

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509313

DANA HICKS,  
EMPLOYEE

CLAIMANT

ANTIQUE WAREHOUSE OF ARKANSAS, INC.,  
EMPLOYER

RESPONDENT

WESTPORT INSURANCE CORPORATION,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 6, 2007

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

Claimant appears pro se.

Respondents represented by the HONORABLE WILLIAM C.  
FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant, *pro se*, appeals an administrative law judge's opinion filed January 10, 2007. The administrative law judge found that the claimant failed to establish that he sustained a compensable injury. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant proved he sustained a compensable injury, and that the claimant proved he was entitled to reasonably necessary

medical treatment and temporary total disability compensation.

I. HISTORY

The testimony of Dana Earl Hicks, age 49, indicated that he became employed with Antique Warehouse of Arkansas in approximately June 2003. Mr. Hicks testified that he worked in the lacquer booth, and that he also moved furniture or lifted items on a daily basis. The claimant testified on direct examination:

Q. On August the 17<sup>th</sup> of 2005, tell us what you did that day and what led up to the event where you were injured.

A. I worked in the lacquer booth all day until approximately 3:30, between 3:30 and 4:00 o'clock, when I was asked to go help move a couple of pieces from Warehouse 7 to Warehouse 8 in preparation for a load from Belgium....

Q. Who asked you to come and help do that?

A. Jimmy Weaver....He was a co-employee who took care of re-assembly....

Q. What types of items did he ask you to come help move?

A. A bookcase and a couple of other items that I think were buffets....

Q. Tell us what happened when you did that.

A. Well, we moved the smaller items first and the bookcase was the last to be moved. We moved it as one piece, but it was two pieces. We debated on whether to haul it in one piece or two pieces. Mr. Keathley said to do it any way we wanted to. So we moved it in one piece....

Q. Who unloaded it?

A. Myself and Jimmy Weaver and Braun Rhoda....

Q. What happened to you when you were unloading it?

A. It was so - it was heavy enough that I was having trouble and Jimmy was having trouble - both ends....So I was lifting my end. I lifted it at least twice, and I think it was the third time when I used my right leg because Braun had not gotten over to my side to get the dolly. I tried to slide the dolly out.

Q. What happened to you?

A. I felt a pull and a twinge in my back....

Q. At the time when you felt this pull and this twinge, did you feel like you were seriously injured?

A. No....Right after we unloaded that, I told Jimmy Weaver....I said, "That really got my back." ...

Q. Did you have any more discussion with Mr. Weaver about your back or an injury or anything after that?

A. No.

Q. Did you report this injury to any supervisor on August the 17<sup>th</sup>?

A. No.

Q. Why not?

A. I didn't realize I was hurt.

The claimant testified that he reported for work the next day, a Thursday, but that he was scheduled off work the next two days, Friday and Saturday. The claimant testified that by Friday evening, "My left was beginning to burn." The claimant testified that on Saturday he called his supervisor, Gary Wolf: "I called him to let him know that I was hurting very bad and that if it didn't straighten itself up, I wouldn't be able to make it on Sunday....I told him that I did it moving that bookcase."

The claimant's testimony indicated that he spoke with Don Keathley, the company owner, the following Monday: "I told him I was hurt and needed to see a doctor....He gave me the pertinent information for the workers' comp insurance to go to Doctor Reddy."

Don Keathley, the company president, testified, "The first I knew of the injury was when Dana called me on Monday morning....If I remember right, Dana called me. Then I called the workman's comp company, and they

told me who the company doctor was....I told Dana to go see Dr. Reddy."

Lynn Keathley, the president's brother and a manager for the respondent-employer, testified, "It was brought to my attention that he notified our shop foreman of an injury....Gary Wolf....Monday of the following week that the incident allegedly happened. I'm not aware of the date of it, though."

The record contains a Form AR-3, Physician's Report, signed by Dr. Krishna K. Reddy on August 22, 2005. The "Brief Description of Accident" section on the Form AR-3 indicated, "Pt said he was lifting something the other day & he felt something pull in his lower back & now his back and leg (L) hurts." The handwritten diagnosis on the Form AR-3 appears to have been muscle sprain of the lumbar spine. Dr. Reddy treated the claimant conservatively and returned the claimant to restricted work on August 22, 2005.

