

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605355

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| JUAN ESTRADA A/K/A JOSE VARGAS,<br>EMPLOYEE     | CLAIMANT   |
| GILBERT CENTRAL CORP.,<br>EMPLOYER              | RESPONDENT |
| ZURICH AMERICAN INSURANCE,<br>INSURANCE CARRIER | RESPONDENT |

OPINION FILED OCTOBER 9, 2007

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

Claimant represented by the HONORABLE STEVEN R. NCNEELY,  
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed January 25, 2007. The administrative law  
judge found that the claimant sustained an injury to his low  
back on or about January 1, 2006. After reviewing the  
entire record *de novo*, the Full Commission reverses the  
opinion of the administrative law judge. The Full  
Commission finds that the claimant did not prove he  
sustained a compensable injury.

I. HISTORY

The claimant testified that he was born in Mexico, and that he began working for the respondent-employer in 2004. The record contains an Employment Eligibility Verification signed by Jose Vargas on July 26, 2005. The claimant testified, "I am Jose Vargas. My real name is Juan Estrada, but I use Jose Vargas' name because Mr. - like I'm not legal. And that's the only way we can find a job."

The claimant testified on direct examination:

Q. Tell the Judge how you injured your back.

A. Well, I had to climb top, it's like a big, they call it the leak. It's like a big low - I've got a picture. Like a big, it's a hammer, hydraulic hammer. So it's at the top. I put it in the ground, and I had it clamped off and hold it until the hammer come down....

Q. So you were keeping this large pipe from swaying, and you injured your back?

A. Yes. It popped it....

Q. When did that happen?

A. When did what happen?

Q. That incident where you hurt your back?

A. Well, when I really snapped my back. That's where it started hurting a little bit, a little more and more like what's called a little more, and more, and more, and more. Until one day I was working, I was step on and I took pieces of 2x4.

And I just laid them down to pick something, and that's where my back snap pops....

The claimant testified that he told his superintendent, Lucky Brewer, that he had hurt his back. The claimant testified that he also told Brian Flock that he had hurt his back.

Handwritten progress notes attributed to Dr. Gumersindo Leal on April 18, 2006 appeared to state that Juan Estrada complained of lumbar pain and weakness in his legs. (On the same report, it appears to have been written that there was some sort of incident at work on May 12, 2006.)

The claimant testified, "I had to tell the truth to my doctor because he's going to give me some medicine. And I do everything with my real name, everything. I just use that name for finding a job."

A CT of Juan Estrada's lumbar spine was taken on April 19, 2006, with the following impression: "1. Lumbar spine osteoarthritis. 2. Central herniated nucleus pulposus L4-5 and L5-S1 with secondary borderline acquired lumbar spinal canal stenosis. Recommend clinical correlation as to the significance of these findings."

A handwritten progress note in Dr. Leal's office on May 12, 2006 appeared to indicate that the claimant was

reporting a work-related injury and added, "real name is Jose Vargas" rather than Juan Estrada.

A Physician's Statement provided to Dr. Leal included the following language: "Within a reasonable degree of medical certainty, the Major Cause (51% or more) of Juan Estrada a/k/a Jose Vargas low back injury is his work related accident." Dr. Leal circled "Yes" on May 12, 2006.

A pre-hearing order was filed on September 12, 2006. The claimant contended that he sustained a back injury. The claimant contended that he was entitled to reasonably necessary medical treatment, and temporary total disability compensation beginning April 19, 2006. The respondents contended, among other things, that the claimant "was not an employee. The claimant is Juan Estrada. The employee who was hired is Jose Vargas. The claimant was not injured on the job."

The pre-hearing order indicated that the parties would litigate the issues of compensability, temporary total disability, reasonably necessary medical treatment, and attorney fees.

A hearing was held on October 27, 2006. The claimant's attorney examined Tyler Buford, a supervisor for the respondent-employer:

Q. When is the first time you became aware that he was stating his back injury was work-related?

A. It was after he was terminated. I don't know the exact date....

Q. Do you know the date he was terminated on?

A. I believe it was May the 2<sup>nd</sup>.

The respondents' attorney cross-examined Mr. Buford:

Q. Did you ever get a report of a work-related injury involving who you knew as Jose Vargas?

A. No, sir.

Q. And did you get some information at one point that he was not Jose Vargas?

A. Yes....As I recall, Jose had a document from a doctor. And he came to me asking for financial help. He wanted to know if we had, if he could put this doctor visit on his company provided insurance.

Q. And what happened then?

A. I asked him, I said yes you're available to put it on the company insurance, which is provided to all hourly employees. He said I have a problem. He went into the doctor, and it's already been paid by Juan Estrada. I said what do you mean by Juan Estrada? He said I had a credit card of Juan Estrada, so I paid for it. So I said, so are you telling me you're Juan Estrada? He said yes. He said my numbers are no good. At that point, I asked him if he was an illegal

alien, and he said yes. It was at that point that I took that information to my immediate supervisors, put Jose back to work until we check into this? They gave me a report that he wasn't who he said he was so we terminated him.

Q. So your only reason for terminating him was because he was illegal and had given you false information about who he was?

A. Yes, sir.

Q. Is that Gilbert Central's policy to not hire illegal aliens, and to require proper identification of somebody who comes to work for them?

A. Yes, sir.

The administrative law judge found, in pertinent part:

4. On or about January 1, 2006, the claimant sustained an injury to his low back arising out of and in the course of his employment with the respondent.

5. The claimant was temporarily totally disabled for the period commencing May 2, 2006, and continuing through the end of his healing period, a date to be determined.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury on or about January 1, 2006.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) defines "compensable injury":

(A) (i) An 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A) (i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The administrative law judge found in the present matter, "On or about January 1, 2006, the claimant sustained an injury to his low back arising out of and in the course of his employment with the respondent." The Full Commission finds that the claimant did not prove he sustained a compensable injury. There is no probative evidence before the Commission supporting the claimant's contention that he sustained a compensable back injury. There were no corroborating witnesses and in fact the three co-workers, all called by the claimant's attorney as witnesses, disputed

the claimant's assertion that he reported a work-related incident. The medical evidence does not corroborate the claimant's testimony. The record does not demonstrate that the claimant sustained an accidental injury causing internal or external physical harm to the body. Nor does the record corroborate the claimant's testimony that there was a specific incident identifiable by time and place of occurrence. Further, a CT in April 2006 showed osteoarthritis in the claimant's lumbar spine and central HNP's at L4-5 and L5-S1. There is no indication of record that any workplace event caused these degenerative abnormalities or otherwise caused a herniated disc. The claimant did not establish a compensable injury by medical evidence supported by objective findings. The Physician's Statement signed by Dr. Leal on May 12, 2006 is entitled to minimal weight and does not prove that the claimant sustained a compensable accidental injury.

The claimant's illegal citizenship status is not relevant with regard to the instant adjudication. Based on the provisions of Ark. Code Ann. §11-9-102(4)(A)(i) and following, the Full Commission finds that the claimant did not prove he sustained a compensable injury. The Full

Commission reverses the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion which finds that the claimant did not sustain a compensable injury. In my opinion, the Majority has erroneously concluded that the claimant was not credible.

Specifically, I find the claimant met his burden of proof in establishing a compensable injury under the Arkansas Workers' Compensation Act.

The Administrative Law Judge who heard the testimony in this case found the claimant to be a credible witness. I agree with that assessment since the claimant candidly testified about his immigration

status in this country and his actions in acquiring false documents in order to obtain employment. Such testimony is clearly contrary to his best interest, in, that it could result in his deportation. His willingness to appear in a formal proceeding and provide sworn testimony to that effect strongly suggests that the claimant is being truthful.

The claimant's testimony was that in January 2006, he was working for the respondent in a bridge building project. The claimant testified that while trying to guide a large pipe into the ground to be used as form for a bridge piling, he injured his lower back. The claimant testified that after this injury, he informed his other coworkers and his immediate supervisor, Lucky Brewer.

The claimant went on to testify that some time after the first back injury, apparently in March 2006, he bent over to lay down some 2 x 4's he was carrying. As he was raising back up, he felt an intense pain in his lower back accompanied by what he described as a "snap." According to the claimant he, once again, advised his immediate supervisors of this injury. Also, because the pain in this case was greater than it had

been before, the claimant asked to see a doctor. According to the claimant's testimony, he advised not only Mr. Brewer, but Brian Flock and Tyler Buford, both also supervisory personnel with the respondent employer, of his injury and his need to seek medical treatment.

According to the claimant, he was never referred to any medical provider. There is some testimony that he saw a chiropractor some time after the second injury but there is no medical documentation to support that. In any event, the claimant sought treatment from Dr. Gumersindo Leal of Memphis, Tennessee. Dr. Leal's initial treatment notes of the claimant dated April 18, 2006, is handwritten and difficult to read. However, it appears that on that date, the claimant did tell the doctor that he was suffering from pain and other symptoms associated with a back injury. The note also contains a reference, presumably added later, which states, "On 5/12/06, he (illegible) was injured at work (illegible) visit of 5/12/06." Upon the April 18 visit, Dr. Leal directed that the claimant undergo a CT scan of his lumbar spine. This procedure was performed on May 19, 2006 and, according to Dr. Edwards Atkinson, who prepared the

report regarding the scan, the claimant was suffering from herniated discs at L4-L5 and L5-S1.

Testimony regarding this case was also provided by Lucky Brewer, Ryan Flock, and Tyler Buford. These gentlemen each denied that they were aware that the claimant was an illegal alien and insisted that he did not ever advise them that he had injured his back prior to May 2006. Each of the witnesses testified that they learned of the claimant's back injury only when he was attempting to obtain health insurance coverage for his ongoing medical treatment. It was also at that time that the witnesses claimed that they learned the claimant's real name was Juan Estrada and not Jose Vargas. According to Mr. Buford, who was apparently the overall superintendent of the construction project at which the claimant was working when he sustained his injuries, the claimant was terminated as soon as they discovered that he was an illegal alien.

After reviewing the testimony of the claimant's three supervisors, I am of the opinion that their testimony is lacking in credibility. I simply do not believe the witnesses when they testified that they had no idea that the claimant was an illegal alien prior

to May 2006. Given the apparent experience of these three witnesses in the construction industry, I simply cannot believe that they were so naive to not suspect that the claimant was illegally in this country. Their testimony is understandable, since any statements to the contrary could expose them to substantial federal, civil, and criminal penalties. Nonetheless, I do not find the testimony of these witnesses to be entirely believable. All things considered, I find that the claimant's testimony is entitled to more weight.

I also note that the medical records support the claimant's testimony. Much is made of the fact that Dr. Leal's initial note does not indicate that the claimant sustained a job-related injury. However, I do not see particular significance in this omission. Dr. Leal's handwritten note does not indicate whether he inquired as to the cause of the claimant's back condition or whether he even thought that was significant. What is certain, that, in a subsequent office visit, the claimant made it clear to the doctor that the injury was job-related, which Dr. Leal went back and noted in his earlier report. Likewise, the CT scan performed on the claimant provides objective

evidence of an injury. Further, the symptoms described by the claimant are in accord with those which would result from a herniated disc in his lower back.

In my opinion, the claimant has clearly offered sufficient evidence to support a finding that he sustained a compensable injury as a result of two separate job-related accidents. Also, the claimant's credible testimony that his employers advised him not to report a job-related injury so as to jeopardize job status (or expose them to possible federal penalties for having hired an illegal alien) is believable and explains whatever discrepancies that might exist in regard to the limited medical records in this case. Therefore, I would have affirmed and adopted the decision of the Administrative Law Judge.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner