

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA11-1123

MICHAEL LUSTER

APPELLANT

V.

BEN E. KEITH COMPANY, INC., and
LIBERTY MUTUAL CORPORATION

APPELLEES

Opinion Delivered March 7, 2012

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. G005756]

AFFIRMED

ROBIN F. WYNNE, Judge

Appellant Michael Luster appeals from the Arkansas Workers' Compensation Commission's decision denying benefits related to his back injury. We affirm.

Mr. Luster worked for appellee Ben E. Keith Company as a route driver from February 2007 through September 2010. In March 2010, while making a delivery to the Rock Café, Mr. Luster fell from a ladder on his truck when the lower rung broke under his weight. He reported the incident to two of his supervisors but did not tell them that he had been injured by the fall. No documentation of an injury resulting from the fall was made until June 14, 2010. On that date, Mr. Luster went to the emergency room after passing a kidney stone, and the treating physician noted that there was something else causing Mr. Luster's back pain besides the stone. A subsequent CT scan indicated degenerative changes and disc bulges in Mr. Luster's lower back. Upon learning that he would need surgical treatment, Mr. Luster filed a claim for workers' compensation on July 7, 2010, claiming that his back was injured when he fell from the ladder in March 2010. Mr. Luster was given an epidural steroid

injection on July 21, 2010, which did not help his pain. He then underwent disc decompression and discectomy surgery on August 31, 2010, but continued to experience pain.

When appellees denied Mr. Luster's workers'-compensation claim, he requested a hearing. At a hearing before an administrative law judge (ALJ) on February 25, 2011, Mr. Luster testified that although he reported the incident, he initially told his supervisors that he was fine and did not need medical attention. However, he claimed that after the fall, he began experiencing lower-back pain that radiated down his leg. He stated that this pain was different from the back pain he had occasionally experienced in the past. Mr. Luster testified that he had not wanted to make an issue of the March 2010 fall because he was worried he would lose his routes.

Mr. Luster stated at the hearing that the incident occurred on March 2, 2010. He claimed to have discussed the fall with his family doctor at a routine appointment on March 10, 2010. However, the medical records from that visit contain no mention of a fall from a ladder. They do, however, note a complaint of low-back pain following a slip and fall on ice in February 2010. Mr. Luster was referred to physical therapy after the March 10 appointment; however, he attended only one session. The physical therapy records state that Mr. Luster began experiencing pain in his back and leg "about a year ago for no apparent reason" and do not reference any type of fall.

Between March 10 and June 14, 2010, Mr. Luster did not seek medical treatment for any reason. He testified that, although he was experiencing pain, he just "sucked it up" and worked through the pain. According to Mr. Luster, it was not until June that he realized he

had sustained an injury requiring treatment, and it was not until he was told he needed surgery that he decided to file a claim for workers' compensation benefits.

Teresa Grant, an employee of the Rock Café, testified that she witnessed Mr. Luster's fall and that she believed it happened on March 2, 2010. Ms. Grant based her belief on the fact that "it was the first of the month and first of the week and he makes deliveries on Tuesdays and Fridays." However, Claude Michaels, Mr. Luster's safety manager, testified that the fall occurred on March 19, 2010, and that he was positive of the date because he had been called out of a sales meeting on that date when it was reported to him. Mr. Michaels stated that Mr. Luster reported the accident but claimed he was okay. Mr. Michaels knew nothing of an injury until the claim was filed in July.

Likewise, Chester Shutes testified that "possibly in March 2010," Mr. Luster told him about an accident where a ladder on his truck broke, causing him to fall. Mr. Luster had told Mr. Shutes that he felt fine and just needed to report the incident. David Morgan, a driver supervisor, testified he learned of the broken-ladder incident in March 2010, as well. He stated that the company had a safety-bonus program through which workers received extra compensation for not having an injury or accident within a one-year period.

In an opinion filed May 26, 2011, the ALJ found that Mr. Luster's back injury was compensable. The employer appealed to the Commission, which reversed the ALJ's decision. Based on its review of the record, the Commission found that Mr. Luster's and Ms. Grant's testimony lacked credibility and that the medical records contained no mention of a ladder fall until June 2010. The Commission relied on the testimony of Mr. Michaels and

Mr. Shutes and the medical records in concluding that the evidence did not support Mr. Luster's claim of a compensable injury on March 2, 2010. Mr. Luster now appeals to this court, arguing that the Commission's decision is contrary to the law and facts of the case.

In reviewing a decision from the Arkansas Workers' Compensation Commission, we view the evidence and all reasonable inferences in the light most favorable to the Commission's findings. *Staffmark Invs., LLC v. King*, 2009 Ark. App. 830, at 2. We affirm those findings if they are supported by substantial evidence, which is relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* We will not reverse the decision of the Commission unless we are convinced that fair-minded persons considering the same facts could not have reached the same conclusions. *Id.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; rather, it is whether there is substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact. *Burris v. L & B Moving Storage*, 83 Ark. App. 290, 293, 123 S.W.3d 123, 125–26 (2003).

It is the function of the Commission, not this court, to determine the credibility of witnesses and the weight to be given to the evidence. *Whaley v. Hardee's*, 51 Ark. App. 166, 168, 912 S.W.2d 14, 15 (1995). 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 it deems worthy of belief. *Id.* Where the Commission has denied a claim because of a failure to show entitlement by a preponderance of the evidence,

our standard of review requires us to affirm if the Commission's opinion displays a substantial basis for the denial of relief. *Id.*

Mr. Luster had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E) (Supp. 2011). A "compensable injury" includes an accidental injury arising out of and in the course of employment which requires medical attention. Ark. Code Ann. § 11-9-102(4)(A)(i). An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. *Id.* Although the inability of the claimant to identify the exact date of an injury might be considered by the Commission in weighing the credibility of the evidence, the statute does not require that the exact date be identified in order for the injury to be compensable. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 492, 58 S.W.3d 369, 373 (2001).

In this case, the objective medical evidence indicated a three-month gap between the date of the accident and the report of the injury, calling into question whether Mr. Luster's back injury was indeed a result of the work-related accident. Although the Commission emphasized the conflicting testimony regarding the exact date of the incident, it was undisputed that Mr. Luster fell from a ladder while working sometime in March 2010. Mr. Luster's inability to identify a certain date does not bar him from receiving compensation; however, it was within the Commission's province to consider this confusion about the date as a matter of credibility. The Commission clearly weighed the conflicting evidence against Mr. Luster, finding his entire testimony to be suspect.

Because the medical records make no mention of the ladder incident until the back injury was discovered in June 2010, Mr. Luster's testimony was the only evidence linking the injury to the March 2010 fall. Given the span of three months, reasonable persons might disagree as to the actual cause of the injury. Our standard of review requires that we defer to the Commission on such questions of fact and credibility. The Commission noted that the following medical evidence contradicted Mr. Luster's testimony: medical records of March 10, 2010, indicated that he related his back pain to slipping and falling on ice the previous February; and the medical records had no mention of any incident involving the ladder until June 14, 2010, when he sought emergency treatment for a kidney stone and was told that he had additional problems. The Commission further noted that, at the time of the fall, Mr. Luster told Ms. Grant and Mr. Shutes that he was fine. Based on this evidence, the decision of the Commission displays a substantial basis for the denial of Mr. Luster's claim. Therefore, we must affirm.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.