

DIVISION IV

NOT DESIGNATED FOR PUBLICATION
ARKANSAS COURT OF APPEALS
JOSEPHINE LINKER HART, Judge

CA06-408

November 1, 2006

CARL HOLT

APPELLANT

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. F412724]

V.

TERRACON CONSULTANTS, INC.
APPELLEE

AFFIRMED

Appellant, Carl Holt, appeals from the decision of the Arkansas Workers' Compensation Commission in which it denied his claim for benefits. On appeal, appellant first argues that there was not a substantial basis for the Commission's conclusion that he did not sustain a compensable hernia. Second, he argues that by substituting its credibility determinations for those made by the administrative law judge (ALJ), the Commission violated "fundamental principles of fairness and justice." We affirm.

In reviewing decisions from the Commission, we examine the evidence in the light most favorable to the Commission's findings, and when a claim is denied because the claimant has failed to meet his burden of proof, we affirm if the Commission's decision displays a substantial basis for the denial of relief. *Stiger v. State Line Tire Serv.*, 72 Ark.

App. 250, 35 S.W.3d 335 (2000). For a work-related hernia to be compensable, there must be proof that “the occurrence of the hernia immediately followed as the result of sudden effort, severe strain, or the application of force directly to the abdominal wall;” that “there was severe pain in the hernial region;” that “the pain caused the employee to cease work immediately;” that “notice of the occurrence was given to the employer within forty-eight . . . hours thereafter;” and that “the physical distress following the occurrence of the hernia was such as to require the attendance of a licensed physician within seventy-two . . . hours after the occurrence.” Ark. Code Ann. § 11-9-523(a) (Repl. 2002).

We further observe that it is for the Commission to determine the credibility of witnesses and the weight to be given their testimony, and once the Commission has made its decision on a credibility issue, the appellate court is bound by that decision. *Daniels v. Affiliated Foods Southwest*, 70 Ark. App. 319, 17 S.W.3d 817 (2000). Further, the Commission reviews the ALJ’s decision de novo, and the Commission conducts its own factfinding independent of that done by the ALJ. *Id.* On appeal, we review the decision of the Commission and not that of the ALJ. *Id.*

According to the Commission’s opinion, on November 4, 2004, appellant sustained a stomach strain at work when lifting and carrying a five-gallon bucket of gravel. Appellant described it as a pulled muscle in his stomach that did not cause him to stop work or seek medical treatment, but appellant completed an incident report. Appellant further testified that on November 15, 2004, while lifting an oil pan, he suffered an injury that caused him

to stop work. A statement of the accident completed by appellant on November 15, 2004, at Cooper Family Medicine lists the date of the accident as the “9th? filled at office” and describes the accident as having occurred when he “lifted bucket of gravel felt pull at navel.” Appellant was diagnosed with an umbilical hernia.

In denying benefits, the Commission noted that appellant did not contend that the hernia occurred on November 4, 2004. Rather, he contended that the injury occurred while lifting an oil pan on November 15, 2004. The Commission noted that appellant did not present any evidence to corroborate his testimony that he sustained a hernia on November 15, 2004, while lifting an oil pan. Further, the Commission observed that when appellant presented for medical treatment on November 15, 2004, he did not mention any precipitating event on November 15, 2004, as causing his need for medical treatment or describe an oil pan lifting incident as causing him pain. Instead, he wrote that the incident occurred on “Nov. 9th?” and described the lifting of a bucket of gravel as causing his pain. The Commission found that appellant’s testimony was not credible, because it conflicted with the history of the injury that he gave at his physician’s office. The Commission concluded that, based on its de novo review of the record, appellant failed to prove by a preponderance of the credible evidence that he sustained a compensable hernia on November 15, 2004.

On appeal, appellant argues that the Commission should have credited his testimony, and he asserts that his report to his physician was the result of his confusion about the dates. As we observed above, it is the Commission that determines the credibility of a witness and

the weight to be given his testimony. Appellant further relies on *Cooper v. McBurney Corp.*, 72 Ark. App. 322, 39 S.W.3d 1 (2001), in which this court reversed the denial of benefits even though the claimant initially reported the injury as having occurred earlier than when he actually sustained his hernia. *Cooper*, however, is distinguishable, as in that case there was corroborating evidence consistent with the claimant's testimony regarding how he was injured, a circumstance not present in this case. Instead, the evidence contradicts appellant's uncorroborated testimony. Accordingly the Commission's opinion displays a substantial basis for the denial of relief, and we affirm.

For his second point, appellant notes that the ALJ awarded him benefits, and that by finding appellant's testimony not credible, the Commission rejected the credibility determination made by the ALJ and substituted its own determination. Appellant asserts that "such a determination on the part of the Commission is a violation of fundamental principles of fairness and justice." This issue was not raised below, so it was not preserved for appellate review. *Kimbell v. Ass'n of Rehab Indus. & Bus. Companion Prop. & Cas.*, ___ Ark. ___, ___ S.W.3d ___ (May 11, 2006); *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). But in any event, we have previously addressed this argument in *Stiger v. State Line Tire Serv.*, 72 Ark. App. 250, 35 S.W.3d 335 (2000), and concluded that the Commission's substitution of its own credibility determinations for those made by the ALJ does not deny due process.

Affirmed.

VAUGHT and BAKER, JJ., agree.