

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F311576**

**SEAN D. PAINE**

**CLAIMANT**

**WEST TREE SERVICE, INC.  
(SELF-INSURED)**

**RESPONDENT EMPLOYER**

**ORDER AND OPINION FILED SEPTEMBER 21, 2004**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JOE M. ROGERS, Attorney at Law, West Memphis, Arkansas.

Respondent represented by the HONORABLE PATRICK L. SPIVEY, Attorney at Law, North Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on August 18, 2004. A prehearing conference was held on June 23, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on October 15, 2003.

2. The compensation rate is \$385.

The claimant contends that he sustained a low back injury on or about October 15, 2003. He contends further that he is entitled to medical benefits and temporary total disability benefits from October 16, 2003, until he returned to work and attorney's fees.

The respondents contend the claimant did not sustain a compensable injury in the course of and arising out of his employment. The respondents paid some initial medical benefits but shortly thereafter controverted the claim. The respondents contend the claimant's healing period ended on December 31, 2003, and that he has returned to work without restrictions.

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

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on October 15, 2003.
2. The compensation rate is \$385.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment.
4. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from October 16, 2003 through December 31, 2003.

**DISCUSSION**

The claimant, 25 years of age, has worked for the respondent employer for six years. The claimant worked out of a bucket trimming trees, lifting logs, grinding brush

and climbing trees. The claimant used a pole saw while up in the bucket. The claimant was a crew foreman on October 15, 2003 and supervised one or two men. On October 15, 2003, the claimant was working in Hot Springs and had been assigned there since July 4, 2003. According to the claimant, he put his chain saw chaps on and was cutting underbrush with a large chainsaw with an 18 or 20-inch blade and weighing about 15 pounds. He cut underbrush about an hour and forty-five minutes. The claimant testified that he heard Avery Austin, an employee working with him, call down that it was 12:00 o'clock and when he raised up, he felt a sharp pain in his back and it was popping. The claimant testified that he walked over to the truck and said to Mr. Austin, "Man, I've done something to my back." T., p. 19. Mr. Austin went to get his lunch and Amos Holland, the general foreman, showed up. The claimant stated he spoke with Mr. Holland for a few minutes but did not mention his back hurting, since the job involves bending over and sometimes you have pain but it goes away.

According to the claimant, he sat down on a log in a convenience store parking lot where he and his co-employees were going to eat lunch. The claimant testified that he told another employee, Ricky Tatum, about cutting underbrush and his back hurting. They ate lunch and according to the claimant, his back continued to feel worse with a sharp pain and pop when he moved. He tried laying down and then moving around to relieve the pain. Finally, Mr. Tatum called Mr. Holland, the general foreman, and the claimant told him that he had done something to his back and he did not know what happened. An ambulance was called and he was taken to the Hot Springs emergency room where he had x-rays, a drug test and a shot and was released. The back pain and incident happened on a Wednesday. The claimant got a friend to come get him

and take him back home to Palestine, Arkansas and he was able to see his family doctor on Friday.

The claimant's family doctor, Dr. James Jacobs, requested x-rays, provided pain medication and ordered an MRI and referred the claimant to a neurosurgeon. The claimant underwent two caudal blocks in his spine and took some physical therapy and was released to return to work without restrictions.

The claimant was questioned about his recorded telephone conversation with the claims adjuster following the incident. The claimant verified that he told the adjuster that he began feeling pressure in his back when he was cutting underbrush.

Under cross examination, the claimant verified that he had been sick vomiting on October 14, 2003, for 10 to 15 minutes; however, he had no back pain. The claimant admitted that he was in pain when he was taken to the emergency room by ambulance and was not sure what he told the personnel. The claimant verified that he did not mention to Mr. Holland that he had a back injury on October 15, 2003, because he thought it was something minor.

Ricky Tatum, a crew foreman for the respondent employer, testified that the claimant did not tell him of a back injury before lunch. Mr. Tatum testified that it was only after they had eaten lunch that the claimant attempted to get up and complained of back pain.

Under cross examination, Mr. Tatum was asked if he recalled a conversation with the claimant a few weeks after the claimant was off work. Mr. Tatum remembered the conversation and after a recording made by the claimant of the conversation was played for Mr. Tatum, he verified that he told the claimant on the telephone, "Oh, yes,

you hurt it on the job.” T., p. 55. Mr. Tatum then confirmed that when the claimant attempted to get up from lunch on October 15, 2003, he told him that he hurt his back cutting underbrush. Mr. Tatum confirmed that the type work he and the claimant are involved with is strenuous work and minor injuries are not reported. Mr. Tatum admitted that a catch here and a little catch there are not reported.

Amos Holland, general foreman for the respondent employer, testified that even minor injuries are supposed to be reported. Mr. Holland was called to the convenience store on October 15, 2003, when the claimant had to be transported by ambulance to the emergency room. Mr. Holland testified that it was a week and a half before he was aware the claimant was contending that he hurt his back cutting underbrush. Mr. Holland also confirmed that bending over using a chain saw can put your back in a bind.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (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 harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be

denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, I found the claimant to be a most credible witness. He was a young man with six years work experience with the respondent employer. I found his account of the incident on October 15, 2003, to be a plausible account and later corroborated by his co-employee, Ricky Tatum. Mr. Tatum testified at the hearing that the claimant had not mentioned hurting his back while cutting underbrush; however, a recording of a telephone conversation with the claimant refreshed his recollection and he remembered the claimant telling him about hurting his back cutting underbrush.

I find the claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on October 15, 2003, while in the course of and arising out of his employment. The claimant testified about cutting underbrush with a chain saw for about an hour and a half or more before lunch and feeling pain in his back and popping. The claimant told the insurance adjuster in a telephone interview that he felt pressure in his back from cutting the underbrush and his pain became more severe after sitting and having lunch. The claimant testified that he was in great pain when he went to the emergency room in Hot Springs and did not recall exactly what he told the medical staff. The Hot Springs Emergency Room report mentions that the claimant did not have a fall but does do quite a bit of lifting with no known instance of injury. The October 17, 2003, report from Dr. Jacobs indicates that the claimant had pain down his legs and this happened at work. The medical reports provide the requisite "objective findings" noting muscle spasms in the back. The November 3, 2003, report from Semmes Murphey clinic also notes the claimant was bent over cutting underbrush and felt something in his back. I find the contemporaneous medical reports

do corroborate the claimant's account of initially having back pain after cutting underbrush. After the claimant cooled off during lunch, the claimant's back problem did seem more severe. The claimant was diagnosed with a bulging disc and acute myofascial strain and treated with conservative care of physical therapy and later some injections. Dr. Morris Ray presented a medical opinion on November 10, 2003, that the claimant's problems stemmed from his work of bending over cutting underbrush. I find the claimant has satisfied the statutory requirements for a compensable injury by presenting credible testimony, providing corroborating medical evidence, objective findings and a medical opinion of the symptoms and cause of the symptoms.

The claimant next contends that he is entitled to temporary total disability benefits from October 16, 2003, until he returned to work. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant sought emergency room treatment on October 15, 2003 and remained in his healing period until Dr. Ray released him on December 31, 2003. The claimant had continued to seek conservative treatment during that period and remained off work. I find the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from October 16, 2003 through December 31, 2003, when he was in his healing period and totally unable to work. The claimant has now returned back to the present employer and has worked full time since his release.

## **ORDER**

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from October 16, 2003 through December 31, 2003.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

---

**LINDA K. MARSHALL**  
**ADMINISTRATIVE LAW JUDGE**