

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511622

JOHNNY B. BIRDSONG, EMPLOYEE	CLAIMANT
TENNECO AUTOMOTIVE, INC., EMPLOYER	RESPONDENT
ACE AMERICAN INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 25, 2007

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

Claimant represented by the HONORABLE JOHN C. BARTTELT,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MARK MAYFIELD,
Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed November 15, 2006. The administrative law
judge found that the claimant proved he sustained a back
injury arising out of and in the course of his employment.
After reviewing the entire record *de novo*, the Full
Commission affirms the opinion of the administrative law
judge. The Full Commission finds that the claimant proved

he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4) (A) (i) and following.

I. HISTORY

Johnny Burl Birdsong, age 47, testified that he had worked for Tenneco Automotive for 17 years before a specific incident occurring on August 17, 2005. Mr. Birdsong testified on direct examination:

Q. Go ahead and tell us how you were doing that and how you were injured.

A. Okay. Well, I was working, like I said, with the Yoda mill....I was putting on the size rollers. Well, you have to pull the stands apart and then slide the rollers off, and they got like a moon key that holds the rollers, you know, on the gears....I stood this up here and it wouldn't go into place....And when I shoved it up there, it jammed. So I jerked on it to pull it back off. That's when I got a burning sensation....I got a burning sensation in my lower back.

The claimant testified that he immediately reported the specific incident to the maintenance supervisor. The claimant testified that his pain worsened overnight, and that the respondent-employer sent him to Dr. Stacey Noel. Dr. Noel noted on August 18, 2005: "45 year old male presents with c/o low back pain, started while pulling on machine at work, back pulled and felt immediate pain down

into legs worse on the right, tingling in foot., c/o radiation of pain, to the leg on the right side, to the leg on the left side, to the thigh on left side, to the thigh on right side." Dr. Noel assessed "back pain" and treated the claimant conservatively.

The claimant subsequently treated with Dr. Parsioon, Dr. Stallcup, Dr. Schecter, and Dr. Braden. Dr. Joseph Jumao-as examined the claimant on November 9, 2005 and noted the following: "BACK - BILATERAL SPASM LOWER LS." Dr. Eichert opined on April 4, 2006 that the claimant had reached maximum medical improvement. The claimant's testimony indicated that the respondent-carrier controverted the claim on or about April 18, 2006.

A pre-hearing order was filed on September 13, 2006. The claimant contended that he sustained a compensable back injury "as the result of a specific incident identifiable in time and place of occurrence on August 17, 2005; that respondents initially paid benefits through on or about March, 2006, at which time it improperly terminated all benefits; that he is entitled to temporary total disability from the date of the injury and continuing through the present, maintaining that his healing period has not ended,

less credit for any temporary disability previously paid; that respondents should be held responsible for all outstanding medical treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to all benefits previously paid and/or awarded."

The respondents contended that there was "no medical evidence supported by objective findings related to the incident of August 17, 2005. Alternatively, respondents contend that the claimant reached the end of his healing period no later than April 4, 2006, and is not entitled to further temporary total disability benefits beyond that date. Respondents further contend that all reasonably necessary medical care related to the minor incident of August 17, 2005, has been paid and that medical care beyond that previously paid is not reasonably necessary or related to the work-related incident on August 17, 2005."

The parties agreed that "the primary issue to be presented for determination concerns compensability. If answered affirmatively, claimant's entitlement to associated benefits must be determined."

A hearing was held on October 13, 2006. The claimant testified that his condition was "About the same....I have been having a pain just right above my - where my pants go, and my right foot feels like there's needles in it." The claimant testified that he wanted to treat with Dr. Stallcup, a company doctor.

The parties agreed at hearing that the sole issue would be "compensability," and that all other issues were reserved.

The administrative law judge found, in pertinent part:

3. The claimant has proven, by a preponderance of the evidence, that he sustained a back injury arising out of and during the course of his employment with Tenneco Automotive, Inc., which resulted from a specific incident identifiable in time and place of occurrence on August 17, 2005, and which is confirmed by medical evidence supported by objective findings.
4. The claimant has proven, by a preponderance of the credible evidence, that his need for treatment and disability beginning August 17, 2005, are directly and causally related to a work-related injury.
5. By agreement of both parties, all additional issues have been specifically reserved.

The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ...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(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The administrative law judge found in the present matter, "The claimant has proven, by a preponderance of the evidence, that he sustained a back injury arising out of and during the course of his employment with Tenneco Automotive, Inc., which resulted from a specific incident identifiable

by time and place of occurrence on August 17, 2005, and which is confirmed by medical evidence supported by objective findings." The Full Commission affirms this finding.

The claimant, who the Full Commission finds was a credible witness, testified that he felt a burning sensation in his low back after trying to move rollers on a "Yoda mill" on August 17, 2005. The claimant's testimony indicated that there was a specific incident identifiable by time and place of occurrence, and that he promptly notified a supervisor for the respondent-employer. The claimant received conservative medical treatment for lower back pain from a number of physicians. Dr. Jumao-as noted the following in capital letters on November 9, 2005: "BACK - BILATERAL SPASM LOWER LS." The record indicates that this notation was based on a physical examination of the claimant's back. A physician's report of muscle spasm is of course an objective medical finding. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999). The record in the present matter demonstrates that the report of muscle spasm was causally related to the specific incident occurring on August 17, 2005. The preponderance of evidence

in the present matter demonstrates that the claimant sustained an accidental injury causing physical harm to his back, which arose out of and in the course of the claimant's employment and which required medical services. The record shows that the injury was caused by a specific incident, identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, namely, the physician's report of muscle spasm in the claimant's low back.

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 a back injury arising out of and during the course of the claimant's employment, which resulted from a specific incident and was supported by objective medical findings. The Full Commission finds that the claimant proved he sustained a compensable injury pursuant to the statutory elements of Ark. Code Ann. §11-9-102(4)(A)(i) and following. We again note that the parties reserved for adjudication all issues except compensability. For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to a 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

Commissioner Hood concurs.

CONCURRING OPINION

I concur with the Majority opinion finding that the claimant sustained a compensable injury. I write separately to note the other objective findings, in addition to those noted by the Majority, which support a finding of compensability. Specifically, I note that the claimant's objective findings reveal a bulging disc and neurological deficits which I find are directly related to his work injury.

Immediately after being injured, the claimant presented with low back pain and pain radiating into his legs. The claimant also reported tingling, particularly in his right leg. The claimant submitted to an MRI on August 29, 2005. The results of the MRI clearly showed disk desiccation and a bulging disc at L2-L3. The claimant was subsequently treated by Dr. Parisoon, who

opined that the claimant suffered from a bulge at L2-L3. He noted no neural impingement but recommended physical therapy. He also opined if the claimant did not improve then he would order a EMG-NCV and possibly later perform a myelogram.

Dr. Stallcup ordered nerve studies, which revealed the claimant suffered from right L-5 radiculopathy to a moderate degree. The diagnostic report also indicated that the possibility of a right deep peroneal, common peroneal, or sciatic nerve lesion should be ruled out. On October 20, 2005, a myelogram and a CT scan again confirmed the claimant had a bulging disc at L2-3. In particular, the CT scan showed the claimant suffered, ". . . some pressure or defect causing stenosis at the level of especially the left L2-3 level."

The results of the original nerve study were later confirmed. On May 9, 2006, a nerve conduction study returned as slightly abnormal and revealed the claimant suffered from, "slightly diminished right peroneal compound muscle action. . ." Additionally, a second CT scan and myelogram were performed on May 24,

2006, and revealed the claimant had a bulging disc at L2-3 and to a lesser extent at L4-5.

The evidence shows that the claimant has a strong work history and is credible as evidenced by the fact that he worked for the respondent employer for some 17 years without incident. The claimant testified he had never suffered from back problems prior to this injury, and the medical records are wrought with various objective findings. As noted by the Majority, the claimant was specifically noted to suffer from muscle spasms. Additionally, it is evident that the claimant also has objective findings in the form of disc bulging at L2-L3 with thecal sac involvement. Furthermore, the claimant's two nerve studies both returned as abnormal and was noted to have a bulge at L4-5.

In my opinion these defects were a direct result of the work-related accident as evidenced by the fact that the findings are consistent with the claimant's injury and the results of the MRI, CT scans, and myelograms. The claimant had no history of back problems, was able to work before the injury and was not afterwards. The claimant immediately presented with symptoms consistent with having a bulging disc, which

was later confirmed by diagnostic testing. As such, I find the claimant has shown he sustained a compensable injury and now respectfully concur.

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.