

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405652

FREDDIE HATCHER, EMPLOYEE	CLAIMANT
CARROLL COUNTY SOLID WASTE AUTHORITY, EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, CARRIER	RESPONDENT

**OPINION FILED SEPTEMBER 15, 2005**

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed January 20, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on April 20, 2004, and at all other relevant times.

3. The claimant's average weekly wage was \$380.00, resulting in a temporary total disability rate of \$253.00 and a permanent partial disability rate of \$190.00.

4. Respondent initially paid \$1,843.14 in indemnity benefits and \$904.24 in medical benefits.

5. Respondent has controverted this claim in its entirety since June 9, 2004.

6. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered an injury in the course of his employment. Claimant's testimony is inconsistent and unreliable, and therefore not credible. Dr. Spurgin's recorded history indicates that an injury occurred at some time other than shortly after noon on April 20, 2004; and, Claimant failed to report that day an injury that he claims produced "sharp, very consistent" pain.

7. Because Claimant failed to prove a compensable injury, it is not necessary to discuss his request for medical benefits, temporary total disability benefits, or an attorney's fee.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the

Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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's opinion affirming and adopting the Administrative Law Judge's January 20, 2005 opinion.

\_\_\_\_\_The claimant has alleged that he suffered an injury to his lower back on April 20, 2004. The claimant began working for the respondent employer on January 12, 2004. The claimant's job was to haul full containers, holding as much as forty yards of waste, from the respondent employer's "yard" in Carroll County ninety-eight miles to a landfill located northwest of Mountain Home. At the landfill, the claimant's routine was to drive through the gate, pass a scale house, turn and go up the hill to a staging area, unload the two full containers on his truck and trailer, and then pick up two empty containers. At which time, he would return to the yard in Carroll County.

\_\_\_\_\_On April 20, 2004, sometime after noon, the claimant was in the process of trying to close a door on the first container when the handle caught on the can frame and

the door sprang back toward the claimant. He put his hands up to protect his glasses and remembers feeling the door push him backwards. The claimant testified to feeling instamatic pain in his lower back.

The claimant continued to work on the day of the incident and managed his pain with Bufferin. The claimant testified that he did not notify anyone that he had hurt his back because he was not clear on how severe the injury was. The pain continued and the claimant then notified the operations manager, Mr. Rod Vise, in the morning of April 21, 2004. The claimant told Mr. Vise that he had hurt his back and had a doctor's appointment at 10 o'clock.

The claimant was first seen by Dr. Randal Spurgin. In the "reason for the visit" portion of the April 21, 2004 report is handwritten "c/o back pain 'heard pop' last night". Further down the report in the dictated portion it states:

S: Freddie said he started having some back pain last night. He felt something pop down in the right lower lumbar region. ...

The Administrative Law Judge seemed to give great weight to

the handwritten portion of this report as indicating that the claimant was injured during the night of April 20, 2004, instead of during the day as the claimant testifies. In my opinion, the doctor's report does not indicate as to the time of the injury, but as to the time that the pain became more intense. Dr. Spurgin assessed the claimant as having a lumbar sprain and issued an off work slip from April 21, 2004 until April 23, 2004.

The claimant was taken to the emergency room by ambulance on April 22, 2004. The nursing notes from that date stated that the claimant was a "48 year old male writhing in pain from right paraspinal muscles ~L1-L5 unable to achieve comfortable position." The report for the MRI taken on April 22, 2004 states: "L4-5 level shows a very prominent central disc herniation effacing the thecal sac and the cauda equina." On April 26, 2004, Dr. Spurgin assessed the claimant with an HNP at L4-5 with spinal stenosis and DJD after reviewing the MRI report and released the claimant from work until further notice.

In a June 9, 2004, letter to Dr. Spurgin, Dr. Knox reports that the claimant "is a 48 year old left-

handed white male who was injured at work on 4/20/04 while trying to close a heavy door on a garbage truck. He had a jarring and twisting injury with immediate onset of back pain." This history is very consistent with the claimant's testimony. Dr. Knox suspected that the claimant's pain was stemming from the central disc herniation at L4-L5. Dr. Knox suggested a physical therapy regimen.

In a June 30, 2004 letter to Dr. Spurgin, the claimant's attorney asked: "Assuming that this pop incident took place in connection with a work activity, would you agree that Mr. Hatcher's condition (MRI substantiated L4-5 hnp) is probably related to the described work accident?". Dr. Spurgin replied on July 23, 2004, "Yes, I would assume this was work related."

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external 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) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997). Claimant must sustain his burden of proving a compensable specific injury by a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 442 (1947).

In Kathie Mize v. University of Arkansas for Medical Sciences, Full Commission Opinion, Filed May 17, 2001(Claim No. E804727), this Commission held:

For an employee's injury to be compensable under the Arkansas Workers' Compensation Law, it must result from an

injury "arising out of and in the course of employment." Ark. Code Ann. §11-9-401 (Repl. 1996). 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). The phrase "arising out of the employment" refers to the origin or cause of the accident, so it must be shown that a causal connection exists between the injury and the employment. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985). In order for an injury to arise out of the employment, it must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

In order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between her employment and the injury. McMillan v. U.S. Motors, 59 Ark. 85, 953 S.W.2d 907 (1997). It is not essential that the causal relationship between the accident and the disability be established by medical evidence. Wal-Mart Stores, Inc. v. Stotts, 74 Ark. App. 428, 49 S.W.3d 667 (2001). It has long been recognized that a causal

relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263(1962).

In my opinion, the claimant has met his burden of proving a compensable injury. The claimant consistently describes the event that preceded his injury which was within the time and space boundaries of his employment while carrying out the employer's purpose. The injury on April 20, 2004 caused internal harm which required medical services, evidenced by the claimant's visit to Dr. Spurgin on the morning of April 21, 2004. The MRI which shows a very prominent central disc herniation effacing the thecal sac and the cauda equina at L4-5 is objective medical evidence of an injury. The claimant has been able to identify the time and place of the occurrence.

The Administrative Law Judge denied this claim based mainly on the credibility of the claimant. 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. "It is, of course, the duty of the Commission to pass upon the credibility of the parties and witnesses who give evidence before it. It is not, however, the Commission's prerogative to refuse compensation to a claimant simply because he is untruthful." Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483(1984). The Commission may not arbitrarily disregard any witness's testimony. Patterson v. Frito Lay, Inc., 66 Ark. App. 159, 992 S.W.2d 130(1999).

In my opinion, the claimant was a very credible witness. The description of the accident causing his injury has been very consistent throughout his medical history.

There is no evidence of a prior HNP, nor is there any other accident or injury to explain the HNP diagnosis. There are many times when things happen so fast that a clear understanding of the events may not be possible. A heavy door was swinging at the claimant's face, he took evasive action and hurt his back. He continued to work his shift thinking that his pain would subside. The pain did not decrease and the claimant reported the incident to his employer and went to the doctor. I do not find any glaring inconsistencies with the claimant's testimony, and find that he presented as a credible witness.

For the foregoing reasons, I must respectfully dissent. The Administrative Law Judge's decision should be reversed and the claimant should be awarded the appropriate medical benefits, temporary total disability benefits, and attorney's fees.

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SHELBY W. TURNER, Commissioner