

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306062

REGGIE MERRIMAN,
EMPLOYEE

CLAIMANT

FORT SMITH HEATING & AIR,
EMPLOYER

RESPONDENT

ARKANSAS INS. ADJUSTING,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 12, 2004

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

Claimant represented by HONORABLE JAMES FILYAW, Attorney at
Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE CONSTANCE CLARK,
Attorney at Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed May 3, 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 April 11, 2003, the relationship of
employee-employer-carrier existed between the
parties.
3. The claimant is entitled to a weekly
compensation rate of \$241.00 for temporary

total disability and \$181.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on April 11, 2003.
5. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from April 11, 2003, to the last week in October 2003. None of the claimant's medical records indicate that any of his treating physicians have recommended that he be taken off work nor have any of them even given him any restrictions as to his ability to work. The claimant's pay records indicate that he worked pretty close to forty hours each week from the date of his injury up through May 29. The pay records do set forth that during the week of June 5 he only worked twenty-one hours and did not work any throughout July or August and began back to work on much shorter hours on September 11. Subsequent to this September 11 date the claimant's work history is a bit more spotty with less hours and his testimony has been that it was due to his physical problems but there is noting (sic) in the medical record to indicate an award of temporary total disability.
6. The claimant has proven by a preponderance of the evidence that he is entitled to medical treatment at the respondents' expense for his compensable injuries.
7. The respondents have controverted this claim in its entirety.
8. Since this is a medical only claim at this time, Arkansas law does not allow for an attorney's fee.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. 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 must respectfully dissent from the majority's opinion affirming and adopting the decision of the Administrative Law Judge. Specifically, I find that the claimant has failed to prove by a preponderance of the evidence the elements necessary to establish a specific incident injury.

The Commission has held that in order to establish compensability of an injury, a claimant must satisfy all of the requirements set forth in Ark. Code Ann. §11-9-102 as amended by Act 796. Fowler v. Blytheville Country Club, Full Commission Opinion filed July 15, 2004 (F306421); see also, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). Specifically, when a claimant alleges that he sustained a specific incident injury, he must prove by a preponderance of the evidence

that he sustained an accidental injury resulting in 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 and which was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. code Ann. §11-9-102(5)(A)(i) and §11-9-102(5)(E)(i)(Supp. 1997). Finally, Ark. Code Ann. §11-9-105(5)(D) requires that a claimant must establish a compensable injury by medical evidence supported by objective findings as defined in §11-9-102(16). 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. Jerry D. Reed, supra.

The claimant testified that he sustained an injury to his knee and back on the morning of April 10, 2003, while performing employment services for the respondent employer. The claimant further testified that his immediate symptoms were related to his knee, which he had twisted while stepping down from a ladder. Although the claimant stated that his knee became immediately painful and swollen, he did not seek medical attention for his injured knee until "about

two or three weeks later." Likewise, although the claimant contends that he also twisted his lower back at the time of his alleged work related incident, he did not begin having problems with his lower back until "about a month after it all happened." The claimant reportedly continued to work in spite of his alleged injury.

Although a co-worker, Mr. Jerry Stockton, testified to having remembered working with the claimant on an occasion in April of 2003, when he complained that he had fallen off of a ladder, this witness could not remember the specific date on which this incident occurred. Furthermore, Mr. Stockton did not witness the claimant's accident and his recollection of details surrounding the incident was sketchy. Likewise, the claimant's supervisor and former step-father, Mr. Curtis Seaton, testified that he was unsure when the claimant had supposedly injured himself, stating that it was in "late spring - April, May, in that time frame." First, believing the claimant's condition to be minor knee injury, Mr. Seaton testified that he placed the claimant on light duty for awhile. When the claimant began complaining of back pain, Mr. Seaton took him to a chiropractor. Mr. Seaton ultimately took the claimant to the emergency room with severe back pain, "probably two to three

weeks after [Mr. Seaton] had first heard about him taking a fall." It was at this time that Mr. Seaton first reported the claimant's injury to his insurance carrier. Concerning this first report of injury, Mr. Seaton testified as follows:

He [the claimant] went personally and bought him a knee brace, I think, down at Wal Mart because he told me he did this and that was before we ever - - before I ever went to my insurance agent - - or I called my insurance agent, John Mackey, with Federated and told him, I said, "John, I may have a worker's comp claim here." You know, I didn't really take it very serious because we saw no blood, but at that time I said, "This guy may be hurt."

Later testimony revealed that Mr. Seaton actually filled out the First Report of Injury on June 9th, some two months after the claimant's alleged work related injury. Furthermore, Mr. Seaton admitted that he kept the claimant on the payroll during the time following his alleged injury; however, Mr. Seaton testified that he "just literally gave him" some of the hours reported after "he got hurt."

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).

Moreover, 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. Because of Mr. Seaton's admittedly close relationship with the claimant, his vagueness regarding the claimant's injury and his report of that injury to his insurance carrier, and the fact that he admittedly falsified work documentation in order for the claimant to continue to receive wages during that time that he was allegedly unable to work, this witness is not credible. Although the testimony of Mr. Stockton is somewhat more credible, it is likewise vague and ambiguous, and is therefore unreliable.

A medical report from Sparks Preferred South dated May 19, 2003, shows that the claimant was seen on that date for leg and back pain and muscle spasms. However, under History of Illness, "no injury" was noted. Furthermore, this report indicates that the claimant had only been experiencing his reported symptoms for one week prior to this visit. Objective medical testing conducted in June of 2003, which included X-rays and MRI's of the claimant's lumbar spine, revealed what appeared to be left posterolateral disc herniation and transverse disc

protrusion at L4-5, with free disc fragments at L4. Objective medical testing of the claimant's left leg performed in June of 2003, revealed no evidence of deep vein thrombosis. However, from his evaluation of the claimant on July 3, 2003, Dr. Joseph W. Queeny reported the following:

The patient is a 42-year-old right-handed male who was referred by Dr. Bell for surgical evaluation of low back pain and left lower extremity pain. He states he started having problems with this on 5/6/03. ... He does give somewhat of a convoluted history as far as the onset of these symptoms. He apparently had an injury on 4/11/03 while at work where he stepped backwards off of a ladder and injured his knee as well as his left hip and groin. ... His symptoms have been a little bit better since he has been off of work.

After examining the claimant and reviewing his X-rays and MRI, Dr. Queeney opined that the claimant suffered from degenerative disc disease at L4-5, with unspecified left lower extremity pain. Dr. Queeney informed the claimant that he was not "100% sure" that he had a herniated disc, and that he would not benefit from lumbar disc surgery. Later medical tests confirmed Dr. Queeney's suspicions, and revealed that the claimant suffered from transverse disc protrusion, facet hypertrophy and disc degeneration at L4-5, with focal air density in the left

anterior spinal canal at L4-5, which represented vacuum phenomenon within the disc protrusion. As of July 24, 2003, Dr. Queeny was certain that the claimant did not suffer from a herniated disc, and he continued to advise against surgery. Dr. Queeney referred the claimant to Dr. William M. Sherrill, for an evaluation of his left hip pain. Dr. Sherrill ultimately opined that the claimant's hip pain was due to his back condition.

The time and date of the claimant's alleged work related injury were never exclusively established in this claim. The Commission has previously found that a precise date of injury is not required in order to establish a specific injury claim, and that evidence of other contemporaneous events can establish the time of an injury. Sheppard v. Calion Lumber Co., Full Commission Opinion filed October 6, 1995 (E320270). In Sheppard, however, the claimant's testimony regarding events that took place when her injury occurred was corroborated by the testimony of other witness. The only evidence, in the present claim, that supports the conclusion that the claimant's injury occurred from a work related fall is the claimant's own self-serving testimony, which is not corroborated by the testimony of other credible witnesses. Therefore, the proof of the

compensability of his injury falls upon the objective medical evidence presented in this claim, and that evidence fails to support a finding that the claimant's back condition resulted from a work related injury on April 10, 2003. For example, the claimant did not seek treatment for his condition until May 19, 2003, some five weeks after his alleged injury. As previously noted, a report of that visit indicated that the claimant's problems had begun a week earlier and that they were not work related. Moreover, the claimant did not report a work related injury until he was examined for his back condition in early June of 2003. Furthermore, the medical evidence does not corroborate the claimant's contention that his back condition resulted from an injury. If anything, the medical evidence demonstrates that the claimant's back condition is degenerative in origin. Moreover, none of the claimant's examining physicians state within a reasonable degree of medical certainty that the claimant's condition resulted from an injury sustained from his employment. In conclusion, the claimant has failed to establish the elements necessary to prove the compensability of his claim, and compensability must therefore be denied.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner