

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513238

HARDY HOOFMAN, EMPLOYEE	CLAIMANT
DELK CONSTRUCTION COMPANY, INC., EMPLOYER	RESPONDENT
TRANSCONTINENTAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 14, 2007

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL, 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 November 7, 2006.

The Administrative Law Judge entered the following 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.

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 opinion, finding that the claimant is not entitled to receive medical or temporary total disability benefits because he did not sustain a compensable, work-related injury on November 9, 2005. 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 claimant testified that on November 9, 2005, while in the employment of the Respondent, he sustained an injury. The claimant had been employed as a mechanic by the Respondents for five months and his duties included operating the SkyTrack, a forklift type of machine that lifts material up to the roof of a building. On November 9, 2005 the claimant was running the SkyTrack machine, which entailed him parking the machine, jumping off, helping another worker loads materials, and then jumping back up onto the SkyTrack. There had previously been a substantial amount of rain, and every time the claimant jumped off of the SkyTrack, he landed in mud. On this particular occasion, the claimant jumped off the SkyTrack, into the mud, and twisted his back. At that point, his back began to hurt.

The claimant had previously experienced problems with his back due to a work-related injury in 2000 while working for a different company in Texas. At that time, the claimant fell from a building, hit a beam, and landed on his back. A discography was performed, which revealed that at L3-4 the claimant suffered mild degeneration and a right posterior fissure. At L4-5 the claimant suffered a broad fissure with a small central disc protrusion. In 2001, Lumbar Intradiscal Electrothermal Therapy (IDET) was performed on the claimant at L3-4 and L4-5. By August 2001, the claimant reached maximum medical improvement, and in August 2001, he underwent a Functional Capacity Exam (FCE). The FCE determined that the claimant was standing, walking, and sitting well. However, his capabilities were described as "light work." It also does not appear that he was assigned an impairment rating. The claimant testified that he had over \$80,000 in medical bills from that injury because that employer had not carried worker's compensation insurance and then declared bankruptcy. As such, the claimant was never compensated for his injury. The claimant

testified that before his November 9, 2005 accident he felt fine and was able to go about his daily activities such as taking care of his yard, coaching his son's baseball team, and fishing.

The claimant returned to Arkansas after his brother's death and began working for the respondents in June of 2005. The claimant's job duties included carrying around heavy tools such as two "spud" wrenches, a two-pound hammer, a silver bar, a bull pin, and bolts. All together, the claimant testified that he carried anywhere from thirty (30) to forty (40) pounds of tools with him each day while at work.

The claimant testified that on November 9, 2005, his back began hurting after jumping off the SkyTrack. Although he knew that he had hurt himself, he did not know what was causing his pain. He thought perhaps that he either had a kidney infection or had injured himself from jumping from the SkyTrack. As such, he sought treatment from Dr. Baker on November 11, 2005. The claimant also notified his employer on November 11, 2005 that he had sustained an

injury. The respondents, however, did not send the claimant to a doctor of their own choosing.

Dr. Baker's medical records note that he saw the claimant on November 11, 2005, and that the claimant complained of lower back pain due to work. Although Dr. Baker noted that the claimant had no previous history of back problems, he did note that the claimant had decreased range of motion and was unable to do a toe/heel walk secondary to muscle spasms and pain. In diagnosing the claimant as having acute lower back strain with paravertebral muscle spasms, Dr. Baker prescribed Lortab, Flexeril, and Voltam and gave the claimant an off-work slip for one week. Dr. Baker also noted that the claimant should avoid lifting, pulling, bending or any activity that aggravated his pain.

On November 16, 2005, Dr. Baker reassessed the claimant, noting that his acute lumbar strain was gradually improving. However, Dr. Baker also noted that the pain, although mainly in the lumbar sacral area in the middle of his back, was radiating toward his left buttocks. Dr. Baker

noted that he was prescribing a Sterapred Dosepak for the inflammation, and advised the claimant to continue with a muscle relaxer (i.e. Flexeril) for muscle spasms, and Ultracet to help with the pain. Dr. Baker also noted that the claimant could go back to work on light duty the following week and that he did not see any indication to perform an MRI.

Unhappy with Dr. Baker's treatment, the claimant testified that he called the respondents and asked to see Dr. Killough. The respondents approved the claimant's visit to Dr. Killough by calling Dr. Killough's office approximately thirty minutes prior to the claimant's appointment and notifying them that the appointment was approved.

On November 21, 2005, the claimant sought treatment from Dr. Killough, complaining of lower back pain extending into the left leg. Dr. Killough noted that it had been two weeks since the onset of the injury and that the claimant had been treating with Dr. Baker. Dr. Killough prescribed Lortab, Flexeril, Prednisone, Ultram, and another

drug, in which the name is illegible in the record. Dr. Killough noted that the claimant suffered from a probable herniated lumbar disk and ordered an MRI. The MRI revealed:

L5-S1: A small right paracentral disc extrusion which extends minimally in an inferior direction is superimposed on a broad based disc bulge at this level. There is an associated increase T2 signal of annular tear seem at the site of disc protrusion. The disc bulge and protrusion in combination with bilateral facet degenerative change and hypertrophy contribute to minimal central stenosis at this level and severe left sided neural foraminal narrowing and moderate right sided neural foraminal narrowing.

L4-5: A small right foraminal disc protrusion is superimposed upon a broad based disc bulge. Minimal increased T2 signal of possible annular tear is also seen in association with this tiny protrusion. Disc contours in combination with facet degenerative change and hypertrophy contribute to a moderate degree of bilateral neural foraminal narrowing and no significant central canal stenosis.

The MRI also revealed that the rest of the lumbar spine was normal, although there were small Schmorl's Nodes seen in L5.

On November 28, 2005, the claimant again saw Dr. Killough, who noted that the claimant suffered from back pain, degenerative disc disease, and a disc bulge at L4-5 and L5-S1. Dr. Killough prescribed Ultram, Skalaxin, Lortab, Restoril, and two other drugs in which the names are illegible in the record. Dr. Killough also prescribed physical therapy. At that time the respondents notified the claimant that Dr. Killough was an unauthorized doctor and that he was not allowed to see Dr. Killough any longer. As such, he did not go to the already ordered physical therapy sessions.

The claimant testified that after he was no longer able to see Dr. Killough, he went back to Dr. Baker. On December 5, 2005 Dr. Baker recommended that he see a neurosurgeon. At that point, the respondents notified Dr. Baker that they were no longer paying for the claimant's medical treatment. The respondents notified the claimant via

letter on December 16, 2005 that they were denying his claim outright. On December 30, 2005, the respondents notified the claimant via letter that they were denying the claimant's change of physician request because his claim was denied. Since being cut off from medical treatment, the claimant has been going to White River Medical, where he is able to receive some medical attention as an indigent.

Although the respondents provided no witnesses for their defense, they did answer interrogatories submitted by the claimant's attorney. In response to Interrogatory #2, the respondents assert that they paid benefits until the claimant stopped getting medical care, which prevented the carrier from determining whether he remained disabled. In response to Interrogatory #4, the respondents contend that they do not dispute the claimant's injury. Additionally, on June 5, 2006, in the Respondent's Amended Response to Pre-Hearing Questionnaire, the respondents identified Mae James, a claim's representative, and Connie Prosser, a former nurse case manager, as potential witnesses. However, the respondents failed to call either Mae James or Connie

Prosser as witnesses, citing they were no longer employed by the carrier and were located in another state.

The Majority, by affirming and adopting the Administrative Law Judge's opinion found 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 although the occurrence of the claimant's symptoms could be an aggravation of a pre-existing condition, there was no objective evidence to substantiate a connection between an on the job incident and the symptoms that he suffered. The Majority also cited the claimant's lack of credibility as a reason for denying benefits.

In my opinion, the Majority's findings are simply not consistent with the objective medical findings of several doctors. Existence of an injury is supported by objective evidence such as documented muscle spasms, prescriptions for pain medication and for relief of muscle

spasms, prescriptions for a Sterapred Dosepak for inflammation, as well as an MRI which shows a bulging disk at L4-5 and L5-S1. Though there is some validity to the Majority's assertion that the claimant's credibility is lacking, I find that there is significant medical evidence and other corroborative evidence to show that the claimant sustained a compensable injury. Specifically, I find that since the claimant was admittedly involved in an accident and presented with objective medical findings of an injury, he has met his burden of proof in showing that he sustained a compensable injury.

The Majority erred in both fact and law by finding that there were no objective medical findings. The Majority's first error in fact was in choosing to ignore the evidence of muscle spasms in the claimant's back. The claimant began suffering from muscle spasms in his back on November 9, 2005 but was unable to immediately identify the cause of his pain. On November 11, 2005, only two days after the accident, the claimant notified his supervisor of his injury and sought treatment from Dr. Baker, who noted

paravertebral muscle spasms. Dr. Baker prescribed Lortab, Flexeril, and Voltam and gave the claimant an off-work slip for one week. Dr. Baker also noted that the claimant should avoid lifting, pulling, bending or any activity that aggravated his pain. On November 16, 2005, Dr. Baker reassessed the claimant and noted that he was prescribing a Sterapred Dosepak for inflammation, Flexeril for muscle spasms, and Ultracet to help with the pain. Although the prescription records indicate that the claimant was taking muscle relaxers prior to the accident, it is evident from Dr. Baker's notes that he observed muscle spasms and inflammation. Additionally, on November 21, 2005, Dr. Killough, prescribed Lortab, Flexeril, Prednisone, and Ultram, noting that the claimant suffered from a probable herniated lumbar disk. As such, it is abundantly clear that the Majority errs in finding that there were no objective findings consistent with an acute injury.

The Majority also erred in finding that the MRI results of the claimant's back were only consistent with degenerative changes and with a small right side disk

protrusion. The Majority completely ignored the MRI's finding that the right paracentral disc extrusion was superimposed on a broad based disc bulge. The Majority completely disregarded the words "superimposed" and "broad based disc bulge" found in the MRI. Additionally, the Majority ignores the MRI's finding that the claimant sustained severe left sided neural foraminal narrowing. Rather, the Majority substituted their own medical opinion, finding that the claimant's pain could not possibly be in his left leg, as he suffered a right sided disc protrusion. As such, the Majority arbitrarily dismissed objective medical evidence.

Furthermore, and perhaps more disturbingly, the Majority found that the claimant's lack of credibility diminished the accuracy of the medical opinions. Apparently, the Majority is not familiar enough with the record to notice that there were no medical opinions given.

While no physician specifically relates the findings of the MRI to the claimant's compensable injury, such proof is not required. See, Wal-Mart Stores Inc. v.

VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). The MRI, which was ordered by Dr. Killough, showed that the claimant has a broad based disc bulge upon which a right paracentral disc extrusion was superimposed at L5-S1. Additionally at L5-S1, there was evidence of an annular tear, bilateral facet degenerative change, stenosis, severe left sided neural foraminal narrowing, and moderate right sided neural foraminal narrowing. This is consistent with the claimant's injury and complaints of pain. Furthermore, the fact that the claimant's extrusion was superimposed is evidence of an aggravation.

More importantly, however, is the fact that the claimant's medical records from an MRI taken in 2000, show that he had no problems with L5-S1. This further proves that the claimant's disc bulge at L5-S1 is a completely new injury. Furthermore, the claimant testified that he was able to perform his daily activities since the IDET procedure in 2001 without much pain, until he injured himself in November of 2005. This further establishes that the claimant's injury was due to his work with the respondents.

In their brief to the Commission, the Respondents assert that the claimant failed to prove that his work-related injury was the "major cause" of his disability or his work-related injury, citing his pre-existing condition. However, the employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable regardless of whether major cause exists. Nashville Livestock Comm'n v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); St. Vincent Infirmary Med. Ctr. v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Public Employee Claims Div. V. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992). As Professor Larson states:

Preexisting disease or infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employee aggravated, accelerated, or combined with the disease or infirmity to produce death or disability for which compensation is sought.

Varner v. Water Loo, Ind., Full Commission Opinion filed march 30, 1998 (E608272); citing 1 Arthur Larson, The

Law of Worker's Compensation § 12.21 (1993). See Nashville Livestock Commission v. Cox, supra; Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, supra. Additionally, to show compensability for a specific incident aggravation one does not need to show major cause. Rather, the claimant is only required to show that her injury was a factor in her need for treatment. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2000).

Indeed, the claimant suffered from an admittedly pre-existing condition to L3-4 and L4-5. A discography performed in 2000 revealed that at L3-4 the claimant suffered mild degeneration and a right posterior fissure. At L4-5, the claimant suffered a broad fissure with a small central disc protrusion. In 2001, Lumbar Intradiscal Electrothermal Therapy (IDET) was performed on the claimant at L3-4 and L4-5. The claimant eventually underwent and FCE, where it was determined that he could perform light duty.

As the claimant had healed from his 2001 IDET and had returned to work for several years, it is evident that on November 9, 2005, the claimant's injury was a factor in his need for treatment. Without any compensation awarded for his injuries sustained in 2000, the claimant was forced to return to work. The claimant even had several jobs before being hired by the respondents and was able to continue his daily activities. In fact, the claimant was able to carry thirty to forty pounds of tools with him on the job and perform normal daily activities. In my opinion, the claimant's ability to return to work, and then subsequent inability to return to work after his injury, shows that he sustained an aggravation. The 2005 MRI revealed that at L4-5, the claimant suffered a broad based disc bulge, an annular tear, facet degenerative change, and neural foraminal narrowing. Additionally, the MRI revealed a right paracentral disc extrusion superimposed on a pre-existing condition, which is consistent with an aggravation. Although the claimant's credibility has been called into question, the evidence proves that the claimant's November 9, 2005

injury was a factor in his need for treatment. As such, the claimant sustained an aggravation of a pre-existing condition at L4-5, and therefore does not need to prove major cause.

In addressing the Majority's assertion that the claimant's credibility is lacking, it is important to note that the respondents did not have entirely clean hands, which lends more weight to the claimant's credibility. It is important to note that the claimant's condition was diagnosed as a possible surgical condition, and there was no denial that the accident occurred as described by the claimant. It was not until Dr. Baker recommended that the claimant see a neurosurgeon that the claim was denied. In the present case, even though the respondents admit in Interrogatory #4 that the claimant sustained an injury, they asserted in Interrogatory #2 that they discontinued his necessary medical treatment because he discontinued getting medical care. In fact, the claimant ceased getting medical care from Dr. Killough, after his November 29, 2005 visit, when he was informed that Dr. Killough was not an authorized

physician. As such, the claimant returned to Dr. Baker. On December 5, 2005, Dr. Baker recommended that the claimant see a neurosurgeon. Ironically, the respondents denied the claimant's claim on December 16, 2006, before the claimant had the opportunity see a neurosurgeon. The claimant's last visit with Dr. Killough was November 29, 2005 and his next visit with Dr. Baker was December 5, 2005 - hardly enough time for the claimant to cease medical care. Interestingly enough the respondent's Interrogatory #2 claims that the claimant ceased getting medical treatment, which is why his claim was denied.

Additionally, in the respondent's Amended Response to Pre-Hearing Questionnaire, the respondents identified Mae James, a claim's representative, and Connie Prosser, a former nurse case manager, as potential witnesses. However, the respondents failed call either Mae James or Connie Prosser as witnesses, citing they were no longer employed by the carrier and were located in another state. Additionally, the respondents did not provide written transcripts of their conversations with the claimant. The respondents asserted in

the Amended Response to Pre-Hearing Questionnaire that Mae James took the claimant's initial statement, that the statement was recorded, and that a copy of that transcript would be provided to the claimant. That transcript was never provided to the claimant, nor was it introduced into the record. In my opinion, the only possible explanation is that the recorded statement contained information damaging to the respondents.

In sum, it is clear that the claimant sustained a compensable injury evidenced by Dr. Baker's observations of muscle spasms, for which he prescribed a muscle relaxer; inflammation, for which he prescribed a Sterapred Dosepak; and the MRI, which revealed a bulging disc at L5-S1 and L4-5 and a right paracentral disc extrusion superimposed at L5-S1. Additionally, the claimant suffered an aggravation of the pre-existing condition at L4-5 when he sustained the compensable injury on November 9, 2005. Furthermore, the Majority arbitrarily dismissed all the objective medical evidence. Additionally, the Majority was so unfamiliar with the record that they affirmed and adopted facts that were

clearly misstated. Therefore, I find the claimant suffered a compensable work-related injury, supported by objective medical findings, and should be awarded medical and temporary total disability benefits.

For the aforementioned reasons, I respectfully dissent.

PHILIP A. HOOD, Commissioner