

CLAIM NO. F604283

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| KYLE J. HOLLEY, EMPLOYEE | CLAIMANT |
| DAVIS CASH LUMBER CO., EMPLOYER | RESPONDENT |
| FIRSTCOMP INSURANCE COMPANY, CARRIER | RESPONDENT |

OPINION FILED OCTOBER 4, 2007

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, on August 22, 2007, in Russellville, Van Buren County, Arkansas.

Claimant was represented by the HONORABLE NEAL HART, Attorney at Law, Little Rock, Arkansas.

Respondent was represented by the HONORABLE WILLIAM FRYE, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on August 22, 2007, in Russellville, Arkansas. A Prehearing Order was entered in this case on May 21, 2007. This Prehearing Order set forth the stipulations offered by the parties and the issues to be litigated, as well as their respective contentions.

Stipulations

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including August 8, 2005.
3. The parties will stipulate to the compensation rates

prior to the hearing. (At the time of the hearing, the parties stipulated that the claimant's average weekly wage was \$381.97, which would entitle him to a temporary total disability rate of \$254.00, and a permanent partial disability rate of \$191.00).

4. The claim has been controverted in its entirety.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Did the claimant sustain a compensable back injury on August 8, 2005?

2. Is claimant entitled to medical benefits?

3. Is claimant entitled to temporary total disability benefits? (At the time of the hearing, the claimant alleged his entitlement to temporary total disability from January 5, 2006 to October 27, 2006).

4. Is claimant entitled to entitled to a 12% impairment rating?

5. Is claimant entitled to an award of attorney's fee.

CONTENTIONS

The claimant contends he suffered a compensable back injury on August 8, 2005, and is entitled to received medical, temporary total disability and permanent partial disability benefits. Claimant's attorney is entitled to receive the maximum statutory attorney's fee on all controverted benefits. All other potential

issues are expressly reserved for litigation at a later date.

The respondents contend that claimant suffered an alleged injury on August 8, 2005 while working for respondent/employer. The respondents contend that there is no medical evidence to support the claimant's claim for benefits. (At the time of the hearing, the respondents asserted that its main defense was that there was no injury rather than no objective medical findings).

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of May 21, 2007, which has been marked as Commission's Exhibit No. 1. The claimant's responses to the Prehearing Questionnaire was marked as Commission's Exhibit No. 2. The respondents' responses to the Prehearing Questionnaire was marked as Commission's Exhibit No. 3. A medical packet submitted by the claimant was marked as Claimant's Exhibit No. 1. The respondents' medical packet was marked as Respondents' Exhibit No. 1. The respondents' non-medical packet was marked as Respondents' Exhibit No. 2. The deposition of Lathaniel Jackson was marked as Respondent's Exhibit No. 3. The claimant's deposition was marked as Respondent's Exhibit No. 4.

The following witnesses testified at the hearing: Laythan (Lathaniel) Jackson, the claimant, Jimmy King, and Rhonda Davis.

DISCUSSION

Laythan Jackson, a coworker and a friend of the claimant's, gave testimony during the hearing. According to Mr. Jackson, he

worked for the respondent as a yard hand, wherein he assisted customers and delivered 2x4's to customers. Mr. Jackson testified he has known the claimant approximately 14 or 15 years.

Mr. Jackson testified that on August 8, 2005, he worked as a yard hand for the respondent/employer, and the claimant, who worked as a warehouse superintendent, served as one of his supervisors. According to Mr. Jackson, Jimmy King was supervisor over the yard hands.

As to the day of the alleged incident, Mr. Jackson testified that Brent, another boss, who worked over Jimmy asked him and the claimant to go to Fairfield Bay and deliver triple french doors that weighed approximately 500 pounds.

According to Mr. Jackson, as he and the claimant delivered the doors to the condo wherein they were being installed, they were instructed by a person doing the installation, not to hit the ceiling or hardwood floor with the doors. Mr. Jackson specifically testified that as he and the claimant brought the doors in, the installer started pulling on the top of the doors and telling them to keep going. Specifically, Mr. Jackson testified:

A. Yes. And so we made it to where he was going to install the door going out the back. And we set the door down right there. And that's when I just bent over.

Q. You bent over?

A. Yes.

Q. What happened to you?

A. Well, I got a pinched nerve going down both sides of

my legs. And I've got two bulging disks.

Q. From lifting that door?

A. Yes, sir.

Mr. Jackson admitted to having also filed a workers' compensation claim due to this alleged incident, which has been denied. He testified that the claimant told him he had been hurt on that same day also. According to Mr. Jackson, the claimant told him his back was hurting and he had trouble walking, as he was just broke down. He testified that the two of them reported their injury at the same time. Mr. Jackson testified:

Q. Well tell me, we already know that you reported an injury, but tell me what happened with you both when you got back to the yard.

A. After we got back? Well, we got back to the yard, and I seen Jimmy King. And so we went over to Jimmy King and said man, we hurt, or Kyle said he hurt himself on the door too after we got back. Then they said wait an hour and a half and you can go home.

Q. Is that what you all did?

A. Yes.

According to Mr. Jackson, the next day he went into work, but could not finish the day because his back was hurting and he was unable to stand. He essentially testified he went back to work after seeing a specialist in Little Rock and thereafter worked maybe a month, but could not work after that. During this period of time while working with the claimant, Mr. Jackson testified the claimant had problems standing and he was always bent over in pain.

On cross examination, Mr. Jackson testified:

Q. Mr. Jackson, let me make sure I understand this. You and Mr. Holley are out there on August 8th. You pick up this french door. And when you put it down, you just notice some pain in your back?

A. Yes.

Q. And after you got, you both got through, that's when Mr. Holley first told you his back hurt?

A. Uh-huh.

Q. Is that correct?

A. Yes, sir.

Q. And before that, you would not have known that his back was bothering him. Is that a fair statement?

A. Yes, sir.

He admitted during his deposition testimony to having stated that he felt a pop in his back while backing up going backwards. Mr. Jackson admitted to going into work the next day and telling Mr. Jimmy King he could not work that day. Upon further questioning, the claimant maintained that this was his last day of work for a month. However, after being shown his time records for August 9, 10, 12, 13, 15, 16, 17, 18, 19, 22, and 23, (2005), Mr. Jackson admitted he had in fact worked those day, but explained he had evidentially made a mistake. He testified:

Q. So when you told me at your deposition that you went in and couldn't work, and you told Mr. Hart here today that you went in and couldn't work, that wasn't correct, was it?

A. No, sir.

Q. Matter of fact, you worked up until the end of December, didn't you?

A. I'm not real sure when it was. December. I don't know.

Q. Well the last time card I have of you clocking in and out is that you clocked out at 5:02 on December 20th of '05. Does that sound about right?

A. Yes, sir.

Q. So you continued to work from August of '05 to December of '05 doing your regular job, didn't you?

A. Yes, sir.

Q. Yet in your deposition on page 39, I asked you about the rest of August, and you said no. I didn't go back. No. That's completely wrong isn't it?

A. Evidently so.

Mr. Jackson further admitted he was mistaken about going in the next day and telling Mr. King he could not work. Mr. Jackson essentially admitted that although the claimant may have testified during his deposition that he hollered while unloading the glass and let it go, he would have remembered and heard the claimant hollering. However, he essentially admitted he did not testify on direct to having heard the claimant holler.

He also admitted the claimant had back problems (just soreness) before August 8, 2005. However, he was unsure as to whether the claimant complained to others about prior back problems.

According to Mr. Jackson, when he saw the claimant in September (2005), he was essentially complaining of severe back pain. However, he admitted it would not surprise him if a medical note from Dr. Abiseid dated September 7 had indicated the claimant

was having very little discomfort, and that this would be different from what the claimant was telling him.

The claimant, age 40 (7/18/67), also gave testimony during the hearing. He testified that he has a previous laborious work history, primarily in construction type work. He testified he had worked for the respondent approximately five or six years, as he last worked for the respondent in January of '06. According to the claimant, he worked for the respondent in the capacity of warehouse manager, wherein he performed shipping, receiving, and various other duties.

He testified that prior to August 8, 2005, he had been able to perform his job physically. However, he admitted to having prior occasional back soreness, but denied that lumbar fusion had ever been recommended for his back prior to August 8, 2005. The claimant testified that his supervisors were Jimmy King, Brent Hunt, and Rhonda Davis.

As to the alleged incident of August 8, 2005, the claimant testified:

A. We was unloading a huge door.

Q. When you say huge, how big is this door?

A. It was about 10 foot, nine foot four or six probably. Plus it was extra tall.

Q. How much do you think it weighed?

A. It had to be 500 pounds close.

Q. That's what you told us in your deposition. Is that still true today?

A. Yes, sir.

Q. What's your height and weight, Kyle?

A. 6'3", 210.

Q. Tell us what y'all were doing with this door.

A. We were, we unloaded it, took it down an embankment, was taking it in through the existing door at a diagonal because it was the same height as the front door. So we leaned it over. And he was on the back side, and I was on the walking forward side.

Q. Who was on the back side?

A. Laythan Jackson.

Q. Okay. Go ahead.

A. And Hollis McFry was holding the door on the inside. And we got it inside just a little bit. And he wouldn't let us set it down on the new hardwood floor. And there was a new glass chandelier. So we had to get past it. So it was probably from here to the wall past the front door.

A. And so we get it in, and it's real heavy. So we need to set it down. And when we go to set it up, Hollis McFry grabs it in the middle and yanks it down. And that's when I hollered. And we finally set it down. And Laythan was already hurting. We finally got it slid over there to where it was going to go, and it was the wrong door. It was too big for the hole. And he wanted us to take it back because it was too big, and wouldn't fit. But we told them we just, there wasn't no way. So he signed our piece of paper, and we went back to the shop.

Q. Hold on for a second. Hold on for a second, Kyle. Let me stop you for just a minute. When you say Laythan was already hurt, you mean he was hurt at the point the door was in the house, or he was already hurt before you guys got to the place?

A. No. He was hurt, when the guy yanked the door down is when it hurt.

Q. How did you know he was hurt?

A. Well, he was, he was all slumped over and it hurt. I mean there was no, it's hard to say.

The claimant testified that although Mr. Jackson denied hearing him scream, he screamed pretty loud because he was carrying a huge weight and when the guy yanked on the door, it felt as though someone had hit him in the back with an axe and his leg went numb. According to the claimant, it was awful, it probably took him 20 minutes to get back up to the truck.

He further testified that upon their return to the yard, they went to Brent's office, their supervisor, and told him, Jimmy King and James Landreth what had happened with the guy yanking on the door and hurting them. According to the claimant, they laughed at them, told them they were big guys and could surely handle it for another hour, as they just needed to "go home and lay down."

The claimant denied that any of these gentlemen offered to let him fill out an accident report, nor did they offer to send him to a doctor. According to the claimant, thereafter he laid around in the warehouse and then went ahead and went home after a little bit before his shift ended. He denied having worked the next day, or for two or three days probably due to the pain.

He testified that upon his return to work, he asked Ms. Wilma about filing a workers' comp, but she told him he couldn't because it was not done within 24 hours of the incident. The claimant admitted to going to the doctor and using his group health

insurance, and to having paid the rest out of his pocket.

The claimant specifically testified as to his initial receipt of medical treatment:

Q. Now to get this out of the way since your deposition has been introduced, you told Ms. Rogers in your deposition that you think you went to the doctor about three days after your accident, right?

A. It could have been.

Q. Do you think you may have been mistaken, Kyle? Because like Mr. Frye has already said, the first note we have from a doctor on you is on 8-24-05, which is more than three days after the accident.

A. Right.

Q. Do you think you may have been mistaken when you told her that?

A. I must have been.

The claimant admitted to initially seeing Dr. Abiseid, who gave him injections and medication, and eventually referred him for physical therapy treatment. The claimant maintains that he told Dr. Abiseid he had been hurt at work, and that he had back problems since he was 15 years of age. According to the claimant, his problems occurred during weight lifting, as he was lifting weights and a guy pulled it from behind and strained his muscles.

The claimant essentially testified he continued to do his job after the alleged incident, but was limping, and all slumped over. He testified that the respondent was aware he was doing physical therapy and treating with Dr. Abiseid. The claimant essentially testified his condition continued to worsen. He admitted to being taken off work by Dr. Abiseid and to being referred to Dr. Jordan,

a neurosurgeon, who performed surgery. The claimant admitted his last visit with Dr. Jordan was on October 27, 2006.

The claimant testified that from January 5, 2006 and October 27, 2006, between the time Dr. Abiseid took him off work and when he last saw Dr. Jordan, he did not engage in any substantial gainful employment. He admitted to telling Dr. Jordan on October 27, 2006, he was feeling better, that the surgery helped and that he was ready to go back to work, because he needed to go back to work. He admitted he has not had follow-up visits with Dr. Jordan.

He testified he currently has problems trying to work, as he works a couple of days remodeling houses and then he rests for a couple of days.

On cross examination, the claimant admitted he filed for workers' comp (which would have been around January 29, 2006) after being turned down for short-term disability. The claimant finally conceded that he probably filed for short-term disability on January 20, 2006, after his last doctor's visit which would have been January 5, 2006. He further admitted that shortly thereafter he probably heard he had been turned down.

The claimant testified:

Q. And that's when you went back to Davis Cash Lumber and said you wanted to file a workers' comp, correct?

A. I don't know. It seems like -

Q. Because I've got them filling out the accident report on January 29, '06, which would have been nine days after you filed the short term disability and were

turned down.

A. That's when they filled it out?

Q. Yes, sir.

A. That doesn't mean that's when I asked them to fill it out.

Q. No, sir. What I am going over with you is, you filed for short term disability on January 20th of '06, correct?

A. Okay.

Q. And then you told me that shortly after that you were turned down -

A. Okay.

Q. And I think you've already testified that after you were turned down you decided to file for workers' comp.

A. Sure.

Q. And what I'm saying is, nine days after you filed for short term disability is when the accident report was filled out by Rhonda Davis. Are you with me so far?

A. Yeah. She didn't fill out the accident report until then?

Q. Isn't that what the date is right there?

A. Okay.

The claimant essentially admitted that on the American Fidelity Assurance Company paperwork he gave an accident date of August 23rd, and when Rhonda Davis completed paperwork, it shows that his accident took place on August 11th. However, he explained that the respondent simply got the date wrong.

The claimant also admitted to first going to see Dr. Abiseid on August 24. The claimant denied telling Dr. Abiseid he had

degenerative disk disease in his low back, but admitted to telling him that he suffered from chronic back pain, for which he had been given back exercises by Dr. Jose. He further admitted to having told Dr. Abiseid that he had been experiencing back pain since work yesterday and that he had a previous back injury, and discomfort with sitting and standing. The claimant admitted that Dr. Abiseid's notes did not mention an August 8th injury, as the claimant explained, "No, because I toughed it out until the 24th before I went."

The claimant was unsure as to whether during his initial filings he indicated an injury date of August 11, 2005. He admitted to hearing Mr. Jackson testify to the fact that he did not hear him yell and drop anything. The claimant also admitted he may have gotten mixed up on the date of his injury due to all the medication he was taking. The claimant could not recall whether he was sure of his injury date as being August 8th, at the time that his deposition was taken on May 16, 2007.

Upon being shown his timecard, the claimant then admitted that on August 8th he completed his shift, as he left work at 5:03, about his regular time. The claimant also essentially admitted that his timecard reflected he worked his regular hours on August 9th, from 7:02 a.m. until 5:20 p.m. He testified:

Q. How about August 11th, what -- August 11th you get in there at 6:59 and it has down what 12:10?

A. That can't be my timecard.

Q. Well, did you draw a check that week?

A. I'm not sure. Probably.

Q. Let me ask a different question. If those times were correct, that wouldn't go along with what you indicated happened, does it?

A. No. Because that indicates that I was there.

The claimant was unsure as to whether he indicated to Blue Cross and Blue Shield that his back condition was work-related condition. The claimant admitted to having a prior sore back due to carrying sheet rock. He also admitted that if Ms. Davis indicated in her testimony that he was having back problems quite awhile before August 8, 2005, it would probably be due to carrying the sheet rock.

He testified:

Q. Mr. King was your supervisor. I assume that you would see him pretty much every day?

A. Yeah.

Q. I understand from him that you were always telling him about your back bothering you?

A. Sure.

Q. That you'd have to go to a chiro, which was Dr. Soward or to Dr. Starnes?

A. Yeah.

Q. That you'd be down in your back and there were times that you couldn't get out of bed?

A. Because of hauling so much sheet rock pretty much except for now Mr. Starnes, the doctor, he's just a, I don't think he should even have a license. He's, I guess, he's the doctor when we fell, when me and Jimmy King fell on the scaffold, that's where they sent us was to Starnes.

Q. So you've had one other incident with them back I guess in April of '04?

A. Something like that.

Q. Where you actually had an incident. It was reported, and you were immediately sent to the doctor?

A. Yes.

Q. And that was paid for as far as you know?

A. Yes.

Q. Because you didn't have to put it on group health, did you?

A. I don't know. I'm sure I did.

Q. Well they sent you to the doctor, didn't they?

A. They got us out of the floor and put us in a truck, yes.

Q. And took you to the doctor?

A. Yeah.

Q. Did you ever get any bills for that?

A. I don't remember.

Q. That was handled under workers' comp, wasn't it?

A. I really don't know.

On redirect examination, the claimant admitted to an on-the-job accident in 2004 wherein he and Jimmy King were both injured. According to the claimant, he and Mr. King were going into the warehouse and there was a rolling scaffold, and when he sat down to tie his shoe it collapsed falling on the two of them, breaking Mr. King's foot, and it fell across his back. The claimant testified

he went to see Dr. Starnes who diagnosed him with a bruised kidney. According to the claimant, he continued to work performing his regular duties thereafter, he denied any problems with absenteeism. The claimant denied having completed the Form 1 or the insurance claim form.

On recross examination, the claimant testified:

Q. Just one follow up, Mr. Holley. You mentioned that you just kept going after the problem in April. The same thing was true in August, September you kept going and worked up until December, didn't you?

A. Yes.

Q. Doing your regular job, didn't you?

A. I was.

Jimmy King, the claimant's supervisor, also gave testimony during the hearing. He testified he has worked for the respondent approximately eight years, and is currently performing duties as a lumber sales person. He testified that injuries are reported to him and then he reports to Ms. Wilma if it is real serious.

Mr. King testified that prior to August 8, 2005, the claimant complained of back pain and stiffness. He also testified he believes the claimant would some times miss work due to his back. He testified the claimant continued to work his regular duties from August to December, but with difficulty. However, he could not recall if the claimant ever said his injury was due to an on-the-job injury.

On cross examination, Mr. King admitted to being the

claimant's supervisor basically the entire time that he worked for the respondent. He essentially admitted he knew prior to January 29, 2006, that the claimant was alleging a work-related injury.

Ms. Rhonda Davis, the owner/respondent, gave testimony during the hearing. She admitted the claimant would complain of back problems prior to August '05, and to having told her he would cry like a baby due to his back hurting. She also testified he would walk around holding his back. According to Ms. Davis, the claimant told her he had hurt his back many years ago, but did not elaborate on what he had done.

She admitted Mr. King had several workers' comp claim, for which timely claims had been filed. Ms. King testified:

Q. Tell me about that. I mean did Mr. Holley come in to see you and kind of take me through what happened.

A. Mr. Holley had said that he was filing, that he had hurt his back. It had been hurt for quite some time. He was going to have to have surgery on his back. And he wanted to file disability. He would come into our office and say it was not a workman's comp claim. He had hurt his back a long time ago, and that he was going to have to have surgery, and it was disability. He had been taking out disability insurance through our health insurance. He would tell us it was disability. Apparently he would go outside, he would call the disability people and tell them no, it's work related.

Q. So on the 29th, what happened that you ultimately fill out this accident report?

A. Apparently it was denied by the disability people. And he said well, he was going to have to file it on workman's comp because they had denied it.

Q. And how soon after he said, I'm going to file this as workers' comp do you fill out this, does your office fill out this accident report?

A. I filled it out right then.

Q. Right then. And where did you get the August 11th date that is on there as far as the accident?

A. That's the date he told me.

Q. But from August 8th up until January 29th, did anyone in your office, did you know that this was being pursued as workers' comp?

A. No, I did not.

Q. In fact, he had told you it had nothing to do with working out at Davis Lumber, correct?

A. Correct.

Q. If he had come to your office back on August 8th and said I've hurt myself, what would y'all have done?

A. We would have gone ahead and filed a report, a first accident report.

The documentary evidence demonstrates that on January 20, 2005, the claimant made application for disability insurance with American Fidelity Assurance Company, as this form was completed by Nurse Robbie Pickle. The claimant reported having his first symptoms as of August 23, 2005, and he reported having first sought treatment for the same on August 24, 2005. He reported a diagnosis of low back pain and degenerative disc disease.

The claimant's First Report of Injury or Illness was made on January 29, 2006. This form was prepared by Ms. Rhonda Davis. The claimant reported having injured his back on August 11, 2005, while carrying a door.

A Form AR-C was filed with the Commission on October 25, 2005. This form demonstrates that the claimant injured his low back and

hip on August 8, 2005, while carrying a door.

Lathanial Jackson's deposition was taken on January 16, 2007. Mr. Jackson gave extensive testimony concerning his alleged injury, condition, treatment, restrictions, etc. He also gave testimony concerning a prior finger injury and his attempts to file for Social Security Disability benefits, which resulted due to his finger injury and his alleged back injury, as Mr. Jackson alleges to have also injured his back during the August 2005 incident when the claimant alleges to have injured his back. According to Mr. Jackson, his most recent Social Security claim for his back has been denied, but his is now on appeal. Mr. Jackson also testified concerning his prior injuries/conditions and work history.

As to the August 2005 incident, Mr. Jackson testified that the french doors he and the claimant were required to carry weighed approximately 450 pounds. Mr. Jackson testified he injured himself when he got the door into the living room because the home owner was pulling as they raised up on the door, and let it down, as he felt something pop in his back accompanied by a burning sensation across the belt line.

According to Mr. Jackson, he reported the injury to Mr. King after they got back to the lumbar yard, but he told him to "wait till the rest of the day, then go home." Mr. Jackson testified he went in to work the next day (August 9, 2005), but told Mr. King and the claimant he could not do it. He denied having worked the rest of August. Thereafter, Mr. Jackson gave extensive testimony concerning his own alleged injury, treatment and condition.

On May 16, 2007, the claimant's deposition was taken. The claimant testified he has performed various construction-type work, and he has special training in the reframing of airplanes. He denied any prior back problems except for an injury occurring in the ninth grade while lifting weights and when he fell in the warehouse and sprained his back, which occurred approximately six or eight months prior to the alleged August 8, 2005 incident. According to the claimant, he saw Dr. Starnes for this incident and returned back to work the next day. He also admitted to seeing a chiropractor in Clinton, Dr. Sowers, a couple of times thereafter. He also admitted to maybe seeing Dr. Jose Abiseid, but could not remember whether or not he did.

The claimant admitted he could not recall if his injury took place on August 8 or August 11, (2005). He specifically testified, "I'm not sure, but it - I think it happened on the 8th, and I didn't return back to work until like the 11th, but I'm not positive for sure."

With respect to his alleged injury, the claimant specifically testified:

A. All right. Me and Lathan Jackson took this - it was a three-piece door, I mean it was all together with double glass with the mini blinds in it, to the Fairfield Bay Resort over there. We unloaded it. There was a fellow there to put it in. I think his name is Hollis McBride or McBroom.

And we carried it down an embankment, and when we started in, there was a new chandelier just inside the doorway, and we had to tilt the door over it. The door probably weighs a good 500 pounds or so.

So we leaned it over and was pushing it, you know,

pulling it through the existing door, and the maintenance guy grabbed it and yanked on it because he didn't want us to bump the new chandelier, and that's when I hollered and made them all let go of it and we stood it up.

And Lathan, he was already hurting. And we went ahead and got the door on over there and leaned it up and then we left.

According to the claimant, they reported the incident of them both hurting their backs to Brent, the manager, Jimmy King, and James Landreth, the new yard boss, who were all sitting in the office. The claimant testified they were instructed to just wait until quitting time before going home. The claimant further testified he did not return to work for three or four days, and when he got back, Ms. Wilma told him it was too late to file workers' comp because he had to get it in within 24 hours.

The claimant testified he first sought treatment for his injury from Dr. Abiseid's office probably three days after the accident. According to the claimant, he told the doctor's office that his injury was work-related.

He testified he was certain that Mr. Jackson was aware he had hurt his back because when the guy yanked on the door, he hollered a few obscenities so that he would let go.

The claimant testified:

Q. Okay. Did you go in to work the next day after your injury?

A. No, ma'am, I couldn't.

Q. Do you know if Lathan Jackson went to work the next day?

A. I can't - - I believe he did, but I'm not for sure. I almost - - I believe he did, but I really don't know

for sure.

Q. Well, would it surprise you to hear that he said in his deposition that he went to work the next day after his injury, and when he got there he said, "I can't do this today." And when asked, "Who did you tell that to?" he said he told that to Jimmy King and to Kyle Holley. But you said you weren't there that day, right?

A. No, I wasn't.

Q. So do you think he wasn't telling the truth in his deposition?

A. I ain't going to say that.

Q. Do you think maybe he was just mistaken?

A. He's not a - - I wasn't there, so he couldn't have told me.

Q. Okay. So you think maybe he was just mistaken about that?

A. Yeah. I mean, yeah, he had to be mistaken about that.

Q. Okay. Now you said that the first time you went to see Doctor Abiseid, or I guess you said you saw his nurse, Nurse Pickle, was about three days after your accident maybe?

A. Yes, I think so.

Q. And you believe that your accident happened on August 8th?

A. I really don't - - I ain't sure of the dates at all.

The claimant was uncertain as to why he listed a date of injury as being August 23rd when he filed for partial disability with American Fidelity if his injury occurred on August 8th.

As to the various dates given for his injury, the claimant gave the following testimony:

Q. Okay, but the problem I have with that is that you

said you injured yourself on August 8th. The First Report of Injury from your employer notes that you claim you injured yourself on August 11th. You told me that you saw your doctor about three days after your injury. The first report from your doctor is August 24th. Your application for this disability is August 23rd. I'm just trying to determine what's the correct date of injury. Can you help me with that?

A. Man, I don't have all my paperwork, but, let's see, I don't know about the Doctor Jose. I went to him like three days, three or four days, after it happened, but I can't remember the date. But I didn't see Doctor Jose then, I seen his nurse or assistant or whatever.

Q. Right.

A. Unless - - I don't know why the days are so far apart like that.

On August 24, 2005, the claimant sought treatment from Dr. Jose Abiseid. Although these notes are not completely legible, it appears he reported that the claimant had a history of, "DDD disc of back" and had been apparently diagnosed in the past for a pinched nerve and chronic pain. He also noted that the claimant worked in a lumbar yard lifting and had been given back exercises before. Dr. Abiseid also noted "left sided swelling, and pain since yesterday, previous back injury." His assessment was lumbar strain and degenerative disc disease, for which he prescribed medication and follow-up care in two weeks.

The claimant returned to see Dr. Abiseid on September 7, 2005. He noted the claimant had very little discomfort and no lower back swelling.

On November 30, 2005, the claimant returned to see Dr. Abiseid for chronic back pain. The claimant had continued complaints of discomfort in the form of pain down the legs and difficulty

walking, for which an MRI was ordered along with a physical therapy evaluation.

The claimant underwent physical therapy evaluation on December 12, 2005. At that time the claimant reported having a recent exacerbation about two months ago in which he was moving three metal doors. The therapist also noted that an MRI had revealed diffuse disc bulge, a posterior annular tear neuroforaminal stenosis and canal stenosis.

On December 9, 2005, Dr. Abiseid reported the claimant had complaints of excruciating pain after physical therapy treatment. The claimant continued to treat conservatively with Dr. Abiseid. On January 5, 2006, he directed the claimant to refrain from working until released by a neurosurgeon.

Dr. Abiseid, reported the following in a letter dated June 2, 2006:

This is regarding your request for medical status on Mr. Kyle Holley. We first visited with Mr. Holley on August 24, 2005 for Lumbar Strain and Degenerative Disc Disease which apparently resulted from working in a lumber yard. We treated him with a muscle relaxer and analgesics. We also discussed back exercises with him. Mr. Holley came back to see us on November 30, 2005 complaining of pain radiating down his right leg making it difficult to walk. We ordered an MRI of the Lumbar Spine that was completed on December 2 2005 which showed a diffuse disk bulge with posterior annular tear at the L4-5 and diffuse disk bulge at L5-S1.

Mr. Holley followed up with us on December 5, 2005. The pain had decreased since the last visit but was still persistent. We ordered Mr. Holley to be evaluated and treated at Housley Physical Therapy here in Clinton. Mr. Holley came back on December 9, 2005 complaining again of severe pain in his lower back and down his right leg. We then scheduled Mr. Holley to see Dr. Richard Jordan, a Neurosurgeon in Little Rock.

Dr. Jordan found this to be an unstable spine and performed a posterior lumbar interbody fusion with instrumentation of L4-S1 on February 28, 2006 and followed up with Mr. Holley on March 8, 2006. See attached report. On April 10, 2006, Dr. Jordan requested that we do an AP and Lateral L-Spine x-ray with diagnosis of Lumbar Instability which was completed in our office and films were sent to Dr. Jordan.

Mr. office contacted Dr. Jordan's office on May 24, 2006 to request return to work status. According to Dr. Jordan's Nurse, Mr. Holley was not to lift over 30 lbs and was to be off work 12-16 weeks after his surgery. I have requested the April follow up report from Dr. Jordan's office but have not yet received this information. I will get that report to you as soon as I receive it.

Dr. Richard Jordan reported to Dr. Abiseid in a letter dated October 27, 2006:

I wanted to update you regarding your patient, Kyle Holley, who was in our office on 3/8/06 for a postoperative follow-up visit regarding his 2/28/06 posterior lumbar interbody fusion with instrumentation of L4-L5 and L5-S1. He states that he is doing well at this time and that he is very pleased with the results of his surgery as the leg pain that he was experiencing prior to surgery is now resolved. He states that he feels ready to return to work. He is still smoking at this time and we strongly cautioned him that to continue smoking might inhibit the graft incorporation. AP and Lateral x-rays of the lumbar spine show that the grafts and instrumentation are in good alignment.

We will not schedule a follow up visit at this time but he is to call our office and follow up with us as needed. We will continue to keep you apprised of his progress.

As always, I thank you for allowing me to participate in the care of your patients.

Adjudication

The claimant contends that he sustained a compensable back injury while working for the respondent on August 8, 2005, while delivering heavy doors to a customer. Arkansas Code Ann.

§11-9-102(4) (A) defines "compensable injury" as:

(i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4) (D). The claimant must prove by a preponderance of the evidence that he sustained a compensable injury. Ark. Code Ann. § 11-9-102(4) (E) (i).

A review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his back on August 8, 2005.

The evidence in this claim is replete with inconsistencies and contradictions. Specifically, I find that the alleged date of the injury contained in the medical records and other documentary evidence is confusing and conflicting. More importantly, I do not find the testimony of the claimant or Mr. Jackson to be credible in light of their inconsistent and varying accounts of the alleged incident as set out above.

In addition to this, the claimant essentially admitted he suffered from prior back problems dating back to a ninth grade injury while lifting weights, and during a 2004 work incident. Mr. King and Ms. Davis credibly testified that the claimant previously complained of debilitating back pain, and the claimant essentially admitted to this, which he stated resulted from carrying sheet

rock. During his initial visit of August 24, 2005 with Dr. Abiseid, the claimant reported a history of a pinched nerve and chronic back problems. He also admitted to having back soreness.

The claimant has given various dates as to when he was injured. Specifically, on his application for disability insurance with American Fidelity Assurance, the claimant reported that his symptoms first appeared or accident happened on August 23, 2005, and that he first consulted Dr. Abiseid for his back condition on August 24, 2005. On his First Report of Injury or Illness, the claimant reported his accident as occurring on August 11, 2005, and on the Form AR-C the claimant reported an injury date of August 8, 2005. Upon being questioned about the conflicting dates, the claimant conceded he was uncertain and may have been confused, but believes it happened on August 8th. The claimant testified he first sought treatment for his injury about three days after the incident. However, the first medical report demonstrates that the claimant did not seek treatment for his alleged August 8th back injury until August 24, 2005, and this date is reflected in his application for disability insurance as being the first date he consulted Dr. Abiseid for his back condition. At that time, he reported pain since work on yesterday, and made absolutely no mention of a work-related injury having occurred on August 8, 2005. The claimant admitted to having filed this service for treatment and other doctor's visits on his personal insurance, which is inconsistent with a work-related claim. He also admitted that he did not file for workers' compensation benefits until after his

claim for partial disability had been denied.

Although the claimant maintains he yelled and hollered when the alleged incident took place and that Mr. Jackson should have heard this, Mr. Jackson did not attest to the same and admitted he had not given any such testimony. Ms. Davis testified that the claimant indicated to her that his back problems were not work-related. In addition, the claimant maintains he missed approximately three days of work after the alleged August 8TH incident; however, he admitted time records demonstrated that he worked those days.

Considering all of the inconsistencies and contradictions as set out above, I think it would require conjecture and speculation to conclude that the claimant sustained a back injury while working for the respondent on August 8, 2005. As such, I am constrained to find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on August 8, 2005 while working for the respondent.

Having found that the claimant failed to prove by a preponderance of the evidence that he suffered a compensable back injury, I further find that the claimant is not entitled to any reasonable and necessary medical treatment for his current back problems, nor is he entitled to temporary total disability compensation or an impairment rating for this condition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed at all relevant times, including August 8, 2005.
3. The claimant's average weekly wage was \$381.97, which would entitle him to a temporary total disability rate of \$254.00, and a permanent partial disability rate of \$191.00.
4. The claim has been controverted in its entirety.
5. The claimant failed to prove by a preponderance of the evidence he suffered an injury to his back on August 8, 2005 during and in the course of his employment with the respondent.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge