

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H204178

MCKENZIE THOMPSON, Employee	CLAIMANT
BLUE RIBBON INDUSTRIES, Employer	RESPONDENT
ACCIDENT FUND, Carrier	RESPONDENT

OPINION FILED JANUARY 6, 2023

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

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

Respondents represented by LAURA J. PEARCE, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On October 11, 2022, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 13, 2022, and a Pre-hearing Order was filed on July 13, 2022. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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 this claim.
2. The relationship of employee-employer-carrier existed between the parties on April 28, 2022.
3. The respondents have controverted the claim in its entirety.
4. The claimant's weekly compensation rates are \$492.00 for temporary total disability and \$369.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant sustained a compensable injury to his low back on April 28, 2022.
2. Whether Claimant is entitled to medical treatment for his work-related injury.
3. Whether Claimant is entitled to temporary total disability benefits from May 10, 2022,

to a date yet to be determined.

4. Whether Claimant's attorney is entitled to an attorney fee.
5. Respondents raise lack of notice as an affirmative defense.

Claimant's contentions are:

“Claimant contends he is entitled to medical treatment and temporary total disability benefits as a result of his work injury. Claimant reserves all other issues.”

Respondents' contentions are:

“Respondents contend that the Claimant did not sustain a work-related injury on April 28, 2022. Respondents contend that the Claimant's lower back injury does not meet the definition of a compensable injury. Furthermore, Respondents contend Claimant failed to report any work-related injury alleged to have occurred on April 28, 2022, thereby preventing Respondents the opportunity to direct any treatment provided to Claimant.”

The claimant in this matter is a 26-year-old male who alleges that he sustained a compensable low back injury on April 28, 2022, while employed by the respondent. The claimant testified at the hearing that his job duties included running a water truck, a roller, and building pad sites for buildings. This work required the claimant to operate bulldozers and a tract excavator, but it also required the use of a hand shovel.

The claimant gave direct testimony at the hearing in this matter about the events surrounding his alleged compensable back injury as follows:

Q What happened on April 28th of this year?

A So on April 28th of this year, we were out at a job site we had in Pinnacle Village and I was trying – every time we had to lay gravel in the ditch, we would have to move the dirt out of the way so that the gravel could set right. And it's red dirt so it's got a lot of rocks in it and it's very hard dirt so I was trying to shovel that, the dirt and the rock out of the way, and when I did that I tripped over my shovel and kind of leaned forward and twisted, and that's when I could hear it pop.

Q And what did you hear pop?

A My back.

Q And how did that feel?

A It felt very bad. It was stabbing and excruciating pain.

Q Were you on level ground? Were you in a ditch? Where were you?

A I was in a ditch.

Q And about how deep was the ditch?

A I'd say three to four foot. They weren't super tall.

Q Were you able to get out on your own?

A I was.

Q And was there anyone working with you that day?

A There were people out on the job site, but nobody was actually with me.

The claimant testified that he reported his injury to his on-jobsite supervisor, Sean Galloway. The claimant gave direct examination testimony about his reporting of the injury and his request to go see a doctor as follows:

Q And when you reported it to Sean, what did he do?

A He told me that he would let Nathan know, which was our in-office supervisor.

Q And at that point, did you feel like you needed to see a doctor?

A I did, but I decided that I was gonna just go home and ice it, finish out my workday and ice it, and try that.

Q Were you able to finish out the day?

A I was able to finish out the day. It was tough to get through it, but I was able to finish it out.

Q And did you ice your back later?

A I did. I went home and laid on the couch, flat on my stomach, and my wife put an ice pack on my back.

On cross examination, the claimant was asked about his request to go to the doctor on the day he alleges the low back injury to have occurred and his decision not to go see a doctor as follows:

Q And did you ask to go to the doctor at that point in time?

A I did. I told them that I may need to go to the doctor, but I decided I was going to stay home and ice it.

Q So there's a difference between my question. My question was did you ask the employer to send you to the doctor?

A Yes.

Q You did? You asked them to send you to a doctor?

A Yes.

Q And what was their response?

A They said that they would.

Q Okay. But then subsequent to that, you decided to just stay home and rest it?

A Yes.

Q And what made you make that decision?

A I just needed the money so I decided to stay at work and ice it.

Q Okay. So let me take a step back. So you didn't – what made you – I'm sorry, the answer wasn't what I thought it was.

So you said you asked to go to the doctor, they said they would send you to the doctor, and you decided to stay?

A I decided to finish out my workday –

Q Okay. –

A – and then go home and ice it.

Q Okay. And then the next day when you went back to work and it was still giving you problems, did you say, "Hey, I decided I needed to go to the doctor"?

A No. I decided I was gonna wait.

On direct examination, the claimant testified that he continued to work after the alleged injury until May 10, 2022, when he first sought medical treatment. The claimant testified that he managed his pain by using ice packs from his lunchbox on his back during his lunch break. Strangely, the claimant did not request for the respondent to send him to the doctor as he testified they had previously offered, was told by the respondent he could go to the doctor, and then the claimant decided not to go. Instead, the claimant went to see his primary care physician, Dr. Gregory Henson. Following is a portion of the claimant's cross examination testimony:

Q Okay. And when you decided to go to your primary care doctor, had you since that day of injury of May – sorry, of April 28th, until you went to see Dr. Henson, did you ask to go to the doctor?

A I did not.

Q And so you made the decision to see your primary care doctor?

A Yes.

Q And how long have been with Dr. Henson?

A Dr. Henson; no very long.

On May 10, 2022, the claimant was seen by Dr. Henson at MANA Medical Associates.

Following is a portion of that medical record:

Reason for Appointment

1. Back pain x 2 wks, now unable to work due to pain.

History of Present Illness

New/Follow-up Patient Consult:

Patient here with complaints of lower back pain that started about 2 or 3 weeks ago. He has been taking ibuprofen as well as Tylenol, using lidocaine patches which was helping but does not seem to be helping much anymore. He does have some Zanaflex he was doing at home as well but this is not helping either. Per patient report he does have a history of a lumbar fracture in the past, this was around 2 years ago. He did have an x-ray done at that time and it did note an anterior superior endplate fracture of the L5 vertebrae. He was supposed to have an MRI done, thinks he had one done of the lower back but he is somewhat unsure. Thinks he had this done at Arkansas medical imaging. He was also post to have physical therapy and see an orthospine doctor but he never did this as he was afraid of having to have surgery. He stated his back did improve a lot and was not having any issues until a couple weeks ago or so. He denies any specific event that caused this pain but he does do manual labor at his job and around the house when he is off work to so he thinks this could potentially have done it. He denies any numbness in the legs at this time.

Assessments

1. Acute midline low back pain without sciatica – M54.50 (Primary)
2. Closed nondisplaced fracture of fourth cervical vertebra, unspecified fracture morphology, initial encounter – S12.301A

Pt still with apparent anterior superior endplate fx of T4, he did have previous x-ray about 2 yrs ago which was resulted by radiology as superior anterior endplate fx of T5, I assume they misspoke on this previous, T5 looks good at this time. I did speak with pt about x-ray. Discussed with pt about possibilities, he would like to try medication first, if pain continue will try PT and referral to ortho spine if desired. He was referred previously but ended up not going.

The claimant was prescribed hydrocodone-acetaminophen tablets and baclofen tablets at his visit with Dr. Henson.

Given the claimant's testimony regarding how his back pain began as a result of the compensable injury he alleges on April 28, 2022, the above medical report undercuts the claimant's credibility severely. In the report there is no mention of the incident the claimant alleges to have occurred regarding shoveling on April 28, 2022. In fact, the report states "he denies any specific event that caused this pain but he does do manual labor at his job and around the house when he is off work so he thinks this could potentially have done it." It is perplexing as to how the medical record does not reflect any information about the incident the claimant alleges, particularly considering the fact that the claimant testified that he was told that he could go to the doctor by the respondents because of the incident and he turned that offer down and then went to see his own primary care physician. On direct examination, the claimant testified that he told Dr. Henson about the April 28, 2022, incident. On cross examination, the claimant was asked about his interaction with Dr. Henson about the alleged incident as follows:

Q Okay. So you go to see Dr. Henson, and do you recall when you went to go see him how you described your injury?

A No.

Q I am going to show you the record that is in our respondents' exhibits, page 163 to 164.

Are you familiar with this record? Have you seen this before?

A I am. I have one at home.

Q Okay. And this is dated what date? Can you read that date on there?

A 5-10-22.

Q Great. So when you went to go see Dr. Henson, it is possible that you had explained to him that you denied any specific event that caused the pain, but that you do manual labor at your job and around the house when you are off work, and you think that could potentially have caused your injury?

A No, ma'am. I told him exactly what happened.

Q Okay. Any reason why Dr. Henson would have reported something different than what you had told him?

A I think he forgot.

Q Okay. So you are denying the fact that you ever told him that it potentially could have been caused from something else?

A Yes, ma'am.

Q And that you don't remember a specific incident?

A No.

In direct examination testimony the claimant alleges that he gave notice to the respondents about going to Dr. Henson, but it is again perplexing that he would give notice of going to his primary care physician for what he alleges is a work-related injury instead of asking to see a doctor through the respondent as they have offered to do, according to his own testimony. Regardless, Dr. Henson placed the claimant on light duty and the claimant provided the light-duty note to the respondent on May 11, 2022.

The claimant gave direct examination testimony about his conversation with Nathan Lopez, a supervisor for the respondent, about his light-duty restrictions as follows:

Q And did you go to work that next day?

A I did not. I went to the office and gave them the light-duty note, and they said they didn't have any light-duty for me.

Q Who specifically told you that?

A Nathan Lopez.

Q And at some point after that conversation, were you offered some light-duty?

A I was. It was later than I normally get texted about work the next day, and I had already taken my pain medication and my muscle relaxer, so I knew that I was supposed to have the light-duty the next day, but I fell asleep and was supposed to be in Fayetteville by 5:00 am, and I was late. I didn't wake up until like nine o'clock.

Q And so what happened when you were late?

A I was let go.

Q And who let you go?

A Nathan Lopez.

Q And since that time, have you been able to work?

A I have not.

Q And why not?

A Just can't – can't do it. Can't stand for a very long time, can't sit for very long. Moving certain ways, hurts.

After the claimant's employment with the respondent ended, he continued to seek medical treatment and was referred by Dr. Henson to Ozark Orthopedics. The claimant was

initially seen by Thurman Smith, PA-C, on June 15, 2022. Following is a portion of that medical record:

Chief Complaint
Lower back/L-spine problem

PM&R Spine

Mr. Thompson Pleasant 25-year-old male with acute onset low back pain after a work accident while he was working for Blue ribbon ground services in April 2022. He was working a shovel and had some degree of strain about the low back and had acute onset pain which eventually saw a provider at the recommendation of his employer who placed some work modifications which provided some degree of relief but his pain persisted and he ultimately went to the emergency room where x-rays were taken and there was some concern for an L4 bone injury. His pain has persisted and he presents clinic today for initial evaluation. He also notes a remote injury to his back in 2020 after a JetSki accident. This was self-limited.

Assessment/Plan

Image/Record Review:

- X-ray of the lumbar spine reviewed from medical Associates of Northwest Arkansas dated 5/10/2022 showing deformity of the anterior superior endplate of L4 vertebra and could be related to previous trauma or injury. There is levoscoliosis of the lumbar spine. There is posterior fusion anomaly of S1 noted.

Pertinent Medications:

- Arkansas PMP reviewed
- Hydrocodone 7.5/325 mg

Assessment:

1. Acute onset low back pain after a work accident in April 2022 with recent lumbar pain radiograph evidence showing L4 bone injury, age indeterminate.

Plan: Mr. Thompson is a pleasant 25-year-old male with acute low back pain after work accident in April 2022. Recent x-rays show L4 deformity a age-indeterminate. There is suspicion for

discogenic pain as well. At this time we will proceed with advanced imaging And see him back in office to review.

Summary:

1. Lumbar spine MRI without contrast.

All questions and concerns addressed. The patient verbally understands and agrees to the plan.

I note that in this medical record the claimant asserts he had a work incident involving a shovel. This is in contrast to his initial visit with his own primary care physician where he denied any acute event causing his low back pain.

On August 1, 2022, the claimant underwent an MRI of the lumbar spine at Ozark Orthopedics. Following is a portion of the diagnostic report authored by Benjamin Lowery, MD:

Findings:

Lumbar spine demonstrates normal lordotic curvature. Vertebral body heights are well-maintained and demonstrate normal signal. Disc desiccation is seen at L3/L4. The conus medullaris terminates the level of L1. Visualized soft tissues of the abdomen and pelvis are unremarkable.

At T12/L1, no evidence of disc bulge, neural foraminal narrowing, or central canal stenosis is identified.

At L1/L2, no evidence of disc bulge, neural foraminal narrowing, or central canal stenosis is identified.

L2/L3, no evidence of disc bulge, neural foraminal narrowing, or central canal stenosis is identified.

At L3/L4, mild diffuse disc bulge is seen with mild bilateral facet degenerative changes present. The central canal measures 9.6 mm in AP dimension consistent mild central canal stenosis. No neural foraminal narrowing is identified.

At L4/L5, minimal diffuse disc bulge is seen. The central canal measures 10.1 mm in AP dimension. Mild bilateral neural foraminal narrowing is noted.

At L5/S1, no evidence of disc bulge, neural foraminal narrowing, or central canal stenosis is identified. Right-sided pars defect is suspected.

IMPRESSION:

1. Mild degenerative changes are seen in the lumbar spine most pronounced at L3/L4 as described above.
2. Possible right-sided pars defect at L5. This could be confirmed with oblique radiographs.

On August 30, 2022, the claimant was again seen at Ozark Orthopedics. However, this time the claimant was seen by Dr. George Deimel. Following is a portion of that medical record:

Chief Complaint

Followup: Lumbar radiculopathy

PM&R Spine

Mr. Thompson returns to clinic today for a follow up. He was last evaluated on 6/15/2022. At that time, he was having acute onset low back pain. Decision was made to pursue an MRI of the lumbar spine. He is here today to discuss further evaluation and treatment options.

Assessment/Plan

Imaging and Record Review:

- Lumbar spine radiographs from MANA dated 5/10/2022 were reviewed, showing deformity of the anterior superior endplate of L4 vertebra, could be related to previous trauma or injury. There is levoscoliosis of the lumbar spine. There is posterior fusion anomaly of S1 notes.
- An MRI of the lumbar spine from Ozark Orthopaedics dated 8/1/2022 shows possible right-sided pars defect. At the L3-4 level, there is disc bulging with mild central canal stenosis.
- An Arkansas Prescription Monitoring Program report was reviewed and consistent with stated history.

Diagnosis:

1. Acute onset low back pain after a work accident, April 2022
2. Lumbar spine MRI evidence of L3-4 disc bulging, mild central canal stenosis, possible right-sided L5 pars defect
3. Lumbar spondylosis

4. S/p activity modification, medication management with improvement in pain complaints

Assessment:

Mr. Thompson returns to clinic today for a follow up. We discussed his clinical course. I reviewed an MRI of his lumbar spine. He does have disc bulging with evidence of disc desiccation at the L3-4 level. I do suspect that this is the likely source of his discogenic pain. He also has some right low back pain. An MRI showed possible pars defect. Again, he may have had exacerbation of this in the setting of his work-related injury. At this point, I certainly do not think he needs any type of surgical intervention. He is managing with activity modification and medications. He is currently taking baclofen and hydrocodone at night. We will give him a refill of the baclofen and a prescription for hydrocodone 5-325mg x 20 tabs. He does understand that this is the last prescription of oral systemic opioids that we will use for control of his back pain. At that point, if he needs further or escalating care, then we will likely move forward with interventions. We will plan a follow up in 6-8 weeks to recheck. If he is doing well at that time, he can cancel the appointment.

Summary:

- Reviewed lumbar spine MRI
- Continue to monitor symptoms, certainly stable
- Refill baclofen
- Hydrocodone 5-325mg x 20 tabs to take at night as needed for break through pain
- If patient calls, can arrange for bilateral L3-4, L4-5, TFESI
- Work note for light duty

It is the claimant's burden to prove that he sustained a compensable injury to his low back in the incident he alleges to have occurred on April 28, 2022. In order to do so, the claimant must prove the existence of objective medical findings regarding his low back and prove a causal connection between those objective medical findings and the incident he alleges to have caused them.

The MRI report dated August 1, 2022, does show the existence of objective medical findings regarding the claimant's low back, as the impression section of that report revealed

“mild degenerative changes are seen in the lumbar spine most pronounced at L3/L4” and “possible right-sided pars defect at L5. This could be confirmed with oblique radiographs.” I note that Dr. Deimel in his August 30, 2022, medical report regarding the claimant discussed the pars defect stating “an MRI showed possible pars defect. Again, he may have had exacerbation of this in the setting of his work-related injury.”

However, the claimant must also prove the existence of a causal connection between those objective medical findings and the incident he alleges on April 28, 2022. Here, the claimant is unable to prove the required causal connection. The claimant’s initial visit to his own primary care physician, Dr. Henson, on May 10, 2022, clearly fails to indicate any type of specific incident the claimant associated with his low back complaints at that time. The claimant, in testimony, suggested Dr. Henson simply “forgot.” It is in the realm of possibility that Dr. Henson simply forgot, but unlikely, particularly because Dr. Henson’s medical record provides the claimant’s thoughts on the cause of his low back symptoms, stating “he denies any specific event that caused this pain but he does do manual labor at his job and around the house when he is off work to so he thinks this could potentially have done it.” I do not believe Dr. Henson forgot, but instead, recorded what the claimant told him about his thoughts on how his pain began.

The claimant’s testimony that he was told by the respondent that he could go to the doctor for his alleged injury and then the claimant decided not to go, is in itself, reasonable. However, for the claimant then to later go to his own primary care physician and testify that he gave notice to the respondent that he was going to his own primary care physician instead of requesting for them to send him to a doctor, as the claimant testified they had done, seems

unreasonable, particularly given the claimant specifically denied any specific work injury causing his low back pain to Dr. Henson.

The claimant does mention a work-related injury in his June 15, 2022, visit to Ozark Orthopedics, but this is after the claimant was terminated from his employment. The claimant was provided light duty work according to the claimant's testimony due to Dr. Henson's work restriction note that he provided to the respondent. However, the claimant was three hours late for work and was terminated on May 12, 2022, for his tardiness.

Here, the claimant is unable to prove the required causal connection between the alleged April 28, 2022, incident and the objective medical findings. I simply do not believe the incident on April 28, 2022, occurred. I do believe the claimant had low back symptoms around that time and told Dr. Henson about those symptoms in his May 10, 2022, visit. The lack of reporting the incident to Dr. Henson is substantial evidence. The claimant only reporting this alleged incident to medical providers after he was terminated from his employment, makes those reports less reliable.

The objective findings of low back difficulties are reasonably explained by the claimant's remarks recorded in his medical record from his May 10, 2022, visit with Dr. Henson, "denies any specific event that caused this pain but he does do manual labor at his job and around the house when he is off work to so he thinks this could potentially have done it." The objective findings could also be explained by the multiple low back complaints shown in medical records prior to this alleged April 28, 2022, incident introduced into evidence by the respondents. I note that the claimant downplayed or did not have memory of only but a few of his past medical issues, which is remarkable since the claimant was seen in emergency departments at three different hospitals, Mercy Hospital Northwest Arkansas, Northwest Medical Center Bentonville,

and Eureka Springs Hospital, a total of 22 times between of February 2016 and September 2019. I will note that the reasons for the claimant's emergency department visits were mostly unrelated to his low back, but the claimant was evasive or very forgetful about his past medical history when questioned at both deposition and the hearing in this matter.

The claimant has failed to prove that he sustained a compensable low back injury on April 28, 2022.

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 the pre-hearing conference conducted on July 13, 2022, and contained in a Pre-hearing Order filed July 13, 2022, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his low back on April 28, 2022.

3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to medical treatment for his alleged work-related injury.

4. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 10, 2022, to a date yet to be determined.

5. The claimant has failed to prove entitlement to an attorney's fee in this matter.

6. The respondents affirmative defense regarding lack of notice is moot.

ORDER

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**