

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600259

MARION "TREY" CARTER, EMPLOYEE	CLAIMANT
JOHNSON'S BELT SERVICE, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 9, 2007

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

Claimant represented by the HONORABLE DAREN NELSON, Attorney at Law, Warren, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the Administrative Law Judge filed December 28, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

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

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.

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 covered by the Act; however, the claimant has failed to establish the elements necessary to prove the compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the December 28, 2006 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 opinion, which finds that the claimant did not sustain a compensable back injury on May 5, 2005. After a de novo review of the record, I find that the claimant provided consistent, credible testimony as to how the injury occurred. I further find that the claimant's testimony is corroborated by the medical records in that the nature of the claimant's injury is consistent with an injury due to lifting. Accordingly, I would have reversed the decision of the Administrative Law Judge.

The Majority, by affirming and adopting the decision of the Administrative Law Judge, essentially rejects the claimant's request for benefits because they found him not to be credible. In particular, the Majority notes that the claimant did not have witnesses

testify in order to corroborate his claim and that despite the claimant's testimony that he had no history of back problems he was noted by the MRI to have degeneration in his spine. They further opine that because the claimant did not seek treatment immediately after the injury, he is not credible. The Majority also notes that the claimant falsified his unemployment application and that he did not file a proper claim until January 2006. Finally, the Majority found that even if the claimant sustained a work injury in May 2005, the accident in October 2005 would have served as an independent intervening cause as his annular tear had healed.

After reviewing the evidence, I found that the claimant was credible. The claimant testified that he was injured on May 5, 2005, when he was in the process of vulcanizing a belt. The claimant testified that he and a coworker had to move a sixty inch cooker in order to complete the task. While moving the cooker, Stevie Johnson, coworker, was holding the other end. The claimant said that Johnson dropped his end, and that he immediately felt pain in his back and right leg. The claimant indicated,

And when he dropped his end, it just - - I mean, I immediately knew I was hurt. It felt like fire or something shooting up my back and down my right leg. And it kind of rested on my knees. From the position I was in, I was already kind of bent over. And when it happened, I just kind of went down with it on my knees.

The claimant said Johnson asked him if he was okay, and that he replied no, the cooker needed to be moved. The claimant further described that his supervisor, Ricky Rice, was 15 to 20 feet away and that he reported the injury to him. Rice informed the claimant that Steve Johnson, Owner, was out of town but that on the following Monday he would notify him of the claimant's injury. The claimant said that the job they were working on was close to being completed, and that therefore he simply went to his truck and laid down till the work had been completed. At that point the claimant was taken to the employer's shop for his personal vehicle. The claimant has not returned to work since that time.

The claimant said that he had never received instructions regarding what actions needed to be taken in the event of a work injury. Additionally, he had never filed a workers' compensation claim before. The

claimant said that he had conversations with the owner about his claim. The claimant said that he initially believed he had a strain. Shortly after the incident, the owner called him. The claimant said he believed that the injury would heal and that accordingly he did not want a workers' compensation claim on his record. The claimant said that the owner told him he would still have to file it to, "cover hisself".

Around two weeks after the claimant was injured he filed for unemployment benefits. The claimant said that he still believed the injury would resolve itself and that the owner urged him to file for unemployment benefits. The claimant testified, "My boss man called me and told me that he was going to lay me off to where I could draw unemployment until I got better." The claimant then filed for unemployment benefits. On that application he reported that he was laid off due to lack of work and that he was able to work.

When the claimant's injury did not resolve, he contacted the employer. The claimant said the owner told him that he had reported the injury and that if the claimant needed assistance he would oblige. The claimant then contacted the owner again, at which time

he was again assured that a claim had been filed. Unfortunately, when the claimant investigated, it had not been properly filed.

The medical records reveal that the claimant consistently reported that in May 2005 he was injured while at work and lifting a heavy object. On May 26, 2005, an MRI was performed and revealed that the claimant had, "1. Small right foraminal herniation and posterior annular tear of the degenerating L5-S1 disc. 2. Multilevel (L2-3 through L4-5) posterior facet synovitis."

The claimant continued to receive treatment but was unable to avail himself of all treatment due to lack of money. The claimant was subsequently involved in an accident in October 2005. The claimant had another MRI in January 2006, which revealed that the claimant had multilevel degeneration and that his annular tear was partially healed. Dr. Calhoun opined that otherwise, the two MRIs were the same. At the time of the hearing, the claimant testified that he was still symptomatic but that he was ready to return to work.

After reviewing the record, I find that the claimant has met his burden of proof in showing he sustained a compensable injury. I first address the Majority's

contention that the claimant is not credible because he provided no witnesses to corroborate his claim. I find that this is simply not logical. While the claimant has the burden of proof, it only seems logical that if the claimant did not report an injury, the respondents would call witnesses to rebut his testimony. In fact, I find it difficult to believe the respondents would not present the testimony of the witnesses of the accident unless the accident did, in fact, occur. Furthermore, when considering the fact that the owner had repeatedly assured the claimant that a claim had been filed when it had not, I simply cannot fault the claimant for not having him or his son testify.

Furthermore, the other evidence in the record supports the claimant's contentions that he was injured at work. In particular, I note that throughout the course of treatment, the claimant consistently reported that he was injured at work. On May 26, 2005, the claimant reported that he was injured at work and that he suffered from symptoms in the form of pain in his lower back and which radiated down his right leg. This is exactly the type of pain that the claimant testified his injury caused. Likewise, it is notable that Dr. Dodson opined that the claimant's symptoms were consistent with a herniated disc.

In fact, the claimant's MRI revealed the claimant did have defects to his spine. The MRI report indicates,

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. Additionally, small amounts of fluid are present in the posterior facets at the L2-3 and L3-4 levels and the left facet at the L4-5 level consistent with synovitis.

IMPRESSION:

1. Small right foraminal herniation and posterior annular tear of the degenerating L5-S1 disc.
2. Multilevel (L2-3 through L4-5) posterior facet synovitis.

Clearly, the findings of the MRI show that the claimant had sustained an acute injury. A herniation and an annular tear are injuries that are commonly associated with lifting injuries. Furthermore, these conditions manifest themselves in the precise types of symptoms reported by the claimant. As there is no evidence that the claimant had a history of back pain and there is no other evidence to explain how he sustained a herniated disc and annular tear, I find it is more probable than not that he sustained the injury while at work.

The Majority further finds,

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 of the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while performing employment services for Johnson's.

This statement seems to imply that the claimant was somehow dishonest or inconsistent in saying that he had no history of back pain simply because his MRI revealed degeneration. I cannot agree with such a conclusion. This Commission has seen countless cases in which a person has degenerative findings which are not symptomatic until they sustain an aggravation. In fact, it is well known that simply because one has degeneration, that does not mean they will suffer from back pain. Not a single record has been produced to establish that the claimant had ever suffered from back pain or treated for back pain before his injury at work. Therefore, I find that it is in error to now find that simply because the claimant had degeneration as shown by an MRI, he was somehow dishonest in reporting he had no prior back problems.

The Majority also places great emphasis on the fact that the claimant waited three weeks after being

injured to seek treatment. I find that this is of no consequence. When the claimant did seek treatment, he reported it was due to a work injury and the nature of the injury was consistent with his reports. There are countless cases in which the Commission has been presented with a scenario such as this and the claim was found to be compensable. Furthermore, I find that to assert that the claimant is not credible simply because he waited to seek medical treatment in the hopes that his condition would improve simply forces workers to seek medical treatment for conditions that otherwise might resolve on their own accord. Certainly, this would not benefit either workers or employers.

With respect to the claimant's application for unemployment benefits, it is evident that the claimant was less than truthful when he completed his application. However, what is peculiar in this situation is that the claimant was honest and forthright in admitting his actions. Additionally, it is also important to note the respondents were apparently also complicit in the claimant's actions. This is important to note because it shows the respondent employer's actions were not beyond reproach. It also adds veracity to the claimant's claim that he was assured his case was being appropriately handled when it was not.

The claimant testified that his employer encouraged him to file for unemployment benefits and told him he was being "laid off". In fact, the claimant reported that he was being laid off due to lack of work when filing for unemployment benefits. Based on this report, the claimant received unemployment benefits.

Prior to awarding unemployment benefits, the Department of Workforce Services routinely contacts the employer to see why the separation occurred. While the respondent-employer's statements to the Department were not introduced by either party, there is also no evidence that the respondent-employer told the Department of Workforce Services that the claimant was not laid off due to lack of work, and was in fact, unable to work due to injury. In fact, it is apparent that the claimant simply waited for his one-week delay in receiving benefits and then received benefits without interruption. Accordingly, it appears that the employer did not disclose the claimant was not laid off due to lack of work. This is significant in that it shows that the claimant was telling the truth with regard to how his application for unemployment benefits transpired. Though his actions were not excusable, the claimant was forthright in his actions, which bolsters his credibility. Therefore, I still find him to be credible with regard to

how his injury was sustained and reported. Accordingly, I would have found that the claimant sustained a compensable injury and awarded related benefits.

Finally, I address the Majority's argument that if the claimant did sustain a compensable injury, then the accident in October served as an independent intervening cause which resulted in a new condition. I must reject this argument. The Majority asserts that the claimant's annular tear had healed by the December 2005 MRI. This is inaccurate. The December 2005 MRI was interpreted by Dr. Calhoun as showing that the claimant's annular tear had only partially healed. He further indicated that was the only change in the MRI from May and December 2005. The claimant testified that he was unable to pay for physical therapy and other medical attention but that he remained symptomatic until the time of the October accident. While the claimant acknowledged that he had an increase in pain after the October accident, there is no objective evidence that his annular tear had healed by the time of the October 2005 accident. As there was no objective evidence that the claimant's condition had healed by October 2005, I find that there is insufficient evidence to support a finding that the October 2005 accident served as an independent intervening cause.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner