

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608592

CHARLES WAYNE SCOTT, EMPLOYEE	CLAIMANT
LIBERTY SUPPLY, INC., EMPLOYER	RESPONDENT NO. 1
MASSACHUSETTS BAY INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 18, 2009

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, 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 February 7, 2008.

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

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.

3) The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset back injury while in the respondents' employ.

4) Since the claimant has failed to prove compensability, all other issues outlined herein are rendered moot.

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 established a compensable injury based upon heavy lifting performed in October 2005. I find that the claimant sustained anatomical impairment in an amount equal to 7% to the body as a whole as a result of his injury. I further find that the claimant is entitled to wage-loss disability benefits in the amount of 20% to the body as a whole. I also find that the claimant is entitled to all reasonable and necessary medical treatment for treatment of his compensable injuries. Therefore, I must respectfully dissent from the majority opinion.

The claimant testified he was 62 years of age and had worked for a chemical company engaged in the extraction of underground brine water for the 35 years preceding 2003. After retiring from that employer, he worked for short periods of time in the construction industry, and for a drilling rig service company. He was hired by the respondent in February 2005.

In the summer of 2003, the claimant complained to his personal physician, Dr. J. A. Franks, about having pain in his hip. The claimant, who testified that he was an avid runner, stated he was running over 20 miles a week, and sometimes as much as 7 miles a day. He attributed this hip pain to his running activities. Dr. Franks prescribed pain medication and anti-inflammatories. The doctor also directed the claimant to undergo x-rays of his hip and lower back. The x-rays were performed in August 2002, and, according to Dr. Franks, revealed the claimant was suffering from a Grade 1 spondylolisthesis at L5-S1. Dr. Franks then directed the claimant to undergo an MRI scan and a referral to Dr. Dwayne Daniels, at the South Arkansas Orthopedic Sports Medicine Center. Dr. Daniels stated in a letter, dated September 4, 2002, that the MRI demonstrated degeneration at L5-S1 of the claimant's spine and stated the degeneration was associated with mild spondylolisthesis but there was no evidence of

disc herniation. According to the claimant, the stiffness and lower back pain he described to Dr. Franks in the summer of 2002, responded well to conservative treatment and a reduction in his running activities.

As indicated above, after accepting an early retirement offer in 2003, the claimant eventually obtained employment with the respondent in 2005. The respondent's business was in the sale and delivery of drilling rig equipment and supplies. According to the claimant, his job duties originally involved working in the employer's warehouse and delivering drilling pipe and other supplies to drilling rigs. However, as his job evolved, he found himself working almost exclusively in the employer's warehouse.

He testified he was not having any physical problems performing this job until October 2005. At that time, the employer received shipment of a large number of metal fittings which came in crates, the top of which was three to four feet from the floor. He stated that in unloading them, he had to bend over from the waist and lift them out of the crate. These fittings varied in size, from a few pounds to much heavier. The claimant testified that during approximately a ten-day period when the fittings were being unloaded, he began experiencing pain in his lower back. The pain soon began radiating down his left leg.

The claimant eventually complained of his back pain to his immediate supervisor, Terrell Sledge. Mr. Sledge, who also testified at the hearing, suggested the claimant see Dr. Butler, his personal physician.

The claimant first saw Dr. Butler on November 11, 2005. In a report related to this visit, Dr. Butler noted the claimant was suffering from lower back pain. Dr. Butler noted the presence of muscle spasms in the claimant's left lower lumbar region and directed him to return for further chiropractic manipulation. Dr. Butler continued treating the claimant, but, when the claimant's condition did not improve and he continued to suffer from ongoing back and leg pain, including radicular symptoms, Dr. Butler directed the claimant to undergo an MRI and to see Dr. Wayne Bruffett, a Little Rock neurosurgeon.

The claimant underwent an MRI scan on June 19, 2006. The radiology report related to the scan reflects the presence of a minimal diffuse bulge at L4-L5 and anterolisthesis of L5-S1. This condition was not noted to be connected to a pars defect. Lastly, the MRI scan detected the presence of a diffuse bulge at L5-S1, along with foraminal narrowing on the left.

Dr. Bruffett saw the claimant on June 19, 2006. In the report relating to that visit, Dr. Bruffett outlined the claimant's condition and then stated as follows:

I reviewed things with Mr. Scott and we had a detailed discussion about his condition. His back pain and achiness is probably multifactorial. I suspect that it is primarily related to the instability of L5-S1 but he could have some back pain from his facet joints at L4-5 or other levels. His left leg symptoms sound like stenosis. It is probably related to his foraminal narrowing at L5-S1. The treatment for this depends on how much it is affecting his life and how aggressively he wants to treat this. I told him I really would not restrict his lifestyle other than with regards to his pain. He likes to ride horses and that sort of thing and I think that is fine as long as he can put up with the resultant symptoms. I think work is exacerbating this problem, He might be better if he is limited to four hours per day. We are going to start this on Monday.

Dr. Bruffett directed the claimant to undergo a conservative regimen of treatment for his back condition, including nerve blocks and physical therapy. The claimant's condition eventually improved and Dr. Bruffett released the claimant from further treatment with him. In a report dated November 13, 2006, the doctor assessed the claimant as having a 7% impairment to his whole body.

The majority, by affirming and adopting the decision of the Administrative Law Judge, finds that the claimant could not establish his condition had changed after his lifting activity in October 2005. I disagree. A comparison of the MRI's, which had been taken in those respective periods, illustrate the changes in the claimant's condition.

In a letter dated September 4, 2002, from Dr. Dwayne Daniels, a Little Rock orthopedist the claimant saw at the direction of Dr. Franks, the claimant's first MRI was discussed. Dr. Daniels noted the MRI revealed, "Some degeneration at L5-S1 in his L-spine." The doctor also noted the presence of spondylolisthesis, presumably at that level, but stated, "There was no evidence of herniation." The doctor went on to conclude the MRI did not reveal any encroachment on neural structures and the claimant had no evidence of radiculopathy.

After the claimant began to develop problems following his working in October 2005, he underwent another MRI, this time at the direction of Dr. Butler. The MRI was conducted on June 19, 2006, and the radiology report not only notes the presence of anteriolisthesis of L5-S1, but also discovers bulging discs at L5-S1 and L4-L5. The report describes the findings at L5-S1 as "pronounced" and notes

diffuse bulging of the discs at that level, accompanied by foraminal stenosis.

As indicated above, Dr. Bruffett reviewed the MRI scan and not only noted the bulging, but stated the claimant was suffering from L5 radiculopathy. Dr. Bruffett went on to specifically state the claimant's work was "exacerbating his problem."

The changes in the MRI scans display a marked difference in the claimant's condition after the work incident in October 2005. The earlier scan detected the slippage of the L5 vertebrae, but did not detect disc bulging or foraminal stenosis, as found in the later MRI. I also believe it is significant that Dr. Bruffett's clinical examination of the claimant revealed radiculopathy and other symptoms related to nerve impingements which were not noted by Dr. Daniels in his 2002 examination of the claimant.

When the MRI scans are compared and the findings of Dr. Daniels and Dr. Bruffett are considered, it is apparent the claimant's condition suffered a notable change following his job-related activity in October 2005. I believe this evidence is sufficient to conclude the claimant established a job-related accident causing disability and need for additional medical treatment.

This case is remarkably similar to the Court of Appeals decision in Parker v. Atlantic Research Corporation, 87 Ark. App. 145, 189 S. W. 3d 449 (2004). There, the claimant had a previous degenerative spinal condition which was not causing any difficulties or any diminishment in his ability to carry out his job duties. However, following an injury at work, the condition became symptomatic, resulting in radicular symptoms and his inability to perform his job. The Commission denied the claim, holding the Commission's degenerative disc disease was a bar to the receipt of any further workers' compensation benefits. The Court reversed, finding the Commission erred in its conclusion of law. The Court determined the Workers' Compensation Act allows benefits where a compensable injury causes a degenerative condition to become symptomatic.

In the present case, this claimant had a spondylolisthesis at his L5-S1 vertebrae (that is, the L5 vertebrae had slipped forward over the edge of the S1 vertebrae). This condition was essentially unchanged in the MRI's conducted in 2002 and 2006. However, the condition the claimant was suffering from in 2002 did not impair his ability to work. Further, the symptoms were limited to pain and some stiffness. However, after October 2005, the claimant was substantially disabled. He began suffering

radicular symptoms which caused a loss of function in his legs. Further, these symptoms were supported by the objective findings in the form of bulging discs at L4-L5 and L5-S1. Significantly, these latter findings were not found in the 2002 MRI.

In my opinion, the holding of the Court of Appeals in the Parker case, as well as similar decisions involving pre-existing degenerative conditions followed by compensable accidents, compels a finding of compensability in the present claim. For a substantial period of time preceding October 2005, the claimant was employed in a variety of physically demanding employments, not only with this employer, but with others. His spondylolisthesis had not impaired his ability to work and carry out whatever job duties were required of him, including heavy lifting and related difficult manual labor, without any significant problems. However, after he was required to unload the crates in October 2005, his condition became symptomatic.

The claimant's initial medical history taken by Dr. Butler reflected the condition had begun approximately ten days before. This would be in accordance with the injury happening at work as described by the claimant. Likewise, Dr. Buffet's history and findings led him to conclude the claimant's condition was aggravated by his work.

I find the evidence strongly preponderates in favor of the claimant having sustained a compensable, job-related injury at work in October 2005. While it may be arguable as to whether this condition should be considered a gradual onset injury or a specific incident injury, I do not believe the distinction is significant in this case. What is significant is the claimant had an asymptomatic degenerative condition prior to October 2005 which did not impair his ability to work. Following a series of job activities which required him to engage in heavy lifting while bent over at the waist, he developed symptoms in accordance with a disc injury in his lower back. Subsequent objective testing determined the claimant had changes not present when similar tests had been done prior to this injury. Therefore, I find that the claimant has more than met his burden of establishing a compensable injury, verified by objective medical findings demonstrating the presence of an actual physical injury causing a disability and need for medical treatment. Those findings are all the Workers' Compensation Act requires for the claimant to establish a compensable injury.

I also find the claimant has established his entitlement to permanent partial disability benefits based upon the assessment of permanent impairment by Dr. Bruffett.

Dr. Bruffett's report detailing his examination of the claimant specified he sustained a 7% impairment to the body as a whole. This is in accordance with Table 75 of the AMA Guides to the Evaluation of Permanent Impairment. I find no reason to disallow this impairment rating or deny the claimant his requested permanent partial disability benefits.

The next issue presented is the claimant's entitlement to wage-loss disability benefits. At the time of the hearing, the claimant was 62 years of age. While he had already taken an early retirement, the claimant was still actively seeking employment following that retirement and had, in fact, worked for three different employers in the time between his early retirement and his injury. Therefore, while it has been held a claimant's receipt of retirement benefits can be a factor in determining his wage-loss disability, I believe, in this case, the claimant was still motivated to work and was a member of the workforce when he was injured. However, the injury has clearly substantially limited the types of employment still available to him. The claimant has testified he lacks the ability to remain on his feet for long periods of time and his lifting ability is significantly limited.

However, I note the claimant is still somewhat mobile and, based upon his experience as a supervisor for and his extensive knowledge in the drilling business and related areas, I think his injury has caused him to sustain a substantial loss in wage-earning ability, an amount equal to 20% to the body as a whole. This would result in a total disability rating to the claimant of 27% to the body as a whole.

In conclusion, I find that the claimant has established a compensable injury based upon heavy lifting performed in October 2005. I find that the claimant sustained anatomical impairment in an amount equal to 7% to the body as a whole as a result of his injury and he is entitled to wage-loss disability benefits in the amount of 20% to the body as a whole. The claimant would also be entitled to all reasonable and necessary medical treatment for treatment of his compensable injuries.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner