

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F404833

TOMMY G. HOLLAND, EMPLOYEE

CLAIMANT

**ABF FREIGHT SYSTEM, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED SEPTEMBER 19, 2005

A hearing in this case was conducted on July 5, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Robert M. Abney, Attorney at Law, Des Arc, Arkansas.

Respondent was represented by John D. Davis, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on March 15, 2005; a Prehearing Order was filed on March 16, 2005. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations. Three of these stipulations are found in the Prehearing Order and were confirmed at the hearing; the parties agreed to the fourth stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on April 9, 2004 and at all other relevant times.
2. Claimant's temporary total disability rate is \$453.00, and his permanent partial disability rate is \$340.00.
3. Respondent controverts this claim.

4. Claimant's healing period ended on August 30, 2004.

At the July 5, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable back injury on April 9, 2004.

2. Whether Claimant is entitled to medical benefits.

3. Whether Claimant is entitled to temporary total disability from April 16, 2004 through and until August 30, 2004.

4. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he sustained a compensable specific incident injury to his low back on April 9, 2004, while moving freight off of a trailer. His injury required medical treatment, including surgery. Claimant seeks medical and temporary total disability benefits, as well as an attorney's fee. Respondent contends that Claimant did not sustain an injury arising out of and in the course of his employment. Respondent also contends that it first received notice of Claimant's alleged injury on April 23, 2004.

THE RECORD

At the conclusion of the July 5, 2005 hearing, the parties were invited to submit post-hearing briefs, as mentioned in the Prehearing Order. Both parties did so, and their briefs were reviewed in preparation of this Opinion. Therefore, the following briefs will be blue-backed and considered as a part of the record in this matter.

1. Respondent's Post-Hearing Brief received August 1, 2005; and

2. Claimant's Post-Hearing Brief received August 5, 2005.

DISCUSSION

A. Compensability

There is a substantial amount of conflicting testimony in the record. However, after reading the transcript, studying the exhibits, and listening to the tape marked as Respondent's Exhibit #2, I believe that disposition of this claim turns on whether Claimant's injury arose out of and in the course of his employment. Therefore, this Opinion will only summarize and recite that testimony relevant to that question.

Claimant had some prior experience in reporting and seeking medical care for an on-the-job injury. Page 1 of Respondent's Exhibit #1 is a Form N which recites that Claimant sustained an injury on July 30, 1999; it also recites that Claimant immediately notified his employer of that accident. The form reports that Claimant "strained or pulled back." On that same date, Claimant presented to a Concentra Health Center for medical treatment. He was diagnosed with lumbosacral strain.

On direct examination, Claimant described how he was injured on Friday, April 9, 2004, in a work-related incident.

Well, I was in Batesville at a place called Hastings. I backed up to the dock and went around and give the lady my paperwork. I had a roll-up door. I opened up the door, and I was trying to put their dock plate in. Their dock plate was messed up, and I couldn't get it in my trailer.

...

[The dock plate is] basically a ramp that goes between the dock and our trailer, to where we can move freight across it.

...

I couldn't get the dock plate up. The freight was about half way up in the trailer on a 4x4 pallet, and it was shrink wrapped. We have a metal floor in the trailer, and I'm going to say it weighed approximately 100 to 125 pounds. So I just took it and pushed it to the back of the trailer.

Then when I got to the dock plate there, I got down on one knee and lifted it up where I could sit it off of the - I couldn't pick the whole pallet up. So I just picked it up a corner at a time and worked it off my trailer. So I did that; and when I got up, that's when I felt the pain in my back.

Claimant described his pain as "sharp" but not bad enough to stop working. He spoke to his supervisor later on that afternoon without mentioning any pain in his back. When he returned to the terminal that evening he did not report an injury, although he admitted that there was a supervisor on site that could have taken a report. Claimant did not believe he had injured himself seriously enough to go to the doctor.

That weekend, Claimant was off work and "didn't do anything." He attended church that Sunday morning, which was Easter; afterwards, he rested while others participated in an Easter egg hunt. Claimant's wife corroborated his testimony.

Claimant testified that when he returned to work the following Monday, April 12, 2004, he had a conversation with another truck driver, Frank Parker, concerning his injury. Claimant recalled that this conversation occurred in the presence of his supervisor, Jack Hutchinson.

Q. ... What was the conversation; was there a conversation about your back?

A. Frank asked me what was the matter. He may have kinda grinned or something and said, "What's the matter with you?" We went into a small conversation about "I think I pulled a muscle Friday." I can't be exactly sure what all was said.

Q. Was Mr. Hutchinson a part of that conversation?

A. Yes, sir, he was.

Q. Did you tell Mr. Hutchinson that you may have pulled a muscle or something the Friday before?

A. He was aware that I'd pulled a muscle Friday afternoon or sometime Friday.

On cross-examination, Claimant confirmed that, in response to interrogatories, he listed the time that the injury was reported as 8:45 a.m. on April 12, 2004. He listed Jack Hutchinson as the person to whom the injury was reported. When asked if he was certain that Parker was also present, Claimant responded: "Sir, I'm sure he was there."

Claimant's city driver's log for April 12, 2004 was introduced into evidence; it is found at page 24 of Respondent's Exhibit #1. In the upper right hand corner, by the abbreviation "ASSGN," there is a box marked "START," with the entry "8 01." Claimant testified that this represents his "starting time" on April 12, 2004, the time when he punched the clock. Immediately to the left of that entry, in a box marked "LEAVE," appears the numerals "816." Claimant testified that "that's the time we actually leave the yard or as close to it as we can get." Thus, this exhibit reflects that Claimant clocked in at 8:01 a.m. and left the terminal at 8:16 a.m. on April 12, 2004.

Parker testified on behalf of Claimant. Parker recalled: "Well, I was sitting on a table when Tommy walked through the door, and I asked him what was wrong. He was walking stiff. He told me he had hurt his back." Parker had his back to Hutchinson's desk during this conversation.

Q. Do you recall if Mr. Hutchinson entered into that conversation?

A. No. I don't remember him entering into it.

Q. Now, if he was actually sitting there and you and Mr. Holland were having this conversation about his back injury, would Mr. Hutchinson have heard it; or was there something keeping him from hearing it?

A. Well, no.

Q. He would have heard it?

A. Yeah.

Q. Okay. Did it appear to you that Tommy was in pain that day?

A. Yeah. He was walking stiff, like it sorta hurt to move or something.

When asked if he recalled when Claimant believed he had hurt his back, Parker responded that “[i]t seems like he said on a Friday. I’m not sure.”

Parker’s city driver’s log for April 12, 2004 was also admitted into evidence; it can be found at page 25 of Respondent’s Exhibit #1. In the upper right hand corner, next to the abbreviation “ASSGN,” in the box marked “START,” appears the numerals “9 02.” Parker confirmed that this is the time that he clocked in, and that he might arrive anywhere from ten to twenty minutes prior to the time that he actually clocks in. To the left of this entry, in the box marked “LEAVE,” appears the numerals “914.” Parker was questioned concerning the timing of his conversation with Claimant.

Q. Would you have clocked in - and you may not remember this, but do you remember if you clocked in before or after your conversation with Mr. Holland?

A. I had clocked in, but I’m not even sure what time of day it was. I think I told them that in my deposition. And to say it was a Monday, I can’t say it was a Monday.

Q. I understand, but you’re telling me now that you had clocked in and then had the conversation with Mr. Holland?

A. Yes.

Parker confirmed that the entry “914” means that is the time that he was in his tractor leaving the terminal gate.

Hutchinson testified on behalf of Respondent. He denied that Claimant reported an injury on the morning of April 12, 2004. He testified that Claimant is a good employee and that if Claimant states he hurt his back at Hastings in Batesville on April 9, 2004,

Hutchinson believes him. Hutchinson was questioned concerning the two city driver's logs, in relationship to the alleged April 12, 2004 conversation.

Q. Now would you turn over to Page 24. This would be Mr. Holland's city driver's log for April 12th, 2004. If you recall, that's the date he and Mr. Parker claim that he reported an injury to you in Mr. Parker's presence. On this particular document, does it show that Mr. Holland clocked in at 8:01?

A. (Consulting document) Yes.

Q. Does it show that he left the lot at 8:16?

A. Yes.

Q. And before leaving the lot and after clocking in, would he have had to walk out to his tractor?

A. Yes.

Q. What else would he have to do at his tractor before leaving?

A. He would hook up to the trailer, probably drive 100 to 150 feet and hook up.

Q. Did he have to back under the trailer?

A. Right.

Q. And then he'd have to dolly -

A. Dolly it up and hook his air lines up.

Q. Would he have been hooking up to two trailers that day or just one?

A. Just one.

Q. Okay. So then he would proceed out the gate. When he wrote 8:16, that would have been when he was -

A. After all of that had taken place, that's when he would have gotten back in his truck; and he would have wrote that down just as he was driving off the lot.

Q. Okay. This shows that his first stop was at Arkansas Kenworth; is that

right?

A. Yes.

Q. At 8:35?

A. Yes.

Q. Now if you look at Mr. Parker's city driver's log, it shows Mr. Parker didn't punch in until 9:02 that morning; is that correct?

A. Correct.

Q. And he left the lot at 9:14; is that right?

A. Correct.

Q. So according to these two documents, Mr. Parker and Mr. Holland weren't even at the facility at the same time; were they?

A. According to this, on that particular day, they wouldn't have been, no.

Although he worked a full shift on April 12, 2004, Claimant awoke in great pain on Tuesday, April 13, 2004. He called in sick and presented to a hospital emergency room. He did not work on April 14; he did work on April 15 and 16. Claimant's pain flared up again on Sunday, April 18; he returned to the emergency room. He then took previously scheduled vacation time until Thursday, April 22, 2004, when he presented to another hospital's emergency room. Claimant underwent surgery on April 23, 2004. This procedure included partial facetectomy at right L3-4 and right L2-3; removal of right L3-4 bilateral herniated nucleus pulposus; microscopic decompression of Claimant's thecal sac and nerve roots; injection of lumbar epidural steroid; and fluoroscopy.

It should be noted that Claimant provided his group health insurance information when he initially presented for medical treatment. Prior to presenting for his first emergency room visit on April 13, 2004, Claimant called his union's representative in

charge of their group health insurance. A form dated April 13, 2004 lists "Insurance Co. 1" as "Blue Cross Blue Shield." Similarly, a White County Medical Center form dated April 22, 2004 lists "BCBS" under "Insurance Information"; this form is dated as of the time Claimant presented immediately prior to his surgery.

Claimant's medical records from April 13, 2004 until April 24, 2004 are worth summarizing to the extent that they provide any history concerning his injury. They uniformly fail to note any incident involving Claimant's work.

After his alleged April 9, 2004 incident, Claimant first sought medical care on April 13, 2004. A Baptist Health emergency room note of that same date records a chief complaint of "R flank pain started yest radiates to front." There is no mention of an incident at work.

Dr. Thomas Robinson dictated a note dated April 13, 2004. In reciting Claimant's history, the doctor notes Claimant "has had no specific trauma." Dr. Robinson diagnosed herniated L3 and L4 discs. There is no mention of an incident at work.

Dr. Robert Harrell's note is dated April 18, 2004, the date of Claimant's second emergency room visit. Dr. Harrell recorded: "He has had back pain in the past. This occurred about five years ago when he was opening and closing a garage door." There is no mention of an incident at work.

Claimant's third emergency room visit occurred on April 22, 2004, when he presented to the White County Medical Center Emergency Department. A form records Claimant's chief complaint as: "LBP to RLE since last Sunday; getting worse." There is no mention of an incident at work.

Claimant was examined by Dr. Chad Sherwood in the White County Medical Center

emergency room on April 22, 2004. Dr. Sherwood noted: "He denies any fever or injury but his pain and symptoms have been worse when he bent over to pick up something the other day." There is no mention of an incident at work.

Dr. Scott Dicus then examined Claimant at the White County Medical Center, apparently on April 22, 2004. Claimant reported: "He has had worsening symptoms of low back pain for the last several weeks and then he was laying in bed when he felt a pop in his back and started having the numbness in his legs." There is no mention of an incident at work.

Claimant was examined by a third doctor on April 22, 2004, Dr. Patrick Chan. Dr. Chan ultimately performed Claimant's April 23, 2004 surgery. In his initial consultation, Dr. Chan took Claimant's history: "This 53 year old white male started having some low back pain on 4/13/04. The pain in the lower back got worse and the patient then started having radiation of low back pain into right lower extremity mostly around the thigh region." Dr. Chan noted that Claimant "has been in bed rest since 4/13/04," until April 18, 2004, when Claimant "heard a loud pop in his back. His low back pain got significantly worse since." There is no mention of an incident at work.

Finally, the record includes patient progress notes from April 23 and 24, 2004. This form notes that "Pt stated he has had numbness and tingling on Rt lower side for 'years.'" The form also notes that unidentified parties "discussed Pt's previous history of numbness and tingling in rt hip and rt thigh. Pt stated he still has some since surgery, but stated it 'already feels better.'" Thus, Claimant's previous history was apparently discussed; there is no mention of an incident at work.

Claimant must prove that he sustained a compensable injury as defined by Ark.

Code Ann. § 11-9-102(4)(A)(i). Among other requirements, Claimant must prove that his injury is one “arising out of and in the course of employment....” Id. “Arising out of the employment” refers to the origin or cause of the accident while the phrase “in the course of the employment” refers to the time, place, and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, ___ (1985); see Preacher v. Cave City Nursing Home Inc., Full Workers’ Compensation Commission Opinion filed January 15, 2004 (E512363). Claimant must sustain his burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, __ (1947).

I find that Claimant did not sustain his burden of proving that he sustained his injury in the course of his employment. Weighing the evidence, I find that the evidence of greater convincing force calls into question whether Claimant sustained an injury arising out of and in the course of his employment on April 9, 2004. Claimant did not report an injury on that date, despite having opportunities to do so and prior experience doing so; he did not seek workers’ compensation coverage for his medical bills, but submitted them under his group insurance policy; and those medical records addressing Claimant’s history consistently fail to mention an incident at work. This last point is particularly telling: all eight of these medical documents fail to mention an incident at work. Indeed, they give inconsistent histories. The Baptist Health medical record dated April 13, 2004 reports “pain started yest”; if “yest” means “yesterday,” that would be April 12, 2004. Yet, the White County

Medical Center Emergency Department form dated April 22, 2004 makes reference to pain “since last Sunday”; that would have been April 18, 2004. Yet again, Dr. Chan’s April 22, 2004 note states that Claimant “started having some low back pain on 4/13/04.” Thus, these three medical records apparently give three different dates for the commencement of Claimant’s pain; not one of these dates is April 9, 2004.

I acknowledge Claimant’s consistent (at the hearing and on his taped statement) report of how his injury occurred. Unfortunately, none of the contemporary medical records record this same report. Again, they consistently fail to mention an incident at work.

I also acknowledge Claimant’s testimony concerning the April 12, 2004 discussion between himself, Parker, and Hutchinson; Parker corroborated this testimony. However, the city driver’s logs clearly indicate that Claimant had left the premises, and had already arrived at his first stop, before Parker even clocked in on April 12, 2004. Worse still, Parker testified that the conversation occurred after Parker clocked in. Thus, the contemporary records call into question whether the discussion even occurred as reported.

The preponderance of the evidence does not establish that Claimant sustained an injury arising out of and in the course of his employment on April 9, 2004. Claimant did not report an injury on that day, despite prior experience in reporting an injury in 1999. When he did seek medical treatment, he submitted his group health insurance information to the medical providers. And, the relevant medical documents consistently fail to give a history of an incident at work. Therefore, Claimant has not sustained his burden of proving a compensable injury on April 9, 2004.

B. Remaining Issues

It is not necessary to discuss Claimant’s request for medical benefits, temporary

total disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of the alleged injury, he failed to establish the compensability of his claim, and compensation must be denied. Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. §§ 11-9-102(4)(F)(i) and 11-9-715(a)(2)(B)(ii).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on April 9, 2004 and at all other relevant times.
3. Claimant's temporary total disability rate is \$453.00, and his permanent partial disability rate is \$340.00.
4. Respondent controverts this claim.
5. Claimant's healing period ended on August 30, 2004.
6. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment on April 9, 2004. Claimant did not report an injury on that date, despite prior experience reporting a work-related injury and opportunities to make a report; he submitted his group health insurance information for payment of his medical bills; and the medical records consistently fail to mention an incident at work when recounting Claimant's history.
7. Because Claimant failed to prove a compensable injury, it is not necessary to discuss his request for medical benefits, temporary total disability benefits, or an attorney's fee.

ORDER

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml