

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F908815

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| WILLIAM SHARP, EMPLOYEE | CLAIMANT |
| RHEEM MANUFACTURING, EMPLOYER | RESPONDENT |
| OLD REPUBLIC INSURANCE COMPANY, INSURANCE CARRIER | RESPONDENT |

OPINION FILED SEPTEMBER 15, 2010

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

Claimant represented by the HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondents represented by the HONORABLE E. DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed June 18, 2010. 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 case.
2. On September 23, 2009, the relationship of employee-employer-carrier existed between the parties.

3. On September 23, 2009, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$399.00 for total disability and \$299.00 for permanent partial disability.
4. On September 23, 2009, the claimant sustained a compensable injury to his low back or lumbar spine in the form of a myofascial or musculoskeletal strain or sprain. Specifically, the claimant has established the actual existence of such physical injury or damage by medical evidence, which is supported by objective findings. Further, the claimant has proven by the greater weight of the credible evidence that this physical injury or damage arose out of and occurred in the course of his employment, was caused by a specific incident, is identifiable by time and place of occurrence, resulted in internal physical harm to his body, required medical services, and produced disability.
5. The claimant has further proven that the medical services rendered him for his low back or lumbar complaints, on and after September 23, 2009, by and at the direction of Dr. Greg Loyd and Dr. David Sills represent reasonably necessary medical services for his compensable low back or lumbar injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for these expenses, subject to the medical fee schedule.
6. The claimant has proven by the greater weight of the credible evidence that his compensable low back or lumbar injury of September 23, 2009, caused him to be temporarily totally disabled for the period beginning September 24, 2009 and continuing through March 7, 2010. Specifically, the claimant has proven that, during this time, he continued within his healing period from the effects of his compensable injury and

was rendered totally disabled by this compensable injury.

7. The respondents have controverted this claim in its entirety.
8. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on all controverted indemnity benefits herein awarded.
9. Pursuant to the provisions of Ark. Code Ann. §11-9-411, the respondents are entitled to a set-off against any benefits herein awarded, which have been previously paid under a group insurance policy or group or (sic) benefit program.

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 June 18, 2010, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings that the claimant sustained a compensable low back injury on September 23, 2009, in the form of a myofascial or musculoskeletal strain or sprain for which he is entitled to medical and indemnity benefits. Based upon my de novo review of the record, without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of proof.

The claimant contends that he sustained an injury to his lower back on September 23, 2009, when he was lifting c-cells off the production line and placing them on a skid. Claimant testified that as he was lifting and twisting he heard and felt a pop in his lower back. Claimant further testified that he felt immediate pain in his lower back and down his left leg. Despite this alleged immediate onset of pain, the claimant did not report a work related injury at that time. Rather, since this occurred near the end of his shift he continued working and then tried to go by the supervisor's office at the end of his shift. After going by the supervisor's office and noting that the supervisor was not in his office, the claimant did not go by the nurse's station which is open at the plant 24

hours a day, but rather went home for the day. The following morning, the claimant called in to work to advise his supervisor of his alleged injury and to seek medical treatment from the company doctor.

The claimant was seen by Dr. Lloyd on September 24, 2009, with complaints of lower back pain and pain in his left leg. Dr. Lloyd noted that the claimant was tender to palpitations at multiple levels in his lumbar spine but that the claimant did not have any palpable muscle spasms. Dr. Lloyd removed the claimant from work and prescribed pain medications. When the claimant's pain failed to subside after one week, Dr. Lloyd ordered an MRI. The MRI performed on September 30, 2009, was read by Dr. Richard Nelson as revealing only "minimal chronic degenerative change in the lumbar spine. This is not out of proportion to the patient's age. There is no focal canal stenosis." After receiving the negative MRI results, Dr. Lloyd prescribed physical therapy and continued the claimant off work.

Upon receipt of the MRI report which revealed only degenerative changes consistent with the claimant's age, and the clear lack of muscle spasms or any other objective medical findings during Dr. Lloyd's physical

examinations of the claimant, respondents controverted the claim.

The claimant has the burden of proving by a preponderance of the evidence the compensability of his claim. Jordan v. Tyson Foods, 51 Ark. App. 100, 911 S.W.2d 593 (1995); Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995). For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (Supp. 2005), 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(16), 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. See also, Ark. Code Ann. §11-9-102(4) (E) (i) (Supp. 2005); Freeman v. ConAgra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001); Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d

889 (2002). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997), see also, Reed v. ConAgra Frozen Foods, Full Commission Opinion, February 2, 1995 (Claim No. E317744). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

In the present claim, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury that is established by objective medical findings. Claimant's alleged injury occurred on September 23, 2009. The claimant was examined by Dr. Lloyd on September 24th and no objective medical findings were noted. Dr. Lloyd even noted the absence of any palpable muscle spasms. Dr. Lloyd examined the claimant at least four additional times on September 28th, September 30th, October 5th, and October 18th and each time, Dr. Lloyd did not detect any muscle spasms. In fact, on October 18th, 2009, Dr. Lloyd specifically noted under the "O" for objective findings, "Back, directly over L-spine still an area of marked

T.T.P.. Still can't say definite spasm - paraspinous muscles relax & contract normally & wt. shift from 1 - foot to other. Still & markedly ↓ ROM."

The only possible objective medical findings noted in the medical records are from the claimant's examination by Dr. Sill, his family physician, after the claim had been controverted by the respondents. Dr. Sills examined the claimant on November 6, 2009, and noted the presence of muscle spasms. This examination took place six weeks after the claimant's alleged injury and after numerous examination by Dr. Lloyd failed to reveal the presence of any such findings. In fact, Dr. Lloyd's October 18, 2009, report indicates that he was activity looking for muscle spasms but there was simply no evidence of any such findings. Accordingly, I can not find that muscle spasms noted by the claimant's family physician six weeks after the claimant's alleged injury and after the clear absence of any such findings during the first month of treatment are evidence of objective medical findings of the alleged compensable injury. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury established by objective medical findings. Accordingly, for all the reasons

Sharp - F908815

10

set forth herein, I must dissent from the majority's
award of benefits.

KAREN H. MCKINNEY, Commissioner