The claimant testified that he lived approximately 23 miles from Antique Warehouse. The claimant testified that on August 23, 2005, he informed Don Keathley he was unable to work: "I told Mr. Keathley there was no way I could sit down and drive my vehicle. So there wasn't any way I could get up there, and there was no way - I

couldn't hardly stand and I couldn't hardly lay down. I was in miserable shape."

Don Keathley testified that he spoke with the claimant regarding light duty: "Dana told me that he'd been to the doctor and had been released to light duty. Well, it might have been the doctor's office that called, and I said of course we had light duty." Mr. Keathley described light duty as "Mopping, sweeping, that type of thing."

The claimant testified that he sought treatment with a chiropractor, and the record indicates that the claimant filled out a Case History form (for chiropractic treatment) on August 24, 2005. The claimant filled out information indicating that he had sustained an accident at work on August 18, 2005, and that symptoms had appeared "early A.M. 8-19-05." A Palpation Examination section of the Case History form purported to show "Grade 3" spasm in the claimant's lumbar spine.

Dr. Reddy filled out another Physician's Report on August 26, 2005. Dr. Reddy's handwritten diagnosis appeared to show "muscle sprain L S spine."

A Radiology Report was entered on August 26, 2005:

Disc space narrowing is seen at L4-L5. There are anterior osteophytes seen at L3-L4, and L4-L5, as well as at L1-L2. There are osteoarthritic changes in the posterior elements, particularly on the left side at L5, S1. Calcific atherosclerotic changes are present in the patient's aorta. There is a mild dextroconvex lumbar scoliosis. The paraspinal soft tissues and bowel gas pattern are within normal limits. IMPRESSION: There are degenerative changes of the patient's lumbar spine as described above with a mild dextroconvex lumbar scoliosis.

Dr. Reddy prescribed physical therapy and indicated that the claimant was not able to return to work until September 2, 2005.

The claimant testified that Lynn Keathley arranged for him to see Dr. George Gray. The record indicates that Dr. Gray saw the claimant on August 31, 2005, at which time the claimant complained of low back pain radiating down his left leg. The claimant reported that he had lifted a bookcase at work and felt a pull in his lower back.

The record contains an undated note from Dr. Gray, stating, "This is to verify that this office spoke with Mr. Dana Hick's employer, Lyn Keathley of the Antique Warehouse, and that it was agreed that Antique Warehouse

would be responsible for services rendered on August 31, 2005."

The claimant testified that Dr. Gray sent him to physical therapy. The record contains a Referral Form to Susan Housley, a physical therapist, for a "Diagnosis/condition" of "ruptured disc." Ms. Housley evaluated the claimant on August 31, 2005:

Mr. Hicks is a 47 YO male who reports injuring his LB at work on 8-17-05 while lifting furniture. He works at the Antique Warehouse in Botkinburg, AR ... There does appear to be mild edema present over the lumbosacral region of the LB....

ASSESSMENT: Pt appears to have signs & symptoms consistent w/DX of HNP. Feel pt would benefit from conservative therapy including modalities as indicated along with possible lumbar traction. Will also educate pt on correct posture and body mechanics.

On September 12, 2005, Susan Housley noted that the claimant had treated with her only twice. Ms. Housley noted, "W/C states that Pt was not referred to PT by the W/C MD. Pt D/C self from PT until situation worked out."

Dr. Gray referred the claimant for an MRI of the lumbar spine, which was taken on December 1, 2005:

The vertebral bodies are normally aligned....There is degenerative disk disease with disk desiccation at L4-5 and L5-S1....

L5-S1: There is a left paracentral acute disk herniation with inferior extension measuring 1.1 cm. The disk extrusion abuts the left S1 nerve root. There is mild bilateral neural foraminal stenosis at this level and no central canal stenosis. Mild degenerative facet disease is present. There is a 6 mm synovial cyst posterior to the right facet joint.

L4-5: There is a diffuse disk bulge with facet disease causing mild to moderate bilateral foraminal stenosis and minimal to mild central canal stenosis. There are multiple peripheral annular tears at this level.

Degenerative facet disease is noted at all levels.

IMPRESSION:

1. ACUTE INFERIOR LEFT PARACENTRAL DISK EXTRUSION AT L5-S1 ABUTTING THE LEFT S1 NERVE ROOT. THERE IS MILD BILATERAL FORAMINAL STENOSIS AT THIS LEVEL.
2. MILD TO MODERATE BILATERAL NEURAL FORAMINAL STENOSIS AND MINIMAL CENTRAL CANAL STENOSIS AT L4-5.
3. 5 MM SYNOVIAL CYST POSTERIOR TO THE RIGHT FACET OF L5-S1.

A pre-hearing order was filed on August 17, 2006.

The claimant contended that he "sustained an injury to his low back on August 17, 2005. An MRI on December 1,

2005 revealed an HNP at L5-S1. He has not been able to work since August 19, 2005." The respondents contended that the claimant did not sustain a compensable injury.

The parties agreed to litigate the following issues: "1. Compensability. 2. TTD. 3. Medical expenses. 4. Attorney's fees."

A hearing was held on October 18, 2006. At that time, counsel for the respondents contended that "a light-duty job was offered to the Claimant after he was released back to light duty on September 2<sup>nd</sup>, and that light-duty job was refused."

The claimant testified that he had not tried to work since August 17, 2005, because, "There's no way I could go to work for somebody and guarantee them I could hold up for a day."

The administrative law judge found, in pertinent part:

5. The claimant has failed to establish by a preponderance of the credible evidence that he sustained a compensable low back injury on August 17, 2005.

6. Respondent employer, Antique Warehouse of Arkansas, is estopped from denying liability for Dr. Gray's services provided on August 31, 2005.

The respondents do not appeal the administrative law judge's order that the respondents pay for Dr. Gray's medical services provided on August 31, 2005. The claimant appeals the denial of compensability to the Full Commission.

## II. ADJUDICATION

### A. Compensability

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(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). 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 failed to establish by a preponderance of the credible evidence that he sustained a compensable low back injury on August 17, 2005." The Full Commission reverses this finding. We find that the claimant proved he sustained an accidental injury causing physical harm to his low back in the form of a lumbar strain. The lumbar strain arose out of and in the course of employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident identifiable by time and place of occurrence on August 17, 2005. The claimant established a compensable injury by objective medical findings not within his voluntary control. These objective medical findings included the report of spasm on August 24, 2005 and the physical therapist's notation on August 31, 2005 of edema in the lumbosacral region.

The Full Commission finds that the claimant was a credible witness. We recognize the testimony of Jimmy Weaver, who was working with the claimant on the date of the accidental injury. Mr. Weaver testified that the claimant "didn't tell me that he'd hurt his back."

However, Don Keathley testified that the claimant informed him the next Monday morning that he had sustained a workplace injury, and Mr. Keathley arranged for the company doctor to see the claimant. Lynn Keathley testified that he was also aware that the claimant was reporting a work-related injury. The claimant's supervisor, Gary Wolf, corroborated the claimant's testimony. Mr. Wolf testified that he spoke with the claimant on Saturday following the accident and again on Sunday: "He said that he thought he had hurt his back while he was moving some furniture on Wednesday afternoon, but I was not present when this happened....I don't want to say something that's not accurate, but I'm pretty sure that's what he said."

The Full Commission finds that the claimant proved he sustained a compensable injury on August 17, 2005, and the decision of the administrative law judge is reversed.

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).

In the present matter, the claimant sustained a compensable lumbar sprain on August 17, 2005. The claimant contended that he had been unable to work since August 19, 2005 and that he was entitled to temporary total disability benefits. The treating physician, Dr. Reddy, indicated that the claimant was able to return to restricted work. Dr. Reddy returned the claimant to work on September 2, 2005. Don Keathley credibly testified that appropriate light duty was available for the claimant. Mr. Gary Wolf, the claimant's supervisor, also credibly testified that appropriate light duty was available for the claimant. Whether or not the claimant remained within his healing period, the preponderance of the evidence demonstrates that the claimant was not totally incapacitated to earn wages after September 2, 2005. The claimant therefore proved that he was entitled to temporary total disability from August 19, 2005 until September 2, 2005.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury on August 17, 2005. The claimant proved that he was entitled to temporary total disability compensation from August 19, 2005 until September 2, 2005. The claimant on appeal contends that

he is entitled to payment for services rendered by Housley Physical Therapy. The Full Commission finds that all of the treatment of record provided the claimant, including physical therapy, was reasonably necessary in connection with the compensable injury pursuant to Ark. Code Ann. §11-9-508(a). The decision of the administrative law judge is reversed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the findings that the claimant sustained a compensable injury and awarding him temporary total disability benefits through September 2, 2005. However, I must dissent from the portion of the decision finding that the claimant only sustained a temporary strain to his back and limiting his award of temporary total disability benefits.

After reviewing the record, I find that the Majority has erred in finding that the claimant only sustained a temporary strain. The Majority has provided absolutely no basis or rationale for its decision that the claimant sustained only a strain. Their conclusion is particularly disturbing when one reviews the medical records, including the claimant's MRI, which clearly shows that he sustained an acute herniated disc. There is simply no explanation as to why the Majority would not consider the results of the MRI in determining the extent of the claimant's injury. Furthermore, there is simply no way to read the record and conclude the claimant only sustained a minor strain.

Likewise, I am confounded by the Majority's decision to deny the claimant temporary total disability benefits after September 2, 2005. Despite the assertions of the Majority, Dr. Reddy did not release the claimant to return at that point. Instead, the claimant was unable to return to Dr. Reddy due to the respondent's request to have the claimant see Dr. Gray. Furthermore, it is significant to note that after September 2, 2005, the claimant was diagnosed with having a herniated disc and had complaints of having a numb leg consistent with that diagnosis. Clearly this

would indicate that the claimant's inability to return to work would be legitimate. Additionally, Dr. Gray's notes also specifically indicate that the claimant was off work due to his injury and that a goal of his treatment was to return the claimant to work. While this is not an explicit note restricting the claimant from working, this language still indicates that the claimant was unable to return to work. Therefore, I must respectfully dissent.

At the time of the injury, the claimant had worked for the respondent employer for over two years in the capacity of "lacquer booth". This job required lifting on a daily basis. The claimant testified that on August 17, 2005, he injured his back while he was lifting a bookcase. The claimant described that Jimmy Weaver and Braun Rhoda assisted him in unloading the bookcase. The claimant described,

A. It was so - it was heavy enough that I was having trouble and Jimmy was having trouble - both ends. There's a dolly on each end. So you're lifting half of the unit up. The bookcase had a heavy glass front and glass sides. So you couldn't use your hand for leverage on it because it was two pieces, and you would have scooted the top off of the bottom; which would have been a catastrophe.

Anyway, we were both having trouble with it. Braun was getting the dolly out from underneath Jimmy's side, and I was pretty sure he was about done. So I was lifting my end. I lifted it at least twice, and I think it was the third time when I used my right leg because Braun had not gotten over to my side to get the dolly. I tried to slide the dolly out.

Q. What happened to you?

A. I felt a pull and a twinge in my back. At about that time, Braun was called up to do some wrapping or something.

The claimant further indicated that he had never felt anything similar and indicated that he did not believe he had been seriously injured. Nevertheless, he still told Jimmy Weaver, "That really got my back." The claimant described that Jimmy Weaver responded, "Well, we both just lifted twice our weight." The claimant admitted he did not report the injury to a supervisor because he did not believe he had sustained a serious injury. The claimant indicated he returned to work but experienced weakness in his leg.

The claimant said the following day a scheduled load did not arrive so he cleaned guns and performed other light duty work in the event the load actually did arrive. However, the claimant did have to

lift heavy items from a Fed Ex load. The claimant testified that by the end of the day his legs were weak. However, he indicated that because he had worked all week, he was not concerned.

The claimant testified that he did not realize how serious his injury was until the following day, which was Friday and his scheduled day off. The claimant indicated that by Friday afternoon his left leg was burning. He also began to suffer from back pain. It gradually worsened. The claimant said that on Saturday, during the afternoon, he called his supervisor Gary Wolf and told him of his injury. The claimant said he relayed the injury was due to lifting the bookcase.

The claimant did not go to work the next two days. The claimant said he spoke with the Owner, Don Keathley, and reported the injury. He was then referred to Dr. Reddy. The claimant said that when he was treated, he told the nurse he was injured on Wednesday while lifting a bookcase.

The claimant described that on Tuesday, August 23, 2005, Dr. Reddy released him to return to work. The claimant said he called Keathley and was offered a job dusting antiques. However, the claimant told Keathley that there was no way he could get there as he lived 23

miles away and could not drive or perform the job due to his back.

Keathley testified that he was the president of the company and that the claimant was a good worker for which he had given a raise. Keathley further indicated that he had no knowledge of the claimant ever engaging in dishonesty. Keathley corroborated the claimant's testimony that on August 17, 2005 furniture was being moved in preparation to receive a load from Belgium. Keathley said he learned of the claimant's injury the following Monday, when the claimant called him. Keathley then spoke with Wolf, who informed him the claimant had previously reported an injury. Keathley then contacted the insurance company. However, he did not complete an accident report. Keathley also described that he offered the claimant light duty work in the form of mopping, dusting, and sweeping.

Gary Wolf also testified. Wolf testified that he had known the claimant for some 30 years and that he had no knowledge of the claimant being dishonest. Wolf's testimony also seemed to be largely in agreement with that of the claimant. Wolf indicated that the claimant initially notified him of the injury on Saturday. He spoke with the claimant again on Sunday

and told him to seek medical attention if he needed. On Monday, the claimant presented him with a light duty work slip but declined work because of his back.

Jimmy Weaver testified that on August 17, 2005, he Braun, and the claimant did move furniture. Weaver specifically recalled that a bookcase which was large was moved on that day. However, Weaver denied any memory of the claimant saying he injured his back.

The claimant received treatment from Dr. Reddy on August 22, 2005. The note indicates, "Pt said he was lifting something the other day + felt something pull in his lower back + now his back + L leg hurts". The claimant was instructed to use a heating pad and was given pain medication. He was also given a one week restriction from lifting more than 10 pounds.

On August 24, 2005, the claimant again sought medical attention. He reported that he was injured on August 18, 2005, at work. The claimant indicated that he had an onset of symptoms on August 19, 2005. The claimant reported low back pain and was noted to have subluxation in his lumbar spine. On August 26, 2005, Dr. Reddy treated the claimant and noted that the claimant continued to have pain radiation from his left hip radiating down his leg. X-rays were taken and

revealed degenerative changes and a mild dextroconvex lumbar scoliosis was noted. Dr. Reddy recommended physical therapy to treat the claimant's condition. Dr. Reddy also restricted the claimant from working until September 2, 2005.

The claimant initially received treatment by Dr. Gray on August 31, 2005. The claimant reported that he injured himself on August 17, 2005, while at work lifting furniture. The claimant was noted to have severe loss of lumbar lordosis. Susan Housley, MSPT diagnosed the claimant with a "HNP" with left leg pain. Housley further indicated, "Pt to be seen 3x/wk x 4-6 wks with treatment to consist of moist heat, Estim, US, massage, manual therapy, possible lumbar traction, therapeutic exercises including McKenzie protocol, and/or other treatment as deemed necessary." The claimant continued with physical therapy until the respondent's denied further treatment.

An MRI was performed on December 1, 2005. The report provides,

1. ACUTE INFERIOR LEFT PARACENTRAL DISK EXTRUSION AT L5-S1 ABUTTING THE LEFT S1 NERVE ROOT. THERE IS MILD BILATERAL FORAMINAL STENOSIS AT THIS LEVEL.

2. MILD TO MODERATE BILATERAL NEURAL FORAMINAL STENOSIS AND MINIMAL CENTRAL CANAL STENOSIS AT L4-5.

3. 5 MM SYNOVIAL CYST POSTERIOR TO THE RIGHT FACET OF L5-S1.

At the time of the hearing, the claimant testified that he still suffered from numbness in his leg. He also has difficult walking uphill or up stairs. Additionally, he cannot sit, stand, walk, or lay down for extended periods of time.

The Majority has found that the claimant sustained a compensable injury in the form of a strain due to lifting a bookcase. I agree that the claimant injured himself; however, I am simply baffled by the finding that the claimant only sustained a sprain. The claimant's medical records are wrought with objective evidence of his physical injury. Within two weeks of being injured, the claimant was diagnosed with having a herniated disc. The claimant later had an MRI which confirmed the existence of an acute herniated disc. As the claimant had no history of back problems, the claimant stopped working two days after his injury, and the Majority has found his testimony to be credible, I am at a loss in understanding why the Majority would now conclude the claimant's condition was only a temporary

strain. Perhaps what is more disturbing is that the Majority provides no rationale or evidence to support such a conclusion.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002).

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998). The basic test is whether there is a causal connection between the two episodes. Bearden Lumber Co. v. Bond, 7 Ark.App. 65, 644 S.W.2d 321 (1983). It is the Commission's duty to

determine if a causal connection exists between the primary injury and any additional injuries. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999).

While medical evidence is not required to show a causal connection, claimant must show proof by a preponderance of the evidence. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is not other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962).

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the Commission's refusal to make an award. Clark v. Ottenheimer, 229 Ark. 383, 314 S.W.2d 497 (1958); Johnson v. Little Rock School District, Full Commission

Opinion filed April 4, 2002 (E700511 & F011921). But, if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the Commission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962).

In this instance, I find that the claimant sustained a compensable injury which occurred from the specific incident of lifting a bookcase at work. The claimant's diagnostic testing revealed a herniated disc in the claimant's spine, which is objective evidence of an injury. Furthermore, the claimant had no history of significant back problems, and the testimony of the claimant and the other witnesses, when considered in conjunction with the medical records, shows a causal connection between the claimant's lifting the bookcase and his subsequent diagnosis of having a herniated disc.

The evidence shows that the claimant's herniated disc was caused by the work-related lifting incident. As previously indicated, and as noted by the Majority, there is no evidence that the claimant had ever suffered from any significant history of back

problems prior to the incident in question. Though the claimant admitted that he had performed manual labor and therefore strained his back in the past, there are absolutely no objective medical records or other testimony to show that he had a pre-existing back condition prior to the incident in question. Particularly, there is no evidence that the claimant had ever suffered from or been diagnosed with a herniated disc in the past.

The medical records also clearly indicate the claimant sustained a herniation. On August 22, 2005, the claimant's initial treatment date, he was noted to be suffering from low back and left leg symptoms. The claimant continued to present with symptoms consistent with a herniation, including low back pain and tingling and numbness in his left lower extremity. Additionally, the claimant was noted to suffer from subluxation of the lumbar spine. On August 31, 2005, the claimant was diagnosed with having a "ruptured disc". On the same date the claimant was noted to have edema in the lumbosacral region. The claimant was again noted to suffer from a "HNP" and to have symptoms consistent with that diagnosis. The claimant continued receiving treatment and was referred for an MRI which corroborated

that he did suffer from an MRI. Specifically, the claimant was noted to have, "ACUTE INFERIOR LEFT PARACENTRAL DISK EXTRUSION AT L5-S1 ABUTTING THE LEFT S1 NERVE ROOT". (Emphasis added).

It is significant that little time passed between the lifting episode and the claimant's notification that he had injured his back. The claimant reported the injury within days of being injured and, in fact, requested medical attention for his back injury. It is also important to note that the claimant denied engaging in any activity which would cause him to become injured between the time he lifted the bookcase and reported the injury. Finally, it is noteworthy that not one physician indicated that the claimant's condition was inconsistent with having a herniated disc. As the claimant repeatedly reported the injury was from work and there is no other explanation for his injury, I find that the overwhelming weight of the evidence shows the claimant sustained a herniation at work.

Given the aforementioned evidence, there is simply no way to rationally conclude that the claimant only sustained a sprain. Not surprisingly, the Majority does not provide any basis for its conclusion. In my opinion, their failure to do so is simply because there

is no evidence to support such a finding. Instead, what is clear is that the claimant sustained a compensable injury and that injury was in the form of a herniated disc. The claimant is clearly entitled to all reasonably necessary medical treatment, including the MRI for treatment of that injury.

Finally, I find that the claimant is entitled to all requested temporary total disability benefits. The Majority essentially argues that the claimant was released to return to work as of September 2, 2005. However, that is a gross oversimplification and misrepresentation of the facts in this case. Rather, the facts reveal that while the claimant was initially released to return to work as of August 23, 2005, he was later restricted from working by the same physician, Dr. Reddy. The claimant was prescribed physical therapy through Dr. Reddy, at which point the respondent decided to discontinue treatment with Dr. Reddy and send the claimant to Dr. Gray, who also recommended therapy. The claimant never returned to Dr. Reddy and was unable to complete the physical therapy prescribed by him because of the respondent, thus it is impossible to know if he would have continued to restrict the claimant from working.

What is clear, is that Dr. Gray indicated that the claimant's condition caused him to be off work. This is evidence that Dr. Gray believed the claimant was unable to work. Additionally, the claimant testified that his symptoms were such that he remained unable to work due to pain and numbness in his leg. As such, it is evident that the claimant should not be precluded from receiving temporary total disability benefits after September 2, 2005.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was

receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984). Additionally, the Arkansas Courts have determined that, if, during the healing period, an employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, her temporary disability is deemed total. See, Farmers Cooperative v. Biles, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

In this instance, when the claimant initially sought treatment on August 22, 2005, he was diagnosed with a simple sprain and released to light duty work. Based on this examination, the respondents offered the claimant light duty work, which the claimant rejected. The Majority attempts to use this initial diagnosis as a basis to show the claimant was not unable to work. However, the medical records show that the claimant's injury was much more serious than what was initially diagnosed. In fact, when the claimant returned for subsequent treatment, even with Dr. Reddy, he was restricted from working. As such, it is apparent that the claimant was not able to work.

Dr. Reddy initially gave the claimant work restrictions of no lifting more than 10 pounds.

However, on August 26, 2006, when the claimant returned for treatment from Dr. Reddy, he was restricted from working until September 2, 2005. Likewise, when the claimant went to Dr. Gray on August 31, 2005, he was noted to be off work due to his injury. Dr. Gray also listed one of the goals of treatment as returning the claimant to return to work without pain, thus indicating the claimant was unable to return to work. Furthermore, it is apparent that the claimant's injury was much more serious than was originally suspected. The claimant's MRI revealed that he suffered from a disc extrusion that abutted the left S1 nerve. Certainly, this is the type of injury that would legitimize the claimant's reports of pain and show that he would be unable to return to work during the time period for which he is requesting benefits.

The respondent essentially asserts that the claimant's refusal to return to work as of August 23, 2005, should preclude him from receiving temporary total disability benefits. The Majority has indicated that Dr. Reddy released the claimant to return to work as of September 2, 2005. I find this argument to be flawed. While Dr. Reddy did initially indicate the claimant could return to work, he subsequently restricted him

from working until September 2, 2005. Furthermore, it is a gross misstatement of the facts to find that Dr. Reddy released the claimant to return to work as of September 2, 2005. Rather, what is apparent is that Dr. Reddy treated the claimant on August 26, 2005. At that time, he restricted the claimant from working until September 2, 2005. The claimant was not released, but was instead prescribed physical therapy. Notably, the claimant was never able to return to Dr. Reddy due to the respondent's request that he see Dr. Gray. As such, it is simply an error of fact to find that Dr. Reddy explicitly released the claimant to return to work as of September 2, 2005.

Furthermore, it is evident that Dr. Gray felt the claimant could not return to work. In a note dated August 31, 2005, Dr. Gray's therapist indicated "Functional Level: On a functional level, pt is currently off work secondary to this injury". Later, the therapist indicated, as a goal "Pt to return to previous level of functional (I), including work, pain free". Notably absent from this report or any other note from Dr. Gray, is an indication that the claimant was able to return to work or that he had been released to return to work. When this language is considered

with the severity of the claimant's objective and subjective injury and symptom, the overwhelming weight of the evidence shows that the claimant was not able to return to work as of September 2, 2005.

In sum, I find that the Majority has essentially ignored the pertinent medical evidence showing the claimant had a herniated disc. There is simply no way to logically conclude that the claimant, who had no history of back problems, did not sustain a herniated disc. Likewise, the Majority has provided no rationale or basis for its decision that the claimant only sustained a sprain. Furthermore, the claimant credibly testified that he was unable to work after the lifting episode, and the medical records from Dr. Gray corroborate that claim.

For the aforementioned reasons, I must strongly, but respectfully concur in part and dissent in part.

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PHILIP A. HOOD, Commissioner