

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G005756

MICHAEL LUSTER, EMPLOYEE	CLAIMANT
BEN E. KEITH COMPANY, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL CORPORATION, CARRIER	RESPONDENT

OPINION FILED OCTOBER 3, 2011

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

claimant represented by the HONORABLE LEWIS E. RITCHEY,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed and
Dismissed.

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 a compensable injury on March 2, 2010. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a food delivery driver. The claimant was

delivering food to the restaurant at Camp Robinson when the ladder broke as he was unloading and he fell to the ground. The claimant's accident was witnessed by Theresa Grant. The claimant reported the incident to Mr. Chester Shutes, but he was not the appropriate person to tell. Claude Michael, who was the safety manager was the proper party. Mr. Shutes testified that Mr. Michael was in a sales meeting. Mr. Michael was called out of that sales meeting and told that the ladder had broken on the claimant's trailer. The claimant did not report that he was injured in any way. When the claimant was questioned, he stated that he was fine. He also told Ms. Grant that he was fine also.

The broken step ladder report was generated on March 19, 2010, the day the claimant reported it. The claimant also reported this incident to his supervisor, David Morgan. It was not until July 7, 2010 that the claimant filed a workers' compensation claim stating that his fall on March 19, 2010 caused him to have to have back surgery. The claimant had gone to the emergency room on June 16, 2010, due to kidney stones and the doctors at that time indicated that there was something more wrong with the claimant than just kidney stones. The claimant had contacted his supervisor on June 16, 2010, telling him he

needed time off due to a kidney stone. He called Mr. Michael again on July 1, 2010, and stated we would not be able to return to work until July 21, 2010 due to a procedure for a bulging disc in his back. On July 7, 2010, the claimant called Mr. Michael again and informed him that he needed to file a Workers' Compensation Claim.

At the hearing, the claimant contended that he was injured on March 2, 2010. To support this alleged date, the claimant presented the testimony of Ms. Grant. Ms. Grant said that it was definitely on the 2nd of March when the accident happened because she thought it was a Tuesday and it was cold outside and that the claimant only did deliveries on Tuesdays and Fridays. However, the testimony of Claude Michael indicates that the claimant reported the broken step to him on March 19, 2010. Mr. Michael testified that he was sure it was that day because he was called out of his sales meeting and this was confirmed by the testimony of Chester Shutes. Mr. Michael confirmed that the 19th was the date that the broken step was reported and March 29th was the date that the broken step was repaired. The reports generated for the repairs are destroyed after 90 days because they are not required under DOT regulations to maintain those when it has nothing to do with the operation

of the truck. However, Mr. Michael was able to confirm the date by searching e-mails that were generated at that time.

The testimony of Ms. Grant is suspect at best. Ms. Grant testified that she was able to verify that the claimant's accident was on March the 2nd, but she was unable to remember other things. For instance, she thought the claimant only worked a couple weeks after the incident. However, the records indicate that the claimant worked through the middle of June, which is more than a couple weeks.

The medical records indicated that the claimant had been treated for a variety of medical issues, including back problems, foot problems, sleep related issues, as well as having a pacemaker prior to this incident. On September 18, 2009, the claimant saw Dr. David King and complained of:

Chronic or recurring problem
with back pain. The back pain
began about six months ago
after no specific injury.

The pain was described as persistent and sharp as well as a cramping.

On February 17, 2010, the claimant sought treatment at the Autumn Road Clinic from Dr. Jack Somers. Again, the claimant reported back pain as a new problem that

had begun one week prior to the appointment. He described a fall that was "a slip and fall on ice."

The claimant went for a doctor's appointment on March 10, 2010 at the Autumn Road Family Clinic. The claimant testified that he told the doctor all about the fall from the ladder during that visit. However, there is absolutely no mention in the medical records of a fall from a ladder, but there is a mention of a slip and fall on the ice that was also discussed at the February 17, 2010 visit. Dr. Somers referred the claimant to a physical therapist whom the claimant only saw one time. The report from the physical therapist on March 10, 2010 mentions nothing about a fall, but does report complaints of "posterior thigh and buttocks pain that began a year ago for no apparent reason." The claimant was scheduled for two follow-up appointments, but was a no-show for both of those. The claimant testified at the hearing that he was not sure why he went to see Dr. Watson on March 10, 2010, and it may have been a previously scheduled appointment.

On June 14, 2010, the claimant sought treatment at Baptist Medical Center complaining of lower back pain and urinary symptoms. The medical records from this date contain the first mention of a fall from a truck ladder.

The records from that date indicate that the claimant has had back pain "intermittently since falling from a truck two months ago." The doctor noted that the claimant was discharged and that a renal stone was passed. During this visit, the doctor also suggested that the claimant's pain was not just the result of a renal stone.

On June 15, 2010, the claimant contacted Dr. Calhoun about a possible kidney stone and was told to see Dr. Watson the next day. At the June 16, 2010 appointment, there was no mention of a fall on March 19 or March 2, 2010.

The claimant sought treatment from Dr. Blankenship at Ortho Arkansas on June 17, 2010. This report does discuss a fall in March of 2010, and states that the claimant started having pain and spasms directly following this fall. Dr. Blankenship recommended a CT scan because the claimant was unable to have an MRI because of his pacemaker. The claimant's CT scan indicated disc bulges and degenerative disc disease. The claimant returned to Dr. Blankenship on June 25, 2010, complaining of low back pain and trouble sleeping. Dr. Blankenship noted that the CT scan showed what appeared to be a herniated disc and he recommended that the claimant have the LESI procedure. The claimant had the first of the injections July 21, 2010, and

on July 28, 2010, he returned complaining that he was still experiencing back pain and that the injections did not help at all.

The claimant was referred to Dr. Scott Schlesinger who saw the claimant on July 29, 2010. Dr. Schlesinger examined the claimant, his CT scan, and a myelogram, and suggested possible surgical intervention. The claimant elected to undergo lumbar decompressive surgery on August 10, 2010. The claimant has continued to complain of back pain since the surgery.

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

Our review of the evidence fails to demonstrate that the claimant sustained a compensable injury on March 2, 2010. First of all, it is evident that the claimant did not file a Workers' Compensation claim until he was told that he had problems other than a kidney stone. The claimant did not file a claim until July 7, 2010. The claimant did not mention any incident of falling off of a ladder to any of his doctors until June 14, 2010, when the claimant sought treatment at the emergency room at Baptist Medical Center for a kidney stone. The claimant contends that this incident happened on March 2, 2010 and that he was confused about the dates. He stated that he discussed the fall from the ladder at the March 10, 2010 doctor's appointment with his doctor. However, the medical records from that date indicate that the back pain that the claimant was complaining about was related to a slip and fall on ice in February of 2010.

Further, the testimony of Ms. Grant is not credible. Ms. Grant was sure that the claimant was injured on March 2nd, but was vague remembering how long the claimant worked after that point. She stated that she thought it was about two weeks when it was actually almost

three months.

Moreover, at the time of the fall, the claimant told Ms. Grant he was fine and told Mr. Shutes he was fine. It is also of note that the claimant came to the conclusion that the incident occurred on March 2nd as a result of his strong feeling that it was a Tuesday. The medical records contain no mention whatsoever of any incident involving the ladder until June 14, 2010. All the other evidence in the record clearly shows that the claimant was not injured on March 2, 2010.

When the testimony of Mr. Michael along with Mr. Shutes' testimony is considered, coupled with the vague testimony of the claimant and Ms. Grant, and the medical records, there is no evidence in the record to conclude that the claimant sustained a compensable injury on March 2, 2010. Accordingly, based upon our de novo review of the record, we reverse the decision of the Administrative Law Judge. Therefore, the decision of the Administrative Law Judge should be and is hereby reversed and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant sustained a compensable back injury when he fell from a broken trailer ladder in March, 2010.

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)(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). If the disability develops soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, then the claimant has established a causal connection. However, if there is a span of time between the accident and the disability, a question of fact arises concerning the causal connection. Hall v. Pittman Constr. Co., 235 Ark. 104, 105-106, 357 S.W.2d 263, 264 (1962).

Here, the March accident is confirmed by a customer, two co-workers, and repair work to the trailer. Therefore, it is identifiable by time and place of occurrence and arose out of and in the course of employment. The claimant denied any injury, but, shortly thereafter, he sought medical treatment using his group insurance. The claimant did not report an injury to his employer, stating that he feared losing his job.

The majority's main argument for reversal of the

Administrative Law Judge's decision seems to hinge on the claimant's failure to report the injury immediately. However, I would note that the statute of limitations for reporting a workers' compensation claim is two years. Ark. Code Ann. §11-9-702 (a)(1). Failure to report may act as a defense to the respondent having to pay for benefits prior to the report of injury, see Ark. Code Ann. §11-9-701, but failure to report immediately does not defeat the claim in its entirety.

Here, the claimant has established a history of using his group insurance to treat prior work-related injuries concerning his feet and back. He did the same after the accident in March, 2010. After the claimant realized that he needed surgery, he reported an injury to his employer four months later in July, 2010. This fact alone does not defeat the claim, and certainly does not impinge on the claimant's credibility. The claimant's testimony is supported by the medical record and particularly the testimony of Ms. Teresa Grant. The majority states that the testimony of Ms. Grant is not credible due to the fact that she could not remember how long the claimant worked for the employer after the accident. I disagree. The question here is whether or not

the claimant injured his back in a ladder accident. Ms. Grant testified that she saw the claimant fall off the ladder onto his back. Whether or not she can remember how long the claimant worked for the employer after the accident is simply irrelevant, and certainly does not make her testimony lack credibility.

In conclusion, I find the claimant's testimony to be credible. I find Ms. Grant's testimony to be credible. I find that the medical records support the claimant's testimony that he injured his back in a ladder accident in March, 2010. It is my opinion that the majority has mischaracterized the entire record in this claim.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner