

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403031

JERRY BARTON,  
EMPLOYEE

CLAIMANT

CORBETT GARRETT TRUCKING, INC.,  
UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JUNE 15, 2006

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

Claimant represented by the HONORABLE PHILLIP M. WILSON,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL KNOLLMEYER,  
Attorney at Law, Jacksonville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed November 21, 2005. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The claimant is entitled to the maximum compensation rates in effect in April of 2002 if this claim is found compensable.
2. The parties stipulate that an individual is not paid for the first five months of disability onset by the Social Security Administration.

3. The claimant has established by a preponderance of the evidence that he sustained a compensable low back injury identifiable by time and place of occurrence.
4. The respondent has controverted this claim in its entirety.
5. The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of the findings of fact and conclusions of law set forth herein, one-half of said fee to be paid by the claimant and one-half of said to be paid by the respondent in accordance with Ark. Code Ann. §11-9-715.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 21, 2005 decision 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 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a truck driver. He began working for the respondent employer in December of 1999. On his pre-employment physical, the doctor noted that the claimant had a "tender lumbar spine with occasional radiation of pain and numbness to legs."

The claimant alleged that on April 28, 2002, while he was checking out the air conditioning on his truck in Texas, he slipped and fell and hurt his back. The claimant continued his journey to Arizona. However, the respondent employer sent another driver to drive the claimant back to Arkansas. The claimant first sought medical treatment on May 3, 2002, at the Joseph Clinic. The claimant eventually became under the care of Dr. Chan. The claimant had an MRI in August of 2002, which found that the claimant had a broad base disk herniation at L5-S1. However, this MRI was four months after the incident.

The medical evidence demonstrates that the claimant had been diagnosed with degenerative disk disease at least six years prior to this alleged incident. The claimant had undergone an MRI on May 7, 2002, which demonstrated that the claimant had early disk dissection and degenerative disk disease with no impingements or protrusions. Between May 7, 2002, and August of 2002, the claimant had a herniation present that was not present in May.

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).

The only evidence supporting a finding that the claimant sustained a compensable injury on April 28, 2002, is the claimant's own self-serving testimony. In my opinion, the claimant is not a credible witness. 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.

The evidence demonstrates that the claimant continued to drive for several days after this alleged incident and did not seek treatment until five days later.

Furthermore, the claimant has a history of fraud. The claimant was asked if he had ever had a prior workers' compensation claim for a back injury at the hearing. The claimant stated that "I've never received no workers' comp on my back other than here." However, when the respondents' counsel confronted the claimant with the medical records which proved he had, he then admitted that he had a prior work-related back claim, but stated that the prior claim was for "sprained muscles." On his medical records, it stated that the prior back injury was actually for a ruptured disc at L4-5. He stated that he never had any back problems when he applied for work with the respondent employer. When the claimant was confronted with the pre-employment physical report, the claimant changed his tune. Moreover, the claimant is receiving Social Security disability benefits and told the Social Security Administration that he was unable to work. The claimant receives benefits from the Social Security but has continued to work at jobs which do not report the claimant's income to the Social Security Administration.

The record fails to demonstrate that the claimant suffered any alleged injury. At the time that the claimant returned to the respondent employer, the respondent-owner

observed a large continuous bruise on the claimant. The bruise was not consistent with similar accidents that had been suffered by other employees and drivers. Mr. Garrett, the respondent-owner believed the bruise was from a fight, not a fall.

In my opinion, it is conjecture and speculation to find that the claimant sustained a compensable injury on April 28, 2002. 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). Accordingly, I find that the claimant has failed to meet his burden of proof. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner