

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIMS F114035 & F114036**

**TERRY ALLEN NEWBERRY,  
EMPLOYEE**

**CLAIMANT**

**KELCRO, INC., D/B/A  
PARK HILL EXXON,  
EMPLOYER**

**RESPONDENT**

**UNION STANDARD INS. CO.,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED FEBRUARY 27, 2004**

Hearing conducted February 25, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Kenneth A. Olsen, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

**STATEMENT OF THE CASE**

This is a dispute over compensability of the claimant's back condition.

The claimant contended that he sustained a compensable low back injury as the result of incidents of injury at work on June 20, 2001, and December 10, 2001, for which he should be awarded benefits, including temporary total disability benefits from September 26, 2002, until a date to be determined and unpaid medical expenses, as well as additional medical care recommended by Dr. Edward H. Saer. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant did not sustain a compensable low back injury. Specifically, they contended that he did not sustain a compensable low back injury on June 20, 2001; that any injury sustained during the incident on June 20, 2001, and was not compensable because it

was substantially occasioned by his use of illegal drugs; that the claimant did not sustain a compensable back injury December 10, 2001; that he did not otherwise sustain a compensable back injury during the employment; and, in the alternative, that he is not entitled to the requested temporary total disability benefits because he was not incapacitated to earn wages, at least beyond October 3, the end of the period covered by his off-work slip.

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 20, 2001, and December 10, 2001; his average weekly wage was \$421.80 on June 20, 2001, and \$396.98 on December 20, 2001; that the claimant suffered a compensable chest injury December 10, 2001; and that the incident of June 20, 2001, was not accepted as compensable by the respondents.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable low back injury, within the meaning of the Act, arising out of and in the course of this employment.

**DISCUSSION**

The claimant, 39 years of age at the time of the hearing, was employed as a service attendant for the employer at its Park Hill Exxon Service Station location where he was involved in two accidents. First, on June 20, 2001, several tires fell from a tire rack and struck him around the neck

and upper back. The next day, Dr. Charles D. Barg, the company physician, saw the claimant, took his history of being struck in the head and neck and diagnosed his condition as cervical strain and right knee strain, after examining him and x-raying his knee and cervical spine. There is no indication in the contemporaneous medical record that the claimant suffered an injury to his low back at that time. Dr. Barg last saw the claimant for this incident June 27, 2001, when he wrote that the claimant had a pretty good range of motion and all in all was improved.

Later, on December 10, 2001, the claimant experienced chest and side pain as he was bent over to remove a wheel while fixing a flat tire. He stated that he thought he was having a heart attack and did not think he had injured his back. He was again seen by Dr. Barg who found that he had normal pain free range of motion by December 17, 2001, but recommended that he see Dr. Saer for possible scoliosis, a condition not related to his work activity.

Dr. Saer had the claimant undergo physical therapy and continued to treat him through January, 2002. The claimant next saw a physician on or about September 18, 2002, when he consulted Dr. Brian Nichol. Thereafter, he was seen again by Dr. Barg and Dr. Saer and eventually by Dr. Sunder Krishnan in January, 2003. The claimant testified that he had injured his back when the tires hit him on June 20, 2001, and that the condition got worse until he was off work in September, 2002. A November 25, 2002, MRI scan showed degenerative changes, disc space narrowing and bulging disc with resulting bilateral foraminal stenosis at L5-S1 and a mild disc bulge at L4-5 with a small posterior annular tear. The claimant attributes his condition as it was in September, 2002, to the incident in June, 2001, and has requested the benefits described 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).

Credibility is a factor to be considered in determining whether the burden of proof has been met. Credibility may be affected by several factors, including overall truthfulness, of course, but also factors such as accuracy of the initial observation by the witness, reliability of the witness's recollection of that observation, and ability of the witness to articulate the recollection effectively at the hearing. A defect in one or more of these factors may lessen the credibility of a witness.

Here, the claimant's testimony was marked, from time to time, by apparent confusion, as well as an uncooperative and deceptive attitude. Indeed, on cross-examination, he explained why he did not feel it necessary to respond truthfully to various questions in his deposition testimony. With such an attitude, his credibility is minimal and there is little reason to rely on his testimony.

Further damaging his credibility is the fact that the claimant told the co-worker that he did not think he could pass a drug screen at the time of the June, 2001, accident, although at the hearing, he frankly explained that he used marijuana once or twice a week.

The record indicates that the respondent employer had a working relationship with Dr. Charles Barg's office, where the claimant was seen June 21, 2001, but had no policy requiring a drug screen at the time. Dr. Barg's notes indicate that his office understood the claim to be a worker's compensation claim at that time, but did not offer a drug screen to the claimant. Thus, the claimant did not refuse to take a drug screen and there is no positive test result that would create a presumption that the incident was substantially occasioned by his use of illegal drugs. Moreover, the co-worker testified that there was nothing about the claimant's behavior that would indicate that he was impaired by drugs. Thus, the intoxication defense provided by Ark. Code Ann. §11-9-102(4)(B)(iv) does not bar the claim.

On the other hand, the medical record does not show that the claimant suffered a compensable injury to his low back in June, 2001, contrary to his testimony at the hearing. Indeed, it appears that the claimant's description of his problem to his physicians varied. For example, on December 17, 2001, Dr. Barg's note indicates that the claimant said he was not hurting, that he had a normal pain free range of motion, and that he was totally non-symptomatic. He was then referred to Dr. Saer, for suspected curvature of the spine, but not a job-related injury. Dr. Saer's note of December 27, 2001, indicates that the claimant stated that he developed pain in the thoracolumbar region, but in July or August. Later, on January 3, 2002, a physical therapist wrote that the claimant stated that he onset of back aching and complaints of nagging pain, this time in September and October. On cross-examination, counsel for the respondents brought out several other

inconsistencies in the claimant's testimony. Thus, given his casual regard for the truth, little weight should be afforded his testimony that he hurt his back in June, 2001, and did not suffer another back injury elsewhere away from work before September, 2002. Even though the claimant's back problems may have had some relationship to his work, the preponderance of the evidence fails to show that the back problems found by the MRI scan in November, 2002, were the result of a compensable injury during his employment in 2001.

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