

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513626

VICENTE GUTIERREZ, EMPLOYEE	CLAIMANT
TYSON POULTRY, INC., EMPLOYER	RESPONDENT
TYNET CORPORATION, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 19, 2007

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

Claimant represented by the HONORABLE STEPHEN SHARUM,  
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE MELISSA LEE,  
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed September 21, 2006. The administrative law judge found that the claimant proved he sustained a compensable injury. The administrative law judge found that the claimant proved he was entitled to reasonably necessary medical treatment and temporary total disability compensation. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The record indicates that Vincente Gutierrez, age 75, was hired by Tyson as a wing cutter in February 2005. The parties stipulated that the claimant sustained a compensable injury to his left knee on September 16, 2005. The claimant testified, through an interpreter, that he was using a cart to carry and empty a box:

Q. And tell us what happened after you dumped the box.

A. After - when I dumped it I turned around and walked four or five steps, and there is a steel pipe where the water runs. I was pushing a small cart when I was walking that way and I slipped....I fell on my side. I fell over on my side - on this side (indicating left side), and then I bent over.

Q. In your demonstration you're showing that your back twisted?

A. Yes, yes.

Q. Did your back twist during the fall?

A. Yes, yes....I fell back and I got all wet....

Q. Will you describe to the judge what pain you had immediately after the fall?

A. Immediately, the leg.

Q. Which leg?

A. The left.

Q. Shortly after that, did anything else hurt?

A. My - my waist - or my back.

Q. Where on your back? Can you point?

A. Left. Right here (pointing on left side of back at belt line)....

A Team Member Health Record on September 16, 2005 indicated that the claimant had fallen and hit his left knee, and that there was a ½ dollar size reddened area with small anterior edema. Christi Combs, a company nurse, testified that she examined the claimant on the date of accident and noted the claimant's injured knee. Ms. Combs testified for the respondents:

Q. Do you remember - what do you remember about him coming in?

A. I remember his face. He come in and said that he had hurt his left knee, and I had a hard time understanding him, and that was pretty much it. I was kind of worried that with his age he may have soreness the next day.

Q. Did he indicate to you that he injured any other parts of his body?

A. No. I specifically asked him....

Q. Did Mr. Gutierrez come back and talk to you ever regarding this particular injury?

A. No. If he had, I would have charted it.

A hospital nurse's assessment on October 27, 2005 indicated the following: "States fell about 1 month ago &

injured left knee - c/o pain from mid thigh to mid calf.  
Has pain in lower back sometimes."

Radiological views of the claimant's lumbar spine on October 27, 2005 showed the following: "1. Osteoarthritis as described. 2. Slight disc space narrowing at L1/2 and L3/4."

On October 27, 2005, the claimant was given restrictions of no lifting, pushing, pulling, and standing for one week.

The record indicates that the claimant began an unpaid leave of absence on October 27, 2005. The claimant testified that he did not return to work, and that he went to live with his daughter in Mission, Texas.

Dr. Nelson R. Kalaf examined the claimant on November 7, 2005. Dr. Kalaf noted that the claimant had fallen at work, and his handwritten assessment appeared to include "Leg Spasm." Dr. Kalaf took the claimant off work for two weeks.

The impression from an MRI of the claimant's lumbar spine on December 12, 2005 was "Large left paracentral disk herniation at L5-S1." The MRI also showed degenerative disc

and joint disease and conditioning stenosis of the lateral recesses at L3-L4 and L4-L5.

Dr. Humberto Tijerina gave the following impression on December 21, 2005: "Herniated nucleus pulposus of L5-S1 left....The suggested treatment plan for this patient will be surgical treatment of L5-S1 left with discectomy."

The record indicates that the claimant's leave of absence finished on January 8, 2006.

Dr. Kalaf referred the claimant to Dr. Jose R. Carreras, who saw the claimant on January 12, 2006 and also planned a lumbar laminectomy at L5-S1.

The claimant's employment with Tyson was terminated effective January 30, 2006.

The impression of Dr. Carreras on April 11, 2006 was "Facet joint pain secondary to mild spinal stenosis."

A pre-hearing order was filed on April 28, 2006. The claimant contended, among other things, that he "sustained a compensable injury to his left knee and to his lumbar spine as a result of a fall when the claimant slipped near a metal drain that was wet....The claimant is entitled to medical treatment and temporary total disability benefits from November 7, 2005, to a date yet to be determined."

The respondents contended, among other things, that they "have controverted the claimant's alleged back injury as it was never reported....The respondents contend that the claimant is not entitled to receive benefits in the form of medical treatment for a back injury, temporary total disability as [no] authorized treating physician has taken him off work, or attorney's fees."

The parties agreed to litigate the following issues: "1. Compensability of the claimant's low back injury on September 16, 2005. 2. Related medical. 3. Temporary total disability from November 7, 2005, to a date to be determined. 4. Attorney's fees."

Dr. Carreras noted the following on May 30, 2006:

He has a herniated disc on the left side, where he has the pain. The EMG/NCVs study was reviewed and shows a chronic radiculopathy at L5. I feel that if he has surgery he will continue to have pain radiating down the leg. The patient has been taking all the medications to control his pain, but he still does not want surgery. He is told that he will benefit from a pedicle screw fixation at the level of L5/S1 with posterior lateral fusion, but he does not want surgery at the present time.

Dr. Kalaf wrote to the claimant's attorney in July 2006:

Mr. Vincente Gutierrez continues with lumbar pain radiating to left lower extremities. This pain has been present since patient fell approximately

9/17/05 while at work. He has been treated medically and with physical therapy without improvement. On December '05 he had an MRI of the Lumbar Spine that revealed a large left paracentral disc herniation at L5-S<sub>1</sub> level that was not present on a previous MRI done on March '03. Most likely Mr. Gutierrez symptoms are due to the described herniated disc. He has been evaluated by an orthopedic as well as a neurosurgeon and both had recommended surgical intervention to correct the problem....

A hearing was held on July 28, 2006. The claimant testified that he wanted to undergo back surgery.

The administrative law judge found, in pertinent part:

6. The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on September 16, 2005....
7. The respondents should pay for all reasonable and necessary medical treatment for this claimant's low back injury.
8. The claimant is entitled to temporary total disability from November 7, 2005, to a date to be determined.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

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

(A) (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(4) (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).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on September 16, 2005." The Full Commission affirms this finding. The claimant was a credible witness, and there is no record before us showing that the claimant suffered from previous back problems. The parties stipulated that the claimant sustained a compensable injury to his left knee on September 16, 2005. The claimant testified that he slipped in some water and twisted his back in addition to injuring his knee. Although the initial medical record on September 16, 2005 did not indicate that the claimant's back was hurting, the claimant's medical

treatment beginning in October 2005 showed that the claimant has suffering from back pain.

An MRI of the claimant's lumbar spine taken in December 2005 showed a large disk herniation at L5-S1. Dr. Carreras opined in May 2006 that the herniated disc on the left was causing the claimant's pain. Dr. Kalaf stated in July 2006 that the claimant's symptoms were most likely related to the herniated disk. Both treating physicians recommended surgery. The Full Commission finds that the disk herniation occurred as a result of the claimant's hard fall at work on September 16, 2005.

The Full Commission finds that the claimant proved he sustained an accidental injury causing physical harm to the body. The claimant proved that the accidental injury arose out of and in the course of his employment with the respondents, and that the injury required medical services and resulted in disability. The claimant proved that the injury was caused by a specific incident and was identifiable by time and place of occurrence. Finally, the claimant established a compensable injury by medical evidence supported by objective findings, namely, the

documented disk herniation at L5-S1. The decision of the administrative law judge is affirmed.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not the claimant's healing period has ended is a question of fact for the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

In the present matter, the administrative law judge found that the claimant was entitled to temporary total disability compensation from November 7, 2005 to a date to be determined. The Full Commission has affirmed the administrative law judge's finding that the claimant proved he sustained a compensable injury to his low back on September 16, 2005. The claimant testified that he did not return to work after October 27, 2005. Dr. Kalaf took the claimant off work beginning November 7, 2005, and the claimant contends that he is entitled to temporary total

disability compensation beginning that date. An MRI in December 2005 confirmed the herniation at L5-S1. We have determined that this herniation was a result of the claimant's compensable injury. Therefore, the healing period for the claimant's compensable injury began on September 16, 2005, and the instant claimant was totally incapacitated to earn wages at least by November 7, 2005, when he was taken off work. The Full Commission finds that the claimant remains within his healing period as a result of the compensable injury, and that the claimant also proved he has been incapacitated to earn wages no later than November 7, 2005.

The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation beginning November 7, 2005 until a date yet to be determined. The administrative law judge's award of temporary total disability is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury. The claimant proved that the medical treatment of record, including the surgical recommendations of the treating physicians, was reasonably necessary

pursuant to Ark. Code Ann. §11-9-508(a). We find that the claimant proved that he was entitled to temporary total disability compensation beginning November 7, 2005 to a date yet to be determined. The Full Commission therefore affirms the opinion of the administrative law judge.

The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(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.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back and that the surgical

recommendations of the claimant's treating physicians were reasonable and necessary medical treatment. I further dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he was entitled to temporary total disability benefits beginning November 7, 2005, to a date yet to be determined. In my opinion, the claimant has failed to meet his burden of proof.

It is undisputed that the claimant sustained an injury to his left knee as the result of an incident on September 16, 2005. However, after conducting a de novo review of the record, I cannot find that the claimant sustained a compensable injury to his lower back. There is no medical evidence that supports the claimant's complaints of lower back pain until after his last date of work for the respondent employer on October 26, 2005. Even the emergency room medical note of October 27, 2005, indicates that the claimant "[S]tates fell about 1 month ago and injured left knee - c/o pain from mid thigh to calf. Has pain in lower back sometimes."

Further, when the claimant reported to the nurse's station on September 16, 2005, after he fell, the claimant complained of an injury to his left knee. The nurse's entry in the Nurse's Notes of that day state that the claimant "fell hit lt knee ½ Dollar size reddened area ĉ small ant. edema. Cold pack applied." The respondents offered the testimony of Ms. Christi Combs, the nurse on duty, and she recalled the claimant coming in and reporting an injury to his left knee. She testified that she specifically asked the claimant if he injured any other part of his body and that he indicated that his only injury was to his left knee. Ms. Combs also testified that she never recalled receiving any phone calls from the claimant or any members of his family nor did he ever come back and complain to her about back problems. If the claimant had complained, she would have noted it in the Nurse's Notes.

The evidence also demonstrates that the claimant was able to work without restrictions or problems for approximately six weeks before he just quit showing up for work after going to the emergency room on October 27, 2005. In fact, the claimant never reported a

back injury until he had already moved to Mission, Texas. It is of note that the claimant worked on October 26, 2005, and never reported any problems to his supervisor or the nurse on duty. However, the claimant's daughter testified that when she saw the claimant a few days after October 26, 2005, the claimant was "in pain, could not straighten up, could not walk, and could not get out of bed and she had to help him with all his personal needs." Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back on September 16, 2005. Accordingly, I would not award the claimant any additional medical treatment or any temporary total disability benefits.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner