

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509830

ROBERT TORRES, EMPLOYEE	CLAIMANT
PRO INSULATION, INC., EMPLOYER	RESPONDENT
CINCINNATI INDEMNITY CO., CARRIER	RESPONDENT

OPINION FILED APRIL 11, 2007

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

Claimant represented by HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed, in part, as
modified and reversed, in part.

OPINION AND ORDER

The claimant appeals and the respondents cross-appeal a decision of the Administrative Law Judge filed on March 2, 2006, finding, in relevant part, that the claimant sustained a compensable injury to his right shoulder and lower back on August 30, 2005, for which he is entitled related medical. The Administrative Law Judge also found that the claimant failed to prove entitlement to temporary total disability benefits from August 31, 2005, to a date yet to be determined.

A carefully conducted de novo review of this claim in its entirety reveals that the decision of the Administrative Law Judge regarding the compensability of the claimant's back injury is generally supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. However, a preponderance of the evidence only supports a finding that the claimant only sustained a lower back injury in the form of a *back strain* on the date in question. Therefore, we find that the findings made by the Administrative Law Judge with regard to compensability of the claimant's back strain injury and temporary total disability benefits are correct, and are hereby affirmed, as modified, by the Full Commission. However, we find that there is no objective evidence to support a finding that the claimant sustained a compensable shoulder injury on August 20, 2005. Therefore, we hereby reverse the decision of the Administrative Law Judge with regard to the claimant having sustained a compensable shoulder injury on the date in question.

A review of the record, including testimony offered by the claimant and his supervisor, J.D. Ashman, and the medical records, reveals that it is more likely than not that the claimant sustained a compensable injury in the form of a lumbar strain on Tuesday, August 20, 2005. The claimant credibly testified that he was standing on top of an eight foot ladder wrapping a pipe with insulation when he lost his footing. In order to prevent himself from falling to the floor below, the claimant caught himself under his arms on the rafters which were located below the duct work on which he was working. The claimant testified that the rafters were approximately waist high to him as he worked. Therefore, he "fell" a very short distance. After steadying the ladder on which he had been standing with the top of his feet, the claimant descended the ladder and took a short, unscheduled break. The claimant contends that he immediately called his supervisor, Mr. Ashman, and informed him of the incident. Mr. Ashman denied that the claimant reported specifically to him that he had fallen; rather, he stated that the claimant told him he was ill. The claimant was unable to complete his

shift and went home early on the date in question. The claimant missed the following day, Wednesday, then returned to work the next day, which was Thursday, August 22, 2005. The claimant testified that he was only able to work for a couple of hours due to recurring numbness in his legs. In the meantime, a co-worker reportedly informed Mr. Ashman of the claimant's alleged incident, and Mr. Ashman arranged for the claimant to obtain medical treatment.

The claimant was first seen for his injury on September 6, 2005, by Dr. Laura L. Adams. The claimant was accompanied to this appointment by Mr. Ashman. Views of the claimant's lumbar spine taken on September 6, 2005, revealed mild levoscoliosis of the lumbar spine with no acute osseous abnormality. Dr. Adams diagnosed the claimant with lumbosacral sprain, and returned him to work with lifting and bending restrictions pending an MRI. This study, which was conducted on September 14, 2005, showed disc dessication at L5-S1, with a right-sided disc bulge at that level which combined with facet hypertrophy to cause right lateral

recess stenosis. The claimant did not return for medical treatment after his MRI of September 14, 2005.

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. Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2005). An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). Based on the totality of the evidence, we find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the form of a lumbosacral strain on August 20, 2005, in the course and scope of his employment with the respondent employer. As the medical treatment that the claimant received was reasonably necessary to the treatment of his lower back injury, we further find that the claimant was entitled to that treatment. However, there is no objective medical evidence that the claimant injured his

shoulder as a result of the incident in question. Therefore, the decision of the Administrative Law Judge finding that the claimant sustained a compensable shoulder injury on August 20, 2005, is hereby reversed.

Finally, the preponderance of the evidence fails to support a finding that the claimant is entitled to additional temporary total disability benefits as a result of his compensable back injury. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Although the claimant's treatment physician, Dr. Adams, assigned the claimant some precautionary work restrictions, he did not take the claimant off of work. Moreover, the record reveals that after approximately ten days following the incident in question, the claimant failed to take medications of any kind for his condition for approximately three months. During this period of time, the claimant's subjective

symptoms reportedly subsided. Further, the claimant applied for and has received unemployment benefits from October 2005. The claimant admittedly sought these benefits within the restrictions placed upon him by Dr. Adams. This supports a finding that the claimant was not totally incapacitated from earning wages, nor did he consider himself to be totally incapacitated from earning wages during the time in question. Finally, claimant has work experience in positions that are less physically demanding than the position in which he worked for the respondent employer. Based on the foregoing, the claimant has failed to prove that he was totally incapacitated from earning wages during the period of time that he claims temporary total disability benefits. Accordingly, the decision of the Administrative Law Judge denying temporary total disability benefits should be, and hereby is affirmed.

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 only sustained a strain, that the claimant did not sustain a compensable shoulder injury, and denying requested temporary total disability benefits. Specifically, I find that the Majority improperly rules that the claimant did not sustain a compensable shoulder injury, that they ignore pertinent medical evidence indicating that the claimant has a bulging disc that is directly related to his admittedly compensable injury. Likewise, I find that they prematurely cut the claimant off from receiving medical benefits necessary to show the true nature of injury and err in denying temporary total disability benefits when there is no evidence to indicate that the claimant is out of his healing period or substantially able to replace his wages.

The claimant worked as a general laborer in construction for the respondents. On August 30, 2005, the

claimant fell off of a ladder, caught himself, and was injured.

The claimant testified that after the incident, he felt instant pain in his ribs and that he lost sensation in his legs. He also said that he felt popping in his back and bruising to his ribs and described that he felt heat in his low back and that his back felt like it needed to "pop".

The claimant called in sick to work the next day. He returned to work on Thursday for some two to three hours. The following day, Ashman told the claimant that he would be required to go to a physician and that he would not be allowed to return to work without a release from a physician.

The claimant initially sought medical treatment on September 6, 2005. Ashman admitted going to the doctor with the claimant and said that was the last time he saw the claimant. The claimant said that Ashman accompanied him to the doctor and that he paid for his prescriptions afterward. The claimant said that after that visit, the respondents refused to pay for any additional treatment.

The physician's report from September 6, 2005, indicates that the claimant reported straining his back after falling off a ladder and catching himself. The claimant reported the incident occurred when he was at work. The claimant reported pain radiating through his legs and that his legs were giving way. The claimant was noted to have tightness in his back and was diagnosed with a lumbosacral strain and spondilolisthesis at L5/S1. An x-ray revealed mild levoscoliosis of the lumbar spine. He was instructed to use moist heat on his back and to avoid repetitive bending, twisting, and lifting more than 10 pounds. He was also prescribed Naproxin and Skelaxin and referred for an MRI.

An MRI was performed on September 14, 2005, and revealed a bulging disc at level L5-S1. The diagnostic report provides,

There is disc desiccation at L5-S1 with a disc bulge more prominent to the right of the midline. This combines with facet hypertrophy and causes right lateral recess stenosis.
At the remaining levels, there is no evidence of disc bulge or herniation.

There is no spinal or foraminal stenosis.

The bottom of the report indicates that the claimant was being referred to see Dr. Capocelli, a neurosurgeon on November 16. Finally, another physician's note dated September 19, 2005, indicates that an x-ray of the claimant's lower back showed mild curvature of the spine.

The claimant testified he has not returned to work and that he continues to have trouble with his back. He said that he still has a sensation where his back feels like it needs to "pop" and that he feels like something is "grinding" in his back. He relayed that he has back spasms that go into his legs, but that he does not lose sensation in his legs to the extent that he has no control over them. He also indicated that when he wakes up, he has stiffness in his back and that it limits his activities, including his ability to stand without pain in his back. He further indicated he has been unable to seek treatment with Dr. Capocelli due to lack of financing.

The claimant said he started drawing unemployment benefits around October or November and said that he had

looked for work that complied with the restrictions set forth by his physician. However, despite these attempts, he has been unable to secure work.

While I agree with the Majority that the claimant sustained a compensable injury, I simply cannot agree with their conclusion that the claimant only sustained a sprain to his back. Curiously, the Majority fails to provide any explanation as to why they conclude the claimant's injury was simply a strain. In my opinion, the medical records do not support such a finding. Rather, I find that the claimant sustained a bulging disc as a result of his compensable injury. Additionally, because the claimant has not yet seen a neurologist, the severity of the claimant's bulging disc and how much treatment he will need is unknown.

As of the claimant's initial date of treatment, he was diagnosed with a sprain. However, even at that time the claimant was noted to have spondilolisthesis. Likewise, he was referred to have an MRI, which indicates that it was suspected that he had a more severe injury. When the claimant submitted to the MRI, it revealed a bulging disc at

one level. As the claimant had no history of having back problems the only logical conclusion is that the work-related injury caused the bulge. Finally, I note that the claimant was referred to a neurologist after the MRI. He also said he continues to suffer from symptoms and has been unable to see the neurologist because he has no money and the respondents refuse to pay for treatment.

Certainly, the claimant's need for treatment by a neurologist indicates that his condition is more than a simple strain or at a minimum that the true nature of his condition has not yet been fully ascertained. Accordingly, I find that to now issue a decision finding that he only sustained a strain is premature and ignores the medical evidence to the contrary.

I note the respondents' argument that the claimant's levoscoliosis was congenital in nature and that his bulging disc was caused by degeneration rather than due to an injury that occurred due to an injury at work. There is nothing in the record to indicate that the claimant's levoscoliosis was congenital in nature or that it would

cause him to have a bulging disc. Likewise, the medical records are simply not consistent with a condition that is degenerative in nature. Specifically, I note that the claimant only had desiccation and a bulge at one level in his spine. This is contradictory to a degenerative condition, in that, degeneration is usually seen in multiple levels of the spine rather than only at one level. Likewise, as previously mentioned, the claimant had no history of having back problems, which indicates that his condition was brought on by falling off the ladder. Furthermore, while the claimant's physician did not specifically indicate that his bulging disc was related to the work-related injury, such an opinion is not required in order to show that a claim is compensable.

I further find the Majority errs in denying the claimant additional medical treatment. I find that to deny the claimant additional medical treatment in this instance would be to encourage employers to avoid paying for medical services designed to diagnose the nature and extent of the claimant's injury. This is directly in contradiction to Ark.

Code Ann. §11-9-508 and the multitude of cases interpreting it.

Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include those that are necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See, Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

In this instance, it is clear that the claimant's treating physician has recommended treatment to ascertain the true nature of the claimant's injury. Yet, the Majority ignores this recommendation to jump to the conclusion that the claimant only sustained a strain.

Finally, I find that this case is similar to the case of Gansky v. Hi-Tech Eng'g, 325 Ark. 163, 924 S.W.2d 790 (1996). In Gansky, the claimant was 34 years old. He had a prior injury to his low back which resulted in a 5% impairment rating. The claimant then began working for the respondent and was injured. He underwent an MRI which revealed that he had bulging discs. Dr. Gansky indicated the claimant had a cervical and lumbar herniated disc with nerve root compression, but later indicated that the claimant did not have a "significant disc herniation." He was referred to a neurosurgeon and prescribed physical therapy. The physical therapist released the claimant from care, indicating that the claimant's symptoms had resolved except for a, "minimal amount of soreness in the lumbar region" and a "minimal headache." The claimant also underwent other testing which his neurosurgeon described to be "suspected cervical strain syndrome." The neurosurgeon also noted the claimant's condition was not resolving satisfactorily at his last visit. The claimant returned to work but developed neck and back pain. In February 1993, the claimant returned to the

neurosurgeon, who recommended he undergo an FCE. At that point the respondents cut the claimant off from further treatment.

On appeal, the claimant argued that the Commission and the Court of Appeals erred in finding he was not entitled to additional medical or temporary total disability benefits. In reversing the Court of Appeals and the Commission, the Supreme Court of Arkansas indicated that the Commission erroneously discounted the neurologist's opinion that the claimant needed an FCE. The Court further noted that Dr. Gocio's opinion was based on a final assessment from that FCE. Finally, the Court also noted that the Commission had erroneously failed to give appropriate weight to the claimant's ongoing symptomology. Id.

Likewise, in the present case, it is evident that while the claimant was initially diagnosed with a strain, he was also diagnosed with spondylolisthesis and referred for an MRI and then a neurologist to determine the extent of his injury. In fact, on the date that the claimant was referred for the MRI, the physician specifically indicated the

claimant was to return after the MRI and that she was unsure what the length of treatment time would be. However, due to the respondent's controversion, the claimant was able to get the needed care. Additionally, I note that just as in Gansky, there is no indication that the claimant's symptoms ever resolved or that the claimant had exited his healing period. In fact, the only reason the claimant has not sought additional care is because of the respondents' refusal to provide him with the needed care. In fact, I find that the facts in the present case are more clear than those in Gansky. In Gansky the claimant had a history of back problems. Yet, in the present case it is undisputed the claimant had no prior back problems and that he has been recommended to have further treatment, indicating that the only plausible reason for his condition is the compensable injury. Additionally, in Gansky the claimant's symptoms were resolving, there is simply no evidence that the claimant's condition was resolving at the time he was denied treatment.

Next, I address the claimant's entitlement to temporary total disability benefits. 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).

A 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).

The medical records show the claimant was in his healing period and unable to return to work after his injury. The claimant testified that he attempted to return to work but that he was unable to because he was in such

severe pain. The doctor's note from September 6, 2005, indicates that the claimant was restricted from repetitive bending, twisting, and lifting over 10 pounds. Likewise, the claimant was referred for an MRI which revealed a bulging disc. It is undisputed that the respondents refused to provide further care for the claimant and that the claimant has been recommended he have further care. Accordingly, I find that he is still in his healing period.

I further find that the claimant is unable to return to work or replace the wages he was earning at the time of the injury. The claimant testified that he only had experience working in manual labor and was performing manual labor for the respondents at the time of his injury. As manual labor would inherently require the claimant to perform the tasks of repetitive bending, twisting, and lifting, I find that it is unlikely that he would be able to substantially replace his wages for the time period he is requesting benefits.

Likewise, I note Ashman's testimony that he told the claimant he could not return to work until he had a

physician's note releasing him to return to work. This illustrates that the claimant would be unable to replace his income due to an inability to work. There is no medical evidence to indicate the claimant was ever released to return to work without restriction and the claimant credibly testified that he was unable to work and that no physician had released him to return to work.

Finally, I find the Majority errs in finding the claimant could not be unable to work because he received unemployment benefits. I find this argument to be unsubstantiated. Furthermore, I note that just because a claimant is receiving unemployment benefits, that does not indicate he is not entitled to receive temporary total disability benefits.

Recently, in the case of William F. Warren v. H & L Poultry, LLC, ___ Ark. App. ___, ___ S.W. 3d ___, (2006), the Arkansas Court of Appeals indicated that in a controverted claim, a claimant is not precluded from receiving unemployment benefits simply because of their application. The Court indicated as follows,

Appellees extrapolate from that statement in *Allen Canning*, and argue on appeal to this court, that to be eligible for unemployment compensation an applicant certifies that he is ready, willing, and able to work, and that this assertion is not compatible with a claim of total incapacity. They urge us to accept the premise that an employee who asserts in the employment security forum that he is capable of working is precluded from asserting to the Workers' Compensation Commission that he is not capable of working. However, our legislature addressed this situation for an injured employee whose claim is controverted. Arkansas Code Annotated §11-9-506(b) clearly states that if a claim for temporary total disability is controverted, and is later determined to be compensable, temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits.

Unlike *Allen Canning*, in the present case no medical evidence supports the conclusion that appellant had reached the end of his healing period. We do not agree that *Allen Canning* stands for the proposition that an employee is precluded from asserting a claim for unemployment benefits during the pendency of a controverted worker's compensation claim. Such an interpretation would render meaningless our statute that specifically allows

temporary total disability benefits when a claim is controverted.

In the present case, the respondents controvert the claimant's receipt of temporary total disability benefits, indicating the language of §11-9-506(b) is applicable. Additionally, as previously discussed, the claimant was told he could not return to work without a doctor's release and he was unable to provide one because the respondents would not provide him with medical care in order for him to get well enough to receive a release. While the claimant testified that he received unemployment benefits and applied for other jobs, that does not indicate that he should be denied temporary total disability benefits. Rather, all it indicates is that he was willing and able to perform any work that was available so long as it conformed with his physical restrictions. Despite this willingness to return to work, his medical restrictions were such that he was unable to return to work or substantially replace his wages.

Finally, I find the Majority errs in finding that the claimant did not sustain a compensable shoulder injury.

Admittedly, the compensability of the claimant's right shoulder was an issue that was listed pursuant to the pre-hearing order. However, the Administrative Law Judge did not indicate whether the claimant's right shoulder was compensable in her decision. Specifically, I note that the Administrative Law Judge, in her Findings & Conclusions, indicated that the claimant had sustained a compensable low back injury. She also awarded benefits specifically related to that injury. However, the Findings & Conclusions are silent as to whether the claimant sustained a right shoulder injury. Likewise, the remainder of the decision fails to specifically state that the claimant sustained a compensable injury to his right shoulder. Accordingly, I find that the Administrative Law Judge did not make a finding with regard to the right shoulder and that to make a finding at this level would be in error. Additionally, I note that neither party appealed a finding that the claimant's shoulder was compensable, which supports the proposition that the Administrative Law Judge did not make any finding regarding the claimant's right shoulder.

I further find that neither party has raised the compensability of the claimant's shoulder as an issue on appeal. As such, I find that even if one concludes the Administrative Law Judge made a finding regarding the claimant's shoulder (a finding I do not make), then the Commission should not address the issue because it was abandoned on appeal.

While both parties appealed, it is evident that neither raised the compensability of the claimant's shoulder as an issue on appeal. The claimant filed a general notice of appeal. However, their brief does not mention the compensability of the claimant's shoulder. Likewise, as a finding that the shoulder was compensable would be in the claimant's favor, he certainly would not be appealing that issue.

The respondents' notice of appeal indicates that they are appealing, "The Administrative Law Judge's finding that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on August 30, 2005 ...". They further go on to indicate

they are appealing the finding that the claimant is entitled to additional medical care in relation to his compensable injury. Yet, there is no indication that they are appealing any finding regarding the claimant's shoulder. Likewise, their brief does not raise the issue. Accordingly, I find that it is in error for the Commission to now raise the issue on its own accord.

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner