

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NOS. F504734 AND F504735**

**DONALD SIMPSON, EMPLOYEE**

**CLAIMANT**

**LAKE VILLAGE SAND & TIRE  
COMPANY, INC., EMPLOYER**

**RESPONDENT**

**AMERICAN HOME ASSURANCE COMPANY  
C/O AIG CLAIM SERVICES (TPA),  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED NOVEMBER 13, 2006**

Hearing before Administrative Law Judge Barbara Webb on August 10, 2006, in Monticello, Arkansas.

Claimant appeared *PRO SE*.

Respondents represented by Ms. Melissa Ross, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on August 10, 2006, before Administrative Law Judge Barbara Webb. A Prehearing Order was entered in this case on June 14, 2006. The Prehearing 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 Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on or about the dates of November 17, 2004 and December 6, 2004.

3. Compensation rate: \$229.00 – TTD, \$172.00 – PPD, based on an average weekly wage of \$342.83.

By agreement of the parties, the issues to be litigated are:

1. Compensability and claimant's entitlement to TTD benefits and medical benefits.
2. Dismissal of claim for failure to appear or, alternatively, allowance of costs to respondents.

The record consists of a one-volume transcript of the August 10, 2006 hearing, consisting of the testimony of Donald Simpson, Ralph Jones, and Beverly Stephenson, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (medical records); and Respondents' Exhibit No. 2 (employment records).

### **CONTENTIONS**

The claimant, Donald Simpson, contends that on both November 17, 2004 and December 6, 2004, while employed with respondent employer, he sustained compensable back injuries while attempting to lift heavy objects for the employer. Simpson contends he is entitled to reasonable and necessary medical treatment, both past and future. He continued working after his injuries until March 24, 2005, at which time he had surgery for his injuries and remained unable to work for approximately three months thereafter. Since that time he has been working part time for an electrical company but is claiming entitlement to temporary total disability benefits during the period of time that he was totally disabled from work. In regard to the Motion for Costs, Simpson asserts that he appeared

for the June 1, 2006 hearing at 10:30 a.m., under the belief that the hearing was scheduled for 11:00 a.m.

The respondents, Lake Village Sand & Tire Company, Inc. and its insurer (“Lake Village”), contend that claimant did not suffer any work-related injury while working for respondent employer. Further respondents contend that no notice of injury was received by respondents until the Form AR-C was filed on or about May 11, 2005. As such, respondents contend that they should not be liable for benefits prior to the receipt of actual notice in this matter. In regard to the Motion for costs, Respondents contend that claimant failed to appear at the hearing previously scheduled and that the claim should be dismissed or, alternatively, they are entitled to costs.

#### **FACTUAL BACKGROUND**

Simpson is 52 years old (DOB: 2-11-54). He finished the eleventh grade. He subsequently attended Forest Echo Vo-Tech and received an electrician’s license. He began working for Lake Village in July of 2002 as a technician performing mechanical work and fixing flats. He worked for Lake Village for a little over two years.

On November 17, 2004, Simpson was fixing a flat and was lifting a heavy tire when it slipped on the wet floor. He tried to catch the tire and felt a tingle and a sharp pain in the back. He told his co-workers and supervisor, Jones, that he had been hurt and sought medical treatment from Dr. DeRamos. He was diagnosed with a muscle spasm and treated conservatively with prescription medication. He was released to light-duty work. He did not miss any work. On December 6, 2004, he was helping Jones pick up a heavy transmission which exceeded his weight restrictions. He told Jones that his back was

feeling funny again and he subsequently sought treatment with Dr. DeRamos. He was referred to Dr. Adametz, an orthopedic specialist. He was given an MRI and treated with a spinal injection. He underwent surgery on his lower vertebrae on March 24, 2005. He was released to return to work in May of 2005. He explained that he has been able to work within his restrictions. He has continued to improve since the surgery and was released from the doctor.

When questioned about prior back problems, Simpson explained that he had prior back problems consisting of back spasms in 1991 while working for another employer. At that time, he was treated conservatively with prescription medication and recovered in three weeks. He denied any other back trouble.

He left the employment with Lake Village in March of 2005 and drew unemployment from March 12, 2005 until September 17, 2005. During the time he continued to draw unemployment, he worked for Tomlin Electrical doing part-time (40 hours per week) electrical work. After Tomlin, he went to work full time (60-70 hours per week) in the construction business for Heber Costello as an operator of big equipment, such as a backhoe, caterpillar, track hoe, etc.

Medical records reflect that Simpson sought medical treatment with Dr. Russell complaining of back pain such that he could not work in March of 1998. Although the exam revealed no objective findings, he requested and was referred to a back specialist, Dr. Pollard. Progress Notes from Dr. DeRamos reflect that the claimant sought treatment on November 19, 2004, complaining of "low back pain for a week". The examination revealed tenderness the right lumbar paraspinal area and he was treated conservatively

with prescription medication. On December 6, 2004, he returned to the clinic complaining of continuing back pain. He was assessed with back pain and advised to continue the same medications and scheduled for an MRI. Notes reflect that he was discharged ambulatory in no acute distress. On January 17, 2005, he returned to renew his prescription medications. On January 3, 2005, Simpson was examined by Dr. Adametz. Notes reflect that he had an MRI scan which read showing some foraminal narrowing and possibly a pars defect without any significant spondylolisthesis at L5-S1. He was referred for physical therapy. On March 24, 2005, he underwent a L5-S1 laminectomy and discectomy and was released to return to work in June of 2005.

Ralph Jones testified that he was the shop manager for Lake Village. He explained that Simpson did not report an injury to him in November of 2004. He did not recall an incident in December of 2004 and could not locate any records which would have existed if it was reported. He was aware that the claimant had an elbow injury and believed the light-duty restriction slips related to medical treatment for the elbow problem. He recalled learning about the allegation of back pain in January or February of 2005. At that time, the claimant asked to be off on Friday to do something at his house. He was in the office on that Friday when the claimant came in to pick up his check. He could tell he was hurting by the way he was walking and the secretary asked him what was wrong. He told them he had hurt his back. He explained that she then asked him whether he had hurt his back at work and he said "Oh no, I did it at the house." He did not learn that Simpson was claiming the back problems to be work related until after the surgery when Jones was contacted by the insurance company after Simpson filed the Form C in May of 2005.

Beverly Stephenson testified that she was in charge of accounting and payroll at Lake Village until the third week in January, 2005. She testified that she observed the claimant having difficulty when he came into the office to pick up his check. He told her that he had hurt his back at home. The only injury reported to her as work related was an elbow injury in September of 2004. At the time of the report of the elbow injury, she testified that she complied with all of the required procedures for reporting the on-the-job injury relating to Simpson's elbow. She explained that she left her employment in January of 2005 and was not aware that Simpson had any back problems except on the day he came in to pick up his check with stiffness in his back.

**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 or about the dates of November 17, 2004 and December 6, 2004.
3. Compensation rate: \$229.00 – TTD, \$172.00 – PPD, based on an average weekly wage of \$342.83.
4. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury on November 17, 2004.
5. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury on December 6, 2004.

## **DISCUSSION**

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 present case, I find that claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.

The claimant testified that he was injured his back on the job in November of 2004 and the symptoms reoccurred on December 6, 2004, after he was asked to lift a heavy piece of equipment by the shop manager which exceeded the weight restrictions placed on him by his doctor as a result of an earlier injury to his elbow. He testified that the initial incident was reported to Jones, his supervisor, within a few days and the second incident occurred in the presence of Jones, his supervisor, and was reported immediately.

To the contrary, Jones testified that Simpson did not report an incident resulting in a back injury to him and did not recall an incident when Simpson injured his back while working together. Both Jones and Stevenson testified that when they observed Simpson in January of 2005 with stiffness in his back, Simpson clearly told them that the back problem occurred at home and not at work. Both Jones and Stevenson indicated that Simpson was familiar with the procedures for reporting a work-related injury and would have processed the necessary paperwork had Simpson reported an incident.

Simpson testified that he had a previous work-related back problem in 1991 but denied any other prior back problems. However, the medical records reflect that he sought treatment for back problems in 1998. In addition, the medical records reflect that Simpson first treated for back problems in November of 2004 without reference to an on-the-job injury. Moreover, the MRI scans of the claimant's back revealed "extensive degenerative changes". Significantly, the initial medical report of November 19, 2004, reflects that claimant stated that he was having lower back pain which had begun almost a week prior

to the alleged incident. The only medical records which reflect that the claimant complained of an injury while lifting at work was almost six weeks later when he sought treatment from Dr. Adametz.

This is clearly a case of credibility. Based on my review of the credible evidence in this case, I find that the testimony of Jones and Stevenson is more credible than the uncorroborated testimony of the claimant. While it is evident that Simpson needed medical treatment for his back, the preponderance of the evidence does not show that claimant's back problems were the result of a work-related injury. The testimony of claimant is even more suspect when considered with the evidence of claimant's prior back problems, his statements that he had hurt his back at home, and the medical evidence of degenerative findings in his MRI scans.

Finally, the fact that the claimant submitted false applications for unemployment benefits simply cannot be overlooked. Although the claimant attempted to blame his daughter for submitting claims without his knowledge after he went to work, it is clear that Simpson had never repaid the excess payments or appealed a determination that he had received benefits while working. Moreover, the record reflects that Simpson had similarly failed to report earnings and drawn excess unemployment benefits in 2002.

I am further persuaded by the testimony of Beverly Stephenson, who specifically recalled the statements of the claimant, as follows:

Q When is the first time you knew he had back trouble?

A He came into the office to pick up a check after he had been off for a day or two and he seemed to be having difficulty moving around, and I merely asked or rather inquired asking him what was wrong, and he said that

he had hurt his back. And I immediately asked him, "Did you do that here?" And he said, "Oh, no, I was – it was at home."

This testimony is corroborated by the testimony of Ralph Jones, as follows:

Q When was the first time you knew that he was having trouble with his back?

A And I didn't document it and I'll tell you what happened. One day he came to me on a Thursday and said, "Ralph, I'd like to be off on a Friday." And I said, "Okay, we're not doing anything, that's fine." He had something to do, I don't even remember what he told me, something to do at the house or something.

Anyway, it didn't matter, we wasn't doing anything, and I said, "That's fine." And I want to say this was in January or February of 2005, I don't know, you know, what date because we didn't document it.

And we get paid on a Friday, and I just happened to be up in the front office talking with Beverly and Donald came in to, you know, pick his check up. And I could tell that he was hurting, you know, by the way he was walking and all, walking slow, and I think Beverly asked him, "What's wrong, Donald?" And he said, "Well, I hurt my back."

And, you know, of course the first thing we asked was, "Well, did you hurt it here?" And he said, "Oh, no, I did it at the house." We didn't really go any further, didn't document anything, because he, you know, said he hurt it at his house.

And you know he picked his check up, and that was the last I heard anything about it. I knew he was going back and forth to doctors, you know, and as far as I know, you know, I didn't keep up with it because it wasn't, you know, as far as business-wise, it wasn't, you know, my concern.

Q. Who else was there when this conversation took place?

A. I really don't know. I think we was the only two there, I'm really not -- I don't know. I don't remember anybody else.

Q. You mentioned Beverly, is that Beverly Stephenson?

A Yes, ma'am.

Q So she was there at the same time?

A Yes, ma'am.

Q And he specifically told you he did not hurt himself at work?

A Right. We was sitting at the desk together, and he came to pick his check up and she asked him and he said, "Oh, no, I didn't hurt it here, I hurt it at home," or something I think is what he said.

The only evidence offered by the claimant to corroborate his testimony is his medical records. While the records reflect that the claimant first complained of back pain in November of 2004, there is nothing in the medical records which confirm that the injury was work related. The records do not document the actual alleged incident but only the subjective and verbal explanation of the complaints of pain from the claimant.

Finally, from a review of the credible evidence offered in this case, I am convinced that any objective medical findings and need for medical treatment are consistent with degenerative conditions of the claimant which may have been aggravated by an injury at claimant's home rather than a specific work-related incident which is identifiable by time and place of occurrence.

Accordingly, after considering the evidence submitted in the record and observing the demeanor of the witnesses during their testimony at the hearing conducted in this matter, I find that the greater weight of evidence fails to support a conclusion that claimant sustained an injury arising out of and in the course of his employment.

Finally, respondents contend that even if this claim were compensable, claimant failed to provide notice as required by the Arkansas Workers' Compensation laws. While it is not necessary for me to address this issue in light of the findings above, I would note that it is undisputed that claimant did not fill out any workers' compensation forms until May

of 2005, almost six months after the alleged date of injury. Although claimant asserts that he notified Jones and Stevenson, both were called as witnesses and specifically denied the incidents were reported.

**MOTION TO DISMISS OR IN THE ALTERNATIVE FOR COSTS**

Finally, respondents seek dismissal of the claim, or in the alternative an award of costs, due to the nonappearance of the claimant at the hearing originally scheduled in this case. In the instant case, claimant requested a hearing after respondents controverted compensability. Thereafter, claimant's attorneys requested, and received, an Order relieving them as attorneys of record. Subsequently, the claimant requested that his case proceed to hearing. A hearing was scheduled but was continued at the respondents' request. In addition to the date change, the time for the hearing was changed from 11:00 a.m. to 9:00 a.m. Claimant failed to appear at 9:00 a.m. but did appear at 10:30 a.m. under the mistaken belief that the hearing was scheduled for 11:00 a.m. Although claimant received the notice setting forth the new date and time for the hearing, claimant contends that he was told to appear at 11:00 a.m. during his telephone call with the Administrative Assistant. Based on the resulting confusion and claimant's belated appearance, I find that the evidence does not warrant dismissal of the case or assessment of costs. Accordingly, respondents' Motion to Dismiss for failure to appear and alternatively for costs is hereby respectfully denied.

**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**