

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511533

DAVID GOUDEAU, EMPLOYEE	CLAIMANT
SCHWAN'S FOOD COMPANY, EMPLOYER	RESPONDENT NO. 1
SPECIALTY RISK SERVICES, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MAY 18, 2007

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

Claimant represented by the HONORABLE KENNETH OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE ANDY CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney, Little Rock, 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 30, 2006. 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 October 7, 2005, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to the maximum compensation rate for 2005.
4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back while working for the respondent on October 7, 2005. See discussion above.
5. The claimant did not report a workers' compensation injury until October 24, 2005. See discussion above.
6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable injury subsequent to October 24, 2005.
7. The claimant is entitled to temporary total disability from October 24, 2005, to January 30, 2006, and should pay temporary total partial disability to the claimant from January 31, 2006, til April 5, 2006. See discussion above. Also see Ark. Code Ann. §11-9-520.
8. The respondents should pay permanent partial impairment to this claimant in the amount of 7 percent to the body as a whole. See discussion above.
9. The respondents have controverted this claim in its entirety.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 30, 2006 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.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his low back while working for the respondent employer on October 7, 2005. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant alleged that he sustained a compensable injury to his back on October 7, 2005. The claimant testified that he was working at CV's Family Foods on that date and bent over to pick up a case of pizza. He testified that he felt pain in his back all the way down to his foot. There were no witnesses to this alleged incident and the claimant did not tell

anyone about this incident. The claimant called his supervisor, Gary Apon, the date of the incident and told him his back hurt and he could not finish his route. The claimant did not report a work related incident to Mr. Apon.

The claimant was questioned about work related injuries and what was the company's policy. He stated that he knew what the company's policy was and that he was to report any work related injuries to Erin Jensen. The claimant failed to do so until October 24, 2005. The claimant carried a hand-held computer every day and at the end of the day when he logged off the hand-held asked the question whether or not the claimant was injured. On the date in question, the claimant signed off of his hand-held and said that he had not had a work related injury.

The medical records also demonstrate that the claimant did not sustain a compensable injury. The evidence demonstrates that the claimant had been reporting radiating pain down his left leg on numerous occasions over the prior two years before this alleged incident. The claimant had been seeking chiropractic treatment for approximately two years before this alleged incident. The claimant's lumbar complaints have

been longstanding. The claimant's first visit to Absolute Chiropractic was on December 23, 2003, and he stated that he had pain off and on for year, that the pain had been constant, and it had been severe for three months. The claimant treated with Absolute Chiropractic until October 7, 2005. On numerous occasions he had exacerbation of his pain of a spontaneous nature. Many of these exacerbations were self reported as moderate or even severe. In fact, the claimant had reported one such exacerbation of severe pain on September 30, 2005, one week prior to the alleged work incident. Furthermore, on several occasions during this almost three-year period of constant chiropractic treatment, it was necessary for the claimant to make daily visits to the clinic. One of these periods was immediately prior to the claimant's alleged work injury on October 7, 2005.

The claimant sought medical treatment from Dr. Russell on October 7, 2005. Dr. Russell's notes did not indicate that the claimant gave a history of low back pain for eighteen months and that the claimant reported that it got worse yesterday. The claimant had no explanation for this and admitted that it was possible that he told Dr. Russell that it happened on October 6, 2005. However, there is no mention of a work

related incident in any of the medical records on the date of the claimant's alleged work incident.

There is a discrepancy in what the claimant alleged happened. The claimant reported that he sustained an injury while lifting up pizza boxes. However, the claimant told Mr. Apon that he injured himself while picking up a pallet. Mr. Apon testified that it was no secret that the claimant had a preexisting problem. Mr. Apon admitted that the claimant called him on or about October 7, 2005, but denied that the claimant told him he sustained a work related injury. It is significant that the claimant did not seek workers' compensation benefits until he learned that he was not eligible for short- or long-term disability benefits because he had not enrolled in those programs. It was at that point that the claimant decided to file a workers' compensation injury.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on October 7, 2005. The claimant has sought chiropractic treatment for essentially the same complaints for over two years prior to this incident. The claimant failed to report it as a work related injury to his treating physicians until he

was told he was not eligible for long- or short-term disability benefits. Therefore, I cannot agree with the majority's decision to award the claimant benefits for a compensable injury. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner