

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F807747

JOSEPH MCNUTT,
EMPLOYEE

CLAIMANT

WILSON INDUSTRIAL SERVICES, INC.,
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 3, 2009

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

Claimant appears Pro Se.

Respondent represented by the HONORABLE MARK MAYFIELD,
Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals an administrative law judge's opinion filed March 17, 2009. The administrative law judge found, among other things, that the claimant sustained an injury arising out of and in the course of his employment with the respondent. 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 injury.

I. HISTORY

Dr. Stephen M. Waggoner examined the claimant, now age 54, on April 6, 2000: "Joseph McNutt is a 45 year old male here for evaluation of back and left hip pain. He injured himself on 03/02/00. He was bending over moving some channel irons....He also had an MRI done on 3/20/00 and we have obtained the report on this. This demonstrated significant degenerative changes throughout the lumbar spine primarily at L2-3 and L5-S1. At L5-S1 there is also an asymmetrical left posterior paracentral disc protrusion with some mild impingement on the thecal sac and there is significant degeneration at that level as well....IMPRESSION: (1) Acute Strain With Underlying Spondylosis (2) Degenerative Disease L5-S1 (3) Shallow HNP at L5-S1, Left."

The claimant was initially treated conservatively and was placed on light duty with restrictions. The claimant's employer at that time was Memphis Fence. Dr. Waggoner noted in an April 24, 2000 follow-up visit, "MRI is reviewed showing small poorly defined disc protrusion at L5-S1 on the left with possible compression of the left S1 nerve root."

The claimant followed up with Dr. Waggoner on May 4, 2000: "He is still complaining of persistent pain in the back that radiates into the posterior thigh and calf. He had a CT/myelogram done on 5/2/00 and he is back for follow up....CT/myelogram is reviewed showing degenerative changes at the L5 level with disc protrusion in the left paracentral region and a small disc herniation at L5-S1 on the left; narrowing of the neural foramen at that level. IMPRESSION: DEGENERATIVE DISC DISEASE WITH HERNIATED NUCLEUS PULPOSUS L5-S1 LEFT AND LEFT S1 RADICULOPATHY."

Dr. Waggoner performed surgery on May 9, 2000: "Microscopic diskectomy at L5-S1, left, with partial medial facetectomy and foraminotomy at L5-S1, left." The pre- and post-operative diagnosis was "Herniated nucleus pulposus, L5-S1, left." Dr. Waggoner noted on May 18, 2000, "His leg pain has completely resolved. He is having some lower back pain." Dr. Waggoner returned the claimant to restricted work on June 27, 2000. The claimant continued to follow up with Dr. Waggoner and continued to complain of pain in his left hip, leg, and back. Dr. Waggoner performed a repeat microscopic diskectomy at L5-S1, left on August 31, 2004.

The pre- and post-operative diagnosis was "Recurrent herniated nucleus pulposus at L5-S1 left".

The claimant returned to Dr. Waggoner on September 12, 2005: "He has been having trouble since Friday when he injured his back when he was lifting a heavy pipe at work. He felt a pop in his back and shortly after this began having pain that radiated into the left hip down in the leg....IMPRESSION: Acute left L5/S1 radiculopathy. Rule out recurrent HNP L5/S1 left." The claimant testified that he was working at Industrial Mechanical Contractors when this accident occurred.

An MRI of the claimant's lumbar spine was taken on September 16, 2005, with the following impression:

1. Left paracentral extradural defect compatible with epidural fibrosis at L5-S1, causing posterior displacement of the left S1 nerve root. A small recurrent central disc protrusion is also present at this level, but does not cause nerve root compression.
2. Mild disc bulges at L2-L3 through L4-L5, without significant associated mass effect or canal compromise.
3. Minimal lumbar scoliosis, convex to the left.

Dr. Waggoner planned conservative management after reviewing the results of the September 16, 2005 MRI. A lumbar myelogram and CT scan was done on November 9, 2005:

1. Status post L5-S1 left laminotomy. There is epidural soft tissue to the left of the midline causing displacement of the left S1 nerve root, although the root sleeve does fill with myelographic contrast. Consistent with either postoperative epidural fibrosis or HNP. This needs to be correlated with the MRI findings at that level.
2. Minor bulges of the L2, L3, and L4 discs.
3. Facet DJD at L3 and L5.

Dr. Waggoner's impression on November 21, 2005 was "Acute left S1 radiculopathy with recurrent HNP L5-S1 left....I have recommended that he consider proceeding with surgical intervention. This would involve a repeat diskectomy at the L5-S1 level followed by a transforaminal lumbar interbody fusion from L5 to S1 with iliac crest bone graft, BMP and pedicle screw instrumentation. I have also recommended a posterior lateral fusion to supplement this due to the fact that he is a heavy smoker."

Dr. Waggoner performed a repeat diskectomy at L5-S1 on January 11, 2006. Dr. Waggoner prescribed Valium for muscle spasm on January 19, 2006.

Dr. Waggoner assigned the claimant permanent work restrictions on or about June 30, 2006. Dr. Waggoner noted on July 13, 2006, "His repeat MRI is reviewed. There are postoperative changes at L5-S1. No evidence recurrent HNP." Dr. Waggoner assigned the claimant a 24% whole-person

impairment rating. The claimant continued to follow up with Dr. Waggoner for complaints of pain in his back, radiating through the left hip, leg, and foot. Dr. Waggoner released the claimant from his care on January 22, 2007.

The claimant testified, *pro se*, that he began working as a welder for the respondent-employer, Wilson Industrial Services, in May 2007. Gregory Wilson, the respondent-employer's owner, testified that the claimant began working for the respondent in about July 2007. The claimant testified that he injured his back at work on or about March 31, 2008: "I bent over and twisted getting underneath the pipe to make a weld, and that's when I pulled something in my back." The claimant testified that he told Gregory Wilson and Wilson's brother, Jeff Wilson, that the claimant had been hurt. The claimant testified regarding an averred conversation with Gregory Wilson in June 2008, "I told him I needed to go to the doctor. It wasn't getting no better. And he told me why didn't I just go on and take the layoff and let my back heal up, and I agreed to that." The record contains the following undated handwritten note, signed by Gregg Wilson: "Joe McNutt was layed (sic) off due to lack of

work on June 6th of 2008. He will return when work picks back up." The note did not mention a workplace injury.

The claimant was seen at Family Practice Clinic on July 21, 2008 on the Clinic's "W/C" account. The claimant tested positive at Family Practice Clinic for Cannibinoids/THC.

The respondent's attorney examined Gregory Wilson at hearing:

Q. And did Mr. McNutt ever approach you saying that he had hurt himself on the job?

A. No, sir, he didn't....

Q. And Mr. McNutt has indicated that he thinks it was sometime around March the 31st that he had this injury. When is the first time you got some kind of report about there being an injury.

A. I got a certified letter in the mail, and it was August, I believe it was August the 2nd....

Q. And had Mr. McNutt indicated to you before then that he had a work injury?

A. No, sir....

Q. After Mr. McNutt was laid off, did you - was there an occasion where he contacted you about some medical treatment?

A. Yes. I don't know the exact date, but, yes.

Q. And what did you do in response to that?

A. Well, I just told him I would have to get him an appointment set up. Well, first, I asked him did he have a family physician or somebody there in town that he would,

you know, like to go to, and he said no, he didn't have one. So I just told him, you know, we use - the family physician that I used, my whole family uses, so that's what we did.

Q. And did you ask - well, let me ask this. Were you suspicious then as to whether he had had an injury on the job?

A. Yeah, I mean, I didn't know. That's the first time I was -

Q. Well, if you were suspicious of that, then what reason did you go ahead and say you would set up an appointment with him to go to the doctor?

A. Oh, I mean, I would've done that with anybody, just no particular reason. I mean, I just, I guess the goodness of my heart, I mean, just to help him out, you know. If he claimed he hurt hisself (sic) on the job.

The claimant presented on his own to a Veterans Administration Medical Center on September 22, 2008:

Joseph McNutt is a 53-year-old Caucasian male who came in complaining of chronic low back pain. He has been having back pain since March 21, 2008. This patient has a history of back surgery. He is a new patient and he is enrolling here at the VA....

MUSCULOSKELETAL: Back with some paravertebral muscle spasms noted. There is a scar from the previous surgery. He has pain in the back with leg extension....

X-rays showed no acute bony process. There is degenerative joint disease.

The assessment was "1. Back pain." It was further noted on September 22, 2008, "Reports having lumbar surgery

times 3 in the past. He states that he developed this injury while working. Workmen's comp is pending."

A CT of the claimant's lumbar spine was done on September 26, 2008, with the following impression:

1. Advanced changes of degenerative arthritis were identified.
2. Postop screw fixation at L5 and S1 disc spaces were noted.
3. Disc space narrowing at L-5-S-1 interspace was seen.
4. Generalized bulging disc without definite disc herniations present at L-2-3, L-3-4 and L-4-5 disc spaces.

It was noted on September 29, 2008, "PT ok to return to work - however he was never instructed by this clinic to cease employment."

The claimant began treating at Jonesboro Neurosurgery Clinic on November 3, 2008. The claimant complained of lower back pain down the left hip and leg. The claimant stated that he was injured on the job on March 31, 2008 and wrote, "was making weld pipe on ground bent over bad position to get to pulled something in lower back pulled two more times after that."

Dr. John A. Campbell saw the claimant on November 3, 2008:

This is a 53-year-old veteran that I am seeing in consultation in the office at the request of Dr.

Ramrup. This gentleman has had previous lumbar fusion by Dr. Waggoner. He has had a total of three lumbar spine surgeries, the most recent of which, I believe, was a L5-S1 fusion with instrumentation done in January of 2006. Since then the patient has noticed a problem since March of this year. He did well up until March and then in March was hurt doing a welding job and felt something pop in his back and since then he has had a lot of pain going down the left leg down to the foot....

A CT scan of his lumbar spine dated 09/28/08 from Poplar Bluff VA Medical Center does show fusion from L5 to S1 with pedicle screws. A generalized disc bulge is seen at L2-3, L3-4, and L4-5.

Dr. Campbell assessed "Patient with history of L5-S1 fusion has some bulging disks above the fusion. The plan is for an MRI of the lumbar spine with and without contrast and followup thereafter."

An MRI of the claimant's lumbar spine was taken on November 17, 2008, with the following findings:

Patient is status post L5-S1 posterior fusion with laminotomies. There is metallic hardware with associated magnetic inhomogeneity artifacts. There is severe disc desiccation and disc height loss at this level. There is mild disc desiccation and height loss at L2-L3. The remainder of the intervertebral discs have normal appearance. There are generalized increased signal in the bone marrow on the STIR images indicating red marrow reconversion. Questioned anemia. The conus ends normally at the L1-L2 level. There are mild anterior fatty endplate changes of the superior endplate of the L3 vertebral body.

There is mild anterior disc bulging with associated osteophytes at the L2-L3 level. No significant posterior disc bulging. Mild posterior facet degenerative changes. Central canal and neural foramen are widely patent. Anterior, predominantly right-sided, disc osteophyte complex is seen at this level as well. Again, mild posterior facet degenerative changes. Very mild broad-based posterior disc bulging but no central canal or neural foraminal stenosis. Mild broad-based posterior disc bulging at L4-L5 with no evidence of central canal stenosis. Neural foramen remain widely patent. At L5-S1, there is the previously mentioned posterior effusion with laminectomies. Thickening of the midline posterior longitudinal ligament, but there is no central canal stenosis. Metallic artifact slightly obscures evaluation of neural foramen. I believe the right neural foramen is clearly patent. There is question of some enhancing granulation tissue mildly narrowing the left neural foramen.

CONCLUSION: Postsurgical changes as described above. There is a small amount of enhancing granulation tissue, which mildly narrows the left neural foramen at L5-S1. Otherwise, central canal and neural foramen are widely patent throughout the lumbar spine.

Dr. Campbell reviewed an MRI of the claimant's lumbar spine and reported on November 17, 2008, "This shows intact fusion at the L5-S1 level. There are some slight bulging disks at L2-3, L3-4, and L4-5 with minimal, if any, stenosis at these levels. Facet changes are seen at multiple levels as well. The fusion appears to be solid and I really see no evidence for any S1 nerve root compression. I have told the patient the results of these films. ASSESSMENT/PLAN: At

this point I have no further surgical intervention to recommend. I have offered consultation with a pain specialist, but he declines this at this time. I will be glad to see him back here on an as needed basis."

A pre-hearing order was filed on November 18, 2008. The claimant contended, among other things, that there was an accident on or about March 31, 2008. The respondent contended that the claimant did not sustain a compensable injury. The parties agreed to litigate the issues of compensability, temporary total disability benefits subsequent to June 16, 2008, and medical benefits.

The record indicates that a physician at Family Practice Associates took the claimant off work for the period November 20, 2008 through January 6, 2009. (The record includes another note from a physician taking the claimant off work from November 5, 2008 until January 22, 2009).

A hearing was held on December 19, 2008. Miles Harvey testified that he had observed the claimant while working on the respondent's premises. Miles Harvey could not recall the claimant ever reporting an injury to him. Mike West testified that he formerly worked for the respondent, that

he never saw the claimant having any physical problems, and that the claimant did not report an injury to him. Cameron Rosenthall, an employee of the respondent, testified regarding the claimant, "He said he hurt his back when he was welding." Jeffrey Wilson, another employee for the respondent, testified that the claimant did not report a workplace injury to him in March 2008.

An administrative law judge filed an opinion on March 17, 2009. The administrative law judge found, among other things, that the claimant sustained an injury to his back arising out of and in the course of the claimant's employment on or about March 21, 2008. The respondent appeals 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 requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

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 Full Commission finds that the claimant did not prove he sustained a compensable injury. The claimant first began treating for an acute back strain with a disc protrusion at L5-S1 in April 2000. Dr. Waggoner noted in May 2000 that the claimant suffered from degenerative disc disease with an HNP at L5-S1 and left S1 radiculopathy. Dr. Waggoner performed a diskectomy at L5-S1 in May 2000 and another L5-S1 diskectomy in August 2004. The claimant reported a "pop" in his back while working for

another employer in September 2005. An MRI in September 2005 showed disc bulges at L2-L3 through L4-L5. A lumbar myelogram and CT in November 2005 also showed disc bulging and facet degenerative disc disease.

Dr. Waggoner performed a third surgery, a repeat diskectomy at L5-S1, in January 2006. Dr. Waggoner also prescribed the claimant medication for muscle spasm in January 2006. The claimant began working for the respondent as a welder in about July 2007. The claimant testified that he sustained an accidental injury on or about March 31, 2008: "I bent over and twisted getting underneath the pipe to make a weld, and that's when I pulled something in my back." The claimant testified that he informed Gregory Wilson and other employees that there had been a specific incident, but the other witnesses generally disputed the claimant's testimony. Cameron Rosenthall did testify, "He said he hurt his back when he was welding."

Pursuant to Act 796 of 1993 as codified at Ark. Code Ann. §11-9-102(4)(A)(i), the Full Commission finds that the claimant did not prove he sustained a compensable injury. The claimant did not prove that he sustained an injury causing internal or external physical harm to his lumbar

spine or lower back. Nor did the claimant establish a compensable injury by medical evidence supported by objective findings. The claimant testified that he felt a "pull" while welding at work on or about March 31, 2008. "Paravertebral muscle spasms" were noted during a medical examination in September 2008. Yet Dr. Waggoner's notes from January 2006 indicated that the claimant suffered from muscle spasm well before the alleged accident in March 2008. The evidence does not demonstrate that the report of muscle spasm in September 2008 was in any way causally related to a specific incident at work for the respondent. A CT of the claimant's lumbar spine on September 26, 2008 showed disc space narrowing at L5-S1 and generalized bulging at L2-3, L3-4, and L4-5. The record does not demonstrate that disc space narrowing shown on the CT was related to the alleged "pull" at work in March 2008. Further, the medical records no later than September 2005 showed prior bulging in the claimant's lumbar spine. The evidence did not show that the bulging reported in September 2008 was the causal result of the alleged incident at work in March 2008. There was no evidence connecting the report of muscle spasms or the abnormalities shown on diagnostic testing to the alleged

accidental injury of March 2008. See *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). Nor was there any probative evidence connecting the "post-surgical changes" reported in November 2008 to the alleged specific incident. Dr. Campbell examined the claimant in November 2008 and opined that the claimant was not a candidate for surgery. The claimant declined Dr. Campbell's offer of a referral to a pain specialist.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove he sustained a compensable injury. The claimant did not prove that he sustained an accidental injury causing internal or external physical harm to his lumbar spine or lower back. The claimant did not prove that he sustained an injury to his lumbar spine or lower back which arose out of and in the course of employment. The claimant did not prove that he sustained an injury which required medical services or resulted in disability. The claimant did not establish a compensable injury to his lumbar spine or lower back by medical evidence supported by objective findings. We therefore reverse the administrative law judge's opinion, and this claim is denied and dismissed.

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. The majority, reversing the Administrative Law Judge, finds that the claimant did not prove by a preponderance of the evidence that he sustained a compensable lower back injury. 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 lower back aggravation injury and I would award benefits accordingly.

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is itself

compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

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[.]

Here, the claimant had prior lower back problems and had in fact underwent a fusion surgery in January 2006. However, the claimant testified that he healed after the fusion surgery and was not experiencing any lower back pain or other symptoms that would keep him from working up until the date of injury in this claim. The claimant testified that on the date of injury he bent over and twisted getting

underneath a pipe to make a weld and that is when he pulled something in his back. The claimant testified that when he got up from making the weld he reported his injury to Greg Wilson and Jeff Wilson. Cameron Rosenthall, a witness for the respondent stated: "Greg come up, and he said one time that he hurt his back." In further corroboration of the claimant's account of reporting the injury and continuing to work thereafter, Mr. Rosenthall described the statement by Greg Wilson regarding the claimant having hurt his back as "shoot, that was way before then [last day the claimant worked for the respondent]." Also tending to corroborate the claimant's testimony is the testimony of Greg Wilson indicating that he sent the claimant to see a doctor after he had been formally notified of the work-related nature of the claimant's injury.

Based on the credible testimony of the claimant, corroborated by the testimony of Cameron Rosenthall and Greg Wilson, I find, as did the Administrative Law Judge, that the claimant has proved by a preponderance of the evidence that he sustained a compensable lower back aggravation injury while performing welding work for the respondent employer on or about March 21, 2008.

For the aforementioned reasons I must respectfully
dissent.

PHILIP A. HOOD, Commissioner