

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504159

JAMES R. SCALLION

CLAIMANT

KAUFMAN LUMBER CO.

RESPONDENT EMPLOYER

TRINITY UNIVERSAL INSURANCE OF KANSAS

RESPONDENT CARRIER

ORDER AND OPINION FILED DECEMBER 19, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE MARVIN "CHIP" LEIBOVICH, JR., Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on October 18, 2005, in Little Rock, Arkansas. A prehearing conference was held on July 19, 2005, and a prehearing order was filed on July 20, 2005. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the evidence without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship around mid-February 2005.
2. The compensation rate is \$304.

The claimant contends that he suffered a compensable specific incident injury approximately mid-February. The claimant requests medical benefits and temporary total disability benefits from mid-February 2005 through mid-June 2005 and temporary

partial disability benefits from mid-June 2005 through a date to be determined.

Attorney's fees are also requested.

Respondents contend the claimant did not sustain a compensable injury and further contend the claimant did not give notice to his employer of a work-related event. Respondents contend the claimant actually worked through April 11, 2005 and there is no evidence that he was unable to work after that date until he obtained other employment. Alternatively, if there is a compensable injury, respondents contend there is no entitlement to temporary total or temporary partial disability benefits.

Respondents contend the claim has been controverted in its entirety and notice was provided by the AR-C filed on April 13, 2005.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Temporary partial disability benefits.
5. Attorney's fee.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann.

§11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship around mid-February 2005.
2. The compensation rate is \$304.
3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment in mid-February.

DISCUSSION

The claimant, 28 years old, worked for the respondent employer driving a truck delivering lumber. According to the claimant, he hurt his back around the first of February 2005, when he was pushing a bundle of lumber that was loaded crooked on his truck. The claimant testified that he heard his back pop and it hurt but he continued working the remainder of the day. After the claimant got home and relaxed, he could hardly move from the couch but thought he had pulled a muscle. The claimant continued to work and sought medical treatment the following week. The claimant remained off work for at least one week and was then placed on light duty. The employer advised there was no light-duty work.

The claimant testified that about one week after the incident, he advised Drew Phillips that he had hurt his back and needed to see a doctor. The claimant also took his off-work slips to his employer. The claimant ultimately got a full release to return to work and after about a week he was loading his truck and his back began hurting a lot. According to the claimant, he was called into the office and terminated for not being

truthful on his application about a previous back injury. The claimant testified he remained off work one to two months and started working at Wal-Mart for \$7 per hour.

Under cross examination, the claimant testified that he had no back problems before the February 2005, incident but did confirm that he missed four days in December 2004 and four days in January 2005 and nine days in February 2005. The claimant testified that he reported the back incident to both Drew and Norman on the same day. The claimant further testified that Drew Phillips told him he could not file a workers' compensation claim as he had waited too long. The claimant last saw Dr. James Cooper on March 28, 2005, regarding his back condition.

The claimant verified that he was released to full duty on March 9, 2005 and he continued to work for the respondent until April 11, 2005. The claimant's job at Wal-Mart is stocking. The claimant has recently been involved in a motor vehicle accident and sustained a neck injury and has been off work about six weeks from that accident.

Norman Thomas, yard foreman for the respondent employer, testified that the claimant told him in January or February 2005 that his back was sore. Mr. Thomas testified that he asked the claimant if he needed to go to the doctor and the claimant responded that he did not hurt his back at work, it happened before he started to work here. Mr. Thomas further testified that he would not tell an employee that he could not file a workers' compensation claim.

Drew Phillips, vice president of finance, testified that he handles the workers' compensation claims for the respondent employer. Mr. Phillips testified that the claimant had not reported a work injury to him before the April 2005, AR-C filing. Mr.

Phillips testified the claimant related his back problems as a previous injury he aggravated at home and never reported a work injury.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury about mid-February 2005, arising out of his employment. While the claimant testified that he told both Drew Phillips and Norman Thomas that he had hurt his back on the job, their testimony differed. Drew Phillips testified that the claimant told him he had aggravated his back at home and that was the cause of his back problems. The contemporaneous medical evidence did not document a work injury until a mention on March 9, 2005. I simply found the testimony of Drew Phillips and Norman Thomas to be more credible than the claimant's testimony. Where the claimant's case for causation rests mainly on his own

testimony, the issue is that of credibility and one that is left to the discretion of the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996).

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment in mid-February. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**