

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701824

BRENT WENTZ, EMPLOYEE	CLAIMANT
LABOR READY, EMPLOYER	RESPONDENT
ESIS, CARRIER	RESPONDENT

OPINION FILED MARCH 10, 2008

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

Claimant represented by HONORABLE KEN OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE JARROD PARRISH, 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 May 21, 2007.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 28, 2007, and contained in a pre-hearing order filed March 29, 2007, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while employed by the respondent.

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 Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove compensability of a specific incident back injury he incurred at work on January 15, 2007. Based upon a de novo review of the record, I find that the claimant has met his burden of proof by a preponderance of the evidence for a compensable specific incident back injury, and therefore, I must respectfully dissent.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical 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 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

I find that the claimant has shown, by a preponderance of the evidence, that he sustained a specific incident back injury on January 15, 2007. The claimant testified that on January 15, 2007, the respondent, a temporary employment agency, had assigned him to work at Montana Tractor, a business that sold and serviced farm tractors. The claimant testified that had been assigned the job of moving large tractor tires. He stated that while carrying one of these tires, he slipped in some ice and fell. He stated that he felt what he remembered as a "squishing pain" and that he realized he had injured himself. However, he stated that it wasn't until much later that he began having severe pain and back spasms. He did, however, complete his shift. He stated that on the next day he reported to work but that by approximately 9:30 a.m., he was no longer able to function and he advised his supervisor at Montana Tractor that he was sick and had to go home. Two days later, on the 18th of January, he reported to the emergency room at Washington Regional Hospital. An emergency room note of that date states, "Patient was moving tires on

Monday and strained his back." The emergency room note also stated that he had been complaining of back pain and spasms in "increasing intensity" over the preceding four days. The claimant was diagnosed as suffering from back pain and spasms.

After being treated in the emergency room, the claimant contacted the respondent-employer and advised them of his January 15 injury and requested that they refer him to a doctor for medical treatment. As a result, the claimant was directed to Dr. Konstantin Berestnev, a general practitioner in Lowell, Arkansas. In a Physicians Report dated January 22, 2007, Dr. Berestnev wrote, "Patient states he injured his low back while picking up big rolls of carpet and later re-injured back while lifting a large tractor tire on ice." The doctor went on to note that the claimant was complaining of severe back pain and spasms with pain radiating into both knees. Dr. Berestnev directed the claimant to undergo an MRI and report back within a week. However, the respondent controverted the claim prior to that

time and the claimant did not see Dr. Berestnev or any other physician again.

Based on the claimant's credible testimony and the corroborating medical records, I find that the claimant has proved by a preponderance of the evidence that he sustained a compensable specific incident back injury.

First, I find that the claimant gave a consistent version of events to both the emergency room personnel and to Dr. Berestnev. In numerous cases in the past, this Commission has attached considerable significance to statements given to the claimant's treating physicians in evaluating a claimant's credibility. Obviously, when someone seeks treatment from a doctor, they are inclined to provide accurate information since the success of the treatment in resolving their condition may well depend upon a correct diagnosis.

Second, I find that there is no evidence in the record that the claimant had sustained any injury or had any problem with his back prior to January 15, 2007. The record contains documents related to a pre-employment screening

which was performed on the claimant on August 23, 2006, just prior to his employment as a seaman on a tug boat. In a document entitled Merchant Marine Physical Examination Report, it is noted that he had no impaired range of motion or other problems in his musculoskeletal system. Likewise, Alicia Sowell, the respondent employer, testified at the hearing that after the emergency room visit of January 18, the claimant did notify her that he was injured at work.

Third, after controverting the claim, the respondent engaged a private investigation firm to conduct covert surveillance of the claimant. However, between February 7, 2007 and February 17, 2007, the claimant was observed leaving his house on only one occasion and that was to attend a court hearing in a matter unrelated to this claim. That one episode was the only physical activity by the claimant that this lengthy surveillance was able to establish. Specifically, the investigator stated that the claimant was observed walking from a parking lot "approximately 5.5 blocks, to the Fayetteville District Court." I find that this investigative report corroborates

the claimant's testimony that his back injury was so debilitating during this period of time that he was simply unable to undertake any activities.

The majority appears to discredit the claimant's testimony due to three factors which I find do not have any direct impact on the claimant's credible testimony. First, the majority noted that the claimant failed to immediately notify anyone at either the respondent or Montana Tractor of his injury. However, the evidence of record shows that the claimant credibly testified that he reported the injury to a co-worker on the day after the injury. Furthermore, both the claimant and the respondent employer, Ms. Alicia Sowell testified that the claimant reported the injury to the respondent at least before January 22, 2007, less than a week after the date of injury. There is no requirement in Arkansas workers' compensation law that the claimant must report an injury the second it occurs. Here, the claimant credibly testified that he was not aware of the severity of his injury until he woke up the day after the incident, and did not seek treatment until he went to the ER on

January 18, after which he reported the injury to his employer. However, to the extent that not reporting the injury to the respondent on the date of injury does reflect on the claimant's credibility, I find that any negative impact is greatly outweighed by the consistency of the claimant's statements to his treating physicians.

Second, the majority appears to focus on the fact that the claimant signed time cards on December 26, 2006 and January 15, 2007, indicating that he had not sustained any job-related injuries on those dates. However, during his testimony, the claimant stated that on December 26, while at work, he had assisted a co-employee moving a large roll of carpet. The claimant stated at that time that he had felt some pain in his back but it had not been particularly significant. He testified that on January 15, 2007, after the incident of moving the tractor tire, he felt a recurrence of that pain which became much more severe. However, on neither the time card on December 26 nor January 15, did he indicate a job related injury. The claimant testified that on the December time card, the injury had

resolved and he did not consider it to have been a job-related injury. Likewise, after the incident on January 15, he had hoped the condition would resolve itself and he would not need to report an injury. He said that he was concerned that if he did report a lifting accident, he would not be provided further employment. I find that the claimant's explanations as to why he did not indicate a job-related injury on his time cards are believable and likely.

Third, the majority appears to find the fact that the claimant had pled guilty to a DWI charge in the past impacted his credibility. I simply cannot determine how the majority could reach this conclusion. I find that the claimant's guilty plea as to a totally unrelated past matter can in no way be said to reflect on the claimant's truthfulness in testifying about a job-related accident.

In conclusion, based on the claimant's credible testimony, the corroborating medical records and the corroborating investigative report, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident back injury.

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For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner