

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIMS NUMBER F307558 & F313402**

**JOHN C. HARRIS,  
EMPLOYEE**

**CLAIMANT**

**KEITH SMITH CO., INC.,  
EMPLOYER**

**RESPONDENT**

**CONTINENTAL CASUALTY COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED DECEMBER 23, 2003**

Hearing conducted December 17, 2003, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Charles R. Padgham, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant and

Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This is a dispute over compensability of two back injuries alleged by the claimant.

The claimant contended that he sustained two incidents of injury to his back, the first in early June, 2003, when he twisted his back, and the second on or about June 26, 2003, when he fell at work. He requested related benefits for temporary total disability from July 14, 2003, until a date to be determined, reasonably necessary medical and related expenses, and an attorney's fee for controversion. Other possible issues were reserved.

The respondents contended that the claimant did not sustain an injury arising out of and in the course of his employment and, further, that his current medical problems are a continuation of pathology which existed prior to the alleged injuries and which had caused the claimant to use medication for pain relief prior to the alleged injuries.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including June, 2003; his average weekly wage was \$599.00; and these claims have been controverted in their entirety.
3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury in early June, 2003.

**DISCUSSION**

The claimant, 38 years of age at the time of the hearing, had worked almost ten years for the respondent employer, first, as a laborer and, more recently, as a truck driver whose duties included picking up eggs at various farms, loading them on the lift gate into a truck, and returning them to the employer's warehouse. He testified that he sometimes lifted as many as twenty cases of eggs and that, during the summer, his normal shift was from 4:00 p.m. to 9:00 p.m., due to the summer heat.

The claimant also testified that he had no significant problem with his back before working for the employer but, after starting work there, he strained his back from time to time because of lifting and overwork from doing double shifts. He explained that sometimes it was necessary for him to fill in on other shifts for workers who were on vacation or otherwise not available to work their normal shifts. He stated that when he had problems with his back during this employment he always went to his own doctor and that the employer had never sent him to their doctor. He said that

he usually missed only two or three days and then would return to work. He also said there was no other activity which caused him back problems and that he had no prior back surgery or MRI scan. He testified that he had never before felt that he had a serious back problem.

The claimant described two incidents involving his back while working for the respondent employer in June, 2003. The first, he stated, occurred in early June at the Pennington Farm when while loading eggs, he twisted and reached to grab a rack, and felt his back pop. He stated that he told Greg, a supervisor, but also told him there was no use in writing it up. The claimant stated that the next day he felt real bad and went to the doctor.

The claimant testified that the second injury occurred on a Thursday at the end of June in the Black Springs area, when while working another employee's shift, he slipped off the back of the lift gate, landed on his butt, and felt immediate pain. He also stated that the day before he had completed his own route and had had no problem with his back, but that now his back hurts and his right leg hurts constantly. The claimant testified that he told Greg or possibly Mike but then declined to fill out a form. He said at first he felt alright, including the next day, Friday, when he was off work. However, the claimant testified, the next couple of days he had numbness and pain down his right side and, back at work, felt sick like he was having a heat stroke. He said the employer told him to go home and someone else would unload for him. He stated that he did not miss much work until July 14.

The parties stipulated that, if called to testify, the claimant's wife would offer testimony that would tend to corroborate that of the claimant.

The respondents offered the testimony of Greg Kokemueller, who stated that he had worked there about ten years and that the claimant had never reported a work-related injury but did say from

time to time that he did not feel good, without indicating a problem with a specific body part. He stated that the claimant did report in June that he was sick to his stomach and was off for a few days and then called to say his back was hurting but did not know if he hurt it at work. Mr. Kokemueller testified that he told the claimant if he had hurt himself at work he should tell Tony, fill out paperwork, and see a workers' compensation doctor. However, Mr. Kokemueller testified, the claimant never did report an injury to him. On cross-examination, he testified that the claimant did not complain of problems associated with work at the Pennington Farm or while driving in the Black Springs area. He also stated that the claimant was a good employee and that in July, when his wife picked up his check, she stated that the claimant had a disc problem, and gave them an off-work slip.

Tony A. Timms testified for the respondents that he had worked about twenty years for the employer and was in charge of risk management. He stated that in June the claimant indicated he had back problems but did not know when, where, or how he had hurt his back. He said that the claimant did not report a work-related injury until about a month later. He also stated that the claimant's wife stated his back problems could have been work related, but she did not know, and asked to fill out workers' compensation forms. He also stated that the claimant was a good employee.

The respondents have declined to pay benefits on the theory that the claimant was not injured at work and his current problems represent pre-existing pathology. For example, the claimant testified that he had been involved in a motor vehicle accident in 1998 while driving a truck for the respondent employer and that he had experienced low back pain off and on since this accident. He stated that after the motor vehicle accident he first saw Dr. Simpson and then consulted Dr. Thomas H. Hollis, Jr.

The December 8, 2003, deposition of Dr. Hollis, indicates that the claimant was first treated at his office in January, 2001, because of pain in his left shoulder, neck, back, and left chest and that the claimant mentioned a motor vehicle accident in 1999 but did not give a specific etiology of his complaints. X-rays of the claimant's chest, left shoulder, cervical spine, and lumbar spine then showed mild osteoarthritic change but no fracture or any kind of soft tissue abnormality. The diagnosis at that time was over-use syndrome and osteoarthritis of the spine for which rest, steroid injections, and anti-inflammatory medication was recommended. Dr. Hollis reviewed his records and indicated that the claimant was seen several times for similar conditions as well as for dermatitis, major depressive disorder, and chronic back pain. Dr. Hollis testified that his records indicate that the claimant did a lot of frequent lifting at his job and that this was the probable source of his aches and pains. In November, 2002, the claimant's complaints included some right hip and lower back pain. Dr. Hollis testified that his recollection was that the claimant kept having these nagging injuries that were secondary to lifting at work. Dep. at 15. His records also showed that the claimant had some problems with breathing, sinus problems, a respiratory infection, and a left ear infection.

Dr. Hollis testified that in June, 2003, the claimant had a CT scan of his head because it looked like he had some possible head prostration and was having some numbness and some neurological findings and was a little weaker. The results of that test were negative and on July 15, 2003, the claimant underwent an MRI scan because of worsening right hip pain radiating around the sacrum and the claimant's increased use of narcotics. The claimant was also complaining of numbness radiating down his right leg. Dr. Hollis testified that it sounded vaguely familiar that the claimant had sustained a fall in June, 2003, but that he did not have any notation of it in his record. Dep. at 20. He also testified that there was no history of the claimant injuring his back away from

work. Dep. at 21, 22. Dr. Hollis testified that he last saw the claimant in September, 2003, when he was complaining of numbness in both lower extremities, nightmares, depression, insomnia, numbness in his right foot, and some right quadriceps weakness and a positive straight leg raising sign on his right. At that time, Dr. Hollis referred him to a neurosurgeon.

The July 15, 2003, report of the MRI scan performed at the request of Dr. Hollis indicated that there was degenerative disc disease of the lower lumbar spine, most severe at L5-S1 with a right parasagittal disc herniation causing focal severe canal stenosis and right neural foramina narrowing and displacing the right S1 nerve root sleeves posteriorly in the spinal canal. It also indicated there was an L4-5 degenerative disc with disc desiccation, posterior bulging, and facet hypertrophy causing mild neural foramina narrowing. An August 4, 2003, note states onset of current back difficulties date to incident third week of June when he was injured at work. On September 18, 2003, Dr. Hollis opined, "Although [the claimant] has some preexisting osteoarthritis and lumbar back pain, he was functioning at a high level prior to his most recent injury. He has been incapacitated since that time and his MRI reveals disc herniation at L5-S1 which causes focal severe canal stenosis." The claimant now requests benefits as stated above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant.

Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

As to the incident in early June, 2003, a compensable injury has not been established by medical evidence, supported by objective findings, as required by the Act. Although the claimant's medical records go back to January, 1998, there is no such objective medical evidence establishing an injury in early June, 2003. However, after the incident on Thursday, June 26, 2003, the claimant again consulted his physician and by July 2, 2003, his medical record reflects lumbar spine back pain with "spasm", an accepted objective finding of injury. Thereafter, his treating physician has diagnosed a herniated disc at L5-S1, consistent with the July 15, 2003, MRI scan. However, no such objective findings of injury exist for the alleged incident in the early part of June, 2003.

The 1998 motor vehicle accident was mentioned in the medical reports of Dr. John B. Simpson beginning April 13, 1998, and continuing until June 2, 1998, when Dr. Simpson noted that the claimant had been working fully doing all activities and opined that he had suffered no permanent injury, the soft tissue trauma was almost totally resolved, and no further work-up or treatment was indicated. His notes concerning the motor vehicle accident indicate that the claimant had discomfort about the shoulders, no radicular discomfort, morning discomfort about the neck and shoulders, and soft tissue chest wall symptoms and trauma. However, there is no indication that the claimant suffered low back or leg symptoms as a result of the motor vehicle accident.

The first mention of low back problems in the medical record occurs August 4, 1998, when Dr. Simpson noted that the claimant had some low back discomfort with left sided sciatica and

radiation of discomfort to about mid-thigh. There was no indication of right leg involvement, the claimant's current problem. This note seems to associate the claimant's condition with being very physically active on his job. Thereafter, the claimant began his treatment with Dr. Hollis, which included narcotic pain medication and steroid injections.

The claimant's supervisors have indicated that the claimant did not allege a job-related injury or associate his problems with his employment. This is contrary to the medical record of Dr. Hollis, who associates the claimant's back problems with his work. However, the testimony of Dr. Hollis at pages 15 and 16 of his deposition indicates that he relied on his office manager to handle the problem of whether an injury was covered by workers' compensation, major medical insurance or paid out of pocket. On the other hand, the testimony of the respondent witnesses indicates that they were more interested in this issue and more specific in inquiring about the source of the claimant's problems and that the claimant consistently denied that his back problems had occurred at work. The testimony of the claimant's family physician may be more the result of his sympathy for his patient than a product of careful inquiry about the occurrence of any injury at work in June, 2003. Indeed, the contemporaneous medical notes from his office do not reflect an incident of injury in June, 2003, that would account for his back problems. Thus, although the claimant's symptoms may be associated with his activity at work and the claimant may have sincerely eventually concluded that work caused his problems, at the time of the alleged injuries the respondents inquired and the claimant denied that his condition was related to an injury at work. Thus, the preponderance of the evidence fails to show that the claimant's back problems, which have been developing over time, are sufficiently related to injuries at work.

For the foregoing reasons, these claims for benefits should be, and they are, respectfully denied and dismissed

**IT IS SO ORDERED.**

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RICHARD B. CALAWAY  
Administrative Law Judge