

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701847

MARK LYNN, EMPLOYEE	CLAIMANT
PHILLIPS COUNTY, EMPLOYER	RESPONDENT
AAC RISK MANAGEMENT SERVICES, CARRIER	RESPONDENT

OPINION FILED JUNE 18, 2010

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

Claimant represented by the HONORABLE JOE M. ROGERS,
Attorney at Law, West Memphis, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted
in part, vacated in part.

OPINION AND ORDER

The claimant appeals and the respondent cross
appeals from a decision of the Administrative Law Judge
filed October 13, 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. The employer/employee relationship existed at all relevant times.
3. The claimant earned an average weekly wage of \$519.00, resulting in an applicable compensation rate of \$346.00 for temporary total disability and \$260.00 for permanent partial disability, if awarded.
4. The claimant filed his claim within the two year statute of limitations period set out in Ark. Code Ann. §11-9-02(a)(1)(A)(Repl. 2001).
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable neck injury on February 22, 2005.
6. The claimant failed to establish by a preponderance of the evidence that he suffered a compensable lumbar or tail-bone injury in February of 2005 under the Arkansas Workers' Compensation Act.

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 nos. 1, 2, 3, 4 and 6 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission. However, we find that the finding no. 5 should not be affirmed. The compensability of an injury to the

claimant's neck was not before the Administrative Law Judge. Specifically, only the issue of the compensability of a lumbar or tail-bone injury was before the Administrative Law Judge. The finding regarding compensability of a neck injury is improper. Accordingly, finding no. 5 is hereby vacated.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including findings no. 1, 2, 3, 4 and 6 and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I concur with the majority opinion that the claimant filed his claim within the limitations period. However, I must

respectfully dissent from the majority opinion finding that the claimant failed to establish by a preponderance of the evidence that he suffered a compensable lumbar or tail-bone injury in February 2005. I find that the claimant suffered a compensable injury to his lumbar spine and his tail-bone on February 22, 2005, and is entitled to indemnity and medical benefits for the same.

HEARING TESTIMONY

The claimant testified that he was 55 years old at the time of the hearing and had been employed since November 1997 as a road superintendent for the respondent-employer Phillips County. He had some degenerative changes in his lumbar spine, but he did not have other problems. He did not have back trouble before the accident.

In February 2005, the claimant was called out to a job in his official capacity. He could not recall the specific date. The Sheriff's Department called his home to report that a tree was down on a county road. When he arrived, the claimant observed that the power company was taking care of the power lines, so he went to work on the tree that was down. He was cutting the tree with a chainsaw when he got tangled up in some vines and "sat down pretty

hard." He was holding the 40-lb. chainsaw, which was engaged, when he went down. He "sat down on the edge of a - one of the blocks that I had just cut." The claimant understood that another county employee, Kenneth Milligan, also got the call and went out too, but he did not see him. The claimant testified that Chuck Hallman was there, as well, for the power company, and that Hallman was the only person the claimant recognized.

The claimant testified that when he fell and sat down hard, his neck "popped." He was more concerned about his neck at that time, but "it felt like somebody hit me with a ball bat on the end of the tail bone and I kind of rolled around there until I got my senses and got up." He went to his truck. He could not recall if he just left the tree mess out there or if Milligan cleaned it up for him. He could not recall, because "it was pretty painful at that point."

The claimant testified that he reported the incident the next work day to Ola Wilson. Her office was next to his at the county road department. He reported his "comp time." For any work over their regular work week, they received "comp time," which was one-and-one-half hour

of leave for every hour of work. This was in lieu of overtime pay. He did not recall the time of day, but it was dark. He felt that he must have told Wilson that it occurred at 7:30 pm, since that was what she said and since she was not present that evening to know herself.

The claimant testified that after the accident, he worked two or three months, confining his activities to riding around in a pickup truck and using the phone at the courthouse. He did not do any physical work. At that point he had pain in his low back. The claimant could not recall when his first visit to Dr. Bell was. His employer had a list of approved doctors, and his family physician, Dr. Bell, was on that list. The claimant saw Dr. Bell. If the injury was February 27, 2005, and the records show that he did not see Dr. Bell until March 5, 2005, this was because he did not go to the doctor all the time, and he was probably to trying to see if the pain would stop without going to the doctor. The claimant did not recall telling Dr. Bell that he was injured on February 22, 2005, but the March 3, 2005 doctor visit says the claimant was injured on February 22, 2005. That could be right. Sometime within that week, he fell and hurt himself.

The claimant testified that Dr. Bell gave the claimant some muscle relaxers. Normally, Dr. Bell would talk to him, as a patient, but "won't hardly put a hand on you." After a couple visits with Dr. Bell, he referred the claimant to Dr. Covey, a pain management physician in Little Rock.

The claimant testified that during his treatment by Dr. Bell, and before the claimant saw Dr. Covey, he had an electrical shock-type of pain in his tail bone if he sat for 30 minutes. He never had these problems before his fall: "Well, I mean, everybody's got a sore back if they do any kind of physical work, but nothing like this." He had no problems with his back and legs, and no numbness. The claimant testified that his tail bone problems, and his back pain and the numbness on the left side gradually worsened from the date of the injury forward. This was why he asked Dr. Bell, a general practitioner, for a referral to a specialist. The first time he saw Dr. Covey was January 15. The pain, including the pain in his tail bone, had gotten worse. Dr. Covey did injections into his spine intended to provide relief for six months to a year. When he returned after the first injection, they expected him to be good as

new, but it had not done anything for him. He went back four or five times. He had MRIs and other tests. Dr. Covey sent him to a neurologist at OrthoArkansas, who said that he had hurt himself "pretty bad." He returned to Dr. Covey, and then he was also referred to a rehabilitation specialist, Dr. Collins. Dr. Collins examined him and gave him a disability rating. None of the medical treatment he received did any good.

The claimant testified that he did not go back to work after August 2005. He owned some rental property, which he managed. He used to be able to perform all of the maintenance himself, but after his fall, he had to hire someone to do it. He got called out once a year for something. His living came from the rentals at the time of the hearing.

The claimant testified that his bills were paid through his wife's insurance. None have been paid by the workers' compensation carrier, although he thought that perhaps the first visit to Dr. Bell was covered by the carrier.

The claimant testified that when he realized there was a problem, he spoke to the county judge's secretary, Rae

King, who told him he no longer had insurance, and he "kind of dropped it at that." He went to a doctor in March 2005 and then again in April 2006. "That was the time that she told me that I wasn't covered, and I just tried to bear the pain." He thought, at the time of the hearing, she was probably talking about medical insurance, not workers' compensation, but he did not know that at the time he spoke to her. Finally he was recommended to his attorney. The claimant testified that he did not file a claim on this injury for two years after the date of the injury, on February 22, 2007.

The claimant was questioned about several forms in evidence. There were four "first reports" and two "N forms," all of which were prepared by Ola Wilson, a secretary for the county. The claimant testified that he did not prepare any of these forms and that he did not tamper with any of the forms. He stated that he was probably not present when the "first reports" were prepared. He did not know why the forms had been written on or changed. "Well, Ola - I mean, I like Ola and all that, but she - she's even had a writeup down here in the judge's office for not keeping good - good records."

The claimant testified that Respondents' Exhibit No. 1 (page 2) was a first report prepared by Ola Wilson. The claimant did not fill any of it out. The date of injury says "2/22," but it looks like it was written over. It also says he returned to work February 23, 2005. The claimant did go to work the next day. Wilson was the person to whom he reported claims. It says he pulled a muscle in his back. The phone number listed, 572-2737, was his home phone.

The claimant testified about another first report which was also in evidence, Claimant's Exhibit Number 2 (page 2). It was also prepared by Wilson. It had a date of injury of February 27, 2005. The phone number was different. It could be his work cell phone, but he was not sure. That number was possibly the courthouse phone. He did not know why there was more than one first report of injury. He "probably was not" present when the forms were completed.

The claimant also testified about Respondents' Exhibit 2, which was another first report in evidence. The date of injury in that report was the 28th, but it was written over as well. He did not tamper with any of the reports. He did not change any of the dates. Ola Wilson

signed this report as well. This form was a copy of a copy. The only date which was not changed was the date he returned to work, which was February 23, 2005, but on that form the date of injury was February 28, 2005, after he returned to work. That was not his writing.

There were two Form N exhibits as well, which the claimant was questioned about. The claimant's signature was on both N forms. Claimant's Exhibit 2 (Page 3) was an N form with the date of injury as February 28, 2005. At the time, he would have signed it no matter what it said. He did not remember when he signed it. He did not recall if he actually signed it on February 28 as marked on the form. So much time has gone by, that he could not say. He was in pain, and he would have signed anything.

Respondents' Exhibit 1 (page 3) was also an N form with the date of injury as February 22, 2005 and the date of return to work as February 23, 2005, but both look like they have been altered. It did have his signature. The one in the county's file said February 22, and the other said February 28, and they both looked like someone tampered with them. It looked like someone changed dates on all the forms. He did not know who did that. They may have just

filled out four or five forms as people asked about them. Both the N forms said that the claimant and Milligan "were cutting up a tree that fell across the road. They were moving limbs and logs from the road. Mark turned wrong and pulled a muscle in his back." The claimant stated that he told Wilson what happened, and she wrote down what she heard. "I did indeed fall with a chainsaw and hurt myself that night." The first report says they were picking up limbs, which he did that night. When he signed the form, he did not check to see that it was correct.

The claimant explained that he gave a date of injury of March 3, 2005 in his pre-hearing information, because it was in some of the employer's records. A doctor's report had that date too.

The claimant testified that he had a lot of pain at the hearing. The claimant explained his understanding of what was wrong with him at that time:

Well, I personally don't think they know just yet, because Covey had told me that I had broke my tail bone and had degenerative disk disease, and I think - but it wasn't - I think it wasn't even in a report until here just recently that they actually sent that, about my tail bone being broke. I had told [his attorney] about it, and he asked me to ask Carl Covey the next time I saw him

if that could be part of my problem, and he said yes.

The report says it was an old fracture, but at that time, the injury was two years old. He knew when he hurt himself. Dr. Covey's final report says that the fracture of his coccyx had healed: "Well, I mean, you have - where it's healed it's like a little knot. In fact, he said - Of course, you can't set a tail bone, and he said it was crooked and that he thinks that's some of my problem. When that's not sitting there straight and then you're sitting on it all day long, it's - can be pretty painful."

Ola Wilson testified that she had been employed as the secretary of the Phillips County Road Department since July 2003. The claimant was her boss. Milligan was an employee of the department. The claimant reported to her that he was called out to remove a tree from the road on February 27, 2005 at 7:30 p.m. She prepared the report based upon what he said, on February 28, 2005, when he came in that morning. He did not say he fell. He was picking up limbs and using a chainsaw, and he hurt his back. She testified that the date of injury was February 27, 2005.

Wilson testified that the first report of injury was what she wrote up before an employee could go to the doctor. She had the original. The date of injury was February 27, and the return to work date was February 28. The claimant went to the doctor that afternoon, that Monday. Since this happened on a Sunday, Milligan and Lynn would have received comp time. She had a comp time report for Milligan, which showed comp time for February 27. Wilson testified that the claimant's paperwork would not be available because he was not with the county anymore. "The judge has most of Mark's paperwork. I was lucky to find what I did."

Wilson testified that she completed the N form (Claimant's Exhibit 2 (page 3) in duplicate: "when they go to the doctor, this is what they send to the workmen's comp office so it's in duplicate, and I send both copies." She did not have the original. She filled it out in her own handwriting, with a date of 2/28/05, and Mark signed it. That was the date that he reported an injury on the day prior. It looks like someone changed the date. She would have filled it out 2/27. She did not have an explanation for the change on that form. She did not have the original

Form N that she filled out. She did not know that there was a Form N with 2/22.

Wilson testified that she did not recall the claimant ever complaining about his back or legs before February 2005, and they worked together daily since 2003.

Wilson testified that she filled out the "first report" labeled Respondents' Exhibit 1 (page 2). It was her handwriting. The accident date on that report looked like February 22. The return to work date was February 23. Her name was at the bottom of the report, and it looks like her handwriting. On that exhibit, it looked like the "22" had been changed. She did not do that.

Wilson testified that she did not change the date on any of the forms. Respondents' Exhibit 1 (page 2) was a copy of the first report she filled out. Respondents' Exhibit 1 (page 2) and Respondents' Exhibit 2 were carbon copies, except that the date was changed on one. The original "first report" is Claimant's Exhibit 2 (page 2), and there were no alterations of the dates. She had the original in her file, and the date was not changed on it. She kept the original in her office. The "original" report that came out of her office is not like the other two. She

did it on February 28, 2005. The phone numbers were different. The 572 prefix is Lexa, West Helena. On another form, 338-1528 was listed, which was his cell number. She had no idea why there was a difference. The date returned to work said 2/28/09. Her explanation was: "Well, I meant 2/28/05." She did not know why it said "09." She stated, "I guess it's possible" that she filled it out in 2009, "but I don't remember doing it." Then she stated that she did not fill it out later. She did not fill it out in preparation for the hearing. She could have put "09" on a piece of paper completed in 2005. "I could be wrong. I'm saying, you know, I don't know. I'm not here for Mark, and I'm not here against the county, and I'm not - I just brought my paperwork." The county should have a copy of that paper. She sent the paperwork to Rae King at the courthouse.

Wilson explained that she printed Claimant's Exhibit 2, (page 1) to bring to the hearing, and she signed it when it came off the computer printer out of habit. "I keep all those documents on my computer of everybody that's ever been hurt out at Phillips County, and when I need letters or need the copies, I go in and I print them out and

then I sign them." So she signed it when she prepared for the hearing. She also attached "one of Kenneth Milligan's report." She did that in preparation for the hearing. Those are all the documents she had. If there are any other documents concerning this time he got hurt, they will be at the judge's office in Rae's files." That's where everything is, including the claimant's payroll records.

Wilson testified that she also typed a letter in 2005. She wrote that letter on Monday morning when the claimant came in to work. She remembered really well because of what it says and when it was written. It says that the claimant pulled a muscle in his back when he picked up a small log. That was what he told her, nothing else. This letter was Claimant's Exhibit 2 (page 1), and she had the original of that letter in her file. She signed it. It showed the date of injury as February 27, and there were no alterations to it.

The claimant did not have a copy of the first report "in her file, because he asked me about it when I came in and I don't have it."

Wilson testified that she was not friends with the claimant, but that they were acquaintances. She stated that

his family was "out of my league." She ran into the claimant a couple times in Wal-Mart, in passing, but has not otherwise seen him since he left in August 2005. She was at the hearing pursuant to a subpoena. She did not attend because the claimant asked her to do so.

Chuck Hallman testified that in 2005, he was employed by Entergy Arkansas. As a serviceman, he was subject to calls every day of the year for seven years. He recalled being called out in February 2005 to a power outage due to some downed trees. He did not recall whether it happened on a weekend or weekday. He recalled seeing the claimant out there. He did not keep a record of the dates, and he did not have a way to pin down the date. Hallman testified that he did not know Milligan, and he could not say if he was there.

Hallman testified that when he got to the outage site, he went to work on the power lines up in the work bucket. He observed the claimant on the ground working. The claimant behaved as if there was "something wrong with him." He was obviously "hurting" or injured. The claimant left, and Hallman continued to work. Hallman did not see the claimant get hurt, and they did not speak that night. A

few days later, the claimant told him that while he was cutting a limb, his feet slipped out from under him, and he fell back and hurt himself.

Hallman testified that he and the claimant were neighbors, and he saw him one or two times a week.

EXHIBITS

Wilson wrote a statement, dated February 28, 2005, in which she reported that:

On February 27, 2005 at approximately 7:30 p.m. Mark Lynn and Kenneth Milligan were called out to remove a tree from the road on PC215. (Storm Creek). Mark and Kenneth cut the tree into sections to remove it from the road. As Mark Lynn was picking up a small log and pulled a muscle in his back [sic]. The following morning he reported that he needed to go to the doctor because his back and hip was hurting so bad he could hardly walk. Mark Lynn left work, went to Dr. Bell. He was given some medicine and sent home. Mark returned to work on February 29, 2005. Mark did not lose any pay due to the accident.

A First Report of Injury was marked Claimant's Exhibit Number 2, page 2. This report was on a standardized form with a copyright mark "IAIABC 2002." This form gave the following information:

Employee:	Mark Lynn 338-1528
Date of injury:	2/27/05
Time employee began work:	7 am
Time of occurrence:	8 pm
Date employer notified:	2/28/05

Contact name:	Mark Lynn 338-1528
Type of injury/illness:	muscle in back
Part of body affected:	back
Location of accident:	PC215
Equipment in use:	no entry
Activity in which the employee was engaged:	moving tree limbs from roadway
Work process in which the employee was engaged:	moving limbs out of road
How injury occurred:	picking up limbs
Date of return to work:	2/28/09
Witness:	Kenneth Milligan
Date administrator notified:	2/28/05
Date form prepared:	2/28/05
Preparer's name:	Ola Wilson, 572-7805

Another First Report of Injury marked Respondents' Exhibit Number 3. This report was identical to Claimant's Exhibit 2, page 2.

A third First Report of Injury was marked Respondents' Exhibit No. 1, page 2. This report was on a standardized form, but not the form with a copyright mark "IAIABC 2002." This form gave the following information:

Employee:	Mark Lynn, 572-2737
Date of injury:	2/22/05
Time employee began work:	7 am
Time of occurrence:	7:30 pm
Date employer notified:	2/23/05
Contact name:	no entry
Type of injury/illness:	pulled muscle in back, left leg, left hip

Part of body affected: back, left leg and hip
 Location of accident: PC215 Storm Creek Road
 Equipment in use: chainsaws, ropes
 Activity in which the employee was engaged: cutting up and moving a tree from road
 Work process in which the employee was engaged: moving limbs and logs from road
 How injury occurred: no entry
 Date of return to work: 2/23/05
 Witness: Kenneth Milligan
 338-8816
 Date administrator notified: no entry
 Date form prepared: 2/28/05
 Preparer's name: Ola Wilson, 572-7805

A fourth First Report of Injury was marked

Respondents' Exhibit No. 2. This report was on a standardized form, but not the form with a copyright mark "IAIABC 2002." This form is identical to Respondent's Exhibit No. 1, page 2, except for the following entries:

Date of injury: 2/28/05
 (The "8" is clearly an alteration of a different number.)
 Date employer notified: 2/28/05
 (The "8" appears altered.)
 Date of return to work: 2/23/05

A Employee's Notice of Injury form ("N form") was marked Claimant's Exhibit 2, page 3. The form was completed by hand, in the same handwriting as the four first report

forms. Wilson testified that she completed the N form. It contains the claimant's contact information. The accident information was recorded as follows:

Place of accident: PC215 (Storm Creek)
Date of accident: 2-28-05
(date changed from 22 to 28)
Time of accident: 6:30 to 8:30 pm
Date and time employer notified:
2-28-05 at 7 am
(date changed from 23 to 28)
Body part injured: back, left leg, left
hip

Discussion of injury:

Mark Lynn and Kenneth Milligan were cutting up a tree that fell across the road. They were moving limbs and logs from the road and Mark turned wrong and pulled a muscle in his back. Has complained with pain in back, numbness in left thigh and numbness in right foot

Witnesses: Kenneth Milligan
Dated and signed: 2-28-05 Mark Lynn

A second Employee's Notice of Injury form ("N form") was marked Respondents' Exhibit 1, page 3. The form was completed by hand, in the same handwriting as the four first report forms. Wilson testified that she completed the N form. The form is identical to Claimant's Exhibit 2, page 3, except for the following two entries:

Date of accident: 2-22-05
Date and time employer notified:
2-23-05 at 7 am

A calendar for February 2005 was entered into evidence, showing that February 22 was a Tuesday, and February 27 was a Sunday.

A county personnel record for the claimant's "comp time" in 2005 showed that on February 22, 2005, the claimant worked two hours of regular time and earned three hours of comp time when he worked on a "tree on 215."

A county personnel record for the claimant's 2005 attendance showed that the claimant worked two hours, earning three hours of comp time on February 22, 2005.

The claimant saw Dr. Ball on March 4, 2005. Dr. Ball's record showed that the claimant was there for a workers' compensation visit and that he was injured on the job on February 22, 2005 when he "fell with chainsaw and sat on butt - then neck 'popped' when he moved branches. Complained of knot on left side of back neck and numbness left thigh and toes." Dr. Ball's handwritten notes are difficult to read but mention "soreness, ... the right neck, right posterior ... pain, bruise at trauma aches." Dr. Ball assessed CSS and cervical radiculopathy, and prescribed Flexeril and other medications.

A Form 3 Physician's Report from March 4, 2005, reflects:

Patient states injured on job on 2-22-05 fell with chain saw and sat on butt then neck "popped" he moved branches complained of knot left side of back neck numbness left thigh and toes
Diagnosis CSS office visit with treatment, meds ordered injection time three c-spine.

The next record is dated April 21, 2006 when the claimant returned to Dr. Ball. The date of injury was noted as March 4, 2005. The claimant complained of pain in his lower back with prolonged sitting. He had pain into his tailbone and could not straighten. Again, Dr. Ball's handwriting is difficult to decipher, but his notes contain "numbness to R toes and distal 1/2 right sole. Feels like a 'collar.' Skin warm and dry." Dr. Ball assessed lumbar radiculopathy and planned an MRI. There is a notation on the record, "Not W/C" but not in the nurse or doctor's handwriting.

A lumbar spine MRI was performed on June 13, 2006, and showed:

1. mild to moderate degenerative disk changes at T12 through L4.
2. left paracentral bulging of the annulus at L3-L4. No evidence of herniated disk, neural

formaminal stenosis or nerve root impingement at any level.

3. Minimal scoliosis of the lumbar spine with convexity to the left.

Dr. Ball reviewed the MRI scan on June 28, 2006, and he referred the claimant to physical therapy. On September 12, 2006, the claimant sought a referral to a specialist from Dr. Ball. Dr. Ball noted that the claimant had a herniated nucleus pulposus in his lumbar spine and that he wanted injections over surgery. Dr. Ball referred the claimant to Dr. Covey. He assessed a herniated nucleus pulposus and lumbar radiculopathy.

On January 15, 2007, Dr. Covey saw the claimant, noting his chief complaint of "end of tailbone" pain with a lancinating component. The claimant related that the pain in his coccyx area had been increasing in severity and frequency for the past eight months. He related this problem to an incident "when he fell 2 years ago holding a heavy chain saw and landing on some rock or block right between his butt cheeks. He had severe pain at the time both in the back, butt and his neck popped." He reported that much of his pain improved with pain relievers, but his tailbone was a problem. He described it as an "electrical

shock." He had lancinating tailbone pain and left low lumbar pain. Dr. Covey noted his mid-lumbar degenerative disc disease shown on an MRI, and that the claimant had not had sacral or coccygeal imaging. Dr. Covey assessed coccygodynia and possible some posterior element lumbar pain with milder discogenic lumbar axial pain. He ordered a CT of the sacrum and coccyx and "CGNB." The claimant also had some moderate osteoporosis.

The CT scan of the claimant's sacrum and coccyx was performed on January 15, 2007, and showed:

1. Mild retrolisthesis of the coccyx versus the distal sacral segments at the sacrococcygeal synchondrosis with a suggestion of mild to moderate degenerative arthrosis. This may represent a sequela from a prior injury that may be causing the patient's pain. Current recommendations include standing versus sitting dynamic radiographs of the sacrum and coccyx to evaluate interval movement at the synchondrosis.
2. Mild to moderate sacroiliac joint degenerative change.

Dr. Covey noted on November 18, 2007 that the claimant may have had an old fracture at the end of the sacrum and coccyx. He noted that there was no real way to tell the age of the fracture, "but it is angulated to the

front and looks like he may have taken quite a lick at some time in the past."

Dr. Covey performed bilateral coccygeal nerve blocks on the claimant on February 15, 2007.

On February 22, 2007, the claimant filed a C Form, marked as Respondent's Exhibit 1, page 1. The date of accident was given as March 3, 2005. The claimant's description of the accident was "coccyx injured believed to be fractured in fall when feet became tangled in debris from tree that had fallen across road that claimant was cutting with a chainsaw."

The claimant underwent an EMG/NCV study of his right leg and of the bilateral L2-S1 paraspinal muscles, on November 8, 2007 at Ortho Arkansas, which was normal.

The final medical report in the record is from Dr. Collins, who examined the claimant on November 27, 2007. Dr. Collins reviewed the accident as the claimant related it:

The patient was in his normal state until he was involved in a work-related incident some three years ago. He was in the process of clearing an area of a log and he was cutting up the log into sections with a chainsaw when he lost his balance, chainsaw was on and he came down holding the chainsaw away from him on his buttocks, but he set

on the edge of a log he had just cut, so he hit it perfectly and fractured his sacrum.

Dr. Collins noted that the claimant had four levels of annular tears in lumbar spine, according to a CT scan. The claimant had a sacral fracture also, which had healed. The claimant had coccygodynia, or pain in the coccyx and that area, and a chronic pain syndrome. Dr. Collins suggested an anti-depressant to help with his pain and the associated frustrations. Dr. Collins also felt that his lack of restorative sleep was a problem. He suggested Lyrica, for sleep and because of the claimant's paresthesia. Dr. Collins also suggested that the claimant's belt could be compressing his lateral femoral cutaneous nerve as it goes over the pelvic brim on the left side. Dr. Collins assessed a seven percent impairment for the annular tear at the first level, and one percent each for the other levels, for a total of a ten percent permanent anatomical impairment rating to the body as a whole. Lastly, Dr. Collins felt that the claimant was not "as good as he is going to be," but deferred the assessment of maximum medical improvement to Dr. Covey.

COMPENSABILITY OF LOW BACK INJURY

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).

I find that the claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his neck and low back on February 22, 2005. Despite much conflicting evidence, there are four documents which demonstrate clearly that the injury occurred on that date, and that the claimant reported that he was using a chainsaw when he fell and sat down hard, and that he felt a

"pop" in his neck while picking up limbs, and that he had pain in his neck and numbness in his left leg and toes.

The claimant saw Dr. Ball with the approval of the respondents, on March 4, 2005. Dr. Ball's office notes reflect that the claimant stated that he was injured on the job on February 22, 2005, which he fell with a chainsaw and "sat on butt then his neck popped when he moved branches." He complained of a knot on the left side of the back of his neck and numbness of the left thigh and toes. Dr. Ball's notes mention soreness of his right neck, right pain, bruise and trauma, and aches. He diagnosed "CSS" and cervical radiculopathy.

Dr. Ball also completed a Form 3 physician's report on March 4, 2005, in which he noted that the claimant stated that he was injured on job on February 22, 2005, "fell with chain saw and sat on butt then neck 'popped' he moved branches complained of knot left side of back ... numbness left thigh and toes."

Also in evidence are two personnel records which are consistent with Dr. Ball's reports. The claimant's "comp time" record and attendance record both reflect that he worked two hours on February 22, 2005 and earned three

hours of comp time. The comp time sheet noted that the reason for this was a "tree on 215." There are no notations for February 27 or 28 on either sheet.

These four records prove that the claimant worked on February 22, 2005 on a downed tree on county road 215, and that he hurt his neck, low back and bottom. These records are reliable above all the other records offered. Dr. Ball was not involved as a party to the claim. His records are the closest in time to the event. His notes are consistent with the personnel records for the claimant's attendance and comp time. There are no questionable markings or apparent changes to these records. I find, based upon these four documents, that the claimant has proved by a preponderance of the evidence that he suffered a specific incident on February 22, 2005 on county road 215 to his neck and low back, when he fell and landed on his bottom and when his neck popped. The claimant was clearly performing employment services in the course and scope of his employment. I also find that these documents prove a causal relationship between the incident and the claimant's need for treatment of his neck and of his low back and tailbone.

The testimony of the claimant about the circumstances of his injury, that he was using the chainsaw when he fell to his bottom, striking his tail-bone on a log which caused immediate severe pain, is consistent with these reports of Dr. Ball, as well as with the testimony of Mr. Hallman that the claimant was obviously in pain that night. The claimant also consistently reported the circumstances of his injury to Dr. Covey and Dr. Collins.

The claimant must also present objective findings of evidence supporting his injury. Dr. Ball's initial medical report appears to reflect that he observed bruising. A lumbar spine MRI was performed on June 13, 2006, and showed degenerative disk changes, a bulging annulus and scoliosis. Dr. Ball and Dr. Covey both assessed a herniated nucleus pulposus and lumbar radiculopathy. The claimant also had moderate osteoporosis. He underwent a CT scan of his sacrum and coccyx which showed:

1. Mild retrolisthesis of the coccyx versus the distal sacral segments at the sacrococcygeal synchondrosis with a suggestion of mild to moderate degenerative arthrosis. This may represent a sequela from a prior injury that may be causing the patient's pain. Current recommendations include standing versus sitting dynamic radiographs of the sacrum and

coccyx to evaluate interval movement at the synchondrosis.

2. Mild to moderate sacroiliac joint degenerative change.

Dr. Covey noted on November 18, 2007 that the claimant may have had an old fracture at the end of the sacrum and coccyx. He noted that there was no real way to tell the age of the fracture, "but it is angulated to the front and looks like he may have taken quite a lick at some time in the past." Dr. Collins' report states that the claimant had four levels of annular tears in lumbar spine, according to a CT scan, and a healed sacral fracture.

The claimant has presented objective evidence supporting injury to his lumbar spine and tail-bone, in the form of degenerative disk disease, annular tears and a sacral fracture. The consistency of the claimant's description of the incident in which he fell on his bottom while holding a chainsaw supports the relationship between the objective evidence and the work-related injury. Furthermore the claimant did not have low back pain, radiculopathy, or tail-bone pain prior to this event, linking his symptomatic degenerative problems to the work-related injury.

The claimant credibly testified that he limited his work activities between the date of injury and his termination, due to his increasing low back symptoms. He also stated that after his termination, his activities remained limited due to his symptoms. The claimant was able to continue working after his incident, because, as a supervisor, he was able to limit his activities. His continued employment until August 2005 is not evidence of the absence of symptoms.

The claimant used the date, March 3, 2005, in his C form, filed on February 22, 2007. His confusion is easily explained. The date of the claimant's second visit to Dr. Ball and the date of Dr. Ball's Form 3 physician's report was March 4, 2005, and the claimant knew that he saw Dr. Ball after his injury. This does not negatively impact the claimant's credibility. Furthermore, even Dr. Ball erred in one of his records, placing the date of injury as March 4, 2005 which was actually the date of his last treatment for the same problem.

I also note that Dr. Ball's record noting "not WC" reflects nothing more than the fact that the claimant was using his own insurance.

I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his low back and tail-bone on February 22, 2005.

CREDIBILITY

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). The record contains many conflicting documents and statements, which distract from the clear evidence of compensability but which do not refute or undermine that evidence. Based upon the record, I find that Ola Wilson is not a credible witness, and the records which she signed are not reliable evidence.

The parties introduced several first reports of injury. Each of these first reports shows that the preparer was Wilson and that the date of preparation was February 28, 2005. The forms were filled out by hand, and the handwriting, Ola Wilson's handwriting, is identical among all of them.

Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 are on a first report of injury form with the

copyright "IAIABC 2002," while Respondents' Exhibit 1 and 2 are on a different version of the first report form. This means, at a minimum, that two first reports were completed, a fact which could not be explained by the preparer of the forms.

Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 are identical. There are two problems with the legitimacy of these exhibits, without comparing them to the other "first reports."

First, Wilson testified initially that Respondents' Exhibit 3 was the "original" from her files, but then stated that, in preparation for the hearing, she printed the form and signed it, out of "habit," after she printed it. The forms are completed by hand, not computer-generated. It makes no sense for the forms to be scanned and saved in her computer without her signature. While it is conceivable that Wilson could have completed a first report form, signed it, and then scanned and saved it to her computer, the evidence does not bear this out. Each version of the first report form is different, and the form that Wilson presented as "original" was one she printed in preparation for the hearing and then signed, according to

her testimony. I do not credit her testimony that she signed the freshly printed but otherwise "original" document, and I do not find that this document is reliable evidence of anything.

Secondly, Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 show that the claimant was injured on February 27, 2005, that the employer was notified on February 28, 2005, and that he returned to work on February 28, 2009. This is an impossible statement of fact. The claimant could not be known to have returned to work in 2009 at the time the document was prepared in 2005. It would require an extraordinary leap of faith and logic to conclude that Wilson made a typographical error in February 2005 by handwriting 2009 instead of 2005. I find that the Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 are of no credible value.

When compared to the other documents in evidence, the value of Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 diminishes even more. There is the simple inconsistency of the fact that the claimant's home phone number is listed in Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3, while what was apparently his work

cell phone number is listed in Respondents' Exhibit 2 and Exhibit 1 (page 2). The date of injury in Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 is listed as February 27, 2005 which conflicts with Respondents' exhibit 1 (page 2), with Dr. Ball's March 2005 medical records and Form 3 report, and with the respondent employer's personnel records, each of which gives February 22, 2005 as the date of injury. Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 state that the claimant began work at 7 am on February 27, 2005, but February 27, 2005 was a Sunday when the claimant was not otherwise to report to work.

Claimant's Exhibit 2 (page 2) and Respondents' Exhibit 3 shows that the claimant notified his employer of the incident on February 28, 2005, which conflicts with Respondents' Exhibit 1 (page 2), the March 2005 records of Dr. Ball and the testimony of the claimant and Wilson that the claimant reported the incident the day after it occurred.

Respondents' Exhibit 1 (page 2) and Exhibit 2 appear to be the same document with certain alterations. Much of the handwritten information is identical in substance and in appearance. One of these documents was

prepared and then altered, and in evidence are an original and an alteration. These documents are likewise not reliable as proof of the date or nature of the incident.

Respondents' Exhibit 1 (page 2) has the typewritten address of the respondent carrier in the appropriate box, while the corresponding box in Respondents' Exhibit 2 is blank. Likewise, Exhibit 1 (page 2) has the carrier's claim number entered by hand, while the corresponding box is blank in Exhibit 2. Respondents' Exhibit 1 (page 2) is stamped "received" by the carrier on April 13, 2005.

The flaws in Respondents' Exhibit 2 lie in the dates of injury, notice and return to work. Respondents' Exhibit 2 shows a date of injury of February 28, 2005, a date of notice of February 28, 2005 and date of return to work of February 23, 2005. This is a remarkably clumsy job of altering the document. First, the date of injury was very clearly altered from February 22 to February 28, and the date of notice was very clearly altered from February 23 to February 28. I would be willing to consider that the form might have needed to be altered to reflect a correct date, except for the glaring errors in the form. First, the

claimant and Wilson both testified that the claimant was called out and injured one day, and that he gave notice the following day, but the form indicates he was injured on the date he gave notice. Secondly, and most importantly, the return to work date of Respondents' Exhibit 2 is February 23, 2005, five days before the date of injury. I disregard Respondents' Exhibit 2 in its entirety.

Respondents' Exhibit 1 (page 2) is less problematic. The dates of injury, notice and return to work are corroborated by Dr. Ball's March records and the claimant's personnel records, and they are in logical order, contrary to Respondents' Exhibit 2. However, the reliability of this document is suspect because the dates of injury and notice also appear to have been altered, although the date of injury is untouched. I find that Respondents' Exhibit 1 (page 2) is reliable for the purposes of corroborating the date of injury and notice, because the form is consistent with Dr. Ball's March records and the personnel records, and because the date of injury is unaltered. Even without the use of this form, the date of injury is clearly established by Dr. Ball's March records

and the respondent employer's personnel records as February 22, 2005.

Two versions of an N Form in regard to the claimant's injury were also offered into evidence, Claimant's Exhibit 2 (page 3) and Respondents' Exhibit 1 (page 3). The forms are almost entirely identical. They show that the claimant was on county road 215 between 6:30 and 8:30 pm when he injured himself cutting up a tree that fell on the road. However, Respondents' Exhibit 1 (page 3) gives the date of accident as February 22, 2005 and the date of notice as February 23, 2005. Claimant's Exhibit 2 (page 3) gives the date of accident as February 28, 2005, where "22" was clearly altered to "28," and the date of notice as February 28, 2005, where "23" was clearly altered to "28." Again, a form has been clumsily altered, to show an injury and notice date of February 28, which conflicts with the testimony that the claimant was injured the day before he reported it, as well as with the medical records and personnel records. These records are in Wilson's handwriting, but she had no explanation for the discrepancy. I disregard the altered Form N, Claimant's Exhibit 2 (page 3), as unreliable. I find the N Form, Respondents' Exhibit

1 (page 3) to be reliable for the purpose of corroborating the medical and personnel records establishing a date of injury.

I note that there would be no purpose to either party to alter the dates for statute of limitations purposes. There is no justification for the claimant or the respondents to alter the dates, because he filed his claim form on February 22, 2007, which was timely under the statute of limitations for either February 22 or February 28, 2005.

On the other hand, the number of documents purported to be the first report of injury and the number of flaws in those documents suggests at a minimum very poor recordkeeping on the part of Ola Wilson, who had responsibility for these records. Wilson's testimony was that she had no explanation for the number of different forms or their inconsistencies. She could not explain the blatant flaws, such as a return to work date of 2009. I disregard the documents prepared by and testimony of Ola Wilson in their entirety, except for the use of Respondents' Exhibit 1 (page 2) and Respondents' Exhibit 1 (page 3) as

corroborating evidence of the date of the injury as February 22, 2005.

Another example of Wilson's failure to accurately record facts is found in her "To Whom It May Concern" letter purportedly prepared February 28, 2005, in which she reported that the claimant was injured on February 27, 2005 on a call on county road 215. She stated that he reported his injury the next day, was seen by the doctor and returned to work on February 29, 2005. This conflicts with Dr. Ball's March reports and the personnel records, as noted many times, but the report gives an entirely new date of February 29, 2005 as the date the claimant returned to work, despite the fact that Wilson dated her statement the day before he returned to work. Again, Wilson's recordkeeping errors preclude a finding of reliability or credibility to her statements, records and testimony.

This "To Whom It May Concern" letter is also suspect, because there is no justification for it. The letter merely repeats the information, with errors, in the N form and first report of injury. There was no purpose behind the preparation of this letter, because the information was already memorialized.

Wilson testified that she had Milligan's comp time report, but that the claimant's employment records were not available, because he was not employed by the county anymore. Her testimony is illogical, since neither Milligan nor the claimant were employed by the county, but she had access to Milligan's records. This is another reason to disregard Wilson's testimony as unreliable. She did not make a credible witness.

Wilson testified repeatedly that she had the original first report in her file, but then also testified that she did not have a copy in her file, because, she explained, when the claimant asked for it, she could not find it. She testified that she brought the original first report to the hearing, then she testified that she had printed it from her computer and signed it in preparation for the hearing, and she testified that when the claimant asked for the first report, she did not have it in her file. Again, her credibility is bankrupt.

I also note that the claimant had been the "boss" of Wilson, who felt that he was out of her "league." He testified that she had a reprimand in her personnel file for poor recordkeeping.

The credibility of Wilson and the reliability of the myriad of documents prepared and signed by her is very important to the determination of this claim. The majority found that the variety of descriptions of his injury and accident in those documents undermined the claimant's credibility. However, Wilson prepared those documents. Wilson was responsible for those documents. It was Wilson who wrote inconsistent descriptions, not the claimant. The claimant's descriptions of his symptoms and his accident in the medical records are consistent, from the first date. I find that the inconsistencies in the descriptions of the accident and symptoms are reflective of Wilson's unreliable recordkeeping and not evidence impacting the claimant's credibility.

I find that the claimant was a credible witness. I acknowledge that the claimant was unsure of the date of the injury, but this was easily identified by the respondent-employer's personnel records and by Dr. Ball's medical records from the claimant's first doctor visit.

I find that Wilson was not a credible witness. I find that the documents signed by Wilson are not worthy of credibility, and I disregard them as unreliable.

INDEMNITY AND MEDICAL BENEFITS

The claimant is entitled to indemnity and medical benefits as a result of his compensable injury to his low back and tail-bone.

The claimant is still within his healing period, as Dr. Collins wrote that he would not place him at maximum medical improvement and because Dr. Covey was still actively treating the claimant's symptoms. The claimant is unable to work, according to his testimony. The absence of off-work slips has no bearing in this situation as the claimant was not employed, negating the need for such documentation. I would award temporary total disability benefits from his termination date in August 2005 to a date yet to be determined.

The claimant is entitled to medical benefits as well. I find that the treatment by Dr. Ball, Dr. Covey and Dr. Collins, including the MRIs, CT scans and EMG tests, from March 4, 2005 forward, was reasonable and necessary medical treatment of the claimant's compensable injury. I find that the claimant is entitled to continued treatment by Dr. Collins and Dr. Covey.

CONCLUSION

After my de novo review of the entire record, I concur with the majority opinion that the claimant filed his claim within the limitations period. However, I must respectfully dissent from the majority opinion finding that the claimant failed to establish by a preponderance of the evidence that he suffered a compensable lumbar or tail-bone injury in February 2005. I find that the claimant suffered a compensable injury to his lumbar spine and his tail-bone on February 22, 2005, and is entitled to indemnity and medical benefits for the same.

PHILIP A. HOOD, Commissioner