

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611849

CHRIS WOODS, EMPLOYEE	CLAIMANT
KOPCO, EMPLOYER	RESPONDENT
CINCINNATI CASUALTY INSURANCE, CARRIER	RESPONDENT

OPINION FILED OCTOBER 10, 2008

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

Claimant represented by HONORABLE EDDIE WALKER, JR., 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 and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 16, 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. On all relevant dates, including October 12, 2006, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitlement to weekly compensation benefits of \$403.00 for total disability and \$302.00 for payment partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his back or lumbar spine on October 12, 2006, or any other date during his employment with this respondent. Specifically, he has failed to prove that he sustained an injury to his back or lumbar spine that arose out of and occurred in the course of his employment with this respondent.

5. 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.

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. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove that he sustained an injury to his back or lumbar spine that arose out of and occurred in the course of his employment. After a de novo review of the record, I find that the claimant has met his burden of proof, by a preponderance of the evidence, for a compensable back injury, and, therefore, I must respectfully dissent.

At the time of his injury, the claimant was employed in the respondent's metal fabrication operation. According to the claimant's testimony, his primary job duties involved welding and similar tasks performed in the assembly and manufacture of a wide variety of custom-made metal fixtures. Some of the items fabricated were relatively small, but others weighed over 1,000 pounds. The claimant testified that, at times, his job involved heavy lifting, but at other times, the object he was working on was too heavy to be lifted other than by a forklift. The job also required him to frequently bend, stretch, and

otherwise move or maneuver into awkward positions to carry out his job duties.

The claimant testified he was injured on October 12, 2006, while he and some co-workers were attempting to move a large air conditioner base. This base was a piece of equipment sitting on rollers, weighing approximately 3,000 pounds. According to the testimony of the claimant and two co-workers, while they were pushing the base, the claimant tripped over an object on the floor and fell on his back. According to testimony, the claimant arose, "cussed up a blue streak" and threw the object he tripped over across the room. The witnesses agreed the claimant completed the work day on the date of his fall.

The claimant testified his pain became worse during the night after the fall and he was forced to seek medical treatment from the emergency room at St. Edward Mercy Medical Center on October 13, 2006. The emergency room report of that date reflects the claimant was seen complaining of chronic back pain dating from an injury two to three years prior, when he was hit in the back with a logging chain. The report goes on to state that the

claimant "had fallen yesterday with new complaints of pain." The claimant was diagnosed with contusion and sprain of the lumbar spine and acute chronic low back pain.

On October 13, 2006, the claimant underwent an MRI scan. The lumbar MRI discovered a moderate sized left paracentral disc protrusion at L4-L5 with moderate compression on the ventral thecal sac. The MRI also discovered a large disc herniation at L5-S1 with an extruded fragment and significant compression on the left ventral thecal sac and some compression the S1 nerve roots on the left and right side.

The only discrepancy in the testimony between the claimant and his two co-workers had to do with the date of the fall and its relationship to when the claimant stopped working. The claimant testified that he worked on October 12, the date of the fall; he reported to work on October 13, but was unable to perform his duties because of severe pain and related symptoms; and was picked up by his wife at his place of employment and taken to a local emergency room. He did not return to work for this employer after the emergency room visit.

However, the claimant's co-workers, Mr. Jerry Seymour and Pacual Del Rio, testified the claimant worked for approximately two weeks following the fall and then stopped coming to work. Interestingly enough, the medical report from the Twin City Medical Clinic, authored by Nurse Carman Oxford, dated September 26, 2006, notes the claimant was complaining of back pain, radiating into his hips and through his lower legs to his toes, along with numbness in his lower extremities. The report mentioned the claimant's work required heavy lifting, crawling, turning and bending, but did not associate the onset of the claimant's symptoms with a fall or any other specific incident injury. A follow-up report from Nurse Oxford dated October 9, 2006, discusses another visit that she had with the claimant on that date in which it was noted that the claimant was still having radiating pain into his hip and lower extremities, along with tingling and numbness. As with the earlier report, Nurse Oxford provided the claimant medication. She also directed him to undergo an MRI to determine whether he had a disc herniation. This was apparently the MRI the claimant underwent on October 13, 2006.

The claimant saw Nurse Oxford again on October 17, 2006. In a treatment note of that date, the nurse reported the claimant was having increased discomfort and was now using a cane for ambulation. Because of the MRI result and the claimant's increasing symptoms, she arranged for the claimant to be seen by Dr. Anthony Capocelli, a Fort Smith neurosurgeon.

Dr. Capocelli first saw the claimant on November 1, 2006. In a treatment note of that date, he stated the claimant had begun suffering from chronic back pain after an injury in 2001. Dr. Capocelli's report also stated that the claimant was managing his pain level until his job-related fall on October 12, 2006. The report goes on to explain the claimant's pain increased and was exacerbated by any type of activity. Dr. Capocelli concluded his report by stating the claimant had a "significant surgical lesion" which the doctor believed would require surgical intervention. Dr. Capocelli performed the recommended surgery on November 20, 2006.

The key issue in this case is whether the surgery performed by Dr. Capocelli was the result of the claimant's

job-related activities, most particularly, the fall described by he and his co-workers, or whether the surgery was the result of an ongoing degenerative condition, or some other traumatic injury unrelated to the claimant's employment. Dr. Capocelli's deposition provides critical information in determining the cause of the claimant's back problems. Dr. Capocelli made it clear he believed the claimant's spinal injury was the result of a traumatic injury. According to the doctor, ruptured discs, such as those sustained by the claimant, are primarily caused by trauma. The doctor explained further that the trauma can be the result of a single event or multiple lesser events with one of them finally causing the ultimate disc herniation. Dr. Capocelli said a herniation or disc rupture can be dated, to some degree, by the onset of symptoms. The doctor's testimony was that an L4-L5 and L5-S1 herniation, as sustained by the claimant, will cause radiating pain from the back through the hip, down the legs, into and including, the whole foot. Significantly, this is exactly the symptomology complained of by the claimant.

In regard to the claimant's case, Dr. Capocelli attached great significance to the worsening of the claimant's symptoms. Even when it was pointed out the claimant had complained of numbness in his September 26, 2006 visit with Nurse Oxford, the doctor did not believe that the past tingling or numbness was severe enough to indicate the injury had fully manifested itself. This belief is set out in his deposition testimony in which he explains the condition the claimant was in when he saw him, as opposed to his apparent condition at the time he visited Nurse Oxford:

A Well, I think that -
in talking to him, I
don't even know that
he necessarily said
he never had a speck
of numbness, but he
developed severe
numbness. He may
have had some
tingling in his legs
prior to that, and
he may have even
told me that; but I
think the big thing
- you know, tingling
and severe numbness
or deadening of the
extremity are not

necessarily the same thing.

Numbness and tingling is one thing, but true numbness can be - a lot of people confuse tingling and numbness. I got the impression in looking at Carmen's notes that he may have had some tingling going down to his feet; but when I saw him, he was reporting that it was a dead leg.

Q So he clearly volunteered to you the fact that he had had back problems over a period of years and that those back problems had gotten worse; isn't that right?

A Yes. It was mainly back; but even the hips and going down, he did not deny having those symptoms prior to that.

Q Now, the only records you've been shown today or that I'm aware of show

that his first back treatment after this October 2001 accident wasn't until September 2006. So unless there's some medical records out there that we don't know about, it appears that he didn't have any medical treatment on his back for five years.

Based upon what we've been presented with here today, is that a reasonable conclusion to draw?

A That's correct.

Q He had worked for this KOPCO Company for six years, doing heavy lifting. If the condition that you observed at the time of surgery had existed since 2001, in your opinion would he have been able to do heavy lifting for five years without receiving medical treatment?

A No.

Q Based upon your findings at the time of surgery, what kinds of activities do you expect he would have been able to do before the surgery without that kind of condition?

A Immediately prior to the surgery?

Q Yes.

A Again, I'll refer back to the Oswestry because it is kind of a nice window into what he could and couldn't do. It was pretty much nothing. He really couldn't do much of anything.

Q So if the evidence in this case shows that he continued to work up until October 12, doing heavy lifting, does that at least suggest that something different happened on October 12?

A Yes.

The doctor also opined that the heavy lifting the claimant regularly performed at work could certainly exacerbate and actually cause the type of injuries the claimant saw. The most salient portion of Dr. Capocelli's deposition related to his opinion regarding the cause of the claimant's back condition which necessitated the surgery he performed. In essence, Dr. Capocelli was of the opinion the claimant suffered a traumatic disc herniation a short time before he saw him and the herniation was the result of a significant traumatic incident or the claimant's heavy lifting. Dr. Capocelli explained his opinion as follows:

Q Based upon your findings during surgery, could you tell how long those herniations had been there, whether they were acute or chronic?

A I don't know that I mentioned it; but for the most part if there's chronic disc herniation, it has a very distinct look to it. I do not recall that he had the typical scar tissue or anything

that would indicate a long-term disc herniation. He had a free disc fragment with no scarring around it whatsoever.

Q Now, you talked about a large fragment at one level and then what I interpreted as small fragments at the other level.

A Yes.

Q Is that of any significance?

A Not necessarily. The disc can either herniate in one large piece or it could herniate in multiple small fragments over time or all the little fragments could blow out at one time; but at that point they're free fragments, neither of which were severely scarred down. So both could have easily been acute disc herniations.

Q If these herniated discs had actually occurred over a long period of time, would you have expected to see some evidence of significant scarring when you did the surgery?

A Yeah. We certainly see patients who have had long-standing disc disease, and the disc has a distinct look to it and there's frequently scar tissue around it. It's a little bit different removal versus a disc like this where it pretty much just drops right out and hasn't really adhered to any of the tissues around it.

Q What was the phone message that you got from Nurse Oxford?

A Give me a second to refer back to the record. (Consulting Records). The message I got from her was that the patient had had a

Medrol dose pak and had two fragments upwards at L4-L5, L5-S1 with S-1 compression. At that time, she asked me to review the films.

Q Are all herniated discs surgical?

A Not necessarily, no.

Q If we assume, Doctor, that the symptoms Mr. Woods presented with to Nurse Oxford on September 26, 2006 were due to preexisting herniations and he returned to work doing heavy lifting and his symptoms significantly worsened from September 26 to the time he saw you, would the heavy lifting at work have been the major cause for his need for treatment?

A It's certainly possible.

Q Is it likely?

A It's very likely, yeah. I think with that worsening, even if there was no fall at all, just the lifting he had done could have theoretically caused an injury.

Q Well, you said theoretically caused the injury. Let's assume that he actually had the herniations, but they hadn't been surgical or severe enough to cause him to seek medical treatment. If he then went back into a work setting where there was heavy lifting, would that heavy lifting have been the major cause of the worsening of his condition and the need for treatment?

A Absolutely.

The majority, by affirming and adopting the Administrative Law Judge, has completely disregarded Dr. Capocelli's opinion. In fact, the Administrative Law Judge stated that, while it was possible the claimant injured his

back at work, he noted, "Even relatively minor stress or trauma, such as picking up his shoes. . ." could have been responsible for the claimant's back problems. This kind of statement by the Administrative Law Judge is sheer speculation, which has no basis in the record. There was no testimony, documents, or any other evidence offered at the hearing suggesting the claimant had reported back pain after any minor injuries. Further, Dr. Capocelli, who physically observed the disc herniations during the surgery, was of the opinion that they were large and severe herniations which would have been caused by a significant traumatic injury. The doctor's findings in this instance are not merely opinions, but the result of his observation during surgery. Clearly, this evidence rules out the type of minor event which the Administrative Law Judge speculated could have caused the injuries.

Furthermore, as indicated above, there is no dispute that the fall described by the claimant occurred, nor that he began missing work after October 12, 2006. The only discrepancy between the claimant's testimony and his co-workers was exactly when the fall occurred. The claimant

testified that he fell on October 12, and did not return to work after that date. The co-workers testified that, while they remembered the fall, they were of the opinion that the claimant returned to work for a period of time after the fall and that he did not stop working until about two weeks after the accident.

Even if the co-workers' version of events were accurate, Dr. Capocelli's testimony indicates the claimant's continued work activities would most likely have caused the claimant's disc injury to worsen to the point that the claimant could not work. As Dr. Capocelli stated, when he saw the claimant in November, he was suffering from a "dead leg."

But, when the testimony is compared to the medical evidence, it becomes apparent that the claimant's version of events is more accurate. The record shows on September 26, 2006, the claimant saw Nurse Oxford at the Twin City Medical Clinic. At that time, he was complaining of some pain and discomfort in his back radiating into his leg. This visit was approximately 16 days prior to the accident and there is no indication the claimant had recently suffered a fall or

any other traumatic injury to his back. Even more significantly, the claimant saw Nurse Oxford again on October 9, 2006. This is three days prior to the date the claimant testified that he fell. According to Nurse Oxford, he did not mention a fall or indicate that he had been missing work. Likewise, Nurse Oxford did not make any recommendation that he stop working. She also did not diagnose him as suffering from any traumatic injury, instead, assessing his injury as "lumbago."

A far different picture is presented in an emergency room note from St. Edward Mercy Medical Center, dated October 13, 2006, where the claimant gives a history of injury reporting a fall the previous day. The claimant is described as being in severe pain and a scheduled MRI on that date revealed the large disc herniation treated by Dr. Capocelli.

I find that the medical evidence establishes the claimant's injury must have happened on October 12. It is unlikely that the claimant would have had such a fall and not reported it to Nurse Oxford when he reported prior traumatic injuries occurring years before. If the claimant

believed that an incident occurring several years before was significant enough to mention, I find it unlikely that he would not have told her about a fall that happened a few days prior to his visit. In fact, the claimant did report such a fall to the medical providers when he visited the emergency room on October 13. In that report, it is specifically noted that the fall occurred the day before.

Another relevant factor in weighing the evidentiary value of the testimony on this point is the significance of the event itself. The fall and its aftermath was of critical importance to the claimant and would have been something that he would have likely remembered clearly. On the other hand, the fall and the claimant's condition would not have been of paramount importance to the other witnesses and it is not likely the events surrounding the claimant's accident would have been forefront in their memory. Since the testimony they delivered was approximately a year following the event, it is not surprising they could not remember, with certainty, when the fall occurred in relation to his missing work.

I also note the claimant was clearly not a malingerer, or someone who wished to use his injury to avoid gainful employment. Prior to his injury, the claimant continued working in a job that involved heavy lifting and heavy physical labor, in spite of his chronic back condition. Also, within a short while after his back surgery, he returned to work for another employer at a job which was also strenuous and required lifting. The claimant's work history supports his testimony that he did not stop working until after he sustained the traumatic injury. Also, it does not appear the claimant was attempting to fabricate the claim to obtain surgery, since he was able to furnish that on his own. His testimony in the trial was after he had already had the surgery and had returned to work.

In conclusion, I find that the claimant's testimony is credible and is supported by the medical records. In fact, **all** of the medical evidence produced at the hearing strongly supports the claimant's testimony about him having a chronic back condition which became markedly worse after a fall on October 12, 2006. In denying this

claim, the majority not only relied upon speculation contradicted by the medical testimony, but misconstrued the testimony and medical documents to reach a wrong conclusion about the temporal relationship between the claimant's injuries and the onset of his symptoms.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner