

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606428

DAVID BODINE, EMPLOYEE	CLAIMANT
BALDOR ELECTRIC COMPANY, EMPLOYER	RESPONDENT
SPECIALTY RISK SERVICES, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 3, 2008

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE TOM HARPER, JR., Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed October 31, 2007.

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. From February of 1993 through January of 1996, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. In October of 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$376.00 for total disability and \$282.00 for permanent partial disability, should such benefits have been appropriate.

4. In January of 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefit of \$467.00 for total disability and \$350.00 for permanent partial disability, should such benefits have been appropriate.

5. The claimant is barred by the statute of limitations, contained in Ark. Code Ann. §11-9-702(a), from receiving any benefits attributable to alleged employment related injuries to his low back or lumbar spine in 2001 and 2002.

6. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his low back or lumbar spine, within the meaning of Ark. Code Ann. §11-9-102(4) (A) (ii) (b). Specifically, he has failed to prove by the greater weight of the credible evidence that his difficulties with his lumbar spine during and after January of 2006 represent an injury that arose out of and occurred in the course of his employment for the respondent within two years prior to January 23, 2006.

7. The respondent has controverted this claim in its entirety. The respondent has denied the occurrence of any compensable injury to the claimant's

lower back or lumbar spine within two years prior to January 23, 2006, and has timely raised the defense of the expiration of the statute of limitations in regard to any alleged employment related injuries occurring in 2001 and 2002.

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 failed to prove that he sustained a compensable gradual onset back injury which required medical treatment and resulted in disability on January 22, 2006. From a de novo review of the record, I find that the claimant proved, by a preponderance of the evidence, that he sustained a compensable gradual onset back injury and that he should be awarded medical and temporary total disability benefits for that injury. The majority

also found that the statute of limitations had run on injuries occurring in 2001 and 2002. Because the evidence fails to show any relationship between the claimant's current problems and the 2001 and 2002 injuries, I find that the statute of limitations issue is moot.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority, without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion. Death & Permanent Total Disability Trust Fund v. Branum, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

HISTORY

The claimant began his employment with Baldor Electric in 1993. He sustained minor back injuries in that employment in 2001 and 2002. Even though the claimant and his employer acknowledged that these injuries were work-related, the medical expenses and disability benefits were submitted and compensated under the employer's group medical and disability plans. This was done by mutual agreement

between the claimant and his employer. Apparently, the claimant missed one week of work from the 2001 injury and two weeks from the 2002 injury. No medical treatment was obtained by the claimant, for either of these injuries, after December 2, 2002, even though the claimant testified that his symptoms never completely resolved. Between December of 2002 and January of 2006, the claimant took over-the-counter medications and continued to work for the respondent-employer.

In August of 2005, the claimant was transferred to a new job in the "builder" area of the plant. This job required the lifting of motors while bending, twisting, pushing, and pulling. Production records were kept on each employee and quotas were imposed on production. As a result, employees performed their work at a fast pace. On Sunday, January 22, 2006, the claimant woke up to find that his back was hurting badly, his leg was tingling, and he could not get out of bed. The claimant attributed these difficulties to his job activities and reported this fact to Perry Goines, Baldor's occupational health and safety

specialist, who was in charge of administering the company's workers' compensation system. Mr. Goines testified concerning the claimant's report of injury, as follows:

Q. What did he tell you happened in '06?

A. '06? He told me when he came in to see me some time prior to that, when we talked about filling out the FMLA and short-term disability, that he had woke up and couldn't get out of bed.

Q. Did he ever mention his job as a cause?

A. He mentioned that he had to do a lot of lifting on a regular basis.

Mr. Goines also testified that employees are given a choice to elect either short-term disability or workers' compensation on injuries considered to be work related, as follows:

A. . . . what we do typically on those when they come in, if a person chose not to file a workers' comp claim on what they considered a work-related

injury, we allow them to do a short-term disability form so they could draw short-term disability and do it that way. Any time they mark a "Yes," we always call them in, say, "You marked 'Yes' on this. You either have to file a claim or mark this 'No' and initial it so that you have to draw short term."

Q. All right. So you advise the employees they can elect whichever they want to do?

A. Correct. Unless it's an obvious, like, say, if they cut their finger on a saw, you know, we're going to take them immediately to the doctor's office. If it's not an obvious injury or obvious origin of injury, we'll give them that option.

On January 30, 2006, the claimant opted for short-term disability benefits in accordance with the above-cited company policy. Even though the claimant answered "no" to the question asking whether the condition was caused by the job, the claimant indicated on the form that he had been injured on January 18, 2006. Mr. Goines took the claimant's application for benefits and testified that he knew, at that

time, that the claimant's back condition was work related, as follows:

Q. Were you aware at this particular time, and speaking of January 30, '06, that David was making complaints of his low back because of his job of working on the line, similar to 2002?

A. Yeah.

Q. Okay. So as far as the personnel department, the company, is concerned, you knew David's complaints, what they were and why he was having back pain?

A. Correct.

The claimant was first seen by Dr. Thomas Cheyne, a sports medicine specialist, on January 23, 2006. The patient history form from Dr. Cheyne's office completed by the claimant indicated that he was suffering from "lower back pain and numbness in right leg" and that the injury occurred "at work". In his report of January 30, 2006, Dr. Cheyne stated that "He did not have a specific injury, although he lifts heavy motors at Valdor (sic) Electric and thinks that he may have aggravated his back". An MRI was

performed, at the request of Dr. Cheyne, on February 3, 2006. The study showed disc desiccation at L3-L4, L4-L5, and L5-S1. In addition there was a "left foraminal disc protrusion" at L4-L5 and a "right foraminal disc protrusion" at L5-S1. Dr. Cheyne said that the herniated disk at L5-S1 was "likely the cause of his symptoms".

Dr. Cheyne referred the claimant to Dr. Arthur Johnson, a neurosurgeon, for surgical evaluation. The history given to Dr. Johnson by the claimant was that he had suffered from low back pain since an injury at work two-and-a-half years ago and that his problems had gotten worse since January of 2006. Dr. Johnson ran a battery of tests on the claimant, including a bone scan, myelogram, and CT scan. The primary findings were exhibited in the CT scan and showed disc bulges at L3-L4 and L5-S1. It was Dr. Johnson's opinion that the claimant's problems were muscular in origin.

The claimant was returned to the care of his family physician, Dr. Vicki Sutterfield, by Dr. Johnson. The history recorded by Dr. Sutterfield was that the

claimant had injured his back two-and-a-half years ago and that, in January of 2006, he had changed jobs with different lifting, and that his pain had become worse on January 18, 2006. Dr. Sutterfield diagnosed a disc herniation at L5-S1.

The claimant was seen by Dr. Larry Armstrong, a neurosurgeon. The history recorded by Dr. Armstrong was that the claimant had injuries in 2001 and 2002 and a work-related injury on January 23, 2006, while doing a lot of lifting, bending and twisting on the job. Dr. Armstrong ordered the claimant's second MRI. This study showed disc protrusions at L3-L4 and L4-L5, as well as a disc bulge at L5-S1. Dr. Armstrong concluded that the claimant was suffering from "three level disc degeneration" which was "a workers compensation injury". He said that the disc herniation at L3-L4 was "a new disc herniation" which had occurred "without any specific activity". Other than the disc herniation at L3-L4, Dr. Armstrong said that "The remainder of his MRI scan, as I reviewed it, is not significantly different form the previous one" (the previous

MRI showed disc desiccation at L3-L4, L4-L5, and L5-S1 with herniations at L4-L5 and L5-S1).

Dr. Armstrong referred the claimant to Dr. James B. Blankenship, neurosurgeon, because he was "an excellent spinal neurosurgeon for workers compensation". He said that "If Dr. Blankenship feels that the patient would benefit from surgical intervention, we will ask him to perform lumbar fusion surgery on the patient to help his condition". The history recorded by Dr. Blankenship was that the claimant had back injuries in 2001 and 2002, but was treated conservatively for these injuries and did fairly well with pain, off and on. In January of 2006, the claimant awoke with rather significant lower back pain that has been severe since and increasing. There was no specific event that created the pain. While Dr. Blankenship outlined several possible treatment options, he said that "At present, I do not feel like that proceeding forward with treatment while this [workers' compensation claim] is still up in the air is wise for either the patient or ourselves". No additional

diagnostic studies were performed with reference to the claimant's back.

After Dr. Blankenship declined to proceed with treatment, the claimant obtained medical care from the University of Arkansas School for Medical Sciences with Dr. Richard Rowe, a neurosurgeon. Dr. Rowe's medical reports do not contain a detailed history of injury and say only that the claimant awakened in January of 2006 with back pain. Dr. Rowe reviewed the previous diagnostic studies and ordered an additional CT scan, which showed bulging discs at L3-L4, L4-L5, and L5-S1. Dr. Rowe performed a lumbar spine fusion from L3 through S1.

Dr. Kathy Luo, a chronic pain management specialist, saw the claimant during his treatment with Dr. Armstrong. Dr. Luo said that the claimant reported back pain since 2001, which had gotten worse during repetitive lifting on the job. She diagnosed the claimant's difficulties as multi-level degenerative disc disease at L3-L4, L4-L5, and L5-S1, lumbar radiculopathy, myofascial pain

involving the lumbar spine, and possible sacroiliitis that were most likely related to his job.

When the claimant was seen for physical therapy, he reported that he sustained an injury on January 22, 2006, when he was working and had to twist, push, and pull a lot and his back went out.

Dr. Armstrong was the only doctor to be deposed in this case. After a detailed discussion of the various histories and findings in the medical reports of record, Dr. Armstrong opined that the claimant was suffering from a work-related aggravation of pre-existing degenerative disc disease, as follows:

Q. Well, to summarize what I think you said, that absent his history of an injury in January of '06, as far as you're concerned, all of these findings could be related to the degenerative problem?

A. Well, not all the spasm that he had. He's done something to his back to create all that spasm.

Q. Could he have had that spasm since 2002?

A. It's possible. Not as likely, but it's possible. You're still talking about -- it was nine months from the time of the injury until I saw him, and he had it, but he also seemed pretty acute and pretty uncomfortable when I saw him. I do remember that. (emphasis added)

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Q. Now, I guess the critical focal issue that we're here today on this Workers' Compensation claim, do you have enough information via history given by Mr. Bodine, the clinical exam, including the objective finding of muscle spasm that you felt, and the tests that have been performed and that you have seen -- can you give us an opinion today, within a reasonable degree of medical certainty, if the work activity that he reports of the "lifts heavy motors at Baldor" as part of his job duties aggravated the pre-existing condition that you see?

A. I think so. (emphasis added)

Dr. Armstrong was also questioned about the various histories of injury given by the claimant in the medical records of the other physicians. He said that he did not see anything particularly inconsistent about them.

ANALYSIS

A claimant seeking Workers' Compensation benefits for a gradual-onset back injury must prove, by a preponderance of the evidence, that: (1) the injury arose out of and in the course of the employment; (2) the injury caused internal or external physical harm to the body; and (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4)(A)(ii); §11-9-102(4)(A)(b); §11-9-102(E)(ii). Furthermore, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D).

The record contains sufficient evidence of physical harm to the claimant's back, demonstrated by objective medical evidence. The only issues involving the compensability requirements stated above are whether the claimant's back problems "arose out of and in the course of"

his employment with the respondent and whether the injury was the "major cause" of the back problems. In order to prove these two elements of compensability, the claimant must establish a causal relationship between his employment activities and the physical damage to his back. In addition, he must show that the employment was more than 50% of the cause of his problems.

With regard to causation, the Supreme Court Arkansas, in Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962), said:

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award.

It is axiomatic that the employer takes the employee as he finds him and that when a compensable injury aggravates, accelerates, or combines with pre-existing

conditions to produce disability or need for treatment, then the resulting disability and treatment is compensable.

Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The number of cases involving aggravation, acceleration and combination of pre-existing degenerative conditions in back and neck injuries was explained in the testimony of Dr. C. C. Alkire, orthopedic surgeon, in General Elec. Railcar Repair Servs. v. Hardin, 62 Ark. App. 120 (1998), as follows:

As I'm sure you're well aware having dealt with workers' compensation insurance claims for years, most workers' compensation injuries, particularly those in the cervical spine and lumbar spine are always related to some degenerative process, regardless of the type of

injury a patient may have.
(emphasis added.)

In summary, the claimant sustained minor back injuries in 2001 and 2002. While he continued to have some pain, he missed only three weeks of work, took over-the-counter medicines, and did not see a doctor for a period of over three years. Even though the injuries were work related, the medical and disability claims were processed under the employer's group plans. In January of 2006, the claimant woke up one morning with a significant back problem, following work activities involving heavy lifting, bending, and twisting. His injury was reported immediately to his employer. Even though the claimant attributed his injury to work activities, his claim was again processed under the group plan, in accordance with company policy for problems which do not have an "obvious origin of injury". His back problems have persisted since January of 2006 and he has, since that time, continuously undergone extensive medical treatment, including back surgery. The type of work performed by the claimant was totally consistent with the

development of back problems. There was a very close temporal relationship between the development of the claimant's back problems and his work-related activities, and there has been no explanation offered for them, other than his work. All of the medical evidence confirms that the claimant suffered from an aggravation of very serious conditions in his lumbar spine which have been objectively demonstrated on numerous diagnostic studies. The descriptions of his injury, given by the claimant to the numerous physicians involved in his care, were consistent with the testimony of the claimant and the employer's occupational health and safety specialist. The only doctor to be deposed in this case, Dr. Armstrong, said that the claimant's back condition was the result of an aggravation of pre-existing disc disease. No doctor has offered an opinion to the contrary. Under these facts, it is obvious that the claimant sustained a compensable back injury.

Despite overwhelming evidence to the contrary, the Administrative Law Judge determined that the claimant had failed to establish a causal relationship between his

employment activities and the back problems which began in January of 2006. In so concluding, the Administrative Law Judge said that the more likely or probable cause of the claimant's back problems were a natural progression of his degenerative disc disease and arthritic spondylosis. Such a finding has no evidentiary support. In fact, Dr. Armstrong was asked specifically whether the claimant's problems could be caused by degenerative conditions, alone, and he said that this was not the case. Dr. Armstrong said that, when he first saw the claimant, he was in the acute phase of an injury, and that the degenerative conditions would not have accounted for the amount of muscle spasms without having "done something to his back". This was a medical question, and the record contains not one medical opinion to the contrary.

With regard to the issue of whether the statute of limitations has run on the 2001 and/or the 2002 injuries, it is unnecessary to address this question. The facts of this case strongly indicate that these injuries were in no way related to the claimant's current condition. He missed one

week of work for the 2001 injury and two weeks for the 2002 injury. He had not seen a doctor for over three years when the present difficulties began. There is no medical evidence relating the conditions in question to the prior injuries. Under these circumstances, the statute of limitations issue is moot.

For the reasons stated above, I respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner