

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404833

TOMMY G. HOLLAND, EMPLOYEE

CLAIMANT

ABF FREIGHT SYSTEMS, INC.
A SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 11, 2006

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

Claimant represented by HON. ROBERT M. ABNEY, Attorney at Law, Des Arc, Arkansas.

Respondent represented by HON. JOHN D. DAVIS, 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 September 19, 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 relationship existed on April 9, 2004 and at all other relevant times.

3. Claimant's temporary total disability rate is \$453.00, and his permanent partial disability rate is \$340.00.

4. Respondent controverts this claim.

5. Claimant's healing period ended on August 30, 2004.

6. Claimant did not sustain his burden of proving by a preponderance of the evidence that he suffered an injury arising out of and in the course of his employment on April 9, 2004. Claimant did not report an injury on that date, despite prior experience reporting a work-related injury and opportunities to make a report; he submitted his group health insurance information for payment of his medical bills; and the medical records consistently fail to mention an incident at work when recounting Claimant's history.

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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The claimant has alleged that he suffered a compensable injury to his lower back on April 9, 2004. At that time, the claimant was employed as a short-haul truck driver for the respondent. The claimant testified that he injured his back while attempting to unload some merchandise at a Hastings Record and Book Store in Batesville, Arkansas.

After a hearing, an Administrative Law Judge ruled that the claimant failed to meet his burden of proof and denied and dismissed this claim. In reaching this decision, the Administrative Law Judge noted that the claimant had failed to notify his employer in a timely manner and gave contradictory information to his initial medical providers as to the date of the onset of his symptoms. Based upon my de novo review of the record as a whole, it is my opinion that the claimant has been a credible witness and that he has met his burden of proof. Therefore, I respectfully dissent from the majority opinion affirming and adopting the Administrative Law Judge's September 19, 2005 decision.

According to the claimant, on April 9, 2004, he was delivering a display case to a Hastings Store in Batesville, Arkansas. While preparing to unload the items from the truck, he had to raise a ramp from the store's loading dock onto his truck so that he could remove the display case. However, the ramp was stuck and in attempting to lift it, he felt a sudden onset of pain in his lower back. Nonetheless, the claimant continued unloading the display case and proceeded to make his other deliveries. He did not return to the respondent's place of business in Little Rock, Arkansas, until after 9:00 p.m. After turning in his paperwork, the claimant returned to his home. He stated that, at that time, his back was hurting, but not severely.

The accident happened on Friday. On the following weekend, the claimant reported having continued pain in his back, but he was able to return to work on Monday. According to the claimant's testimony, after arriving at work, he went to the office of his supervisor to obtain the paperwork for his day's route. At that time, he stated that he had a conversation about his back with another driver, Frank

Parker, and his immediate supervisor, Jack Hutchinson. After this conversation, the claimant worked a regular work day.

The next day, April 13, 2004, the claimant related a substantial increase in his back pain. Consequently, he traveled to the emergency room at the Baptist Medical Center in North Little Rock, Arkansas. The hospital emergency room notes indicate that the claimant had reported pain and numbness in his lower back and leg. The report also indicates that the claimant did not relate a specific trauma. The claimant eventually underwent a lumbar MRI scan while at the hospital in which he had bulging discs at various levels and a disc herniation at L3-L4.

The claimant did not work either April 13th or April 14th, calling in sick on both of those days. The claimant returned to work on Thursday, April 15th. He testified that, at that time, he told Mr. Hutchinson that if his back did not improve, he would have to take some more time off. The claimant also worked the following Friday without incident on either day. However, he did indicate to his employer that he was going to take the following week off as a scheduled vacation.

Over the following weekend, the claimant had a severe escalation in his symptoms. Over the next few days, the claimant repeatedly sought emergency room assistance, eventually being hospitalized at the White County Medical Center in Searcy, Arkansas. Because of the claimant's worsening symptoms and based upon his MRI scans, the claimant's hospitalization eventually resulted in spinal surgery performed on April 23, 2004, by Dr. Scott Dicus. After a period of convalescence, the claimant returned to work on August 31, 2004.

The claimant formally notified his employer that he sustained a job-related injury on April 23, 2004. On that date, the claimant's wife called the respondent and spoke with Dorothy Wilson, who handles clerical matters in the claimant's department. Ms. Wilson stated that she took down certain information from Ms. Holland and later asked Mr. Hutchinson if he was aware of the claimant's injury. According to Ms. Wilson, Mr. Hutchinson said something to the effect that the claimant had discussed a back injury with him but he did not know the specifics. Ms. Wilson stated that it was the respondent's procedure that an

injured worker should notify their immediate supervisor and that the supervisor should then contact her. However, she stated that Mr. Hutchinson, at times in the past, had failed to advise her when he was told of a job-related injury.

Another witness who testified was Frank Parker, who stated that he was present when the claimant reported to work on Monday, April 12th. He stated that he saw the claimant walking in an unusual manner and asked him what his problem was. He stated that the claimant told him he had injured his back the previous Friday. While Mr. Parker did not remember whether Mr. Hutchinson had been involved in the conversation, he stated that Mr. Hutchinson was in the area where the conversation was spoken and that he would have been able to hear what was said.

In denying the claim, the Administrative Law Judge and the majority, by their affirming and adopting of the Administrative Law Judge's opinion, found that the claimant's testimony was not credible, in that, it was contradicted by Mr. Hutchinson and some of the employer's business records. The Judge was also persuaded by reviewing the emergency room records and similar medical reports in

which the claimant gave conflicting dates regarding the onset of his symptoms. The Judge concluded that the claimant's testimony was not a sufficient basis to establish that he was injured on the job. However, in my opinion, I believe the Judge was not considering the circumstances of the claimant's injury and was not attaching sufficient credibility to his statements.

The claimant is a long-term employee with the respondent. At the time of the hearing, he had been employed by them for over 25 years. In fact, when Mr. Hutchinson, the claimant's immediate supervisor, was asked whether he believed the claimant injured his back in Batesville on the date in question, Mr. Hutchinson replied in the affirmative. Obviously, the claimant has a reputation as a truthful person who would not lie about such things as a workers' compensation injury. Further, late reporting is not tantamount to false reporting. The claimant testified that initially he did not believe that his injury was serious. Consequently, he sought to take care of it with some rest and, when he sought medical treatment, he did so under his group health insurance. It was not until the week of

April 19, 2006, that the true severity of the claimant's physical condition became apparent. However, after that time, according to both his testimony and his wife's testimony, he began taking large quantities of pain medication which impaired his faculties. Also, in my opinion, the claimant believed that he had notified his superior of his job-related injury. Consequently, the claimant did not formally advise the respondent of his injury until April 23, 2004. However, there is nothing in the record which suggests that the respondent was in any way prejudiced by this delay in reporting.

I also do not attach any great weight to the medical reports which do not document a job-related injury. My review of those reports indicate that they do not list any particular history as to how the claimant injured his back. It does not appear to me that the emergency room personnel inquired of the claimant as to any background on how the injury occurred. They were, understandably, more concerned with treating his back at the present time. Also, the Judge attached great weight to statements in the medical record setting out the onset of the claimant's injury.

However, in my opinion this information was overemphasized, in that, the claimant testified that, after his April 9th injury, his back condition improved somewhat with rest, but would then flare up and become more severe again. The onset date given to his medical providers reflects the dates in which his symptoms occurred, not the actual date of injury.

In my opinion the claimant's credible testimony was sufficient to establish the occurrence of compensable injury. I find that the corroborating testimony as well as the claimant's reputation for honesty (as evidenced by the testimony of Mr. Hutchinson, the respondent's witness) is sufficient to meet his burden of proof. Therefore, I respectfully dissent from the majority's decision.

SHELBY W. TURNER, Commissioner