

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704097

JESSIE L. GIST, EMPLOYEE	CLAIMANT
UNITED FARMS, INC., EMPLOYER	RESPONDENT NO. 1
AG-COMP SIF CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 27, 2009

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 1 represented by the HONORABLE NEAL L. HART, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 did not appear.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed July 14, 2008. 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 over this claim.

2. The stipulations agreed to by the parties are hereby accepted as fact.
3. On March 28, 2007, the claimant sustained a back injury which arose out of and during the course of his employment with United Farms, Inc., and which was the result of a specific incident identifiable in time and place of occurrence on said date, and which caused internal physical harm, specifically a transverse process L2 fracture and which was established by medical evidence supported by objective findings.
4. The claimant earned sufficient wages to entitle him to the maximum applicable compensation rates of \$504.00 per week for temporary total disability and \$378.00 per week for permanent partial disability.
5. Respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment.
6. The claimant has proven, by a preponderance of the evidence, that he is entitled to temporary total disability benefits for the period beginning March 29, 2007, and continuing through July 28, 2007.
7. The claimant's healing period ended on or before July 28, 2007.
8. Respondents have failed to show, by a preponderance of the credible evidence, that the claimant refused suitable employment offered to him by the employer.
9. Respondents are entitled to a credit for any temporary total disability previously paid, as well as a credit for the days that the claimant worked within his healing period.

10. The claimant has proven, by a preponderance of the evidence, that he is entitled to a five percent (5%) permanent impairment assessed by Dr. Jerry Engelberg which is directly and causally related to the March 28, 2007, admitted incident.
11. Respondents have controverted this claim in its entirety.
12. Claimant's attorney is entitled to the maximum statutory attorney's fee pursuant to, and limited by, Ark. Code Ann. §11-9-715.
13. Claimant's entitlement to wage-loss disability, if any, was specifically reserved.

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 July 14, 2008, 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.

A. WATSON BELL, 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 on March 28, 2007 and awarding temporary total disability benefits for the period March 29, 2007, through July 28, 2007. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a truck driver. On March 28, 2007, the claimant slipped and fell on some wet steps at the respondent employers facility. The claimant was sent to the Crittenden Regional Hospital. He was ultimately diagnosed with a transverse process L2 fracture and a compression fracture at L1. Dr. Jerry Engelberg, a neurosurgeon, assessed the claimant with a 5% permanent anatomical impairment rating. The claimant has also been diagnosed with metastatic disease which is not related to the claimant's acknowledged slip and fall on March 28, 2007.

Ark. Code Ann. §11-9-102(4) (A) (i) (Supp. 2005) defines "compensable injury" as "[a]n 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. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective

findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. The claimant underwent diagnostic studies which revealed that he had a fractured transverse process at L2 and a compression fracture at

L1. The medical evidence demonstrates that the radiologist, Dr. James Acker, reading the results found them to be "remote" which demonstrates to me that these fractures pre-existed the fall the claimant had on March 28, 2007. Dr. Engelberg was questioned in his deposition regarding these "remote" findings:

Q. What do you mean when you tell us that the L1 fracture is old?

A. Well, this is a MRI finding. Usually with an acute fracture you'll have certain changes. And I looked at this with a radiologist, and they felt that - - there is changes on acute fractures with edema in the bone and so on, and this wasn't present. And the radiologist felt, and I had no reason, that it was an old compression fracture as opposed to a current one. You say how old? That I can't say.....

Dr. Engelberg additionally testified:

Q. I want to ask you, Doctor, how hard is it to tell the age of these fractures?

A. I depend on the radiologist more than my expertise. I don't do enough trauma. So when you take someone who is stationed down at The Med, the Trauma Center here, they probably are pretty good at that. I don't see that much trauma. And MR has been available only since about 1985 or '88, and I don't have expertise in differentiating an acute compression fracture from an old compression fracture, so I'm not very good at that, and I'll look at the films

with a radiologist to try to get their impression on that most of the time.

* * *

Q. On the 7-3-2007 study it appears to indicate under the Findings section that the lesion appeared to be healed. Can you tell us anything about that?

A. I don't know what period of time. Now, this man's alleged fall and trauma was March the 28th of 2007. This was July the 3rd, and I thought it took a longer period of time for a transverse process fracture to heal, but in no way do I have expertise, and no one sees a great number of transverse process fractures.

Q. Again, putting a date on them is difficult; would that be fair to say?

A. Yes.

Q. And at least from what I'm getting from your testimony, you're going to defer I suppose as far as the age of some of these things to the radiologist-

A. Absolutely.

Q. - who read those?

A. Yes.

Q. And when we look at the opinion, and again talking about the CT scan report of 7-3-2007, it indicates that both fractures are remote. Can you tell us what that means and what you know about that?

A. I don't know. The radiologist here is an outstanding radiologist.

Jim Acker is first class, first class. Now, I don't know what he meant by "remote." I felt that the transverse process wasn't that old, but I'll surely defer to his expertise.

It is also of note that the claimant's credibility is suspect at best. The claimant gave inconsistent testimony on a number of issues including whether or not he returned to work after his slip and fall on March 28, 2007. The record in this claim indicates that, at various times, the claimant returned to work for the respondent employer and worked for short periods of times. However, the record is not clear whether the claimant was advised to go home or was sent home. The claimant repeatedly stated that his immediate supervisor, Peyton Upton, sent him home each time he attempted to return to work with a restricted release, and that Mr. Upton ultimately terminated his employment on May 21, 2007.

Jessie Morgan, a management employee, testified at the hearing concerning the employer's efforts to provide the claimant with light-duty work. In fact, Mr. Morgan stated that he would have paid the claimant forty (40) hours per week to do nothing but sit in a chair and watch the day pass by if the claimant had returned to work and requested some form of light-duty.

Clearly, Mr. Morgan's testimony is inconsistent with the testimony of the claimant. Mr. Morgan testified as follows:

Q. But did Mr. Gist ever come to you and actually try some of the things that you were wanting him to do on light duty?

A. Yes. Like I say, if he brought in a slip from the doctor stating he was on light duty, the done - we asked him to do just whatever he felt comfortable doing. We didn't ask him to do anything that would aggravate his injury or hurt himself.

Q. Okay. Do you remember some specific things you asked him to do when he came back and tried to work after March 28?

A. Yes. I've asked them just coming back, clean the truck up, you know, his live haul truck. It's sitting there. Clean it out, vacuum it, just whatever you feel comfortable doing to improve the looks of the truck. Also, we have light duty running birds. There's a bad bird problem on our farm in the spring, and I've asked them to run birds with a pickup truck, and he chose not to drive the truck. He chose to drive a Gator that we had. He went out and tried it for a while, and come back and said he was not able to do it and he went home.

Q. Okay. How many times did he come back and then try or purport to try to go back to work on light duty?

A. There's several times Jessie come back and tried to do different things on the farm. There's very few

times I actually sent him home, myself personally. I can't say what the owner of the company done or the general manager, but every time that I had him do something, it's "Jessie, go do it," and he would go try it and he would come back and basically say, "I can't do it. I'm going home."

Q. Okay. Had you ever had a problem with Jessie prior to the fall?

A. No.

Q. Was he a good worker prior to the fall?

A. Excellent worker.

Q. Okay. Was he always there on time and did what you asked him to do?

A. Yes.

Q. Was his job predominantly driving a truck transporting fish?

A. Yes.

Q. Since the accident there's been a constant issue about going back to work, hasn't there?

A. Yes.

Q. Okay. You never actually asked - I know you said earlier that you could have him to sit by a time clock, if necessary.

A. Right.

Q. But you never actually asked him just to sit by the time clock and -

A. No, I've told them, "Just do whatever you feel comfortable doing, just get your 40 hours in."

In my opinion, the claimant is not a credible witness. His testimony should be given very little weight. I give more weight to the testimony of Mr. Morgan than I do to the claimant. Mr. Morgan is an uninterested witness, merely an employee of the respondent employer. 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); Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); 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 Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964).

Further evidence of the claimant's complete lack of credibility is the surveillance photographs introduced into the record. When the claimant was allegedly sent home by the respondent employer, he was photographed working on his riding lawn mower. The claimant is seen lying on the ground beside the deck of a riding lawn mower, bending over looking at the deck and using a piece of lumber to pry the deck of the riding lawn mower. During this same time period, the

claimant was telling his physicians that he was unable to do anything.

Therefore, after I consider the fact the claimant did not make a good faith effort to return to work, the fact that Dr. Engleberg was unable to explain the "remoteness" in the fracture to the claimant's transverse process and the fact that the claimant was witnessed working on a riding lawn mower when he was telling his physicians he was unable to do anything, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner