

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F607634

STEPHEN A. GORDON, EMPLOYEE CLAIMANT

CAL-ARK INTERNATIONAL  
A SELF-INSURED EMPLOYER RESPONDENT

**OPINION FILED SEPTEMBER 19, 2008**

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

Claimant represented by HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, 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 January 23, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. There was an employer-employee relationship on July 5, 2006.
2. The compensation rates are \$488/366.

3. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on July 6, 2006, that arose out of and in the course of his employment.

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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion affirming and adopting the Administrative Law Judge's finding that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable back injury on July 5, 2006. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that he sustained a compensable back injury on July 5, 2006, and therefore, I must respectfully dissent.

For the claimant to establish a compensable injury

as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

First, I find that the claimant has proven by a preponderance of the evidence that he sustained a specific-incident injury, identifiable by time and place of occurrence, arising out of and in the course of his employment, which caused internal physical harm to the body causing disability. The claimant testified that he aggravated his pre-existing back problems when he fell from

his truck on July 5, 2006. The claimant's account of the accident was consistent with, and corroborated by, the testimony offered by his wife; by the testimony of Ms. Jeanie Sharkey, the respondent-employer's representative; and by the treatment notes of his medical providers. Ms. Sharkey testified that when the claimant reported his injury to her, she could tell that he was in pain. The claimant's wife testified that when she spoke to her husband in the days following the fall, she could tell "he was getting worse and worse" and she encouraged him to report the injury. While it is true that the claimant had back and leg problems prior to this incident, a pre-existing disease or infirmity of an 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 the death or disability for which compensation is sought. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Here, despite his pre-existing back problems, the preponderance of the evidence of record, including the testimony of the claimant's wife and

the claimant's son, shows that the claimant was able to work and do his job prior to the July 5, 2006 incident.

The majority, by affirming and adopting the Administrative Law Judge, has apparently determined that the claimant is incapable of giving credible testimony, and therefore cannot prove that he actually fell from his truck on July 5, 2006. However, I find that the claimant did give credible testimony as to exactly how he fell and injured himself on July 5, 2006. The claimant's account of the injury is corroborated by the testimony of the other witnesses and by the medical evidence of record. The respondent has not presented any evidence to dispute the claimant's testimony, and in fact, Ms. Sharkey's testimony clearly indicates that she believed the claimant when he reported the incident to her. Based on his report of the incident, the respondent sent the claimant to the "company doctor" for treatment.

While it is true that the claimant withheld his medical history from the respondent when he first applied for employment, this fact does not mean that the claimant

did not give credible testimony regarding his on-the-job accident. The record clearly shows that the claimant sincerely believed he had a legal right to withhold his medical history, and that the employer was out-of-bounds in asking for it. The fact that the claimant was mistaken about his rights under federal privacy laws does not mean that the claimant is incapable of giving credible testimony. I find, based on the claimant's credible testimony, corroborated by the testimony of the other witnesses at the hearing, that the claimant proved by a preponderance of the evidence that he did in fact injure his back when he fell from his truck on July 5, 2006.

Second, I find that the existence and extent of the claimant's compensable aggravation injury is established by medical evidence supported by objective findings. The Supreme Court has previously held objective findings to exist where a doctor's diagnosis of contusion is supported by objective imaging studies. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1999) Here, the claimant's initial treating doctor diagnosed him with a "contusion" and

prescribed Skelaxin, a medication commonly used to treat muscle spasms. The MRI performed September 12 revealed a disc bulge at L4-L5, and an annulus rupture at L5-S1. While the claimant admits that he has pre-existing back problems, there is no prior imaging study to indicate these defects were present prior to July 5, 2006, and their existence corroborates and supports the company doctor's diagnosis of a lumbar contusion. Therefore, I find that the claimant has satisfied the "objective findings" requirement.

In conclusion, I find that the claimant is a credible witness and has proved by a preponderance of the evidence that he sustained a compensable aggravation of his pre-existing back condition when he fell from his truck on July 5, 2006.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner