

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705280

DAVID DUNAHOO,  
EMPLOYEE

CLAIMANT

PILE'S CONCRETE,  
EMPLOYER

RESPONDENT

CNA INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 19, 2010

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

Claimant represented by the HONORABLE JASON M. HATFIELD,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE FRANK B.  
NEWELL, 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 August 26, 2009. In said  
order, the Administrative Law Judge made the following  
findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at  
the pre-hearing conference conducted on March  
18, 2009, and contained in a pre-hearing order  
filed that same date, are hereby accepted as  
fact.
2. Claimant has failed to prove by a  
preponderance of the evidence that he suffered  
a compensable injury to his lumbar spine at

the L3-4 level as a result of the accident on April 10, 2007.

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 compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the August 26, 2009 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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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant sustained a compensable back injury on April 10, 2007, and therefore I must respectfully dissent.

On April 10, 2007, the claimant was loading a parking curb for a customer, with no assistance from anyone else. He felt a pop in his back and knew immediately that something was wrong. The claimant promptly reported the incident to his boss. Following the incident, the claimant was sent by the respondent to Dr. Vandergriff, who initially evaluated the claimant on April 16, 2007, and diagnosed claimant's condition as a lumbar strain. At that time, Dr. Vandergriff prescribed medications, work restrictions, and ordered an MRI scan. In a report dated April 23, 2007, Dr. Vandergriff assessed claimant's condition as lumbar strain with

right lower extremity radiculopathy and paresthesias, and again recommended an MRI scan and ordered claimant to continue with his work restrictions and, in addition, she also ordered physical therapy.

An MRI scan was performed on May 7, 2007, which revealed a herniated disc at the L4-5 level. It also revealed disc bulging and a bilateral mild foraminal narrowing at the L2-3 and L3-4 levels.

When conservative treatment did not alleviate claimant's condition, Dr. Vandergriff referred the claimant to Dr. Knox. Dr. Knox treated the claimant with an injection, a lumbar traction program, and physical therapy.

A second MRI scan was performed on the claimant's lumbar spine in November 2008, which revealed injury to the L2-3, L3-4, and L4-5 levels. Pertinent to the case at hand, the scan revealed a herniated disc at the L3-4 level. Dr. Knox has recommended treatment to include a lumbar traction program and a follow-up evaluation by Dr. Ennis.

An MRI taken on May 7, 2007, revealed disc dessication at L4-5 and disc dessication with diffuse annular annular disc bulging at L2-3 and L3-4. A subsequent MRI, taken on November 24, 2008, revealed

dessication of the L2-3, L3-4, and L4-5 disc spaces; mild broad-based bulging of the L4-5 disc; and focal disc extrusion on the right at L3-4, "likely of clinical significance to explain this gentleman's right leg pain."

It is apparent that the April 10, 2007 injury is responsible for the injury to all of the aforementioned disc levels. The MRI results corroborate the claimant's testimony that his pain never resolved, but instead worsened, after the April 10, 2007 injury. The pain worsened as his condition worsened. The respondents have repeatedly denied compensability for the injury to the L3-4, yet accepted the injury to the L4-5. Both discs were injured at the same time, and the respondent has no basis to accept one disc injury as compensable, while denying the other.

According to Dr. Knox, the claimant had a disc herniation at L4-5 and diffuse annular disc bulging and mild foraminal narrowing at L3-4, which are all objective findings and could be causing leg pain. Dr. Knox testified that his impression would be that the lifting incident was responsible for the claimant's pain. Dr. Knox's recommended treatment has repeatedly been denied by the respondents. Consequently, the

claimant's condition continues to cause him pain and interfere with his life.

In his response to a questionnaire, signed and dated June 4, 2009, Dr. Knox answered in the affirmative the following three questions:

1. Based upon the history provided, the two MRIs and the medical treatment you have performed, do you believe within a reasonable degree of medical certainty that the work-related lifting incident which occurred on April 10, 2007, resulted in injury to the L3-4 lumbar disc?
2. Do you believe that the treatment you have recommended for the L3-4 lumbar disc is proximately related to the work-related injury dated April 10, 2007?
3. Are your opinions above based upon a reasonable degree of medical certainty?

Dr. Knox's affirmative responses to the above listed questions are not responses open to interpretation. They are not speculative responses. However, the Administrative Law Judge, affirmed and adopted by the majority, stated that Dr. Knox's opinion was "based on a gut feeling which is speculative in nature." When asked in his deposition, Dr. Knox agreed that a "gut feeling" is "somewhat speculative." However, Dr. Knox's "gut feeling" was based on his evaluation of the claimant, medical history provided by

the claimant, and MRI scans. Medicine is not an exact science. Doctors' medical opinions need not be absolute. Crudup v. Regal Ware, Inc., 20 S.W.3d 760. Here, Dr. Knox's opinion goes well beyond mere speculation. Dr. Knox testified that he was of the opinion that both the L3-4 and L4-5 injuries resulted from the lifting incident in April 2007, and that his opinion was based on a reasonable degree of medical certainty. Dr. Knox's opinion, the only medical opinion of record is supported by the other medical evidence of record as well as the claimant's credible testimony. I find, based on the above listed evidence of record, specifically Dr. Knox's opinion, that the claimant sustained a compensable back injury and is entitled to associated workers' compensation benefits.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner