

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F804446 & F806561

ISMAIL QASEM, EMPLOYEE	CLAIMANT
GREAT PLAINS COCA COLA, EMPLOYER	RESPONDENT
MIDWEST EMPLOYERS CASUALTY, CARRIER	RESPONDENT

**OPINION FILED SEPTEMBER 8, 2009**

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, North 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 January 26, 2009.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him

to weekly compensation benefits of \$336.00 for total disability and \$252.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury or injuries to his back on or about March 31, 2008 and/or April 18, 2008. Specifically, he has failed to prove that on or about either of these dates, he sustained a physical injury to this portion of his body that arose out of and occurred in the course of his employment with the respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury on either March 31, 2008 or April 18, 2008.

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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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant sustained a compensable injury on March 31 and April 18, 2008, and that he is entitled to medical benefits, as well as temporary total disability benefits from April 25, 2008 through a date yet to be determined.

For the claimant to establish a compensable injury as a result of a specific incident, 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. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant testified that he developed low back pain and right leg numbness on or about March 29, 2008, while on a delivery run at a mall, during which he had to service four or five drink machines. In particular, the pain started when he bent to pick up the cases of drinks. On March 31, 2008, his day off, he went to see Dr. Rhoads, using his personal insurance. He explained to the doctor

that he had low back pain and right leg numbness, and the doctor gave him a shot, which helped for a while. Dr. Rhoads recommended rest, intermittent heat, analgesics and muscle relaxants. He returned to work. Rhoads sent him to see Dr. Kyle. Dr. Rhoads and Dr. Kyle cautioned him to slow down, to be careful when he worked, and to not overwork." He kept doing the same thing every day. The claimant testified that he talked to Chris Meyers the morning after this pain developed but that Meyers did not appear to understand him. The claimant told Meyers that he was going for an MRI, and that he had back pain for a long time. No paperwork was completed.

The claimant explained that he told the doctor he had light pain for a couple months, but not to the extreme it was when he went to the doctor. The claimant did not understand what the doctor wanted when he asked for "precipitating event." The claimant testified that he did not understand what the doctor said to him that day. The claimant told him "the pain started from work." Dr. Rhoads checked him out and sent him to Dr. Kyle. He paid the co-pay and the company paid the rest. He went over exercise, smoking, and lifting techniques. Dr. Kyle thought he did

not need an operation but did need to see another doctor, and told him to take it slow. When the claimant bent, stooped, or lifted, he had pain in his back and numbness down his leg. After his visit to Dr. Kyle, he still had the pain in the leg and back. Christopher Meyers, a supervisor of the claimant, testified that the claimant told him on April 2, 2008 that he had an appointment for an MRI due to back pain, and that he had the pain for some time. Meyers did not ask if it was work-related.

Dr. Rhoads' notes from March 31, 2008, indicate that the claimant presented with low back pain for three months, "positional with bending or lifting, with radiation down the legs," and numbness in right leg. No precipitating factors were noted, and the claimant had no prior back problems. Injections were performed, and prescriptions provided.

On April 2, 2008, the claimant underwent an MRI of the lumbar spine due to "low back pain for three months, worsening, radiating up spine, and associated with right leg numbness, instability at times." The results of the MRI were:

Large central to left paracentral disc herniation superimposed on otherwise diffuse annular bulge at

the L1 to level causes moderate left lateral recess stenosis and canal stenosis with prominent crowding of the nerves in the thecal sac. Right lateral annular fissure and small disc protrusion at L5-S1 slightly displaces the S1 nerve in the canal and abuts the L5 nerve in the neural foramen. There is mild to moderate neuroforaminal narrowing on the right.

On that date, Dr. Rhoads noted that the claimant needed to see a neurosurgeon for a herniated disc. The claimant saw Dr. Kyle on April 8, 2008, who wrote that the claimant had mild stenosis at L1-2 from a broad based disc bulge, which appeared to be a chronic condition. He did not see an acute herniation. Dr. Kyle noted that on exam, his strength, reflexes and gait were normal. The medication Dr. Rhoads prescribed helped. Dr. Kyle reviewed proper lifting techniques with him and encouraged him to exercise before work and to stop smoking.

I find that the claimant suffered an injury on or about March 29, 2008, while lifting cases of drinks while servicing drink machines at a mall. This activity clearly furthered the interests of the employer, and thus arose out of and in the course of his employment. Likewise, the incident was specific and identifiable by time and place. There is objective evidence of injury found in the herniated

disc, annular bulge, fissure and small disc protrusion seen on April 2, 2008. The claimant's testimony that he had pain prior to the injury, but that it became worse at the time that he was lifting the cases of drinks for the machines at the mall, thus linking the event to the objective findings of injury which clearly required treatment.

Turning to the second date of injury, April 18, 2008, the claimant testified that he was filling his truck with the cases of drinks and snacks to be delivered that morning. When he picked up a case of chips, his back and arm started to become numb, and he began to feel "a lot of pain." He reported this, and was sent to the doctor, who gave him a shot. He returned to work and spoke to his supervisor. He worked, but with help, so he did not do as much for two or three days.

The claimant testified that he had a lot of pain in his back and numbness in his leg, between March 31 and April 18. The claimant testified that after April 18, he had a lot of back pain, difficulty sleeping, and general achiness. He also had neck pain, right leg pain and numbness, as well as numbness in his right arm. The right leg pain was more extreme after April 18 than it was before

April 18. His back was different after that date - "a lot of back pain." After that incident, he only worked for a couple more days. He was sent to the physical therapist, returned to work on light duty, and then taken off of work. He could not work, physically, after therapy. The claimant testified that Dr. Briley ordered an MRI on April 24. He told Briley he had pain in his back and in his right side.

Chris Meyers testified that he is the Snappy Snack manager for the respondent employer. The claimant reported an on-the-job injury around April 18 to his supervisor. The claimant told Meyers that "he was moving some stuff around on the truck and he pulled something." Paperwork was completed. The human resources administrator made the arrangements for the claimant to go to the clinic. Meyers testified that the claimant was in a lot of pain at that time. He did not complain about problems doing his job before this incident in April.

Dr. Briley's notes from the claimant's April 18, 2008 visit indicate that the claimant reported a history of treatment for acute low back pain on March 31, including x-rays and two injections. "Today the patient was lifting product and started experiencing extreme low back pain. The

patient reports to the clinic today with intense low back pain." His gait was affected, he could not sit, and he reported radiating pain into the heel of the right leg. Walking also caused pain. Dr. Briley's impression was low back pain. He prescribed Naprosyn, Tramadol, Toradol and Flexeril, as well as exercise. He was not returned to work, because the doctor did not feel that he was able to sit or stand. The Physician's Report from this date reflects that the claimant reported that he was loading his truck with cases of drinks for work and bent down to pick up a case, when his back began to hurt. The diagnosis was low back pain and bulging disc. A form from the respondent employer, completed by Dr. Briley on that date, noted that the claimant was off work until his next appointment on April 21, 2008, and that the prescribed medications cause drowsiness and dizziness.

The claimant has shown that he sustained a compensable injury on April 18, 2008, in the loading facility of the respondent employer, when he bent over, lifted a case of product, and felt intense back pain. This incident is specific, identifiable by place and time, and was clear arising in the course and scope of his employment.

The claimant consistently described the incident at hearing and to his medical caregivers as evidenced by the medical records. There is objective evidence of injury, as the MRI of April 24, 2008 showed a herniated nucleus pulposus at L1-L2 impinging on both foramina, bulging discs at multiple levels with no evidence of other impingement, and a Schmorl's node at the superior end plate of L-5. The claimant testified that he experienced a significant increase in low back pain, which is consistent with his reports to his doctors from April 18, 2008 forward. There are certain differences in the MRI reports from April 2 and April 24, 2008 as well. The April 2 report does not mention any straightening of the lordotic curve (an indicator of muscle spasm), while this was present on April 24. Likewise, there was foraminal impingement by the herniated nucleus pulposus on April 24, while the April 2 report stated there was no significant neuroforaminal narrowing at L1-L2. The April 18 incident caused at a minimum an exacerbation of his back pain, sufficient to be a compensable injury in and of itself, requiring medical treatment and causing disability. In fact, the claimant was able to continue working after the March 31 incident, but

after the April 18 incident, he was unable to continue to work.

I find that the claimant was a credible witness. One challenge to his credibility centered around his testimony that he reported the March injury, but that Meyers did not understand him, in light of the fact that the claimant did not have difficulty making himself understood on April 18, 2008. However, Meyers testified that it was common to hear complaints about pain and that he did not ask if the problem was work-related. It appears that this is a self-serving attitude to take by a supervisor. The claimant, certainly not fluent in English and apparently not sophisticated in the ways of workers' compensation cost management, went to his supervisor to report back pain and that he had an appointment. By not asking any questions or offering any paperwork, the supervisor avoided the claimant's trigger of workers' compensation procedure. It was only when the claimant experienced extreme pain, requiring a visit to a doctor that day, that the supervisor was forced to initiate the procedures. The difference in the results of the claimant's reporting in March and in

April had no impact on the claimant's credibility whatsoever.

Secondly, the claimant included his complaints of pain in his neck and arm in his general testimony, while that pain only appears in the medical records after some time had passed after the April 18, 2008 incident. In reading the testimony, it is apparent that due to the unusual circumstance of having an interpreter at the hearing and due to the limitations of understanding on the part of both the interpreter and the claimant, the testimony was jumbled at times and did not follow a clear timeline. In the claimant's contentions, he sought compensation for his back. The fact that he developed and complained about neck and arm problems does not affect his credibility, especially given the language barrier and the confusion generated by the interpreter.

Lastly, the claimant did testify that he had significant pain, but he also testified that the injections gave varying degrees of relief and that the pain would be "temporary" and then return. Again, his testimony was not so inconsistent with the medical records as to reduce his credibility.

I find that the claimant's credible testimony and the medical records support a finding that he sustained a compensable injury to his back on or about March 29, 2008, and again on April 18, 2008, that he is entitled to reasonable and necessary medical treatment of that back injury, and to indemnity benefits. The claimant was unable to work, pursuant to doctor's orders, from May 8, 2008 to a date yet to be determined.

The claimant testified that he worked for a couple days after the April 18 incident. The records show that Dr. Briley took him off work from April 18 until his return visit on April 21, 2008, at which time he was placed on light duty. The claimant explained that he went to physical therapy for a few days, and then was taken off work for awhile. The physical therapy record of April 25 shows that the claimant was off work for one week. The claimant testified that after that the human resources manager told him that he was off work until he was released to return to work. The claimant testifies that he was physically unable to work after the physical therapy. Since that time, Dr. Raben took the claimant off work for six weeks on July 14, 2008, and Dr. Rhoads took him off work for four months on

October 20, 2008. The claimant was terminated from employment on August 18, 2008. The records do not indicate that the claimant has been released to return to work or that he has reached maximum medical improvement. I find that the claimant was unable to work, while in his healing period from April 25, 2008 to a date yet to be determined.

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find the claimant to be a credible witness, and based upon his testimony and the medical records, I find that he has proven by a preponderance of the evidence that he sustained compensable back injuries on March 31, 2008 and on April 18, 2008 for which he is entitled to medical and indemnity benefits, including temporary total disability benefits from April 25, 2008 to a date yet to be determined.

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PHILIP A. HOOD, Commissioner