

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F803493

JOHN WILLIAMS, EMPLOYEE	CLAIMANT
BOB'S MARKET, INC., EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED DECEMBER 7, 2009

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

Claimant represented by the HONORABLE AARON MARTIN, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed April 29, 2009.

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 December 3, 2008, and contained in a pre-hearing order filed December 4, 2008, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury in the form of

a herniated disc to his low back on April 3, 2008.

In affirming and adopting the opinion of the Administrative Law Judge, we note that a reference in the opinion to the claimant's medical records regarding the claimant's inability to sleep due to back pain that pre-existed his alleged compensable injury should refer to the July 7, 2006 medical records, not the January 7, 2006 records.

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

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant has proven that he suffered a compensable injury to his low back on or about April 3, 2008 and that he is entitled to reasonable and necessary medical benefits, including the treatment of his lower back of Dr. Justice and Dr. Blankenship from April 3, 2008 to date and the surgery recommended by Dr. Blankenship.

The majority found that the claimant failed to prove by a preponderance of the evidence that he suffered a compensable injury in the form of a herniated disc to his lower back on April 3, 2008, and more specifically that the claimant failed to prove that there was a causal

relationship between the incident on April 3, 2008 and the claimant's need for treatment.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant was injured on April 3, 2008 when a shelf loaded with grocery stock fell on his back while he was kneeling on the floor helping to move a different shelf. His testimony of the event was corroborated by co-employees James Ambrose and Candace Sexton. There is no doubt that

the claimant suffered a specific incident injury arising out of and in the course of his employment.

Likewise, there are objective findings of injury as shown in the 2008 MRI.

The claimant must also prove that there is a causal relationship between the specific incident and the injury evidenced by objective findings. The first fact supporting a causal connection is the distinct difference in the claimant's symptoms before and after April 8, 2008, as experienced by himself and observed by his regular treating physician in, and out, of the clinical setting, and by a managerial co-worker and a regular employee of Bob's Market.

The claimant testified as to the distinct difference between his symptoms before and after the April accident. He stated that while he did have back problems which existed as far back as 2000, those problems were managed with intermittent care and relatively low dose Hydrocodone, and that he was able to maintain a full work and personal schedule. The claimant's wife also testified as to this difference in condition pre- and post-incident. The claimant testified that, after the April 2008 injury, he was unable to work full time, was unable to participate physically in his family life or recreational activities,

and was unable to control his pain or symptoms with the same level of care he had been able to do so before the incident. His Hydrocodone prescription was increased significantly.

The claimant's testimony as to the increase in severity of his symptoms after the April 2008 incident was corroborated by Candace Sexton, a fellow managerial employee, who testified that he had back problems, which were more severe since the incident. She observed that the claimant no longer socialized at work or talked to her or other employees: "He just tries to get through with whatever he has to do so he can go home." She has observed him fall against counters and that "his stability is compromised." She did not observe this before the most recent accident. Before the April 2008 accident, he worked more hours. After the accident, sometimes he would only work two to three hours in a week, and some weeks, he could work twenty hours. Sexton, and all the other employees of Bob's Market, tried to help him do his job, "because he cannot do the job like he used to."

Sexton testified that since the 2000 accident, he was never "the same." He had ongoing problems. He struggled, which she could observe on his face. He did not complain a lot, but she could see it in his face. She

observed him grimacing and favoring one side since 2000, but since the April 2008 incident, both were worse. She would not say that it gradually became worse, "because it's always been there, but it does seem worse now."

Similarly, Dr. Justice corroborated the claimant's testimony, noting that his Hydrocodone dosage had changed significantly after April 2008, going from a "fairly small dosage" to a significant one. Dr. Justice testified that he has observed that the claimant behaves as if his pain was worse over the year prior to his deposition which was taken in April 2009:

And the way I go by that really is I see him often at Bob's and I've noticed ... over the last year or so he's a lot more antalgic gait and stuff like that... And the last time he was in - and I don't even know the dates on this - but talking about when his back pain got so bad that he was wanting to be suicidal and all that kind of stuff from it so... But I think to me when I see him around I think he's worse over the last year or so.

Lastly, James Ambrose, an employee of Bob's Market, also corroborated the claimant's testimony, noting that the claimant was a "good guy," but that since the accident, his attitude was "really ... poor." Ambrose related this to the claimant being in "just so much pain" and unable to sleep. Ambrose was unaware that the claimant had prior back problems, that he did not complain or miss

work to his knowledge. After the accident, the claimant say that his back was "killing him," that he was not sleeping, and that he had seen doctors for it. After the accident, Ambrose noticed the claimant having trouble doing his work. He could not bend over. The claimant would ask Ambrose for help, to lift for him. The claimant had to get on his knees when working on the lower shelves, when before the accident, he could just bend over. Ambrose testified that after the April 2008 incident, the claimant fell when his leg gave way, in front of Ambrose at work. That was the only time Ambrose saw the claimant fall. This was maybe four weeks after the April 2008 incident. His leg just gave way: "Probably because he was hobbling on it. .. I mean his leg is numb basically." Ambrose did not speak to or know the claimant outside of the store and work hours. The claimant was working significantly reduced hours because of his back.

The majority found that the claimant understated the extent of his pre-April 2008 symptoms. The consistency of the testimony of the claimant, Ambrose, Sexton and Dr. Justice shows that there was indeed an increase in the severity and frequency of symptoms after the April 2008 incident. I note that Ambrose and Sexton have no interest in the outcome of this claim. The fact that three other

witnesses corroborated the claimant's testimony that his symptoms increased in constancy and severity and in how they affected his work shows that the claimant did in fact experience that increase.

The records and the testimony show that the claimant experienced a significant injury in 2000 which caused him recurrent back problems, unresolved at the time of the 2008 injury. The claimant's testimony that he had only occasional flare-ups of his lower back pain, sufficient to interfere with work, is not contradicted by his history of doctor visits and prescription medication usage. The claimant suffered a cervical sprain with spasm and a left lumbar sprain in June 2000 when a pallet struck him at work. His low back was significantly improved by July 20, 2000. He continued to receive treatment for his cervical problems through August 2000.

To summarize the medical history from 2000 to April 2008, the claimant had the following treatment by Dr. Justice for low back pain:

- i. Several office visits in June and July of 2000;
- ii. Two office visits in 2002;

- iii. One office visit in 2003, and Hydrocodone prescription refills in March, August, October and December of 2003;
- iv. One office visit in 2004, one MRI showing degenerative disc disease, and nine Hydrocodone prescription refills from March to September 2004;
- v. One office visit in 2005, and four Hydrocodone prescription refills from May to July, and one in October 2005;
- vi. Three office visits in 2006, and monthly Hydrocodone prescription refills;
- vii. One office visit in 2007, and monthly Hydrocodone prescription refills, except for December;
- viii. One visit in March 2008 which resulted in a referral to Dr. Blankenship, and Hydrocodone prescription refills in January and March.

The claimant did not misrepresent his condition prior to the April 2008 incident in his testimony. His own testimony and that of his co-workers and his physician indicate that prior to that incident, he had chronic back problems that bothered him but did not interfere regularly with his employment at the respondent employer and which intermittently required treatment. The claimant received low dose Hydrocodone to manage his chronic back pain and required office visits one to three times a year. I fully disagree with the majority's conclusion that the claimant misrepresented his condition.

Dr. Justice did refer to the claimant's low back pain as "chronic," which is defined as "marked by long duration or frequent recurrence." (Webster's Ninth New Collegiate Dictionary, 239 (1985)). As can be seen above, the claimant's problems were long in duration, having begun in 2000, and continuous, requiring regular use of prescription pain medication. When taken as a whole, the claimant's testimony regarding "flare-ups" is entirely consistent with his history of office visits. He had ongoing pain but was functional, other than those times when he was forced to see Dr. Justice once, twice or three times a year. I will concede that the claimant's testimony initially minimized his ongoing problems, but on cross-examination, he clarified that he had low back pain dating back to 2000, that he required office visits and prescriptions since that time for his low back pain, and that he only saw Dr. Justice when he had a specific event or incident causing a problem.

I also disagree with the majority finding that the January 7, 2006 record from the Rural Health Clinic shows that the claimant reported being able to sleep no more than three hours per night. There is no notation on that page of

the record or elsewhere in relation to that office visit regarding the claimant's sleep at all.

The claimant actually saw Dr. Blankenship on April 8, 2008, with a chief complaint of right sided lower back pain with right anterolateral leg pain. The claimant reported his injury of 2000, low back pain and right leg pain, and that he had increasing pain over the past six months. He also mention falling the day before "due to give away weakness in his leg after he got up with acute pain." There is no mention of the April 3, 2008 incident at Bob's Market. Dr. Blankenship testified that he had no recollection of a mention of that incident at that office visit. There is no way to determine whether the claimant failed to mention the incident at all, or whether there was some sort of miscommunication between doctor and patient. I note that there is only one mention of his legs in the 2000 medical records, while the claimant described low back pain and right leg pain and numbness as the significant, severe and increased symptoms in the twenty-four hours after the April 3, 2008 incident.

An MRI was performed on April 8, 2008, which showed an extreme lateral disk herniation L4-5 on the left with compression of the L4 ganglion; L5-S1 disk protrusion

in the midline eccentric off to the left; disk space settling and changes with end plate changes at L4-5 and L5-S1.

Dr. Blankenship assessed right L4 radiculopathy secondary to the protrusion with compression at L4-5 as well as disk space changes and a disk protrusion at L5-S1 contributory to his back pain. He recommended home exercises, lumbar epidural steroid injections and physical therapy. He also stated that his problems were work-related.

The claimant completed an information form for Dr. Cannon, who performed a lumbar epidural steroid injection for him on May 21, 2008. The claimant explained that he had back problems since 1999, and that the "severe pain started April 3, 2008. The event that started the pain that I am feeling now is caused by a 4' long by 6' tall shelf falling on top of me from behind knocking me to the floor."

The claimant returned to Dr. Blankenship on June 5, 2008. Dr. Blankenship wrote:

... He states his pain is essentially unchanged. Mr. Williams had problems over the last nine to ten and a half years with intermittent back pain but he only had intermittent back pain and occasional anterior thigh paresthesias and these always resolved within a few days after a flare up. A month and a half ago he had a rather

significant injury at work with rather significant onset of lower back pain and now right anterior leg pain and weakness which is new. His MRI confirms an extreme lateral disk herniation at L4-5. His epidural steroid injection by Dr. Cannon is confirmatory of this being the etiology of his pain with a resolution of pain, but unfortunately this only lasted approximately four days. Mr. Williams has had significant problems with depression over the last month given the fact that he has been rather incapacitated with his pain and I told him that this is all very reasonable and expected.

Dr. Blankenship went on to address causation in this report. Interestingly, he said:

... It once again is my medical opinion based on a reasonable degree of medical certainty that the patient's current need for treatment and the etiology of his extreme lateral disk herniation was the injury that occurred at work a month and a half ago not nine years ago. Certainly some of his mechanical lower back pain is related to his old injury but he was doing quite well with that and not needing any constant treatment...

On February 3, 2009, Dr. Blankenship wrote that the MRI of March 2004 did not change his opinion that his L4-L5 disc herniation was a result of the on-the-job injury in 2008. He pointed out the absence of significant neural encroachment or focal disc herniations in the 2004 MRI as opposed to the existence of the extreme lateral disc herniation at L4-5 on the left with compression of the L4 ganglion. He summarized his opinion:

I do feel like his current need for treatment and his back and leg pain are directly related to the lateral disc herniation at L4-5 which was not present on his MRI that was done in 2004, but is present now. His clinical symptoms are now different than then, and it is my medical opinion, based on a reasonable degree of medical certainty that his current problem is directly related to his injury from last year.

Dr. Blankenship testified at deposition as to causation, noting that the difficulty in assigning causation was that during the office visit and treatment the focus is on correcting the problem, not in identifying the etiology. He noted that the claimant did not specifically mention the April 3, 2008 injury at his first visit, but did note a significant event one and one-half months prior at the June 2008 visit. He discussed the importance of the claimant's reports of new anterior thigh pain. He stated that the onset of acute anterior thigh pain correlates to the tearing of the annulus. (He clarified that the reverse is not true, that the absence of acute anterior thigh pain does not preclude a tearing of the annulus.) Dr. Blankenship stated with "fair to near certainty" that the injury triggering the acute anterior right thigh pain tore the annulus. Dr. Blankenship also noted that the claimant's muscle weakness in the right thigh was consistent with the location of his annular tear at L4.

In reviewing the claimant's testimony and medical history, there is one report of the resolution of leg pain in July 2000 without any further specifics. In March 2002, he reported pain, numbness and tingling in his right anterior thigh, after which the 2004 MRI showed no disc herniation. Otherwise, there are reports of radicular pain into his right leg, approximately once a year from 2002 to 2007. At the hearing the claimant acknowledged that he had thigh pain and numbness prior to the April 2008 event, which is consistent with these records. However, the claimant testified that after the 2008 injury, he had pain and weakness in his leg severe enough to cause him to fall. On waking the morning after the accident, he fell when he attempted to stand, due to right leg pain and weakness. He explained that his low back pain and the pain and numbness he felt in his right thigh were significantly worse than he had ever experienced with his chronic problems prior to the April 2008 accident.

Dr. Blankenship also explained that the 2004 MRI showing no disc herniation or impingement, the 2008 MRI showing both, and the 2008 lumbar epidural steroid injection which provided relief of the claimant's symptoms for a short while were diagnostic and objective proof of the injury to

his low back. Coupled with the timing of the onset of acute anterior right thigh pain, right leg weakness, and an increase in the severity of his low back pain immediately, and the claimant's report to Dr. Blankenship that the onset of these problems was an incident one and one-half months prior to his June 5, 2008 visit, Dr. Blankenship's opinion was that there was a causal relationship between that incident and his need for treatment.

The fact that the claimant does not appear to have specifically discussed the April 3, 2008 event in his initial visit with Dr. Blankenship does not mean that it did not occur or that it was not the cause of his damage and need for treatment. The claimant is not charged with self-diagnosis. Further, Dr. Blankenship acknowledged that his purpose in that April 8 visit was not to determine the etiology of the injury, but instead how to fix it. More importantly, Dr. Blankenship observed that his notes were "not the best" and that the claimant may have reported more than was recorded. Likewise, Dr. Justice acknowledged that his notes were sometimes lacking detail. There is no question that the April 3 incident occurred, and the claimant, his co-employees and Dr. Justice observed a

significant change in the claimant's symptoms after that incident.

I find that the claimant has proven by a preponderance of the evidence a causal relationship between the specific incident on April 3, 2008, the objective findings of injury shown in the April 8 MRI, and the claimant's need for treatment from April 3, 2008 forward. Therefore, I find that the claimant has proven the compensability of his claim.

Dr. Blankenship explained that, assuming the claimant's condition had not changed, he recommended a lumbar fusion:

The patient has an extreme lateral disc herniation at L4-5, and in order to decompress the L4 nerve root out laterally, you would have to have his entire joint taken off of that side, so what I would offer the gentleman would be a - a lateral approach with a - a lift. It's an extreme lateral arthrodesis, approaching it for the left-hand side and then turning him over and going in from the right from - from off to the side of the back incision to decompress the nerve root and then put in pedicle screws on - on that one side, so we could have titanium instrumentation from the side on the left, and pedicle screws on the right, and then a - an implant that would in the disc space from the left.

Dr. Blankenship explained that the lumbar fusion is "a surgery we do every day." He emphasized the importance of proper selection of patients for this type of

surgery, that the success rate was eighty-five to ninety percent in properly selected patients. He did not offer the surgery to patients unless he thought they would get better.

Dr. Blankenship preferred his fusion patients to mobilize and return to work early after surgery, sometimes as early as two weeks post-surgery. For the claimant, whose job was a supermarket manager, his projected return to work would be within two to four weeks, although his deconditioning might cause a further delay.

With the conservative care the claimant has received, the clear diagnosis and the expectation of success and early return to work, I find that the recommended surgery is reasonable and necessary treatment of the claimant's compensable injury.

I must respectfully dissent from the majority opinion, because I find that the claimant has proven by a preponderance of the evidence a causal relationship between the specific incident on April 3, 2008, the objective findings of injury shown in the April 8 MRI, and the claimant's need for treatment from April 3, 2008 forward, including the recommended surgery by Dr. Blankenship. I would award all available benefits including the medical

treatment provided by Dr. Justice and Dr. Blankenship from April 3, 2008 forward for the claimant's low back and leg pain, and the recommended surgery by Dr. Blankenship.

PHILIP A. HOOD, Commissioner