

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H205408

DOMINIC T. RUSSELL, Employee	CLAIMANT
SIMMONS PREPARED FOODS, INC., Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 6, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On August 16, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 21, 2023 and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer/carrier relationship existed among the parties at all relevant times.
3. The claimant was earning an average weekly wage of \$495.52 which would entitle him to compensation at the weekly rates of \$331.00 for total disability benefits and

\$248.00 for permanent partial disability benefits.

4. Respondents have controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back on December 27, 2021.
2. Medical.
3. Temporary total disability benefits.
4. Attorney fee.

At the time of the hearing claimant clarified that temporary total disability benefits are being requested from November 14, 2022 through a date yet to be determined.

The claimant contends he suffered a compensable injury to his low back on December 27, 2021. He contends he is entitled to additional medical treatment as recommended by Dr. Blankenship. He contends he is entitled to temporary total disability benefits from the date last paid to a date yet to be determined. Claimant reserves all other issues.

The respondents contend that claimant did not suffer a compensable injury to his low back.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference

conducted on June 21, 2023 and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back while working for respondent on December 27, 2021.

FACTUAL BACKGROUND

Claimant is a 48-year-old man who began working for respondent on its production line in November 2021. One of his job responsibilities was to “catch” boxes of chicken at the end of the production line and place the box on a pallet. These boxes could weigh 30, 40, or 50 pounds, depending on the customer for which the line was running at a particular time. Claimant testified that he injured his low back while moving these boxes on December 27, 2021. At his deposition, he described the accident as follows:

Q So in that process, Dominic, how did you get hurt?

A On the back of the line, grabbing the box, turning around and dropping it on the pallet stack, seven to seven, seven wide and seven high, and my back - - on one of them I just turned and set it down and my back had popped and I felt a warm sensation. I straightened back up and I tried to stretch it out and then it was about lunch. It was pretty much lunch after that point. And I went out to the car. I ate lunch. And then my leg started tingling and I went in and seen - - I went straight to medical at that time. I went to medical.

At the hearing, claimant admitted that he did not report his injury to the nurse’s station on the day of the accident, but instead reported it three days later on December 30, 2021. After claimant reported the injury he was sent to Dr. Berestnev who diagnosed claimant with a lumbar sprain; prescribed medication; and placed work restrictions on

claimant. Claimant testified that he returned to work for respondent and that at times he was placed at the end of the line catching boxes again. He testified that after working a few days his back was hurting so bad he could not get up from his bed.

Claimant missed his follow-up appointment with Dr. Berestnev on January 12, 2022, and testified he was essentially in bed for six months because of pain in his back. Claimant did not seek any additional medical treatment for his low back until May 26, 2022, when he was evaluated at the emergency room by Shawn Hall, APRN, for complaints of back pain after falling down a flight of stairs. Claimant was offered medication but he refused and was instructed to use ice and over-the-counter medications and to receive follow-up care from his primary care physician.

On June 2, 2022, claimant was seen by his primary provider, Sandi Casey, APRN, at NeoHealth. At the time claimant was requesting a referral to a dermatologist for a mole removal and to Dr. Anagnost, an orthopedic specialist, for back pain. Casey made the referral to Dr. Anagnost and claimant was seen by him on August 15, 2022. Dr. Anagnost noted claimant's history of an injury at work, but also indicated that claimant's low back pain "has been an issue for several years." Dr. Anagnost ordered an MRI scan, x-rays, physical therapy, and activity modification.

Claimant underwent the MRI scan on September 12, 2022, which was read as follows:

L4-5: Broad-based disc bulge along with cystic changes creating mild to moderate bilateral neural foramen narrowing, left worse than the right. The central canal is intact.

L5-S1: Central disc protrusion protrusion seen on image 18/22. Mild impression on the anterior thecal sac. Bilateral neural foramens are patent.

IMPRESSION:

1. Small central disc protrusion seen at L5-S1 level creating mild impression of the anterior thecal sac. However, bilateral neural foramina are patent.
2. Mild epidural lipomatosis.
3. Early degenerative changes of the disc material at the L4-L5 level.

Following the MRI scan claimant returned to Dr. Anagnost on October 3, 2022, who noted that claimant's prior treatment had not improved his condition and stated that surgery was a possible option. At this point claimant obtained legal representation and respondent sent claimant back to Dr. Berestnev on October 6, 2022. At that visit Dr. Berestnev again diagnosed a sprain and he referred claimant to physical therapy twice a week for three weeks.

Claimant returned to Dr. Anagnost on November 4, 2022, and he recommended an injection and work restrictions. As of claimant's next visit with Dr. Anagnost on November 14, 2022, he had not undergone the injection.

On December 12, 2022, claimant was discharged from physical therapy for non-compliance. The discharge report indicates that claimant attended two visits with three cancellations and one no show.

On April 10, 2023, claimant was evaluated by Dr. Blankenship who recommended medication, a referral to Dr. Cannon for a possible injection, and additional physical therapy before determining whether to proceed with surgery. Claimant was seen by Dr. Cannon on May 3, 2023, and he recommended an injection.

Although respondent paid for medical treatment from Dr. Berestnev, respondent

subsequently controverted this claim in its entirety. As a result, claimant has filed this claim contending that he suffered a compensable injury to his low back while working for respondent on December 27, 2021. He requests payment of medical benefits, temporary total disability benefits, and an attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his low back while moving boxes of chicken for respondent on December 27, 2021. Claimant's claim is for a specific incident, identifiable by time and place of occurrence. In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proof by a preponderance of the evidence.

A review of the evidence reveals a number of inconsistencies in claimant's testimony. First, claimant testified at his deposition that prior to the incident on December 27, 2021, he had not had any problems with his back.

Q Well, let me ask you this: Prior to this happening

in December of '21, had you ever had any problems with your back?

A No. Not - - no.

Q So prior to December 27th of '21, you had not had any back problems?

A No.

Q And I think I asked you before, prior to December 27th of 2021, you never had any problems with your back; correct?

A No.

However, the medical records indicate that claimant underwent an MRI scan of the lumbar spine on February 10, 2014, which revealed disc protrusions at L4-5 and L5-S1, the same levels for which claimant is currently receiving treatment. At the hearing, claimant acknowledged having been a passenger in a car that was rear-ended in a parking lot in February 2014. Claimant stated that he did not injure his back at that time, but instead suffered an injury to his shoulder. It seems unlikely that claimant would have undergone a lumbar MRI scan in 2014 if there were no complaints of low back pain and the MRI scan does reflect disc protrusions at L4-5 and L5-S1.

Second, at his deposition, claimant testified that his injury occurred shortly before lunch and that he did not finish his 30 minute lunch but instead went to the nurse's station where he reported the injury and was sent for medical treatment.

Q So you finished lunch. Did you have 30 minutes for lunch?

A Yes. And, no, I didn't finish lunch.

Q Okay. So before your lunch break was up, you

went to medical?

A Yes.

Q And by medical, do they have a nurse's station out there?

A Yes.

Q Who did you see there?

A One of the nurses. I don't know her name.

Q What did the nurse do for you?

A Drug test me. Then said that they was going to take me up to see their doctor.

Q Okay. And you went to see a doctor at Occupational Health?

A Yes.

Q Was it that day?

A Yes.

Q Dr. Berestnev?

A Yes.

At the hearing claimant admitted that he did not report the incident on December 27, 2021. In fact, claimant did not report an injury to the nurse's station until three days later on December 30, 2021.

I also note that after claimant reported an injury he was sent to Dr. Berestnev who placed work restrictions on claimant. Claimant testified that after working for a few days his back was hurting so bad he could not get up out of bed and that this condition lasted for six months.

Q Okay. Well, you actually told me you couldn't get out of bed for six months. Is that accurate?

A Yes.

Q Okay.

A And I couldn't get out of bed, but like I said, I had to get up and go to the bathroom. I had help on a lot of stuff that I had to do. Now, when I say I am bedridden, I am sorry. I don't know if you misunderstood, but if I physically can't do it myself, I am bedridden.

Q Okay. So up until June, you were unable to walk by yourself; correct?

A Not walk by myself. I could get to small places, distance.

Q Like to go to the bathroom?

A Bathroom. If I had to go to the kitchen and whatnot, but I also had help.

Likewise, claimant at his deposition also testified that he was essentially bedridden for six months.

Q Did Dr. B schedule a follow-up visit?

A Yes.

Q You were supposed to see him in a week?

A Yes.

Q Did you ever go to that appointment?

A No.

Q Why not?

A When I went back to work, I was supposed to be on light duty and they kept me on the back of the line

and when I went home, I could no longer move after I got back home. I was stuck in bed when I woke up the next day.

Q So what did you do?

A Laid in bed in pain and my wife and her mother, my mother-in-law, took care of me.

Q Okay. How long did you stay in bed?

A I was in bed about six months.

Q So, basically, what I am trying to figure out is from January of '22 until June of '22, are you telling me you were just at home in bed?

A I was in bed - - I am trying to think did they - - because my mother-in-law and my wife would try to get me to go to the hospital, but I didn't have insurance. I don't have insurance. I can't. They ain't going to do nothing for me. Sandi Casey, though, did my referral.

Q Okay. And I see that, to Dr. Anagnost?

A Yes.

Q So from January of '22 to June, how were you doing physically?

A Physically, I mean them parts, I couldn't move. I could move, but I really couldn't move. My legs would go out from underneath me. I laid in bed. They tried to rotate me from the bed to the chair. That's pretty much it. I was just in the house.

Q Were you able to walk?

A Depending on how far. It was - - it depends on how far. Like to the bathroom, yes, my wife would help me get there to the bathroom.

Q So to walk from the bed to the bathroom, you had to have help from your wife?

A Yes.

Q For that period of January of '22 to June of '22?

A Let's see. Probably right around the end of April to May-ish is when I could go probably by myself because I would lock up on the toilet bowl.

Q Until April or May?

A Yes.

Q And so around April or May, you got to the point where you were able to walk from the bedroom to the bathroom by yourself?

A About that point I was starting to get around by myself a little bit.

Despite this testimony that claimant could barely get out of bed for six months without help and that he could not get medical treatment because he did not have insurance, the medical records indicate that claimant was seen on January 31, 2022, at NeoHealth Tahlequah Family Practice. The one-page report does not mention why claimant was seen that day, but it is significant because this was during the period claimant testified that he could not get out of bed to return to Dr. Berestnev and was unable to obtain medical treatment because he had no insurance.

More significantly, claimant was seen by his primary provider, Sandi Casey, APRN, on April 18, 2022. Her report indicates that claimant was there to have a mole on his inner thigh examined. Despite claimant's testimony that at this time he could barely move from his bed to the bathroom without help, Casey in her exam notes under General Appearance noted that claimant was "Well-nourished, well-developed male in no acute

distress.” She also noted under her Musculoskeletal notes: “Gait is described as normal.” This report makes no mention of back pain, much less any indication that claimant had been bedridden for four months.

As previously noted, claimant was evaluated by Dr. Steven Anagnost, an orthopedic specialist, on August 15, 2022. Dr. Anagnost’s medical record does not specifically state that claimant injured himself while working for respondent, but instead merely states: “He was in Simmons chicken plant in Gentry, Arkansas.” Significantly, Dr. Anagnost’s medical report also contains the following notation:

He presents with a chief complaint of low back pain, which has been an issue for several years. (Emphasis added.)

Dr. Anagnost’s medical report also goes on to indicate that claimant had not been seen in the emergency room within the last year when in reality the claimant had been seen in the emergency room on May 26, 2022, about two and a half months earlier after falling down a flight of stairs.

On April 10, 2023, claimant was evaluated by Dr. Blankenship. Dr. Blankenship’s medical report indicates that claimant gave a history of no prior back problems. Again, this is contradicted by the 2014 lumbar MRI scan as well as the history noted in Dr. Anagnost’s medical records.

Finally, I note that fourteen days after claimant was evaluated by Dr. Blankenship, claimant went to the emergency room and was placed in observation/evaluated for chest pains which began while he was building hog pens.

In short, claimant has the burden of proving by a preponderance of the evidence

that he suffered a compensable injury to his low back while working for respondent on December 27, 2021. In this case, a finding that claimant suffered a compensable injury on that date is dependent in large part upon the claimant's credibility as a witness that the injury occurred as he testified. For reasons previously set forth, there are a number of inconsistencies present in this case. Claimant denied prior back problems; however, he underwent a lumbar MRI scan in 2014 which revealed disc protrusions at L4-5 and L5-S1, the same levels for which he is currently receiving medical treatment. In addition, in Dr. Anagnost's history he notes that claimant had had an issue of complaints of low back pain for several years. Claimant testified at his deposition that he reported his injury on the same day it occurred to a nurse in respondent's nurse's station. In fact, claimant did not report a work-related injury until three days later. Claimant testified that he was essentially bedridden for almost six months beginning in January 2022. According to claimant he could barely get up from bed without help to even go to the bathroom. However, claimant was seen by his own primary provider, Sandi Casey, on April 18, 2021, and her report makes no mention of back pain. Her report does not indicate that claimant had been bedridden for four months, but instead indicates that claimant was in no acute distress and she described his gait as normal.

Based upon these inconsistencies, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his low back on December 27, 2021, while working for respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered

a compensable injury to his low back while working for respondent on December 27, 2021, Therefore, his claim for compensation benefits is hereby denied and dismissed.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$415.00.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE