

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806168

CHARLES W. HARRIS, EMPLOYEE	CLAIMANT
LEXICON, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INS. CO., CARRIER	RESPONDENT

OPINION FILED JUNE 14, 2011

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

Claimant represented by the HONORABLE JOHN BARTELT,
Attorney at Law, Jonesboro, Arkansas.

Respondent represented by the HONORABLE GUY A. WADE,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained an injury to his right testicle on September 26, 2007. The Administrative Law Judge also found the claimant failed to prove by a preponderance of the evidence he sustained a compensable injury to his testicle on May 28, 2007. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof.

Accordingly, we affirm in part and reverse in part

the decision of the Administrative Law Judge. Specifically, we affirm the finding that the claimant failed to prove by a preponderance of the evidence that he sustained an injury on May 28, 2007. However, we reverse the finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on September 26, 2007.

The claimant was employed by the respondent employer as a mechanic. On May 28, 2007, the claimant was parked behind a sky track, which is a large forklift. The claimant was putting his tools over the side of the truck when he heard the sky track fire up and the sky track hit him. The claimant tried to get the attention of the driver, which he finally did, and the driver pulled forward. The claimant was pinned between the sky track and his truck. The claimant was put in the back of his truck, taken to the office and, subsequently, taken to the emergency room in a company truck. The claimant had injuries to his lower back and both knees, which were accepted by the respondents as a medical only claim. The claimant had a bruise on the back of his left leg bigger than a football.

The claimant contended that both of his testicles were crushed together during the accident. The claimant also

received treatment from Dr. Williams within the next few weeks. It is of note, that there was no mention of a testicle injury after the May 28, 2007 incident. The claimant was put on light duty and was disassembling welders for Tom Ducett. The claimant did that job for approximately two and a half months.

On September 27th or 28th, the claimant indicated there was another incident where he was throwing some tires and felt something pull in his lower stomach and groin. The claimant testified that he went over to the yard and talked to the safety guy. The claimant returned to work the next day and said he had swelling in his right testicle. The claimant went to St. Bernard's Hospital and had fluid drained.

The claimant saw Dr. Joseph Kueter, a urologist, for several months. Ultimately, the claimant had surgery done on his testicle and had to have it removed. During this time period, the claimant did not miss any work and received his regular paycheck. In mid-February of 2008, the claimant was terminated from the respondent employer. In June of 2008, the claimant was approved for Social Security Benefits.

Ark. Code. Ann. § 11-9-102(4) (A) (i) (Supp. 2009)

defines a compensable injury as:

[a]n 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 for 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 claimant. Ark. Code. Ann. § 11-9-102(16). Further the employer takes an employee as he finds him.

The evidence demonstrates that the claimant has been treated as far back as 1983 for discomfort in his scrotal area and groin pain. The medical records demonstrate that in 2002, the claimant was diagnosed with a hydrocele in his right testicle. The claimant was referred for surgery, but he refused to have that surgery performed. The claimant stated that when he lifted things heavier than 40 pounds, he would have swelling in his testicle, but the problem was only slight. The claimant testified that he had learned to

live with it.

After the May 2007 incident, the claimant completed an employee's report of accident, which was filled out by Mr. David Snyder. The information contained in that report indicates that the body part injured was the claimant's upper left leg. When the claimant was seen in the emergency room, he indicated that his leg was caught between the automobile and the sky track and he complained of left thigh pain. The claimant was treated by Dr. Williams on June 1, 2007, and reported that he injured his right thigh. The claimant did not tell Dr. Williams his back, knees, or testicle was bothering him.

The claimant saw Dr. Williams again on June 12, 2007. The report indicated that the claimant complained that the bottom of his foot had "muscle spasms" as well as musculoskeletal injury to his left thigh and left lower extremity. Again, the claimant did not report problems with his knee, low back, or right testicle.

The claimant was seen by Dr. Williams on June 22, 2007. The claimant complained of left leg pain and a knot on his posterior thigh area above his buttocks. Again, the claimant did not mention his back, knees, or right testicle.

It was not until a July 12, 2007 visit with Dr. Williams that the claimant complained of lower back pain. However, the claimant did not mention either of his knees or his right testicle.

The first mention of a knee problem involving the claimant's left knee occurred on August 10, 2007, when the claimant saw Dr. Williams. However, once again, there was no mention of a right testicle problem.

The claimant testified that his right testicle started giving him trouble after the sky track event in May of 2007. However, the medical records from the emergency room and from Dr. Williams do not indicate it. The claimant complained to his "safety guy" allegedly, but there is no evidence of that.

It was not until September 28, 2007, that the claimant mentioned for the first time of pain in his lower abdominal area. The claimant said that his testicle was swollen a little bit before and was now swollen "a whole lot". This was after the tire lifting incident.

The evidence demonstrates the claimant has a history of going to see a urologist since 1983. The claimant had kidney stones in 1983 and 1984. In 1990, he was

evaluated for kidney problems which he was diagnosis with a cyst on his right kidney. The claimant did admit that he had pain in his testicle in April of 2002, and sought treatment at the VA. The claimant reported that his testes were tender, soft and the size of a duck egg in April of 2002. The claimant was diagnosed with a hydrocele. Surgery was recommended at that time, but the claimant refused to have surgery. The claimant indicated that he had previously had shoulder surgery at the VA and that they had messed it up, and he was not going to have surgery again.

The claimant testified that the swelling in his testicle came and went. If he lifted too much, it showed up. The claimant testified that he always had help when he was lifting anything over 40 pounds.

The Administrative Law Judge found that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his testicle on May 28, 2007. The Full Commission affirms this finding. However, the Administrative Law Judge went on to find that the claimant sustained a compensable injury to his right testicle on or about September 27, 2007. The Full Commission reverses this finding.

First and foremost, the claimant did not file a claim for an injury on or about September 26, 2007. The claimant only filed a form AR-C regarding the May 2007 injury. This form was received by the Commission on June 27, 2008 and reflected an injury date of May 28, 2007. There is no mention or notation of injury claimed on September 26, 2007, nor is there another AR-C introduced reflecting a claimed September 26, 2007 date of injury. The pre-hearing questionnaires of both the claimant and the respondents stipulated in paragraph number 4 which states:

The respondents would stipulate that they have controverted the claimant's injury of September 26, 2007 (claim number pending). The respondents would stipulate that they are controverting that particular claim based upon the statute of limitations, as well as the claimant's burden of proof concerning compensability of the hydrocele and hernia.

The respondents went on in their contentions to indicate that any injuries of September 26, 2007 would be barred by the statute of limitations and that there was no formal claim filed. The Administrative Law Judge recognized that the respondents asserted that the September 26, 2007 injury was barred by the statute of limitation. However, the Administrative Law Judge stated that:

The respondents were aware of the claimant's September 26, 2007 claimed injury on or before September 28, 2007.

The Administrative Law Judge did not offer an explanation of this and just went on to state that the parties did not offer proof on the statute of limitations defense. The only AR-C in the file is the one with a date of injury identified as May 28, 2007. There is absolutely no AR-C filed for the September 26, 2007 alleged injury. Somehow, the Administrative Law Judge morphed the September 26th alleged right testicle injury into the May 28, 2007 AR-C filing. This is simply illogical. The AR-C Form filed by the claimant on June 27, 2008, with an injury date claimed as May 28, 2007, does not toll the statute of limitations with regard to an incident which allegedly occurred four months later. If that is the case, once a claimant has an injury and files a Form AR-C, that AR-C would cover any subsequent incidences and injuries forever. This is not the law. To do so would deprive the respondents of due process.

The Administrative Law Judge alleged that "supervisory personnel" assigned to the claimant knew about the alleged incident of September 20, 2007. The claimant testified that he went to the "Nucor yard and I went in

immediately and talked to the safety guy". The claimant did not remember the man's name. Nor is there any evidence that he notified Jerry Moore, his supervisor. The claimant testified that he went to see Dr. Joseph Kueter and was sent there by the safety commission at Nucor Yamamoto Steel; Nevertheless, the problem remains that the claimant never filed an AR-C alleging an injury of September 26, 2007. The claimant's testimony that he reported the incident to an unnamed safety guy and was sent to Dr. Kueter by some "safety commission at Nucor Yamamoto Steel" is simply insufficient evidence to indicate that the claimant satisfied the requirements of filing a claim for an injury. The burden of filing a claim is on the claimant. It is not on the respondents. The respondents did not file an AR-1 Form indicating that there was an injury on September 26, 2007. If the respondents were directing the medical care for this claimant, they would have filed an AR-1 indicating that there was some sort of an incident on September 26, 2007. With regard to the statute of limitations' defense raised by the respondents, Ark. Code Ann. § 11-9-702 (Supp. 2009) provides the following in pertinent part:

- (a) Time for filing.

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury...

(B) For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in § 11-9-102(4).

In our opinion, the claimant has failed to not only prove by a preponderance of the evidence that he sustained a compensable injury to his right testicle on September 26, 2007, but he has also failed to file the requisite claim for this alleged injury with the Commission. The burden is on the claimant to do such, and accordingly, we find that the statute of limitations bars any claim.

The Administrative Law Judge cited Eden v. Superior Marble and Glass, 346 Ark. 487, 58 S.W.3d 369 (2001) to find that the claimant sustained a compensable injury on September 26, 2007. In Eden, the Court indicated that it is not a prerequisite to compensability that the claimant identify the precise date on which an accidental

injury occurred. The Eden case involved an employee who could not identify the date of his injury within a specific date, but he knew it was within a four-day period. In the present case, we do not have a similar situation. First of all, the claimant only identified May 28, 2007 as a date of the alleged right testicle injury. He only filed the Form AR-C with the Commission indicating a date of May 28, 2007. Eden does not support a finding that the claimant sustained a compensable injury on September 26, 2007.

Further, we find that any problems that the claimant had with his right testicle were pre-existing problems and not the result of any injury either in May of 2007 or September of 2007. The claimant had been diagnosed with a hydrocele in 2002, and at that time, was told he needed surgery to correct it. The claimant refused to have the surgery. There is no credible evidence that the claimant sustained an injury to his right testicle on May 28, 2007. The emergency room record fails to reflect that the claimant was complaining of pain in his right testicle. All the treatment the claimant received up until the time he was released in September to full duty does not indicate that the claimant complained of any pain with his right testicle.

The claimant tries to justify the emergency room records by saying, "I was in so much pain, I didn't know what it was -- what all was hurt." If the claimant were having that much pain, in our opinion, he certainly would have said something.

The claimant's credibility is suspect at best. The evidence demonstrates that the claimant was not truthful on the medical forms he completed when he went to work for the respondent employer. The claimant did not indicate that he had prior shoulder surgery or prior back problems. The claimant had also received treatment by a chiropractor for his back and he never indicated this on his employment information. Further, the claimant also had a hernia before he went to work for the respondent employer, and he failed to mention that as well. In our opinion, this goes to the claimant's credibility. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. Powers v. City of Fayetteville, 97 Ark. App 251, 248 S.W.3d 516 (2007). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Cedar Chem. Co. v.

Knight, 99 Ark. App. 162, 258 S.W.3d 394 (2007). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. However, the Commission may not arbitrarily disregard the testimony of any witness. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004).

Therefore, when we consider the evidence, we find that the statute of limitations bars the claimant's claim for a right testicle injury on September 26, 2007. Further, we find that the claimant failed to prove on May 28, 2007 that he sustained a compensable injury to his right testicle. The evidence demonstrates that the claimant had a pre-existing hydrocele that existed at least prior to 2002 and that surgery had been recommended at that time and the claimant had refused to undergo the procedure. Therefore, we affirm the decision of the Administrative Law Judge finding that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury on May 28, 2007 to his right testicle. We reverse the finding of the Administrative Law Judge that the claimant sustained a

compensable injury to his right testicle on September 26, 2007. This claim is therefore dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs.

CONCURRING OPINION

I agree with the majority that there is a statute of limitations problem with this case. However, I must write separately because I take issue with the majority's characterization of the claimant as not credible. In my opinion, the claimant gave credible testimony regarding both the September 26, 2007 incident and the May 28, 2007 incident. In short, I believe the incidents occurred exactly as he testified. But for the statute of limitations problem, I would award benefits in this case.

PHILIP A. HOOD, Commissioner