

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313084

JOSHUA B. CROW, EMPLOYEE

CLAIMANT

VICKI LISEBY d/b/a  
P. B. BUILDING, UNINSURED EMPLOYER

RESPONDENT

OPINION FILED MAY 23, 2005

Hearing held February 25, 2005 at Texarkana, Miller County, Arkansas, before HONORABLE DALE DOUTHIT, Administrative Law Judge.

Claimant represented by HON. GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondents represented by HON. LISA MILLS WILKINS, Attorney at Law, Texarkana, Arkansas.

STATEMENT OF THE CASE

On February 25, 2005, the above-captioned claim came on for a hearing in Texarkana, AR. A prehearing conference was conducted on December 9, 2004, and a prehearing order was entered on December 17, 2004. A copy of the December 17, 2004, prehearing order, with attachments, has been marked as Commission Exhibit #1 and made a part of the record herein without objection.

At the hearing, the parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim.

The issues to be presented were defined as whether the claimant sustained a compensable injury on November 16, 2003; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to associated medical benefits, and attorney fees. Also, the claimant's applicable compensation rate must be determined.

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The claimant contends he sustained compensable injuries on November 16, 2003, to his neck and back, arising out of and in the course of his employment, and that he is entitled to TTD benefits from November 16, 2003 through February 15, 2004, associated medical benefits and attorney fees. Claimant further contended his average weekly wage was \$400.00 per week, which would entitle him to a weekly TTD compensation rate of \$267.00, and a weekly PPD compensation rate of \$200.00.

Respondents contend the claimant was not employed with P.B. Building on November 16, 2003. Respondents deny compensability and controvert this claim in its entirety. Respondents contend the claimant's average weekly wage was \$255.00 per week, which would entitle him to a TTD rate of \$170.00 per week.

As will be discussed in detail below, the prehearing order recites sanctions imposed on the respondents for their failure to abide by Commission regulations and orders from this Administrative Law Judge. Those sanctions remained in effect at the full hearing held on February 25, 2005.

## DISCUSSION

### A. COMPLIANCE REFERRAL

The respondent is an uninsured employer. During the course of the claim, it became apparent to this ALJ the uninsured respondent operated in violation of Ark. Workers' Compensation Law for failure to secure payment of compensation pursuant to §11-9-406. Further, the respondent (owner) stated under oath in her proffered testimony the following regarding her lack of workers' compensation insurance:

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Q. You admit also that in spite of Arkansas Law to the contrary, you didn't have workers' comp insurance on this job?

A. I had workers' comp insurance up until October 25th and it did lapse but I was not aware of it and my agent was not aware of it. She did not make me aware of it.

Q. So you admit that you did not have workers' comp insurance when this was going on? (T. pg 132, lines 17-25)

A. Yes, I do.

Q. Have you received any fine or penalty from the Commission?

A. No, I have not, not as of yet.

Q. Mr. Crow was your employee, right?

A. Yes, he was. (T. pg. 133, lines 1-6)

In this ALJ's opinion, the record demonstrates the respondent had the requisite number of employees to fall within the Act at the time of the injury, and chose not to comply with the law. As such, a copy of this opinion, along with the Court's record and case file, are hereby being referred to the Ark. Workers' Compensation Compliance Division for their determination whether to pursue penalties against the respondents for the failure to secure workers' compensation insurance.

#### B. SANCTIONS

As outlined in the prehearing order filed December 17, 2004, the respondents failed to comply with the Commission's prehearing procedure and were, therefore, barred from asserting

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any defense against this claim, or offering any evidence at the full hearing. The prehearing order originally set a full hearing date for February 15, 2005; however, a few days prior to the originally scheduled full hearing, the respondents decided to retain an attorney. The respondent's counsel requested a continuance to prepare for trial and requested the sanctions be lifted. A continuance was granted, but the sanctions were not lifted.

The reasoning for the sanctions is as follows:

1) The respondents were sent a total of three prehearing questionnaires, notices and standing orders over the course of one year, to which they never responded.

2) On November 2, 2004 this ALJ entered an order directing the respondents to submit its answers to the prehearing questionnaire by December 1, 2004. Said order specifically stated that should the respondents fail to submit a response to the prehearing questionnaire by December 1, 2004, that they would be precluded from raising any defense or submit any evidence regarding this claim at any hearing. (CX-G )

3) The November 2, 2004 order was sent to the respondent by certified mail and Commission Exhibit I evidences her receipt of the order on November 8, 2004.

4) The respondents failed to ever file a prehearing response by the December 1, 2004 deadline after nearly one year and two Administrative Law Judges requesting they comply with Commission regulations.

The respondents lack of regard for the Act and Commission regulations resulted in a substantial delay of the process of this claim.

The Court of Appeals has expressly held that the Commission has the authority to

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preclude a respondent from asserting defense or offering evidence for failure to comply with prehearing procedures. Harrington Construction Co. v. Williams, 45 Ark. App. 126, 872 S.W. 2d 426 (1994). The Commission is given the authority to “preserve and enforce order” before it under A.C.A. §11-9-706(a).

I conclude the sanctions imposed in the December 17, 2004 prehearing order were warranted, and as such, this ALJ did not rely on any of the respondents proffered witness testimony, or proffered exhibits when adjudicating this claim.

### C. HISTORY

The respondents build metal barns and are in the disaster clean-up business. In early October of 2003, the respondents sent a crew from Arkansas to Virginia to do clean-up from the hurricane that had devastated the area. The claimant testified he met with the owner, Ms. Vicki Lisenby, prior to going out to Virginia, at her home in Arkansas. The claimant testified he was hired in Arkansas for the Virginia clean-up and that Ms. Lisenby agreed to pay him \$125.00 per day.

Upon receiving his first check in Virginia, the claimant stated he only received \$8.00 per hour with an assurance he would receive a \$2.00 per hour bonus once he completed the job.

After a few weeks on the job in Virginia, the claimant testified he was injured when the loader he was operating lost control and went back and forth causing him to be thrown around inside the loader.

Q. Okay. Now, tell us what happened. What do you say you were doing when you say that you got hurt?

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A. I was on the loader and I extended the boom out, fixing to pick up a pine tree or whatever kind of tree it was, I believe it was pine. Anyway, I had the boom extended out as far as it would go and I pulled up and I picked the tree up and it broke. When it broke ----

Q. You are saying that it was the tree that broke?

A. Yes. And then it made the loader go forward and - like I'm sitting here, there's a little window, there's no glass or nothing in it, it's just bars, but it threw me up into it and then whenever the loader went forward then the (sic) come back onto the wheels and so it then throwed me against the back of the seat and throwed my head over the back of the seat. (T. pg, 28, lines 1-17)

After the accident, the claimant testified he went to his motel but as time wore on his pain became worse and he elected to go to the emergency room. Claimant presented to the emergency room in Williamsberg, Virginia on November 16, 2003. At the E. R., x-rays were taken of the claimant's lumbar and cervical spine. The E. R. Report indicates the claimant reported his injuries took place at work a week earlier on a bulldozer; however, the claimant denied giving anyone in the E. R. such a statement.

The claimant testified he was released from the E. R. with a cervical collar and given some medications. The claimant testified he never did any meaningful labor for the respondents after the 11/16/03 accident, and returned to Arkansas as soon as he could line up transportation.

On December 16, 2004 the claimant went to see Dr. Chris Alkire of Texarkana, TX regarding his alleged work-related injuries. Dr. Alkire noted the claimant's normal x-rays that

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were taken in Virginia; however, Dr. Alkire did recommend MRIs of the lumbar and cervical spine. (CX 1, pg. 11) On January 22, 2004 MRIs were conducted. The lumbar and cervical MRI report indicates a normal impression of the cervical spine, but found a paracentral protrusion of the L4-5 disk. (CX 1, pg.15).

Still having complaints of arm numbness, on January 30, 2004, Dr. Alkire recommended nerve conduction studies at Health South. (CX 1, pg. 16) On February 13, 2004, the nerve conduction study was conducted and came out within normal limits bilaterally. (CX 1, pg. 23)

The claimant also treated with Dr. Khoa Nguyen of Ashdown, AR, regarding his back pain. According to Dr. Nguyen's report of January 3, 2004, the claimant was treated for pain and spasm to his lower back on January 16, 2004. The claimant went back to Dr. Nguyen on July 15, 2004 and November 22, 2004 for low back pain, and was treated with pain medication. The claimant testified he returned back to the workforce on February 15, 2004 for another employer as a loader operator once again.

#### D. COMPENSABILITY

For the claimant to establish a compensable injury as a result of a specific incident, the following requirement of Ark. Code Ann. §11-9-102(4)(a)(ii) must be established:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment ;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death.

- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied.

The claimant has contended he sustained compensable neck and back injuries on November 16, 2003, while in the respondent's employ in the State of Virginia. The claimant has failed to prove by a preponderance of the evidence a compensable cervical injury. Specifically, there is no medical evidence supported by objective findings that establishes a cervical injury. The cervical x-rays on the reported day of injury were normal, (CX 1, pg. 10), and the subsequent cervical MRI on January 22, 2004 had a normal impression. (CX 1, pg. 15) Further, the claimant's nerve conduction studies on February 13, 2004 came back normal. (CX 1, pg. 23) There is no proof whatsoever that the November 16, 2003 accident caused any type of harm to the claimant's neck either internally or externally.

The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on November 16, 2003. Even though the initial back x-rays taken on the day of the accident didn't show the L4-5 protrusion, the subsequent MRI did. (CX 1, pg. 15) I find the MRI gives a better determination of the claimant's low back condition than the x-rays. Another objective finding of the claimant's low back injury is contained in Dr. Nguyen's report

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where he witnessed low back spasms. (CX 1, pg. 24)

The claimant's testimony is sufficient to prove by a preponderance of the evidence that the claimant sustained the low back injury, caused by a specific occurrence; and that his injury arose out of and in the course of his employment. I find the claimant has proven by a preponderance of the evidence that the existence and extent of his low back injury is established by medical evidence supported by objective findings; and that he sustained an injury causing internal physical harm to his back requiring medical services. The claimant has proven every element of compensability; therefore, I find he has proven by a preponderance of the evidence that he sustained a compensable injury to his back on November 16, 2003.

As a result of the compensable back injury, I find the respondent is liable for all medical expenses related to the claimant's back injury. An Employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ( A.C.A. §11-9-508[a]). What constitutes reasonably necessary medical treatment is a question of fact. Ark. Dept. of Correction v. Holybee, 46 Ark. App. 232, 878 S.W. 2d 420 (1994).

Due to the sanctions imposed, which were brought about because of the respondents actions, the record is sparse with regard to an average weekly wage determination. The claimant testified he was initially hired to work for \$125.00 per day; however, after his first paycheck, he saw he was only getting \$8.00 per hour. After knowing his new wage rates, the claimant chose to stay on and continue to work at \$8.00 per hour. I find his continued employment under the new terms and conditions evidences his agreement to work for \$8.00 per hour. The claimant testified

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he averaged \$400.00 per week. However, on cross-examination the claimant was asked about amounts of weekly pay which totaled \$409.00, \$160.00, \$216.00 and \$336.00, and seemed to indicate he agreed with those amounts.

Q. Okay. There is \$409 and there is \$160 and there is \$216 and \$336.

A. Uh huh. (T. pg.75, lines 23-25)

Upon averaging those amounts, I find the claimant's average weekly wage while working in Virginia on November 16, 2003, was \$280.25,, which would entitle him to a weekly compensation rate of \$187.

The claimant has requested TTD benefits for the period November 16, 2003, through February 15, 2004. To receive TTD benefits the claimant must prove by a preponderance of the evidence that he has entered a healing period and totally incapacitated to earn wages as a result of a compensable injury. Ark. Highway & Transportation Dept. v. Breashears, 272 Ark. 244, 613 S.W. 2d 322 (1981). Dr. Alkire gave the claimant an off work slip the first time he examined him. (CX 1, pg.12). Subsequently, the MRIs were completed on January 30, 2004. Dr. Alkire recommended the claimant remain off work another two weeks. Dr. Alkire obviously took the lumbar MRI into account on January 30, 2004 and still did not choose to release the claimant to work until mid February of 2004. I find the claimant is entitled to TTD benefits for the period requested, and that the claimant's healing period ended two weeks from January 30, 2004. Also, Dr. Alkire's return to work date coincides nearly to the day with the date the claimant returned to work for a new employer with the same type job description.

Therefore, the respondents shall pay to the claimant thirteen (13) weeks of TTD at the rate of \$187.00 per week for a total of \$2,431.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had the opportunity to hear the testimony of the witness and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The claimant's average weekly wage was \$280.25, entitling him to a TTD rate of \$187.00 per week.
- 3) The claimant failed to prove by a preponderance of the evidence that he sustained a compensable neck injury.
- 4) The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury, which was established by medical evidence supported by objective findings, and that the back injury caused internal physical harm to the back requiring medical services.
- 5) The claimant has proven by a preponderance of the evidence that he was within his healing period and totally unable to earn wages for the period November 17, 2003 through February 15, 2004, and as such, the respondents are found to owe the claimant for thirteen (13) weeks of temporary total disability benefits.
- 6) The claimant has proven by a preponderance of the evidence the compensability of the November 16, 2003 back injury and therefore, the respondents shall be responsible for medical expenses related to the claimant's November 16, 2003 back injury.

AWARD

The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury, and that he is entitled to reasonably necessary medical treatment, and temporary total disability benefits from November 16, 2003 through February 15, 2004. The respondents are hereby ordered and directed to pay benefits in accordance with the findings of fact and conclusions of law set forth herein. The claimant's attorney, Mr. Gregory Giles, is hereby awarded the maximum statutory attorneys fee on all indemnity benefits awarded herein, pursuant to A.C.A. §11-9-715.

All sums shall be paid in lump sum, without discount, and this award shall bear interest at the legal rate until paid pursuant to A.C.A. §11-9-809.

IT IS SO ORDERED.

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DALE DOUTHIT  
Administrative Law Judge

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