

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F407042

BOBBY J. HEARD, EMPLOYEE

CLAIMANT

**CENTRAL ARKANSAS BUILDING MATERIALS
d/b/a MARTIN BORCHERT CO., EMPLOYER**

RESPONDENT

**STATE FARM FIRE & CASUALTY CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED OCTOBER 26, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on July 28, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Simmons S. Smith, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

_____A hearing was held on July 28, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to an alleged injury date of November 18, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$253.00 for temporary total disability and \$190.00 for permanent partial disability benefits, based on an average weekly wage of \$380.00.

_____ Claimant contends that he was injured on the job on November 18, 2003, and that he is entitled to benefits, as a result. Claimant reserves all issues relating to permanency.

Respondents controvert the claim in its entirety, contending that the claimant did not suffer a compensable injury on November 18, 2003, and that the medical records do not establish any objective evidence of a work-related injury. Respondents further contend that although claimant has asserted injuries to his neck, his left shoulder, his left ankle, and his lower back, no causal relationship can be established between the incident that occurred on November 18, 2003, and claimant's need for medical treatment associated with any of those conditions.

Respondents contend that claimant continued to receive full salary from respondent-employer through May 5, 2004, and that, in the event his claim is found to be compensable and he is found to be entitled to benefits, respondents should be entitled to a credit for any pay that was given to claimant during that period of time.

Moreover, respondents assert that the medical records do not establish entitlement to indemnity benefits beyond May 12, 2004; that, in fact, respondent-employer had scheduled an independent medical evaluation for claimant during that time frame, and that claimant failed and/or refused to attend the evaluation and, in light of that, respondents should not be liable for any benefits beyond that time in the event claimant's claim is found to be compensable.

STATEMENT OF THE CASE

Claimant is a forty-nine-year-old male who testified that he has worked for respondent-employer since 1994, a company that sells cement products and steel lath products for the stucco industry. Claimant testified that he delivered orders for respondent-employer and that on November 19, 2003, he had arrived, as normal, at work at approximately 7:15 a.m. and was told by Dan McIntosh, one of his supervisors, to deliver some pallets of cement to Stone Creations in Jacksonville. He testified that he had delivered there many times before, and it was just like any other day in the course of his job.

Claimant testified that he was alone when making this delivery to Stone Creations and that his delivery was to be unloaded there by a forklift. He testified that he parked at Stone Creations on the right-hand side of the road, just as he always does when making deliveries there. He testified that he locked the brakes on the truck and went inside to get Shane Wilkins, the foreman, to come unload the truck, which is standard operating procedure. He testified that Shane was on the phone, so another man came out to unload the truck with the forklift, and claimant went back outside and got back on top of his truck.

Claimant testified that while the truck was being unloaded, two bags of cement got busted by the forks on the lift and fell off the pallets. As someone was coming out to get those bags to carry them inside, a City of Jacksonville garbage truck backed

into claimant's truck, striking it while claimant was standing in the bed of the truck, thereby jarring him. Claimant testified that the impact made his neck pop and it knocked him down onto the bed of the truck. Notably, claimant is a very small, wiry man in stature. Claimant testified that when he arose, he was still staggering and that he grabbed hold of the forklift to keep from falling onto the ground. Claimant testified that the impact from the garbage truck was so great that it actually knocked the left fender out from the bumper of the truck, which was depicted in photographs introduced into evidence and was corroborated by the testimony of Curtis Lyman, owner of respondent-employer.

Claimant testified that he then went into the office of Stone Creations and called Mr. Lyman to let him know he had had an accident. He said that Mr. Lyman asked him if he could drive the truck back to the job, and claimant told him "Yes, sir." He testified that Mr. Lyman told him to come back because an ambulance ride would be too high. Claimant testified that Shane was on the phone when he went into the office to call Mr. Lyman and that he had to wait for Shane to get off the phone before calling Mr. Lyman.

Claimant testified that a police officer came to the scene of the accident and issued a motor vehicle collision report. That report is in evidence and corroborates claimant's version of the accident, including claimant's complaints of neck and back pain, as well.

Shane Wilkins, foreman for Stone Creations, testified on behalf of respondents and testified to quite a different story than claimant. He testified that he has worked for Stone Creations for two and a half years and is familiar with the claimant, as he has delivered to Stone Creations previously. Mr. Wilkins claims that he was a witness to the incident that occurred on November 18, 2003, although he was not listed as a witness on the police report and testified that he did not make the police officer aware that he witnessed the incident. When asked by this examiner why he would make himself known as a witness to the respondents but not the police, he replied, "I don't know."

He testified that it was he who was unloading claimant's truck with the forklift, not another man, as claimant had testified. He testified that after he had taken all of the cement bags off the pallets and had taken four pallets back to claimant, claimant was securing the pallets on the back of his truck and Mr. Wilkins was returning on the forklift back inside Stone Creations, when he heard claimant "hollering" at the driver of the garbage truck. He stated that before the driver could hear him, the truck had already hit claimant's truck and that it "jarred the whole truck, and it jarred him." Mr. Wilkins testified, however, that claimant caught the back of the cab with both of his arms and was not thrown into anything and did not fall down.

Mr. Wilkins testified that the garbage truck was going slow and that the accident was "minor." However, in a recorded statement Mr. Wilkins gave to the

insurance company, when asked, "How would you rate the collision," Mr. Wilkins answered as follows:

Uh, well it, it was pretty good because I mean, when that dump truck hit the front of the [claimant's] truck it, you could hear it, you could hear it probably 100 yards away. I mean, it was a pretty good hit. . . . And the whole truck moved.

Mr. Wilkins denied having been on the phone when claimant arrived with his load or when claimant was attempting to call Mr. Lyman to report the accident. Mr. Wilkins admitted that Randy Green, who no longer works for Stone Creations, but who was working there on November 18, 2003, sometimes drove a forklift, but he insists that it was he who was driving it that day. He further insists that claimant's load was shrink-wrapped on that date and that there is no way two bags could have busted and fallen from the load, as claimant testified. However, he did admit that sometimes claimant's loads were shrink-wrapped, and sometimes they were not. Mr. Wilkins simply insists that his memory of November 18, 2003, is perfectly clear.

Claimant testified that once he got back to respondent-employer and told Dan McIntosh he was injured, he was told to go to the Springhill Emergency Room. He stated that he drove his own vehicle there. Claimant testified, and records reflect, that he was x-rayed there, and given medication and a neck brace, and his wife picked him up there. Both claimant and his wife testified that they stopped by respondent-employer on their way home to inquire whether Mr. Lyman wanted claimant to see

a doctor. Claimant testified that Mr. Lyman said he did not, so claimant went home. Claimant testified that he returned to work three days later and attempted to work but could not work, due to the pain in his neck. He testified that Mr. Lyman sent him back home and three days later he went to see a chiropractor.

Claimant testified that his neck, back, shoulder, and ankle were all hurting and that he stayed in touch with his employer every week about his problems and sent them his doctors' statements to let them know he was hurt. Claimant testified that he continued to be paid by respondent-employer during the period of time that he was not able to work. He testified that it was his understanding that Mr. Lyman was continuing to pay him because he did not have workers' compensation insurance and did not want claimant to file a workers' compensation claim.¹ Curtis Lyman, in fact, testified that he indeed did think this was a "minor incident" and that filing a claim for it would make his insurance premiums go up, so he just paid claimant, instead. Mr. Lyman testified that he did believe, at some point, that claimant had sustained an injury on the job and testified about paying him as follows:

Q And, as far as continuing to pay Mr. Heard, that's just something you continued to do?

A I continued to do that because I kept anticipating him to return to work shortly. And, rather than pursue the claim and risk a higher policy premium, you know, if he was coming back to

¹Although there was initially some issue at the Prehearing as to whether there was coverage in this claim, that issue has been resolved and the carrier has accepted coverage; as such, that issue no longer exists between respondent-employer and respondent-carrier.

work with a minor injury, I thought, “Well, I’ll just avoid the hassle of all that.”

Claimant testified, as did Mr. Lyman, although Mr. Lyman did not pay for any of claimant’s medical treatment, he did pay for claimant’s prescriptions on his credit card.

Claimant testified that he continued to be paid by Mr. Lyman, without question, through May 5, 2004, at which time Mr. Lyman terminated him. Claimant testified that he was, at that time, under Dr. Gruenwald’s care at UAMS and that the doctor had given him four more weeks of therapy; when he took the doctor’s statement to Mr. Lyman, it seemed to anger Mr. Lyman, and Mr. Lyman fired claimant. Claimant testified that he has continued under doctors’ care since that time and, although Dr. Gruenwald released him to return to work on June 8, 2005, he was still being seen by other physicians as of the date of the hearing and had not been released by those doctors.

Mr. Lyman testified that he ceased paying claimant because he decided, after paying claimant for several months and allowing claimant to go to doctors of his own choosing, that he wanted claimant to go to another doctor and claimant refused. He testified that he made an appointment for claimant on a Monday in May to go see another doctor and that claimant “blew up and walked out the door.” He testified,

I gave him that notice on Thursday or Friday of the week before, and he told me he would not go to it. And I told him that he didn’t have a choice. He came in on Monday

and I asked him if he went to the doctor, and he said, “No.” And I said, “Well, I’ll make you another appointment for Wednesday,” which I did. And he did not go to that either, and at that point I told him he was no longer employed with Martin Borchert.

Claimant testified that he did receive some short-term disability for a period of time; he testified that he received \$140.00 per week for fifty-two weeks but that it has been exhausted and that this has been extremely difficult on his family. He testified that none of his medical bills have been paid. He admitted, and the medical records reflect, that he has had prior neck problems dating back to 1993 and some prior back problems; however, he testified that none of these problems bothered him or affected him prior to this injury of November 18, 2003, enough to cause him to miss work. In fact, he testified that prior to this injury, he never took a day off from respondent-employer. Mr. Lyman had testified that although he had only recently purchased the company, he had known of claimant to be a good, long-standing employee.

Claimant’s wife, Shirley Heard, testified that they had been married for fifteen years and together twenty years and that he had never taken time off from work with respondent-employer prior to this November 18, 2003, work-related incident. She described her husband as a “workaholic.” She said that he never even took a vacation and that they never even took a honeymoon. She testified that she works as a personal care nurse for CareLink and she knows her husband is not faking.

She testified as follows:

Q What have you had to do for your husband all during this ordeal?

A Practically dress him. Take care of him. I've dressed him and helped bathe him and shower. You have to do it because the left side – The way his neck was leaning to the side, there was no way for him – And his arm was messed up. And I'm a personal care nurse. I work for CareLink, so I knew how to put clothes on him. But I didn't know that his arm was that messed up that he couldn't raise it up – that it would bother his neck. So I basically bathed him and took care of him, you know. I helped him and dressed him.

Q Has your husband been in a lot of pain, especially right after the accident?

A Oh, God, don't mention the pain. I mean all night long – 2:00 or 3:00 o'clock in the morning – my husband is moaning and groaning. I just felt helpless. I couldn't help him, you know.

While the initial emergency room report shows that claimant complained mainly of neck pain, the police report mentioned that claimant was complaining of back pain, as well. Moreover, Dr. Cathey's reports indicate that claimant was seen on several occasions following the accident of November 18, 2003, for neck pain, as well as left shoulder pain, which started on the date of the accident.

The medical reports verify claimant's complaints of back, neck, left shoulder, and left ankle pain since the November 18, 2003, accident. While claimant's medical records also contain reports that pre-date the November 18, 2003, accident, the reports since the date of the accident at issue in this case indicate that claimant had become

free of pain from his prior problems and conditions and that the November 18, 2003, injury aggravated any prior conditions or problems he had experienced. For example, in Dr. Gruenwald's patient note of May 5, 2004, Dr. Gruenwald notes as follows:

Mr. Heard is a 47-year-old, African-American male who sustained an ankle fracture that was treated in 2002 with open reduction internal fixation on the left side. He subsequently had a motor vehicle accident when he was hit by a city trash truck in November of 2003. Since that time he has developed pain in the left ankle *which was prior to this wreck painless*. Due to this pain he has developed atrophy and decreased strength in the left lower extremity.

[Emphasis added.] In addition, the records are replete with off-work slips continuously dated from November 18, 2003, through June 8, 2005, at which time Dr. Michael Gruenwald issued a letter, opining that claimant could finally return to work.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury on November 18, 2003;
3. Claimant is entitled to treatment, both past and future, for complaints associated with his November 18, 2003, compensable injury;
4. Claimant is entitled to temporary total disability indemnity benefits from November 18, 2003, and continuing through June 8, 2005;
5. Respondents have controverted the claim in its entirety;

6. Respondents continued to pay claimant his regular rate of pay from November 18, 2003, through May 5, 2004; as such, respondents are entitled to a credit for those payments against the indemnity benefits owed claimant;

7. All issues related to permanency are reserved.

DISCUSSION

A claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). An accidental injury is caused by a specific incident, identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4)(A)(i) (2003). For an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16). The requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of

the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

It is within the Commission's sole discretion to determine the credibility of each witness and the weight to be given to their testimony, *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989), and it is not required to believe or disbelieve the testimony of any witness. *Green v. Jacuzzi Brothers*, 269 Ark. 733, 600 S.W.2d 448 (Ark. App. 1980). The Commission may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Univ. of Ark. Med. Sciences v. Hart*, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

In this case, I found claimant to be a credible, hard-working individual who proved his case by a preponderance of the evidence. His honesty and diligence in reporting to Mr. Lyman weekly with his doctors' statements so that he would remain in touch with his employer shows his sense of responsibility. Even Mr. Lyman admitted that he felt claimant had sustained a work-related injury and was continuing to pay him because he did not want to file a workers' compensation claim.

In this examiner's opinion, Shane Wilkins' credibility was questionable at best. It is quite curious to this examiner why someone who purports to be such an astute witness with complete clarity of events that happened nearly two years ago would offer himself as a witness to the respondents but would not offer himself as a witness to the police at the time of the accident, at the scene of the actual event. Furthermore,

his rating of the seriousness of the collision differed from his recorded statement and that of his live testimony. In this examiner's opinion, he simply was not a credible witness.

The medical records reflect, and claimant admits, that he had some pre-existing medical problems. Records also reflect, however, that claimant's conditions had stabilized prior to the November 18, 2003, incident, and that claimant was always able to work prior to November 18, 2003, full time and with no restrictions; in fact, both he and his wife testified that he never even took vacation time off.

It is certainly the law that the employer takes the employee as he finds him, *see Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). Notwithstanding, the claimant still must prove that a work-related injury occurred in order to aggravate or worsen his pre-existing condition; and, in this examiner's opinion, the claimant herein has proven by a preponderance of the credible evidence that he sustained a compensable injury.

It is this examiner's opinion that claimant has met his burden of proving the compensability of his claim by a preponderance of the credible evidence and he is entitled to all medical and indemnity benefits from the date of injury through the date Dr. Gruenwald released him to return to work on June 8, 2005.

Respondents' assertion that the medical records do not establish entitlement to indemnity benefits beyond May 12, 2004, because respondent-employer had

scheduled an independent medical evaluation for claimant during that time frame and that claimant failed and/or refused to attend the evaluation is not compelling. First, respondents offered no evidence that an IME had been scheduled, other than the testimony of Mr. Lyman, the same man who had allowed claimant to see the doctor of his choice for almost six months at that point and had chosen not to pay for his medical treatment but had continued to pay him wages to avoid having to file a workers' compensation claim. In this examiner's opinion, respondents could have petitioned the Commission for an IME but chose not to do so.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay for claimant's medical treatment, both past and future, for complaints associated with his November 18, 2003, compensable injury.

Respondents are directed to pay claimant temporary total disability indemnity benefits from November 18, 2003, and continuing through June 8, 2005.

Respondents are entitled to a credit for regular wages paid claimant from November 18, 2003, through May 5, 2004, against the indemnity benefits owed claimant.

Respondents are directed to pay the claimant's attorney, Mr. Simmons Smith, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge