

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F600259

MARION "TREY" CARTER, EMPLOYEE

CLAIMANT

**JOHNSON'S BELT SERVICE & SUPPLY, INC.,
EMPLOYER**

RESPONDENT

**COMMERCE & INDUSTRY INSURANCE CO.
c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT

_____ OPINION FILED DECEMBER 28, 2006

Hearing before Administrative Law Judge Barbara W. Webb on September 28, 2006, in Monticello, Drew County, Arkansas.

Claimant represented by Mr. Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Huckabay, Munson, Rowlett & Moore, P.A., Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on September 28, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on July 27, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as stated on the record are hereby accepted:

_____ 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed on May 5, 2005.

3. The claimant's average weekly wage at the time of the alleged injury was \$763.00, which would entitle him to a compensation rate of \$466.00 for temporary total disability benefits and \$350.00 for permanent partial disability benefits.

ISSUES

By agreement of the parties, the issues presented at the hearing were as follows:

1. Compensability of claimant's alleged May 5, 2005 injury.
2. Claimant's entitlement to medical benefits, temporary total disability benefits, and permanent partial disability benefits.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the September 28, 2006 hearing, consisting of the testimony of Marion "Trey" Carter and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order), Claimant's Exhibit No. 1 (medical records); Claimant's Exhibit No. 2 (Order); Respondents' Exhibit No. 1 (medical records); Respondents' Exhibit No. 2 (non-medical records).

FACTUAL BACKGROUND

The claimant contends he sustained a compensable injury to his back on May 5, 2005, and is entitled to medical benefits (past and future), temporary total disability benefits, and attorney's fees. The claimant reserved all other issues.

The respondents contend that the claimant did not suffer a compensable injury on or about May 5, 2005. Further, respondents contend claimant's medical records do not establish a causal relationship or objective findings to support a

compensable injury and that the medical records do not support entitlement to indemnity benefits. The respondents contend that they did not receive notice of an alleged injury until January 16, 2006, when the claimant's unemployment benefits ceased. The respondents contend they are entitled to a credit for any unemployment benefits received by the claimant in the event the claimant is found to be entitled to TTD benefits during that time frame. Respondents further contend that the claimant was involved in a motor vehicle accident in October of 2005 which aggravated his condition and acted as an independent intervening incident such that any benefits awarded, if any, should not be awarded subsequent to that time.

The claimant is thirty-three years old (b.04-23-73). He worked in construction since his graduation from high school at the age of eighteen. He worked for Johnson's Belt Service & Supply, Inc. ("Johnson's") for approximately two years. Carter testified that he was injured as he was splicing a large conveyer belt with a two hundred pound cooker during a process referred to as "vulcanizing". He explained that he and a co-worker were removing the cooker when his co-worker dropped his end causing him to fall to his knees with the remaining end of the cooker. He felt immediate pain "like fire" shooting up his back and down his right leg. His supervisor was approximately fifteen feet away. He reported to his supervisor that he thought he pulled a muscle and was hurt. He went to the truck and laid there until the job was completed. He returned to the shop and drove home. He subsequently spoke with the owner, Steve Johnson. He testified that Johnson told him that he would report the injury. He explained that he did not file

his claim until January of 2006 because he thought it was a pulled muscle and he hoped to get better. He sought medical treatment at the Cumberland Medical Clinic. The clinical evaluations revealed findings consistent with a herniated disc of the lumbar spine with radicular symptoms. He was treated conservatively and referred for additional diagnostic tests, including an MRI scan. He was treated with muscle relaxers and pain medication. Carter was referred for physical therapy but did not receive the therapy because he could not afford the treatment. Carter explained that he was in a car wreck in October of 2005 which aggravated his lower back problems. Carter testified that he stayed in bed for weeks and needed constant help from his wife to perform daily activities. He testified that he remains limited on walking, standing, and sitting upright for long periods of time. He has non-stop pain and has difficulty sleeping. He has not been able to work since the work-related incident. He had previously worked on a regular basis and had no prior back problems. He collected unemployment in the amount of \$260.00 every two weeks for approximately five months.

On cross-examination, Carter testified that he applied for unemployment approximately two weeks after his injury on May 5, 2005. He received benefits through January 16, 2006. He told the unemployment office that he was laid off for lack of work. He also filled out a form showing that he could work full time. He testified that he did not try to seek other employment although he reported weekly to ESD that he was making at least two contacts a week. Some of his unemployment was withheld due to his child support obligations. He also received

approximately \$600.00 in short-term disability from AFLAC. He sought medical treatment for his injury on May 26 and June 30, 2005, and did not receive additional treatment until after the motor vehicle accident on October 15, 2005. He testified that he and his wife had gone deer hunting approximately four to five times in the last year and he had spent one or two nights at the deer camp since he was injured on the job. He explained that in October of 2005, he was driving to deer camp with his wife when the front passenger tire and wheel fell off the car. The car stopped suddenly as it went down into the asphalt. He explained that after the wreck, he had increased pain and aggravation of his earlier symptoms. Carter further testified that he did not initially file a workers' compensation claim in May because he didn't want it on his record.

Medical records reflect that claimant was initially treated by Dr. Dodson on May 26, 2005. The patient history reflects that Carter reported that he was injured during the course and scope of his employment on May 13, 2005. Examination of his lumbar spine revealed marked tenderness to palpation and palpable muscle spasm. Dodson noted that his clinical findings were consistent with a herniated disc in the lumbar spine secondary to the recent accident. He requested a lumbar MRI and prescribed moist heat and outpatient prescribed medications. The lumbar spine MRI scan of May 26, 2005, revealed that claimant had

no acute fracture, subluxation, or bony destruction is identified. The L1-2, L2-3, and L4-5 discs and foramina are within normal limits. There is mild degenerative of the otherwise unremarkable L3-4 disc. There is slightly more pronounced degeneration of the L5-S1 disc which exhibits a small right foraminal herniation and posterior annular tear with resultant right foraminal stenosis."

Carter returned for evaluation on June 30, 2005. He was scheduled for further diagnostic testing and physical therapy. He was next seen in the clinic by Dr. Rutledge on January 9, 2006. At that time, clinic notes reflect that Carter reported that he had suffered an on the job injury to his lower back and had subsequently sustained multiple injuries to his left elbow and aggravation of his lower back pain in a motor vehicle accident on October 15, 2005. He was continued on medications and it was noted that Carter could benefit from physical therapy but had no insurance.

On June 14, 2006, Carter underwent an independent medical evaluation by Dr. Calhoun. Patient history reflects that the claimant was injured on May 13, 2005, while holding a "cooker plate" which fell and jerked the claimant severely with an immediate onset of pain. The MRI revealed an annular tear on the right L5-S1 and some degenerative disc disease at other levels. He did not return to work and was later involved in a motor vehicle accident. He reported a slight worsening of his low back pain but no true change in symptoms. He underwent a second MRI on December 28, 2005. At that time, the annular tear had healed and only the degenerative disc disease was reported. Following his examination, Calhoun opined in a June 14, 2006, report that it appeared that Carter suffered from right L5-S1 annular tear and lumbar strain in May of 2005. He noted that he would be much better if he had physical therapy and possibly steroid injections early in the course of his treatment. He noted that the MRI following the motor vehicle accident showed no changes other than the healing of the annular tear. In his report,

Calhoun concluded that while the motor vehicle accident could have temporarily aggravated his back, "the major cause of his continued symptoms is the work injury of May of 2005." On June 21, 2006, Calhoun clarified his June report by noting that his basis for saying Carter suffered a work related strain and possible annular tear was based solely upon Carter's history obtained from Carter's descriptions to him and what he told his initial treating physicians.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on May 5, 2005.
3. The claimant's average weekly wage at the time of the alleged injury was \$763.00, which would entitle him to a compensation rate of \$466.00 for temporary total disability benefits and \$350.00 for permanent partial disability benefits.
4. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable work-related injury on or about May 5, 2005.
5. Claimant has failed to prove by a preponderance of the evidence that a work-related incident was the cause of the need for his medical treatment.

DISCUSSION

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accidental

injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or 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). Claimant’s burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant’s testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, there is a dispute over whether a specific incident occurred on May 5, 2005, at work. The claimant testified that he injured his back

when the two hundred pound “cooker” fell when his coworker let go off the opposite end. He testified that he reported the incident immediately to his supervisor and remained at work. Although the testimony of the claimant reflects that the incident was witnessed by the owner’s son and his supervisor, there were no other witnesses called by the claimant to corroborate the claimant’s testimony. While claimant contends that respondents could have called the same witnesses to refute the testimony of the claimant, it should be noted that the claimant had the burden of proof as to compensability of his claim. In addition, it appears that the claimant did not seek immediate medical attention until May 26, 2005, almost three weeks after the alleged injury. The medical records reflect that claimant stated that he was injured on the job on May 13, 2005, and not on May 5, 2005, the date claimant alleges the work-related incident occurred and his last day of work. Moreover, the application for unemployment filed by claimant on June 8, 2005, reflects that claimant’s last day of work at Johnson’s was May 27, 2005, and that he was laid off due to lack of work. Moreover, by Carter’s own testimony, he did not file his workers’ compensation claim until January of 2006 – after he stopped receiving unemployment benefits and the motor vehicle accident in October of 2005.

Although claimant reported no prior back problems, diagnostic testing revealed degenerative disc disease. Although the MRI testing done in late May revealed an annular tear in Carter’s lower back, the only evidence offered to establish that the tear was work-related was the testimony of the claimant. Based on the inconsistencies in the evidence, I find that claimant has failed to prove by a

preponderance of the evidence that he suffered a compensable injury while performing employment services for Johnson's.

II. OBJECTIVE FINDINGS AND CAUSATION

The employee must prove by a preponderance of the evidence that he sustained a compensable injury. In addition, 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 patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the medical evidence does reflect objective findings, i.e. muscle spasms and an annular tear in his lower back with evidence of degenerative conditions. However, in a workers' compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

In the instant case, it is clear from the medical evidence that claimant suffered from some degenerative disc disease. The facts further reflect that the claimant did not seek medical treatment until one month following the alleged incident at work. Dr. Calhoun stated that he could offer no opinion regarding the cause of the claimant's back condition absent the claimant's own history. This

arguably makes any opinion of Dr. Calhoun speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof.

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). However, an aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.* Respondents contend and the medical evidence supports that claimant's back condition was aggravated by an independent incident, the motor vehicle accident in October of 2005. Moreover, the second MRI taken in December of 2005 revealed that the annular tear shown in the MRI in May of 2005 was healed notwithstanding claimant's continued complaints of pain. Therefore, I would find alternatively that the claimant has failed to prove by a preponderance of the evidence that his need for medical treatment after October of 2005 was causally related to a work-related incident.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge