

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202401

RON THROWER,
EMPLOYEE

CLAIMANT

ISG RESOURCES, INC.,
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 22, 2003

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

Claimant represented by HONORABLE LEWIS RITCHEY, Attorney at
Law, Little Rock, Arkansas.

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

Decision of the Administrative Law Judge: Affirmed and
adopted as modified.

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 September 20, 2002.

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

1. The employee-employer-carrier
relationship existed at all
relevant times.
2. The claimant's average weekly wage
is \$550.00

3. The preponderance of the evidence reflects that the claimant sustained a compensable lumbar spine injury on February 25, 2002.
4. The preponderance of the evidence reflects that the claimant is entitled to temporary total disability from March 4, 2002 to a date to be determined. He has remained in a healing period, and is totally incapacitated from earning wages.
5. The preponderance of the evidence reflects that the claimant is entitled to permanent partial disability of 10% to the whole body, and the compensable injury is the major cause of the permanent impairment.
6. The preponderance of the evidence reflects that the medical treatment claimant received was reasonably necessary and related to the compensable injury, and is the responsibility of the respondents.
7. The preponderance of the evidence reflects that the claimant's attorney is entitled to an attorney's fee for controversion.
8. The preponderance of the evidence reflects that the respondent is entitled to an off-set, pursuant to A.C.A. 11-9-411.

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. After reviewing the entire record *de novo*, it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. We find that the Administrative Law Judge's findings of fact Nos. 1-3 and 5-8 are correct and are, therefore, adopted by the Full Commission. The Full Commission modifies the Administrative Law Judge's finding of fact No. 4, "The preponderance of the evidence reflects that the claimant is entitled to temporary total disability from March 4, 2002 to a date to be determined. He has remained in a healing period, and is totally incapacitated from earning wages."

Dr. Simpson assigned the claimant an anatomical impairment rating on July 3, 2002, and he released the claimant on an as-needed basis. Permanent impairment, which is a medical condition, is any permanent functional or anatomical loss remaining after the healing period has ended. Pilkington v. The Children's Center, Workers' Compensation Commission E904624 & E906080 (Aug. 28, 2002), citing Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). Accord, Benner v. City of Barling, Workers' Compensation Commission E702353 (Jan. 3, 2002). Temporary disability cannot be awarded after the claimant's healing period has ended. Trader v. Single Source

Transportation, Workers' Compensation Commission E507484
(Feb. 12, 1999).

The preponderance of evidence thus shows that the present claimant's healing period ended no later than July 3, 2002. An injured employee is entitled to temporary total disability compensation during the time that he remains within his healing period and is totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). We find that the claimant proved he was within his healing period and totally incapacitated to earn wages from March 4, 2002 through July 3, 2002. The Full Commission therefore modifies the Administrative Law Judge's finding of fact no. 4. We find that the claimant proved he was entitled to temporary total disability compensation from March 4, 2002 through July 3, 2002.

We therefore affirm as modified the September 20, 2002 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. 1996). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur with the findings in the principal opinion that claimant sustained a compensable injury and is entitled to benefits for temporary total disability until at least July 3, 2002. However, I must respectfully dissent from the failure to award benefits for temporary total disability beyond July 3, 2002.

SHELBY W. TURNER, Commissioner

Commissioner Yates concurs and dissents.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the principal opinion. I find that the claimant failed

to meet his burden of proof that he sustained a compensable lumbar injury on February 25, 2002; therefore, I dissent from the principal's affirmation of the Administrative Law Judge's opinion. However, in light of the principal opinion's finding that the claimant sustained a compensable injury, I must concur with the modification of Finding No. 4 to limit temporary total disability benefits to a period ending July 3, 2002.

In order to establish the compensability of an injury, a claimant must satisfy all of the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). A claimant must prove by a preponderance of the evidence that he sustained an accidental injury as a result of a specific incident, identifiable by time and place of occurrence, which caused internal or external harm to the body, which arose out of and in the course of his employment, and which required medical services or resulted in disability or death. See, Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(E)(i). Ark. Code Ann. §11-9-102(4)(D) further requires that a claimant establish a compensable injury by medical evidence supported by objective findings, as defined in §11-9-102(16). Finally, medical opinions addressing compensability must be stated within a reasonable degree of

medical certainty. Ark. Code Ann. §11-9-102(16)(B). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704. The findings of the Administrative Law Judge on issues of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983), Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). 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).

The claimant began working for the respondent on April 10, 2001. He testified that during the morning of February 25, 2002, he picked up a brake drum and felt a sharp pain in his back. He continued to work, but complained of pain to his co-worker, Daniel Frisby. At approximately 10:30 that morning, supervisor Keith Richmond called in, and the claimant notified him about his back injury. Mr. Richmond put the claimant on light-duty, and he finished working out his shift. After work, the claimant was seen by his primary care physician, Dr. Alexander, and treated for a severe cold. The medical record from this visit does not reflect that the claimant made any mention of a work-related injury, a back injury, or back pain.

The claimant testified that the following morning, he was repairing a fiberglass fender with a lightweight sander when the pain hit him again. He finished working his shift that day and continued to work over the course of the next several days. The claimant testified that his

condition deteriorated during this time, and he eventually notified supervisor Shon Traylor about his back injury and was taken to see Dr. Harvy. The claimant had an MRI on February 28, 2002. He continued to work through March 4, 2002, when Mr. Traylor instructed him to leave the premises until he could provide a work release from a doctor. The claimant was referred to Dr. Simpson, who performed a lumbar laminectomy on March 12, 2002. The claimant has not returned to work since that time, and receives short-term disability benefits from a private policy and social security disability benefits.

During his hearing testimony, the claimant was asked:

Q. Did you ever tell anybody that you were trying -- you were out to get ISG or anything of that nature?

A. No.

Q. You never told anybody that you were going to take advantage of the company --

A. Definitely not.

Q. -- and retire?

A. Definitely not.

Also during his testimony, the claimant stated that he owned several rental properties, and that on Sunday,

February 24, 2002, he acquired two rental houses that were in bad condition. He testified that he hired people to make the repairs and that he supervised them, and stated that he did not work on the newly-acquired houses prior to his injury.

The claimant's co-worker, David Frisby, testified that on the morning of February 25, after the claimant lifted the brake drum, he immediately complained of his back popping and causing him pain. Frisby testified that prior to this incident, he was talking to the claimant about the two rental houses he had acquired over the weekend, and stated that the claimant asked him if he thought he would be able to get a leave of absence for six to eight weeks to repair the houses. Mr. Frisby testified that after the incident the claimant "said that ISG had screwed us enough, and he was going to show them what it was like to get f***ed, if there was something wrong with his back."

Keith Richmond testified that the claimant reported to him that he injured his back on February 25, but did not ask to go see a doctor until February 27. Mr. Richmond testified that he had had problems with the claimant's job performance in the past; specifically that the claimant had been reprimanded on four prior occasions

and had been told that he would be terminated if other problems arose.

Pat Williams testified that he was in the shop with the claimant on February 26, when the claimant was sanding the fender, and that the claimant said to him, "If ISG think they've been f***ed, then they're going to get f***ed."

David Frisby was recalled and the Administrative Law Judge asked him for clarification regarding the claimant's comments about getting even with the respondents. Mr. Frisby testified that Pat Williams had been present on the 25th at the time of the initial incident, and not on the 26th. He testified that the claimant had not received a Christmas bonus and that they had recently stopped receiving overtime hours, and that these were the causes of the claimant's problems with the respondent.

Based on my review of the foregoing evidence, I cannot find that the claimant met his burden of proof by a preponderance of the credible evidence that he sustained a compensable back injury on February 25, 2002. I do not think that the Administrative Law Judge weighed the evidence impartially. His opinion does not mention the hearing testimony regarding the claimant's rental homes, and glosses

over the testimony of the Mr. Williams and Mr. Frisby regarding the claimant's statements of hostility toward the respondent. My review of the evidence shows that the claimant was a disgruntled employee who was seeking a way to be off work for an extended period of time to fix up two rental properties he had acquired the day before his alleged injury. My concerns as to the compensability of this claim were particularly raised by the fact that the claimant was treated by his family doctor on the evening of the first alleged incident, but did not make any complaints with regard to his back whatsoever.

For these reasons, I find that the opinion of the Administrative Law Judge should be reversed and the claimant's claim should be denied and dismissed. However, in light of the principal opinion's findings to the contrary, I must concur that the claimant is only entitled to temporary total disability benefits through July 3, 2002. Therefore, I respectfully concur in part and dissent in part from the majority opinion.

JOE E. YATES, Commissioner