

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708057

ROGER WEBB, EMPLOYEE

CLAIMANT

AVERITT EXPRESS, INC., EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED FEBRUARY 22, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on January 11, 2008, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE SIMMONS S. SMITH, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above styled claim to determine the claimant's entitlement to workers' compensation benefits. On November 6, 2007, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Roger Webb, Neil Pierce and Kurt Mosley coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Roger Webb, the claimant, with a date of birth of January 11, 1966, is a high school graduate with two (2) years of post-secondary education. Claimant has been a truck driver for seventeen (17) years. Claimant possesses a CDL, and, in accordance with same, undergoes periodic Department of Transportation physical. Prior to his employment with respondent-employer claimant worked as a truck driver for Southwestern Motor Transportation.

Claimant commenced his employment with respondent-employer in September 2006. Claimant denies that he had ever sustained an injury to his back prior to July 2007, or received medical or chiropractic treatment for back pain or complains prior to July 2007. In July 2007, claimant resided at 9300 Treasure Hill, in Little Rock, Ark. The claimant's mother resides at 3417 Lite Lane, Little Rock.

Regarding his employment with respondent-employer, the testimony of the claimant reflects that he underwent three (3) days of orientation beginning on September 6, 2006. The following week the claimant was issued a truck and began driving on the road for respondent-employer. Claimant described his job duties for respondent-employer as truck load driver, delivering truck loads from one state to another state. Claimant performed the afore job until the third week of March 2007. Thereafter the claimant became a combo driver.

In describing the duties of a combo driver claimant explained it was "city driver/dock worker/combo driver". As a city driver claimant was working the city pick up and delivering freight. Dock worker entailed working on the dock:

You're doing dock work to transport, removing freight from off one trailer to another one, you're staging it, reloading to another trailer for it to be shipped out that evening. (T. 63).

Claimant explained that re-loading freight entailed the use of a pallet jack or a forklift at the dock moving weights varying from five pounds to 2000 pounds. Regarding the combo driver aspect of his duties, claimant testified:

Combo driver you go like a shuttle driver from Little Rock to Memphis, Little Rock to Louisiana, Little Rock to Oklahoma, from Little Rock to Dallas. (T. 64).

The testimony of the claimant reflects that prior to July 3, 2007, he had never reported an on-the-job injury to respondent-employer. Claimant testified that he got to work on the morning of July 3, 2007, at approximately 9:00. Thereafter the claimant secured his pallet jack and loaded it on his trailer, hooked up his tractor (truck) to the trailer and left the terminal to commence his routes. Claimant testified that he did not go to Pine Bluff that particular day, but instead went to Stuttgart:

I stayed in Stuttgart for about two, two and a half hours. All my trucks are computerized, so it means that they can email us or give us another pickup on our Qualcomm. My Qualcomm had pickup at Hazen, Arkansas. I proceeded to Hazen, Arkansas. I got there I'm thinking about 11:30, 12:00 o'clock. From there they had a pickup for me to go to Jacksonville. It was - -

The first one I cannot remember the name of the street. It was over there by the Air Force Base. It was a customer who wanted to leave early because it wanted to get off and drink because I asked him about it. He wanted to get off work a little early. He wanted to have some drinks. So I got his one pallet, so I had two pallets on then. From there I went to another place on Redden Road. I picked up four pallets over there.

It was about - - I got there about 2:00. I stayed there for about 45 minutes to an hour. The freight wasn't ready completed, so I had to wait on the customer to complete the freight. I got four pallets from there. From there I went to Lamanco which is about seven minutes away. (T. 65).

The testimony of the claimant reflects that he arrived at Lamanco at approximately 3:40 to 3:45

p.m. Claimant noted that the normal hours of Lamanco for shipping and receiving are from 7:30 a.m. to 3:00, 3:30 p.m., Monday through Friday. The claimant testified that Lamanco was not open at the time he arrived on July 3, 2007:

When I pulled up into the parking lot the facility was closed. All drivers know that if you have freight in your trailer, you butt the trailers together. You put them at an angle to you can fit between the trailer. You climb up in the trailer and you move the freight from one trailer to another one. (T. 66).

Regarding his specific actions on July 3, 2007, at the Lamanco facility, the claimant testified:

Yes, sir. I proceeded my trailer, I got my pallet jack, put it under the first pallet up until the last pallet. When I proceeded to pick up the last pallet which is eight to ten inches different height in my trailer from the other trailer I was loading to, that's when I hurt my back.

I picked the pallet jack - - bent over, picked up. When I picked it up, pain shot around both sides of my waist. I had pain shot down the right side of my leg to my right foot.

Sit there for about 30 seconds, the pain went away, and I tried again. I picked the pallet up, put it into the trailer. I guided the trailer, got into my tractor and moved it over to another spot where we park the unloaded trailers. From that, I had pain shot down my waist again. I stood there for about 20 seconds. From there I downloaded my trailer, unhooked the king-pin and proceeded to hook up to the next trailer.

I hooked up to the next trailer. You have to log all your paperwork until the Qualcomm. The dispatcher could see everything on the computer showing that your pickups and what time you got there and what time you leave. (T. 66-67).

Thereafter, the claimant testified that he returned to terminal, however there was not a door assigned to the trailer. Claimant explained:

You put the trailer in the door, I downloaded the trailer and went in and told Neil - - I'm sorry, I told Kurt [Mosley] I had a back

problem that I got hurt at Lamanco. His words was that, "We got another run for you going to Home Depot in Cabot, Arkansas, and proceed on to Searcy to Wal-Mart." (T. 68).

The claimant completed the dispatches as directed by Mr. Mosley. Claimant explained what happened once he reached Searcy:

I had a little pain in my back. It wasn't like it was at first. You really don't have a spot to park in at Wal-Mart in Searcy. You just set your dolly down anywhere really. I picked up an empty trailer, I put in my Qualcomm that I was empty and headed back to Little Rock, and Kurt said, "10-4, come on back in." I came back - - I really didn't speak to Kurt. I just asked him was we done for this evening and he said yes. (T. 69).

Claimant estimated that he completed his shift at approximately 8:00 or 8:30 p.m., and thereafter clocked out to go home. The testimony of the claimant reflects that he was unable to drive home due to residual pain in his back of his injury, and, as a consequence, stopped at his mother's house and spent the night. Claimant's testimony reflects that around 2:00 or 3:00 in the morning he caught cramps in both legs and was unable to get any further sleep. Claimant noted that he "kind of slept during the 4th of July". The testimony of the claimant reflects that as a result of the afore he did not have a festive 4th of July holiday.

Claimant reported for work as scheduled on July 5, 2007. Regarding the afore, the testimony of the claimant reflects:

The next morning I reported back to work. Neil was in the drivers' lounge and I reported that I had hurt myself at Lamanco about 3:00, 3:45 that evening, and he said, "Did you go to the emergency room?" I said, "No, sir, I thought I needed some paperwork." He walked away from me. (T. 70).

Claimant noted that Mr. [Neil] Pierce did not write a report regarding the reported injury, nor did he ask if the claimant wanted to go to the doctor.

Following conversation with Mr. Pierce, claimant testified that he got his paperwork and assignment to make his deliveries. The claimant testified regarding his symptoms as he performed his job duties on July 5, 2007:

Maybe one time, but I did all my deliveries, came back in. There was some - - there was two bundles of pipe that had busted. I had to help recoup it up, and I had to do that on my knees. I couldn't bend over and do it because I was uncomfortable by doing that, so another employee helped me with that, and after that I went home. (T. 70-71).

Claimant explained that evening after arriving home he was uncomfortable due to residual of his injury and unable to sleep. The following morning claimant called in to the doctor, Dr. Brenda Covington, whom he understood to be respondents' designated physician.

Claimant testified that he followed the recommendations of Dr. Covington, to include physical therapy for eight weeks. Claimant testified that he called and reported to Neil Pierce every day to let him know his status and the fact that he was attending physical therapy.

Claimant testified that he underwent a MRI which disclosed a "pinched nerve". Following the MRI claimant testified he was referred to a neurologist. Claimant noted that during the first visit with the neurologist he was provided two (2) prescription and a discussion was had regarding future treatment.

Claimant testified that he later sought and obtained treatment from a chiropractor pursuant to a recommendation of his mother. Claimant was seen by the chiropractor for six (6) weeks. The testimony of the claimant reflects that his treatment for his back injury included eight (8) weeks of physical therapy, six (6) weeks of chiropractic adjustments, and two (2) visits to the neurologist. Claimant was ultimately released by the chiropractic physician to return to work on October 3, 2007. Claimant actually resumed employment/work on October 16, 2007.

Claimant explained that while he was released to return to work on October 3, 2007, and resumed work on October 16, 2007, he received a letter from Neil Pierce directing him to return to work by October 23, 2007, or his employment would be terminated. Claimant testified that he attended physical therapy that morning and thereafter reported for work.

The testimony of the claimant reflects that he return to the employment of respondent-employer for one (1) week. Claimant's testimony reflects, regarding the afore:

I worked there a week and the next week I had a run delivery that Monday. I worked that Monday and then the following, that evening, my phone service was off when I got home, so they had no way to get in touch with me that Tuesday morning.(T. 74)

claimant testified that all the drivers were on call. Claimant noted that while he had been called previously by Mr. Pierce or Ms. Janice White, he had never been called every morning or that early. Regarding the purpose of the call by Mr. Pierce, the testimony of the claimant reflects:

He said he had a load for me. I had - - the week prior to that, they had to call on Neil Pierce to go running me to Memphis one Friday night when I had two drivers underneath me for seniority. I spoke with - - a lady in Human Resources said, "We do have seniority lists," and I spoke with her and said, "I was told we don't have seniority," and she said, "Seniority doesn't matter."(T. 75).

Claimant further testified:

The following week I was given - - that following Tuesday morning was getting a load in at 4:00. I had a phone call at 4:00 that morning. (T. 75).

Claimant testified that his employment was not terminated until a week later.

The testimony of the claimant reflects that in addition to reporting his July 3, 2007, work-related injury to Kurt Mosley on the date of its occurrence and to Neil Pierce on July 5, 2007, he also contacted the Human Resource Department of respondent-employer, on Friday, July 6,

2007, and reported his injury.

The claimant is 6'7" tall and weighs 310 pounds. Claimant testified that under his normal work schedule with respondent-employer he was off work at about 7:00 or 8:00 p.m. Claimant denies that Neil Pierce offered to allow him to go to the doctor on July 5, 2007.

On cross-examination, claimant acknowledged that during the time he was undergoing physical therapy he did go to the casino on one occasion, however noted that it was uncomfortable for him. Claimant acknowledged that normally his delivery route entailed Stuttgart/Pine Bluff area, however on the date of his accident, July 3, 2007, he did not go to Pine Bluff.

The testimony of the claimant reflects that in highschool he played basketball and in his senior year he was seen by a chiropractor. Claimant also played college basketball at UCA.

Claimant explained why he unloaded six (6) pallets from his trailer at Lamanco onto another trailer rather than bring the pallets back to the service center at respondent-employer:

Because that would be time consuming for me to leave Jacksonville where I picked those pallets up, at and to bypass Lamanco where I was reported to go and get a loaded trailer which was halfway full to go back across to the service center, then come back with the empty trailer. (T. 81).

Claimant did not call in for assistance noting that driver are not assisted with trailer, but are by themselves.

The testimony of the claimant reflects that on Friday, July 6, 2007, he was unable to go to work due to residuals of his injury. Claimant testified that he called respondent-employer at the North Little Rock terminal on the morning of July 6, 2007, and talked to either Janice Wayne or Neil Pierce. At the time of the afore call, claimant testified that he relayed that he was in a lot of

pain, had to go to the doctor, and went to see Dr. Covington. Claimant had been informed by another driver on Thursday, July 5, 2007, that if he had to go to the doctor for a work-related injury he should go to respondent's doctor, Dr. Covington. Later claimant contacted the Human Resources Department in Cookeville, Tennessee, and reported the injury.

The testimony of the claimant reflects that as some point he was informed that respondents were denying his claim. Claimant did receive a bill for his treatment under the care of Dr. Covington. Claimant was referred to a neurologist by Dr. Covington, however does not remember his name.

Claimant was provided a written release to return to work by the chiropractic physician on October 3, 2007, however did not provide the release to supervisory personnel of respondent-employer. Claimant acknowledged that at the time of the October 3, 2007, chiropractic release he was physically capable of resuming his employment duties with respondent-employer. Claimant's testimony reflects that he telephoned Neil Pierce and informed him that he was ready to return to work. At that time, claimant testified that Mr. Pierce informed him that he would have to obtain a release from Dr. Covington in order to return to work. (T. 85-87). Claimant returned to Dr. Covington and obtained the release on October 16, 2007.

Neil Pierce is employed as the service center director of the North Little Rock facility of respondent-employer, with duties which entail supervising and managing fleet operations at that location. Mr. Pierce has been employed in the afore capacity since November 2004. Mr. Pierce testified that he had reviewed the claimant's file in preparation for the hearing. In explaining the basis for contesting the compensability of the claimant's claim Mr. Pierce testified:

It's under our understanding that the injury, said injury, did

not happen while at work. (T. 8).

Mr. Pierce acknowledged that he had no information as to where the claimant's injury occurred, offered as a basis for the afore:

Well, the basis is the fact that it was - - there was a significant delay in his reporting the injury. (T. 8-9).

Mr. Pierce concedes that he has not been told by anyone that the claimant's injury occurred elsewhere. Further, Mr. Pierce acknowledged he has no proof that the claimant had any prior injuries. In identifying the "significant delay" Mr. Pierce testified:

About a day and a half. He didn't report the injury until the 5th of July, the day after a holiday. Supposedly it happened the afternoon of the 3rd. (T. 9).

Mr. Pierce concedes that he was aware of the fact that the claimant alleged that he informed his immediate supervisor, Kurt Mosley, of the injury on the date of its occurrence.

Mr. Pierce asserts that he became aware of the claimant's injury on July 5, 2007, because of his own inquiry:

He told me on the morning of the 5th because I asked him - - he looked to be in pain when he walked through the building, and I just happened to be in the drivers' room talking to other drivers that morning, and I noticed a grimace on his face, and I asked him if he was okay.

And I asked him also did he need to go to the doctor that day, and he said no. (T. 10).

Mr. Pierce maintains that the claimant's demeanor or evidence of pain by grimacing was similar to "the same situation before months prior to this". (T. 10).

Respondent-employer was closed for business on July 4, 2007. Nevertheless Mr. Pierce maintains that the claimant could have reported any work-related injury to him by calling him on

his cell phone at home. The claimant worked eleven (11) hours on July 3, 2007. Mr. Pierce worked from 6:00 a.m. until 5:30 or 6:00 p.m. on July 3, 2007, and was not present when the claimant returned to the service center at the conclusion of his route. In the instance of the claimant having sustained an injury on July 3, 2007, Mr. Pierce testified that the injury should have been reported to the claimant's immediate supervisor, Kurt Mosley.

Mr. Pierce testified that the claimant did eventually go to the doctor, the Baptist Health Clinic on Lindsey Road, "where he was instructed to see our company doctor". (T. 14). Mr. Pierce noted that the claimant called in to work on Friday morning, July 6, 2007, "and at some point that morning he was instructed to go to our company doctor". (T. 14). Mr. Pierce's testimony reflects that Dr. Brenda Covington has been the company doctor during the entirety of his employment at the service center.

Mr. Pierce acknowledged that Dr. Covington determined that the claimant had sustained an injury and that she took him off work relative to same. Further, Mr. Pierce acknowledged that the reports of Dr. Covington regarding the claimant reflects a history of an on-the-job injury for which the claimant was prescribed physical therapy, and directed to undergo a MRI scan in addition to being directed to remain off work. There is not a disputed regarding objective findings at the L5-S1 level of the claimant's spine.

Mr. Pierce testified that Dr. Covington referred the claimant to a neurosurgeon, however he has not seen any reports of the specialist. Mr. Pierce noted:

I don't recall seeing any of those reports. I believe that at some point he went to a chiropractor. At the time he called me and told me that he had been released to return to work, he told me that a chiropractor fixed his back is what he told me. (T. 17).

Mr. Pierce described the nature of respondent-employer's business:

We transport less than truckload shipments, which could be anything that's not prohibited to haul by our company, where from tiers to anything that you would see in a Wal-Mart, any retail stores, any manufacturing facilities. As long as it will fit on a 53-foot trailer, we'll haul it. (T. 19-20).

The records of respondent-employer reflect that the claimant worked 9.27 hours on July 3, 2007.

Mr. Pierce's testimony reflects regarding the route that the claimant worked on July 3, 2007:

Your Honor, he was regularly assigned a route that took him Little Rock, North Little Rock area, down to Pine Bluff and occasionally through Stuttgart. I would say 85 percent of the time he was employed with us in this local capacity, he ran the Pine Bluff route as his main route. (T. 21-22).

Mr. Pierce asserts that on July 3, 2007, the claimant make his normal route that took him down to Pine Bluff and then through Stuttgart. While Mr. Pierce is uncertain what drops the claimant made in Stuttgart on July 3, 2007, his testimony reflects:

Normally he would be routed through Stuttgart initially in the morning, early morning, and then end up his route that day in Pine Bluff where he might pick up and be routed back to the service center. (T. 22).

Regarding the normal practice of drivers with returns on their trucks:

Normally we have those drivers bring their trailer back to the service center, and if he were to be re-dispatched, he would grab an empty trailer from the yard and continue on to his next dispatch. (T. 23).

Mr. Pierce asserts that the records reflect that the claimant "went straight from Pine Bluff to Jacksonville". (T. 23). The Jacksonville stop was at Lamanco. Mr. Pierce's testimony reflects regarding the afore:

Lamanco is our customer. We pick up approximately four to six trailers a day that are spotted. They manufacture whirlybirds for rooftops and air vents for the home market. We have spotted trailers

there, so they load their product on our trailers throughout the day and at the end of the work day, we would dispatch a driver with an empty trailer to that location and pick up a full trailer and bring it back to our service center. (T. 23-24).

Mr. Pierce maintains that on July 3, 2007, the claimant was dispatched from Pine Bluff to Lamanco. Mr. Pierce asserts that once the claimant picked up the loaded trailer at Lamanco he would have returned to the service center and dropped it there. Regarding any loading or unloading of the trailer, Mr. Pierce testified:

Normally our operation works with Lamanco since it is our number one customer. They do work very well with us in regard to our loading product, and we normally set those trailers up as head loads, so once we spot them to our dock, they are immediately loaded upon it. So we really don't have to touch the product once it gets back to us. (T. 24).

Mr. Pierce maintains that the trailer that the claimant took from "Pine Bluff to Lamanco" should have been empty, and had it not been empty:

He would have - - sometimes he will be dispatched to Lamanco, depending on what he's got. A lot of times our drivers, once empty, they all take a pallet jack and a two-wheel dolly with them. We ask them to swing that equipment onto the Lamanco trailer if there's room to do so. If there's something that he's able to get off and swing over, of course, we have him do that as well. (T. 25).

The testimony of Mr. Pierce reflects that the claimant worked a full day on July 5, 2007.

Mr. Pierce described the normal activities of a driver for respondent, which would have included the claimant:

Would have been a normal workday for him. Again, delivering freight in and around the Pine Bluff and Stuttgart area which consists of driving a truck obviously, hooking up a truck which consists of getting - - bending underneath the trailer to insure the king-pin is fastened, dollying up the trailer, climbing in and out of the rear of the trailer. Possibly, depending on what deliveries he had, hand unloading freight from the

rear of the trailer to the customers' locations. So there's a lot of physical activity sometimes in those jobs. (T. 28-29).

Mr. Pierce maintains that there was no further reporting of injury by the claimant to him on July 5, 2007, at the conclusion of the day.

Mr. Pierce testified that pursuant to policies and procedures of respondent-employer the claimant should have reported "that injury immediately". (T. 29). When questioned regarding whether there was a "set time" to report an injury, Mr. Pierce testified:

I'm want to say if it's significant enough from what I've read that he had to take some time to regain I guess his strength or his pain tolerance, he should have reported something like that immediately. If it was something that would have been a safety issue where he could not continue to drive, we would have had to dispatch another driver to relieve him of duty on site.

* * *

As soon as possible. It's customary if you have an injury, we've always told our guys through different safety meeting that, you know, report. (T. 30).

Mr. Pierce concedes that "as soon as possible" could vary from individual to individual. The testimony of Mr. Pierce reflects that the claimant did not violate any set rule with respect to the reporting of his injury. Based on the statement of the claimant that he read Mr. Pierce concedes that the claimant "pretty much complied with" the policy of respondent with respect to the reporting. (T. 31).

Mr. Pierce testified that he does not know for a fact that the claimant had his cell phone number during the pertinent period. Mr. Pierce acknowledged that drivers of respondent do have to pick up product within the course of their employment duties.

Mr. Pierce, in explaining his employment position with respondent, testified that in

another field it would be called “the terminal manager. Inclusive in his duties is the hiring of drivers. Regarding the claimant’s employment, Mr. Pierce testified:

Roger was initially hired in our truck load division which is hired out of our corporate office. We had a position available what we term our combo position which is a local city driver, dock associate/shuttle driver, and he was hired in that position, transferred into that position. (T. 33).

The testimony of Mr. Pierce reflects that the claimant had to undergo an initial physical upon entering the truck loading position. The testimony of Mr. Pierce further reflects that the claimant was physically able to perform his job without any problems until July 2007.

While asserting that he had seen the claimant grimace in pain prior to July 2007, Mr. Pierce acknowledged that the claimant had never registered a complaint of an injury to himself either on the job or away from work. The testimony of Mr. Pierce reflects, regarding prior complaints of pain by the claimant:

I can recall us talking around at our old center, our old location, and I don’t recall the specifics of the conversation, but I do remember him talking about, you know, his back or his knees or his feet or even complained about having gout one time, and complained that that was an issue that he was having problems limping one day. So I do remember that very specifically. (T. 34).

There is evidence that the claimant missed work because of his back or took medication relative to his back prior to July 2007.

Mr. Pierce acknowledged that on July 5, 2007, the claimant told him that he had reported his work-related injury to his immediate supervisor, Kurt Mosley, on July 3, 2007. The testimony of Mr. Pierce reflects that the claimant fully discharged his employment duties on July 3, 2007, and on the morning of July 5, 2007, appeared to be in pain:

It was quite a surprise to me when I saw him in pain, so naturally I asked him about his well-being and eh had told me he hurt his back. I asked him if he needed to go to the doctor, and he said, "No, I think I can make it." At that point, I asked him did he report his injury, and he said, "Yes, I reported it to Kurt."

He called in sick on the 6th, Friday the 6th, and explained that he would not be in, that he had to go to the doctor. (T. 35-36).

The testimony of Mr. Pierce reflects that in his dealings with the claimant he had found him to be a credible and honest individual. Mr. Pierce testified that the decision to controvert the compensability of the claimant's claim was not solely his alone but also the corporate office through their Human Resource Department.

Mr. Pierce testified that the claimant's employment with respondent-employer ceased in mid or late November 2007. Regarding the claimant's return to work when released to do so on October 3, 2007, Mr. Pierce's testimony reflects:

Yes, I believe he - - once he came back to work and after he passed our company doctor's physical and returned to work, I believe he worked about two weeks after that. (T. 37).

Mr. Pierce asserts that the termination of the claimant's employment was "due to attendance". (T. 37). In elaborating on the claimant's attendance problem, Mr. Pierce testified that the same was due "partly" to the time that claimant was off work because of the injury. The testimony of Mr. Pierce reflects, regarding the afore:

He had - - we've got attendance points, and he did have some attendance points already prior to him leaving work on the 6th, I guess. With those attendance points and the ones he accumulated while he was gone for his back injury, when he returned to work, I sat down with Roger and I explained, "This is what the decision is on your attendance record." I sat down with him and I explained to him that, "If you're late or if you miss another day of work between now and the end of the year, it will be your 15th point." He was at 14 points at the time he

returned to work. Due to an issue of the phone situation, we could not contact him one morning and he missed his 15 points, so we had to terminate his employment. (T. 37-38).

During further examination, Mr. Pierce testified that the claimant telephoned and relayed that he had been released his chiropractor to return to work on October 3, 2007, with his back having been fixed by same. Mr. Pierce maintains that the claimant did not come back to work the next day. Mr. Pierce's testimony reflects:

We tried to contact him on several occasions after the fact, and apparently his phone had been disconnected. We kept getting a recording. Therefore, two or three days goes by, I contact our Human Resource Department, and they ask me to write him a letter giving him two weeks to report back to duty. I believe the letter was - - I'm not sure the date of the letter, but I believe he had until the 24th of October before we terminated his employment. (T. 91).

Mr. Pierce testified that after the letter the claimant contacted him and that he was set up to be cleared for work evaluation by Dr. Covington, the company doctor.

Mr. Pierce testified that he had a conversation with the claimant on the morning of July 6, 2007, during which time he personally asked the claimant to go to the company doctor, Dr. Covington.

Mr. Pierce's testimony reflects, regarding the afore:

He had mentioned that he was going to his own personal doctor, and I told him, no, we had to go to our company doctor if it was a workmen's comp or an injury on duty. (T. 93).

Mr. Pierce acknowledged that the claimant was in Stuttgart on July 3, 2007.

Mr. Pierce testified that at the time of his July 5, 2007, conversation with the claimant, claimant relayed the mechanics of his back injury at Lamanco on July 3, 2007. Regarding his actions following the afore conversation with the claimant, Mr. Pierce testified:

I did call the Workmens' Comp Department to find out of there

had been any injuries reported. At the time it was, between 9:00 and 9:30 in the morning, if I recall, and I found supervisor Kurt Mosley who Roger has explained that he reported it to doesn't come in until 12:30 in the afternoon, or roughly between 12:00 and 12:30, so at that point in the morning, I didn't have an opportunity to find out if this injury had actually been reported or not. (T. 97).

Mr. Pierce maintains that "roughly later that morning, early afternoon, around lunchtime" he telephoned Mr. Mosley to inquire if the claimant had reported the July 3, 2007, back injury to him. (T. 98). Mr. Pierce did not complete any paperwork encompassing the claimant's July 5, 2007, reporting of the July 3, 2007, back injury:

No, sir, not at that time. Being that he had already told me earlier that morning that he didn't need to go to the doctor, I didn't feel it was necessary at that point to fill out an injury report at that time.

That wasn't done until Friday, the next day when he said he needed to go to the doctor. (T. 98).

Mr. Pierce's testimony reflects that he telephone a 1-800 number to report the claimant's injury, however he himself did not completed any paperwork. Further, due to the nature of the reporting procedure Mr. Pierce acknowledged that the claimant was not furnished a Form AR-N. (T. 99).

The testimony of Kurt Douglas Mosley reflects that he is employed by respondent-employer as a front line leader and his duties include working operations, dispatch, loading truck. Mr. Mosley has been employed by respondent-employer for over seven (7) years. Mr. Mosley was the claimant's immediate supervisor during his employment with respondent-employer. Mr. Mosley denies that the claimant reported to him on July 3, 2007, that he had been injured while performing his job duties. Regarding when he first learned that the claimant was injured Mr. Mosley testified:

This was after my vacation. I went on vacation the 5th and 6th. I found after that point that he was hurt. (T. 40-41).

Mr. Mosley estimates that he saw the claimant on two (2) occasions on July 3, 2007:

I think maybe he came back once during the afternoon to pick up the other trailer to go back out, and then I saw him at the end of the shift. (T. 41).

Mr. Mosley testified that the claimant was dispatched to Stuttgart on July 3, 2007, for two to three hours, and that from there he was dispatched to Lamanco for a pickup. Thereafter, Mr.

Mosley's testimony reflects:

Then he came back to the service center from Lamanco to drop a load he'd brought in, and then he was dispatched to Searcy to drop a load. (T. 41).

Mr. Mosley maintains that upon the claimant's return trip from Searcy the shift was over and the claimant went home. The records of respondent-employer reflect that the claimant worked 11 hours on July 2, 2007; 9.27 hours on July 3, 2007; and 10.33 hours on July 5, 2007. Mr. Mosley testified that on July 3, 2007, he came into work at the middle of the shift and the claimant had already left for his first dispatch by the time he arrived at 12:00 noon or 12:30 p.m. Mr. Mosley is uncertain what time the claimant was dispatched to Lamanco on July 3, 2007, only that it was in the afternoon/evening.

Mr. Mosley testified that when he comes in as leader on nights or evenings he usually arrives between 12:00 noon and 12:30 p.m. and remain until roughly 9:00 p.m. Mr. Mosley's testimony reflects that the Stuttgart/Pine Bluff area is one of the claimant's normal routes - -that he runs day in and day out. Regarding his knowledge that when the claimant got to Lamanco he had to unload six pallets from the trailer he had onto the trailer he was picking up on July 3,

2007, Mr. Mosley testified:

After the fact he did, after it was already done, but it was like one to two pallets. I never knew it was that many pallets and that heavy. (T. 47).

Mr. Mosley asserts that when the claimant returned to the service center to drop of the trail from Lamanco he did not indicated that he was in any kind of pain or having problems physically. Further, Mr. Mosley testified that the claimant did not indicate to him that he felt that had hurt his back during the trailer transfer at Lamanco. Claimant was dispatched to th Searcy location via a manifest, which was prepared by Mr. Mosley, so showing. Mr. Mosley denies having any conversation with the claimant regarding the Searcy dispatch. Upon the claimant's return to the service center following the Searcy dispatch, Mr. Mosley testified that the claimant relayed that he was tired, however he did not say anything about his back being hurt either on that run or earlier.

Mr. Mosley acknowledged that respondent-employer issue each driver a pallet jack and a two-wheel dolly to be used in lifting and moving pallets. The pallet jack has the capability of lifting up to 1500 pounds of freight. Mr. Mosley acknowledged that he is unaware of the hours of Lamanco's shipping and receiving department.

During further examination Mr. Mosley's testimony reflects that while he saw the claimant on at least two (2) occasions on July 3, 2007, the time was at the time of the Searcy dispatch, "and that was probably after 6:00 o'clock in the evening". (T. 58). With respect to when he first learned that the claimant had moved some pallets at Lamanco Mr. Mosley's testimony reflects:

Yes, I understood there was a few pallets that he had to move,

and I did not know of the circumstance beforehand because normally drivers will come back and unload the particular pallets so they can take an empty trailer up. If it was that magnitude of weight, it would just be unbelievable to me to move that type of weight.

That evening when he came back. (T. 59).

Mr. Mosley asserts that the claimant did not report an injury to him on July 3, 2007, and has never done so.

The medical in the record reflects that the claimant was seen by Dr. Brenda Covington on July 6, 2007. A Patient Information Sheet completed at the time of the initial visit to Dr. Covington reflects a history of the claimant's injury consistent with his testimony before the Commission and at the time of his July 5, 2007, encounter with Neil Pierce of unloading freight off one trailer onto another on July 3, 2007. (JX. #1, p. 1). Claimant was referred by Dr. Covington for an MRI lumbar scan on July 9, 2007, for complaints of back pain with right lower extremity radicular pain. (JX. #1, p. 2). The record reflects the presence of a July 11, 2007, prescription for medication authored by Dr. Covington on behalf of the claimant. (JX. #2, p.7).

The MRI scan was performed on July 10, 2007, at Westside Open MRI. The MRI scan disclosed L5-S1 rightward "non-avulsion type" disc protrusion; spondyloarthropathic changes at L3-4 results in moderate central canal encroachment and moderate symmetric biforaminal narrowing; and spondyloarthropathic changes involving the lower thoracic segments results in moderate central lateral canal encroachment. (JX #1, p. 11-13).

The claimant underwent physical therapy at Associates Physical Therapy pursuant to the referral of Dr. Covington. A July 12, 2007, correspondence by the physical therapist, Nathan Tumilson, to Dr. Covington details a history of the claimant's July 3, 2007, injury as well as

objective finding observed during the physical therapy to include a decrease in the L S lordosis. (JX. #1, p. 14-19).

A July 18, 2007, Work Status Report authored by Dr. Covington relative to the claimant reflects a diagnosis of “Lumbar Strain/L5,S1 Disc Herniation”. The afore report also denotes the claimant’s injury as being work-related with directions to continue exercises, and medication. (JX. #1, p. 5). During a August 1, 2007, visit to Dr. Covington, the Work Status Report of the same date reflects that the claimant was released to limited/modified work duty and was also referred to a neurosurgeon. (JX. #1, p. 8).

The medical bills in the record reflects that the claimant was seen at Neuroscience Associates PA, 9601 Lile Drive Ste 750, in Little Rock on two (2) occasions. The first of the afore visits was August 30, 2007, as a new patient neuro consultation. The claimant was next seen on October 2, 2007, for neuro checkup. (JX. #1, p. 25).

An October 3, 2007, report of Dr. William G. Carbary, D.C., regard the claimant reflects, in part:

Mr. Webb is released to return to work. He currently is a systematic regarding his low back disc pathology. Upon resuming work, I will monitor his progress to assess his ability to sustain re-employment. (JX. #1, p. 20).

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.

2. On or about July 3, 2007, the relationship of employee-employer-carrier existed among the parties.

3. On or about July 3, 2007, the claimant earned an average weekly wage of \$803.52, which generate weekly compensation benefit rates of \$504.00/\$378.00, for temporary total/permanent partial disability.

4. On or about July 3, 2007, the clamant sustained an injury to his back arising out of and in the course of his employment with respondents.

5. The claimant was temporarily totally disabled for the period beginning July 6, 2007, and continuing until October 3, 2007.

6. Respondents unreasonably refused to allow the claimant to return to work during the period October 4, 2007 through October 15, 2007, while work was available for him within his restriction. The evidence preponderates that the claimant is entitled to additional compensation benefits at his average weekly wage of \$803.52, pursuant to Ark. Code Ann. §11-9-505 (a), during the period of unreasonable refusal of respondent-employer to return him to work.

7. Respondents were notified of the claimant's July 3, 2007, injury on the date of its occurrence, and failed to provide medical treatment in accordance with Ark. Code Ann. §11-9-508.

8. Treatment rendered to the claimant under the care of Dr. Brenda Covington, as well as referrals therefrom, and Dr. William G Carbary, was reasonably necessary in connection with the claimant's July 3, 2007, compensable injury. Respondents shall pay all reasonable hospital and medical expenses arising out of the injury of July 3, 2007.

9. The respondents have controverted this claim in its entirety.

CONCLUSIONS

_____The claimant asserts that while within the course and scope of his employment with respondent he sustained an injury to his low back on July 3, 2007, which required medical treatment and resulted in a period of total incapacitation from engaging gainful employment. Claimant seeks corresponding medical and indemnity benefits as well as controverted attorney fees. Respondents deny that the claimant sustained a work-related injury and maintain that any complaints suffered by the claimant are either the product of a pre-existing condition or other activities outside of his employment.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions. The claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. *Georgia-Pacific Corporation v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). Pursuant to Ark. Code Ann. §11-9-102 (4)(A)(i), an accidental injury is caused by a specific incident, identifiable by time and place of occurrence.

In order to prove a compensable accidental injury, the claimant must show that he sustained an accidental injury; that the injury caused physical harm to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Further, the claimant must establish a compensable injury by medical evidence, supported objective findings. Ark. Code Ann. §11-9-102 (4)(D). Objective findings being those findings which cannot come under the voluntary control of the patient. Ark.

Code Ann. §11-9-102 (16).

In the instant claim, the claimant successfully passed a physical examination prior to his employment with respondent. The evidence preponderates that the claimant successfully discharged his assigned job duties, without physical limitations or restrictions, from the date of his employment in September 2006 through July 2007. There is no credible evidence in the record to reflect that the claimant sought or required medical treatment relative to his back prior to July 3, 2007. Further, there is no credible evidence that the claimant suffered from or registered complaints regarding his back pain prior to July 3, 2007.

The evidence preponderates that while unloading pallets from one trailer onto another at the Lamanco facility in Jacksonville, Arkansas on the afternoon of July 3, 2007, claimant sustained an injury to his back which resulted in the immediate onset of pain in his lower back which radiated down his right leg. Upon regaining his composure, claimant completed the task and ultimately returned to the service center or terminal of respondent. The claimant reported the occurrence of the back injury growing out of transferring the pallets to his immediate supervisor, Kurt Mosley. Mr. Mosley did not document the reporting of the claimant but rather dispatched the claimant a load in the Searcy, Arkansas area. Once the claimant completed the Searcy load and returned to the service center his work day was completed.

Contrary to the testimony of the service center director/terminal manager, Neil Pierce, the claimant did not run his regular route, which would have included Pine Bluff, on July 3, 2007. Respondent-employer was closed for business on Wednesday, July 4, 2007. Kurt Mosley, the claimant's immediate supervisor, was scheduled off on vacation on July 5, 2007 and July 6, 2007. Indeed, once Mr. Mosley completed his shift on July 3, 2007, he was effectively on vacation until

Monday, July 9, 2007.

The claimant's symptoms growing out of the July 3, 2007, back injury were such that once he complete his last run and returned to service center concluding his work shift he was unable to drive to his residence. Claimant instead stopped at his mother's home where he spent the night and the following day, July 4, 2007, recuperating. There is no evidence in the record to reflect that the claimant suffered an injury to his back over the 4th of July holiday. Indeed, the credible evidence is to the contrary.

Upon reporting for work at his regular time on Thursday, July 5, 2007, the claimant's injury was reported to the service center director/terminal manager, Neil Pierce. Claimant disclosed the mechanics of the injury - - moving the pallets, the date of its occurrence - - July 3, 2007, and the fact that he had reported the injury to his immediate supervisor - - Kurt Mosley. Through his conversation with another driver/co-worker, claimant learned the identity of respondents-designated medical provider, Dr. Brenda Covington.

An incident/accident report was not completed by Mr. Pierce on July 5, 2007, when he was made privy to the claimant's on-the-job injury. As a consequence of the afore, the claimant was not provided Form AR-N, Employer's Notice to Employee form, pursuant to Ark. Code Ann. §11-9-514 (c). Claimant completed his shift on Thursday, July 5, 2007. The claimant was unable to work on Friday, July 6, 2007, due to his injury.

The claimant was seen by respondents' designated medical provider, Dr. Brenda Covington on Friday, July 6, 2007, reported his need for treatment as being work-related, and provided a history of the July 3, 2007, pallet transfer efforts within the course and scope of his employment. The medical reports in the record reflect that claimant remained under active

treatment relative to his July 3, 2007, work-related back injury from July 6, 2007, through October 3, 2007. In addition to the objective findings disclosed on the July 10, 2007, lumbar MRI scan, the medical records reflect a decrease in L/S lordosis. Claimant was prescribed physical therapy, medication, and a neurosurgical referral. The evidence further reflects that the claimant received chiropractic treatment relative to July 3, 2007, compensable back injury under the care of Dr. William G. Carbary.

The credible evidence reflects that following the failure of supervisory personnel of respondent at the local facility to address his reporting of the injury the claimant ultimately contacted the Human Resource Department of respondent-employer at the corporate offices on July 6, 2007. There is evidence to reflect that the Form 1A-1, Workers Compensation - First Report of Injury or Illness, was completed by Mr. Pierce, the service center director on July 13, 2007.

The credible evidence in the record reflects that claimant sustained an injury to his lower back on July 3, 2007, while transferring pallet from one trailer to another while at the Lamanco facility in Jacksonville. The injury was reported to his immediate supervisor on July 3, 2007, however was not documented or addressed. Claimant reported the July 3, 2007, injury to the service center manager on July 5, 2007. Again, the reporting was not documented or addressed. Claimant was incapacitated from engaging in gainful employment on Friday, July 6, 2007, notified the local facility of respondent-employer, and later notified the corporate office of his injury.

The assertion of respondent-employer that the claimant's delay in reporting the July 3, 2007, work-related injury until July 5, 2007, constituted a "substantial" delay is unreasonable,

particularly in light of the fact the its operations was closed for business on July 4, 2007.

Further, the credible evidence in the record reflects that the claimant reported the injury to his immediate supervisor on the date of its occurrence. Additionally, the afore information was relayed by the claimant to the service center manager on July 5, 2007. The report of the injury was not documented by respondent-employer until July 13, 2007, with the filing of the Form 1A-1. Supervisory personnel of respondent-employer acknowledged that there was not in place a specific time frame within which an injured employee was to provide notice of an injury. If indeed respondent-employer controverted/denied the present claim of the claimant based on a “substantial delay” in reporting the injury the action is arbitrary and capricious.

Upon receiving initial medical treatment on July 6, 2007, from Dr. Brenda Covington relative to the July 3, 2007, work-related low back injury, claimant was provided medical treatment, directed to remain off work, and referred for further diagnostic studies. Claimant was referred to a neurosurgeon by Dr. Covington for further treatment of his back injury. Rather than under go surgery claimant elected to obtain chiropractic treatment, and received same under care of Dr. William G. Carbary.

The claimant has sustained his burden of proof by a preponderance of the evidence that he sustained an injury to his low back on July 3, 2007, arising out of and in the course of his employment which caused physical harm to the body, required medical service and resulted in disability. The medical evidence of the claimant’s injury is supported by objective findings. Respondents have controverted this claim in its entirety.

The evidence preponderates that the claimant was within his healing period and totally incapacitated from engaging in gainful employment for the period July 6, 2007, through October

3, 2007, as a result of the July 3, 2007, compensable injury. The healing period is defined as that period to healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102 (13). The healing ends when the employee is as far restored as the permanent character of the injury will permit. *High Capacity Products v. Moore*, 61 Ark App. 1, 962 S.W.2d 831 (1998). So long as the claimant remains within his healing period and totally incapacitated from engaging in gainful employment he is correspondingly entitled to temporary total disability benefits. *Arkansas State Highway Department v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Respondents have converted the this claimant in its entirety, to include the claimant's entitlement to temporary total disability benefits.

While the claimant was released to return to work by his treating physician, Dr. William G. Carbary, D.C., on October 3, 2007, he was not allowed to resume work. Respondents were fully aware of the claimant's October 3, 2007, release to return to work. The claimant was not allowed to return to work until he was seen by Dr. Covington, respondents' designated medical doctor. Claimant was not seen by Dr. Covington until October 16, 2007. Since respondents insisted that the claimant be cleared by Dr. Covington before he could return to work, it was likewise incumbent to arrange the visit as soon as possible. There is no evidence in the record to reflect that respondent-employer took any action to expedite the appointment of the claimant with Dr. Covington. Indeed, there is not a medical record or report in the record regarding the claimant's October 2007, evaluation by Dr. Covington.

The claimant was not within his healing period and totally incapacitated from engaging in gainful employment as of October 3, 2007. Nevertheless, the claimant was not permitted to resume work by respondent until October 16, 2007. While respondent-employer maintains that

the claimant was required to obtain a clearance evaluation from its designated medical provider, Dr. Covington, before resuming work, the record does not reflect that any affirmative actions were taken to expedite the appointment with Dr. Covington. In point of fact the record does not reflect the presence of the report of Dr. Covington relative to an October 2007 evaluation of the claimant.

Respondents denied the compensability of the claimant's July 3, 2007, work-related injury. Respondents have not paid any medical bills in connection with the claimant's July 3, 2007, injury - - not even those associated with treatment rendered to the claimant by Dr. Covington. There is no evidence in the record of a policy of respondent-employer which mandates that an employee return to work from an injury or illness receive clearance to do so from the "company" doctor.

Ark. Code Ann. §11-9-505 (a) (1) provides:

Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding one (1) year.

In order to prove entitlement to benefits pursuant to Ark. Code Ann. §11-9-505 (a) (1), the employee must establish that he sustained a compensable injury; that suitable employment within his physical and mental limitations was available with the employer; that the employer refused to return the employee to work; and that the employer's refusal to return the employee to work was without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237

(1996).

In the instant claim, as noted above, the claimant sustained a compensable injury to his low back on July 3, 2007. The claimant received active medical care and treatment relative to the injury from July 6, 2007, until October 3, 2007, when he was released to return to work. Claimant notified respondent-employer that his been fixed by his chiropractor, he had been release to return to work, and he was available for work. Respondents refused to allow the claimant to return to work until he was seen by their designated physician. Respondents took no affirmative action to expedite an evaluation of the claimant by their designate medical provider.

Respondents are hard press to assert reliance on the October 2007, evaluation of the claimant by their designated medical provider when they have failed to offer the medical report of the evaluation in the record. The claimant was allowed to resume his employment with respondent in his pre-injury capacity and job duties on or about October 16, 2007. The evidence preponderates that supervisory personnel of respondent-employer elected to penalized the claimant in refusing to allow him to come back to work in accordance with the October 3, 2007, release to do so by Dr. Carbary. While respondent-employer had suitable employment within the claimant's physical and mental limitations available, they refused to return him to work until October 16, 2007, and the refusal was without reasonable cause. The claimant has sustained his burden of proof by a preponderance of the evidence that he is entitled to his average weekly wages for the period October 3, 2007 through October 16, 2007, pursuant to Ark. Code Ann. §11-9-505 (a)(1).

Ark. Code Ann. §11-9-508 (a) mandates that the employer provide such medical services as may be reasonably necessary in connection with the employee's injury. Whether a medical

procedure or device is reasonable and necessary is a question of fact. *Air Compressor Equipment v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). In the instant claim, claimant learned the identity of respondents' designated medical provider from a co-worker on July 5, 2007. The evidence preponderates that the medical and chiropractic treatment rendered to claimant was reasonably necessary in connection with the claimant's July 3, 2007, compensable back injury. Respondents have controverted this claim in its entirety.

AWARD

Respondents are herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$504.00, for the period beginning July 6, 2007, and continuing through October 2, 2007, as a result of his July 3, 2007, compensable injury. Said sums accrued shall be paid in lump without discount.

Respondents are further ordered and directed to pay to the claimant his average weekly wage of \$803.52, for the period October 3, 2007, and continuing through October 16, 2007, pursuant to Ark. Code Ann. §11-9-505 (a)(1).

Respondents are further ordered and directed to pay all reasonable and necessary medical, hospital, nursing, and other apparatus expenses, to include chiropractic care and medical milage, growing out of the claimant's compensable injury of July 3, 2007.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded, pursuant to Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE