

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506056

JASON L. REYNOLDS, EMPLOYEE	CLAIMANT
FIREBALL EXPRESS, INC., AN UNINSURED EMPLOYER	RESPONDENT

**OPINION FILED FEBRUARY 2, 2007**

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

Claimant represented by HONORABLE F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE NORWOOD PHILLIPS, Attorney at Law, El Dorado, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed May 24, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The parties' stipulations recited herein are reasonable and are hereby accepted as fact.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and during the course of his employment with the respondents on May 6, 2005.

4. The respondent-employer admitted under oath his failure to secure Workers' Compensation Coverage at the time of the alleged incident for its employees. Therefore, the record in this matter shall be immediately forwarded to the Arkansas Workers' Compensation Commission Compliance Division for further investigation and proceedings.

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.

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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 finding that the claimant did not sustain a compensable injury. The claimant contends that he injured his back while lifting cases of soda in order to stock a

cooler. In denying the claimant benefits, the Majority, by affirming and adopting the decision of the Administrative Law Judge as their own, opines that there were varying accounts of how the claimant's injury occurred and that the claimant had failed to meet his burden of proof. However, after a de novo review of the record, I find that the claimant provided consistent, credible testimony that he injured himself while lifting cases of soda and stocking a cooler. His testimony was corroborated by the Brian Johnson, Owner. Likewise, the medical records also supported the claimant's testimony regarding how the injury occurred. Accordingly, I would have reversed the decision of the Administrative Law Judge.

The claimant contends that he sustained a compensable injury while lifting cases of soda at work. At the hearing it was agreed that the primary issue would be compensability and that in the event compensability was overcome, a determination would need to be made with respect to temporary total disability, permanent partial disability, medical benefits, and a change of physician.

The Administrative Law Judge found the claimant had not sustained a compensable injury and essentially indicated that the claimant gave varying accounts of how his injury occurred. However, after reviewing the record, I find that the claimant provided consistent, credible evidence of how his injury occurred. This testimony was corroborated by Johnson's testimony that the claimant reported a work-related injury to him and by the medical records which indicate that the claimant injured himself while at work.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann.

§ 11-9-102(4)(A)(i)(Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant in the present case had admittedly objective findings in the form of the presence of muscle spasms and a bulging disc as shown by an MRI. Likewise, he was diagnosed with a strain, which indicates that he had objective findings to support a compensable injury. However, the parties dispute how the injury occurred. Therefore, the issue of compensability is largely dependent on whether the claimant's testimony that he injured himself at work is credible.

The findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the

Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worth of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). Indeed, the Commission may not arbitrarily disregard any witness's testimony. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

In my opinion, it is more probable than not the claimant injured himself while lifting the case of soda at work. The claimant consistently testified that he injured himself when lifting a case of soda. It is undisputed that these cases of soda held some 24 20 oz. bottles of soda. Furthermore, these cases of soda were stacked upon one another. When considering the claimant's testimony that his only previous back injury was a resolved strain from high school, in conjunction with his age at the time of the

injury, I find that it is unlikely the claimant injured himself by simply getting out of bed. I also note that the claimant consistently testified that he did not injure himself while getting out of bed and repeatedly reported that his injury was work-related when seeking medical treatment. Therefore, I find that the claimant injured himself while at work.

I also find that the testimony of Johnson corroborates the claimant's testimony that he injured himself while lifting soda. Johnson said that he talked with Adcox, who told him of her conversation with the claimant. While Johnson did not go into detail regarding the conversation with Adcox, he did not say that Adcox told him that the claimant was injured when getting out of bed. In fact, the evidence seems to indicate that Adcox told Johnson the claimant injured himself while at work. Johnson testified that he spoke with the claimant, the insurance company, and Adcox about the injury. Almost immediately after indicating that he spoke with Adcox, he indicated that the claimant told him a virtually identical account of the

injury. The testimony was as follows,

Q Did Sarah tell you about her conversation with him?

A Yes.

Q From your knowledge of workers' compensation, not what it says but the way you appreciate it, did you have any choice but to accept the claim?

A It was My understanding that I had to pay.

MR. PHILLIPS: That's all I have, Judge.

THE COURT: Mr. Thomas?

CROSS EXAMINATION

BY MR. THOMAS:

Q When you and Jason had your first conversation about his injury, what did he tell you about how he had hurt himself?

A It was later on - when I talked to Jason it was probably later that - I guess that Saturday afternoon. He told me basically the same thing, that he had hurt it the previous night.

Q At the store?

A Yes.

Based on the aforementioned testimony, I find that Johnson's testimony corroborates the claimant's testimony that he was injured at work. It also rebuts Adcox's testimony that the claimant reported he injured himself when getting out of bed.

The Majority places great weight on Adcox's testimony that the claimant told her he was injured while getting out of bed. However, I find that Adcox's testimony is entitled to little weight. Adcox testified that the claimant told her he was supposed to work and was attempting to contact a manager. Accordingly, I find that it is unlikely that Adcox's or the claimant's primary concern would be in discussing the details of how and where the claimant's injury occurred. Likewise, I find that based on Johnson's testimony, the evidence tends to support a finding that the claimant told Adcox he injured himself while at work.

The Majority argues that the claimant seemed to be "hazy" with regard to his conversation with Adcox and vague with regard to how he injured himself. However, I find that

the claimant's testimony regarding his statements to Adcox to be credible. The claimant testified that he did not remember telling Adcox that he injured himself when getting out of bed. In my opinion, this is essentially a denial of such a statement, which would be consistent with the medical reports, the claimant's other testimony, and the testimony of Johnson. Additionally, the claimant testified that he told Adcox that he could not get out of bed. I note first that such a statement is certainly not an admission that the claimant reported injuring himself while getting out of bed. However, I also note that if the claimant reported he could not get out of bed, it is plausible and likely that Adcox simply become confused regarding whether the claimant injured himself when getting out of bed.

Finally, I find that it is simply not logical that a 26-year-old male that had no medical issues regarding his back would injure himself simply by getting out of bed. Rather, it is simply more logical and believable that the claimant would have injured himself when lifting a heavy object at work as he reported. Therefore, I find that the

preponderance of the evidence shows that the claimant injured himself while lifting a case of soda at work.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner