

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F112577

SILAS HARTLEY,
EMPLOYEE

CLAIMANT

SORRELLS SAWMILL,
EMPLOYER

RESPONDENT

BITUMINOUS CASUALTY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 21, 2003

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE SHERRI ARMAN McDONOUGH,
Attorney at Law, Hot Springs, Arkansas.

Respondents represented by HONORABLE RANDY P. MURPHY,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

This case comes on for review by the Full
Commission on appeal by respondents from an opinion filed
herein by an Administrative Law Judge on February 10, 2003.

The Administrative Law Judge entered the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On October 10, 2001, the
relationship of employee-employer-
carrier existed among the parties.

3. On October 10, 2001, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$217.00/\$163.00 for TTD/PPD benefits.
4. On October 10, 2001, the claimant sustained an injury arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the period beginning October 11, 2001 and continuing through March 4, 2002.
6. The claimant's healing period ended March 4, 2002.
7. The claimant has a permanent physical impairment in the amount of 9% to the body as a whole per the AMA Guide, 4th Edition, Table 75, II.
8. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of October 10, 2001.
9. The respondents have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the February 10, 2003 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on October 10, 2001. Based upon my de novo review of the record, I find that the claimant failed to meet his burden of proof.

The claimant was employed by the respondent-employer as a debarker. The claimant contended that he sustained an injury to his low back on October 10, 2001. The claimant testified that a log became caught in the debarker due to the presence of a large knot. While attempting to pull on the log, he felt a pull in his back. The claimant testified that he told his co-worker, Algie Ford, (who also drove the claimant to and from work every day), that he believed he injured his back while trying to pull on the log. Mr. Ford did not testify at the hearing. Mr. Ford instructed the claimant that he should report the incident to someone at the respondent-employer, but the claimant failed to do so. The claimant testified as follows:

Q. When you mentioned something to Algie you said you felt a pop in your back, is what you told me in your deposition. You told Algie that on October 10th, right?

A. I said I felt something pull in my back.

Q. Algie told you you should go tell someone, didn't he?

A. I don't remember.

Q. Well, that's what you told me in your deposition, and you may not can remember that. Page 24, line seven, I said:

"What did you tell him?"

Answer: "I told him it felt like something popped in my back."

Question: "What did he say?"

Answer: "He said 'You should go and tell somebody.'"

Do you remember Algie telling you that?

A. Vaguely.

Q. But you didn't go tell anybody, did you?

A. No.

Q. You finished out your day?

A. Right.

In fact, it was not until approximately November 15, 2001, that the claimant reported the injury to the respondent-employer. Both the owner of the business, Winford Sorrells, and his sons, Chad and Mark Sorrells were present the day this alleged incident took place. The claimant conceded that he did not report an injury to any of

these individuals before leaving work the day it allegedly happened.

The claimant had numerous opportunities to report an injury, but there was no notice given until the claimant's wife, Linda Hartley, brought a Form C to the home of Winford Sorrells. This occurred approximately on November 15, 2001. The claimant testified that he did not have a telephone, but he conceded that he could get a telephone somewhere and call. The claimant was also able to have his wife take him for medical attention in Bearden, El Dorado, and Camden. These are places that are between 10 and 30 miles from the claimant's home, but the claimant only lived approximately 4 or 5 miles from the respondent-employer's place of business. However, the claimant was unable to drive to the respondent-employer's place of business to report an injury.

It is also of note that Winford Sorrells actually came by the claimant's house, and the claimant failed to mention a work-related injury to Mr. Sorrells. The claimant testified as follows:

Q. What conversation did you have with Mr. Winford Sorrells?

A. He came down to the house that day and I told him my back was hurting and he asked me had I seen a doctor. I

said, "Yes." He said, "Where did you go?" I said, "I went to Bearden." He said, "You need to get another opinion," and so I told him, "I am getting one, I am going to El Dorado."

Q. Did you tell Mr. Winford Sorrells at that time that you had injured your back at work?

A. Not exactly, no.

Q. And in your deposition, I asked you those questions and you told me that you had never reported any injury to Winford Sorrells.

A. No.

Q. The folks at Sorrells Sawmill knew that you were off work for a bad back because your wife told Algie Ford that you were down in your back, right?

A. Right.

Q. But you never went to the mill and had a conversation with Winford Sorrells, Chad Sorrells or Mark Sorrells about having been injured on the job, did you?

A. No.

Further, the claimant spoke to Chad Sorrells when he returned his work uniform and did not report an injury. Chad Sorrells made it clear in his testimony that the policy at the respondent-employer was for injured workers to immediately report any work-related injury. He confirmed that the proper workers' compensation notice was posted at the mill.

I find the claimant's credibility to be suspect, at best. It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Arkansas Dept. of Health v. Williams, 43 Ark. App. 169, 863 S.W.2d 583 (1993). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995).

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the

Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b)(6)(A) (Repl. 1996), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. *Id.* "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

With respect to the claimant's credibility, the following exchange that took place on cross-examination during the hearing establishes that the claimant is not a credible witness:

Q. Mr. Hartley, I took your deposition back on March 15, 2002, at Ms. McDonough's office, do you remember that?

A. Yes.

Q. The court reporter was there who swore you in under oath?

A. Yes.

Q. And I asked you a series of questions and you responded to those under oath?

A. Yes.

Q. And one of the questions I asked you was whether or not you were taking any medication and you told me at that time the only thing you were taking was the muscle relaxer medication. Do you remember that?

A. Yes.

Q. Among the questions I asked you, and your attorney made reference to this, related to whether or not you had ever had any back problems in the past. Do you remember those questions?

A. Yes.

Q. And I asked you if you had ever gone to a doctor complaining of back problems before October 2001, this is on page 17, line 14, and your answer was "No." Do you remember telling me that in your deposition?

Q. And I asked you, "Did you ever go to Doctor Wiseman complaining of problems with your back before October of 2001?" and your answer was "No." Do you remember telling me that?

A. Yes.

Q. And, in fact, you know that you were treated for back problems in the past?

A. Yes.

Q. You actually testified pretty clearly today that you remember going to Little Rock, I believe, in 1996 and undergoing an MRI?

A. Yes.

Q. And you say you had gone to a specialist for your back problems at that point in Little Rock?

A. I went up there and they took x-rays.

Q. That referral was Doctor Wiseman, is that right?

A. No.

Q. Who was it?

A. Dr. Abbott.

Q. Where is Doctor Abbott?

A. Where is she?

Q. Where is Doctor Abbott located?

A. She was located in Bearden at that time.

Q. Is she no longer in Bearden?

A. No.

Q. You had seen Doctor Wiseman before October 2001, complaining of back problems, hadn't you?

A. Yes.

Q. When you went to Little Rock to see this specialist upon referral by Doctor Abbott, you underwent x-rays, is that what you are telling me?

A. Yes.

Q. And you also underwent this MRI?

A. That is what the MRI does, is take x-rays.

Q. That is what you are referred to, it is a sophisticated x-ray is one way of putting it?

A. Yes.

Q. They put you in a machine?

A. Yes.

Q. And closed you up?

A. Yes.

Q. Had you ever undergone anything like that before?

A. No.

Q. How many trips did you make to Little Rock back in 1996?

A. One.

Q. And you have seen Dr. Wiseman since that time for complaints of low back problems?

A. Yes.

Q. And all of that was before October 10th of 2001, isn't that right, sir?

A. Before what?

Q. You saw Doctor Wiseman before October 10th, 2001, complaining of lower back?

A. Yes.

Q. And you saw Doctor Wiseman before October 10th, 2001, complaining of left leg numbness?

A. Yes.

Q. In fact, when you went to the doctor following this incident of October 10th, 2001, that you filed a claim about, you told them that you had had back problems in the past, didn't you?

A. Yes.

Q. When I took your deposition under oath, you didn't tell me about any prior back problems, did you?

A. No.

Q. And you denied ever seeing Doctor Wiseman in the past for any prior back problems, didn't you?

A. Denied?

Q. You denied it?

A. Yes.

In my opinion, the evidence in the record indicates that no actions were taken whatsoever by the claimant to file a workers' compensation claim until after the claimant knew he would need surgery. The claimant admitted on cross-examination:

Q. Your testimony will speak for itself, with Ms. McDonough leading you a little bit, and the Judge will read it, but if I remember correctly, the testimony went like this: You went to the Child Support Office after you found out you were going to have to have surgery and then it was mentioned that you needed a From [sic] AR-C. Do you remember giving that testimony just a few minutes ago?

A. Yes.

The claimant offered the testimony of his wife to support his version of events. Her credibility is suspect also. The claimant's wife has an undisclosed "nerve" problem for which she receives social security disability. The claimant's wife seemed to be confused about whether Mr. Sorrells was present at the home when she delivered the AR-C Form, or whether he was not. The testimony reflects:

Q. Was Mr. Sorrells home when you took that form to his house?

A. Yes.

Q. Did you see him there?

A. Uh-huh (yes).

Q. What was Winford Sorrells?

A. Yes.

Q. Did you talk to him when you took that form to his house?

A. No, just her. She was the only one there.

Q. So he wasn't there?

A. Huh-uh (no).

The claimant's wife was also confused about when she married the claimant. She testified as follows:

Q. And you have been married to your husband for about two years?

A. Yes.

Q. What is your anniversary date?

A. February the 20th.

Q. Of?

A. 1981.

Q. No, your anniversary date.

A. Oh. February the 12th.

Q. What year?

A. 1981.

Q. 2001.

A. No.

Q. How long have you been married?

A. Two years.

Q. To Mr. Hartley?

A. Uh-huh (yes).

Q. What date did you get married?

A. February the 12th of 1981.

Q. Do you have difficulty with dates?

A. Yes.

Q. Do you have difficulty remembering specific events?

A. Yes.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of

Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Workers' Compensation Commission, Aug. 27, 1993 (D703346). In workers' compensation cases, the burden rests upon the

claimant to establish his claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

In my opinion, a review of the evidence indicates that the claimant has failed to meet his burden of proof that he sustained a compensable injury. The claimant failed to report this alleged work-related injury, despite numerous opportunities to do so. He turned his medical bills into his group health insurance carrier and pursued a workers' compensation claim only after he learned he needed back surgery. Accordingly, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner