

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400142/F400141

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| JOSEPH TOMBS                             | CLAIMANT   |
| JR TRUCKING, INC.                        | RESPONDENT |
| AIG CLAIMS SERVICES<br>INSURANCE CARRIER | RESPONDENT |

OPINION FILED AUGUST 19, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by JOE D. BYARS, Attorney, Fort Smith, Arkansas.

Respondent represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on June 8, 2004 in Fort Smith, Arkansas.

A pre-hearing conference was previously held in this claim, and as a result thereof, a pre-hearing order was entered in the claim on March 11, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to be litigated and resolved at the present time, and the respective parties contentions in regard thereto. Prior to the commencement of this hearing, certain amendments or modifications were made in this Prehearing Order. A copy of the Prehearing Order with the amendments noted thereon was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The appropriate weekly compensation rates are \$422.00 for total disability and \$316.00 for permanent partial disability.
3. The claims are controverted in their entireties.

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

1. Whether the claimant sustained compensable injuries to his thoracic and/or lumbar spine as the result of specific incidents on October 28, 2003 and/or November 26, 2003.
2. Whether the claimant sustained a compensable injury to his head as the result of a specific incident on October 28, 2003.
3. The claimant's entitlement to the payment of medical expenses, temporary total disability from November 30, 2003 through a date yet to be determined and attorney's fees.
4. Whether the claimant is barred from receiving any benefits prior to December 11, 2003 by A.C.A. §11-9-701.

In regard to these issues, the claimant contends that the claimant suffered a compensable injury arising out of and in the course of his employment with the respondent. The respondent-employer failed to pay temporary total disability from October 28, 2003 through a date yet to be determined. On October 28, 2003, Joseph L. Tombs, was performing employment services for his employer and fell, injuring his head and back, which constituted an accidental injury and the major cause of claimant's temporary total disability and the need for additional medical treatment. Claimant's compensable injuries are the major cause of his temporary and/or permanent disability and need for treatment.

The claimant, Joseph L. Tombs, suffered an accidental injury arising out of and in the course of his employment with the respondent, J. R. Trucking, Inc., when his head and back injuries occurred, as described in Mr. Tombs' medical records.

In regard to these issues the respondent contends that the claimant did not suffer compensable injuries on or about 11/26/03 or 10/28/03. Further, respondent contends claimant was not in the course and scope of his employment on 10/28/03. Respondent contends the claimant failed to give notice of any alleged injury until 12/11/03, and, as such, respondent should not be held liable for benefits until they received actual notice.

### DISCUSSION

The central issues in this case the question whether the claimant sustained “compensable injuries” to his thoracic or lumbar spine, as the result of two employment related specific incidents or accidents in October and November 2003, and a compensable injury to his head, as the result of a specific incident on October 28, 2003. The burden rests upon the claimant to prove these alleged “compensable injuries.”

In order to meet this burden, the claimant must show by the greater weight of the credible evidence that his alleged compensable injuries satisfy all of the statutory requirements of A.C.A. § 11-9-102 (4) (A) (i) and § 11-9-102 (4) (D). Should he fail to prove even one of these statutory requirements, then he has failed to prove that any injuries he may have sustained represent “compensable injuries,” as that term is used in the Act.

A.C.A. § 11-9-102 (4) (D) requires that the claimant prove by medical evidence the actual existence of the physical injuries or conditions alleged to be compensable. This subdivision further requires that the actual existence of the physical injuries or conditions must further be supported by “objective findings.” Such findings are defined by A.C.A. § 11-9-102 (16) as the independent observation of findings that are beyond the claimant’s voluntary control.

In regard to the claimant’s alleged head injury, the medical evidence fails to “establish” the existence of any physical injury to his head, until after a subsequent employment related

motor vehicle accident on February 23, 2004, while he was employed by another employer (Workforce). When the claimant sought medical treatment at St. Edward Mercy Medical Center's emergency room, on December 8, 2003, he made no complaints of any injury to his head and none was diagnosed. When an injury was subsequently diagnosed in February 2004, it was attributed to the accident of February 23, 2004, and no history was recorded of any prior head injury.

Essentially, the only evidence presented by the claimant to prove the actual existence of a physical injury to his head, on October 28, 2003, is his testimony and that of his girlfriend. I simply do not find this evidence sufficient to satisfy the requirements of A.C.A. §11-9-102 (4)(D). Thus, the claimant has failed to prove a "compensable injury" to this part of his body.

The medical evidence presented does "establish" the actual existence of various degenerative changes involving his cervical, thoracic, and lumbar spines. The existence of these multiple defects is clearly supported by "objective findings," in the form of radiographic abnormalities. Plain x-rays have been interpreted as showing mild degenerative marginal spondyls at the C4-5 level, the C5-6 level and the C6-7 level, but were negative for the thoracic and lumbar spines. MRI studies were interpreted as showing a diffused moderate disc bulge of the C6-7 intervertebral disc that indented the sub arachnoid space, mild spurring of the vertebral facets at the T7-8 level on the right with a mild right sided bulge of the disc at this same level, probable hemangioma or lipoma in the T7 vertebra, minimal arthritic spurring of the vertebra at the T9-10 level, a degenerative disc at the L4-5 with an anterior tear of the annulus on the left and a diffuse mild bulge on the right with no actual herniation of the nucleus pulposus through the annulus, an anterior annular tear of the L5-S1 intervertebral disc with a mild bulge that were both on the right, but again no actual

herniation of the nucleus pulposus through the annulus. Mild degenerative changes in the posterior elements of the vertebra at the L3-4, L4-5, and L5-S1 level were also noted.

Therefore, in regard to these medically established and objectively documented physical conditions or defects, the claimant has satisfied the statutory requirement of A.C.A. §11-9-102 (4) (D). However, he must further prove that one or more of these defects also satisfies the requirements of A.C.A. §11-9-102 (4) (A) (i). These requirements are:

- (1) That the physical injury or condition arose out of and occurred in the course of the claimant's employment;
- (2) That the physical condition or injury was causally related to a specific incident;
- (3) That the physical injury or condition is identifiable by time and place of occurrence;
- (4) That the physical injury or condition caused internal or external physical harm to the claimant's body, and
- (5) That the physical injury or condition required medical services or resulted in disability.

In order to prove the occurrence of a physical injury that "arose out of and occurred in the course of the employment," the greater weight of the evidence must show the existence of a causal relationship between the injury and the employment. Under A.C.A. §11-9-102 (4) (A) (i), the employment related cause must be a "specific incident." Although it is not necessary to prove the existence of this causal relationship within an absolute certainty, its existence must be likely or probable. The mere possibility of a causal relationship between the injury and the employment is not sufficient.

It is also unnecessary, under § 11-9-102 (4) (A) (i) that the employment related cause be the sole or even “major cause” of the injury. Finally, the claimant is not required to prove the existence of this causal relationship by medical evidence.

Clearly, the objectively demonstrated defects, involving the claimant’s spine, are widespread and essentially degenerative in nature. These defects would appear to have likely preexisted the claimant’s brief period of employment with this respondent. However, an employment related aggravation of such a preexisting degenerative condition can still constitute a “compensable injury,” as that term is used in the Act.

In the present case, the only direct evidence to prove the actual occurrence of an employment related “specific incident” and a causal relationship between such an incident and any difficulties which the claimant has experienced with this thoracic and lumbar spine, is the testimony of the claimant and Valerie Beck, his girlfriend. I do not find the testimony of these two witnesses to be sufficiently credible to prove either the occurrence of a “specific incident” or of the required causal relationship between this “incident” and the claimant’s alleged difficulties with his thoracic and lumbar spines.

The claimant testified that, “just before Halloween” of 2003, he fell from the front tire of his semi (while he was checking on a problem with the cooling system of his truck) and landed on the black top parking lot. He stated that he struck his back and the back of his head on the pavement. He described the blow to his head as sufficient to knock him senseless, lacerate his scalp, and form a “big knot” on his head. Following this incident, he described experiencing a headache and his back “hurt a little bit,” but neither of the symptoms bothered him that much and he did not think anything of it. He stated that minutes after the fall occurred, he told Dewayne Fears (the dispatcher) and Art Floyd (the “main boss”) that he had fallen off his truck and “cracked my head open.” However, when he was

asked if he was “okay,” he informed them that he was “alright.” He sought no medical treatment following this incident and continued driving (T8-9).

The claimant testified that he drove a “little while longer” for the respondent and then took some time off, because he was having problems with his ex-wife (T16). He acknowledged that when he quit working for the respondent (on October 25, 2003), he advised the respondent that the job just “wasn’t working out” for him, that he was driving too many hours, and he was real fatigued. (T17). He conceded that he made no mention of the prior alleged injury on October 28, 2003, or any continuing symptoms as a result of such an injury.

The claimant testified that he reapplied for employment with the respondent and was rehired on November 21, 2003. Again, he conceded that he made no mention of any continuing symptoms or difficulties as a result of the previous alleged employment related fall at the time of his rehire. During this second period of employment, he describes another employment related incident that occurred “the day before Thanksgiving” (November 26, 2003). He testified that he was helping load heavy boxes over his head and “noticed all of a sudden. . . a sharp, burning sensation” in his upper back, between his shoulder blades, and the lower part of his back. He stated that he thought that he might have another kidney infection. He continued to have “a lot of pain.” The day after Thanksgiving, he, Valerie (his girlfriend), and a young employee of A to Z (where the load was being delivered) unloaded a portion of the load by hand. Following the unloading of the truck, he went to the respondent’s office and informed Gary Dale Moore (the Safety Director and HR Director for the respondent) that he thought that he might have a kidney infection and wanted to go to a doctor to get it checked out. He refused to take out his scheduled load, got his things out of his truck, and left. His testimony does not reflect that he reported the alleged lifting

incident of November 26, 2003, or any other employment related incident or activity, as playing any role in his back difficulties.

The claimant then testified that “a day or two” later, he finally got into the emergency room and was seen for his complaints (T12). The medical records indicate that this emergency room visit actually occurred at approximately 10:30 p.m. on December 7, 2003 (Claimant’s Exhibit No. 1, Page 1), over one week later.

Valerie Beck (the claimant’s girlfriend) testified that she was with the claimant, while he was driving for the respondent on the morning of October 28, 2003. She stated that some time after 8:00 a.m., they were at a truck stop and the claimant was attempting to check a cooling problem he was having with this semi tractor trailer truck. She is emphatic in her testimony that the exact date of this incident was October 28, 2003 (T36). She testified that, while the claimant was standing on the top of the front left side tire of the truck, he fell backward, striking his back and the back of his head on the ground (T29-30). After this fall, he continued to experience constant back pain, “couldn’t lift anything,” and that “it hurt to even sit.” She testified that the claimant immediately reported the incident and his difficulties to Art Floyd and Dewayne Fears (T31-32). She offers no explanation for the claimant’s failure to seek immediate medical treatment for the rather severe symptoms she describes.

Ms. Beck also makes no mention of any incident or increased difficulties with the claimant’s back, when he was loading items on his trailer the day before Thanksgiving. Instead, she described an incident of increased difficulties, when the claimant was unloading items off his trailer at A to Z, the day after Thanksgiving. Her description of this incident is as follows:

“I don’t remember what time it was, but I remember him (the claimant) and a 16 year old kid, Joe said, ‘Valerie, I need you,’ and he yelled and he screamed and you know when somebody you love yells and screams, you know there is certain pain. Joe

and this kid, I don't remember what it was they were carrying, but it was something heavy, but Joe was going to go down and I just remember got it up and helped him up real quick and lifted it up to a platform or something where they were loading stuff at, and Joe went down; he went down, he sat down, and he couldn't stand up no more."

Ms. Beck further testified that, following this incident, she and the claimant returned to the respondent's office for the claimant to report in. She stated that she waited outside the office and did not hear any conversation between the claimant and any other individuals in the office. However, she stated that the claimant later informed her that, during this conversation, he had reported his injury to the individuals in the office. She makes no mention that the claimant advised her, or the persons in the office, that he believed his back difficulties were due to a kidney infection.

Dewayne Alan Fears, the claimant's dispatcher, testified that he did not recall the claimant ever telling him that he had hurt his back (or any other portion of his body), when he fell off a truck or when he was lifting boxes. He stated that, when the claimant initially quit in October 2003, the claimant did not mention any injuries or complaints with any portion of his body. He stated that he was led to believe that the claimant was simply quitting for a better job. He also testified that when the claimant quit the second time, in November 2003, the claimant again did not mention any employment related injuries. At some point during the claimant's brief employment with the respondent, he did recall the claimant stating that he had a kidney infection, had gone to the doctor for this condition, and was taking medication for the condition.

Gary Dale Moore, the respondent's Director of Safety and Human Resources, also refuted any testimony concerning the claimant's reporting of any employment related accident or injury. He stated that, when the claimant quit on October 25, 2003, he gave no history of any employment related accident, any resulting injury, or any difficulties resulting therefrom.

He testified that when the claimant reapplied and returned to work, on November 21, 2003, the claimant mentioned no prior injury or continuing difficulty. Finally, he testified that when the claimant again quit on November 26, 2003, he did not report any employment related accident or injury. He does recall that, on that date, the claimant informed him that he was taking medication for a kidney infection and that the medicine was making him sick. He denies that the claimant ever requested that the respondent send him to a doctor.

Lisa Morgan, the Human Resources Director at the respondent's parent company (Tankersley), testified that the claimant never informed her of any employment related accident or injury that supposedly occurred in either October or November 2003. She stated that the claimant never mentioned any employment related accident, injury, or resulting difficulties, when he initially quit work in October 2003, when he returned on November 21, 2003, or when he subsequently quit on November 26, 2003. She stated that the first time she was informed of any alleged employment related injury was when she received a copy of the AR-C form from the claimant's attorney.

The medical evidence presented also records varying histories of the onset of the claimant's difficulties that are somewhat internally inconsistent and in conflict with the testimony of the claimant and Ms. Beck. The nurse's record, for the emergency room visit on December 7, 2003, notes a history that the claimant fell off a truck at work and hurt his back approximately one month prior. However, it makes no mention of any subsequent lifting incident. Finally, this record notes that the history was obtained directly from the claimant.

The subsequent history, recorded by the examining physician, states:

"Mr. Tombs presents with complaints of mid and low back pain. He said about six weeks ago he was working loading a truck, had reached overhead and had a sudden onset of pain in his back. He has had several similar episodes since that time and just is not

getting better and at times feels significantly worse with sharp pain in his back and some paresthesias, sometimes in his arms, sometimes in his back and leg. He has not had bowel or bladder problems. He said prior to this event six weeks ago, he has not had any back troubles.” (Emphasis mine).

Curiously, this history mentions no fall preceding the alleged lifting event. Further, it makes no specific mention of any recent accident or injury. It is also worthy to note that neither the nurse’s records nor the physician’s records contain any mention of an injury to the claimant’s head.

The medical evidence also shows that shortly after the claimant returned to work, in January 2004, he was involved in an employment related motor vehicle accident that resulted in the rolling over of the truck he was driving. He again reported an injury to his head with a loss of consciousness, an injury and complaints involving his neck or trapezius area of his upper back, and an injury and complaints involving his lower back or lumbar spine. These records contain no mention of any recent prior employment related injuries or preexisting difficulties to these same areas of the claimant’s body. In fact, under past medical history, these records indicate a prior fracture of his left leg, but expressly note a past medical history of:

“Negative arthritis, diabetes, cardiac disease, hypertension, ulcers, hepatic disease, back or joint injuries, renal disease, or other medical problems.”

The subsequent medical records, dealing with the claimant’s continued treatment for his subsequent employment related accident of February 23, 2004, also record a past medical history that was negative for any prior head, neck, upper back, or lower back injuries or problems.

The personnel and payroll records of the respondent show that the claimant was employed by the respondent for only two brief periods. The first of these periods ran from

September 26, 2003 to October 25, 2003. The second period ran from November 21, 2003 to November 29, 2003. Thus, the claimant was not even employed by the respondent on October 28, 2003.

The AR-C form, completed by the claimant, records two injury dates, October 28, 2003 and November 26, 2003 (the day before Thanksgiving). Although this form does mention an accident, in the form of a fall, there is no description of the accident alleged to have occurred on November 26, 2003. There is also no mention of any accident or injury on November 28, 2003 (the day after Thanksgiving).

I find the respondent's personnel records to be accurate. Thus, the alleged employment related fall described by the claimant and Ms. Beck could not have occurred on October 28, 2003, as the claimant had terminated his employment with the respondent, three days prior.

As previously indicated, there is a significant conflict between the claimant's testimony and that of Ms. Beck concerning the nature and magnitude of any symptoms experienced by the claimant immediately after this alleged fall. However, the evidence is undisputed that the claimant never requested or sought medical treatment for his head and did not seek any medical treatment for any thoracic and lumbar difficulties until many weeks after this alleged fall. In fact, except for the mention of a head injury in the testimony of the claimant and Ms. Beck, there is no other record that mentions such an injury, including the AR-C form completed by the claimant on December 11, 2003. It is also undisputed that the claimant failed to mention any accidental injury or continuing difficulties or request any medical treatment when he initially terminated his employment with the respondent on October 25, 2003, or when he returned to employment with the respondent on November 21, 2003. All

of these facts are clearly inconsistent with the claimant experiencing any injury to his head, thoracic spine, or lumbar spine in an employment related fall in October 2003.

There is also an obvious conflict between the claimant's testimony, the testimony of Ms. Beck, and various medical histories, concerning the alleged lifting incident or incidents in November 2003. The claimant describes a lifting incident the day before Thanksgiving, Ms. Beck describes a lifting incident the day after Thanksgiving, and the medical evidence records a history of a lifting incident six weeks prior to December 8, 2003 (which would be in the last week of October 2003).

If the claimant had, in fact, experienced a sudden and immediate onset of back pain that occurred contemporaneously with heaving lifting on either the day before or the day after Thanksgiving (November 26 or November 28, 2003), I am at an absolute loss as to who the claimant could reasonably believe that such difficulties represented a recurrent kidney infection. I am also at a loss to understand why he would have failed to report such a specific injury when he terminated his employment with this respondent only a day or so later. His failure to request medical treatment from the respondent, prior to and at the time he terminated his employment, and his failure to even attempt to seek any medical treatment until December 8, 2003, is also inconsistent with a sudden and immediate onset of severe difficulties contemporaneous with a specific employment related lifting incident on either October 26 or er October 28, 2003.

After consideration of all the evidence presented, it is my finding that the claimant has failed to prove by the greater weight of the credible evidence the existence of a reasonably close temporal relationship between any employment related specific incident or incidents (in either October or November 2003), and any difficulties with his thoracic and/or lumbar spine, which would be indicative with occurrence of a physical injury to these portions of his

body. The absence of this reasonably close temporal relationship must further be considered in light of the fact that the medical evidence shows the presence of extensive long term degenerative changes that could likely be the cause of any complaints that he might have experienced with his thoracic and lumbar spine, without the necessity of any specific trauma. It is simply my opinion that the claimant has failed to prove that any difficulties he may have experienced with his thoracic and/or lumbar spine represent a physical injury to these portions of his body “that arose out of and occurred in the course of his employment” with this respondent, Hall v. Pittman Construction Company, 235 Ark. 104, 357 S. W. 2<sup>nd</sup> 263 (1962). The claimant’s failure to prove this necessary requirement of A.C.A. §11-9-102 (4) (A) (i) further compels me to find that he has failed to prove the occurrence of “compensable injuries” to his thoracic or lumbar spines as that term is defined by the Act.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$422.00 for total disability and \$316.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained compensable injuries to his thoracic or lumbar spines, as the result of any employment related specific incidents in October and/or November 2003.

Specifically, I find that the claimant has failed to prove the actual occurrence of any employment related specific incident in either October or November 2003, and has also failed to prove the existence of any causal relationship between any alleged incident and any difficulties he may have experienced with his thoracic and lumbar spine.

5. The claimant has further failed to prove that he sustained a compensable injury to his head as the result of a specific incident in October 2003. Specifically, he has failed to prove the actual occurrence of an employment related incident in October 2003 or the occurrence of any physical injury to his head that is “established by medical evidence supported by objective findings.”
6. The respondent has denied the occurrence of any compensable injuries to the claimant’s thoracic spine, lumbar spine, or head and controvert these claims in their entirety.

ORDER

Based upon my forgoing findings and conclusions, I have no alternative but to deny and dismiss these claims in their entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE