

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402745

FRANCIS BOWERMAN, EMPLOYEE	CLAIMANT
HUGG & HALL EQUIPMENT COMPANY, EMPLOYER	RESPONDENT
FIRST NATIONAL INSURANCE OF AMERICAN, CARRIER	RESPONDENT

OPINION FILED JULY 26, 2007

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed October 30, 2006.

The Administrative Law Judge entered the following findings of fact and 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.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the

elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable injury on March 2, 2004 and denying him temporary total benefits and payment of medical expenses related to that injury. More specifically, the Majority found that the claimant failed to prove that he sustained an injury supported by objective medical findings. Based upon a de novo review of the record in its entirety, I find the claimant suffered a compensable work-related injury, supported by objective medical findings. As such, I must respectfully dissent.

_____The Majority, by affirming and adopting the Administrative Law Judge's decision, finds that the claimant did not satisfy the statutory requirement of Ark. Code Ann. § 11-9-102(4)(D), where a "compensable injury must be established by medical evidence supported by objective findings" in regard to his work related back injury. The

Majority found that there was no mention of spasms, swelling, discoloration, inflammation, etc., within a reasonable period of time following the employment related accident.

The Majority's findings are simply not consistent with the objective medical findings of several doctors or with the testimony of the claimant. Existence of an injury is supported by objective evidence such as doctors' diagnosis of a lumbar strain, as well as documented the physical therapist's notation of lumbar lordosis, which she attributed to muscle spasms.

_____In my opinion, the evidence shows that the claimant sustained an injury while in the course and scope of employment. The Respondents do not dispute that the 2500 pound battery began sliding off the forks, and the claimant grabbed the battery before it hit the ground. The claimant testified that he then felt pain in his lower back and he reported the pain to the dispatcher, Stan Rice. Two days later, the claimant sought medical treatment for his lower back and was diagnosed as having a lumbar strain. As such,

it is evident that the claimant's injury occurred in the course of his employment, required medical treatment, and was caused by a specific incident, identifiable by time and place of occurrence.

Specifically, I find that the claimant sustained a strain to his back. This is shown by the physical therapist's observance of loss of lumbar lordosis, which she testified would be consistent with muscle spasms and having a strain. Furthermore, the objective findings of Cauthen are supported by the diagnosis and observations of every physician in the record. While certainly the claimant did not sustain a herniated disc, it is evident that he strained his back and therefore sustained a compensable injury. The claimant was indisputably diagnosed with a lumbar strain for which he received treatment and medication. Dr. Carson diagnosed the claimant with a lumbar strain. Also, Dr. Carson noted that the claimant was "very guarded" during the range of motion test of the back and that he could not take measurements. However, Dr. Carson also noted that the claimant's range of motion was abnormal and prescribed a

muscle relaxer and pain killer. Most importantly, Dr. Carson testified that the claimant's lumbar strain was the result of a work-related accident.

_____ Dr. Hurlbut also diagnosed the claimant as having a lumbar strain, consistent with catching a large battery at work. Dr. Hurlbut also acknowledged degenerative disc disease and lower extremity sensory polyneuropathy consistent with diabetes. Dr. Hurlbut's diagnosis is identical to Dr. Carson's.

Dr. Holder provided an Independent Medical Evaluation. Dr. Holder also made the finding that the claimant suffered a lumbar strain. Dr. Holder also noted that the claimant's pain was related to the March 2, 2004 injury and that he had not reached maximum medical improvement. Dr. Holder not only prescribed aqua therapy and a TENS unit, but also prescribed topical Lidocaine and Indocin, Ultracet, and Neurontin.

Dr. Jennings, the claimant's general physician, also noted that the claimant had a tender lower back and diagnosed the claimant as having a lumbar strain.

Interestingly, the claimant had been seeing Dr. Jennings for several years, and the claimant's medical records revealed that the claimant had not suffered any recent back pain or injury prior to the March 2, 2004 accident.

As such, it is evident that the claimant sustained at least a lumbar strain from the March 2, 2004 injury. The majority of the claimant's treating physicians diagnosed the claimant as having a lumbar strain. As the claimant had not suffered any recent back pain or injury prior the accident, it is clear that the claimant's injury is compensable.

_____Third, Cauthen made the finding that the claimant suffered from lumbar lordosis, which is generally caused by muscle spasms. Cauthen testified that a muscle spasm is most likely the cause of the claimant's lumbar lordosis. Cauthen also found that the claimant suffered a low back strain and that his symptoms were most likely related to the work-related accident. In making these findings, Cauthen relied on her observations of (1) the claimant's lumbar lordosis; (2) his tenderness at both L4 and L5 areas; (3) his

significantly abnormal range of motion; (4) his negative heel walk test; and (5) his positive straight leg test.

Lumbar lordosis has previously been held to be an objective finding. In my opinion, the Administrative Law Judge errs in failing to acknowledge such. *Dorland's Illustrated Medical Dictionary, 28th Ed.*, defines "lordosis" as an "abnormally increased curvature" of the spine. Furthermore, the Arkansas Court of Appeals held that "a physical therapist's notation of 'decreased lumbar lordosis' is an objective medical finding." King v. Peopleworks, ___ Ark. App. ___, ___ S.W.3d ___ (2006); citing Continental Express v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999).

_____ In fact, the Majority completely fails to consider and ultimately ignore the holdings of Fred's Inc., and Estridge, where medical notes of muscle spasms and prescriptions of muscle relaxers are held to be objective medical findings. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), and Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005). In Estridge, the claimant reported a back injury after carrying and nearly dropping a

railroad tie. He was diagnosed with a low back strain and radicular pain. The Arkansas Supreme Court held, "Appellant's treating physician found straightening of the curve in the spine, which is a sign that is normally associated with muscle spasm in the straightened area. This finding is objective evidence of injury with no evidence to the contrary." Id.

_____ Likewise, in the present case, the claimant was diagnosed by Cauthen as having lumbar lordosis. As in King, Cauthen's notation of lumbar lordosis is an objective medical finding. Cauthen testified that a muscle spasm is most likely the cause of the claimant's lumbar lordosis. Cauthen explained that lumbar lordosis is the normal curve in one's back, but that the claimant's curve was decreased. Cauthen testified that muscle spasms cause the curve to decrease, and it was her opinion that in the claimant's case, muscle spasms caused the decrease in curvature. In fact, Dr. Carson's testimony that a decrease in the curvature of the spine is consistent with the presence of muscle spasms in the lumbar spine, corroborated Cauthen's

testimony as to why the claimant suffered from lumbar lordosis.

Furthermore, as in Estridge, the curve in the claimant's spine is further proof that the claimant suffered from muscle spasms, which ultimately causes lordosis. Interestingly, even though no muscle spasms were detected by the claimant's physicians or physical therapist, Dr. Carson had prescribed muscle relaxers to the claimant as a prophylactic measure. As such, it is evident that Dr. Carson felt that the claimant's injury was severe enough that the claimant would suffer from muscle spasms. As the claimant developed lumbar lordosis, it is evident that the claimant did in fact suffer from muscle spasms. It is, however, unfortunate that prophylactic treatment, designed to decrease objective medical findings and reduce symptoms, is the excuse the Majority had used to deny treatment for minor injuries. Had the claimant not received prophylactic treatment, his muscle spasms would most likely have been observed by his treating physicians sooner.

Fourth, the legitimacy of the claimant's injury is undisputed. The claimant did not suffer back pain prior to his injury, and his symptoms did not subside after the accident. In fact, the majority of the claimant's treating physicians diagnosed him as having a lumbar strain. Additionally, the claimant was given a BTE test by Cauthen. The BTE test is designed to see if the patient is giving consistent effort throughout the whole time physical testing, such as reflexes and muscle use and range of motion, is administered. Cauthen testified that the claimant passed the test, indicating that he was giving a consistent effort on all tests. Dr. Carson went a step further and added that there was nothing in the course of the claimant's treatment that would lead him to believe that the claimant was trying to exaggerate his condition, and the BTE test validated that opinion. Finally, the claimant was diagnosed as having a lumbar strain from Dr. Holder, who, interestingly enough, was chosen by the respondents to perform an Independent Medical Evaluation. After noting the claimant's history with catching the battery at work,

Dr. Holder's medical opinion was that the claimant's pain was related to the March 2, 2004 injury.

As such, Dr. Carson and Cauthen's opinion that the claimant sustained a lumbar strain was further bolstered by the claimant's credibility evidenced by consistent symptoms of a lumbar strain and the results of the BTE test.

Interestingly enough, despite the fact that the claimant was diagnosed with a lumbar strain and the fact that the respondents paid for medical treatment for five months, the claimant's medical care was terminated after Dr. Holder's assessment. Dr. Holder noted that the claimant's pain was related to the March 2, 2004 injury and that he had not reached maximum medical improvement. Dr. Holder not only prescribed aqua therapy and a TENS unit, but also prescribed topical Lidocaine and Indocin, Ultracet, and Neurontin. Even though Dr. Carson had not released the claimant, and Dr. Holder specifically noted that the claimant had not reached MMI, the respondents prematurely terminated the claimant's reasonable and necessary medical treatment and temporary total disability benefits.

_____Fifth, the Majority completely and erroneously ignores the medical diagnosis of every single treating physician. While the medical opinions were based in part on subjective findings, they were consistent with the claimant's lumbar lordosis and having a strain. The Majority did not even address the possibility that the claimant might have a simple lumbar strain, even though all of the claimant's doctors found that he sustained a lumbar strain as a result of the March 2, 2004 accident. As such, the Majority arbitrarily disregarded expert medical opinion.

_____The Commission is authorized to accept or reject medical opinion and is authorized to determine its medical soundness and probative force. McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001). However, the Commission

is not free to arbitrarily disregard any expert medical opinion. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Moreover, the Commission not authorized to arbitrarily disregard the testimony of any witness. Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994).

_____The Majority hinges its first argument on the claimant's degenerative disc disease, and found that the only objective medical findings were that the claimant's MRI showed that the claimant suffered from degenerative disk disease. The Majority also opines that the degenerative disc disease was not aggravated, because the claimant did not meet the statutory requirements for a "compensable injury," which includes objective findings. The Majority errs in ignoring the existence of the claimant's lumbar lordosis and arbitrarily disregarding all of the doctors' opinions that the claimant suffered a lumbar strain as a result of the March 2, 2004 accident. The claimant's doctors noted that the only plausible reason for his lumbar strain is the compensable injury which he sustained on March 2, 2004.

There is no dispute that the incident with the battery occurred, and every physician believes that he had a legitimate injury. Furthermore, as the evidence has established that the claimant suffered a compensable injury, the Majority erred in finding that the claimant's degenerative disc disease was not aggravated by the lumbar strain. The claimant had no recent back problems prior to the March 2, 2004 accident. Accordingly, there is no indication that the claimant's symptoms ever resolved. Furthermore, the claimant has not worked since the time of the injury. As such, it is evident that the compensable injury, which caused the claimant to suffer a lumbar strain, also aggravated his degenerative disc disease.

_____Additionally, the Majority errs in arbitrarily disregarding Cauthen's diagnosis of lumbar lordosis. Specifically, the Majority found, "With the single exception of the physical therapist's opinion that she observed some loss of 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." The Majority dismisses the finding of lumbar lordosis, based upon the fact that muscle spasms were not observed and time had lapsed from the original injury. However, the claimant had been taking muscle relaxers, prescribed by Dr. Carson, thus likely resulting in a decrease of symptoms and opportunity for physicians to see spasming. Furthermore, the claimant had no history of back problems and was not working, indicating the work related injury would be the only possible explanation for his lordosis.

_____ Furthermore, even though the Majority disregards medical testimony, it is interesting that they substitutes their own medical opinion. The Majority specifically found that the failure of Dr. Lenington's spinal injections, given to relieve the claimant's symptoms, would be contrary to a facet or discal injury. Apparently, the Majority bases his entire decision on whether or not the claimant sustained a facet or discal injury. It is obvious that the claimant did not sustain a facet or discal injury, nor does the claimant make the argument that he sustained a facet or discal

injury. The claimant sustained a lumbar strain. The majority of the treating physicians diagnosed the claimant as having a lumbar strain. The Majority's failure to identify that the claimant sustained any injury is contrary to every medical opinion and therefore arbitrary.

_____It is evident that the claimant sustained a compensable injury in the form of a lumbar strain. While the claimant admittedly had few objective findings, the fact remains that he sustained a minor injury in the form of a strain. The existence of a lumbar strain is evidenced by objective medical findings and medical opinions of several treating physicians. The claimant was repeatedly tested to make sure that his complaints were valid, and every doctor concluded that the claimant had a legitimate injury with symptoms. Additionally, the claimant had no recent prior history of back pain, and after the accident there is no indication that his symptoms ever resolved or that he had exited his healing period. In fact, Dr. Holder had just noted that the claimant had not reached MMI when the respondents terminated his medical treatment. Furthermore,

the legitimacy of the claimant's injury is not disputed, and the Majority arbitrarily dismissed every medical opinion. Therefore, I find the claimant suffered a compensable work-related injury, supported by objective medical findings.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner