

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512192

ERIC W. SULTZ,  
EMPLOYEE

CLAIMANT

COOPER TIRE & RUBBER COMPANY,  
EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED JANUARY 5, 2007

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

Claimant represented by the HONORABLE NELSON V. SHAW,  
Attorney at Law, Texarkana, Texas.

Respondents represented by the HONORABLE WILLIAM G. BULLOCK,  
Attorney at Law, Texarkana, Texas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondent appeals an administrative law judge's opinion filed July 6, 2006. The administrative law judge found that the claimant proved he sustained a compensable injury, and that the claimant proved he was entitled to a period of temporary partial disability compensation. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

Eric Wayne Sultz, age 35, underwent an x-ray of the claimant's lumbar spine in October 2002. The following impression resulted: "Hypertrophic spondylitis of the upper lumbar spine with probable old compression fracture of L1."

The record indicates that the claimant was hired at Cooper Tire & Rubber Company in January 2003. The claimant testified that he worked in Sort and Label, that is, sorting tires: "I have five lines that I take care of and you sort them and stack them and label them up and get them on the tow conveyor."

The record indicates that Dr. Bryan Bowen occasionally treated the claimant for low back pain beginning in August 2004. Dr. Bowen noted in May 2005, "MRI showed some degenerative changes but no herniated disc." Dr. Bowen's impression in May 2005 was "Low back pain with degenerative disc disease."

The claimant began injection treatment with Dr. Thomas Watson in August 2005. Dr. Watson reported on September 16, 2005, "He reports significant improvement after two epidural steroid injections. However, in the interim, he has strained himself at work at Cooper Tire. He felt some pain in his back going down his leg. I advised him to proceed with a third injection, as well as restrain from heavy

physical activity over the weekend such as work or lifting anything over 25 pounds."

The parties stipulated that the employment relationship existed at all relevant times, including September 28, 2005. The claimant testified that while moving a tire, "I felt something give in my lower back on the right side....It felt like something had popped loose in there or something."

The parties stipulated that the claimant's supervisor on September 28, 2005 was Frank Pearson, and that the claimant timely notified the respondent of his injury.

Dr. Craig E. Ditsch saw the claimant on September 28, 2005:

Eric Sultz is a 34 year old employee of Cooper Tire that while picking up a tire to flip it over on today's shift he developed severe low back pain described as being bilateral in his lower back, right above his belt line making it very painful for him to stand and bend. The other thing that has been going on here is that for the last two weeks he has noted significant, intermittent pain and numbness in his left leg. Apparently it has gotten worse since he has done his job. He has not had any specific blunt trauma injury to the back before today. He has had a neck injury, cervical sprain, and sprain in his shoulder back in February of this year.

EXAMINATION: Reveals he is extremely tender in the lower lumbar spine area, probably some spasm bilateral to the spine in this lower lumbar area. It is difficult to assess because he is so tender to palpation....

X-rays show one area where there is some loss of height of the vertebrae up in the upper lumbar area. No acute fractures are appreciated. The joint spaces seem to be well-preserved.

Dr. Ditsch assessed, "Sciatic pain on the left and low back pain....We will allow him to return to his regular job....He needs an MRI of his lumbar spine and we will arrange for that and follow him in the office after his MRI."

An MRI of the claimant's lumbar spine was taken on September 29, 2005, with the following impression: "1.) Small central disc protrusion at the L4-L5 level and left paracentral disc protrusion at the L5-S1 level without thecal sac or nerve root effacement identified. 2.) Disc degeneration and volume loss, of a mild to moderate nature, from L1-L2 through L5-S1, sparing L3-L4. Associated annular disc bulges are seen."

The claimant testified that he returned to work at light duty but at a lower hourly wage.

Dr. Ditsch noted on October 10, 2005:

He apparently was sent home and not allowed to do light duty....Today reveals that there is an area of muscle spasm palpated right over the sacroiliac joint....I feel like because of his facet problems, he is going to have some long-term flare-ups with his back pain....He is to try and find a job that doesn't rotate his back as much. It is currently difficult because they are not

moving people around very much at the plant at this point in time. At any rate, he is not ready to do Sort & Label for 12 hours. He is allowed to return to restricted duty with no lifting, pulling or pushing over 5 lbs....

Dr. Ditsch noted on October 17, 2005 that the claimant had returned to light duty. The claimant continued to follow up with Dr. Ditsch.

The record indicates that a pulmonologist examined the claimant on December 29, 2005. A radiologist gave the following impression on December 29, 2005: "1. Findings consistent with a healing rib fracture involving one of the lower left lateral ribs."

The claimant testified that he was able to return to work "probably around December 30<sup>th</sup>", 2005.

A pre-hearing order was filed on January 23, 2006. The claimant contended that he sustained a compensable injury to his back on September 28, 2005. The claimant contended that he was entitled to indemnity benefits from the date of injury until about December 30, 2005. The respondents contended, among other things, that the claimant could not prove he sustained a compensable injury.

The claimant testified, "Due to some other health issues my last day at work was February 6, 2006."

The administrative law judge found, in pertinent part:

3) The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on September 28, 2005.

4) Respondents are responsible for all medical expenses reasonably necessary, and related to the claimant's September 28, 2005, compensable injury.

5) Claimant has proven ... he is entitled to temporary partial disability benefits for the period September 29, 2005, through December 30, 2005.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

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

(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 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). The burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

In the present matter, the administrative law judge found that the claimant proved he sustained a compensable back injury on September 28, 2005. The Full Commission

affirms this finding. The claimant testified that he "felt something give" in his lower back on that date while lifting a tire at work. The parties stipulated that the claimant timely notified the respondent of the specific incident. The claimant treated with Dr. Ditsch on the date of accident. Dr. Ditsch noted, "He has not had any specific blunt trauma injury to the back before today." During an October 2005 followup visit, Dr. Ditsch reported "an area of muscle spasm palpated over the sacroiliac joint."

The Full Commission finds that the claimant proved he sustained an accidental injury causing physical harm to the body on September 28, 2005. The accidental injury arose out of and in the course of employment, required medical services and resulted in disability, and was caused by a specific incident identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings, namely the notation of muscle spasm by Dr. Ditsch. The MRI findings demonstrated a degenerative condition which was not the result of the accidental injury.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total

incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Temporary partial disability is that period within the healing period in which the employee suffers only a decrease in his capacity to earn the wages he was receiving at the time of the injury. *Id.* "Healing period" means "that period for healing of an injury resulting from an accident[.]"

The Full Commission has found *supra* that the claimant proved he sustained an accidental injury on September 28, 2005. The claimant testified that he returned to work at light duty on or about September 29, 2005, but that he worked at a decreased hourly rate of pay. The claimant's testimony indicated that he returned to full work duty on or about December 30, 2005. The claimant on appeal does not contend that he is entitled to temporary disability compensation after December 30, 2005. Based on the record before us, the Full Commission finds that the claimant was no longer partially incapacitated to earn wages after December 30, 2005. We therefore affirm the administrative law judge's finding that the claimant proved he was entitled to temporary partial disability compensation from September 29, 2005 through December 30, 2005.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved he sustained a compensable injury. We also affirm the administrative law judge's finding that the claimant proved he was entitled to temporary partial disability compensation from September 29, 2005 through December 30, 2005. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a)(2)(B)(ii)(Repl. 2002). For prevailing on appeal, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2)(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 must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 28, 2005. Based upon my de novo review of the

record, I find that the claimant has failed to meet his burden of proof.

The medical records demonstrate that the claimant was having back problems prior to the September 28, 2005, alleged incident. The records are not completely clear as to when the claimant started having problems. However, an August 23, 2004, note by Dr. Brian Bowen at the Family Medical Group in Texarkana, stated that the claimant was having a 4-week follow-up for back pain and joint aches at that time. Dr. Bowen's note reflected that the medication prescribed was not helping the claimant and he was "still having the back pain." Dr. Bowen also administered a trigger point injection.

The medical records further demonstrate that on October 4, 2004, the claimant advised Dr. Bowen that the Ultracet that he had prescribed him was not helping his back pain and requested a stronger medication. The claimant returned to Dr. Bowen in April of 2005, reporting that his back pain had progressed to the point that it was affecting his job. Dr. Bowen noted at that time that the claimant was taking medication for his back but he really had not noticed any improvement. Dr. Bowen prescribed Celebrex, Micardis HCT, and Ultracet for the claimant and instructed him to

return in four weeks. The claimant returned on May 18, 2005, reporting that he "still having a lot of problems with back pain, radicular down both lower extremities, causing numbness at times." Dr. Bowen ordered an MRI of the claimant's lumbar spine, which was performed in May of 2005. Dr. Tom Watson, an anesthesiologist who administered epidural steroid injections to the claimant noted on August 24, 2005:

"...an MRI report dated 5-24-05 ...shows some mild degenerative disc disease with small central disk protrusion. He also has degenerative disc disease at L1-2, L2-3 and L4-5."

At the time of Dr. Watson's visit, a diagram was done showing where the claimant was hurting. The diagram indicated that it was on the right side of the claimant's back. Dr. Watson discharged the claimant with instructions to return in one week for his second injection. The claimant underwent two more injections; one on August 30, 2005, and another on September 16, 2005. At the time of the third injection, the claimant reported an increased pain which he described as being on the right side of his back just below his belt-line down into his right buttocks. He also reported numbness in his right leg.

It is of interest to note that less than two weeks after the claimant reported his level of pain at 5 on a scale from 1 to 10, to Dr. Watson, he had a work injury on September 28, 2005. The claimant testified that he "felt something give" in his lower back on the right side or that something in there "popped loose" as he was lifting a tire. There were no witnesses to this incident and the claimant acknowledged that he told no one and kept right on working. He stated that it finally got so bad about an hour later that he had to tell someone and he quit working.

The testimony of the claimant demonstrates that he is not a credible witness. The claimant was specifically asked at the hearing if he'd ever had any problems with his lower right back before. He replied, "no sir". However, the medical records demonstrate this is not the truth. The medical records of Drs. Bowen, Watson, and Hundley, clearly demonstrate that the claimant was experiencing low back problems on his right side prior to the September 28, 2005, alleged incident. The claimant tried to cover it up at the hearing by saying all of his problems were on the left side. However, the medical evidence conclusively demonstrates that the claimant's back pain was in the right side.

Furthermore, when the claimant reported the alleged incident to his supervisor, he was told to go see Dr. Craig Ditsch at the Collum & Carney Clinic. Dr. Ditsch's office notes regarding the claimant's initial office visit failed to indicate that the claimant had long-standing low back complaints. There is absolutely no mention of a previous history of any lower back problems. The claimant advised Dr. Ditsch that he had sustained a neck injury, a cervical sprain, and a shoulder sprain, back in February of 2005, but failed to mention that he had been seeking treatment less than two weeks prior to this alleged incident for his back. Nor did he tell Dr. Ditsch that he had undergone a low back MRI in May of 2005.

In my opinion, a review of the evidence simply fails to demonstrate that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 28, 2005. Clearly, the claimant was suffering from longstanding back problems and was receiving medical treatment up to less than two weeks prior to the date of this alleged incident. In my opinion, the claimant's credibility is suspect at best. It is well settled that 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 Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Accordingly, when I weigh the credible evidence of record, I cannot find that the claimant sustained a compensable injury.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 28, 2005.

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KAREN H. MCKINNEY, Commissioner