

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511024

TERRY WISE, EMPLOYEE	CLAIMANT
NORWOOD-LYNDA McDOUGALD, INC., EMPLOYER	RESPONDENT
AMERICAN INTERSTATE INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED APRIL 23, 2007

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

Claimant is not represented by counsel but appears *pro se*.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This claim is on appeal to the Full Commission from an opinion of the Administrative Law Judge finding that the claimant sustained a compensable gradual onset back injury for which respondents are liable. The Administrative Law Judge did not award any temporary total disability benefits but instead ordered the respondents to send a WCC Form AR-3 to the claimant's physicians to solicit responses with regard to the claimant's healing period. Based upon our de novo review of the entire record, without giving the benefit of the doubt to either party, we find that the

claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury for which he is entitled to benefits. Therefore, we find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed.

The claimant alleges that he sustained a compensable gradual onset injury on or about September 15, 2005, while driving a log truck for respondents. The claimant reported this alleged injury to a co-worker who provided the claimant with aspirin for his pain. With regard to the actual cause of his injury, the claimant asserted that having to make four loads per day as opposed to the usual three loads caused him to drive faster down the rough dirt roads injuring his back. However, during cross examination by counsel for respondent, the claimant testified that, "I know I got hurt in that truck driving down that road. I hit a hole too quick and it slammed me around in the truck...Well, that's how it happened. I mean, undoubtedly I hit a hole or rut or something." Thus, the claimant presented evidence that his injury was both gradual

from driving too much on rough roads, and specific from hitting a hole or rut and being slammed around in his truck. This conflicting testimony clearly indicates that the claimant is unsure of how or why his back hurts. Moreover, the claimant admitted that his own physician did not relate his current back problems to an acute injury, but rather advised the claimant that the findings on the MRI are "part of getting old."

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. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997), see also, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

In the present claim, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset injury. The claimant testified that when he got off work on September 15, 2006, his back was sore, and that after talking with the other drivers he discovered that all of them were complaining of being sore too. After driving

trucks for 17 years the claimant came to accept that "every now and then you do get in a bad condition and it makes you sore." The claimant admitted that his doctor advised that the findings on the MRI are the result of aging and thus degenerative in nature. There is no credible evidence establishing that the claimant's present medical findings of degenerative disc disease arose out of or are causally related to his work driving log trucks, let alone, from driving the log truck four trips per day as opposed to three trips per day in September of 2005 while working for respondents. Moreover, any evidence of causation is clearly lacking. Other than the claimant's testimony that the log roads were rough, there is no evidence that driving on this rough roads resulted in degenerative disc disease. The truck's suspension and the type of seats in the truck were not discussed at all at the hearing. It is just as likely as not that the claimant's degenerative disc disease resulted from the aging process as explained by the claimant's physician as opposed to driving the log truck in or around September 15, 2005.

Accordingly, while the claimant's degenerative disc disease may have resulted in the claimant's need for medical treatment, we find that the record fails to prove by a preponderance of the evidence that the claimant's degenerative disc disease arose out of and in the course of his employment. Therefore, we find that the decision of the Administrative Law Judge must be reversed and this claim for benefits denied and dismissed.

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 sustain a compensable, gradual onset back injury. On appeal, the claimant contends that he sustained a compensable injury in the form of a gradual onset injury. The Majority finds that

the claimant only suffered from degenerative disc disease which did not arise in the course and scope of employment. However, after reviewing the record, I find that the evidence is clear that the claimant's degeneration, was, at least in part, caused by his work for the respondents. Furthermore, I find that the claimant's degeneration was aggravated by his work for the respondents and resulted in him having nerve root involvement in his lumbar spine. Accordingly, I would have affirmed the decision of the Administrative Law Judge.

The claimant testified that he had worked as a truck driver for seventeen years prior to the injury. At the time of his accident, he had worked for the respondents for a year and a half. The claimant denied having any previous back problems, but admitted that on occasion his back would become sore.

The claimant testified that his back began hurting around September 15, 2005, after driving his truck over rough terrain. The claimant said the next day he told a coworker, Parnell Jackson that he hurt his back. The next

Monday, the claimant reported the injury to the respondents and made a doctors appointment.

The claimant testified that he drove a log truck and that the roads were extremely rough. The claimant said that this job differed in that he was required to make more loads than in his past jobs. The claimant said he had to make four loads a day and indicated that he had to go as fast as possible to get the job done. The claimant further testified that he had been working on the road in question for the past "several weeks" and that the road became rougher over time. Finally, the claimant and Lewis Elton, Owner of Elton's Auto and Diesel Repair, testified that shortly after the claimant's injury, a u-bolt on the respondents truck was broken. The u-bolt was used for suspension on the truck and both the claimant and Elton testified that the u-bolt was broken from driving over rough roads.

On November 4, 2005, the claimant submitted to an MRI. The report from that test provides,

Multilevel degenerative disc and joint disease with multilevel disc bulges.

These are asymmetric and more pronounced on the left at L4-5 and L5-S1 with resultant compromise of the respective left nerve roots at these levels. I cannot completely exclude a component of a far left lateral disc herniation at L5-S1.

On January 11, 2005, Dr. Cox Carter Jr. authored a note indicating as follows,

Mr. Terry Wise was seen for a new complaint of low back pain, for one week. He was examined on September 20, 2005. He stated his symptoms started one week before while driving a log truck over rough roads. His MRI shows nerve root involvement at L5S1 on the left side.

The claimant testified that on the day he reported his injury, he requested to see a doctor. He was told he had to make another load and has not returned to work since. He described that he still suffers from pain down his left leg and in his tail bone which renders him unable to work.

Ark. Code Ann. § 11-9-102(4) (A) defines

"compensable injury":

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of

employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back injury which is not caused by a specific incident or which is not 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). The burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4) (E) (ii).

I further note that a claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or by objective medical evidence. See Wal-Mart Stores, Inc. v. Vanwagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

In the present instance the claimant had worked as a log truck driver for seventeen years and had only worked for the respondents for a year and a half. The claimant testified that while he had experienced soreness in his back

in the past, he had never experienced symptoms like those that occurred after September 2005. Likewise, there is no evidence to suggest that the claimant had ever been treated for or diagnosed with any back condition prior to the incident in question.

I find the claimant credibly testified that he began experiencing symptoms gradually as he drove over rough roads while hauling logs for the respondents. Likewise, the medical report from Dr. Cox corroborates his testimony regarding the cause of the claimant's symptoms and when the onset of those symptoms began. The claimant's MRI showing that he had a possible herniation at one level with nerve root involvement is consistent with the claimant's symptoms and the nature of how he describes his injury occurred. Furthermore, while the claimant had degeneration in his back, it is evident that he did not suffer from any symptoms until September 2005 after riding over rough roads while performing work for the respondents. In fact, the claimant testified that the nature of this work was different in that he was required to make more loads per day. He indicated,

Q. And what was different about this one?

A. Probably the reason is the boss wanted four loads a day and that's hard to do, and we really have to buck up and get it. I mean, we don't just ease down the road slow, we have to go as fast as we possibly can.

Q. Had you ever had to do that before?

A. No, sir, it was just with this boss.

The Majority argues that the claimant cannot show that his work caused his degenerative condition. However, I find that this is not the burden of proof required. As previously noted by this Commission and the Court of Appeals, a claimant is not required to show that the work is the major cause of the condition. Rather, a claimant is required only to show that the compensable injury is the major cause of the disability or the need for treatment. See, Medlin v. Wal-Mart Stores, Inc., 64 Ark. App. 17, 977 S.W.2d 239 (1998); See, also, Christie v. McKee Foods

Corporation, Full Commission Opinion filed June 11, 2002 (F105116).

Furthermore, I find that, at a minimum, the claimant has shown that he sustained an aggravation. 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. 2d 3d 150 (2003).

I find the present case similar to Christie. In that instance, the claimant worked as a "feeder", which duties included bending, lifting, carrying twisting, and reaching. She also worked as a "cripple hauler" which required carrying large barrels of cake with a two-wheel dolly. After some seven years of employment the claimant began working as a "packaging tech", a job that required her to perform more lifting and leaning. The claimant began experiencing pain after two days. Her condition worsened and she was ultimately diagnosed with muscle spasms and advised to quit her job because, "it aggravates her back problem".

Likewise, another physician explicitly indicated, "I am certain her years of working as a pack technician, etc., have contributed somewhat to her back problems but, as to exactly how much they contributed and is it compensable, I cannot say."

In finding the claimant sustained a compensable injury the Full Commission explicitly noted there were no physician's notes saying that the claimant's condition was not work related. They further noted that the claimant's condition and need for treatment arose after an increasing duties. Finally, they noted that there was no symptomatic preexisting condition or past back pain before the claimant began the duties. Id.

Likewise, the claimant, in this case, while suffering from degeneration, had never required treatment prior to working in the increased capacity for the respondents. Additionally, he had never been diagnosed with stenosis or nerve root involvement in his spine. As these symptoms arose shortly after he was required to take more loads and there is no other explanation for his symptoms, I

find that he has met his burden of proof in showing he sustained a compensable gradual onset injury.

Likewise, in the past, this Commission has awarded benefits to a claimant whose job duties were very similar. See, Marvel v. Nabholz Construction Co., Full Commission Opinion Filed June 5, 2002 (F003247) (where the Commission found a crane operator sustained a gradual onset injury despite the fact that he had a history of having back pain.)

The Majority further asserts that the claimant was unsure of how or why his condition was caused and therefore indicates that the claimant was somehow asserting his injury was due to both a gradual onset and a specific incident. However, when reviewing the testimony of the claimant, I find that it is apparent his symptoms occurred gradually over time. In fact, the claimant was not able to recall one particular incident that caused his pain which supports his argument that he suffered a gradual onset injury as opposed to a specific incident injury.

The Majority places great emphasis on the claimant's alleged testimony that his physician said his MRI

results were simply caused by aging. I must disagree with this conclusion. There is no medical report indicating that the claimant's condition was only caused by aging. Additionally, the claimant's testimony seems to indicate that he was told that while he had degeneration, it was aggravated by his work. In fact, it is quite clear that the claimant was essentially testifying that his doctor told him he suffered degeneration due to aging, but a bulging or protruding disc due to his work. As there is no evidence the claimant had ever received treatment for his back and reported symptoms that would be consistent with sustaining a disc injury, I can only conclude that he did, in fact, suffer a bulging disc or protrusion due to his riding over rough roads.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner