

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F513238**

**HARDY HOOFFMAN, EMPLOYEE**

**CLAIMANT**

**DELK CONSTRUCTION COMPANY, INC., EMPLOYER**

**RESPONDENT**

**TRANSCONTINENTAL INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED NOVEMBER 7, 2006**

Hearing before Administrative Law Judge Barbara W. Webb on August 9, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Frank Newell, Laser Law Firm, P.A., Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on August 9, 2006, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on June 5, 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. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on November 9, 2005, when claimant contends he sustained a compensable injury.

3. If allowed, claimant earned sufficient wages to entitle him to temporary total disability at the rate of \$372.00 and permanent partial disability at the rate of \$279.00.
4. Some temporary total disability benefits were paid by respondents through December 14, 2005, before respondents controverted the claim.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Compensability.
2. Medical benefits and temporary total disability benefits.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the August 9, 2006, hearing, consisting of the testimony of the claimant, Hardy Hoofman, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1-2 (medical records), Exhibit 3 (Respondent's answers to discovery and amended response to prehearing questionnaire), and Exhibit 4 (AR-2 Form); Respondents' Exhibit No. 1-2 (abstract and medical records) and Exhibit 3 (earnings register). In addition, a letter submitted on August 14, 2006, reflecting claimant's agreement to the proposed stipulation as to the applicable rates of compensation has been blue-backed and will be made part of the record of this case.

### **FACTUAL BACKGROUND**

Hardy Hoofman contends he sustained compensable injuries to his back while employed as an ironworker with Delk Construction Company in November of 2005. In a report dated December 5, 2005, Dr. Ronald Baker recommended that Hoofman be seen by a neurosurgeon. Hoofman contends respondents have not made arrangements for him to

see a neurosurgeon and have discontinued his benefits, effective December 14, 2005.

Respondents initially accepted the claim and paid temporary total disability benefits through December 14, 2005, but now controvert the entire claim contending that Hoofman did not suffer a compensable injury.

The claimant is 42 years old (dob: 2/1/64) and completed the tenth grade with a GED. He worked as an ironworker for twenty years. He started his job with Delk in June of 2005. He was working on the construction of Cabot High School. On November 9, 2006, he was operating a piece of equipment, i.e. a SkyTrak, which is similar to a forklift. He explained that he was jumping off and on the SkyTrak to help a co-worker load roofing material. The ground was muddy due to a lot of rain. He twisted in the mud and felt pain. He did not seek immediate medical attention. He initially thought he had a kidney infection. On November 11, 2005, he reported the incident to the superintendent and sought medical treatment with Dr. Baker, his personal physician. He was treated conservatively with medication and was released to return to work. The claimant testified that he was unhappy with Dr. Baker's treatment and sought treatment from Dr. Killough. He believed that he was authorized to seek treatment from Dr. Killough. He was referred by Dr. Killough for an MRI. He was scheduled by Killough to go to physical therapy but did not go since he was notified that Killough was an unauthorized doctor. He also did not receive the shots recommended by Killough. He returned to Dr. Baker and showed him the MRI. He was ultimately referred to Dr. Chan, a neurosurgeon, but never saw Dr. Chan.

Dr. Baker's clinic notes reflect that claimant was seen on November 9, 2005, for a low back muscle spasm resulting in pain. The notes reflect that the patient has no previous history of back problems. However, the medical evidence demonstrates that

Hoofman has an extensive history of back problems beginning in 2000 for which he received treatment, including lumbar epidural injections and IDET procedures at L3/4 and L4/5 in 2000. The MRI taken of the lumbar spine on November 21, 2005, reflected significant degenerative disc disease at L4-5 and L5-S1 with foraminal narrowing.

Although the occurrence of symptoms immediately following an accident could result in an aggravation of a pre-existing condition, there was no objective evidence offered in this case to substantiate a connection between an on-the-job incident and the symptoms allegedly suffered by Hoofman. Any opinion regarding causation is speculative at best. Claimant's lack of credibility concerning his pre-existing conditions further diminishes the likelihood of the accuracy of the medical opinions since they were based on the patient's history.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on November 9, 2005, when claimant contends he sustained a compensable injury.
3. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on or about November 9, 2005, in that claimant has failed to prove by a preponderance of the evidence that the alleged injury is established by medical evidence supported by objective findings.

4. Claimant has failed to prove by a preponderance of the evidence that the 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, the claimant testified that he injured his back when he twisted his back and felt immediate pain. However, he testified that he did not report the incident immediately to his supervisor and did not seek treatment immediately because he believed he had a kidney problem. Although the incident allegedly occurred in the presence of another co-worker, there was no evidence offered by claimant which corroborated his testimony. Basically, the only evidence offered is the claimant's inconsistent version of the events. First, he told Dr. Baker that the back problem was the result of lifting all week. At the hearing, he testified that the back problem occurred when he twisted his back in the mud as he got on and off the SkyTrak. Moreover, he admitted that he denied any prior back problems to both the doctor and the insurance adjuster. Based on my review of the credible evidence, I find that claimant has not proven by a preponderance of the evidence that he was injured while performing employment services for Delk Construction in November, 2005.

## **II. OBJECTIVE FINDINGS**

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 voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the claimant does not establish a compensable injury by medical evidence supported by objective findings.

A review of the medical records offered in this case reflect there is no objective medical evidence that the claimant sustained an injury to his back while working for Delk. First, the record is clear that the claimant had continuing back problems. He testified on cross-examination that he had a work-related back injury in May of 2000, when he fell and landed on his back. He admitted that he denied any prior back problems when seeking treatment with Dr. Baker. He admitted that it was possible that he told the insurance adjuster that he had not had any back problems before. He denied that he told Dr. Baker that his back was a lot better after one week, although the clinic notes reflect that his back was improving and he was released to return to light duty work. He denied Dr. Killough sent him back to work, although the record reflects that Dr. Killough signed a work slip releasing him back to work on November 29, 2005. The only findings reflected on the MRI show degenerative changes with a small right side disk protrusion. However, Hoofman's complaints are of left-side pain. Medical records further reflect that Hoofman received 118 doses of narcotic medications between November 1, 2004 and March 16, 2005, prior to the date of the alleged incident. While there are objective findings of back problems, claimant has failed to prove by a preponderance of the evidence that the back problems were the result of an on-the-job incident rather than degenerative changes.

In the instant case, the primary dispute is whether claimant has established a causal connection between a compensable injury and the need for medical treatment given the fact that claimant suffered from a preexisting back problem prior to the work-related incident. 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 that claimant suffered from degenerative disc disease and that his complaints of back and leg pain preceded the alleged incident. 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.*

Claimant contends that he sustained a lower back injury but continued to work after the alleged incident for two days. However, Dr. Baker notes that Hoofman presented on November 9, 2006, with "severe lower lumbar sacral pain unable to stand on one foot without severe pain and spasm in his lower back." There was no evidence offered as to the cause of the claimant's back condition absent the claimant's own history. In addition, the record is clear that the claimant failed to relate his prior history of similar complaints and that his condition could also be degenerative in nature versus the result of an acute injury. Conjecture and speculation, even if plausible, cannot take the place of proof.

Based on my review of the entire record, I find that claimant failed to prove that a work-related incident was the cause of the need for his medical treatment.

**ORDER**

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

**IT IS SO ORDERED.**

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**HONORABLE BARBARA WEBB**  
**Administrative Law Judge**