

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G000202

STEPHEN HAYES,
EMPLOYEE

CLAIMANT

AMFUEL CELL & COATED FABRIC,
EMPLOYER

RESPONDENT

F. A. RICHARD & ASSOCIATES,
TPA

RESPONDENT

OPINION FILED MAY 3, 2011

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

Claimant represented by the HONORABLE LAURA BETH YORK,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed December 3, 2010. The administrative law
judge found that the claimant proved he sustained a
compensable injury. The administrative law judge awarded
medical treatment and temporary total disability benefits.
After reviewing the entire record *de novo*, the Full
Commission affirms the administrative law judge's opinion.

I. HISTORY

The record indicates that the claimant became employed with Amfuel in June 2005. The parties stipulated that the employment relationship existed at all pertinent times. The claimant testified that he was repairing fuel cells for the respondents in December 2009. The claimant testified on direct examination:

Q. What were you doing at the time this injury occurred?

A. I was on top of the table, trying to place a heater on a defective part of the cell, because you have to put a heater on it to cook it in order for it to lay down, and, you know, you have to repeat that, you know, if it don't lay down. So I was being trained by Ms. Doris. And I was up on the table with a clamp trying to put the heater because you've got to put your hands inside the cell and hold the clamp and the heater. And I twisted and I heard something pop when I twisted....

Q. Okay. Now tell us what happened December 31st, 2009.

A. We was up - we came in early that morning and we was up on the table. I was trying to put a heater on a spot that we needed to cook. And I had a clamp, I had one of them big clamps, one of the 50-pound clamps - it might be a little more - but it was about a 50-pound clamp, and I had the heater, and I had the plate, and I was trying to reach this spot with the clamp. And when I twist, I just heard something snap in my back, and she told me that maybe I just, you know, pulled a muscle or something....

Q. And what day of the week was that?

A. That was on a Thursday....

Q. Did you report the injury to anyone that day?

A. I looked in the phone book and I tried to get my supervisor's number, but upon calling his house phone, it was, it said that it was disconnected, so I wasn't able to contact my supervisor....

Doris Stacy testified at deposition that she had been employed with the respondents for 30 years. The claimant's attorney questioned Doris Stacy:

Q. While you were at work at AMFUEL, did you ever work with Stephen Hayes?

A. Yes.

Q. In your work, do you recall Mr. Hayes ever complaining about back pain?

A. Yes.

Q. Can you tell me about that?

A. Well, one day we were dealing with a big old long clamp, probably about 20 clamp, and I had him holding a heater in the inside, and I was on the outside, and he couldn't quite do it. So when he come out of the inside, he said, "Oh man." I said, "What's the matter?" "Man, that's something else." I said, "What?" So he - from there, he started complaining about his back.

Q. Do you recall when that incident occurred?

A. I don't remember the exact date or anything because it's been a while.

Q. Okay. And can you tell me, was in December of last year?

A. Yeah, it was somewhere close to there, because we was getting ready to go out for Christmas, I believe.

Q. Okay. And do you know if it was Christmas or New's Year's?

A. I do not remember. Like I said, it's been so long....But I know it was right around the holidays.

The claimant presented for treatment at Ouachita Valley Family Clinic on January 5, 2010, at which time it was noted, "C/O LBP radiating down L leg. Shooting pain x 2 wks." The claimant denied at hearing that he had experienced "shooting pain for two weeks." Dr. Joseph A. DeLuca, the claimant's family physician, saw the claimant on January 5, 2010:

Patient reports gradual onset of left lower extremity pain that is in the distribution of his sciatic nerve. It is worse with extension of the left leg and improves with sitting in a flexed position. He has been doing a lot of stooping, lifting and climbing, and reports that these have all worsened his complaint. He is not having any weakness in his lower extremities nor difficulty ambulating, just the pain....

Dr. DeLuca assessed "1) Sciatica....Work excuse for 1/5/2010 and 1/6/2010. May return to work light duty 1/7/2010. No climbing or lifting greater than 10-pounds for 7-days, then normal duty thereafter."

The claimant testified that light duty with the respondent-employer was not available. The record indicates that the claimant signed a Form AR-C, Claim For Compensation, on January 7, 2010. The claimant wrote on the Form AR-C that he had sustained a back injury, and that the Date of Accident was January 4, 2010. The claimant wrote in the Accident Information section of the Form AR-N, "see attached letter." The claimant's letter was dated January 7, 2010:

My job is repairing airplane fuel cells. This requires me to climb onto a 4 foot table, grab a cord for balancing, reach for clamp & heater. (Claps can range from 5 to 15 pounds.) After grabbing the clamp, I have to twist & turn my body in order to reach the defective part of the cell to repair. On January 4, 2010, as I was twisting my body, I felt a twinge and then severe pain in my back gyrating down to my thigh and leg. I notified my supervisor, Andre Ewell, that I had hurt my back. He asked me to let him know the time of my doctor's appointment, which I did. He did not make any reference to a company doctor or write up a report about my injury.

On January 5, 2010, I saw my family doctor, Joseph Deluca. I was given an injection of Kenalog, muscle relaxers & pain medication. He requested that I remain off work 2 days and return to light duty for 7 days. He also stated that I was not to lift anything greater than 10 pounds. After 7 days, I could return to normal work duties.

Once I returned to work on Thursday, January 7, 2010, I met with my Supervisor, who took me to Human Resources to meet with Ben (not sure of last

name). Ben read my doctor's note and stated because I didn't see their company doctor, I would be sent home without pay for 10 days. I asked about light duty and he said, once again, only their company's doctor could make that recommendation. I called back to ask the name of the company's doctor in order to make an appointment, but no one would provide that information to me.

At this time, I am asking for your assistance to investigate this matter. I feel that I was treated unfairly. My injury happened while I was at work. I immediately informed my supervisor who did not advise me to seek medical attention from the company doctor. I saw my family doctor and provided Human Resource with the doctor's statement. Rather than assign me to light duty, I was sent home without pay. There are several employees who are now assigned and working light duty and I feel this is unfair of them not to give me the same opportunity.

I have attached a copy of my doctor, Joseph Deluca, written excuse....

The claimant followed up with Dr. DeLuca on January 12, 2010: "He attempted to go back to work but was unable to do so secondary to weakness and pain. He is to the point where he is now having difficulty ambulating and is deeply concerned about his numbness." Dr. DeLuca assessed "1) Left lower extremity radiculopathy with nerve impingement. Plain films of the lumbar spine (sic) reveal some degenerative changes at S1 which correspond to symptomatology and

physical exam findings. Refer for MRI of lumbar spine. Off work until then."

An MRI of the claimant's lumbar spine was taken on January 21, 2010, with the following impression:

1. Congenital canal stenosis of the lumbar spine.
2. Degenerative disc disease at L4-5 with facet arthropathy and ligamentum flavum thickening, and a superimposed right paracentral disc extrusion, resulting in moderate to severe central canal stenosis and narrowing of the right lateral recess with mass effect of the proximal right L5 nerve root. There is also bilateral mild to moderate foraminal narrowing.
3. Degenerative disc disease at L5-S1 resulting in bilateral mild to moderate foraminal narrowing.

The claimant followed up with Dr. DeLuca on January 26, 2010: "The study performed on 01/21/2010 revealed congenital cervical canal stenosis. In addition to this, there was impingement of the proximal right L5 nerve root as well as loss of disk height at L5-S1 and some arthritic changes. Continues to have pain in the left lower extremity with sensory loss in the lateral aspect of his left lower extremity extending into the foot." Dr. DeLuca assessed "1) Congenital central canal stenosis, severe, as well as impingement of the proximal L5 nerve root and sensory loss....Refer to Dr. Brad Thomas. He is to remain off work until seen by a specialist."

Dr. DeLuca filled out a form on January 28, 2010 and reported that the claimant was suffering from "Sciatica." Dr. DeLuca wrote that an accident had occurred on January 4, 2010, "pt hurt back on job."

Dr. Brad A. Thomas examined the claimant and corresponded with Dr. DeLuca on February 3, 2010:

As you know, he is a very pleasant, 46-year-old, right-handed male who presents with back pain that has been radiating down the left leg since December 31, 2009. He reports that this happened as a work-related injury. He works for AM Fuel and this pain started on December 31 when he was at work. He was moving a table, was bending over and pulling it when he felt a pull in his back. Since this time, his pain has been increasing. It radiates down his left leg and goes into his toes....

Imaging Studies:

MRI: The patient has an MRI report only. I reviewed this. This reports that he has some L4-5 degenerative changes with a right-sided herniated disc. This is opposite of the side of his pain.

Plain Radiographs: Today, I ordered and interpreted standing AP and lateral with flexion and extension views of the lumbar spine that show he has some degeneration with anterior spurring at

L5. No abnormal motion or fractures seen.

Dr. Thomas stated, "We are going to have the MRI disk mailed to us....I will keep him off work for two weeks until the disk is received and reviewed."

Dr. Thomas reported on February 5, 2010:

Mr. Hayes recently saw me in the clinic with pain radiating down his left leg, into his toes. He had an MRI report which that showed degenerative changes at L4-5 with a herniated disc eccentric to the right hand side. We did not have this image and he had it mailed to us. I reviewed this today. Honestly, it was of low to poor quality as far as the image quality. I was able to see that he does have significant stenosis at L4-5 and it does appear to be from a disc herniation. To me, this appears to be more central in location which could attribute some of the left leg pain....At this point, because the image quality is suspect, I recommend a lumbar myelogram. I also recommend him staying off of work until the lumbar myelogram is performed and he follows up with me in clinic.

A CT of the claimant's lumbar spine was done on February 19, 2010, with the following findings:

There is straightening of the normal lumbar lordosis. The pedicles appear diffusely shortened throughout the lumbar spine congenitally. At L4-L5, there is a mild posterior disc-osteophyte in conjunction with apparent facet hypertrophy and prominence of the ligamentum flavum with short pedicles producing moderate central canal stenosis with apparent mild/moderate bilateral foraminal stenosis. At L5-S1, there is a mild posterior disc bulge with anterior disc osteophytic spurring but no definite evidence for neural compromise. There is a loss of disc height also noted at this level.

IMPRESSION-

1. Degenerative disc disease at L4-5 and L5-S1 with apparent superimposed congenital spinal canal stenosis with moderate central canal stenosis at L4-L5 in conjunction with facet hypertrophy and prominence of the ligamentum flavum and mild to moderate bilateral stenosis at this level.

A post-myelogram CT of the lumbar spine was also

performed on February 19, 2010, with the following findings:

There is straightening of the normal lumbar lordosis which may be positional or related to muscular spasm. Conus terminates at L1. There is loss of disc height at L5-S1 where there is also vacuum phenomena.

At L4-L5, there is a mild posterior disc-osteophyte in conjunction with facet hypertrophy and prominence of the ligamentum flavum with short pedicles producing moderate central canal stenosis and mild bilateral foraminal stenosis. Central inferior subligamentous extension of disc material cannot be excluded. At L5-S1, there is mild concentric disc-osteophyte with slight eccentricity to the left in conjunction with facet hypertrophy producing mild/moderate bilateral foraminal stenosis, more pronounced on the left. There is no central canal stenosis at this level. The remaining levels are unremarkable.

IMPRESSION-

1. Straightening of the normal lumbar lordosis may be positional or related to muscular spasm.
2. Degenerative disc disease at L4-L5 and L5-S1. There is moderate central canal stenosis at L4-L5, in this patient with an underlying congenital cervical spinal canal stenosis. There is also mild bilateral foraminal stenosis at this level as well as mild/moderate bilateral foraminal stenosis at L5-S1.

The claimant followed up with Dr. Thomas on March 8, 2010:

Mr. Hayes returns after having a myelogram done....He reports that he continues to have pain that radiates down his left leg into his foot, in what sounds to be an L5 distribution. As you know, he was injured on-the-job. This happened on December 31, 2009....

Imaging Studies: The patient's myelogram shows some mild stenosis at L4-5, but no significant neural impingement on the left hand side.

Assessment and Plan: At this point, I would not recommend surgery. I would recommend one lumbar epidural injection and have him follow back up after this. I am going to have him to continue light-duty. That is no heavy lifting, pushing or pulling greater than fifteen (15) pounds. I have given him a prescription for Lorcet.

Dr. Thomas signed a note on March 8, 2010 indicating, "Restrictions: Light duty on 3/10/10 (Wednesday). No lifting over 15 lbs."

Dr. Thomas performed an epidural steroid injection on March 22, 2010.

Alisa Proctor, a Human Resources/Payroll representative of Amfuel, wrote on March 29, 2010, "This is to verify that Stephen Hayes has been released to return to work on light duty. However, we have been unable to accommodate this. This is pending approval from the Workers' Compensation. When/If this is approved he will be able to return then."

The claimant followed up with Dr. Thomas on April 9, 2010:

Mr. Hayes returns after having an epidural steroid injection....He reports that this only helped him for about three days and he continues to have some pain down his left leg. As you know, he was injured in a work-related injury on December 31,

2009. He did have a myelogram that showed some mild stenosis at L4-5, but no significant impingement on the left hand side....

Assessment and Plan: At this point, I would not recommend any surgery. Unfortunately, the epidural steroid injection did not offer any significant relief. I am going to set him up for six weeks of physical therapy and have him continue light duty in the meantime. Finally, I am going to have him perform an FCE in approximately four to five weeks. This will be near the end of his physical therapy. We will have him follow back up in six weeks' time and at that point, be able to have an end point and hopefully MMI and classification for Mr. Hayes.

Dr. Thomas signed a note on April 9, 2010 indicating, "Restrictions: Continue light duty." The record indicates that the claimant was assessed for physical therapy on April 21, 2010.

A pre-hearing order was filed on May 24, 2010. The claimant contended, among other things, "1. On December 31, 2009, claimant was bent over tightening a clamp to position a heater in the course and scope of employment when he injured his low back. Claimant attempted to contact his supervisor, Andre Ewell, but could not reach him until January 4, 2010, to report the injury....Claimant contends that he sustained a compensable injury in the course and scope of employment for which he is entitled to medical benefits, TTD from January 5, 2010, to a date yet to be

determined, and that his attorney is entitled to attorney's fees."

The respondents contended, "1. The claimant reported a gradual back problem on January 5, 2010. There was no specific incident. The major cause of the gradual condition is not any incident at work."

The record contains an undated portion of a Functional Capacity Evaluation, with the following conclusions: "Mr. Stephen Hayes completed functional testing on this date with reliable results. Overall, Mr. Hayes demonstrated the ability to perform work in the MEDIUM classification of work as defined by the US Dept. of Labor's guidelines over the course of a normal workday with limitations as noted above."

Dr. Thomas stated on June 30, 2010, "Stephen Hayes (DOB 11/12/63) is a patient of mine. He has reached Maximum Medical Improvement on July 2, 2010." The claimant testified that he returned to work for the respondents on July 14, 2010.

Benjamin Bauer, human resources and safety director for the respondent-employer, was deposed on August 2, 2010. The claimant's attorney questioned Mr. Bauer at deposition:

Q. In your employment with AMFUEL, do you recall ever meeting with Stephen Hayes?

A. Yes, ma'am, I do.

Q. Okay. Do you recall Mr. Hayes ever reporting a workers' comp injury to you?

A. No, I don't.

Q. Do you have any recollection of Mr. Hayes reporting any injuries to you?

A. No, not that I can recollect. The incident that I recall, as far as meeting with him, occurred about two to three weeks after the supposed incident was told to his supervisor or not told to his supervisor. But anyway, it was way after the fact. And the normal procedure is for any kind of a work-related injury, which is pretty well known among everyone here in the plant, is to go to the supervisor with the incident or reported incident on what occurred; and the supervisor, along with the safety manager, will then do an incident report or an accident investigation. And from there, they would bring that paperwork to me, I would fill out the First Report of Injury, and within 24 hours, I would send that to our workers' comp people who would then tell me exactly what kind of treatment, et cetera, that they would recommend if that was in an emergency type of situation.

Q. Who was Mr. Hayes' supervisor?

A. That was Andre Ewell. He was the supervisor over FIS department which builds FIS fuel cells....

Q. Did Mr. Hayes ever bring you any return-to-work slips?

A. He brought me several updates from his doctor. And I'm the person that is the administrator for short-term disability. And we were able to get him on short-term disability just recently. And I think Mr. Hayes was trying to pursue a claim with the workers' compensation insurers, and that never

came to fruition. So consequently I was able to get him on short-term disability so he would have some money until he could return to work. He finally brought me a release statement from his doctor which was about two weeks ago, and that statement said that he was fully capable of returning to work with medical restrictions....

Q. Did Mr. Hayes ever bring you work restrictions throughout his course of treatment?

A. Yes, he did.

Q. Okay. And did AMFUEL ever provide him with any light-duty work?

A. No, because at the time, we didn't have any light-duty work available based upon his restrictions....

Q. Did you do any type of investigation into Mr. Hayes' incident?

A. No, because he never reported the injury....nothing ever was officially reported to me as far being a workers' comp injury....

Q. Did Mr. Hayes ever tell you how he injured himself?

A. No, never did. I mean he said he had some sort of - I asked him what type of injury it was, and he said it was a back sprain. He couldn't give me a date, and he couldn't tell me exactly how it happened.

After a hearing, an administrative law judge filed an opinion on December 3, 2010. The administrative law judge found that the claimant proved he sustained a compensable injury. The administrative law judge found that the

claimant was entitled to reasonably necessary medical treatment and temporary total disability benefits.

The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) (Repl. 2002) provides:

(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i) (Repl. 2002).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i) (Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "4. The claimant established by a preponderance of

the credible evidence that he sustained a compensable low back injury on December 31, 2009." The Full Commission affirms this finding. The claimant testified that he was repairing fuel cells for the respondent-employer in December 2009. The claimant testified that he twisted his back and heard a "pop" or "snap" while reaching with a heavy clamp. Although some of the documentary evidence before the Commission indicates that the accident occurred on January 4, 2010, the claimant adamantly testified at hearing that the specific incident occurred on December 31, 2009. Doris Stacy corroborated the claimant's testimony that the claimant injured his back as the result of working with a heavy clamp. Despite the claimant's apparent confusion regarding the date of the accidental injury, Dr. Thomas consistently reported that the specific incident occurred on December 31, 2009.

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The claimant proved that he sustained an accidental injury causing physical harm to his low back. The claimant proved that the injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific

incident and was identifiable by time and place of occurrence on or about December 31, 2009. See *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely, a herniated disc shown on the January 21, 2010 MRI. We find that the herniated disc was causally related to the accidental injury occurring on or about December 31, 2009.

Based on our *de novo* review of the entire record, therefore, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury to his low back on or about December 31, 2009. The Full Commission finds that the claimant proved he remained within a healing period for his compensable injury and was totally incapacitated from earning wages beginning January 5, 2010 and continuing through July 2, 2010. See *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). We therefore affirm the administrative law judge's finding that the claimant proved he was entitled to temporary total disability benefits from January 5, 2010 through July 2, 2010. The respondents are entitled to an appropriate credit in accordance with Ark. Code Ann. §11-9-

411(a) (Repl. 2002). We affirm the administrative law judge's finding that treatment provided by Dr. DeLuca and Dr. Thomas was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a) (Repl. 2002). The Full Commission attaches significant evidentiary weight to Dr. Thomas' opinion that the claimant is not a candidate for surgery. See *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on December 31, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer repairing fuel cells. The claimant was training with Doris Stacey on December 31, 2009, when he contended that he hurt his back while repairing a fuel cell. The claimant testified that he told Ms. Stacey that he was hurt and that he tried to call his supervisor several times over the weekend but was unable to reach him.

Ark. Code. Ann. § 11-9-102(4)(A)(i)(Supp. 2009) defines a compensable injury as

[a]n accidental injury causing internal or external physical harm to the body... arising out of and in the course of employment and which requires medical services for results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code.

Ann. § 11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the claimant. Ark. Code. Ann. § 11-9-102(16). Further the employer takes an employee as he finds him.

In my opinion, a review of the evidence demonstrates that the claimant has failed to meet his burden of proof. First and foremost, the claimant went to Dr. Joseph DeLuca on January 10, 2010 and reported to Dr. DeLuca that he had had pain for two weeks. The claimant did not report an injury to Dr. DeLuca, even though this was only a few days after the alleged injury. Further, Mr. Benjamin Bauer testified via deposition that he had talked to the claimant's supervisor, Mr. Ewell, and that Mr. Ewell had never been informed about an injury by the claimant. The claimant also never reported an injury to Mr. Bauer. Mr. Bauer recalled that he talked to the claimant two or three weeks after the alleged incident.

Moreover, the claimant returned to Dr. DeLuca on January 12, 2010, and again, did not mention any accident occurring at work. The claimant was referred by Dr. DeLuca for an MRI, which only showed congenital canal stenosis of the lumbar spine and degenerative disc disease. The claimant applied for short-term disability benefits, in which he

received those benefits. The Form C also indicates that the claimant's date of injury was January 4, 2010. None of the dates match up. The claimant reported to Dr. DeLuca that the pain had been ongoing for two weeks when, in essence, it had only been going on for five or six days if the claimant's testimony about an alleged injury is to be believed. Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER