

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402281

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| MICHAEL FINNEY, EMPLOYEE                   | CLAIMANT   |
| NEWS-TIMES PUBLISHING CO., EMPLOYER        | RESPONDENT |
| AMERICAN CAS. CO. OF READING, PA., CARRIER | RESPONDENT |

**OPINION FILED SEPTEMBER 21, 2005**

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

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

Respondent represented by HONORABLE FRANK NEWELL, Attorney at Law, , Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed December 29, 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. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.

4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.

5. The respondents have controverted this claim in its entirety.

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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

\_\_\_\_\_I respectfully dissent from the majority opinion, which affirms the decision of the Administrative Law Judge, finding that the Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his lumbar spine on January 26, 2004. I find that the ALJ should be reversed because the Claimant has presented sufficient evidence to prove that he sustained a specific incident injury while working for the Respondent.

The Claimant testified that on January 26, 2004, he was working as a mail clerk when he was moving a pallet filled with newspaper inserts into a storeroom. He stated

that as he was pulling the jack down an incline into the storeroom, the jack's wheel hit an indentation in the floor causing the jack to stop suddenly. The jerking motion caused Claimant to release the jack and he felt a sharp pain in his back. The Claimant continued to work the rest of his shift because he did not think that he was seriously hurt at the time. However, he did report the incident to his supervisor, Larry McDaniel. The next morning, Claimant testified that he woke up unable to move and in a lot of pain. He called his supervisor and an employee was sent to his house with workers' compensation paperwork.

The next day, the Claimant was evaluated by Dr. Greg Smart. Dr. Smart's note stated, "States back already hurting. Pulled on a pallet cart and cart stopped at a bad place in the floor. Continued to pull - caused lower back pain." He diagnosed the Claimant with "back pain - probable lumbar sprain." The claimant was placed on light-duty and prescribed medication. Respondent did not have a light-duty position available, so Claimant did not return to work and has not worked since.

On February 2<sup>nd</sup> and 12<sup>th</sup>, Claimant was seen by Dr. Smart, who recommended physical therapy. Again, on February 19<sup>th</sup>, Dr. Smart recommended further diagnostic studies and the Respondent denied both recommendations. Since the Respondent controverted medical treatment, the Claimant saw his own primary care physician at the Interfaith Clinic. The Claimant underwent an MRI on May 13<sup>th</sup>. The MRI revealed a degenerative disc disease with mild posterior bulging at L4-5 and degenerative disc disease with a "small to moderate herniation" at L5-S1 encroaching on the thecal sac and the L1 nerve. Claimant's physician referred him to a neurosurgeon at that time. The consultation by the neurosurgeon was excluded from evidence at Claimant's hearing because it was not provided to the Respondents at least seven days before the hearing. Even without this evidence, the medical evidence reveals that Claimant has a herniated disc at L5-S1 and there was no evidence presented that this condition was present prior to his work related injury.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the

claimant must show that he/she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

The majority affirms the ALJ's finding that the Claimant did not sustain a compensable injury because portions of the Claimant's testimony were inconsistent and because Claimant had complained of lower back pain prior to the accident at work. However, the ALJ contradicts these findings in his opinion that a specific incident injury did not occur. He stated, "I am willing to concede that an

incident with a pallet jack did take place on January 26, 2004. Yet I remain unconvinced that this incident caused an injury to the claimant's back, or that it aggravated the claimant's pre-existing back problems." This is pure speculation on the part of the ALJ.

Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The evidence clearly indicates that after Claimant's work related injury, his MRI revealed a herniated disc and the Respondent controverted all claims for diagnostic testing and medical treatment.

I find that the Claimant has proven by a preponderance of the evidence the occurrence of a physical injury to his back by the existence of medical evidence supported by objective findings. Accordingly, I would

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reverse the ALJ's opinion and award Claimant the benefits to which he is entitled.

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SHELBY W. TURNER, Commissioner