

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708057

ROGER WEBB,  
EMPLOYEE

CLAIMANT

AVERITT EXPRESS, INC.,  
EMPLOYER

RESPONDENT

ACE AMERICAN INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 13, 2009

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

Claimant represented by the HONORABLE SIMMONS S. SMITH,  
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. HARDY,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part,  
reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed February 22, 2008. The administrative law  
judge found that the claimant proved he sustained a  
compensable injury, and that the claimant was entitled to  
temporary total disability compensation. The Full  
Commission affirms these findings. The Full Commission does

not affirm the administrative law judge's finding that the claimant proved he was entitled to §11-9-505(a) benefits.

I. HISTORY

The record indicates that Roger D. Webb, age 43, became employed as a driver for Averitt Express in September 2006. Mr. Webb testified that he became a "city driver/dock worker/combo driver" for the respondents in March 2007. The parties stipulated that the employment relationship existed at all pertinent times, including July 3, 2007. The claimant testified that while moving pallets, "I picked the pallet jack - bent over, picked up. When I picked it up, pain shot around both sides of my waist. I had pain shot down the right side of my leg to my right foot."

The claimant's testimony indicated that he told his supervisor, Kurt Mosley, on July 3, 2007 that he had injured his back. The claimant testified that he was able to continue working but that the pain intensified by the end of the day.

Neil Pierce, the respondent-employer's service center director, testified that the claimant reported the injury to him on July 5, 2007: "He told me on the morning of the 5<sup>th</sup> because I asked him - he looked to be in pain when he walked

through the building, and I just happened to be in the drivers' room talking to other drivers that morning, and I noticed a grimace on his face, and I asked him if he was okay. And I asked him also did he need to go to the doctor that day, and he said no."

Neil Pierce testified that the claimant "called in to work on Friday the 6<sup>th</sup>, and at some point that morning he was instructed to go to our company doctor." The record indicates that the claimant sought medical treatment on July 6, 2007. The claimant reported that his symptoms were related to work and he described the injury: "Unload freight off one trailer to another one." The claimant wrote that the accident occurred on July 3, 2007.

An MRI of the claimant's lumbar spine was taken on July 10, 2007, with the following impression:

1. L5-S1 rightward "non-avulsion type" disc protrusion.
2. Spondyloarthropathic changes at L3-4 results in moderate central canal encroachment and moderate symmetric biforaminal narrowing.
3. Spondyloarthropathic changes involving the lower thoracic segments results in moderate central lateral canal encroachment.
4. Please see above report for additional and pertinent negative findings as well as accompanying supplement with regards to "non-avulsion type" disc displacement.

The record indicates that Dr. Brenda K. Covington, Baptist Health Occupational Health Clinic, diagnosed lumbar strain and L5/S1 disc herniation on or about July 10, 2007. Dr. Covington treated the claimant conservatively.

A physical therapist reported on July 12, 2007, "Mr. Webb states that he injured his back on July 3, 2007 after lifting palette jack. He complains of pain in the L/S, the R buttock, and pain that radiates in the posterior R thigh and calf into the foot....Objective Findings: Posture shows a decrease in L/S lordosis." The therapist assessed "Pt has signs and symptoms consistent with L/S strain with disc protrusion at L5-S1. Cannot rule out L/S posterolateral derangement."

Dr. Covington returned the claimant to restricted work on July 25, 2007.

Dr. William G. Carbary, D.C. stated on October 3, 2007, "Mr. Webb is released to return to work. He currently is a systematic regarding his low back disc pathology. Upon resuming work, I will monitor his progress to assess his ability to sustain re-employment."

The claimant testified that he was physically capable of working at the time of the October 3, 2007 release. Neil

Pierce testified that the "company doctor" released the claimant to return to work on or about October 3, 2007. The respondents' attorney questioned Mr. Pierce on recross-examination:

Q. Did you have a conversation with Mr. Webb on October the 3<sup>rd</sup>, 2007, about his release from the chiropractor?

A. Yes, he called me and told me that his chiropractor had released him to return to work and that they had fixed his back is what he told me.

Q. Did he come back to work the next day?

A. No.

Q. What transpired after he had given you that information?

A. We tried to contact him on several occasions after the fact, and apparently his phone had been disconnected. We kept getting a recording. Therefore, two or three days goes by, I contact our Human Resource Department, and they ask me to write him a letter giving him two weeks to report back to duty. I believe the letter was - I'm not sure the date of the letter, but I believe he had until the 24<sup>th</sup> of October before we terminated his employment.

Q. Did he contact you at that point in time?

A. Yes.

Q. Is that when you set him up to have the cleared for work evaluation by Dr. Covington?

A. Through our company doctor, yes.

The claimant's attorney initially stated at hearing that the claimant was entitled to temporary total disability until October 3, 2007. Counsel later stated that the claimant was entitled to temporary total disability until October 16, 2007. The claimant testified that he returned to work on October 16, 2007.

A pre-hearing order was filed on November 6, 2007. The claimant contended, among other things, that he was involved in a work-related accident on July 3, 2007. The respondents contended that the claimant did not sustain an injury arising out of and in the course and scope of his employment on July 3, 2007. The respondents asserted that "any complaints the claimant has are not due to his work at Averitt Express but are rather due to a pre-existing condition or other activities outside his employment at Averitt Express."

An administrative law judge scheduled a hearing on the issues of "compensability (temporary total disability and medical benefits) and controverted attorney fees." Following a hearing, the administrative law judge filed an opinion on February 22, 2008. The administrative law judge found that the claimant sustained an injury to his back

arising out of and in the course of the claimant's employment on or about July 3, 2007. The administrative law judge found that the claimant was temporarily totally disabled beginning July 6, 2007 until October 3, 2007. The administrative law judge found that the claimant was entitled to additional compensation benefits pursuant to Ark. Code Ann. §11-9-505(a). The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002), 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 by 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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge essentially found that the claimant proved he sustained a compensable back injury on July 3, 2007. The Full Commission affirms this finding. The claimant, who the Commission finds was a credible witness, testified that he hurt his back as the result of a work-related specific incident on July 3, 2007. The claimant testified that he reported the accident on July 5, 2007. The record indicates that at least one company representative knew of the accident no later than July 5, 2007. The claimant began treating with a company physician on July 6, 2007. The medical records corroborated the claimant's credible testimony. An MRI on July 10, 2007 showed a disc protrusion at L5-S1. Dr. Covington, the authorized company doctor, diagnosed lumbar strain and L5-S1 disc herniation. The evidence demonstrates that the L5-S1 disc protrusion was the result of the accidental injury and not merely degenerative

in nature. The record also shows that the L5-S1 disc protrusion was causally related to the July 3, 2007 accidental injury. See *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The instant claimant proved by a preponderance of the evidence that he sustained an accidental injury causing physical harm to the body. The injury arose out of and in the course of employment, required medical services, and resulted in disability. The accidental injury was caused by a specific incident, identifiable by time and place of occurrence on July 3, 2007. The claimant established a compensable injury by medical evidence supported by objective findings, namely the L5-S1 disc protrusion as noted in the July 10, 2007 MRI study. The administrative law judge's decision on compensability is affirmed.

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). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12).

The determination of when a claimant's healing period has ended is a question of fact for the Commission. *Ark. Hwy. & Transp. Dept. v. McWilliams*, 41 Ark. App. 1, 846 S.W.2d 670 (1993).

An administrative law judge found in the present matter that the claimant proved he was entitled to temporary total disability benefits from July 6, 2007 through October 3, 2007. The Full Commission affirms this finding. The claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 3, 2007. The claimant was unable to work, that is, incapacitated from earning wages, beginning July 6, 2007. The treating chiropractor released the claimant to return to work as of October 3, 2007. Whether or not the claimant remained within a healing period for his compensable injury, the record indicates that the claimant was no longer incapacitated from earning wages after October 3, 2007. The administrative law judge's decision is affirmed.

C. Additional compensation

Ark. Code Ann. §11-9-505(a) (Repl. 2002) provides:

- (1) Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable

employment is available within the employee's physical and mental limitations, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of the refusal, for a period not exceeding (1) year.

Before Ark. Code Ann. §11-9-505(a) applies several requirements must be met. The employee must prove by a preponderance of the evidence that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause. See *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). At a minimum Ark. Code Ann. §11-9-505(a) requires that when an employee who has suffered a compensable injury attempts to re-enter the work force the employer must attempt to facilitate the re-entry into the work force by offering additional training to the employee, if needed, and reclassification of positions, if necessary. *Id.*

An administrative law judge found in the present matter:

6. Respondents unreasonably refused to allow the claimant to return to work during the period October 4, 2007 through October 15, 2007, while work was available for him within his restriction. The evidence preponderates that the claimant is entitled to additional compensation benefits at his average weekly wage of \$803.52, pursuant to Ark. Code Ann. §11-9-505(a), during the period of unreasonable refusal of respondent-employer to return him to work.

The Full Commission first notes that the instant claimant did not contend he was entitled to benefits pursuant to Ark. Code Ann. §11-9- 505(a). The administrative law judge raised this statute *sua sponte*. In any event, the Full Commission does not affirm this finding. Dr. Carbary, the treating chiropractor, did not assign any work restrictions when he released the claimant on October 3, 2007. Neil Pierce testified that the claimant "called me and told me that his chiropractor had released him to return to work and that they had fixed his back is what he told me." Nevertheless, the claimant testified that he did not return to work until October 16, 2007. The record demonstrates in the present matter that suitable employment within the claimant's physical limitations was available with the respondent-employer on and after October 3, 2007, and that the employer did not refuse to return the claimant to work on and after October 3, 2007. We again note the

claimant's testimony that he returned to work on October 16, 2007.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation beginning July 6, 2007 through October 3, 2007. We affirm the administrative law judge's findings with regard to compensability and temporary total disability. The Full Commission does not affirm the administrative law judge's finding that the claimant proved he was entitled to additional compensation pursuant to Ark. Code Ann. §11-9-505(a)(1). The claimant proved that the medical treatment provided of record was reasonably necessary in connection with the compensable injury, pursuant to Ark. Code Ann. §11-9-508(a)(Repl. 2002). The Full Commission therefore affirms the administrative law judge's findings in part. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(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.

---

A. WATSON BELL, Chairman

---

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

---

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 3, 2007. Therefore, I must dissent from the majority's finding. However, if I were to find that the claimant sustained a compensable injury, a finding I do not make, I agree and concur in the finding that the claimant was not entitled

to benefits pursuant to Ark. Code Ann. §11-9-505(a) for the period of October 4, 2007, through October 15, 2007.

The claimant gave inconsistent testimony and his credibility is suspect, at best. The claimant indicated that he did not have any prior back injuries or workers' compensation injuries. However, there is a workers' compensation claim history from the claimant working at Freightways indicating that the claimant had a back injury. The claimant also went to the casino on July 24, 2007. His comment, after being confronted with this evidence, was that it was "uncomfortable for me." The claimant also admitted that he had seen a chiropractor in the past and that his mother also sees a chiropractor.

Mr. Pierce is the service center director for the respondent employer. Mr. Pierce testified that the claimant told him on July 5, 2007, about his alleged injury. Mr. Pierce offered for the claimant to go to the company doctor that day but the claimant declined. Mr. Pierce stated that the claimant appeared to be in pain and that he had seen him in pain months prior to that. Mr. Pierce testified that he told the claimant to go to

Dr. Covington on July 6, 2007, when the claimant informed him that he was going to his family doctor.

The testimony of Kurt Mosley was also given at the hearing. Mr. Mosley is the front line leader for the respondent employer and is the one that the claimant supposedly reported a worker related injury to on July 3, 2007. Mr. Mosley testified that the claimant did not tell him that he was injured on July 3, 2007. Mr. Mosley was on vacation for several days after the July 4th holiday. In fact, Mr. Mosley did not learn of the claimant's alleged injury until he returned to work after his vacation. Mr. Mosley also questioned why the claimant would be transferring pallets from the trailer he had when he went to Lamanco to make a pick up. Lamanco is typically a place where they pick up a full trailer and they take an empty trailer and leave it there at the facility. The drivers do not typically transfer pallets from one trailer to the next at that particular facility. There was no witness at Lamanco that saw the claimant actually saw the claimant transferring pallets.

The medical evidence also fails to demonstrate that the claimant sustained a compensable injury. The medical records show that the claimant presented to Dr. Covington for evaluation of back pain on July 6, 2007. The claimant was scheduled for physical therapy and an MRI. During his July 25, 2007, physical therapy, the claimant reported to the physical therapist that his back was doing good until his trip to the casino Monday night. Also, the claimant's MRI of his lumbar spine showed L5-S1 rightward non-avulsion type disc protrusion, as well as, spondylarthropathic changes at the L3-4 and in the lower thoracic segments. There is no indication in the MRI report that the findings are in any way related to the claimant's report of pain, nor is there any indication that these findings resulted due to the claimant's alleged injury of lifting pallet's at work on July 3, 2007. In fact, the supplement to the MRI stated that "avulsion type" of herniation has been found in association with severely degenerative disks. Therefore, it is speculation and conjecture to relate any of the finding on the MRI to an injury of July 3, 2007. Conjecture and speculation, even if plausible,

cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Just because the claimant said that his back began to hurt on that day after lifting pallets does not link the MRI finding to the injury.

Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on July 3, 2007. However, since a majority has determined that the claimant sustained a compensable injury, I must concur with the finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to §11-9- 505(a) benefits.

Therefore, for all the reasons set forth herein, I respectfully concur, in part, and dissent, in part from the majority's opinion.

---

KAREN H. MCKINNEY, Commissioner