

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E905243**

<b>RICKEY BURNS (DECEASED), EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MORRIS MATERIAL HANDLING, EMPLOYER</b>	<b>RESPONDENT</b>
<b>RELIANCE NATIONAL INSURANCE, CARRIER CRAWFORD &amp; COMPANY, TPA</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 23, 2004**

This matter comes before Administrative Law Judge J. Mark White on the record.

Claimant represented by Mr. Greg Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Ms. Carol Worley and Ms. Melissa Ross, Attorneys at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

Pursuant to the Prehearing Order filed October 20, 2003, the parties agreed to submit consideration of this claim on a stipulated record. The record is comprised of the Prehearing Conference Order filed September 8, 2003; the Prehearing Order filed October 20, 2003; the medical records and other documentation submitted by the claimant on October 21, 2003, and by the respondents on November 21, 2003; the oral deposition of the claimant taken January 10, 2000, along with the condensed version thereof; the oral deposition of the claimant taken January 28, 2003; and the briefs and attached medical records submitted by the parties.

The parties stipulate that the employee/employer/carrier relationship existed between the parties on or about March 16, 1999; that the claimant earned sufficient wages to entitle him to \$375 per week for temporary total disability benefits, and \$281 per week for permanent benefits in the event this claim is found to be compensable; that the respondents accepted the compensability of the laceration the claimant suffered on March 16, 1999; that no TTD benefits were paid subsequent to July 20, 1999, because the respondents did not accept the claimant's alleged neck and shoulder injuries as compensable; and that the claimant was shot and killed on May 16, 2003.

The parties agree that the issues to be presented are whether the Arkansas Workers' Compensation Commission has jurisdiction of this claim; whether the claimant sustained a compensable cervical injury; whether the claimant is entitled to temporary total disability benefits from July 20, 1999, through May 16, 2003; and controversion and attorney's fees.

The claimant contends that Arkansas is the proper jurisdiction as the injury occurred in Arkansas; that he sustained an injury to his head and neck; that he has received medical benefits which are reasonable and necessary which are the respondents' liability; and that he is entitled to temporary total disability from July 20, 1999, through May 16, 2003. It is noted that the claimant's brief contends the

claimant is entitled to indemnity benefits going back to March 16, 1999, while the Prehearing Order of September 8, 2003, identifies a start date of July 20, 1999. The parties have stipulated that the claimant's temporary disability benefits ceased after July 20, 1999. To ensure fairness to the parties, it will be assumed herein that the claim for temporary total disability benefits is for a period beginning July 20, 1999, the same date identified in the prehearing order.

Respondents contend that the claimant did not suffer a compensable neck and shoulder injury on March 16, 1999, for which respondents should be liable; that the claimant was released to return to work after his alleged injury on March 17, 1999, and as such he is not entitled to any further indemnity benefits; that wages cease with death and that any compensation received in lieu of wages must also cease with death; and that claimant does not have a vested right in compensation. In the event this claim is found to be compensable, the respondents contend they are entitled to a credit for indemnity benefits already paid, and an offset for social security benefits received by the claimant.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity

to review the testimony of the claimant by deposition, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
2. The Legislature has expressly allowed for a claimant's estate to pursue a claim of compensation after the claimant's death for benefits incurred prior to the claimant's death.
3. The respondents have failed to rebut by a preponderance of the evidence the statutory presumption that the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
4. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
5. The claimant has proven by a preponderance of the evidence that on March 16, 1999, he sustained an injury arising out of and in the course of his employment, and that the injury was caused by a specific incident identifiable by time and place of occurrence.
6. The claimant has proven by a preponderance of the evidence that his March 16, 1999, injury caused internal physical harm to the body requiring medical

services, specifically the herniated discs in his cervical spine.

7. The claimant has proven by a preponderance of the evidence that the existence and extent of his March 16, 1999, cervical injury is established by medical evidence supported by objective findings, specifically the MRI findings of June 6, 1999.
8. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 16, 1999.
9. The claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages during the time period from July 20, 1999, to the time of his death. Therefore, he has failed to prove by a preponderance of the evidence that he is entitled to additional temporary total disability benefits.
10. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant is a resident of Texas and worked for the respondent-employer as a laborer. On March 16, 1999, he was working on a construction project, managed by the respondent-employer, in the Nucor-Yamato Steel Mill near

Blytheville, Arkansas. Although his home was in Texas, he was temporarily residing at a motel near the Blytheville work site. At the time of his injury, he was sixty to seventy feet in the air on a catwalk when a metal brace, measuring some five to six feet long and 3 inches thick, fell from the ceiling and hit him on the head. The impact knocked him down to the catwalk grating. He testified in his January 10, 2000, deposition that the impact knocked him unconscious, but emergency room records reflect that he denied any loss of consciousness. He was transported by ambulance to Baptist Memorial Hospital in Blytheville, where he was treated for a laceration to the head and released. An x-ray of the cervical spine revealed no fractures or subluxation.

He testified in his 2000 deposition that he was unable to work the day after the accident because of pain in his neck, left shoulder and left arm. His wife came from Texas to pick up him and drive him home. Three days after the accident, with the respondents' authorization, he sought treatment from Dr. Chris Smith for his pain. Dr. Smith diagnosed "MS strain/arm strain" and instructed the claimant to stay off work for one week.

The claimant then traveled to Mexico to begin work on another project managed by the respondent-employer. He testified that he was placed on light duty by his supervisor because of his continuing complaints of pain. When he returned

from Mexico, he again saw Dr. Smith on April 26, 1999. He complained of continuing neck, left shoulder and left arm pain, along with numbness in the fingers of his left hand. Conservative treatment failed to alleviate the claimant's symptoms, and on May 11, 1999, Dr. Smith referred the claimant to Dr. Frank Hamlin.

Dr. Hamlin saw the claimant on May 24, 1999, and indicated that the claimant "probably has some radiculopathy from a cervical disk problem. Whether it is herniated or just injured, I am not sure." Dr. Hamlin ordered a cervical MRI, which revealed "mild posterior to left paracentral disc herniation at the C6-7 level as well as a diffuse posterior subligamentous protrusion at the 5-6 interspace, both causing mild to moderate narrowing of the ventral canal without significant cord compression or foraminal stenosis." On June 4, 1999, after reviewing the MRI, Dr. Hamlin referred the claimant to a neurosurgeon, Dr. Joel Patterson, for possible surgery.

Dr. Patterson saw the claimant on June 22, 1999, and recommended physical therapy. At this point the respondent-carrier controverted the claim and refused to pay for any therapy. The claimant asked the Commission for a hearing on his claim, and one was scheduled for February 22, 2000. Before the hearing was held, however, the respondents agreed to pay for another evaluation by Dr. Patterson and for the physical therapy that had previously been recommended. On April 27, 2000,

Dr. Patterson noted: "Mr. Burns returns after some PT. He is a little better. We are going to try some work hardening and see him back when this is complete. He has normal exam."

On August 3, 2000, Dr. Patterson recommended that the claimant undergo surgery, a C5-6 and C6-7 anterior discectomy and fusion. The respondents sent the claimant for an independent medical evaluation with Dr. James Adametz, who opined that surgery was inappropriate and recommended additional conservative treatment. The claimant reported that the additional treatment did not help, and Dr. Patterson recommended a myelogram. Dr. Patterson's notes state that the myelogram revealed "partial nerve root amputation at C5-6 and C6-7 on the left." Dr. Patterson again recommended surgery on January 17, 2001, but conceded that an EMG test would be appropriate to verify the existence of nerve root compression. The claimant testified that he continued to see Dr. Patterson in the following years, though the record contains no medical records from 2002 or 2003. The recommended surgery was never performed, and on May 16, 2003, the claimant was shot and killed in an unrelated incident.

## **II. Adjudication**

### **A. Jurisdiction**

Before the merits of this claim may be reached, two questions of jurisdiction must first be addressed: whether the Commission has jurisdiction to consider the claim for compensation herein; and whether the Commission has jurisdiction to award benefits to the claimant's estate, since the claimant is deceased as the result of an unrelated injury.

There is a prima facie presumption that the Arkansas Workers' Compensation Commission has jurisdiction over any claim for compensation. ARK. CODE ANN. § 11-9-707. The question of jurisdiction is a mixed one of law and fact, but the question of whether a rebuttable presumption of jurisdiction has been overcome by the evidence is a question of fact. *Baker v. Frozen Food Express Transport*, 336 Ark. 451, 987 S.W.2d 658 (1999), citing *Ester v. National Home Ctrs., Inc.*, 335 Ark. 356, 364, 981 S.W.2d 91, 95 (1998).

### **Jurisdiction of the injury**

Citing Professor Larson, the Supreme Court has identified six factors which may be considered in a question of jurisdiction: where the injury occurred; where the employment contract was made; where the employment relation existed; where the industry is localized; where the employee resides; and the place, if any, whose statute the parties have expressly adopted by contract. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971). The Court favorably quotes Professor

Larson as opining that any of the first three factors alone may typically grant jurisdiction to a forum state. *Id.* The Court also notes that workers' compensation is "governed wholly by statute," and that the statute itself must ultimately provide the basis for entertaining a claim. *Id.*

The record establishes that the injury considered herein occurred in Arkansas; and that the employment relation existed in Arkansas, in that the claimant was employed on an Arkansas construction project managed by the respondent-employer in Arkansas. Conversely, the record establishes that the contract was made in Texas; that the respondent-employer is based in Texas; and that the claimant testified that he was a resident of Texas, although at the time of his injury he was staying at a motel in Arkansas. There is no evidence that the parties ever agreed to adopt the statute of any particular state. Given this evidence, I find that the respondents have failed to rebut by a preponderance of the evidence the statutory presumption that the Arkansas Workers' Compensation Commission has jurisdiction of this work injury.

In making this finding, I am aware that in at least one case where Arkansas courts have considered an injury sustained in Arkansas by a non-resident, the Supreme Court found that the Commission lacked jurisdiction. *Baker v. Frozen Food Express Transport, supra.* However, *Baker* concerned a truck driver whose presence

in Arkansas was merely transitory, while the present claimant had been in Arkansas for an extended period of time working on a construction project, and by every indication intended to remain in Arkansas for a period of time to complete his work on the construction project.

Moreover, I note that the Workers' Compensation Act purports to cover "*any* person ... in the service of an employer under *any* contract of hire." ARK. CODE ANN. § 11-9-102(9)(A) (emphasis added). The statute does not expressly exempt non-resident employees, nor does it exempt contracts of hire made out of state. An employer, as that term is used above, is likewise defined as "*any* individual, partnership, limited liability company, association, or corporation carrying on *any* employment." ARK. CODE ANN. § 11-9-102(10) (emphasis added). An "employment" is defined as, "*Every* employment in the state in which three (3) or more employees are regularly employed by the same employer in the course of business." ARK. CODE ANN. § 11-9-102(11)(A) (emphasis added). Again, the statute does not expressly exempt out-of-state employers from its coverage. The Commission is mandated to strictly construe the provisions of the Workers' Compensation Act. ARK. CODE ANN. § 11-9-704(c)(3). Strict construction is narrow construction, requiring that nothing be taken as intended that is not clearly expressed and that the plain meaning of the language be employed. *Marshall v.*

*Madison County*, 81 Ark. App. 57, 98 S.W.3d 452 (2003).

The respondents have introduced no evidence to show that its employment in the state consisted of less than three employees. The plain language of the statute establishes its coverage over every employment within the state, regardless of whether the employer or employee is an Arkansas resident. The claimant alleges that his injury occurred in Arkansas, and the evidence establishes that the claimant was working in an employment carried on in this state – a long-term construction project managed by the respondent-employer. Considering the evidence of record, and strictly construing the provisions of the Arkansas Workers' Compensation Act, I must find that the respondents have failed to rebut by a preponderance of the evidence the statutory presumption that the Arkansas Workers' Compensation Commission has jurisdiction of this work injury.

#### **Jurisdiction to award benefits**

The remaining question is whether the Commission has jurisdiction to hear a claim by a claimant's estate and grant an award of compensation to the estate, where the claimant's death is due to an unrelated, non-compensable injury, and where the respondents have denied the compensability of the injury for which the claim has been made. It does not appear that the courts or the Full Commission have ever addressed this precise question.

Workers' compensation benefits differ from most other legal remedies in that they lack any recognizable property right that might survive in favor of heirs. 4 Larson, *Worker's Compensation Law*, § 89.01; see also *Jefferson v. Munsey Products, Inc.*, Workers' Compensation Commission E405575 (Sept. 12, 1995) (holding that no property right exists in workers' compensation benefits). Worker's compensation is governed wholly by statute, and thus any holding that an entitlement to benefits survives the claimant's death must be based solely on statute. *McCaa Chevrolet Co. v. Bounds, Admr.*, 207 Ark. 1043, 183 S.W.2d 932 (1944) (decision under prior law); cf. *International Paper Co. v. Tidwell*, 250 Ark. 623, 466 S.W.2d 488 (1971). In determining the legislature's intent, the statute should be construed in its entirety, and as a whole. *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002). As noted above, the Commission is required to strictly construe the provisions of the Workers' Compensation Act. ARK. CODE ANN. § 11-9-704(c)(3); *Marshall v. Madison County, supra*.

The parties focus their respective arguments on Ark. Code Ann. § 11-9-704(e):

(e) Award after Death. (1) No compensation for disability of an injured employee shall be payable for any period beyond his or her death.

(2) However, an award of compensation for disability may be made after the death of the injured employee for the period of disability preceding death.

On its face, this statute would appear to allow the claimant's estate to pursue

any claim after the claimant's death, so long as the benefits sought were for the period of disability preceding death. The problem is that the term "death" is specifically defined for purposes of this section as, "only death resulting from compensable injury" (emphasis added). ARK. CODE ANN. § 11-9-102(6). Given the use of "only" in the definition of the term "death," and given the requirement that the Commission strictly construe the provisions of the Workers' Compensation Act, I cannot conclude that "death" as used in Ark. Code Ann. § 11-9-704(e) includes a death from an unrelated injury. The parties in the instant claim agree that the claimant's death did *not* result from the allegedly compensable injury; thus, § 11-9-704(e) cannot save the instant claim.

However, I conclude that the claimant's estate need not resort to § 11-9-704(e) to salvage its claim. The Commission is empowered by statute to award benefits to any "employee" with a compensable injury. ARK. CODE ANN. § 11-9-102(4)(F)(i). The Act provides, in its definition of the term "employee," that "any reference to an employee who has been injured, when that employee is dead, shall also include his legal representative, dependents, and other persons to whom compensation may be payable." ARK. CODE ANN. § 11-9-102(9)(F). *Black's Law Dictionary*, 6<sup>th</sup> Edition, defines a "legal representative" as, "The term in its broadest sense, means one who stands in place of, and represents the interests of, another.

Examples include the executor or administrator of an estate and a court appointed guardian of a minor or incompetent person.”

The Legislature has expressly provided in the statute that benefits are payable to an employee *or* his legal representative if the employee is dead. Unlike the term “death,” the term “dead” is not restricted by the statute to death by a compensable injury; the term applies to all deceased employees, regardless of whether their death was brought about by their compensable injury. Considering the Workers’ Compensation Act in its entirety, construing its provisions strictly, I must conclude that the Legislature has expressly allowed for a claimant’s estate to pursue a claim of compensation after the claimant’s death for benefits incurred prior to the claimant’s death. The present claimant’s estate may therefore pursue its claim for compensation, even though the claimant is deceased. Such a conclusion is consistent with the policy and purpose of the Workers’ Compensation Act, “to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment.” ARK. CODE ANN. § 11-9-101(b). If the claimant did sustain a compensable injury, he was entitled to compensation for his lost wages – wages that are also lost assets for the estate.

I find that the respondents have failed to rebut by a preponderance of the

evidence the statutory presumption of jurisdiction; I therefore find that the Arkansas Workers' Compensation Commission has jurisdiction of this claim.

### **B. Compensability**

For a 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). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.* In claims where the claimant is deceased, his declarations concerning the injury may be received into evidence and may, if corroborated by other evidence, be sufficient to establish the injury. ARK. CODE ANN. § 11-9-705(a)(2).

The parties stipulated that the claimant sustained a compensable injury on March 16, 1999, in the form of a laceration to the face. The issue under consideration is whether the claimant also sustained a compensable cervical injury as a result of the same accident. I found the claimant's testimony regarding the accident to be credible, in that it was plausible, internally consistent, and mostly consistent with the other evidence of record. Given the stipulated fact that an accident occurred on March 16, 1999; given the claimant's credible testimony regarding the accident; and given the corroborating evidence in the medical records, I find that the claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment, and that the injury was caused by a specific incident identifiable by time and place of occurrence.

Therefore, the only remaining questions are whether the work accident of March 16, 1999, caused the harm alleged to the claimant's cervical spine, and whether the existence and extent of the alleged cervical injury is established by medical evidence, supported by objective findings. The ambulance report from the day of the accident describes the "cause of injury" as, "struck back of head." Emergency room nursing notes quote the claimant as complaining of "pain to L scapula." Within days of the accident the claimant sought treatment for the continuing pain in his left shoulder area; he eventually saw Dr. Frank Hamlin, who

suspected the left shoulder and scapula pain was connected to “radiculopathy from a cervical disk problem.” Dr. Hamlin ordered a cervical MRI, performed June 1, 1999, which revealed a mild herniation at C6-7 and a protrusion at the 5-6 interspace. Dr. Joel Patterson later opined that the herniated discs were caused by the March 16, 1999, work accident. Given this medical evidence, and the lack of any evidence of any other causal factor, I find that the claimant has proven by a preponderance of the evidence that his March 16, 1999, injury caused internal physical harm to the body requiring medical services, specifically the herniated discs in his cervical spine. I further find that the claimant has proven by a preponderance of the evidence that the existence and extent of his cervical injury is established by medical evidence supported by objective findings, specifically the MRI findings of June 6, 1999.

Since the claimant has proven by a preponderance of the evidence each element of compensability, I therefore find that he has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 16, 1999.

### **C. Temporary Total Disability Benefits**

An employee who suffers a compensable unscheduled injury is entitled to

temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The medical evidence and the claimant's testimony establish that his work limitations have been consistently applied only to his left arm, and that no other part of his body has been limited by this injury. He testified in his January 28, 2003, deposition that Dr. Patterson had restricted him from lifting more than ten pounds with his left arm; he did not testify to any restriction on his right arm. The medical evidence and the claimant's testimony establish that with the sole exception of Dr. Hamlin, the claimant's doctors have consistently determined that the claimant was capable of at least light-duty work. The only evidence suggesting otherwise is Dr. Hamlin's brief notation on two of his status reports. On those reports, dated May 24, 1999, and June 4, 1999, Dr. Hamlin checked "Off work" but gave no return date, no estimate of how long the claimant would be off, and no report of what the claimant's restrictions were. Because of the lack of any explanation or context of Dr. Hamlin's brief notation, and because of its contradiction by the remaining medical

evidence and testimony, I find that Dr. Hamlin's brief notation is entitled to less weight than the opinions expressed by the claimant's other physicians.

The most recent evidence regarding the claimant's work capabilities was from Dr. Adametz, who noted in his report of September 18, 2000, "This man is convinced that he can't go back to work at this point doing his previous job, but has been apparently at least looking around for a light duty type job, *and I think that may be in his best interest*" (emphasis added).

The claimant testified in his January 10, 2000, deposition that he was able to stand, sit, squat, walk, drive, read and write with no difficulty. When asked whether he was totally unable to work, he replied, "I don't know." He was asked what he was unable to do other than lift with his left arm, and he replied, "I don't know. I haven't tried anything. I just been being careful."

While the claimant may not have been capable of performing his previous job, he was clearly capable of working at least light duty from the time of his injury up until the time of his death. Given the medical evidence, and given the claimant's testimony, I find that the claimant has failed to prove by a preponderance of the evidence that he was totally incapacitated from earning wages during the time period from July 20, 1999, to the time of his death. Therefore, I must find that the claimant has failed to prove by a preponderance of the evidence that he was entitled

to additional temporary total disability benefits.

#### **D. Evidentiary Objections, Estoppel**

The respondents have objected on the grounds of relevancy to the claimant's submitting into evidence correspondence from the respondents' attorney dated February 15, 2000, and November 22, 2000, and correspondence from the respondent-carrier's adjuster dated February 29, 2000. While the correspondence in question has no probative value in determining compensability, it is relevant to the claimant's contention of estoppel, and therefore admissible. The respondents' objection is overruled.

In his brief, the claimant contends that the respondents should be estopped from controverting the claimant's cervical injury. Given my findings above, the claimant's estoppel argument is moot and need not be addressed.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 16, 1999. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Greg Giles, is hereby awarded the maximum statutory attorney's fee on the entire Award pursuant to ARK. CODE ANN. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge