

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209479

DANNY HEBERT,
EMPLOYEE

CLAIMANT

J. D. & BILLY HINES TRUCKS, INC.,
EMPLOYER

RESPONDENT

ZENITH INSURANCE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 23, 2004

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

Claimant represented by HONORABLE GREGORY GILES, Attorney at
Law, Texarkana, Arkansas.

Respondents represented by HONORABLE J. MATTHEW MAULDIN,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed May 5, 2003. The
Administrative Law Judge found that claimant did not sustain
an injury arising out of and in the course of his employment
on or about July 16, 2002. After reviewing the entire
record *de novo*, the Full Commission reverses the opinion of
the Administrative Law Judge.

I. HISTORY

Claimant, age 39, began working as a short haul
truck driver for respondent in April 2002. Claimant

testified that he was educated through the eighth grade. With regard to prior injuries, claimant testified that he incurred a compensable work related injury to his left foot in 1997 and sought treatment for his lower back in 1998 resulting from a nonwork-related injury. Claimant testified that he had a full recovery after receiving treatment for these injuries.

On July 7, 2002, respondent issued a newer model truck to claimant based on his seniority. Claimant testified that this new truck drove very rough, which caused him to frequently bump his head on the ceiling of the cab. Claimant testified that while driving the truck, and pulling a loaded trailer, on July 16, 2002 or July 18, 2002, he bumped his head on the ceiling of the cab so hard that he began to experience neck, shoulder, and back pain and has also developed numbness in his arm. Claimant testified that prior to this occurrence, he told the dispatcher and the maintenance department that the truck rode rough. Claimant also testified that he told the dispatcher the morning after this specific incident that he had hit his head while driving the truck. Claimant continued to work until August 7, 2000 when he informed the dispatcher on duty that he

could not come in to work due to his pain and that he was going to a doctor.

On August 7, 2002, claimant sought treatment from Dr. Chris Primeaux, a chiropractor. Claimant completed a questionnaire at Dr. Primeaux's office regarding his pain and wrote that the cause of his pain was "new truck." Claimant was treated by Dr. Primeaux on August 7th, 8th, 9th, and 12th for complaints of neck and shoulder pain. Dr. Primeaux released claimant from work on August 7th, 8th, and 9th. Claimant did not formally report his injury until August 13, 2002, when respondent's safety director contacted him. The First Report of Injury, dated August 13, 2002, states that "[t]he employee was driving a truck when his head hit the ceiling of the truck, resulting in pain to his head, neck and back areas." On the Form N filed with the Commission, claimant also stated that the cause of his injury was "Rough Riding Truck."

The first written complaint regarding the truck riding rough is dated August 1, 2002. The record contains three records evidencing service on the truck's suspension system. On August 1, 2002, the rear suspension arm bushings were checked and the technician noted that they needed to be replaced on the right rear axle. On August 5, 2002, the

leveling valves that function as the cab's suspension system were adjusted and the cross member was repaired. On August 13, 2002, the cross member under the cab was replaced.

David Jackson, the respondent employer's tire manager, testified that he test drove the truck after claimant told him that it was riding rough. Mr. Jackson testified that he drove the truck and pulled an empty trailer on both the interstate and a two-lane road and that the truck did not ride rough. Mr. Jackson also testified that he drove the truck a second time in the truck yard in response to a complaint of a "popping" noise coming from the truck. At that time, it was determined that the cab's suspension bolt, a component of the cross member, was loose. Mr. Jackson also drove the truck on or about August 13, 2002 at the request of the respondent employer's safety manager and stated that the truck did not ride rough. Mr. Jackson drove the truck with a loaded trailer on a 140 mile round trip assignment sometime during August 16, 2002 and August 29, 2002, the period that claimant was on light duty, and testified that the truck did not ride rough.

Wayne Morrow, the Fleet Maintenance Director, testified that on August 1, 2002 the truck was inspected and the technician noted that the rear suspension arm brushings

needed to be replaced on the right rear axle. Mr. Morrow, however, also inspected the rear suspension arm brushings and did not think that they needed to be replaced because they did not have any internal wear. Mr. Morrow also testified that he worked on the truck when claimant complained that it made a popping noise and diagnosed the cause as relating to loose bolts on the "cross member directly underneath the cab air-ride system." Mr. Morrow explained that this cross member "actually supports and holds the frame together of the truck." On August 13, 2002, the cross member was replaced. On August 13, 2002, respondent's safety director called Mr. Morrow and asked him to inspect claimant's truck due to a driver injury. Mr. Morrow testified that he inspected and test drove the truck on August 13, 2002 and did not detect any problems with the truck.

On August 13, 2002, claimant was sent to the company doctor, Dr. Charles Vermont. Dr. Vermont's office notes from that date state that claimant "claims he was in a truck and he bounced up and hit his head and he has been seeing a chiropractor since then, 3-4 times. He is complaining of pain in the neck and upper back. He is not particularly point tender. He has muscle spasm in the upper

right neck." X-rays taken of claimant's back revealed normal thoracic and cervical spine. Dr. Primeaux and Dr. Vermont, however, noted objective findings of swelling and muscle spasms in the upper thoracic area, right neck, and upper back between the shoulder blade and spine.

Claimant did not work from August 7, 2002 to August 15, 2002, and worked a light duty assignment from August 16, 2002 to August 29, 2002. Claimant underwent physical therapy at Hope Physical Therapy Center for approximately one week before the claim was controverted on August 22, 2002. Dr. Vermont's August 29, 2002 office note states that claimant still had muscle spasm and advised against returning claimant to work. Claimant has not returned to work since August 30, 2002.

Claimant was last seen by Dr. Vermont on September 20, 2002. On that date, Dr. Vermont recommended that claimant undergo an MRI of his back, but claimant did not undergo this exam due to the fact that respondent controverted the claim and claimant was unable to pay for the exam. Dr. Vermont's notes from the September 20th evaluation state that he cannot release claimant to work at that time and that claimant has not been following up with him due to the fact that the claim was controverted and

claimant has no money to pay for medical treatment or physical therapy. Dr. Vermont has not released claimant to return to work. Claimant has discontinued treatment with Dr. Vermont because he could not afford to pay for medical treatment. Claimant has not worked anywhere since August 30, 2002 and testified that he is in too much pain to work. Claimant testified that he has not been informed that he was terminated.

II. ADJUDICATION

A. Compensability

To prove a compensable injury as a result of a specific incident that 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.

We find that claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his neck and upper back. While claimant did not file a formal report of injury with respondent until August 13, 2002, we find that claimant's uncontroverted testimony establishes that he reported to the dispatcher on duty within a day of the incident that the truck needed to be repaired because it rode rough and caused him to hit his head. The "statutory definition of compensable injury does not require a timely reporting of an injury, or the receipt of medical treatment within a specified period of time." Services Chevrolet v. Atwood, 61 Ark. App. 190, 194. See also, Reed v. Arkansas Methodist Hospital, Full Commission Opinion filed November 4, 1999 (E809731) ("Moreover, the compensability of a specific incident injury is not contingent upon timely reporting. This is so regardless of an employer's internal policy governing the reporting of work-related injuries.")

Further, we find that claimant's testimony regarding the specific incident is corroborated by the questionnaire he completed in Dr. Primeaux's office on

August 7, 2002, in which claimant wrote that the cause of his pain was due to a "new truck." We credit this explanation as sufficient corroboration of claimant's injury, especially in light of the limited space provided on the form. Claimant's testimony is further corroborated by Dr. Vermont's notes on August 13, 2002, which describe the incident in more detail, and by claimant's description of the cause of his injury that he wrote on the Form N that was submitted to the Commission. We, therefore, credit claimant's testimony that he sustained injuries to his neck, shoulder, and back when he bumped his head forcefully against the ceiling of the truck.

We further find that the record contains objective findings establishing claimant's injury as evidenced by Dr. Primeaux's observation of swelling and muscle spasms in claimant's right shoulder, and Dr. Vermont's observation of muscle spasms in claimant's right neck and upper back between the shoulder blade and the spine.

The Administrative Law Judge's conclusion that "[t]he maintenance records and testimony of the witnesses reflect that respondent was unable to confirm that the vehicle in fact rode rough, as asserted by the claimant or to find a mechanical problem with the vehicle which could

serve as a source of a rough ride due to the suspension system," ignores facts in the record. Respondent's witness, David Jackson, testified that repairs were made to the suspension and he could not confirm whether the repairs had been made prior to when he test drove the truck. Work orders in the record confirm that repairs were made to areas involving the suspension on at least three occasions from August 1st to August 13th. Wayne Morrow, a witness for respondent, testified that he test drove and inspected the truck on August 13th when respondent's safety director, Betty Cornelius, contacted him regarding investigation of the incident and that he did not find any problems with the suspension or notice that the truck was riding rough. This investigation, however, took place after the truck had been serviced for suspension related repairs.

For these reasons, we therefore find that claimant proved by a preponderance of the evidence that he sustained a compensable injury on or about July 16, 2002 or July 18, 2002.

B. Temporary Total Disability Benefits

Temporary total disability for unscheduled injuries is that period within the healing period in which a claimant suffers a total incapacity to earn wages. Ark.

State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

We find that there is no evidence that claimant's healing period has ended nor is there any evidence that claimant has reached maximum medical improvement. We further find that claimant credibly testified that his injury prevents him from working and that no doctor has released him to return to work. We find, therefore, that claimant has remained in his healing period and that he is totally incapacitated to earn wages.

Based on our de novo review of the entire record, the Full Commission finds that the respondents are liable to claimant for additional medical benefits and for temporary total disability from August 7, 2002 through August 15, 2002, and from August 30, 2002 to a date yet to be determined. 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 claimant's injury occurred after July 1, 2001, 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 must respectfully dissent from the majority's opinion finding that the claimant sustained a compensable injury on or about July 16, 2002. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

In my opinion, a review of the evidence demonstrates that the claimant's account of how the alleged accident occurred lacks credibility. The claimant, who is only 5'6" tall, testified that he struck the ceiling of his tractor cab numerous times while the seat was positioned down and forward to accommodate the claimant's stature. The claimant also testified that he would hit his head not only while the truck was traveling at 55 to 60 m.p.h., but also when the truck was traveling at only 5 to 10 m.p.h. over scales. There were no witnesses to the alleged accident occurring at Mile Marker 54 which forms the basis of the claimant's claim.

The claimant's testimony is not credible considering that two different employees of the respondent-employer, including the Fleet Maintenance Director, drove the truck and came to the conclusion that there was nothing wrong with the way the truck drove or rode. Subsequent test drives by David Jackson, the Tire Manager, and Wayne Morrow, the Fleet Maintenance Director, demonstrated that the truck gave its driver a smooth ride. Significantly, David Jackson's first test drive clearly occurred while the claimant was still operating truck 688 and while the claimant was still complaining that it gave him a rough

ride. Also, the Claimant admitted that the mechanics could not substantiate his complaints, which is also evident following a review of the maintenance records, but the claimant believed that Wayne Morrow found and fixed the problem. However, Mr. Morrow testified that he never found anything wrong with the ride of the truck.

Other evidence in the record sheds light on the claimant's credibility. On May 23, 2001, while treating for depression, the claimant told his counselors that he perceived child support as stealing from him – the claimant, and that he planned on quitting his job in order to avoid paying child support. On July 5, 2001, the claimant told his counselors that he was working 50 hours per week, and planned to continue working unless child support began taking money out of his check.

Following the claimant's alleged specific work-related accident, he told Dr. Vermont on September 20, 2002, that he was counting on his workers' compensation appeal to pay for his medical care because he had no money. Furthermore, on September 30, 2002, the claimant refused to pay *five dollars (\$5.00)* toward his balance with Dr. Vermont. However, it is interesting to note that the claimant also told his counselors on November 26, 2002, that

he was having trouble with the IRS, and as a result, he had lost his *Internet and Direct TV services*.

I find the claimant not to be a credible witness. 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.

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. 2002), 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.

Therefore, after I consider all the evidence in the record and the claimant's lack of credibility, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner