

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613876

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| HUONG NGUYEN, EMPLOYEE | CLAIMANT |
| FM CORPORATION, EMPLOYER | RESPONDENT |
| S.B. HOWARD & COMPANY, INC., CARRIER | RESPONDENT |

OPINION FILED APRIL 13, 2009

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

Claimant represented by HONORABLE LAURA J. MCKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed April 15, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 29, 2007, and contained in a pre-hearing order filed November 30, 2007, are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his back while employed by respondent on November 9, 2006.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. 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 job-related injury to his lower back on November 9, 2006, and therefore, I must respectfully dissent.

The claimant is a non-English speaker. He was born in Viet Nam and came to this country in 1980. In 1983, he went to work for the respondent and worked for them for the following 23 years. While he understands English when spoken

to him, he is not able to speak the language with any degree of fluency. An example of the confusion created by the claimant's language problem is demonstrated at the very onset of this claim. According to the claimant's testimony, he was squatting down, cleaning his paint gun, on the date of his injury. When he attempted to return to his feet, he felt a sharp, intense pain in his lower back which radiated upward. As the claimant explained at the hearing, with the benefit of a translator, he meant to say that his pain was radiating from his low back up to his chest. However, when the ambulance personnel arrived at the claimant's workplace, he was noted as suffering from back and chest pain. The EMT apparently interpreted the complaints of chest pain as that similar to a heart attack and provided him nitroglycerin. Later, at the hospital, tests were also performed on the claimant's heart, but, no evidence was found of a heart attack. However, as the claimant later made clear through a translator, he did not intend to tell anyone he was suffering from any type of heart attack or any other similar condition. He was merely trying to tell people he was

suffering from pain radiating from his lower back up his body and into his chest.

While at the emergency room, the claimant underwent an MRI of his lower spine. The report related to that examination, dated November 9, 2006, found the claimant was suffering from significant degenerative changes at his spine at virtually every level from T11 to L5. Most significantly, the MRI discovered the claimant had a paracentral disc protrusion at T11-L1, which the radiologist characterized as a herniated nucleus pulposis, which compromised the L1 nerve root at that level. The claimant was also found to have circumferential disc bulges at all levels in his lumbar spine with what the radiologist termed to be nerve root clumping at L2-L3 and L4-L5. The radiologist was also of the opinion that the claimant suffered from arachnoiditis.

While in the hospital, the claimant also saw Dr. V. R. Umbarger, a pain management specialist in Rogers, Arkansas. Dr. Umbarger provided the claimant with a lumbar epidural steroid injection on November 9, 2006, and in his report detailing that procedure, the doctor noted the

claimant. "has had pain over his back for the last few weeks and it has slowly gotten worse." He also noted the claimant was having weakness in his lower extremities and the MRI demonstrated significant spinal stenosis which Dr. Umbarger noted to be most severe at L4-L5.

The claimant was discharged from the hospital on November 10, 2006, and followed up for further treatment by Dr. Gary Moffitt, a general practitioner in Lowell, Arkansas. In a report dated November 17, 2006, Dr. Moffitt diagnosed the claimant as having a "right sacroiliac strain superimposed on degenerative disc disease and osteoarthritis." Dr. Moffitt released the claimant to return to work with the restriction of not lifting more than 10 pounds. Dr. Moffitt eventually referred the claimant for a two-week period of physical therapy. After the claimant completed this regimen, he returned to Dr. Moffitt on December 6, 2006. In a report of that date, Dr. Moffitt noted the claimant stated he was doing a little worse and was losing weight. Dr. Moffitt also noted the claimant had an antalgic gait mainly on his right side. Significantly, Dr. Moffitt discussed the claimant's language problem and

stated it was difficult to understand him when he spoke English. In this report, Dr. Moffitt returned the claimant to physical therapy and prescribed him an anti-inflammatory and pain medication. In his follow up report, Dr. Moffitt discussed the claimant's declining condition. In a report of December 21, 2006, Dr. Moffitt comments the claimant appeared to be in distress and was walking with an antalgic gait. He also stated the claimant was complaining of significant pain in his lower back. Dr. Moffitt then referred the claimant to Dr. David Brown, a Fayetteville neurologist for further consultation.

In his report of January 23, 2007, Dr. Brown reviewed the claimant's medical history and stated he doubted the claimant had arachnoiditis. Rather, he felt the claimant's back pain was mechanical due to his spinal condition. Eventually, Dr. Brown referred the claimant to Dr. Michael Standefer, a Fayetteville neurosurgeon, for a further evaluation. After reviewing the claimant's history of injury and the applicable condition, Dr. Standefer stated the claimant's November 9, 2006, MRI scan, which he believed was of poor quality, demonstrated a severe focal canal

stenosis at L4-L5. Dr. Standefer directed the claimant to undergo a myelography and post myelogram CT scan to confirm the nature and extent of his spinal injuries.

The CT scan was performed on March 14, 2007. The CT scan confirmed the presence of broad-based disc protrusions at L2-L3, L3-L4, and L5-S1. At L4-L5, the scan also indicated the claimant had a large defect, suggestive of a severe disc herniation.

Dr. Standefer, after reviewing the results of the CT scan, determined the claimant would benefit from a spinal fusion. Consequently, this surgical procedure was performed on April 25, 2007. In his operative note of that date, Dr. Standefer described the laminectomies and facetectomies he performed at the disc spaces located between the L3-L4 and L4-L5 vertebrae. He also performed a fusion at L4-L5. However, Dr. Standefer stated he did not find evidence of any focal disc protrusions or any ruptured discs at L4-L5.

The Arkansas Workers' Compensation Act provides a claimant is to receive benefits when it can be established he or she sustained a specific incident injury while acting in the course and scope of their employment, and the injury

required medical services or resulted in disability or death. Also, the nature and extent of the injury must be established by medical evidence supported by objective findings. See Ark. Code Ann. §11-9-102 (4) (A) (i) and (B). In this case, the claimant has fully met his burden of proof. According to the undisputed testimony of the claimant, he was attempting to clean a paint gun when the injury occurred. Clearly, this activity was within the course and scope of his employment. According to the claimant, he had squatted down to complete this task and, upon standing up, found that he was unable to do so because of the severe pain in his back. There also appears to be no dispute that the pain in the claimant's back was caused by his spinal condition. Specifically, the broad based disc protrusions and the instability in his lower vertebrae. This condition was what caused him to seek medical treatment and was the ailment Dr. Standefer attempted to correct with surgery.

The majority's rationale for finding the claim is not compensable is the conclusion that the claimant's problems were caused by a pre-existing degenerative

condition. However, no evidence was offered to establish the condition was symptomatic or required any medical treatment prior to the claimant's onset of symptoms at work.

A similar case was Cedar Chemical Company v. Knight, 372 Ark. 233, ___ S.W.3d ___ (2008). There, the claimant sustained an injury to his knee while climbing stairs at work. The respondent controverted the case, arguing his pre-existing degenerative disease was the cause of his disability and need for medical treatment. The Supreme Court affirmed both the Commission and the Court of Appeals in their decision to award benefits. The critical factor in this case was the claimant's testimony that he did not suffer any knee problems until the date of his reported injury, and his prior medical history, which did not reflect any prior treatment for a knee problem. On that basis, the Court concluded the injury arose out of his employment and was the result of a specific incident injury at work.

Another case similar to the one at bar is Parker v. Atlantic Research Corporation, 87 Ark. App. 145, 189 S.W.3d 449 (2004). There, the claimant alleged she sustained an injury to her neck based upon her job activities. The

Commission denied her claim but, on appeal, the claimant was awarded benefits. The Commission's rational for denying the claim was its conclusion an injury was not compensable if it caused a pre-existing degenerative spinal condition to become symptomatic. The Court specifically rejected this conclusion and held the new onset of pain was sufficient to establish a compensable injury. Significantly, the Parker case was one involving a nonspecific injury and the claimant had to demonstrate the injury was the major cause of his disability or need for treatment. In the present case, the claimant has established his injury was the result of a specific incident and, therefore, he must only prove his injury was a cause of his disability or need for treatment. See also, Crawford v. Single Source Transportation, 87 Ark. App. 216, 189 S.W.3d 507 (2004).

In its brief, the respondent cites the Administrative Law Judge's conclusion regarding the claimant's testimony. Specifically, they note the Administrative Law Judge found the claimant had testified his lower back pain pre-existed his injury. However, I find that this alleged inconsistency is due to a language

difficulty and does not reflect the claimant's true testimony. The allegedly inconsistent testimony was given in a deposition taken of the claimant. During the course of the deposition, respondent's counsel asked the claimant about his past medical history. The claimant advised him that, in the 23 years he had been working for the respondent employer, he had not sought or received medical treatment for his back condition. The claimant did admit he had upper back pain for which he had taken some over-the-counter medication. The following exchange then took place:

Q. And what body pains were you treating with this medication?

A. At that time, I had --- the pain was in both sides of my upper back and shoulders, because I was working hard, and I didn't have pain in my lower back at that time yet.

Q. You did not have it at that time?

A. Not, it was hurting there yet.

At that point, the claimant's answers made it clear he had not suffered from prior lower back pain.

Rather, the problem had been in his shoulders and upper back but, even then, his condition was not serious enough to see the doctor but was treatable with over-the-counter medication. The claimant's testimony indicated the problem had resolved by taking that medication.

Later, respondent's attorney attempted to recast the claimant's testimony as follows:

Q. Specifically, within a week or two of this incident happening, were you taking any over-the-counter medication to control pain for your low-back?

A. Yes, I did. I went to Wal-Mart, and I took some Tylenol and it helped relieve the pain, and then I went back to work.

Q. And this is before the incident occurred, then, right?

A. Before the incident, I was taking the medication because I was in pain, but I was able to go back to work because it wasn't that severe.

Q. Within a week or two of the incident that we're here to talk about, you were having some pain in your low-back and you were taking medication for

it, but you were still able to work?

A. Yeah.

Q. And is this pain that you were having in your back a week or two beforehand get gradually worse leading up to when this happened?

A. No, it didn't get any worse, it was just a very light pain. When I took the medication, it went away.

A great deal of emphasis was placed upon that quotation by the Administrative Law Judge. However, I note in the first quote the claimant was simply asked to state the location of his pain and he clearly explained the location was in his upper back and shoulders. Later, when the respondent's attorney inserted the phrase low-back pain in his question, the claimant replied in the affirmative. In my opinion, more weight should be placed upon the claimant's first question where he was simply asked to state the location of his pain, as opposed to the response when the respondent's attorney asked a leading question.

I find that even less emphasis should be given to the claimant's second response when the other language difficulties which arose during the deposition are considered. On Page 18 of the deposition, an exchange begins over what time of day the injury happened and when the claimant's shift began. Over two pages are consumed before it is determined the claimant arrived at work at approximately 5:00 a.m., where he then would spend the next 30 minutes to an hour preparing his paint gun for use. A short time later, several more pages are taken up with questioning the claimant to determine whether, when he had the onset of his back pain, he was standing, sitting down, or squatting before the onset of his pain. Again, two pages later, extensive questioning is required to determine the names of certain witnesses who were present when the claimant injured himself. In a sidebar comment, the translator explained the claimant was confused over some of the terminology being used by the respondent's attorney in asking the questions.

Obviously, even though a translator was being used during the deposition, communication was serious problem

when dealing with the claimant. Considering that almost ten pages of the deposition are taken up by trying to determine the time the claimant reported to work, the difference between sitting and squatting, and whether various witnesses were named Robert, Ruben, Roberto, or Tony, it is not surprising that some confusion might arise over the location of the claimant's back pain. In fact, given the obvious problems caused by the claimant's language difficulty, I simply cannot attach any real significance to the response the claimant gave to a leading question posed by the respondent's counsel whose purpose was to confuse the claimant and develop contradictory testimony.

Another alleged inconsistency are the statements found in the emergency room report to the effect the claimant had suffered chest pains when the incident happened at work. However, as the claimant explained in the hearing, he was trying to tell the ambulance personnel he had pain radiating from the low back into his chest. Considering the situation and the communication difficulties, it is not surprising the medical providers began treating the claimant for a heart attack. However, the claimant's testimony was

substantiated by the emergency room records which demonstrated the claimant's heart was functioning normally.

The Administrative Law Judge also referred to two medical reports, one from Dr. Raben, and other from Dr. Umbarger, both prepared while the claimant was hospitalized following his injury, which suggests the claimant had been suffering from either "chronic" back pain or had been having pain for some time. However, as the Administrative Law Judge points out, the claimant also advised several other doctors the onset of his low back pain did not begin until after the injury on November 9, 2006. However, all of the claimant's doctors mentioned, at some point, the difficulty they had in communicating with the claimant. Also, when the claimant was brought from work to the hospital, he did not have anyone available to translate for him. Eventually, his son arrived, but it is not clear whether Drs. Rabin and Umbarger spoke to the claimant with the benefit of an interpreter or whether they were dealing with him directly. Once again, any inconsistencies in this matter can be explained by the claimant's language difficulties, and I also note the majority of medical reports indicates the claimant told his

medical providers his low back pain did not begin until the incident at work.

Based on the preponderance of the evidence of record, I find that the claimant had a sudden onset of low back pain when he attempted to arise after cleaning his paint gun at work. In fact, I believe the evidence to this effect is overwhelming. The inconsistencies cited in the Administrative Law Judge Opinion, affirmed and adopted by the majority, are minor, and do not detract from the majority of evidence which tends to establish the compensability of the claimant's claim. This point is made even stronger when the communication problems are considered.

The applicable case law also supports the claimant's position. In the above cited cases, both the Arkansas Supreme Court and the Arkansas Court of Appeals have held where an asymptomatic condition is made symptomatic by a job-related event, the resulting disability and need for treatment are the result of an accident and are compensable. Such is exactly the situation in the present claim. The claimant may have had a degree of degenerative

spinal disease, but it is apparent this condition was not sufficient to require him to seek medical treatment or miss work. That conclusion is corroborated by the claimant's 23-year employment history at a physically demanding job without having to seek medical treatment or miss work because of his back condition. However, following the incident he described on November 9, 2006, he needed immediate medical treatment in the form of an ambulance ride to the hospital, followed by extensive medication, and eventual surgery. It is obvious his condition was materially worsened and made symptomatic by the event at work.

According to the Workers' Compensation Act, as explained and applied by the Arkansas Supreme Court and the Arkansas Court of Appeals, that factor alone is sufficient to meet the claimant's burden of proof.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner