BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113732

BILL SMITH		CLAIMANT
A & M TRUCKING		RESPONDENT
HARTFORD INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
SECOND INJURY FUND	NO. 2	RESPONDENT

OPINION FILED JANUARY 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents Employer-Carrier represented by TOM HARPER, JR., Attorney, Fort Smith, Arkansas.

Second Injury Fund represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 10, 2003, in Springdale Arkansas. The first deposition of the claimant was taken on April 11, 2002, and has been admitted as Respondent's Exhibit No. 7. The second deposition of the claimant was taken on October 6, 2003, and has been admitted as Respondent's Exhibit No. 8.

A pre-hearing order was entered in this case on September 16, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, a clarification was made to the issue dealing with the claimant's entitlement to temporary total disability benefits (issue No. 3), and the additional issue of the appropriate weekly compensation rates was added (issue No. 7). A copy of the pre-hearing order with those amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations have been offered by the parties and are hereby accepted:

1. On all relevant dates, including March 20, 2000, the relationship of employee-employer-carrier existed between the parties.
2. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. Whether the claimant sustained a compensable injury to his low back on March 20, 2000.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability from March 20, 2000 through the end of the healing period (except for a two week period during which he returned to truck driving), and permanent disability (including both permanent physical impairment and actual wage loss).
4. Whether there is any liability on the part of the Second Injury Fund.
5. Whether this claim has been brought or maintained without reasonable grounds so as to entitle the respondents to fees and costs.
6. Appropriate attorney's fee.
7. The appropriate compensation rate.

In regard to these issues, the claimant contends:

> "Claimant was injured in April of 2000 (actually he alleges ths injury occurred in March of 2000) when he was on top of a truck opening and shoving doors when he injured his back. He request (sic) TTD and medical."

In regard to these issues, the respondent employer-carrier contends:

> "Respondents contend that claimant did not receive the compensable injury as alleged and that claimant's back complaints, symptoms and treatment therefore, including surgery, result from multiple back injuries, all of which occurred before and after March 20,2000. Claimant filed an identical claim for similar benefits in Oklahoma, prior to filing this claim, and as a result, this claim is barred and the Arkansas Workers' Compensation Commission has no jurisdiction because of election of remedies. In his deposition, taken herein on April 11, 2002, claimant admitted that, at the time of his alleged injury, his employer had only two employees and as a result, the Arkansas Worker's Compensation Commission has no jurisdiction of this claim. Further, and in the alternative, even if claimant can prove that he received a compensable injury on March 20, 2000, the injury was only a temporary aggravation of claimant's preexisting back condition and such injury was not the major cause of claimant's need for medical treatment and/or alleged disability."

In regard to these issues, the Second Injury Fund contends:

> "Whatever injury that may have happened at A & M, and I am certainly not contending there is one, but that injury was, in fact, disposed of in the Peterson settlement. Claimant testified he did not have an injury at Peterson, yet he settled that claim. It's my position that the claim settled not only whatever may have happened at Peterson, but also at A & M, based upon his testimony. Therefore, whatever second injury there was claimed in this case, and it being the claim F113732, that claim has already been disposed of for purposes of wage loss., so I'm contending that that claim has been disposed of and there could be no award of wage loss for an injury that occurred at A & M Trucking in 2000."

DISCUSSION

I. JURISDICTION

The first matter to be addressed is the respondents' contention that by initially filing a workers' compensation claim in Oklahoma, the claimant has made an "election of remedies", which deprives the Arkansas Workers' Compensation Commission of jurisdiction over this case. I do not agree with the respondents' argument. It is my opinion that the Workers' Compensation Commission does have jurisdiction over the present claim.

Although the claimant appears to have initially obtained counsel in the state of Oklahoma, there is no evidence that he actually filed a claim there. It appears that his initial counsel determined that Oklahoma did not have jurisdiction over this case and directed him to pursue his remedy in Arkansas, with Arkansas counsel.

There is also no evidence that the claimant knowingly accepted benefits for his alleged compensable injury, which were paid by the respondents under the laws of the state of Oklahoma. In fact, the record would indicate that the respondents have controverted this case in its entirety and have paid no benefits, whatsoever, for the claimant's alleged compensable injury of March 20, 2000.

The mere fact that the claimant initially retained Oklahoma counsel and may have contemplated filing a claim in the state of Oklahoma for his alleged compensable injury of March 20, 2000, is clearly not sufficient to constitute an "election of remedies", so as to otherwise strip jurisdiction of this claim from the Arkansas Workers' Compensation Commission. I find that the facts in this case to be sufficiently similar to those in the case of Towery v. Hi-Speed Electrical Company, 75 Ark. App. 167, 56 S.W. 3rd 391 (2001), for that case to be controlling here.

Although the record reveals the claimant to be a resident of the state of Oklahoma (both at present and at the time of his alleged employment related injury), it further shows that the respondent is an Arkansas based company. The record also reveals that the alleged injury, occurred at the Peterson Farms feed mill, which is located in Decatur, Arkansas. There is no evidence which directly identifies where the claimant's initial employment was perfected, but it can be assumed that this, too, occurred at the respondent's regular place of business in Bentonville, Arkansas. Thus, the greater weight of the evidence shows sufficient contacts with the state of Arkansas for the Arkansas Workers' Compensation Commission to exercise jurisdiction over this claim.

Even if the claimant had actually filed a workers' compensation claim in the state of

Oklahoma, for benefits attributable to the alleged employment related injury of March 20, 2000, this would not, in and of itself, invoke the election of remedies rule and bar him from pursuing his remedy in this jurisdiction. There are various reasons for this conclusion, but only one will be mentioned.

The first criteria for invoking the election of remedies rule is that the alternative remedy must actually exist, Travelers Insurance Company v. Smith, 329 Ark. 336, 947 S.W. 2nd 382 (l997).

Based upon the evidence presented, the claimant's previous Oklahoma attorneys correctly concluded that the state of Oklahoma did not have jurisdiction over his claim. The laws of that state, similar to the laws of the state of Arkansas, require more than mere residency of the claimant to confer jurisdiction. As previously noted, the various elements necessary to confer jurisdiction existed only in regard to the state of Arkansas.

II. COMPENSABILITY

The next issue is the question of whether the claimant sustained a "compensable injury" to his low back or lumbar spine on March 20, 2000. The burden rests upon the claimant to prove the occurrence of this alleged compensable injury.

As the claimant also alleges that his low back or lumbar injury was caused by a "specific incident", to meet this burden he must prove that this alleged injury meets all of the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). The definitional requirements are:

(1) The injury arose out of and in the course of his employment;

(2) The injury was caused by a "specific incident";

(3) The injury is identifiable by time and place of occurrence;

(4) The injury caused internal or external physical harm to his body;

(5) The injury required medical services or resulted in disability.

The only direct evidence presented by the claimant to prove the first three of these

definitional requirements is his own testimony. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If credible, the testimony of a party is usually sufficient, in and of itself, to prove any fact it is legally competent to address.

Clearly, the claimant's testimony would be legally competent to establish the actual occurrence of a specific employment related incident on or about March 20, 2000. It would also be legally competent to describe the nature or mechanics of this incident and the stress or trauma it entailed. It would further be legally competent to describe the type and magnitude of the symptoms he subsequently experienced and to identify the temporal relationship between the specific incident and the onset of these symptoms. Finally, his testimony would be legally competent to exclude other possible causes for the onset of these difficulties. See Eddington v. City Electric Company, 237 Ark. 804, 376 S.W. 2d 550 (1964). However, after consideration of all the evidence presented, I do not find the claimant's testimony to be sufficiently credible to prove any of these various facts, so as to establish the required causal relationship between a specific employment related incident on or about March 20, 2002, and the various objectively documented physical defects involving his lumbar spine, which have produced his symptoms and need for treatment.

The claimant conceded that he had experienced previous injuries with his back that had caused him some difficulties. However, he testified that at the time he began working for A & M Trucking and up until March 20, 2000, he was doing "good" and was not experiencing any difficulties, whatsoever, with his lower back. In his deposition, he indicates that his last difficulties were approximately a year prior to the employment related incident of March 20, 2000.

When the claimant sought medical treatment for lower back difficulties, after March 20, 2000, he consulted Dr. J. Travis Smiley, a chiropractor. His first visit with Dr. Smiley

was on March 21, 2000. At that time, he gave a history of an onset of difficulties occurring contemporaneously with some incident involving a “heavy door” or “truck door” (Dr. Smiley’s initial records, in this regard are handwritten and somewhat illegible). The claimant offers no explanation as to why he consulted Dr. Smiley, rather than returning to his family physician, Dr. Don R. Turner. Dr. Turner had clearly been providing the claimant with continuous treatment for almost identical lower back difficulties since April of 1999, which were attributed to a motor vehicle accident on March 5, 1999.

In his depositions and at the hearing, the claimant associated all of his continuing difficulties with his lower back and radicular difficulties involving his legs to the alleged employment related incident of March 20, 2000. This is clearly inconsistent with the records of Dr. Smiley. These records show that the claimant made a speedy recovery, following the alleged employment related incident of March 20, 2000. In his last office notation, Dr. Smiley records the following:

> “Patient presents with no complaints...much improved...feels
> he is close to preinjury status...”

The medical evidence shows that the claimant has had substantial defects involving the L4-5 and L5-S1 areas of the lumbar spine with significant symptoms for a considerable period of time prior to March 20, 2000. On March 19, 1990, the claimant appears to have sustained a severe employment related injury to his low back or lumbar spine, when he was thrown off a riding lawnmower. Following this injury, the claimant voiced symptoms almost identical with those which he describes as occurring on and after March 20, 2000. Testing performed, at that time, revealed non bony spinal canal stenosis at L4-5 with “diffuse annular bulges” at L4-5 and L5-S1. These tests also show an “amputation” or severe impingement of the bilateral nerve roots by the bulging of the L4-5 disc. On June, 5, 1990, Dr. Bernard T. Poole, the claimant’s treating physician and an orthopaedic surgeon, attributed the claimant’s difficulties to a “central disc herniation” of the L4-5 disc

with degenerative stenosis at that level. After extensive physical therapy, Dr. Poole ultimately recommended "surgical intervention" in the form of a decompression at the L4-5 level with a possible fusion. This is essentially the same procedure that was ultimately performed by Dr. Wilson in November of 2000. However, the claimant declined this offer and, after a second opinion, conservative treatment was continued. The claimant was ultimately assigned a 25% disability to the body as a whole by Dr. Poole, and his case was settled before the Kansas Division of Workers' Compensation. The claimant testified that he received some $8,000.00 or $9,000.00 in this settlement.

According to the claimant's testimony, he was incarcerated for a drug related offense in the Federal Correction Facility at El Reno, Oklahoma, from 1992 until 1998. The medical evidence shows that following his release, the claimant consulted Dr. Don Turner for "intermittent low back pain", on December 9, 1998. On March 23, 1999, he returned to Dr. Turner complaining of symptoms essentially identical with those which he subsequently attributed to the alleged injury of March 20, 2000. However, at that time of his symptoms and the claimant attributed complaints to the motor vehicle accident on March 5, 1999. Dr. Turner continued to treat the claimant on a regular basis for these complaints, thereafter.

An MRI study of the claimant's lumbar spine was performed, at the request of Dr. Turner on April 28, 1999. This study again revealed various degenerative changes and a substantial defect at L4-5. The radiographic interpretation of this test was as follows:

> "1. Severe degenerative disc disease at L4-5 with large anterior disc herniation at L4-5 in addition to a broad based disc herniation dorsally at L4-5 extending into the epidural space narrowing the canal and also filling the majority of both neural exit foramina but with bilateral neural exit foramina narrowing due to the disc herniation.
>
> 2. Degenerative disc disease at L5-S1 with small midline HNP that extends to just right of the midline and does narrow the right L5-S1 neural exit foramen.
>
> 3. Mild disc bulging at L1-2.

4. The conus medullaris is not enlarged and there is normal marrow signal intensity arising from the vertebral bodies.

5. There is moderate degenerative facet arthropathy at L1-2, L3-4, and L4-5, but no lateral recessed stenosis."

Contrary to the claimant's testimony, the records of Dr. Turner revealed that the claimant continued to complain of low back and radicular difficulties and received frequent treatment for these difficulties. He was seen or treated by Dr. Turner twice in April of 1999, twice in May of 1999, once in June of 1999, once in August of 1999, and once in December of 1999. In his office notation of December 13, 1999, Dr. Turner notes that the claimant is complaining of continuing problems with his back and legs and that these problems had increased when the claimant apparently attempted to return to work. He records that the claimant related that he was unable "to do much" and even had a problem "getting out of bed" each morning. On physical examination focal muscle spasms were observed. The records of Dr. Turner further revealed that he prescribed medication for the claimant for the claimant's continuing complaints on January 31, 2000; February 25, 2000; March 24, 2000; and May 5, 2000.

Contrary to the claimant's testimony, there is no indication in any of Dr. Turner's records that the claimant ever related to Dr. Turner that he had sustained a new or additional injury to his lower back or lumbar spine, while at work on March 20, 2000. In his report of May 2, 2000, Dr. Turner expressly attributes all of the claimant's lumbar spine and radicular symptoms to the claimant's motor vehicle accident in Nebraska on March 5, 1999. Dr. Turner's records do indicate that the claimant subsequently related a history of the alleged employment related incident, while working for Peterson's in May of 2000. Ultimately, Dr. Turner assessed a 75% disability to the body as a whole, as a result of the claimant's lower back and radicular complaints, but again, he relates all of these complaints and resulting disability to the motor vehicle accident on March 5, 1999.

The claimant was also referred by Dr. Turner to Dr. Gregory Wilson, a

neurosurgeon. Dr. Wilson ultimately performed the surgical decompression and fusion at L4-5, the same type of procedure that was initially recommended by Dr. Poole in 1990 and 1991. Again, contrary to the claimant's testimony the reports and records of Dr. Wilson contain no history that the claimant experienced an employment related incident on March 20, 2000, which played any causal role in or had any effect on his lumbar or radicular symptoms and complaints. In fact his records contain a motor vehicle accident/personal injury accident patient form and patient registration form signed by the claimant, which specifically attribute <u>all</u> of the claimant's lumbar and radicular complaints and difficulties, for which he was consulting Dr. Wilson, to the motor vehicle accident of March 5, 1999. In his narrative report of August 15, 2000, Dr. Wilson does record a history of the prior low back injury in 1989 (actually 1990), but he makes no mention of any recent or subsequent injury. According to the claimant's testimony, the expense of the services provided him by Dr. Wilson were paid under the terms of the settlement of the tort action arising out of the motor vehicle accident of March 5, 1999.

It must also be noted that at one point, the claimant has also attributed his lumbar and radicular symptoms to an employment related injury that occurred while he was employed for Peterson Industries, on or about May 26, 2000. This claim has been previously settled by Joint Petition for the payment of $1,500.00 plus previously paid medical expenses. It is also worthy of note that during the claimant interview conducted in this subsequent claim, the claimant related a prior back injury in the motor vehicle accident of March 5, 1999, but did not relate a history of any employment related injury to his back while employed at A & M Trucking in March of 2000.

Finally, there is the narrative report of a Dr. Jim C. Martin, dated May 14, 2001. This report was clearly prepared by Dr. Martin for the claimant's previous Oklahoma attorneys and is typical for the type of report, which is commonly associated with Workers' Compensation claims in that state. In this report, Dr. Martin attributes the majority of the

claimant's lumbar and radicular difficulties to the employment related incident on March 20, 2000. He attributes the claimant's lumbar and radicular difficulties to defect or "disc pathology" at L4-5, as do essentially all of the claimant's various physicians. However, he erroneously assumes that this defect first appeared on an MRI, which was performed at the request of Dr. Turner "subsequent" to the alleged work related incident of March 20, 2000. If he had bothered to pay any attention to the study or to the records of Dr. Turner, he would have realized that this study was performed and the presence of the L4-5 defect was noted almost a year prior to the alleged incident of March 20, 2000. He was also not provided or he ignored the various report of Dr. Turner and Dr. Wilson wherein this defect and the claimant's resulting difficulties and need for treatment are expressly attributed to the motor vehicle accident of March 5, 1999. He also appears to be unaware of the 1990 tests which also showed the presence of an L4-5 defect.

While it has no effect on my opinion, I find it curious to note that the records of Dr. Smiley show that the charges for the services he rendered to the claimant for his lumbar or radicular difficulties (in March and April of 2000), have been paid by a "workers' comp payment". However, he offers no insight as to the identity of the payer. It may well be that these expenses were also paid under the terms of the tort settlement.

In summary, the evidence shows that the claimant has obtained compensation for essentially the same defects involving his lumbar spine and the difficulties they have produced from three separate sources, his Kansas Workers' Compensation claim, his Nebraska motor vehicle accident, and his Arkansas Workers' Compensation claim against Peterson Industries. In order to do so, he has, at one time or another attributed his lumber defects, all of his lower back and radicular symptoms, together with his disability and need for treatment to his initial Kansas employment injury, his motor vehicle accident of March 5, 1999, and his alleged employment related incident at Peterson Industries on May 26, 2000. He is now seeking benefits for these same defects and symptoms from the

present respondent.

The evidence shows that the claimant has not fully and accurately informed each of the respondents or his various treating physicians of the nature or existence of his other ongoing claims. In fact, in regard to his motor vehicle accident and his alleged employment related injury of March 20, 2000, it appears that he may have attempted to prevent any possible meaningful exchange of information by maintaining one set of physicians for the motor vehicle accident and another for his alleged employment related injury of March 20, 2000.

As previously stated, I simply do not find the claimant's testimony to be sufficiently credible to prove the facts necessary to establish the occurrence of a "compensable injury" to his lower back or lumbar spine that occurred as a result of a specific employment related incident on or about March 20, 2000. This finding is dispositive of all other issues raised in this claim, except for the respondents' contention that costs and fees should be assessed for the claimant's bringing or the maintaining of this claim "without reasonable grounds".

III. SANCTIONS FOR BRINGING OR MAINTAINING A CLAIM WITHOUT REASONABLE GROUNDS

The final issue to be addressed is the respondents' contention that it is entitled to fees and costs under the provisions of Ark. Code Ann. §11-9-714. The fact that the claimant has not meet his required burden of proof to establish a compensable injury is not synonymous with bringing or maintaining a claim "without reasonable grounds". Ark. Code Ann. §11-9-714 should not be interpreted in such a way as to discourage a party, acting in good faith, to seek to enforce the rights conferred upon them by the legislature. The term "without reasonable grounds" should be limited to those claims where it is proven that a party has acted in bad faith or that their position is so lacking in merit or so contrary to the law as to constitute what would be considered in other forms as a "frivolous action".

As the respondents are seeking to avail themselves of the benefit of the provisions of Ark. Code Ann. §11-9-714, the burden rests upon them to prove that the present case has been instituted or continued “without reasonable grounds”. After consideration of all the evidence presented, I am not convinced that the respondents have met their burden.

Although I do not find the claimant to be a credible witness, for the reasons heretofore set out in this Opinion, the evidence falls short of showing that this claim is fraudulent or was brought in bad faith. The evidence also fails to show that this case is so without merit or so contrary to the law as to be “frivolous” in nature. Therefore, I must deny the respondents’ request to impose the sanctions provided by Ark. Code Ann. §11-9-714.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including March 20, 2000, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is not estopped from pursuing this claim before the Arkansas Workers’ Compensation Commission by the doctrine of the election of remedies.
4. The claimant has failed to prove that he sustained a “compensable” injury “ within the meaning of Ark. Code Ann. §11-9-102(4)(A)(i), to his lower back or lumbar spine on or about March 20, 2000. Specifically, he has failed to prove the existence of a causal relationship between any specific employment related incident, on or about March 20, 2000, and any medically “established” or objective documented physical injuries or condition involving his lumbar spine.
5. The respondents have failed to prove that this claim has been brought or

maintained “without reasonable grounds”. Thus, the sanctions or penalties provided by Ark. Code Ann. §11-9-714 are inapplicable.

6. The respondent employer and carrier has denied the occurrence of any compensable injury to the claimant’s lumbar sine, while the claimant was in the employ of A & M Trucking, and controverts this claim in its entirety.

7. The respondent Second Injury Fund controverts the claimant’s entitlement to any benefits from the Fund.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety, as against all parties involved (including the Second Injury Trust Fund).

For the reasons heretofore set forth in this Opinion, the respondents request for the imposition of the sanctions provided by Ark. Code Ann. §11-9-714, is also denied.

IT IS SO ORDERED.

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MICHAEL L. ELLIG
Administrative Law Judge