I find that it is more probable than not that when he testified he reported a work injury four to five days later, he was referring to the time he reported having a lasting injury. Accordingly, I find that any discrepancies in his testimony were minor and do not diminish his credibility.

Ultimately, I find that the claimant's testimony was consistent. He clearly testified from the outset of the hearing that he reported injuring his back on the day after the injury. When considered in conjunction with the medical records that consistently indicate the claimant injured his back while working, I find the claimant likely injured himself during the course and scope of employment. As such, I must respectfully dissent.

SHELBY W. TURNER, Commissioner