

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402745

FRANCIS BOWERMAN	CLAIMANT
HUGG & HALL EQUIPMENT COMPANY	RESPONDENT
FIRST NATIONAL INSURANCE OF AMERICA, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 30, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by GUY WADE, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 1, 2006, in Fort Smith, Arkansas. The deposition of Jennifer Cauthern was taken on April 24, 2006, and has been admitted as Joint Exhibit No. 1. The deposition of Dr. Randall Carson was taken on June 28, 2006, and has been admitted as Joint Exhibit No. 2.

A pre-hearing order was entered in this case on March 14, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On March 2, 2004, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation benefits are \$453 .00 for total disability and \$340.00 for permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the claimant sustained a compensable injury to his back on March 2, 2004.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from March 3, 2004 through August 17, 2004, and attorney's fees.

In regard to these issues, the claimant contends:

"a. The claimant contends that he sustained a compensable injury to his back on March 2, 2004, and that he initially obtained medical treatment regarding that injury on March 4, 2004. The claimant contends that the respondents authorized treatment by Dr. Randall Carson and that Dr. Carson has opined that the condition for which he treated the claimant is work related.

b. The claimant contends that he is entitled to temporary total disability benefits from March 3, 2004 until a date yet to be determined and reasonably necessary medical treatment.

c. The claimant contends that his attorney is entitled to an appropriate attorney's fee."

In regard to these issues, the respondents contend:

"Respondents contend that the claimant did not sustain a compensable injury within the course and scope of his employment within the meaning of the Arkansas Workers' Compensation Act. The claimant's complaints are the result of a pre-existing condition for which respondents are not responsible."

## DISCUSSION

### I. COMPENSABILITY

\_\_\_\_\_The central issue in this case is the question of whether the claimant sustained a “compensable injury” to his back, as the result of a specific incident on March 2, 2004. The burden rests upon the claimant to prove all of the facts necessary to establish this alleged “compensable injury”.

Ark. Code Ann. §11-9-102(4)(D) requires the claimant to prove by medical evidence the actual existence of the physical injury or damage alleged to be compensable. Further, this subsection requires that the actual existence of this physical injury or damage must be supported by “objective findings,” as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

Ark. Code Ann. §11-9-102(4)(A)(i) requires:

- (1) That the physical injury or damage must arise out of and occur in the course of the employment;
- (2) That the physical injury or damage must be caused by a specific incident;
- (3) That the physical injury or damage must be identifiable by time and place of occurrence;
- (4) That the physical injury or damage must result in internal or external physical harm to the claimant’s body;
- (5) That the physical injury or damage must be such as to require medical services or result in disability.

The various physicians who have seen and evaluated the claimant, since March 2, 2004, have diagnosed a multitude of conditions. Dr. Randall Carson, the claimant’s initial and primary

treating physician, initially diagnosed a back or lumbar strain and subsequently diagnosed degenerative disc disease at L3-4 and L4-5, sciatica, and musculoskeletal back pain. Dr. Marty Hurlbut, a physiatrist, saw the claimant on two occasions and diagnosed lumbar strain, degenerative disc disease at L3-4 and L4-5, bilateral posterior thigh numbness (no specific etiology given), occasional sharp back pain (no specific etiology given), slow capillary refill of the bilateral lower extremities, diabetes, lower extremity sensory polyneuropathy consistent with diabetes, and decreased sensation stocking type distribution (following no dermatomal pattern) of both lower extremities. Dr. Keith Holder, a general practitioner, performed an independent medical evaluation and diagnosed a lumbar strain, degenerative disc disease, non insulin dependent diabetes mellitus with diabetic neuropathy, hypertension, and hypothyroidism. Dr. Charles Jennings, a general practitioner and the claimant's family physician, diagnosed a lumbar strain, hypothyroidism, hypoplastic colon polyps, NIDDM (diabetes mellitus), and knee difficulties in the form of pain and crepitus. Dr. Jerry O. Lenington, a pain management specialist, saw the claimant on two occasions and diagnosed radicular pain involving the S1 nerve on the left side secondary to a disc bulge. Dr. Daniel Dagen, a neurologist, evaluated the claimant on one occasion and diagnosed a moderate diabetic peripheral neuropathy, a left S1 radiculopathy, lumbar degenerative disc disease, lumbar spondylosis, hypertension, elevated BNI, hypothyroidism,

dyslipidemia, mild carpal tunnel syndrome on the right, Dupuytren's contractures on the right, and diabetes mellitus.

The existence of mild degenerative disc disease at L3-4 and L4-5 is supported by objective findings noted in an MRI study performed on March 15, 2004. The existence of an S1 radiculopathy is supported by objective findings noted on electrodiagnostic studies performed on December 22, 2005. However, such findings are in conflict with electrodiagnostic studies performed by Dr. William Griggs on July 14, 2004. This radiculopathy is also inconsistent with the MRI study that showed only mild degenerative changes with no evidence of nerve impingement or compression. The lumbar spondylosis noted by Dr. Dagen does not appear to have been observed by any of the claimant's other physicians, nor does Dr. Dagen refer to any objective testing that this condition (i.e. x-rays, MRI, etc).

The record also indicates objective findings to support the claimant's diagnosed hypertension, hypothyroidism, diabetes, diabetic peripheral neuropathy, carpal tunnel syndrome, Dupuytren's contracture on the right, dyslipidemia, and elevated BNP. However, these physical conditions or defects appear unrelated to the present claim.

Another arguably objective finding was a decrease or straightening of the normal lordosis or curvature of the claimant's lumbar spine, which was observed by the physical therapist in performing the FCE on June 15, 2004. However, this was merely a visual observation made on only one occasion by a physical

therapist. It has not been confirmed on any x-ray or MRI studies that have been performed before or since June 15, 2004. Further, no such abnormality has been observed or noted by any of the various physicians that have examined the claimant on multiple occasions both before and after June 15, 2004.

In his reports and deposition, Dr. Carson has given his expert medical opinion that the employment accident on March 2, 2004, as described by the claimant aggravated the claimant's degenerative disc disease, so as to cause his subsequent chronic symptoms. Clearly, the stress produced by the incident described by the claimant could logically and reasonably have aggravated such a pre-existing condition. However, the law requires that the aggravation, itself, must meet all of the statutory requirements for a "compensable injury," Crudup v. Regal Ware, Inc., 341 Ark. App. 804, 20 S.W. 3<sup>rd</sup> 900(2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W. 2<sup>nd</sup> 5(1998). This would include "objective findings" to support the actual existence of an aggravation.

The "objective findings" noted on the MRI study are interpreted as revealing only the presence of mild degenerative changes (degenerative disc disease), rather than any damage due to a specific traumatic event (particularly one of recent origin). The objective abnormalities on the electroneurological studies of December 22, 2005, which were interpreted as indicative of a left S1 radiculopathy are also not directly supportive of the occurrence of any aggravation or injury to the claimant's lumbar spine on March 2, 2004. First, no such objective abnormalities were noted

on essentially the same tests performed on July 14, 2004. More importantly, the MRI that was performed on March 15, 2004, showed no defect at the L5-S1 level and showed no defect at any level that was producing neural encroachment or compression. Thus, it would reasonably appear more likely that this subsequently documented neurological deficit or compromise did not arise until some time after the claimant's alleged injury on March 2, 2004.

with the single exception of the physical therapist's opinion that she observed some loss of the lumbar lordosis, on June 15, 2004, there is absolutely no "objective findings" to support or confirm the occurrence of an aggravation or new injury to the claimant's lumbar spine on March 2, 2004. There is no record of any objective findings of a recent or acute injury, such as muscle spasms, swelling, discoloration, inflammation, etc., within a reasonable period of time following the employment related incident of March 2, 2004. Rather, the medical evidence concerning the occurrence of a physical injury to the claimant's lumbar spine on March 2, 2004, either in the form of a lumbar strain or aggravation of his pre-existing degenerative disc disease, is based solely upon the claimant's subjective complaints and symptoms.

In light of the absence of any observation of "objective findings" consistent with a recent or acute injury to the claimant's lumbar spine by the various physicians who saw and treated the claimant during 2004, I do not find the single observation of a possible loss of lumbar lordosis by a physical therapist on June 15, 2004, and the subsequent electrodiagnostic

abnormalities noted on December 22, 2005, to be sufficient to “support” the actual existence of a physical injury to the claimant’s lumbar spine on March 2, 2004. I would also note that the medical evidence reflects that during the claimant’s course of treatment in 2004, even his subjective findings (ability to heel and toe walk, straight leg raising test, etc. appear to be generally normal). Other subjective complaints consistently made by the claimant, such as numbness in his feet and the inability to walk for distances would also be consistent with his other objectively documented conditions involving his peripheral neuropathy and knee abnormalities. Finally, it must be noted that the spinal injections given by Dr. Lenington are medically considered diagnostic, as well as therapeutic. The failure by these injections to relieve the claimant’s symptoms would be contrary to a facet or discal injury.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to satisfy the statutory requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D). Therefore, he has failed to prove that the alleged injury to his back or lumbar spine represents a “compensable injury” under the Act.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On March 2, 2004, the relationship of employee-employer-carrier existed between the parties.

3. On March 2, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$453.00 for total disability and \$340.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his back or lumbar spine, as the result of a specific incident on March 2, 2004. Expressly, he has failed to prove the actual existence of a physical injury to this portion of his body that is supported by "objective findings" as required by Ark. Code Ann. §11-9-102(4)(D).

5. The respondents have denied the occurrence of a compensable injury to the claimant's back or lumbar spine and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE