

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F408666**

**JAMES BABB, EMPLOYEE**

**CLAIMANT**

**MCSHERER TRUCKING, EMPLOYER**

**RESPONDENT**

**AMERICAN HOME ASSURANCE  
COMPANY, CARRIER**

**RESPONDENT**

**OPINION FILED JANUARY 26, 2006**

A hearing in this case was conducted on September 26, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Little Rock, Pulaski County, Arkansas.

Claimant appeared on his own behalf.

Respondents were represented by Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

\_\_\_\_\_A prehearing telephone conference was held in this claim on May 17, 2005; the Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to four stipulations, which were confirmed by the parties at the hearing. The following stipulations are hereby accepted:

1. The employee-employer-carrier relationship existed on July 19, 2004 and at all other relevant times.

2. Claimant sustained a compensable injury to his left shoulder and chest on July 19, 2004.

3. Claimant's average weekly wage is \$369.00; his temporary total disability rate is

\$247.00; and his permanent partial disability rate is \$185.00 per week.

4. Respondents controvert the compensability of Claimant's lower back injury.

At the September 26, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. After agreeing to amend the first issue, the parties then agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable low back injury on or about July 30, 2004.

2. Whether Claimant is entitled to a change of physicians.

3. Whether Claimant is entitled to additional medical benefits.

4. Whether Claimant is entitled to temporary total disability benefits.

Claimant contends that he injured his low back on or about July 30, 2004 as he either stepped from his truck or pulled on a tarp covering the load on his trailer. He seeks a change of physician, additional medical benefits, and temporary total disability benefits. Respondents contend that there are no objective findings in support of this claim and that Claimant suffers from a pre-existing back condition.

### **DISCUSSION**

\_\_\_\_\_ Claimant initially sustained a compensable injury to his left shoulder and chest on July 19, 2004. Respondents accepted this injury as compensable, and as Claimant noted, "[a]ll that was taken care of."

Claimant testified that he subsequently injured his low back on or about July 30, 2004. He initially testified that his injury occurred as follows:

Well, I was hauling coil steel, and you had to put tarps over that, you know, to keep the weather off of it. And I was just pulling on a tarp, and I could feel a little thing, you know, but it didn't hurt for a while.

But after you get -- after awhile you get to driving, and it just starts to -- I guess the bouncing and stuff, you know. It's right down here in your lower thing (indicating), and it seems like when you sit up or lay down or do anything it just -- you know, it jerks you, your right leg, you know.

Claimant testified that he felt "like a little pull, or, you know, like a muscle strain." He completed adjusting the load and started driving; as he drove, his right leg began to hurt "more and more."

On cross-examination, Claimant was questioned concerning the history he gave on direct examination and Dr. Scott Smith's August 3, 2004 note: "[Claimant] reports his onset was when he was getting out of his truck."

Q. So you're saying that when you told the Judge that you hurt yourself getting out of the truck, that's not true, or is the tarp incident not true?

A. I'm not sure, you know. I mean, probably getting out of the truck, I probably felt a pain, but -- and a twang or something. But, you know, I wouldn't think I just hurt myself, you know what I mean --

Q. So you can't point to a specific incident --

A. No, it really didn't start hurting until after I got through tarping the load, you know what I mean....

Claimant later conceded that, between exiting his truck or tarping his load, "I guess I just didn't know for sure, you know, what caused it."

Claimant was also questioned concerning a prior back surgery and preexisting low back problems.

Q. Have you presented anything in the records today, in the medical records or any other exhibits, to indicate that the problem in your back is anything other than degenerative and related to that surgery?

A. Is what, sir?

Q. Is related to the preexisting back problems and your back just being wore

out, as you said, have you presented anything --

A. I don't know. That's what the doctor said he told the insurance stuff that my back was just worn out. He told me it had a little arthritis on it and a few spurs, so, you know, I mean, you know, he's the professional....

Claimant testified that his doctor never performed an MRI: "And he just took an x-ray, you know, and said -- he told me my back was worn out."

Dr. Smith's August 3, 2004 note contains the following reference to an objective study.

X-rays, AP and lateral of the lumbar spine show extensive degenerative change with loss of disc space height at L5-S1, anterior osteophyte formation on the bodies of L4, L3 and L1. There is also extensive osteophyte formation anteriorly at the T12-L1 level.

Dr. Smith recorded an impression of "[l]umbar spondylosis with sciatica." Although Dr. Smith did not note spasms upon examination, he did prescribe medication "as needed for muscle spasms...." He placed work restrictions on Claimant, prescribed additional medications, and prescribed a lumbar program for stabilization.

Claimant returned to Dr. Smith on August 17, 2004. Claimant reported "tremendous improvement in his buttock and thigh pain." Dr. Smith recorded an impression of "[r]ight lower extremity sciatica with lumbar spondylosis, improved." He continued Claimant's physical therapy and adjusted his work restrictions.

#### **A. Compensability**

Claimant contends that he sustained a compensable injury to his low back on or about July 30, 2004. Among other requirements, Claimant must prove that his injury is one "arising out of and in the course of employment...." Ark. Code Ann. § 11-9-102(4)(A)(i).

"Arising out of the employment" refers to the origin or cause of the accident.... There must be a causal connection between the accident and

a risk which is reasonably incident to the employment. There must be affirmative proof of a distinctive employment risk as the cause of the injury. The connection with the employment cannot be supplied by speculation.

Gerber Prods. v. McDonald, 15 Ark. App. 226, 229, 691 S.W.2d 879, \_\_\_ (1985) (citations omitted). It is Claimant's burden to prove a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant has not sustained his burden of proving by a preponderance of the evidence that his alleged injury arose out of his employment. Claimant gave one history concerning the cause of his injury to Dr. Smith on August 3, 2004; he gave another history upon direct examination at the hearing on September 26, 2005. Claimant candidly admitted: "I guess I just didn't know for sure, you know, what caused it." Upon this testimony, it would constitute speculation to determine that Claimant's injury is connected with his employment.

#### **B. Change of Physician**

Claimant seeks a change of physician under Ark. Code Ann. § 11-9-514. However, an employer is not liable for payments under this code section, in a case of contested liability where the Commission decides that the injury does not come within the provisions of the workers' compensation law. See Ark. Code Ann. § 11-9-510; Johnson v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Opinion filed June 8, 2000 (E705919). Because Claimant did not establish the compensability of his claim, Respondents cannot be required to pay for a change of physician.

### **C. Remaining Issues**

It is not necessary to discuss Claimant's request for medical or temporary total disability benefits. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of his alleged injury, he failed to establish the compensability of his claim, and compensation must be denied. Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. § 11-9-102(4)(F)(i).

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

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on July 19, 2004 and at all other relevant times.
3. Claimant sustained a compensable injury to his left shoulder and chest on July 19, 2004.
4. Claimant's average weekly wage is \$369.00; his temporary total disability rate is \$247.00; and his permanent partial disability rate is \$185.00 per week.
5. Respondents controvert the compensability of Claimant's lower back injury.
- \_\_\_\_\_6. Claimant did not sustain his burden of proving the compensability of his claim by a preponderance of the evidence. Specifically, he did not prove that his injury arose out of his employment. Claimant's testimony indicates that he is not certain as to the cause of his injury, and the connection with the employment cannot be supplied by speculation.
7. Claimant is not entitled to a change of physician because, under Ark. Code Ann. § 11-9-510, Respondents' liability has not been proven. In the absence of a finding of compensability, this relief cannot be awarded.

8. Because Claimant failed to prove a compensable injury, it is not necessary to discuss his request for medical or temporary total disability benefits.

**ORDER**

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

DFA/ml