

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501842

ROGER WILLIAMS, EMPLOYEE	CLAIMANT
CROCKETT BUSINESS MACHINES LLC, EMPLOYER	RESPONDENT
CINCINNATI CASUALTY CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 8, 2007

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

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed September 15, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. That the employee/employer/carrier relationship existed at all relevant times, including February 10, 2005.

3. Claimant has failed to establish by a preponderance of the evidence that he had a compensable injury on February 10, 2005.

4. Respondent has fully controverted the payment of all additional benefits.

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.

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.

Therefore we affirm and adopt the September 15, 2006 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 Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's September 15, 2006 opinion finding that the Claimant failed to establish by a preponderance of the evidence that he sustained a compensable injury on February 10, 2005. Based upon my de novo review of the record, it is my opinion that the Claimant has met his burden of proving a compensable injury.

The Claimant began working for the respondent-employer around March 1, 1998, after his brother bought the company. Claimant was hired to be the general manager, which meant that he had to handle anything that needed to be done. He oversaw sales, service and

administration, he helped service machines, setup machines and perform demonstrations. He was required to sell a full quota as a normal salesman. Claimant has a college degree in business management. Prior to working for the respondent-employer, Claimant worked as a mine foreman from 1974 through 1995. Although Claimant worked in Little Rock, he maintained dual residency in Kentucky.

In 2002, Claimant began having back problems which ultimately culminated in a lumbar laminotomy, facetectomy, and nerve root decompression at the L4-5 level on March 11, 2003, by Dr. David Reding. Notably, in Dr. Reding's operative report, he reported that the L4-5 disc was not ruptured. In fact, during the operation Dr. Reding saw that "[t]he annulus beneath the root was actually flat. I could not identify a disc rupture." At that point, Dr. Reding took an x-ray to confirm that he was looking at the correct lumbar level. Dr. Reding further reported, "[t]he annulus appeared completely intact, although it was somewhat soft and movable. Eventually I elected not to violate the annulus at all." A repeat MRI on May 23, 2003, found no herniation of the L4-5 disk. Claimant was off work for six to eight weeks and then returned to work at full duty. On July 21, 2004, Claimant returned to Dr. Reding

complaining of an exacerbation of back pain. At that time Dr. Reding reported that Claimant's prior back pain had resolved over the past year and that he had done "very well." Dr. Reding examined the Claimant and found that his straight leg raising was normal as were both his knee and ankle reflexes. Dr. Reding believed that any back pain Claimant was having at that time was musculoligamentous and did not warrant any additional testing. On January 4, 2005, Claimant went to his family doctor, Dr. Jay Holland, complaining of pain in his left upper buttock and low back with occasional spasms in his left calf. Claimant denied any parasthesias. Upon examination by Dr. Holland, Claimant again exhibited a negative straight leg raise.

At the hearing on this matter, the Claimant testified consistently with the physician's reports that following his back surgery in 2003 he returned to work and that he progressively got better. Claimant's job duties did not change. Eventually Claimant was right back to the same routine as he grew stronger and better. On February 10, 2005, Claimant was called upon to help an employee, Mario Sherrell, move a machine off of a shelf. Claimant recounted that it was during this time that the respondent-employer had bought out a competitor and that it was necessary to physically merge the

inventory and that he was involved in physically moving the equipment. Both Mario Sherrell and the Claimant testified about how the injury occurred. Mario Sherrell testified that he was a co-worker with the Claimant and that prior to the incident on February 10, 2005, he had been employed with the respondent-employer for about sixteen years. Mr. Sherrell was terminated approximately two months before the hearing. Mr. Sherrell's relevant testimony is set out below:

Q. Can you tell the Judge in your own words what happened with regard to the moving of that equipment?

A. Okay. That morning I was sent out to do a service call in town in Little Rock, and I done the call, then I was called in to come pick up a machine to go out of town, which was - - if I remember right, it was El Dorado. And they have a machine which is over 200 pounds, and the machine that I have to load onto a gurney, I couldn't do it because it was too wide to get to, so I had to have help. And I looked around. There was no technicians available and there was only women there and Roger, so I asked Roger to, you know, help me put it on the gurney. And he got on one end and I got on the other end, we lifted it up, and right at the time we started coming down, I heard a pop and he gave way and it sort of slipped down toward the gurney, so we sat it down, and I guess that's when his back popped. And I heard that before because I was an EMT in the fire department, so I know what it sounds like.

And so after that, I notice that the machine didn't have a part I needed, which is called a roll tape unit, which is just part of the machine, and so I had to get the machine back up to get another machine. And what I ended

up doing is, I was trying to get it up by myself and Roger came and helped me finish putting the machine back on there just the right corner because I knew he was hurting already. So we put the machine back up, and after that, I just went and found a machine and took the part out of the machine instead of having to move the machine again.

Q. How was he behaving after that incident?

A. He was hurting.

Q. Can you describe for the Judge what he was doing? How did you know he was hurting?

A. Because he was holding his lower back and then he was sideways, he was walking sideways with lean and all of this, and I felt bad because I thought, you know, I helped cause it, you know, but it was just the lifting of the machine.

Q. Okay. Before that - - before that day of the week before, had you noticed him holding his back or complaining of back pain or walking funny or anything like that?

A. No.

The description of the incident by the

Claimant is set out below:

Q. We've already heard Mr. Sherrell's testimony, but if you could, please tell the Judge in your own words what occurred on February the 10th of 2005.

A. I was in my office doing paperwork and he came in said he needed to get a machine off of a - off the shelf.

Q. You're referring to Mr. Sherrell?

A. Mr. Sherrell. And I went back and attempted to help him or help him get it off the shelf. I wasn't the one who pulled it off, but I got hurt.

Q. What happened?

A. We were - the shelves are like - I'm estimating, like two, four foot all the way to the ceiling, and we were on like the second shelf. As we were pulling it out of there, once I got it out there, it's about the size of this table. I had my hand - and it was a little bit too heavy for me, and I kind of stumbled and fell back and it actually fell, trapped my legs and put me against the rack behind there. And we had no other choice but to route it on up to get it off of me. And the minute I did that, I knew - I knew instantly that I hurt something because I - - my leg was - - it was like I peed on myself. It was like a warm sensation went down my leg and within ten, 15 minutes the pain was excruciating and I went to the emergency room.

Q. You heard Mr. Sherrell's description of the incident today. Would you agree with his version of the events?

A. Pretty much. I don't really know about the popping because, I mean - - but other than that, I do know I got hurt there immediately.

Q. And were you able to help him lift that machine back up on the gurney or anything?

A. I did. We put it down there. I mean, we already had the weight off the shelf. It was either set it on the gurney or set it back on the shelf. The trauma would have been the same.

Q. Were you in pain when you did that?

A. I was by then, the warm sensation was down my leg. It was more of a numbing feeling. I wasn't in as much pain as I was in just a few minutes after that. I wasn't, at that very moment, in no excruciating pain.

Q. How long was it before the pain started to come on?

A. Just a few minutes. Five or ten minutes, my muscles started tightening up and it actually physically drew me over to one side. When he came back in just a minute, I told him I got hurt and we need to set it up there, but then I was physically drawn by my muscles to one side.

Q. So what did you do then?

A. I sat there a few minutes to see if it was just maybe a muscle pull, but the pain continued to get more and more and more, and it got to where it was bringing tears to my eyes. And I told the girls I was going to have to go to the emergency room.

Q. Did you do that?

A. I did.

Mr. Sherrell also testified that shortly after the incident, Claimant was exhibiting pain behavior, holding his low back and leaning sideways. Both the Claimant and Mr. Sherrell testified that prior to the incident Claimant had not complained of his back hurting.

When the Claimant arrived at the hospital on the day of the incident, he described the accident to the emergency department personnel as follows:

This is a 49-year old white male who states he was lifting a machine today when it fell hitting him on his left thigh. He is not sure exactly how he turned, caught most of it on his leg. However, since then he has developed some left hip pain going down his left leg and calf and feels like his calf is going to cramp up on him. He had back surgery about 2 years ago and states it feels the same as it did before he had his surgery. He has some little

twinges in his back recently but nothing that required any medication.

The emergency room physician noted that the Claimant had trouble standing from a sitting position and that he has some pain with straight leg raising on the left. Claimant then followed up with his family doctor, Dr. Jay Holland, on February 14, 2005. Dr. Holland took a history which noted that the Claimant's previous injury (on January 4, 2005) had lasted two days. Dr. Holland examined the Claimant and found that unlike the visit on January 4, 2005, the straight leg raising test was positive on the left at 70 degrees. Dr. Holland then referred the Claimant to Dr. John Wilson. Dr. Wilson noted that the Claimant was referred for "treatment of injuries sustained to his back on February 10, 2005. Mr. Williams [Claimant] relates he was moving a 200 pound machine and began to ha[v]e pain in his left leg down to his calf." Dr. Wilson also noted the Claimant had previous back surgery by Dr. Reding and that "[h]e has done well following that surgery until this episode." Dr. Wilson's examination of the Claimant also revealed a positive straight leg raise on the left.

The Claimant then returned to his home in Kentucky, where he was sent for an MRI on March 8, 2005.

The MRI exam had the following impression:

- 1) Signs of degenerative disc disease involving L3-L4, L4-L5 and L5-S1 disc interspaces is seen.
- 2) Mild diffuse bulging annulus at the L3-L4 disc interspace is accompanied by a small annular tear.
- 3) Moderate sized left paracentral disc protrusion or herniation with accompanying inferior subligamentous extrusion is seen at the L4-L5 disc interspace.
- 4) Signs of an adjacent left sided hemilaminectomy defect is seen at the L4-L5 disc interspace.
- 5) Small right paracentral herniated nucleus pulposus was also identified at the L5-S1 disc interspace.

Dr. Moez Premji, a physician in Tennessee referred the Claimant to Dr. Krishnaswamy, a neurologist in Kentucky. Dr. Krishnaswamy saw the Claimant on March 21, 2005, and stated the following with regard to the Claimant's history of present illness:

This is a 49-year old gentleman with low back surgery three years ago, that presented with history of back pain. He has been having severe back pain for the past 4-6 weeks. He states that the pain is in the lower back, radiated down to his left back of the thigh to his big toe. Indicates that he had surgery three years back and he had pain on and off, but he did not have pain like this. He states that whenever he bends, the pain increases. He is on Percocet which helps to some extent. There is no history of bowel or bladder

incontinence. There is no history of any focal weakness. Denies any injury.

Dr. Krishnaswamy noted, again, that the straight leg raise was decreases on the left and diagnosed "[b]ack pain with left L4-L5 radiculopathy, disc herniation at L4-L5 disc interspace." Next, Claimant was seen by Dr. James Bean, a neurosurgeon, on April 4, 2005. Dr. Bean indicated that Claimant had a "history of pain in his left hip and calf for eight weeks. It began probably around January, but it was early February when it became more severe."

Dr. Jose Echeverria, Claimant's family doctor in Kentucky, authored a report dated April 7, 2005, which unequivocally stated that, after a comparison of Dr. Reding's operative note of March 11, 2003, with Claimant's most recent MRI, that the second lesion suffered on February 10, 2005, is different from the one that was taken care of in March of 2003. Dr. Echeverria also reiterated the history of Claimant having returned to work following his March 2003 surgery until the work incident on February 10, 2005. Dr. Moez Premji saw the Claimant again on April 13, 2005, and he also noted that "[c]linical exam shows new lower extremity deficits which were absent after Dr. Reding's surgery, more

li[k]ely to have resulted from recent injury. MRI also shows new changes.”

A letter was sent to the Claimant from the respondent-employer requesting information from his doctor in order that he may be eligible for FMLA leave. That letter indicates that the respondent-employer was aware that Claimant began missing time from work on February 10, 2005. In response to that letter, Dr. Echeverria indicated that the Claimant is under a significant risk of injury/re-injury if he returned to his job duties and that there is also a significant risk that such an injury/re-injury would be severe. On the date of the injury, the emergency room physician wrote a note taking Claimant off of work from February 10, 2005 through February 14, 2005. Dr. Holland took Claimant off of work from February 14, 2005 through February 21, 2005. Both Drs. Premji and Echeverria authored off-work slips taking the Claimant off of work indefinitely from February 28, 2005 and February 10, 2005 respectively.

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). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Based upon the evidence in the record, it is my opinion, that the Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury on February 10, 2005. The injury arose while the Claimant was helping a co-worker to remove an approximately 200 pound machine off of a shelf. Mr. Sherrell, the co-worker, credibly corroborated the Claimant's description of the incident. Helping a co-worker to move a machine is clearly within the course and scope of the Claimant's employment as general manager with the respondent-employer.

The Claimant went to the emergency room on the date of the incident. Claimant credibly accounted to

the emergency room personnel that he had injured himself while lifting a machine at work. The emergency room assessed the Claimant as having an acute lumbar strain, which is clearly a harm to the body requiring medical services.

The record contains medical evidence supported by objective findings of an injury on February 10, 2005. It is undisputed that Claimant had a prior injury to his low back in 2002 which resulted in a surgery in 2003, but there is objective evidence of a new injury from the February 10, 2005 incident. The Claimant has had at least four MRI's, three before the February 2005 incident and one after. After reviewing the MRI reports it is clear that there is objective evidence of a new injury after the February 2005 incident. Claimant's first MRI was taken on March 8, 2002, and had the following impression:

Mild degenerative disk disease of the lower spine, as noted above. There is a left disk herniation at L4-L5, resulting in moderate left foraminal narrowing, suggestive of displacement of the left L5 nerve root. There is also right disk herniation at L5-S1, resulting in minimal right foraminal narrowing. Study shows no evidence of significant spinal stenosis.

A second MRI was taken on January 24, 2003, with the following impression:

1. Small left lateral disc extrusion at L4-5 compromising the left L5 nerve root in the lateral recess.
2. Posterior annular tear at the L5-S1 level with a small right paramedian disc protrusion of doubtful significance.
3. Posterior annular tear of the L3-4 disc.

Claimant underwent a lumbar laminotomy, facetectomy, and nerve root decompression at L4-5, left on march 11, 2003. Another MRI was taken after the surgery on may 23, 2003, with the following impression:

1. Interval surgery at L4-5 with evidence of epidural scar tissue surrounding the proximal left L5 nerve root. No evidence of residual or recurrent disc herniation.
2. Stable diffuse disc bulge and annular tear at L3-4.
3. Stable small right paracentral disc protrusion at L5-S1, and approximation of the proximal right S1 nerve root.

There is not much of a difference between these MRIs.

As stated above the Claimant underwent one MRI after the February 2005 incident. Although there were similar findings as seen in the previous MRIs there is also new changes, specifically:

Moderate sized left paracentral disc protrusion or herniation with accompanying inferior subligamentous extrusion is seen at the L4-L5 disc interspace.

None of the previous MRIs show any inferior subligamentous extrusion at the L4-L5 disc interspace.

Dr. Jose Echeverria clearly stated that he compared Dr. Reding's operative note of March 11, 2003, with the Claimant's most recent MRI, and stated that the lesion suffered in February of 2005 was different from the one taken care of in March of 2003. Dr. Moez Premji also noted that the Claimant had new lower extremity deficits and that the MRI showed new changes. In my opinion, the record clearly has medical evidence of a new injury supported by objective findings.

The claimant credibly testified and was corroborated by a witness and medical reports as to the specific incident that was identifiable by time and place of occurrence. It is also clear from the letter sent by the respondent-employer that they were aware of an incident on February 10, 2005 which cause the Claimant to begin missing time from work.

In my opinion, the Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury in the course and scope of his employment with the respondent-employer, which required medical services, is supported by objective medical evidence, and that the incident is identifiable by time and place of employment. Therefore, I respectfully dissent for the Majority's decision

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affirming and adopting the Administrative law Judge's
September 15, 2006 opinion.

SHELBY W. TURNER, Commissioner