

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505590

RICKEY STRONG, EMPLOYEE	CLAIMANT
PINE BLUFF HAULING, EMPLOYER	RESPONDENT NO. 1
INDEMNITY INSURANCE CO. OF NORTH AMERICA/GALLAGHER BASSETT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 25, 2009

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

Claimant represented by the HONORABLE GENE E. MCKISSIC,
Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L.
PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as
Modified.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order
of the Administrative Law Judge filed February 5, 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 of this
claim.

2. The employer/employee/carrier relationship existed on May 23, 2005.
3. The claimant's average weekly wage was \$436.00, resulting in a temporary total disability rate of \$291.00.
4. The claimant sustained a prior injury to his back in January of 2001.
5. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury at a specific date and time.
6. Respondents No. 1 have controverted this claim in its entirety.
7. (Omitted- see below)
8. The claimant was paid short-term disability benefits by CIGNA on behalf of Waste Management from May 22, 2005, through September 24, 2005 at a rate of \$250.00 per week for a total of \$4485.60. Respondents are entitled to an offset pursuant to A.C.A. §11-9-411 for any short-term disability payments received by claimant.
9. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

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 February 5, 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, modified to correct a date error made in the Administrative Law Judge's opinion. The Administrative Law Judge's opinion stated:

7. Claimant has proven by a preponderance of the evidence that he is entitled to medical treatment and temporary total disability benefits from May 23, 2007, until a date yet to be determined.

The Full Commission finds that the claimant is entitled to and hereby awards the claimant benefits from May 23, 2005, correcting the date error contained in the above finding of the Administrative Law Judge. Therefore, the correct finding of the Full Commission reads:

7. Claimant has proven by a preponderance of the evidence that he is entitled to medical treatment and temporary total disability benefits from May 23, 2005 until a date yet to be determined.

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 and awarding medical benefits as well as temporary total disability benefits for the period May 23, 2007, through a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

The claimant was employed by the respondent employer as a truck driver. On May 23, 2005, the claimant testified that he was delivering a container to an apartment complex when he pulled himself out of the truck and as he was stepping down had a sharp pain in his leg. The claimant did not know what caused the pain. The claimant sought treatment from his personal physician, Dr. Harris, on that same date. Dr. Harris ordered an MRI which reflected "focal abnormal soft tissue density on the right at L5-S1 which may represent a focal bulge in the annulus or a small herniated disk far laterally @ L5-S1 on the right." Dr. Harris noted on May 24th that the claimant's symptoms were "just like when he had his herniated disk in the past." The claimant had back surgery in 2001 for a herniated disk.

On June 1, 2005, the claimant sought treatment from Dr. P. B. Simpson. Dr. Simpson noted that the claimant's MRI was negative and that the claimant appeared to be getting better. He also noted that he was not a surgical candidate.

On July 22, 2005, Dr. Harris noted that it was the opinion of two neurosurgeons that the MRI revealed scar tissue that was causing pain under excess stress and strain. He noted that while he felt the claimant's occupation as a sanitation driver was, at least at times, exacerbating his problem, he did note that the claimant could perform any job with a normal workday and could sit, stand, walk, and ambulate satisfactorily.

The claimant contended that he sustained a compensable injury on May 23, 2005. The respondents contended that the claimant's back problems are pre-existing and that the fall was caused by an idiopathic condition. The respondents brought in the Second Injury Fund and the Fund contended they had no liability.

The evidence demonstrates that the claimant had a previous back injury in January of 2001, for which he underwent surgery. The claimant admitted during his testimony that he has continued to have problems with his back and has pain radiating into his right leg. The problems he suffered in 2005 were strikingly similar to

the claimant's 2001 problems. In fact, the claimant sought treatment in January of 2005 for problems with his right leg.

Further, the testimony of George Whale demonstrates that the claimant thought his 2005 problems were associated with his previous problems. Mr. Whale testified that the claimant told him that he was basically walking and his leg went out. He also told Mr. Whale that his problems were due to arthritis.

Moreover, Dr. Harris, the claimant's treating physician opined that the claimant's problems were related to scar tissue. He noted that the claimant could perform *any job*. Dr. Simpson also opined that the claimant was not a surgical candidate.

Therefore, when I consider Mr. Whale's testimony, the fact the claimant had prior back problems and the opinions of two physicians that the claimant's problems were related to scar tissue, I cannot find that the claimant sustained a compensable injury on May 23, 2005. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner