

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301306

PHILLIP WHITE,  
EMPLOYEE

CLAIMANT

WEYERHAEUSER COMPANY,  
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED FEBRUARY 23, 2004

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

Claimant represented by HONORABLE STEPHEN SHARUM, Attorney  
at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE ANDREW IVEY, 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 September 26, 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 July 5, 2002, the relationship  
of employee-employer-carrier  
existed between the parties.

3. The claimant is entitled to a compensation rate of \$358.00 for temporary total disability and \$268.00 for permanent partial disability.
4. The parties acknowledge that the claimant filed his claim with the Arkansas Workers' Compensation Commission on February 10, 2003.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on July 5, 2002.
6. The claimant did not give notice to the respondent that he had sustained a work related injury until he filed his claim for benefits on February 10, 2003. Therefore, the claimant shall not be entitled to benefits prior to February 10, 2003.
7. The respondents should pay for the cost of this claimant's medical treatment for his compensable injury subsequent to February 10, 2003.
8. The respondents should pay temporary total disability to this claimant subsequent to February 10, 2003.
9. The respondents have controverted this claim in its entirety.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 September 26, 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

At the hearing held on August 7, 2003, claimant contended that he sustained an injury to his low back on the early morning hours of July 5, 2002, when he was loading pallets off the process line. Conversely, respondents contend that the claimant did not sustain a compensable injury. I agree with respondents.

Claimant testified that as he was working on July 5, 2002, he felt a pop in his back and as time passed his back began to bother him; however, claimant did not report a work related injury. Claimant further testified that he completed his shift that day, but that he had to ask for assistance from Mike Neal, a co-worker. Claimant did not work July 6<sup>th</sup> or 7<sup>th</sup>. On the evening of July 7, 2002, claimant's father took claimant to the emergency room where

he was diagnosed with L5 radiculopathy. A CT scan of the claimant's lumbar spine revealed a left posterolateral focal disc herniation at L4-5. Claimant was admitted to the hospital where he underwent a left 4-5 lumbar discectomies via interlaminar laminotomy on July 10, 2002. Upon his release from the hospital, claimant's father drove the claimant directly to respondents' place of employment to advise respondents that he had been in the hospital, was under doctors care, and was unable to work. The claimant did not report a work-related injury at that time, nor did he inquire into workers' compensation benefits; rather claimant advised respondents that his low back problems were not related to work and he was provided forms for short-term disability benefits.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. In order to establish compensability of a specific incident injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of

occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body 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) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). 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.

Moreover, the findings of the Administrative Law Judge on issue 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). 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).

Although the History and Physical report prepared by Dr. Arthur Johnson on July 7, 2002, contains a history of a work related injury having occurred on the previous Friday, I do not find that this one piece of evidence outweighs the remaining evidence in the record which contradicts this history. This history, like the other documents reflecting how claimant's injury occurred are based upon a history as provided by the claimant. Moreover, I do not find claimant's corroborating witness, Mike Neal,

to be credible. Finally, while the claimant and his parents offered testimony regarding claimant's activities the weekend prior to surgery, I find these witnesses to be biased and self-serving.

Claimant completed a new hire orientation program in which he was specifically instructed how to report any on the job injuries. Claimant contends that he hurt his back on the job on July 5, 2002, yet he did not report such an injury despite the fact that he spoke with his supervisor after the alleged injury occurred. Nor did the claimant report a work related injury when he went to the plant upon his release from the hospital to provide respondents with medical documentation for his absence from work. In fact, the claimant never reported a work related injury until he filed a claim for benefits with the Commission on February 10, 2003.

Dr. Johnson's medical records contain a Neurosurgical Dept. History and Physical Assessment on Phillip White. This assessment contains several questions regarding the claimant's problem. The question, "Is the injury accident related, if, so, how did it occur?" is left blank. The question, "Is the accident job related?" is marked "No." Claimant was specifically questions about this

assessment form and he admitted that the handwriting on the form is his. Thus, while Dr. Johnson relayed a history of a work related injury in the typed History and Physical report he prepared on July 10, 2002, the History and Physical assessment completed in the claimant's own handwriting denies a work related injury. Accordingly, given the diametrically opposed statements in these two forms, I am not persuaded to find that the history as recorded by Dr. Johnson is entitled to any weight.

Likewise, I do not find that the testimony of Mike Neal is persuasive. Mr. Neal is a former employee. Mr. Neal was employed by respondents on a work-release program. Mr. Neal was not scheduled to work weekends but he lied about his work schedule to the police informing them that he had to work on the weekends. Claimant's work release was pulled after he was re-arrested. Mr. Neal's testimony was offered to show that the claimant requested assistance from Mr. Neal during the early morning hours of July 5, 2002. Mr. Neal did not observe an injury, and there is no evidence that the claimant actually relayed a work related injury to Mr. Neal. At best, Mr. Neal testified that the claimant asked for his help because the claimant thought he had done something to his back. No mention was made by Mr. Neal

regarding how or when the claimant may have "done something to his back."

In my opinion, the record simply leave too many questions unanswered to find that the greater weight of the evidence supports a finding of compensability. Why didn't the claimant report a work related injury as he was taught how to do? Why did the claimant complete a questionnaire in his doctor's office denying that the injury was work related? Why didn't the claimant report a work related injury when he provided respondents with his medical excuse from work? Furthermore, there are no witnesses to the alleged injury and not even Mr. Neal testified that the claimant advised him that he had injured his back at work. Accordingly, when I weigh this evidence against the evidence indicating that the claimant sustained a work related injury, i.e. claimant's testimony and the testimony of his parents, together with the medical report from Dr. Johnson that contradicts the self-reporting assessment denying a work related injury, I cannot find that the claimant has established a compensable injury by a preponderance of the evidence.

For all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner