

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F713372

MICHAEL SHAUGHNESSY,  
EMPLOYEE

CLAIMANT

SUN GROUP, INC.,  
EMPLOYER

RESPONDENT

WAUSAU UNDERWRITERS INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 5, 2009

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

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirm and Adopt

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on April 3, 2009. 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. The employer/employee/carrier relationship existed on or about September 22, 2007.
3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$504.00

for temporary total disability and \$378.00 for permanent partial disability benefits.

4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his lumbar spine as a result of his employment with Sun Group on or about September 22, 2007.

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. The claimant has alleged that he sustained a compensable injury to his lower back on September 22, 2007, while carrying a steel tube at work. The respondent controverted the case in its entirety, contending the claimant injured his lower back in February 2007, a time prior to his employment with the respondent. After a de novo review of the record, I find that the claimant has met his burden of establishing a compensable, job-related injury and would award benefits accordingly.

The claimant went to work for the respondent employer sometime in August 2007. The employer was engaged in installation of signage for department stores and other businesses around the country. According to the claimant's

testimony, his injury occurred while working in a Home Depot store in New York. He stated he was carrying a hollow steel beam, approximately eight feet (8') long and weighing 80 to 100 pounds, when he felt a sharp pain in his lower back which he likened to being stabbed by a knife. He stated it was a steady sharp pain which continued for about a half an hour after the incident, but then began to get better. He further testified he advised his immediate supervisor, Donny Patton, of the injury, but, he was able to continue working. Later, when they had returned to the motel, the claimant and Mr. Patton told Mr. Patton's immediate supervisor about the incident. Assuming his supervisors had handled any other necessary notifications, the claimant continued working. He testified the back pain got somewhat better for a "couple of days," and then progressively got worse from there on out. He also testified that, the day following his back injury, the claimant left the job in New York and traveled to Utah to assist in erecting signage at another Home Depot store in that state. It was there the claimant stated the pain moved into his legs and he began developing a dull ache in his left thigh.

The clamant continued his job, with no interruption in his duties, even though he stated he was

having severe pain. Eventually, the claimant returned to Arkansas for a brief period of time, where he was seen by Dr. Blair at the Cabot Medical Clinic. In a medical report dated October 23, 2007, he noted that the claimant was having lumbar radiculopathy and he was directed to undergo x-rays and return in seven days. However, the claimant's job duties once again required him to travel out of state.

While in Arizona, the claimant testified he began having severe and debilitating back pain to the extent that he was unable to get out of bed and also began having bowel and bladder dysfunction. Consequently, he was seen at the Flagstaff Medical Center emergency room on November 1, 2007. According to the medical reports from the emergency room, the claimant was given medication and stabilized and, after he became comfortable, was released. He was advised to obtain an MRI scan upon his return to Arkansas.

The claimant underwent the MRI scan on November 8, 2007, at the direction of Dr. Jeffrey Stamp, at the Cabot Medical Clinic. According to a report dated November 8, 2007, the MRI scan discovered a large central/left central disc extrusion at L5-S1, causing compression of the thecal sac and the ipsilateral nerve root. Eventually, the claimant underwent lumbar spinal surgery for this condition.

The surgery was successful and, by the time of the hearing, the claimant had returned to work at the same or greater wages as he was earning when injured.

The respondent controverted the case because statements the claimant allegedly made to some of his treating physicians suggested his injury occurred in February 2007, a date prior to his employment with the respondent employer. The first occasion the claimant saw a doctor following his injury date of September 22, 2007, was the above-referenced visit at the Cabot Medical Center with Dr. Blair on October 23, 2007. The report of that date includes a handwritten notation suggesting the claimant's back condition may have started "in spring '07" with a recurrence of lumbar back pain two to three months prior.

The claimant's next visit with the Cabot Medical Center was with Dr. Jeffrey Stamp on November 5, 2007. The report of that date states the claimant is being seen for a followup of lower back pain with a notation indicating the claimant "twisted wrong 2-07."

As indicated above, the claimant also sought medical treatment from an emergency room in Arizona. The report related to that emergency room visit was dated November 1, 2007 and states:

"The patient is a 29 year old male who states back in February of this year he had twisted and had gotten a little twinge in his back. It was there for about one week, then seemed to go away. The patient notes that then in July he woke up one morning and had the same pain, same spot, but it seemed to be more intense and was radiating into his buttocks cheek. After a couple of weeks that seemed to get better. The patient reports then in October about one month ago, he had onset of pain again without any injury."

The claimant also saw Dr. Steven Cathey after a referral from his treating physician. Dr. Cathey's report of November 15, 2007, stated the claimant, "presents with a two month history of lower back pain and left leg pain. His symptoms came on after an occupational injury he suffered on September 22, 2007, while he was carrying a large steel beam."

Admittedly, it seems unlikely three different doctors, one of whom was in Arizona would have been able to have such a consistent history of pre-existing back injuries if the claimant had not advised them all of that. In particular, I note Dr. Blair's comment that the pain began in the spring of '07 and had been continuous for two to

three months prior to the claimant's visit in October 2007, is in accord with the Arizona emergency room doctor, who stated the claimant had woken up in July with intense radiating pain. Likewise, both the emergency room physician and Dr. Stamp related a history of a twisting injury to the claimant's back in February 2007

The claimant testified he did not recall ever having told any of his doctors about injuring his back in February 2007. While he admitted to occasional periods of back pain, he denied having ever sought medical treatment for such an injury and denied having taken medication or having had missed work because of it. A lack of medical records prior to October 2007 supports that testimony. In this regard, I note the claimant's job history indicates he was employed throughout this period of time at jobs requiring lifting, bending, carrying, and other forms of manual labor. I also note the claimant's job history is absent of any evidence of malingering or any lack of motivation. The claimant only missed approximately three months of work following his back surgery and he returned to work as an electrician and reported no vocational disability or impairment resulting from this surgery.

The majority, by affirming and adopting the

opinion of the Administrative Law Judge, finds that the claimant is not a credible witness. However, I do not believe a finding of credibility in this regard disposes of this case. The evidence is indisputable the claimant had a large disc herniation in his lower back. This is documented not only by the MRI scan but the surgical notes from Dr. Cathey. Those reports clearly establish a large herniation caused nerve root impingement responsible for the radicular symptoms the claimant complained of.

Given the severity of the claimant's symptoms, it appears unlikely to me he could have had such a debilitating condition occur in February 2007, and be able to continue working as he did through November 2007. Obviously, something occurred after the claimant went to work for the respondent which caused any back condition he might have had to become severely disabling. In my opinion, the testimony the claimant gave regarding the incident in September 2007 is in accord with the type of activity which could have caused this increase in symptoms.

I also note the claimant was traveling extensively during the period of September and October 2007 in carrying out his job duties. Because of this heavy travel schedule, it appears highly unlikely the claimant would have had any

other opportunities to have injured his back other than while engaging in job-related activities.

Even if it is accepted the claimant had injured his back in an earlier accident, I do not believe such an occurrence would disqualify him from obtaining benefits. As has often been held by the Courts of this state, a pre-existing condition which is aggravated by a job-related condition or accident, can entitle a claimant to benefits if the aggravating incident is the major cause of the resulting disability and need for treatment. Parker v. Atlantic Research Corp., 87 Ark. App. 145, 189 S. W. 3d 449 (2004). Here, it is readily apparent the claimant's back injury in September 2007 caused a significant increase in his back symptoms. This increase in symptoms clearly correlates to the extruding disc material discovered by the MRI scan in November 2007. This condition could not have been present in February 2007 or at any time prior to the fall of that year without the claimant having been rendered disabled. Since something obviously happened to the claimant to cause this magnification of symptoms, and the claimant's job duties required him to travel extensively and be away from home, there is no other logical explanation for his symptoms other than a job-related accident. I also note the

claimant's symptoms were not exaggerated or magnified, but were entirely supported by the objective medical tests performed on him, and the observations of Dr. Cathey during surgery.

In conclusion, after my evaluation of the evidence, I believe the claimant's testimony establishes his occurrence of a compensable injury on or about September 22, 2007 while carrying a steel beam or tube at work. I believe this incident caused an aggravation to whatever back condition the claimant may have already had and, accordingly, he is entitled to appropriate medical and disability benefits, including the medical expenses he incurred for treatment of his back condition, as well as temporary disability benefits during the requested period and permanent partial disability benefits based upon an anatomical impairment of 10% to the body as a whole.

For the aforementioned reasons I must respectfully dissent.

---

PHILIP A. HOOD, Commissioner