

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402281

MICHAEL FINNEY, EMPLOYEE	CLAIMANT
NEWS-TIMES PUBLISHING CO., EMPLOYER	RESPONDENT
AMERICAN CAS. CO. OF READING, PA, CARRIER	RESPONDENT

OPINION FILED DECEMBER 29, 2004

Hearing before Administrative Law Judge J. Mark White on November 18, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 18, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on September 13, 2004 – though the respondents did not participate – and a Prehearing Order was entered that same day. A copy of the September 13, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection.

At the hearing, the parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employer/employee relationship existed at all relevant times, including January 26,

2004; and that the claimant earned \$6.38 per hour at the time of his alleged injury.

The issues to be presented were defined as whether the claimant sustained a compensable injury on January 26, 2004; whether the claimant is entitled to temporary total disability benefits; whether additional medical treatment is reasonably necessary in connection with a compensable injury; and controversion and attorney's fees. At the hearing, the parties agreed to add the issue of determination of the claimant's average weekly wage and corresponding compensation rate.

The claimant contends that he sustained a compensable injury to his back on January 26, 2004; that he is entitled to temporary total disability benefits from on or about January 26, 2004, to a date yet to be determined; that he is entitled to additional medical treatment associated with his compensable injuries; that he is entitled to have his attorney's fees paid as permitted by law; that he earned an average weekly wage of \$255.20, entitling him to a compensation rate of \$170; and that his few partial-work weeks should not be taken into account to reduce that compensation rate.

Respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment; that it is not clear that the claimant's symptoms are caused by his herniated disc or that his herniated disc was caused by

anything he did at work; and that the claimant is not entitled to indemnity or medical benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.
4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.
5. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer as a mail clerk. On at least two occasions prior to the incident in question, in May and December 2002, he sustained work-related back injuries. Both prior injuries were diagnosed as back strains and he returned to work afterwards.

The claimant testified that on January 26, 2004, he used a pallet jack to move a pallet filled with newspaper inserts into a storeroom. He testified that he was pulling the jack down an incline into the storeroom when the jack's wheel hit an indentation in the floor, causing the jack to stop suddenly. The claimant testified that the jerking motion caused him to release the jack and that he immediately felt a sharp pain in his back. He did not think he was seriously hurt at the time, though, and he continued working until the end of his shift. He testified that he mentioned the incident to his supervisor, Larry McDaniel, that afternoon.

The next morning, the claimant testified, he woke up "immobile" and "in a lot of pain" in his back. He called and reported the injury to McDaniel, who dispatched an employee to the claimant's home to complete the workers' compensation paperwork.

The claimant saw Dr. Greg Smart the next day, on January 28. Dr. Smart's

handwritten note reads, "States back already hurting. Pulled on pallet cart & cart stopped @ bad place in floor. Continued to pull – caused lower back pain." Dr. Smart recorded that the claimant complained of pain in his back but with no significant radiating pain into the arms or legs. Dr. Smart diagnosed the claimant with "back pain – probable lumbar strain." He placed the claimant on light duty and prescribed medication. The claimant testified that he did not return to work because his employer did not have a light-duty position available. He has not worked since.

The claimant returned to Dr. Smart on February 2, and again on February 12. Dr. Smart recommended physical therapy, which the respondents denied. The claimant returned to Dr. Smart again on February 19, and Dr. Smart recommended further diagnostic studies. Dr. Smart's March 4 note records that the respondents denied the MRI exam he had recommended, and that the respondents were controverting all further treatment. Dr. Smart wrote in his note:

Over the past several weeks, his condition has very slowly improved, but has not resolved. There is still a lower lumbar pain. The pain radiates somewhat to the left - left to mid lower lumbar region. There has been occasional pain radiating into the left leg, but there are no significant radicular symptoms at this time.

Because the respondents controverted further treatment, the claimant returned to his personal physician at the Interfaith Clinic. He underwent an MRI exam on May 13. The exam found degenerative disc disease with mild posterior

bulging at L4-5, and degenerative disc disease with a “small to moderate herniation” at L5-S1 encroaching on the thecal sac and the L1 nerve. The claimant’s physician referred him for a neurosurgical consultation. This consultation evidently occurred shortly before the full hearing; a record of the consultation was excluded from evidence as it was not provided by the claimant to the respondents at least seven days before the hearing as required by Ark. Code Ann. § 11-9-705 (c).

II. Adjudication

A. Sanctions

As outlined in the Prehearing Order of September 14, 2004, the respondents failed to comply with the Commission’s prehearing procedure and were therefore barred from asserting any defense against this claim or offering any evidence at the full hearing. After the Prehearing Order was entered, the respondents finally retained counsel and filed a prehearing questionnaire response on September 27. Ten days before the hearing, the respondents moved that the bar against the introduction of evidence be lifted. The motion was granted in part, and the respondents were allowed to introduce medical records and other documents into evidence, on the grounds that the claimant would not be substantially prejudiced by the introduction of this evidence. The bar against the calling of witnesses was

retained; because only ten days remained until the hearing, allowing witness testimony would have necessitated a continuance so that the claimant could locate and interview the prospective witnesses. Lifting this bar would have resulted in a substantial prejudice to the claimant.

I note that the Court of Appeals has explicitly held that the Commission has the authority to preclude a respondent from asserting defenses or offering evidence for failure to comply with prehearing procedures. *Harrington Constr. Co. v. Williams*, 45 Ark. App. 126, 872 S.W.2d 426 (1994). I further note that the Commission is granted by statute the authority to “preserve and enforce order” before it. ARK. CODE ANN. § 11-9-706(a). I conclude that a bar was warranted in this case, given the respondents’ complete failure to participate in the prehearing procedure and the resulting prejudice to the claimant and inconvenience to the Commission.

B. Compensability

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) 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(16), establishing the existence and extent of 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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

I did not find the claimant to be a credible witness, in that his testimony was internally inconsistent and inconsistent with the documentary evidence. The claimant testified that when he woke up the morning after his work incident he was “immobile” and “in a lot of pain.” Yet he later testified that he chose not to fully disclose the cause of his accident on the Form N – completed the *same day* he woke up “immobile” – because he “didn’t think that the injury was that serious.” I do not see how one could plausibly think an immobilizing injury to not be serious. The claimant on the one hand denied that he complained of back pain before his injury, and on the other said that if he did complain, it was because he thought his kidneys might be causing him back pain. Yet the claimant also testified that there was no evidence of any kidney or urinary dysfunction that might cause back pain.

As for the contradictions with the medical evidence, the claimant categorically denied complaining of back pain to his doctors in the days and months before his injury. Yet on December 22, 2003, only a month before this incident, the claimant's personal physician had assessed him with "chronic low back pain." On October 20, 2003, he had sought treatment from his personal physician for "LS pain". Likewise the claimant denied telling Dr. Smart that his back was already hurting at the time of the work incident, even though Dr. Smart's handwritten notes say precisely that.

I am willing to concede that an incident with a pallet jack did take place on January 26, 2004. Yet I remain unconvinced that this incident caused an injury to the claimant's back, or that it aggravated the claimant's pre-existing back problems. The record is plain the claimant had significant back problems immediately prior to this injury, and that he was already taking prescription pain medication for his knee at the time of his injury – medication that possibly could have masked his back pain. I find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Because I so find, the remaining issues identified by the parties are moot and need not be addressed.

AWARD

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on January 26, 2004. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge