

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303989

SANTIAGO FRANCO,
EMPLOYEE

CLAIMANT

NABHOLZ CONSTRUCTION CORP.,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 12, 2004

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

Claimant represented by HONORABLE BRENT STERLING, Attorney
at Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE CURTIS NEBBEN, Attorney
at Law, Fayetteville, 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 March 15, 2004.

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 September 9, 2002, the
relationship of employee-employer-
carrier existed between the
parties.

3. The claimant is entitled to a weekly compensation rate of \$387.00 for temporary total disability and \$290.00 for permanent partial disability.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back on September 9, 2002, while working for the respondent.
5. The claimant did not appropriately report a job related injury until the filing of his AR-C on April 24, 2003, therefore, no benefits will be awarded to this claimant prior to this date.
6. The respondents should pay for all the reasonable and necessary medical care for this claimant's compensable back injury subsequent to April 24, 2003.
7. The respondents have controverted this claim in its entirety.
8. This is a medical only claim, therefore, no attorney's fees is allowed by Arkansas law.

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 March 15, 2004 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 finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 9, 2002. Based upon my de novo of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on September 9, 2002. In my opinion, the claimant has failed to meet his burden of proof.

The claimant is 41 years old and began working for the respondent employer in March of 1993. The claimant started as a general laborer in October of 1995, he had a right elbow injury. This injury was treated by his family doctor, Dr. Goss, but the claimant never reported the injury to the respondent employer. The claimant saw Dr. Goss on or about June 26, 1998, and reported back pain. On August 22, 2000, the claimant presented to Dr. Goss complaining of back and left leg pain, but failed to mention it was work-related. Dr. Goss ordered an MRI and ultimately referred the claimant to Dr. Knox, whom he saw on September 24, 2000.

The claimant was transferred to client services, a division of the respondent employer in August of 2000. During that time period, he still experienced left leg pain. He stated that it was not constant, but would "...come and

go". He testified that he treated this condition with hot showers and over-the-counter medications.

In April of 2002, the claimant was transferred back to production and stated that he began having back problems, but he did not see a doctor. Again he took over-the-counter medications and hot showers. From April 2002 to August 2002, the claimant worked the Catholic Church project in Fayetteville and missed approximately half a day of work due to his back. After that job, he was transferred to the Arvest Bank project on New Hope Road in Rogers, Arkansas. At that time, they were working on the punch list. Marty Schmidt was his supervisor. On September 9, 2002, the claimant was directed to clean the sidewalks with a pressure washer, and he used it for approximately four hours. Roger McDaniel came by the work site during this time period and informed the claimant that he would be transferred the next day to the John Brown University project.

After finishing pressure washing, the claimant and Marty Schmidt loaded the pressure washer into Mr. Schmidt's Suburban. The claimant testified he felt "...something like electricity in my back, in my right side" while he was loading the pressure washer. The claimant testified that Mr. Schmidt asked him if he was okay and the claimant told Mr. Schmidt he was alright and that "tomorrow, I am going

to be okay." The next day, the claimant testified that he woke up in a lot of pain and had his wife make an appointment with Dr. Goss's office. The claimant did not call in to work, but decided to go to see Mr. McDaniel. The claimant stated he could not call the job site because he did not have a phone number.

On September 10, 2002, the claimant went to the respondent employer's office in Rogers, to speak with Mr. McDaniel during lunch. He wanted to show Mr. McDaniel his MRI from 2000 and explain where his back problem started. The claimant stated that he did tell Mr. McDaniel that he injured himself lifting the pressure washer and informed Mr. McDaniel that he had already made an appointment with Dr. Goss. The claimant wanted a "soft job" but Mr. McDaniel stated that the claimant's job was at John Brown University.

The claimant testified that if he was injured on the job, he was to communicate with his superintendent or boss. He acknowledged that there were regular safety meetings held by the respondent employer and admitted that reporting injuries at work was a topic discussed at the safety meetings.

The claimant testified that on Friday, September 13, he went into the respondent's employer office

to pick up his check and talked with Mr. McDaniel and again requested a "soft job." Again Mr. McDaniel told the claimant the job was at John Brown University. The claimant then asked to be laid off and Mr. McDaniel complied with this request.

The claimant filed for unemployment benefits. He testified that he did not have enough room on the unemployment application to explain his entire situation and wrote "I explained to him, on the job, two years ago, I was on the scaffold system, and I self pick up "I" beams, 14 feet, 12 feet, 16 feet long. With the time, the feeling in my left leg, like, a burn and asleep. I was an MRI, and they find hernias on my back." The claimant testified that he did not have enough space to write down the September 9, 2002, incident. The claimant admitted drawing \$285 per week in unemployment benefits until March or April, 2003.

The claimant started a business, Franco and Matar Construction, that did concrete, sidewalks, driveways, slabs and curbs. The claimant's job responsibilities were to look for jobs and make estimates. The claimant stated that he did help on some jobs. The company did one big job at the Hampton Inn in Fayetteville and some little jobs like a slab and a driveway in Garfield, Arkansas. The Hampton Inn job lasted forty-five (45) days. That work ended in the middle

of August of 2003. Since then the claimant has done some air-conditioning pads. Since September 9, 2002, the claimant admitted he has painted two (2) rooms in his home.

The claimant denied that Dr. Knox's March 17, 2003, report was correct when it stated, "...he did hurt his back 9 or 10 years ago, which improved after 5 months of chiropractic management." The claimant denied ever seeing a chiropractor.

The claimant had group health insurance when he worked at respondent employer and then went on his wife's policy when she went to work for the Bentonville School District in August of 2003. His group health insurance paid for his elbow injury that he claimed occurred at the respondent employer. The claimant admitted having back problems going back to 1998 and 2000 and had two (2) MRIs. Mr. Schmidt did know about the claimant's prior back problems.

The day after the alleged accident, the claimant drove himself to the respondent employer's office in Rogers. He admitted he did not ask Mr. McDaniel to send him to a doctor and at no time filled out any paper work. He also stated that he told no one else about his injury at respondent employer, other than McDaniel.

The evidence demonstrates that the claimant drove his family to Mexico sometime after the alleged incident, an eighteen (18) hour car trip, and he would drive for about two to three hours before he would stop, get out and stretch. He also flew to Mexico a day or two prior to his deposition on November 11, 2003, with his brother. They flew from Northwest Arkansas to Dallas and then to Mexico, which was a four-hour trip one-way, and he did not have any problems making that trip. The claimant stated that he has also used a push mower since this incident. The claimant admitted that he changes the oil in his family's vehicles, two trucks and two cars.

Mr. Schmidt, a field superintendent for the respondent employer, testified that he has been in that position for over one year. He is the respondent employer's top man in the field at the particular job site. The Arvest Bank project on New Hope Road in Rogers was the first time he worked with the claimant. The claimant was on that job for approximately four weeks. The claimant was sent there to assist Mr. Schmidt in finishing up the project.

According to Mr. Schmidt, the claimant informed him of previous back problems the first day he was on the job. Therefore, Mr. Schmidt made modifications and alterations in the claimant's work. For example, Mr. Schmidt

would go up a ladder as opposed to the claimant. He stated that the claimant also asked off work to go to the doctor.

Mr. Schmidt stated that all employees were told that if they get injured they were to tell their immediate supervisor at the time of the accident. He testified that he claimant never reported the injury to him. Mr. Schmidt did not specifically recall loading or unloading a pressure washer with the claimant. He has been on other job sites where there have been serious injuries and remembers those days. He stated it stands out when someone gets hurt. However, there was nothing that stood out about the Arvest Bank job. Mr. Schmidt said that there was a pressure washer on the job site but did not have a specific recollection of loading it into his suburban with the claimant's help.

Mr. Schmidt testified that the claimant never refused to do any work because of back problems. However, he did recall on two different occasions that the claimant stated that he was going to the doctor for his back but he did not recall where he was going for treatment. Mr. Schmidt also testified that the claimant worked for a friend of his, Joe Stephens, doing concrete work. However, he does not have any knowledge as to what the claimant did on that job.

Mr. McDaniel is Sr. Vice President and a 24-year employee of the respondent employer. He is in charge of

production and field operations. He recalled going to the Arvest Bank site on New Hope Road sometime in September to reassign the claimant but he did not receive any report of an on-the-job injury from the claimant. The claimant went to Mr. McDaniel's office the following morning and reported to Mr. McDaniel that his back was sore from an injury he sustained at the Town Center project in Fayetteville, which was at least two years prior. The claimant asked for light work and there was no light work for him to do. During this conversation, Mr. McDaniel did not see anything that looked similar to an MRI or X-ray. The claimant made no mention of hurting himself at the Arvest Bank job, the claimant did not request medical treatment and therefore, no medical treatment was offered. At no time did the respondent employer receive a report of injury from the claimant for the Arvest Bank job in Rogers prior to the AR-C, being filed April 24, 2003.

The medical evidence reflects that on June 26, 1998, the claimant presented himself to his family physician, Dr. Goss, with complaints of back pain and a specific history that he injured himself at work. On August 22, 2000, the claimant was examined by Dr. Goss after a complaint of low back pain and pain radiating down his left leg. The claimant underwent an MRI of the lumbar spine

on August 25, 2000, which reflected a bulging disc at L3-4, a large left-herniated disc at L4-5 and a moderate disc herniation at L5-S1. Dr. Luke Knox, a Fayetteville neurosurgeon, examined the claimant on September 25, 2000, and the claimant gave a history of a bank injury many years ago. The claimant next saw Dr. Knox on December 5, 2002, in which a history was given of low back pain and sciatica since April of 2002, believed due to heavy lifting at his job site. In his March 17, 2003, letter to counsel for the claimant, Dr. Knox stated the claimant "...hurt his back 9 to 10 years ago, which improved after five months of chiropractic management."

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).

In my opinion, a review of the evidence demonstrates that the claimant has failed by a preponderance of the evidence that he sustained a compensable injury on September 9, 2002. The medical evidence establishes that the claimant had pre-existing problems with his back prior to September 9, 2002. In Dr. Knox's letter dated March 17, 2003, he stated that the claimant hurt his back 9 to 10 years ago, but it improved after five months of chiropractic treatment. The claimant denied making this statement and ever having chiropractic treatment. However, it is of interest to determine where Dr. Knox would have gotten that information. For the Commission to believe the claimant, they have to believe that Dr. Knox created this history completely out of thin air.

The evidence establishes, without a doubt, that the claimant sought medical treatment as early as June 26, 1998, from his family physician, Dr. Goss, with complaints

of back pain with a specific injury which occurred at work. The claimant did not report this specific injury to his employer either. On March 1, 1999, the claimant presented to Dr. Goss with a history of discomfort to the left knee and specifically stated that it occurred while he worked for the respondent employer. Again, the claimant failed to file any sort of work-related injury report with the respondent employer. On August 22, 2000, the claimant again presented to Dr. Goss with back pain and pain radiating down his left leg. There was a notation in Dr. Goss's medical records which indicated, "he does construction type work, which is hampering to him."

The claimant had an MRI of his lumbar spine performed on August 25, 2000. It was noted that the claimant had a mild to moderate bulging at L3-4 and a large herniated disc on the left side at L4-5 and a moderate herniation at L5-S1.

The first medical treatment that claimant received after this alleged injury on September 9, 2002, was on September 11, 2002. The claimant sought treatment from Dr. Goss with a complaint of low back pain and pain radiating down his left leg. The records failed to mention any history of this being a work-related injury. Dr. Goss's notes stated, "the patient has recently done a bit of

lifting and this has caused a lot of discomfort." The claimant was adamant that the incident on September 9, 2002, of lifting a pressure washer was the cause of the claimant's injury. However, every other time the claimant associated his pain and discomfort with his work it is noted. It is of interest that Dr. Goss's September 11 notes fail to mention any sort of work-related incident.

On December 5, 2002, the claimant presented to Dr. Knox. The claimant gave Dr. Knox a history of low back pain and sciatica since April of 2002. At that time he gave a history of heavy lifting at his job site to Dr. Knox and Dr. Knox's reflect the history. This is the first indication of a work-related incident.

A review of the medical evidence demonstrates, the claimant has not given a consistent history of a lifting incident on September 9, 2002. The claimant's credibility is questionable, at best. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or

any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

Further, the claimant's inability to communicate has been given as his excuse why he is not able to make it clear that he sustained an injury on September 9, 2002. However, the claimant has been in this country since 1988. He is an American citizen. His wife is a Spanish teacher at Bentonville High School.

The claimant's application for unemployment benefits is also of note. The claimant asked to be laid off after he told Mr. McDaniel that he could not work at the John Brown University job site. On the unemployment application, the claimant must indicate that he is ready, willing, and able to work. The claimant put on his unemployment application that he had prior problems and noted the problems from 2000. However, the claimant stated that he didn't have enough room to put anything about the September 9, 2002, incident. I find it of interest that Mr. McDaniel had visited the job site prior to this alleged incident taking place and told the claimant that he would be working at the John Brown University job site in Siloam Springs.

The respondents offered the testimony of Mr. Schmidt who testified that the claimant told him of prior back problems and that he had to take off several occasions for treatment for his back. The claimant's job was modified informally to the extent that Mr. Schmidt would do those jobs and activities on the punch list that were more labor-intensive. Mr. Schmidt does not deny that there was a pressure washer on the job site on September 9, 2002, but he was adamant that the claimant did not report an injury to him. The claimant testified that he knew all injuries were to be reported to their immediate supervisor. In fact, the respondent employer held regular safety meetings wherein this had been discussed.

Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on September 9, 2002. The claimant had pre-existing problems, which were significant enough for him to have asked for modified duties on his job. Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner