

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511949

NICHOLAS WEBBER, EMPLOYEE	CLAIMANT
DIEBOLD, INC., EMPLOYER	RESPONDENT
ZURICH AMERICAN, INSURANCE CARRIER	RESPONDENT
CRAWFORD & COMPANY, TPA	RESPONDENT

OPINION FILED OCTOBER 29, 2007

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

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

Respondents represented by the HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed April 19, 2007. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including October 14, 2005, the relationship of employee-employer carrier-third party administrator existed between the parties.

3. On appropriate dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$466.00 for total disability and \$350.00 for permanent partial disability.

4. On or about October 14, 2005, the claimant sustained a compensable injury to his lumbar spine, in the form of a herniated disc at L5-S1 with resulting nerve root impingement. Specifically, the claimant has established the actual existence of this physical injury by medical evidence, which is supported by objective findings. He has further proven by the greater weight of the credible evidence that this particular injury arose out of and occurred in the course of his employment, caused internal physical harm to his body, and involved his "back". He has also proven that this compensable injury was the major cause of his need for medical treatment and the major cause of his temporary total disability.

5. The medical services provided to the claimant for his compensable lumbar injury by and at the direction of personnel at the Cornerstone Family Medical Clinic and by and at the direction of Dr. Arthur Johnson represent reasonably necessary medical services, under Ark. Code Ann. §11-9-508. Subject to the provisions of this subsection, the expense of these services is the liability of the respondents herein, subject to the Commission's medical fee schedule.

6. The claimant has been rendered temporarily totally disabled as a result of his compensable lumbar injury for the period beginning October 20, 2005, and continuing through at least February 20, 2006. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period, he continued within his healing period from the effects of his compensable injury and was rendered totally disabled as a result of this injury.

7. The claimant has received group disability benefits that would coincide with the workers' compensation benefits herein awarded. Pursuant to Ark. Code Ann. §11-9-411, the respondents would be entitled to an off-set or reduction for such benefits, but must place in reserve an amount equal to this offset or reduction.

8. The respondents have denied the occurrence of any compensable injury to the claimant's back or lumbar spine and have controverted this claim in its entirety.

9. A reasonable fee for the claimant's attorney would be the maximum statutory attorney's fee on all controverted benefits herein and hereinafter awarded directly to the claimant.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the April 19, 2007, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his lumbar spine on or about October 14, 2005. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his lumbar spine on or about October 14, 2005.

The claimant was employed by the respondent employer as a service technician. In his job responsibilities, the claimant was required to go to ATM machines and service the equipment. The claimant asserts that he sustained a compensable gradual onset back injury on or about October 14, 2005.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Supp. 2005). See, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744); see also, Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000). If the claimant does not contend that the injury is the result of a specific incident that is identifiable by time and place of occurrence, then the claimant must

show that the injury is a gradual onset injury under Ark. Code Ann. §11-9-102(4) (A) (ii) through §11-9-102(4) (A) (vi). In order to prevail on a gradual onset claim, the claimant must prove by a preponderance of the evidence that he sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death. In addition, the claimant must prove by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-02(4) (E) (ii) (Supp. 2005) Finally, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D); see also, Hapney, supra.

If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, he fails to establish the compensability of the claim and the claim must be denied. Reed, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. § 11-9-704(c) (3). Under the gradual onset exception to the specific incident requirement, the claimant must

establish a causal connection between his injury and his employment by medical evidence supported by objective findings and he must establish that his injury is the major cause of his disability or need for treatment.

The claimant asserts that he sustained a back injury at work. He is unable to state with specificity when it happened therefore he is contending that he sustained a gradual onset injury. On October 14, 2005, the claimant sent an email to his supervisor stating that he was sick and would not be into work. The email sent to the claimant's supervisor, Mike Johnson, on Monday, October 17, 2005, stated:

Mike,

Im out sick today, Had to call it a day Friday afternoon in being to sick to continue. I will return tomorrow Tuesday but could be slow. I have an appointment with the doc this Thursday morning at 10/20/05 9:00 there be running lots of tests. Should get out and back to work for the afternoon.

Thanks Nick Webber

When the claimant was questioned at the hearing and asked why he could not continue to work, he replied, "I was basically feeling really ill with stomach and back and real bad pains in my leg - right leg."

The claimant offered the excuse that the reason why he told his supervisor that he was sick as opposed to having a back injury was because he was originally from England and they have different terminology. The claimant has been in the United States for eight years and he also had a prior hernia claim while working for the respondent employer. The claimant testified that he actually told his supervisor with the hernia he knew exactly what was wrong with him and that he needed treatment.

Q. With regard to the second hernia, did you realize that you had a work-related injury?

A. Yes.

Q. And when you called Mike Johnson did you tell him, --

A. Yes.

Q. -- "I've hurt myself at work"?

A. Yes, I did.

Q. "And I would like to get medical treatment"?

A. I told him that I had a hernia.

A. And needed to go to the doctor?

A. I needed to put up a claim, yes.

Unlike the claimant's prior workers' compensation claim, he arguably assumed his supervisor could read his mind when he said he was sick. He even admitted he did not plan to file a claim for his back treatment:

Q. And when you sent this e-mail to Mike Johnson on October the 17th of 2005, did you indicate anywhere in that e-mail that you wanted to go get medical treatment for a work-related incident?

A. I spoke to him on the phone.

Q. You spoke to him on the phone at that time?

A. Yes. I was a team leader. I spoke to Mike virtually daily.

Q. Okay. As far as this e-mail is concerned, which is what your attorney has introduced here today, did you put anything in there indicating that you thought you had a work-related injury and needed to get medical treatment?

A. I was sick.

Q. Just answer my question yes or no.

A. Define the question.

A. Did you in this e-mail put anything in here that would indicate that you wanted to get medical treatment associated with a work-related injury?

A. I thought I did.

Q. You said you had an appointment with a doctor. Did you want them to pay for it?

A. No. I would pay for it. I wasn't expecting workers' comp to even pay anything. They never did on the first hernia.

Q. Well, this wasn't a hernia. This was a back injury.

A. I understand.

Q. Well, were you expecting them to pay for your back injury or your knee injuries?

A. No. I didn't think that they would.

Q. Were you planning on filing a workers' compensation claim at that point in time?

A. At that time, no.

While the claimant maintains in the testimony cited above that he spoke to Mike Johnson following the e-mail, Mike Johnson testified at the hearing and indicated that the claimant did not tell him that his back was the reason for him taking off work:

Q. If you would, please, Mike, let's go back to October of 2005, and October 14th, I believe, is the date that he's now claiming that this occurred or culminated. He's introduced an e-mail to you, I think, that was dated October 17th of 2005.

A. Uh-huh.

Q. Did you in fact see that e-mail?

A. I think I remember it, uh-huh.

Q. And when you got that e-mail what, if anything, did you think about it?

A. I was under the impression that he was ill as flu, stomach, whatever, and needed to be off work, and that's common. I mean, it happens with technicians. That's just something we deal with.

Q. And he indicated in his testimony today that he actually talked to you about that. Did you talk to him? Do you recall talking to him?

A. I don't recall it. We could have had a conversation. I just don't specifically recall it.

Q. In that conversation do you recall him indicating anything to you about problems associated with his back being his reasoning for having to be off work?

A. No.

The claimant also testified that he did not report his alleged injury as being work-related until October 27, 2005. When asked what he told Mike Johnson when he reported it, the claimant replied, "That basically I couldn't work because of the things that [the physician's assistant] had found and that basically more work would have really caused me more serious

problems." He supposedly then told his supervisor that, "Basically getting in and out of my truck," was what caused the back problem. However, when Mike Johnson was asked about the "getting in and out of the truck" issue, he testified:

Q. Up until the time that he had surgery, which I think was -- I think he said December 16th of 2005, did he indicate to you that he had a work-related injury associated with his lower back?

A. He had had the hernia previously in the summer and had been off work on and off due to some of that, but I was never aware about a back issue until he started mentioning about his knee and about - he asked about getting a step installed, but that was early on, though.

Q. No, let's talk about that step for a few minutes. They've introduced some pictures here today of the truck, and he indicated that he was complaining on a regular basis about wanting a step. Was that because of problems with his having with his back?

A. No. That was because of his knee. He kept bumping his knee and having problems lifting himself in and out of his truck is the way I understood it.

Q. Prior to October the 28th, which I think is when he actually filed his claim or reported his work-related

injury to the folks out at Diebold, prior to that did he ever mention to you that he was having difficulty doing the job, that it was hurting his back or anything like that?

A. No. Only his knee was where I heard most of the problems and he - and that's when he asked about putting a step on and I had told him to find one.

Q. Did you ever tell him that, no, you wouldn't put a step on there?

A. No.

Q. When you say told him to find one, why would you tell him to do that?

A. Well, we typically - that's a technician's responsibility is the upkeep and maintenance of the truck, which would be - and I just asked him to find one aftermarket that he could have installed reasonably priced and left it pretty well at that - at his discretion.

Q. And you all - or Diebold would have reimbursed him or paid for it?

A. Sure.

Q. Did he ever have any restrictions or modifications in his job associated with problems that he was having with his back?

A. No.

Q. Did he ever come to you and go, you know, "I can't do this anymore, getting in and out of my truck. My back is killing me"?

A. No.

Q. When he said he was having problems getting out of his truck, what part of his body was he saying that was bothering him?

A. His knees.

Q. He never said anything about his back?

A. No.

Q. How many technicians did you all have out there?

A. Roughly 40.

Q. And that would be back in the 2005 era?

A. Uh-huh.

Q. You need to say yes for the record.

A. Yes.

Q. Anyone else out there have a similar problem?

A. No.

Q. Anyone else have problems with their knees or their back getting in and out of the truck?

A. No.

The medical records reflect that the claimant reported having problems with his right knee and back since his hernia surgery in July. He denied the same on cross-examination:

Q. Now, you had an MRI done, it looks like, November the 2nd of 2005. Does that sound about right?

A. Yes.

Q. And at that point in time it looks like you were reporting to the Summit Medical Center folks in Van Buren that you've had problems with your lower back and your right knee since you had hernia surgery back in July. Is that what you told them?

A. No.

Q. So they come up with that history how?

A. I don't know.

Q. Just made it up?

A. I don't know.

Q. Did you tell them about your hernia surgery?

A. Yes. They needed to know that before they done the procedure and MRI.

A further review of the medical records reflect that the claimant was treated for his right knee condition by Dr. Frankie Griffin. Dr. Griffin's note of November 28, 2005, reflected that the claimant reported the knee pain as being associated with getting in and out of his truck and with trapping his knee in a door of his pickup. It is also interesting to note that the claimant told Dr. Griffin that on October 17, 2005, he had some right knee pain that "hurt me all the time." This is the exact same date the claimant sent the e-mail to Mike Johnson, saying he was sick.

While the claimant was somehow able to tell Dr. Griffin what caused his knee problems, he did not do the same when he started seeing Dr. Arthur Johnson for his back. The claimant first saw Dr. Johnson December 13, 2005, and complained of problems since October of 2005 with no mention whatsoever of a work-related injury. While the claimant has submitted a report from Dr. Johnson dated January 4, 2007, saying that the "repetitive activity" of getting in and out of the truck most likely contributed to his condition, this opinion is not based on an accurate history. The claimant never testified to having to get in and out of his truck in a repetitive manner; in fact, he described his job duties as follows:

I worked on ATMs, which is pretty much like a mini vault, so basically a lot of kneeling, squatting, picking objects up from the floor, a lot of ladder work and basically stretching.

In my opinion, it takes conjecture and speculation to find that the claimant injured his back while getting in and out of his truck. The claimant had longstanding degenerative changes in his lumbar spine. And, as we know, conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The claimant's supervisor could not recall the claimant ever complaining about his back hurting getting in and out of his truck; only that the claimant's knee bothered him getting in and out of his truck. Therefore, when I consider all of the evidence in the record, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back on or about October 14, 2005. Accordingly, I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the

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evidence that he sustained a compensable injury.

KAREN H. MCKINNEY, Commissioner