

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509311

CHRISTOPHER AUSLER, EMPLOYEE	CLAIMANT
J. B. HUNT TRANSPORT, INC., EMPLOYER	RESPONDENT
INSURANCE COMPANY OF PENNSYLVANIA, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 17, 2009

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.

Respondent represented by the HONORABLE WILLIAM BIRD, III,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed June 13, 2008. The administrative law judge
found, among other things, that the claimant proved he
sustained a compensable back injury. After reviewing the
entire record *de novo*, the Full Commission reverses the
administrative law judge's opinion. The Full Commission

finds that the claimant did not prove he sustained a compensable back injury.

I. HISTORY

Christopher Ausler, age 48, reported in May 1995 that he had fallen and had injured his back, hip, knee, and ankle. Mr. Ausler was working for another employer at the time. The parties stipulated that the claimant sustained a compensable right knee injury on August 28, 2005. The claimant testified *pro se*: "I was climbing up into the truck and I got to the top step, I was lifting my right leg to swing inside the truck and set down. And when I lifted my right leg to go in, I guess my left foot, I didn't have it far enough, I fell backwards off the truck. And I landed on my right leg and I grabbed the handle. And when I pulled myself in, I twisted sideways and just fell straight down on that top step....my buttocks was right on my right foot when I landed."

The claimant received emergency treatment on August 29, 2005. Handwritten notes showed that the claimant complained of right knee pain after his "knee gave out while climbing in truck," but there was no indication that the claimant had injured his back or that the claimant felt pain in his back.

The diagnostic impression was "R knee strain." Diagnostic imaging showed degenerative changes within the knee and joint effusion. Dr. Rodger Langster reported on August 29, 2005: "The patient is a 45-year-old who states that his right knee gave out on him and he fell yesterday about 1930 hours. The patient states that he has had two previous surgeries on that right knee in 1986 and 1987. He denies any other trauma to the knee. He denies any numbness, tingling or paresthesias. No other injuries....At this time the patient was placed in a knee immobilizer. He will be given a prescription for Vicodin for pain. He was to follow up with the company physician as this is a Worker's Compensation injury, for reevaluation."

An orthopaedic specialist, Dr. Benjamin M. Dodge, began treating the claimant on September 6, 2005. Dr. Dodge noted that the claimant had complained of right knee pain since August 28, 2005: "He was stepping up into his truck, was carrying too much stuff, and he felt a pop inside his knee. His knee gave way....He has a 2+ joint effusion. His right foot is neurologically intact. He has difficulty with straight leg raising." Dr. Dodge's impression included right knee strain and there was no indication that the

claimant had sustained a back injury. Dr. Dodge treated the claimant conservatively and released the claimant to return to work on October 20, 2005. However, Dr. Dodge noted on November 3, 2005 that the respondent-employer would not let the claimant work with a hinged knee brace. Dr. Dodge took the claimant off work and referred the claimant to Dr. Allison for a second opinion.

Dr. Stephen Carter examined the claimant on November 4, 2005: "Musculoskeletal; having trouble with right ankle numbness and weakness since an injury to his right knee on August 28. Dr. Dodge does not think it relates to the knee injury and Mr. Ausler has had lower back problems with degenerative disc disease for a number of years."

An MRI of the claimant's lumbar spine was taken on November 7, 2005, with the following impression:

1. Degenerative disk disease with a mild broad-based bulging disk and central disk herniation which is very small, at L5-S1. There are also bilateral facet degenerative changes at this level with mild to moderate bilateral neural foraminal narrowing.
2. Very minimal bilateral inferior neural foraminal narrowing is noted at L4-5, as described above.

Another orthopaedist, Dr. Charles E. Pearce, Jr., examined the claimant on November 17, 2005 and stated in

part: "Mr. Ausler is a 45-year old, truck driver for J.D. Hunt (sic), who while gainfully employed on 8/28/05 was climbing into the cab of a vehicle when the door gave away, in his words, and he fell backwards to the ground - Basically causing a hyperflexion type injury to his right knee....His main complaint to me today is that his knee gives way....Right knee - there is no swelling or effusion....He is neurovascularly intact. He has painless hip motion." Dr. Pearce's impression was "Right knee injury, which I suspect is an exacerbation of a prior underlying problem of chondromalacia after surgeries done in 1986 and 1987. He also has quadriceps atrophy and deconditioning....At this point, pending a functional capacity evaluation, there is no indication for further diagnostic testing or surgery."

Dr. Carter diagnosed "Chronic lower back pain with sciatica" on November 21, 2005.

The claimant participated in a Functional Capacity Evaluation on December 1, 2005: "Mr. Ausler presents today with reports of on-going pain in his right knee and his low back. Mr. Ausler reports that his work tolerances are in question due to a reported work injury which he states that

he sustained on 8/28/05....The results of this evaluation suggest that Mr. Ausler gave a reliable effort, with 52 of 53 consistency measures within expected limits....The results of his material handling tests indicate that he is capable of performing work classified as HEAVY based on US Dept. of Labor guidelines."

The parties stipulated that "medical expenses and temporary total disability benefits were paid until December 5, when Drs. Pearce and Dodge released the claimant to return to work."

Dr. Pearce opined on December 6, 2005 that the claimant could return to work as a truck driver, and Dr. Pearce reported, "He has sustained no new injury to his knee. It is my feeling that, at most, he has sustained an exacerbation of an underlying problem; but the majority of his problem is due to a pre-existing condition."

A representative of the respondent-employer informed the claimant on December 7, 2005, "Upon the expiration of your FMLA leave on 12/16/05 you may qualify for an additional 6 weeks of protected Personal Leave under the new policy. In order to qualify for this additional time, you must submit records to the J. B. Hunt Group Benefits

Department from your physician/provider indicating your need for continued leave and expected return to work date. If approved, you will be given 6 more weeks of leave. If you are unable to return to work prior to 12/16/2005 (the expiration of your initial 12 week FMLA period) or during the additional 6 week Personal Leave period, your employment with J.B. Hunt will end."

Dr. Dodge reported on December 8, 2005:

Mr. Ausler has had right knee pain. He got a second opinion from Dr. Charles Pierce who recommended that he discontinue his knee brace and return to work and take Tylenol for his pain. He subsequently had a functional capacity evaluation which revealed that the patient was able to lift 80 pounds and perform sedentary type work.

Physical exam reveals right knee with negative Lockman's test, negative anterior drawer, no varus or valgus instability, and a right lower extremity that is neurologically intact.

Dr. Dodge's impression was "1. Right knee strain. 2. Right quadriceps tendon tendinitis." Dr. Dodge returned the claimant to work full duty no limitations and stated, "2. Secondary to his back pain and his MRI evidence of a possible herniated disk, I will refer him to Dr. Bruce Safman for evaluation and treatment of pain."

Dr. Carter completed a J.B. Hunt Attending Physician's Certification Of Health Condition on December 15, 2005. On

the Certification, Dr. Carter diagnosed "Deg Disc Disease - Lumbar Strain with acute exacerbation." Dr. Carter indicated that the claimant was unable to work without restrictions.

Dr. Bruce Safman evaluated the claimant on December 20, 2005:

Mr. Ausler reports that he is a truck driver. In the earlier part of this year, 8/28/05, he fell. He reports that he had swelling of the right knee. He had some numbness of the right heel. He reports that the numbness in the right heel has persisted....

He did have a functional capacity test earlier this month and wound up with lower lumbar pain, which has persisted. He has had a MRI of the lumbar spine, which shows some mild degenerative disc disease. There is no actual disc herniation. There is no nerve root impingement....

On examination, there is minimal tenderness in the lower lumbar spine in the midline.... There is no guarding or muscle spasm present....

Dr. Safman gave the following impression: "I believe that his lumbar problem is due to a lumbar strain. The degenerative changes are relatively mild and I think are consistent with his age. I am a little perplexed about the persistent paresthesias of his right heel. There is a branch of the posterior tibial nerve to the calcaneus, which may have been damaged or injured at the time of his fall. I

would like to do electrodiagnostic testing to see if there is any residual problem or objective pathology there. I have reassured the patient that I could see no evidence of any significant pathology as a result of his fall."

Dr. Safman noted on January 3, 2006, "Mr. Ausler is here today, reporting that he is still having some lower lumbar pain....I was going to electrodiagnostic testing, if it was approved by workers' comp. However, we have not had approval yet....I have no objective pathology present on the MRI of his lumbar spine to justify him being off work....From the standpoint of his lumbar spine on examination today, there is no tenderness, guarding, or muscle spasm. Straight leg raising was normal....Dr. Pearce was of the opinion that he was able to return to work as a truck driver. I would have to concur with this." Dr. Safman further noted on January 3, 2006, "Mr. Ausler left today, stating that he is not going to return. From my standpoint, without objective pathology being present, I cannot account for his pain nor can I justify his ongoing disability."

On January 6, 2006, Dr. Carter diagnosed "Lumbar strain with chronic back pain and right lower extremity pain." Dr.

Carter's deposition testimony indicated that he did not see the claimant after that date.

Dr. Russell B. Allison, an orthopaedist, examined the claimant on February 7, 2006: "[I]t is obvious that his back is painful. He points to the low part of the lumbar spine as the most painful area. The right foot and leg are also numb. Straight leg raise is essentially normal. I detect no atrophy to the lower extremities....Lumbar spine MRI's show degenerative discs at L5-S1 with some bulging, but I see no true herniations or nerve root impingement." Dr. Allison assessed "Low back pain with right leg pain."

Electro-diagnostic testing was done on February 21, 2006, with the following impression: "The above electrodiagnostic study reveals no evidence of an active right lumbar radiculopathy, lumbosacral radiculopathy, myopathy, or polyneuropathy."

Dr. Allison noted on April 11, 2006, "I told him that as a surgeon there is not much I can do. I do not think this is surgical in nature and I advised him to try to follow with his family doctor and if he needs medications, that would probably be the best way to go. I did write him Darvocet today and I will see him back prn."

The claimant sought emergency treatment at Central Arkansas Veterans Health Care System on June 16, 2006. The claimant was diagnosed with back pain. It was noted on June 16, 2006, "His major source of pain tonight is the left hip. He is wearing a right knee brace due to the torn ACL. He drove a car from Florida to Arkansas last weekend and has noted worsening left hip pain since that time."

A lower back exam at Central Arkansas HCS on or about August 7, 2006 showed "stiff back spasm of paravertebral muscles."

An MRI of the lumbar spine was taken on November 13, 2006, with the following impression: "1. Moderate disc protrusion at T11/12 causing moderate canal stenosis and abnormal signal within the spinal cord. 2. Moderate degenerative change at L5/S1."

It was noted at Central Arkansas HCS on February 16, 2007, "fell at work and developed back pain since August of 2005 has pain in the lower back and a dull ache in the upper back....had some LBP before that but it was not severe....please schedule preop and surgery for L5-S1 diskectomy."

Dr. Chinyere Obasi performed a Bilateral L5/S1 microdiskectomy on May 1, 2007. The surgical findings showed "Bulging disk at L5/S1, more prominent on the right side even though patient (at least initially) was worse on the left side." The pre- and post-operative diagnosis was "Lumbar disk herniation, Left paracentral, L5-S1."

Dr. John Vanderschilden performed a right knee arthroscopy on August 20, 2007.

A pre-hearing order was filed on February 27, 2008. The claimant contended, among other things, that he "developed back pain as a result of the knee injury which also remains symptomatic. The claimant is seeking payment of additional medical treatment and temporary total disability benefits from September 14, 2006 to a date yet to be determined. The claimant anticipates surgery on his back and knee."

The respondents contended that "all appropriate benefits have been paid for the compensable knee injury. The claimant's present condition is the result of a preexisting condition. The respondents further contend there is no medical evidence linking the claimant's back condition to the compensable knee injury."

The parties agreed to litigate the following issues:
"Compensability (back); additional medical treatment (both knee and back) and additional temporary total disability benefits. All other issues are reserved."

After a hearing, an administrative law judge filed an opinion on June 13, 2008. The administrative law judge found, among other things, that the claimant proved he sustained a compensable back injury. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is 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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the only issue on appeal is whether or not the claimant sustained a compensable back injury. The Full Commission finds that the claimant did not prove he sustained a compensable back injury. The parties stipulated that the claimant sustained a compensable right knee injury on August 28, 2005. The claimant testified that he fell backwards while climbing into a truck and landed on his right leg. The claimant specifically testified, "I twisted sideways and just fell straight down on that top step....my buttocks was right on my right foot when I landed." The evidence before the Commission does not demonstrate that the claimant also injured his middle back, lower back, thoracic spine, or lumbar spine when he fell on August 28, 2005. None of the initial medical records corroborate the claimant's contention that he injured his back on August 28, 2005. Dr. Carter noted on November 4, 2005, "Mr. Ausler has had lower back problems with

degenerative disc disease for a number of years." Dr. Carter did not opine that the claimant had sustained a traumatic injury to his back. There was no testimony in Dr. Carter's lengthy deposition indicating that the claimant had sustained a compensable injury to his back. A lumbar spine MRI performed on November 7, 2005 showed degenerative disk disease and a small central herniation at L5-S1. The claimant did not prove that these abnormalities were caused by the August 28, 2005 accidental injury.

On December 15, 2005, Dr. Carter diagnosed degenerative disc disease and lumbar strain with acute exacerbation. The record does not demonstrate that the claimant sustained an "acute exacerbation" to a pre-existing back condition on August 28, 2005, when the claimant fell and injured his knee. Dr. Safman noted on December 20, 2005 that no muscle spasm was present in the claimant's lumbar spine. The claimant began treating at Central Arkansas Veterans Health Care System in June 2006. A lower back exam at Central Arkansas HCS in August 2006 showed "stiff back spasm of paravertebral muscles." The record does not demonstrate that this report of spasm was causally related to the August 2005 accident. An MRI in November 2006 showed a protrusion

at T11/12 and moderate degenerative change at L5/S1. The conditions described in this MRI examination were not the causal result of the August 28, 2005 accident.

The instant claimant did not prove that he sustained an accidental injury causing internal or external physical harm to his back. The claimant did not prove that he sustained an accidental injury to his back which arose out of and in the course of employment. The claimant did not establish a compensable injury to his back by medical evidence supported by objective findings. The Full Commission therefore reverses the administrative law judge's finding that the claimant proved he sustained a compensable back injury.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

_____I must respectfully dissent from the majority opinion, reversing the Administrative Law Judge's award of benefits and denying the compensability of the

claimant's low back injury which occurred on August 28, 2005. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that he sustained a compensable back injury on August 28, 2005 and therefore, I must respectfully dissent.

_____A finding of compensability in this case calls for proof, by a preponderance of the evidence, of a specific incident, identifiable by time and place of occurrence, arising out of and in the course of employment, causing physical harm to the body, requiring medical treatment or resulting in disability, which is established by medical evidence and supported by objective findings. Ark. Code Ann. §11-9-102(4) (E) (i); §11-9-102(4) (A) (i); and §11-9-102(4) (D).

_____In denying the compensability of this claim, the majority found, *inter alia*, that the claimant failed to prove that his herniated disc at L5-S1, and the surgery performed for the treatment of that condition, was causally related to the accident of August 28, 2005.

In Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962), the Arkansas Supreme Court 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.

In this case, the claimant suffered a significant fall and experienced radicular symptoms of a back injury immediately thereafter. A herniated disc was shown in the very first diagnostic study performed. There was absolutely no evidence presented even remotely suggesting that the herniated disc preexisted the accident. In fact, the claimant had received no treatment for back problems for 11 years and no medical reports concerning that treatment are contained in the record. No doctor opined that there was any etiology for the herniated disc other than the accident in question. Under these facts, it can fairly be said that the claimant's disability arose soon after the accident, that there was no explanation for the herniated disc other than the accident, and that there was no substantial evidence to support the Commission's refusal to make an award in this case.

The majority bases its decision on several factual allegations, none of which support its finding that the claimant failed to prove that he sustained a compensable injury. Firstly, the majority concludes that the initial medical reports do not corroborate the claimant's contention that he injured his back on August 28, 2005. This conclusion is based on the fact that the claimant's first symptoms did not include back pain. It is important to note that the claimant had symptoms in the entire right lower extremity after the accident. He was initially treated for a right knee injury by an orthopedic surgeon. This doctor suspected that the numbness and weakness in the right ankle were not from the knee injury but were emanating from his back. When the MRI was performed, this fact was confirmed. Under these circumstances, it was improper for the majority to conclude that "none of the initial medical records corroborate the claimant's contention that he injured his back on August 28, 2005".

The second erroneous conclusion reached by the majority was that the claimant failed to establish causation because Dr. Carter never said, in his lengthy deposition testimony, that the herniated disc and the

accident were related. However, I would note that Dr. Carter was never asked to state his opinion on this issue. Therefore, Dr. Carter's failure to comment on causation does not negate proof of causation, especially in light of the other overwhelming evidence establishing a connection between the herniated disc at L5-S1 and the accident. Dr. Carter did, in fact, state in a medical report dated December 15, 2005 that the claimant had experienced an "acute aggravation" and a "lumbar sprain" which "commenced: August 28, 2005". This is certainly evidence that Dr. Carter believed that the claimant's low back problems were related to his fall of August 28, 2005, even though he diagnosed the claimant's injury as a "sprain" as opposed to a "herniated disc".

While the majority acknowledges that Dr. Carter said that the claimant suffered from degenerative disc disease and had experienced an "acute aggravation" and "lumbar sprain" on August 28, 2005, the majority concludes that the acute aggravation and the lumbar sprain were not the result of the August 28, 2005 fall. The only evidence cited by the majority, in support of this conclusion, is that Dr. Safman did not find muscle spasm on December 20, 2005. However, the injury that

resulted from the fall was a herniated disc at L5-S1 and not a lumbar sprain. Therefore, the presence or absence of muscle spasm, the sign of a sprain, is irrelevant.

Next, the majority concludes that the MRI of November 7, 2006 showed a protrusion at T11-T12 and moderate degenerative change at L5-S1 and that these conditions were not the result of the August 28, 2005 accident. This conclusion is unsound for several reasons. Firstly, the majority offers no evidentiary support for this conclusion. The Commission must make findings of fact which are more than mere conclusions. A simple narration of the testimony followed by a conclusion is insufficient. The Commission must detail or analyze the facts upon which the findings are based. Otherwise, a meaningful review is not possible. Lowe v. Car Care Marketing, 53 Ark. App. 100, 919 S.W.2d 520 (1996). The above referenced finding is nothing more than a naked conclusion with out supporting facts and totally devoid of analysis. In addition, the finding contains a misrepresentation of fact, i.e., that the MRI showed only degenerative changes at L5-S1. Of course, the MRI also showed a herniated disc at that level which was the object of the claimant's surgery and the

condition which is in issue in this case. Under these circumstances, the majority's finding on the causal relationship between the herniated disc and the accident is fatally deficient.

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

PHILIP A. HOOD, Commissioner