

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500051

MICHAEL BREWTON	CLAIMANT
RENTAL SERVICE CORPORATION	RESPONDENT
LIBERTY MUTUAL INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 7, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 18, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on May 31, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. In October and November of 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$326.00 for temporary total disability and \$245.00 for permanent partial Disability.

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

1. Compensability of the claimant's injury to his low back.
2. Related medical.
3. Temporary total disability from November 18, 2004, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained an injury on or about October 1, 2004, while unloading a boom. Although the Commission set this file up as having a date of injury of November 22, 2004, that information apparently was provided by the insurance carrier and not by the claimant. The claimant contends that he is entitled to temporary total disability benefits from November 18, 2004, until a date yet to be determined and reasonable medical treatment. The claimant contends that his attorney is entitled to an appropriate attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury to his low back which arose out of and in the course of his employment with the respondent employer, Rental Service Corporation, at any time in either October or November 2004.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted medical information marked Respondents' Exhibit No. 1, non medical information marked Respondents' Exhibit No. 2 and the deposition of the claimant marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that on or about October 1, 2004, while working for the respondent, he was sent to pick up a 120 foot boom at the Immaculate Conception Church. The claimant testified that in the process of breaking down this boom so that it could be transported, the boom got away from him and it knocked him down and he grabbed onto it and it jerked him real hard. The claimant testified that he was trying to prevent it from swinging out into the street and hitting some cars. The claimant testified that he is not absolutely certain as to the exact date that this event happened but he does remember that it was on a Thursday or Friday because there was to be a funeral at the church over the weekend. The claimant testified that at the end of his shift around 3:30 he left work to meet with Rick Stiles. The claimant remembers that he had promised Mr. Stiles that he would go with him to catch pigs. The claimant was asked why he went with Mr. Stiles if he had hurt his back and the claimant responded that if he tells someone he is going to do something he does it. The claimant testified that he would agree with the description that Mr. Stiles gave as to the activities they were engaged in catching the pigs and loading them

up. The claimant testified that he worked the next day for the respondent which would have been a Friday and that he reported his injury to Dale and Ricky Joe who work for the respondent as well as to Mike Gilbert who is the assistant manager. The claimant testified that when he reported his injury to Mr. Gilbert, Mr. Gilbert did not say anything. The claimant testified that he did not ask to be seen by a doctor because he was in hopes that his problems would resolve. The claimant testified that no paperwork was filled out at that time. The claimant testified that it was his understanding that if an injury had happened at work he was to report it to the safety guy who was Ricky Joe and that paperwork would be filled out automatically. The claimant testified also that his job is very physical and it is not uncommon for him to have sore muscles and pain in his back and limbs due to the nature of his work for the respondent. The claimant testified that it was not uncommon for him to have sore muscles but that this time over a period of time his problems got worse and that he started walking crooked over, had problems getting up and down and he started losing the feeling in his right leg, butt and his balls. The claimant was asked if he had pain in either of his legs and the claimant responded that he hurt a little bit in his right leg but it was mostly in his low back. The claimant testified that when he began to experience numbness is when he knew that he had done something besides just having an old sore aching muscle.

The claimant testified that he has had problems with his back in the past remembering that when he worked for Mulberry Sanitation

he had leaned over to put fuel in the truck and he felt a catch in his back. The claimant testified that at that time he had vacation time which he took and his problems went away. The claimant testified that at this time he did not have any problems with his legs. The claimant testified that in 1989 he rolled his truck over and injured his neck. The claimant testified that this discomfort was in his neck and between his shoulder blades or upper part of his back. The claimant was asked if he had any problems with his low back as a result of this automobile accident and the claimant responded, "No, Sir." The claimant testified that in the deposition he had given earlier he failed to mention that he was seen by Dr. Cheyne for complaints of back problems. The claimant testified that an MRI was ordered but since the insurance company would not pay for it, he only saw Dr. Cheyne one time and never went back to him. The claimant testified that Dr. Harper is his family doctor and that he primarily has seen Dr. Harper for problems with colitis due to his belly problems.

The claimant testified that after his October accident he took a day or two off to try and rest in hopes that his back would get better but it did not. The claimant testified that he continued to work and if they were able to get the work done early the respondent would let him go home so that it would be a little easier on his back. The claimant testified that he finally told Stan that he had had an MRI that showed that he had ruptured disc and that he was scheduled to be seen by Dr. Johnson. The claimant testified that within a day or two after this announcement Stan

told him that upper management required a note from a doctor saying that he was able to work before he could return to work. The claimant testified that he has not worked since November 18, 2004, because he has been physically unable to do the work due to his low back problems. The claimant testified that he has never been allowed to be seen by Dr. Johnson.

The claimant testified that prior to his October 2004 accident, he has taken Mobic for his back. The claimant testified that he in reality does not remember taking this medication because his wife monitors and puts out his medication for him. The claimant testified that he was not taking any medication for his back within four to five months prior to October 2004. The claimant also testified that he had not missed any work because of his back during a period of approximately four or five months before October 2004.

On cross examination, the claimant gave a much more detailed description of the activities he was engaged in at the time he injured his low back. The claimant testified that after he got the boom under control and got it loaded onto the truck, he delivered it to the respondent. The claimant testified that he then went into the store where he saw the assistant manager, Mike Gilbert, Dale Knightly and Ricky Joe Batman and the first thing he did was tell them that he had hurt his back on the boom at the church. The claimant testified that when he left work around 3:00 or 3:30 he left to go meet Mr. Stiles. The claimant testified that when he and Mr. Stiles were riding down to pick up the pigs, he told him

that he could not help with the pigs that night because he had hurt his back. The claimant testified that he had heard Mr. Stiles testify that he had loaded up three pigs and that in his deposition he had remembered Mr. Stiles loading up one pig. The claimant was told that on Thursday and Friday of September 30 and October 1, his payroll records indicated that he took off at 1:30 on each of those days. The claimant was asked if it took him three hours to get from his place of work, fill up his truck and get to his meeting with Mr. Stiles and the claimant responded, "No, Sir." The claimant testified that he had waited on Mr. Stiles because he had gotten there earlier and was not going to drive all the way home and then back in order to keep his appointment. The claimant testified that he does not recall stating in his deposition that he had told Stan the next day after his injury about his accident and reminded him that he had told him about it the day before. The claimant testified that he talked to Stan later about his doctor's appointment and that he was going to get an MRI. The claimant testified that he had to wait approximately a week to a week and a half to get the results of the MRI and when he did Stan was off work that day. The claimant testified that when he did get to speak with Stan, he had asked him if there was any way that he could continue working until his appointment with Dr. Johnson which was on the 21<sup>st</sup> of October. The claimant testified that Stan said that he though the respondent could do that but the next day when he came in, Stan told him that corporate management had called and said that he had to have a doctor's note before he could return to

work. The claimant testified that he had talked with Stan in hopes of keeping the cost down for the company but that eventually his individual insurance was canceled. The claimant testified that he drew twenty-six weeks of short term disability and that his doctor, Dr. Harper, had said that his injury was workers' comp. The claimant testified that he talked with Dr. Johnson and Dr. Johnson also told him that he should file it under workers' comp. The claimant was asked if the first time he told anyone at the respondents' business that he wanted to file his injury under workers' comp was after he had talked to Dr. Johnson and the claimant responded yes.

The claimant testified that he does not remember seeing Dr. Tod Stewart in February 2001 at which time the doctor prescribed Vioxx and Flexoril for his back pain. The claimant testified that he also does not remember a follow up appointment with Dr. Stewart for back pain. The claimant testified that when he saw Dr. Stewart in June 2001 it primarily was for his belly trouble although he did have some muscular pain in his back. The claimant testified that he does not remember Dr. Stewart having him undergo x-rays or prescribing Mobic for him. The claimant agreed that due to a change in his insurance he switched from Dr. Stewart to Dr. Harper but initially was seen by Dr. Holly Heaver Jennings. The claimant testified that he probably saw Dr. Jennings for his belly problems as well as his back. The claimant agreed that Dr. Jennings ordered an MRI but his insurance would not pay for it and she referred him to Dr. Cheyne. The claimant agreed that Dr. Cheyne also wanted to

have an MRI but it was not done. The claimant testified that his back was sore and it hurt at that time but not like it hurts now. The claimant was read a portion of Dr. Jennings' office notes and the claimant responded by testifying that he does remember telling the doctor that he had played football but does not remember telling her the other information set forth in her notes. The claimant testified that he does not remember seeing Dr. Harper on June 6, 2003, reporting that he was experiencing right lumbar muscle spasms. The claimant agreed that he did have muscle spasms because he had a sore back a lot of the time. The claimant agreed that when he saw Dr. Harper on July 16, 2004, he reported having low back pain. The claimant testified that he did have low back pain and sore muscles from his work but it was not until after the incident with the boom that he began having problems with his butt, testicles and legs. The claimant agreed that when he saw Dr. Harper on October 14, 2004, which was some two weeks after his accident he reported problems with asthma, his belly as well as his back. The claimant testified that when he saw Dr. Harper he told the doctor that he would like to take care of his problems through his family insurance because he thought it might just be a catch in his back. The claimant testified that it was at the November 18, 2004, visit with Dr. Harper that an MRI was ordered. The claimant was read the portion of Dr. Harper's report setting forth that the work related to the claimant's injury was lifting and bending. The claimant responded, "That's my job." The claimant testified that he tried to work with the respondent to keep his injury away from

a workers' comp claim but after his MRI showed that he had a ruptured disc, his employer required that he have a note from a doctor stating that he was able to perform his work. The claimant testified that after this happened he started getting calls asking him to sign up for short term disability which is what he did. The claimant testified that after he reported his injury on workers' comp his short term disability benefits stopped.

On redirect examination, the claimant testified that in the process of breaking down and trying to haul the boom, he had to stoop down and bend down while working with the pins. The claimant testified that during the five or five and a half years that he had worked for the respondent, he has performed very physical work hauling dozers, backhoes, generators, excavators, booms and a few road graders. The claimant testified that his work required him to lift weights as much as one hundred pounds or more. The claimant was asked if he had any leg problems or problems with his testicles prior to October 2004 and the claimant responded, "No, Sir." The claimant testified that prior to the October 2004 event he did take medications on a daily basis indicating that he took medicine for asthma, high blood pressure, Prozac and an aspirin. The claimant testified that his wife takes care of his medications as well as refilling his prescriptions and he is not completely sure what all he takes on a daily basis. The claimant testified that throughout his life he has always done hard manual labor and he has experienced sore strained muscles but it was not until his October event that he began to experience numbness and pain in his legs,

butt and testicles. On recross examination, the claimant was again asked exactly how he had hurt his back while working with the boom and the claimant stated, "Well, the boom got away from me, it knocked me down, and I grabbed a hold of it and it yanked on me and it hurt my back. It all has to do with pinning that boom."

Rick Stiles testified that he had been acquainted with the claimant for approximately five or six years. This witness stated that in early October 2004 the claimant went with him to Sugarloaf to pick up some pigs. Mr. Stiles testified that they had met at the Choctaw travel place and the claimant had driven down with him in his pickup. Mr. Stiles was asked if the claimant had a trailer attached to his truck that day and he responded that the claimant did not have a trailer attached. Mr. Stiles testified that when they got to the farm, the pigs were in a small area and that he was able to catch them and asked the claimant to work the gate for him off the back of his truck. Mr. Stiles testified that the claimant did not touch anything that day because he had been complaining about his back hurting. Mr. Stiles testified that he had brought the claimant along for him to help him catch or load the pigs but he did not need his help that day. Mr. Stiles testified that the claimant acted like he could not get around very well and that is why he asked him what he had done and the claimant had told him that he hurt his back. Mr. Stiles testified that riding down in the truck the claimant was fidgeting in his seat and he would not sit still so he asked him what was wrong. Mr. Stiles was asked if

prior to this date if the claimant had appeared to have any back problems and Mr. Stiles responded not that he knew of.

On cross examination, Mr. Stiles testified that the event with the claimant in early October would have to of been on a Thursday or a Friday but was not exactly sure of the day. Mr. Stiles testified that the only thing that he was sure about was that the claimant had gotten off work before they went down to pick up the pigs. Ms. Stiles testified that they had made arrangements to meet several days prior to the actual meeting date. Mr. Stiles testified that the claimant never did tell him that he was not going to be able to help him catch the pigs it was just after they got to the farm and he saw the set up he knew he could do it by himself. Ms. Stiles testified that on this trip he loaded three pigs in the truck. Mr. Stiles testified that this was the last time the claimant has gone with him to pick up pigs but the claimant has been over to his place since this event.

Mike Gilbert testified for the respondents stating that he was the assistant manager for their business. Mr. Gilbert testified that he has been working for the respondent for twenty to twenty-five years. This witness testified that he was familiar with the claimant and also familiar with the use of a 120 foot boom at the Immaculate Conception Church in September or earlier October 2004. Mr. Gilbert testified that he had seen the claimant the day in question and the claimant had arrived at work in his pickup truck with a stock trailer attached. Mr. Gilbert testified that the claimant told him that he was going to a livestock sale in

Oklahoma. This witness testified that the claimant was sent to remove the 120 foot boom from the parking lot of the Immaculate Conception Church. Mr. Gilbert testified that the claimant came into the area where he was working after he had retrieved the piece of equipment. Mr. Gilbert testified that the claimant did not report an injury, he did not report getting hurt nor did he appear to be in any type of physical discomfort. Mr. Gilbert testified that he does recall that the claimant left work around 1:00 p.m. to go to the sale. Mr. Gilbert testified that he saw the claimant the next morning and he was walking like it was hurting him. Mr. Gilbert was asked if it was obvious that the claimant was having difficulty and the witness responded, "Yeah. It was like he was stiff and sore, yes, Sir." Mr. Gilbert testified that the claimant reported that he had twisted his back when he grabbed a pig and it had jerked and twisted him. Mr. Gilbert testified that when the claimant demonstrated how his accident happened there were several other employees present. Mr. Gilbert testified that the claimant did not say anything about a back problem being caused while he was moving the boom at IC.

On cross examination, Mr. Gilbert testified that he was unsure as to the date and time of this particular event nor does he know how long the claimant worked following this incident or if he filled out any paperwork. Mr. Gilbert testified that he does remember, however, the claimant coming to work with a trailer attached to his pickup because it was the only time the claimant has ever brought a trailer with him to work since he began working

with him five years ago. Mr. Gilbert did testify that it was not uncommon to have a sore back, noting that it was just part of his job. This witness testified that he cannot recall the claimant taking off work for a sore back. Mr. Gilbert testified that when the claimant showed up the next day he was walking slow and kind of pulling to one side and appeared to be in pain. This witness testified that even though the claimant appeared to be in pain, he was able to hunker down and show them how he grabbed the pig.

Craig Ed Bower testified that he was employed with the respondent and had been working for them for two years. This witness testified that he was acquainted with the claimant only through work. Mr. Bower testified that one day last fall the claimant came into the shop and was walking like he had kind of a little kick in his walk and everyone in the shop started poking fun at him and asked what he did. This witness testified that the claimant told them that he was chasing pigs at a sale barn and then he demonstrated what he had done. Mr. Bower testified that the day before he came into the shop with a limp, the claimant had left early with a stock trailer.

On cross examination, Mr. Bower testified that the "scuttlebutt in the shop" was that the claimant hurt himself on a piece of equipment. Mr. Bower testified that he had heard this about two weeks prior to this hearing. Mr. Bower testified that he has seen the claimant bring a stock trailer to the office two times, one counting the day before he demonstrated getting hurt by

a pig. This witness testified that he can remember the event because the description of chasing the pig was funny.

Stanley Morris Green testified that he was a general manager of the respondent's business and had been working for them for twenty-five years. Mr. Green testified that he was acquainted with the claimant and that he was a good worker. This witness testified that the claimant has never told him personally that he hurt his back at work. This witness testified that he knew the claimant was having difficulty with his back and that he had tried to work with the claimant through the years to keep him working. Mr. Green testified that he knew nothing about the pig story. Mr. Green testified that he heard the claimant testify that he, the claimant, had reported the injury to him. Mr. Green testified that this conversation never took place and that he never had a discussion with the claimant about doctor's appointments and neurosurgeons. Mr. Green testified that he learned about the claimant's ongoing back problems from the claimant and that the claimant had even missed work prior to November 2004 because of his back problems. This witness again indicated that the claimant never related these back problems to his work. Mr. Green testified that the claimant never mentioned anything to him about the pig or the boom. Mr. Green testified that he learned about the claimant's workers' compensation claim from their insurance carrier and that was sometime after November 18, 2004.

On cross examination, Mr. Green testified that it was sometime in February or March 2005 that he learned from his workers'

compensation carrier that the claimant had filed a claim. Mr. Green testified that if an employee had filed paperwork from a doctor indicating that they had a job related injury, he would expect that information would be brought to him by his human resource department. Mr. Green indicated that this was not done in the claimant's incident. On redirect examination, Mr. Green testified that his HR department is in Kansas City.

On rebuttal, the claimant was recalled and testified that he did not take a stock trailer to work on the day of his accident.

The medical records set forth that the claimant was seen by Dr. Jon Harper on October 14, 2004, with complaints of asthma and low back pain. The doctor notes that two weeks ago he developed low back pain after stooping down. It is further noted that his pain is on his spine and different than usual with pain going down his leg. At this visit the claimant was also treated for intestinal problems and an MRI was ordered for his spine. The claimant underwent a lumbar spine MRI on October 27, 2004, which showed a prominent central disc herniation at L4-5 with mass affect on the thecal sac and narrowing of the central channel. There was also hypertrophic degenerative changes of the facets. On November 18, 2004, Dr. Harper wrote out a note for the claimant setting forth that he was unable to lift the weight necessary to do his job. An office note of that same date indicates that the claimant is to see a neurosurgeon within the next week. Dr. Harper filled out FMLA forms for the claimant setting forth that he first saw the claimant on October 14, 2004, and the claimant has been unable to

work since October 1, 2004, with his anticipated return to work unknown since he needs to be seen by a neurosurgeon. Dr. Harper notes that the claimant's condition is work related due to his lifting and bending and his inability to work is due to his sciatica pain with the possibility of worsening his condition with his continued working. Dr. Harper writes on January 5, 2005, that the claimant was refused by Dr. Author Johnson and it has been suggested that he should file under workers' comp. The doctor notes that the claimant's leg is going numb off and on. Dr. Harper writes that the claimant remembers breaking down a boom at work just before his back started hurting. Dr. Harper filled out a form concerning the claimant setting forth that he has a L4 L5 disc herniation with narrowing of the central spinal column. The doctor notes that the claimant should not lift greater than five pounds and that he does not anticipate any spontaneous change in the claimant's condition. When asked about what job duties the claimant could perform Dr. Harper noted that the claimant was unable to perform any of the physical requirements and that he needed to be seen by a neurosurgeon to possibly have surgery. Dr. Harper did recommend that the claimant would be suitable for sedentary work or could do work that required no lifting, bending, squatting, etc.

The medical records submitted by the respondents set forth that the claimant was involved in a motor vehicle accident in 1989 in which his upper back was affected. Tests run on the claimant's cervical spine showed a slight straightening of the spine but no

other significant findings. The claimant's thoracic and lumbar spine were both normal studies. On February 5, 2001, Dr. Tod Stewart saw the claimant for his complaints of lack of energy and low back pain times two weeks after lifting a chain. The claimant also was complaining of arms hurting, swelling and tingling as well as pain in his chest. Dr. Stewart prescribed medications for the claimant's low back and recommended moist heat. On June 28, 2001, the claimant was seen by Dr. Stewart with complaints of a bad cough and shortness of breath as well as chest pain. After examination, Dr. Stewart diagnosed the claimant with having asthmatic bronchitis as well as back pain, noting that it is likely muscular due to his coughing. Dr. Stewart writes on July 26, 2001, that he has seen the claimant for follow up of his headaches, sinus as well as his back pain. The claimant was seen by Dr. Holly Jennings on January 11, 2002, for a multitude of problems one including chronic mid thoracic and low back pain. The doctor notes that the claimant reports having played high school football and has had back pain since then. Dr. Jennings notes that his problems have grown to the degree that he feels taxed in terms of being able to function, noting that his chronic pain is particularly in the left lower back area. Dr. Jennings recommended that the claimant undergo an MRI of his thoracic and lumbar spine area. Dr. Jennings writes on April 3, 2002, that the claimant was seen and he had not had any of his studies performed due to the insurance company not authorizing the procedures. After examination, the claimant was again diagnosed with chronic low back pain and prescribed medication. On August

13, 2002, the claimant was seen by Dr. Jennings for multiple medical problems one being low back pain. Dr. Jennings notes that the claimant would benefit by being on a OTC non steroidal anti-inflammatory but must have PPI protection. The claimant was seen on June 6, 2003, for low back pain, noting that his pain is worse after driving his truck at work. Medications were prescribed and lumbar spasms were noted. On July 28, 2003, the claimant was seen at Sparks Medical Center for problems in his lower abdomen. Dr. Harper writes on October 17, 2003, that he has seen the claimant for bowel problems as well as low back pain, medications were prescribed. The claimant was seen at the Sparks emergency room on June 25, 2003, for abdominal pain as well as low back pain. The ER notes set forth that on Sunday night the claimant had pain from his throat to his rectum and this started two weeks ago. The claimant did a follow up with Dr. Harper on July 16, 2004, for his abdominal and low back pain. The claimant was assessed with having diverticulitis/colitis and chest pains.

The claimant was seen by Dr. Thomas Cheyne on January 22, 2002, for his complaints of chronic left low back pain over the past year which has gotten worse over the last four or five months. Dr. Cheyne notes that the is a truck driver, having to load and unload his trucks. The doctor writes that the claimant has been on Mobic for a year without relief and he denied radicular pain or paresthesias. X-rays taken at that time were normal and an MRI was recommended. Dr. Cheyne stopped the claimant's Mobic and put him on Celebrex as well as home exercises.

After consideration of all the evidence presented, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on or about October 1, 2004. It is not questioned that this claimant has low back problems which need medical attention, however, it is doubted that these problems resulted from his work for the respondent on or about October 1, 2004. The testimony from the claimant as well as his witness and those of the respondents' is in direct opposition one unto the other. Due to the inconsistencies in the claimant's testimony, I find that he has failed to meet his burden of proof. I find that the weight of the credible evidence is in favor of the respondents, therefore, this claim should be denied in its entirety.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. In October and November of 2004, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a weekly compensation rate of \$326.00 for temporary total disability and \$245.00 for permanent partial Disability.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on or about October 1, 2004. See discussion above.

#### ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on or about October 1, 2004. Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE