

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408480

JAMES L. MITCHELL, EMPLOYEE	CLAIMANT
GEORGIA PACIFIC CORPORATION, A SELF INSURED EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, TPA	RESPONDENT

OPINION FILED JANUARY 17, 2007

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

Claimant represented by HONORABLE EDDIE WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE SUSAN M. FOWLER,
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 August 3, 2006.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. Claimant was employed by Georgia-Pacific on August 10, 2004.

3. Claimant has proven by a preponderance of the evidence that he was hit by a falling catwalk while performing employment services on August 10, 2004.

4. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on or about August 10, 2004, in that Claimant has failed to prove by a preponderance of the evidence that the alleged injury is established by medical evidence supported by objective findings.

5. Claimant has failed to prove by a preponderance of the evidence that the work-related incident was the cause of the need for his medical treatment.

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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant did not have objective

findings of any cervical or other back injury and denying associated medical and temporary total disability benefits. On appeal the claimant contends that he sustained objective findings in the form of a herniated disc as shown by an MRI, and also by the objective presence of a limited range of motion. In contrast, the respondents submit that there was no specific incident that caused injury at work and that any condition to the claimant's back is due to pre-existing degeneration.

The claimant was employed by the respondents for approximately 21 years prior to the incident in question. At the time of the incident in question the claimant worked as a Deck Operator. The claimant testified that on August 10, 2004, he was injured when a catwalk struck him in the mid-back and knocked him to the floor on his hands and knees. The claimant said that James Kazee, coworker assisted him after the accident and saw him trying to get up. Kazee corroborated the claimant's testimony and said that while he did not see the incident, he saw the claimant struggling to get up. He described the incident, as follows,

- A. Well, I was running the machine called a lathe, and then I had looked back and I seen it, the catwalk - - logs had got doubled up on top of one another, and it pulled up there and it turned over, and I seen the catwalk down and I seen he was struggling, trying to get up.
- Q. So the catwalk had actually turned over?
- A. Right.

The claimant then reported the injury to his supervisor, Bill Wray. Wray got the claimant an ice pack and the claimant returned to work. The claimant continued working, but ultimately left early because of pain in his back.

The following day the claimant spoke with the Safety Director, John McQuirkin. He was seen by the company physician, Dr. Edward A. Gresham, on August 12, 2006. In a report dated August 12, 2004, Dr. Gresham indicated that the claimant had pain in his low back and neck. Dr. Gresham noted that the claimant had no abrasions, ecchymosis, swelling, or spasm. He further indicated that he had spoken with the supervisor, and that, "apparently this catwalk did land on him, but apparently not with its whole weight."

Dr. Gresham diagnosed the claimant with a muscle strain and recommended ibuprofen and ice.

The claimant was dissatisfied with Dr. Gresham's care and went to the emergency room. The claimant reported that he had a history of prior back pain due to a pulled muscle. He also reported the incident where he was hit by the catwalk. The claimant was noted to have a contusion in the lumbar dorsal region and was diagnosed with an acute thoracic and lumbar sprain secondary to the catwalk falling on him. He was also prescribed Flexeril.

Dr. Benjamin Walsh, also an employer's physician, continued to treat the claimant. Dr. Walsh noted the claimant had muscle tightness and diagnosed him with thoracic and lumbar strains. However, he also indicated the claimant had symptom magnification. Dr. Walsh released the claimant to return to work on August 25, 2004, at which time the claimant sought treatment from a specialist.

On September 28, 2004, the claimant was treated by Dr. Massanelli. Dr. Massanelli noted that the claimant had "significant limitations in both active and passive range of

motion of his cervical spine, which causes pain." He also noted the claimant's x-rays showed significant degenerative disk disease and that his x-rays of his lumbar spine were, "essentially negative." Dr. Massanelli diagnosed the claimant with a mild lumbar strain and a moderate to severe cervical strain. He recommended physical therapy and an MRI. He further gave the claimant a prescription for Darvocet and for Flexeril and placed him on light duty, with restrictions of no lifting more than 20 pounds, no climbing ladders, and no operating machinery.

The claimant's MRI was performed on September 30, 2004. It revealed,

There is degeneration of the C3-4 through C7-T1 discs with accompanying posterior disc/osteophyte complexes. There is resultant mild central and foraminal stenoses at the C3-4 and C5-6 levels, and accompanying small left paracentral herniation at the C4-5 level, and moderate bilateral foraminal stenoses at the C6-7 level.

On October 5, 2004, Dr. Massanelli indicated that the claimant's MRI was consistent with degenerative changes. He also noted that the claimant had accused him of

collaborating with the employer. He opined that the claimant's condition was not work-related and released the claimant back to Dr. Walsh. He also recommended the claimant have physical therapy for his cervical spine and noted that if the claimant's symptoms did not improve, he might need surgery. However, in another letter, dated October 5, 2004, Dr. Massanelli opined, "I don't think his MRI changes were caused by the work-related accident; however, certainly an injury can aggravate an arthritic neck."

On October 14, 2004, the claimant was treated by Dr. D'Orsay D. Bryant, III. Dr. Bryant noted the medical records pertaining to the claimant's treatment and indicated that the claimant complained of neck pain. On a portion of the report entitled "PHYSICAL EXAMINATION", Dr. Bryant, noted, "The neck reveals tenderness and spasm in the right and left paravertebral region of the neck and right and left trapezial musculature." Dr. Bryant diagnosed the claimant with a, "Cervical strain with disc disease with spinal and foraminal stenosis". He recommended the claimant take medications and undergo physical therapy.

Dr. Bryant continued to treat the claimant for his neck condition and for carpal tunnel syndrome. The claimant underwent a right-sided carpal tunnel release, but continued to complain of persistent neck pain. On January 24, 2005, Dr. Bryant prescribed the claimant medication to alleviate spasms in his neck. On January 31, 2005, the claimant presented with muscle spasms and Dr. Bryant referred the claimant to a neurosurgeon.

On February 10, 2005, Dr. Reza Shahim treated the claimant and noted that his onset of symptoms began after the catwalk fell on him. Dr. Shahim noted, "

I reviewed a very poor quality MRI from September 2004. I see multi-level disc disease and most likely central disc herniation at C4-5 causing moderate canal stenosis. There is also cervical foraminal stenosis at C6-7.

Due to the poor quality of the MRI, Dr. Shahim recommended the claimant have another MRI.

On February 24, 2005, Dr. Shahim treated the claimant again. Dr. Shahim, indicated that the claimant had another MRI and that the claimant suffered from,"a broad

disc herniation at C4-5 which results in severe canal stenosis. He also has multi-level cervical spondylosis extending from C7 to T1." Dr. Shahim further recommended that the claimant undergo surgery.

The claimant underwent surgery on March 25, 2005. The operative report from the surgery indicates that the surgeon found a broad based disc herniation. On January 12, 2006, Dr. Shahim was deposed and indicated the claimant had not yet been released from care. At the time of the hearing, the claimant testified that he still had not been released from care.

By virtue of affirming and adopting the decision of the Administrative Law Judge, the Majority finds the claimant failed to show objective findings of a work-related injury. Specifically, they opine that there were no objective reports of muscle spasms, swelling, bruising, or any other indication of acute injury. They further opine that because Dr. Shahim testified that he could not give his opinion within a reasonable degree of medical certainty

without relying on the history given by the claimant, his opinion was entitled to little weight.

After a de novo review of the record, I find that the claimant's degenerative disc disease was aggravated when the catwalk fell on him. Specifically, I note that despite the assertions of the Administrative Law Judge and the Majority, the claimant was repeatedly noted to have muscle spasms and prescribed medication for such. Additionally, the claimant was noted to have objective findings in the form of decreased passive range of motion. Additionally, while the claimant had degenerative disc disease that pre-existed his accident, there is no indication that he was under medical care for the condition at the time of the injury.

Furthermore, while Dr. Shahim admittedly had to rely on the claimant's history to make a conclusion on causation, that does not mean his opinion should be disregarded as the incident in question is consistent with the claimant's complaints and the diagnosis made by Dr. Shahim.

A "compensable injury" is defined as, "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" Ark. Code Ann. § 11-9-102(4)(A)(i) (Rep. 2002). To be compensable, an injury must also be established by medical evidence supported by objective findings, which are defined as evidence supported by objective findings, which are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999).

The Court of Appeals has held that muscle spasms constitute objective findings. University of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997). Similarly the Court of Appeals has held that a muscle spasm or other objective finding can be stated within a medical degree of certainty regardless of whether the party observing the spasm has a medical degree. Continental Express, Inc. v. Freeman, 66 Ark. App. 102 (1999), 989

S.W.2d 538; See also Estridge v. Waste Management, 343 Ark. 276 (2000), 33 S.W.3d 167. Furthermore, the Court has held that a prescription designed to treat muscle spasms in and of itself constitutes an objective finding, as a doctor would not prescribe medication to be taken to relieve muscle spasms if the condition did not exist. Id; See also, Fred's, Inc. v. Jefferson, ___ Ark. App. ___, ___ S.W.2d ___ (December 15, 2004).

The claimant in the present case was treated in the emergency room on August 12, 2004. At the time of the treatment, the claimant was diagnosed with a contusion of the lumbar spine, which is objective. Additionally, the claimant was noted to have tenderness in his back and prescribed Flexeril. As there is no indication that the claimant was prescribed Flexeril simply on his own subjective complaints, I find that there is sufficient evidence to satisfy the criteria of Estridge and Jefferson. I also note the claimant was diagnosed with a sprain to his lumbar and cervical spine. The claimant's muscle spasms were also noted on treatment by Dr. Bryant. Specifically, I note

the October 14, 2004, doctor's note where Dr. Bryant indicated under the portion of the report titled "PHYSICAL EXAMINATION", indicating, "The neck reveals tenderness and spasm in the right and left paravertebral region of the neck and right and left trapezial musculature." Additionally, after that visit, Dr. Bryant noted that the claimant continued to present with spasms and continued refilling medication for treatment of such. Accordingly, I find that despite the assertions of the Administrative Law Judge and the respondents, the evidence supports a finding that the claimant's muscle spasms were not simply a subjective complaint; instead they were objective.

I further find that the claimant sustained an aggravation to his pre-existing degenerative disc disease. In workers' compensation law, an employer takes the employee as he finds him, and 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 preexisting 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.

In the present instance, the claimant had an admitted history of back pain and had been diagnosed with degenerative disc disease. However, there is no evidence in the record that he had ever been treated for muscle spasms or given medication for treatment of spasm. As such, I find that the presence of spasms, is enough in itself, for the claimant to show that he sustained a compensable injury. Likewise, there is no evidence that he was previously diagnosed with canal stenosis or with a herniated disc as shown on the MRI. Additionally, the claimant had not received treatment for his condition since 2002, indicating that he was asymptomatic and that his condition was aggravated.

I also note that on October 5, 2004, Dr. Massanelli indicated, "I don't think his MRI changes

were caused by the work-related accident; however, certainly an injury can aggravate an arthritic neck. In my opinion, this indicates that while the claimant had pre-existing degenerative changes, he suffered an aggravation.

Additionally, I note that Dr. Shahim testified that if the claimant's symptoms started after the trauma described by the trauma, then he would associate the trauma as being the cause of the claimant's aggravation and need for treatment.

I note the Majority's contention that Dr. Shahim's opinion is not reliable because he noted degenerative changes in the claimant's back and because he had not been provided with information indicating that the claimant had previously suffered back problems. However, I find that these conclusions are flawed for two reasons. First, a finding of degeneration does not necessitate a finding that the claimant's condition was not aggravated by the work-related injury. Second, I note that the claimant had been largely asymptomatic and had not received treatment for his back for a two-year period prior to the accident. This indicates that while Dr. Shahim was not privy to that

information, the end result is still that the claimant's symptoms were directly related from having the catwalk dropped on him.

Additionally, I find that the claimant is not required to show that the degenerative changes shown on the MRI are directly related to the work-related injury. To show he sustained a compensable injury, he is only required to show objective signs of an injury. As this requirement is fulfilled by the presence of muscle spasms, the assessment he had a contusion, and the notation that the claimant had decreased passive range of motion, the claimant has established that he sustained a compensable injury in the form of an aggravation.

Ultimately, I find that the claimant had pre-existing degenerative disc disease which was aggravated when a catwalk fell on him. While the respondents contend the accident never occurred, the claimant provided credible testimony regarding this accident. Additionally, Kazee corroborated the claimant's testimony regarding the accident, and even Bill Wray, the claimant's supervisor,

testified that he had no reason to disbelieve the claimant's testimony that the accident occurred. I further find that the claimant's injury was shown by objective findings in the form of a contusion, muscle spasms, and limited passive range of motion. The claimant had a catwalk weighing some 400-600 pounds fall on him, which would be consistent with the nature of his injuries. As the claimant had not received treatment for his degenerative disc disease for two years before this incident, and since the claimant was able to perform his work in the interim without difficulty, I find that it is more probable than not the claimant's onset of symptoms was an aggravation of his pre-existing degenerative disc disease. As a result of that injury, the claimant had to undergo surgery and was unable to work, indicating that he is entitled to medical and temporary total disability benefits.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner

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