

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308906

MICHAEL PHILLIPS,
EMPLOYEE

CLAIMANT

OSMOSE HOLDINGS,
EMPLOYER

RESPONDENT

ACE USA,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 8, 2005

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

Claimant represented by the HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE MICHAEL MAYTON,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed April 8, 2004. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 24, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On June 24, 2003, the claimant earned

wages sufficient to entitle him to weekly compensation benefits of \$440.00 for total disability and \$330.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence presented that he sustained a "compensable injury" to his lumbar spine on June 24, 2003. Specifically, he has failed to prove the occurrence of a physical injury to his lumbar spine on that date that arose out of or occurred in the course of his employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury to the claimant's lumbar spine on June 24, 2003, and 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.

Therefore we affirm and adopt the April 8, 2004 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion affirming that the claimant failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his lumbar spine on June 24, 2003. I find that the claimant provided consistent, credible testimony that he injured his back on June 24, 2003, during the course of employment, and that the injury was a compensable injury as defined by Ark. Code. Ann. §11-9-102.

The claimant provided testimony that he injured his back on June 24, 2003 while at work and lifting a "jig" weighing sixty-five to seventy-five pounds. The claimant complained of his back injury

shortly thereafter and contacted a personnel worker in order to determine who could treat his back. The claimant had a history of having back injuries due to muscle strains, but the symptoms usually subsided within a short period of time. The respondent had a policy providing incentives when the entire crew failed to sustain injury or miss work for particular periods of time. The claimant waited to see if his pain would subside and when it did not sought medical attention. The medical findings were consistent with an injury due to a specific lifting and twisting incident on June 24, 2003.

The majority opinion relied on the administrative law judge's finding that the claimant's injury did not arise out of the course of employment. This finding dismisses the medical records indicating that the incident on June 24, 2003 was consistent with the claimant's injury. It also fails to address testimony from the claimant and the respondent's own witnesses that the claimant began complaining of back pain and sought medical attention immediately after June 24, 2003; the same date the claimant says he injured his back. The claimant testified that he reported his

injuries to his supervisor and to Yates. The claimant's supervisor, Miles, testified that on the morning of June 24, 2003 the claimant did not appear to be suffering from back pain but acknowledged that later the same day the claimant appeared to be suffering from back pain. Miles testified that he attributed the injury to the claimant's history of having back pain, but admits he asked the claimant if he needed to fill out an accident report. This testimony indicates that Miles was aware of some change in the claimant's condition for it would not be logical for Miles to ask the claimant about completing an accident report if he did not feel the claimant's injury was not attributable to an injury sustained that day. Additionally Yates' testimony that she spoke with the claimant regarding seeking a doctor for his back but then retrieved Miles to participate in a conference call with the claimant in order to determine if his need to see a doctor was for his work injury indicates that Yates likely had knowledge the claimant's injury was work related or she would not have felt the need to include Miles in the conference call or to witness her questions to the claimant regarding whether his injury was work related.

With regards to the finding that the claimant's injury was due to a preexisting back injury the evidence indicates that while the claimant had sustained previous muscle strains he did sustain a compensable injury due to the specific incident regarding when he lifted the "jig." The administrative law judge supported his decision with the fact that the claimant did not indicate his previous back problems when consulting Dr. Cheyne or Dr. Johnson. The claimant sought medical attention at the hospital on the date of the incident and the doctor noted that the claimant complained of a history of back pain and of pain due to twisting the same day. This supports a finding that the claimant injured his back the same day and that he did not intentionally fail to report any previous back pain.

Later the claimant completed a patient history form for Dr. Cheyne and answered a question regarding whether he had ever been treated for his condition. The claimant indicated, "yes" and listed the doctor's name. Another section on the form has questions for the claimant to indicate if he or immediate family members had history of specific illnesses, including heart disorders, high blood pressure, cancer, ulcers, arthritis, respiratory,

tuberculosis, and hepatitis. There is also a section entitled "other." However, there is no specific question regarding whether the claimant had a history of back problems. The claimant's testimony that his previous back pains had subsided and that the injury in the present case did not, coupled with the fact that there was no specific question regarding having a specific back injury, explains why the claimant or his sister would have believed the claimant's injury to be separate and distinct from any previous "muscle strains" in his back and therefore not found it necessary to expound on his previous "muscle strains." The claimant's disclosure that he had received treatment for his condition in the past also indicates that he was not attempting to conceal his injury.

Based on the foregoing, I find that the claimant incurred a compensable injury arising out of the course of employment with the respondent, for which he is entitled to benefits. Accordingly, I dissent.

SHELBY W. TURNER, Commissioner