

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F812650

JOHNNY SMITH,
EMPLOYEE

CLAIMANT

COMMERCIAL METALS COMPANY,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 19, 2010

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

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

Respondents represented by the HONORABLE GILL A. ROGERS,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed January 27, 2010. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The relationship of employee/employer/carrier
existed between October 2, 2008, and November
24, 2008, and at all other pertinent dates
relevant to this claim.
2. Liberty Mutual has filed a lien for disability
benefits paid to the claimant.
3. The claimant's average weekly wage of \$455.81
entitles him to benefits for temporary total

disability at the rate of \$297.00 per week and permanent partial disability benefits at the rate of \$223.00 per week if he is entitled to those benefits.

4. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable back injury.

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.

The claimant alleges that he sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the January 27, 2010 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 would award the claimant indemnity and medical benefits, because I find that he proved by a preponderance of the evidence that he sustained a compensable back injury.

The majority concluded that the claimant satisfied all the requirements for a specific incident compensable injury, except for showing a causal connection between his fall on October 2, 2008 and his back injury. The majority also concluded that the claimant failed to show that the major cause of his need for treatment was his employment, for a gradual onset compensable injury.

The claimant presented to Dr. Chambliss on November 25, 2008. The notes indicate that he "started with complaints of low back pain, then over to right hip and radiate down right leg. Symptoms started 2 weeks ago getting worse. Does heavy lifting at steel mills."

The claimant testified that he had a history of low back pain and that he managed his flare-ups of low back pain with over-the-counter pain relievers. He also testified that, immediately after he fell, he was not "really having any symptoms," but then, around the middle of October, his pain started changing and progressing. It started to hurt more, as time passed. When he saw Dr. Chambliss, he was being specific that his radiating pain started about couple weeks before the visit, but he had pains off and on, depending upon his activity level. If he was sitting at home, his pain would decrease, but if he did a lot of physical work, it would increase. He explained that this was why he was not concerned about it at first. Then when his pain elevated to an eight or nine on a scale of one to ten, in November, he went to see Dr. Chambliss. The claimant testified that when he went to see Dr. Chambliss in November, he did not know what was wrong with him, and he did not know what happened.

I find that the claimant's testimony and Dr. Chambliss' report do not conflict. The claimant explained that he was being specific about the severe and new symptoms in his complaints to Dr. Chambliss. The fact that the claimant did not mention a fall to Dr. Chambliss is reflective of the fact that the claimant did not know what was wrong and that he originally related his low back symptoms to his historical problems. By focusing on the "symptoms," the majority neglects the fact that the claimant was clear that his symptoms changed over time, from discomfort in mid-October which did not require medical intervention to pain and radiation which did. The claimant did indeed have symptoms in mid-October, but he went to the doctor for the increased symptoms which developed approximately two weeks prior to the first visit. Dr. Chambliss' opinion that the fall (of which he became aware later) was causally connected to the need for treatment was based at least in part on the fact that the claimant reported that his symptoms worsened two weeks prior to the visit.

The claimant prepared a Form N in December 2008, after getting the results of his MRI and realizing that his problem was more significant than his

occasional low back pain. He attributed this injury to his work, but was under the impression it was a gradual injury. He testified that he did not recall the incident in which he fell in October at that time. The claimant was adamant in his testimony that his understanding of the nature and cause of his injury developed over time, and that at each stage he was honest, reporting what he knew. The form also has confusing dates of injury, but this is merely indicative of the nature of the claimant's injury and the gradual development of his symptoms, as well as the claimant's lack of savvy in workers' compensation claims. The Form N does not undermine the presence of a causal connection between the fall and the need for treatment.

The claimant saw Dr. Buono on January 7, 2009. His notes reflect that the claimant's symptoms "started October 24, 2008, when he was working and he was moving a box at work, and the pain started after that." The claimant did not recall that anything occurred on October 24. There may have been a mix-up on the dates, since his last day of work was November 24 and he was in a great deal of pain when he first saw Dr. Buono. He did not recall reporting an injury on October 24 involving a box. He also stated that if there had been

a lifting incident, it would have involved a bucket, not a box. He did relate his injury to his heavy lifting at work, at that time, and the heavy lifting included lifting buckets with pieces of steel in them. He did state to Dr. Buono that the heavy lifting he did every day may have caused his disk to bulge. Dr. Buono might not have had a good understanding about what the claimant said.

I find that Dr. Buono's notes do not undermine the claimant's position. An important theme in this claim is that the claimant was under the impression his injury was gradual until he remembered the fall he took in October. Dr. Buono's notes are consistent with this theme. The claimant is admittedly unclear in his history, which exacerbates the fact that, as a heavy laborer and not a physician, he is under a distinct disadvantage in identifying and communicating the cause and nature of his injury. It is reasonable for the claimant to have presented the facts as he remembered them, for the physician to use. The fact that Dr. Buono construed the claimant's explanation as a single lifting incident relates more to the claimant's communication skills than it does to his credibility. The record of testimony is one hundred fifty-four pages long, and

approximately one hundred of those pages is the claimant's testimony. It is certain that Dr. Buono did not spend that much time discussing the causes of the claimant's injury.

The claimant testified that he fell hard onto his right side when he tripped in October. He explained that he had his arm full of shop books, and that his left foot cleared the platform onto which he was stepping, but that his right foot caught the platform causing him to go down. Johnny Estes, a line supervisor, testified that he did not see the claimant fall. Estes heard a "thud" and looked up to see the claimant on his knees. While Estes estimated that the time between hearing a "thud" and seeing the claimant on his knees was brief, this is insufficient to disprove that the claimant went down on his side. The "thud" was heard in a steel mill, by a man across the line from the claimant. The claimant was going up a step which was a foot tall. The claimant's testimony and Estes' testimony do not conflict. They address different parts of the events of the claimant's fall.

The fact that the claimant indicated to Lavelle Cole, his supervisor, that he was not having any medical problems, is completely consistent with the

claimant's testimony, that his pain developed slowly over time after he fell. Furthermore, the fact that the claimant did not complain about back pain more than once according to Cole does not show that he did not have back pain.

Larinda Clayton testified that the claimant first told her that he had back problems that he attributed to his arthritis, and that his doctor had told him it was work-related. His testimony that his understanding of his problems and their origins had changed over time is completely consistent with Clayton's testimony. Clayton also discussed the day that the claimant called her to state that he recalled that he had fallen and that he related the fall to his back problems. Clayton testified that she did not prepare any paperwork because of this report. She did not update his paperwork. Clayton testified that Estes said he fell on his knees. There is no written report by Estes, and his testimony was that he did not see the claimant fall but when he did see the claimant he was on his knees. Clayton's testimony does not contradict the claimant's testimony that he fell on his side.

Contrary to the majority, I find that claimant to be credible and that his opinion on causation is of

probative value. Indeed, he was confused as to the type, extent and origin of his problem, but his testimony is not inconsistent.

The fact that the claimant had degenerative disc disease is not disputed. However, the claimant had a work-related fall, before which he was able to do his job, and after which he was not. Likewise, before his fall, the claimant had not had to seek medical treatment for his back since 2004, but after the fall, the claimant needed treatment for new symptoms and severe symptoms, including surgery.

I find that the causation element is satisfied where the claimant did not have back problems sufficient to require treatment until November 2008, after a work-related fall in October 2008, and where he testified that he had never had radiating symptoms into his hip and leg and he had never had the severity of low back pain before that time.

In the alternative, the claimant argued that he sustained a gradual onset back injury. The majority finds that the claimant failed to show that the major cause of his need for treatment was an injury at the respondent-employer. Again, I disagree.

Certainly, the claimant had been employed in the manufacture of furniture for twenty-seven years. His job was to attach a twenty-five pound arm to a base. He and a co-worker lifted the finished pieces. He used a jack to lift the arms and to pull loads with. He never had any physical problems which affected his ability to do his job. Contrast this work to the work he did for the respondent-employer. He lifted steel joists varying in length from ten feet to one hundred feet. Sometimes he lifted joists alone and sometimes with one or two other employees. They did not use equipment to lift the joists, and the joists weighed several hundred pounds. As a rigger, he joined two joists together, back to back, and then corrected any gaps in between the two joists. A welder joined one side of the joists, and the rigger joined the other side with a clamp which had to be screwed into place, which was hard to do. The claimant also worked as a machine operator, cutting steel to make end rods which were put on the end of each joist. He had to carry thirty-inch tall buckets containing "fills" which were pieces of steel he cut to be used to fill the gap between the joists. The buckets would weigh fifty pounds or more. Since May 2007 he was either a rigger or a machine

operator. The finished product was a joist, like those seen overhead in a Wal-Mart facility. It is clear that the claimant's position at the respondent-employer was more physically demanding, in terms of the amount of weight to be lifted and of the lack of use of a jack or other equipment to assist in that lifting.

The claimant saw Dr. Williams in November 2004, complaining of pain in his joints and low back pain. He was diagnosed with generalized arthralgias. On December 3, 2004, he complained mainly of arthritis in his hands. He was again diagnosed with generalized arthralgias and given Celebrex samples. He returned on December 27, 2004, for a medication check and was directed to discontinue the Celebrex and use over-the-counter Motrin. The claimant lost his job in the furniture factory when the factory shut down, in May 2005. At that time, he started a two year vocational program for a certificate of industrial technology in machine shop. In May 2007, with the certificate, the respondent-employer hired him as a rigger.

The claimant testified that when he began work at the respondent employer, he was in pretty good condition. He was not taking any medication routinely at that time or seeing a doctor regularly for anything.

The record bears this out, as after the December 27, 2004 visit regarding medications, the next doctor visit was to Dr. Chambliss in November 2008. He had joint pain for years, which was mainly stiffness from doing hard labor work. Those aches and pains were not affecting his ability to work as an assembler at Alan White, and he did not miss work because of them.

The claimant began work in a much more physically demanding job in May 2007, and in November 2008, he was forced to seek medical treatment for the first time in four years. His symptoms were different than the symptoms he complained to Dr. Williams about in 2004. In 2008, he complained of low back pain going into his right hip and radiating down his right leg. Dr. Chambliss even assessed "new right hip pain." The claimant was also assessed with lumbago, which is not in any record prior to November 2008. His pain was severe and interfered with walking, bending and lifting. Dr. Chambliss noted that this was not a "chronic" problem, in the FMLA paperwork.

On June 17, 2009, Dr. Buono, the claimant's surgeon, wrote that his degenerative disk disease in his lumbar spine was related to a lifetime of hard labor and heavy lifting on the job. On September 16, 2009, Dr.

Chambliss stated that his condition could have been caused or worsened by his occupation. On September 29, 2009, Dr. Chambliss further stated that the claimant's condition was the result of work-related activities, the October fall and that the work related accident was the major cause (more than 50%) of the need for treatment.

When considered together, the facts show that the claimant's back injury was the result of his employment, and that employment, with the respondent-employer, was the major cause of his need for treatment. The claimant went from fully functioning to disabled after a year and a half with the respondent employer. There was no need for treatment, but for the current employment.

I find that the claimant has satisfied the requirements of either or both the specific incident and the gradual onset back injury. I find the claimant credible and the records and his testimony consistent. I find that the respondents are liable for medical benefits to the claimant, including the treatment received from Dr. Chambliss and Dr. Buono from November 2008 to date, including his surgery, and future reasonable and necessary medical treatment, including pain management. I also find that the respondents are

liable for indemnity benefits to the claimant in the form of temporary total disability benefits from November 25, 2008 to March 15, 2009, when he was within his healing period and totally incapacitated from earning wages.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner