

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509151

DAVID HARDER,
EMPLOYEE

CLAIMANT

SEARCY ACOUSTICAL & DRYWALL,
EMPLOYER

RESPONDENT

FEDERATED MUTUAL INS. CO.

RESPONDENT

OPINION FILED JULY 24, 2006

Hearing before Administrative Law Judge Mark Churchwell in Searcy, White County, Arkansas.

Claimant represented by Honorable Philip Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Honorable Eric Newkirk, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 23, 2006 in Searcy, Arkansas. A Prehearing Order was entered in this case on February 17, 2006. This Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the Prehearing Order or at the start of the hearing and are hereby accepted:

1. The employer-employee-carrier relationship existed between the parties on all relevant dates, including December 8, 2003.
2. The respondent has controverted this case in its entirety.
3. The claimant's average weekly wage on December 8, 2003 was \$429, establishing a temporary total disability compensation rate of \$286 per week and a permanent partial disability compensation rate of \$215 per week if this claim is found compensable.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability.
2. TTD from the date of the accident to a date yet to be determined.
3. Medical expenses.
4. Controverted attorney's fees.

The record consists of the May 23, 2006 hearing transcript and the exhibits contained therein, except that I have excluded from consideration Respondents' proffered Exhibit No. 3.

DISCUSSION

1. Evidentiary Objections

The claimant's attorney objected to the admissibility of Respondents' Exhibit No. 3, a document entitled Judgment And Commitment Order on the grounds that the document was not provided to the claimant's attorney at least seven days before the hearing and on the grounds that the document is not relevant to the issues under consideration. The claimant's attorney also objected on page 40 of the hearing transcript to the respondents' attorney questioning the claimant regarding information contained in that document. The respondents' attorney acknowledged that the document was not provided to the claimant's attorney at least seven days prior to the hearing because the respondents' attorney did not receive the document more than seven days prior to the hearing. The respondents' attorney also asserts that the document is relevant to the claimant's credibility.

The Prehearing Order filed in this case on February 17, 2006 indicates that no document will be allowed into evidence unless exchanged by the parties at least seven days prior to the hearing except upon leave of the Commission and a showing of good cause. In the present case, the

respondents' attorney indicated that he began to investigate the claimant's possible criminal convictions as the result of the claimant's deposition on January 18, 2006, some four months prior to the hearing conducted on May 23, 2006.

While I note that the respondents' attorney was diligent in providing the document to the claimant's attorney once the respondents' attorney received the document, I am without sufficient evidence to conclude that the respondents' attorney was diligent in the manner by which he pursued the document, and I therefore lack sufficient evidence to conclude that a good cause exception to the seven day rule exists in this case. I therefore will not consider respondents' proffered Exhibit No. 3 in deciding this matter. However, my prehearing order does not bar witness questioning regarding documents not in the record. I find no error in the respondents' attorney questioning the claimant regarding his knowledge of information purportedly contained in the proffered exhibit, and the claimant's relevant answers on page 40 of the hearing transcript have been considered in rendering a decision in this case.

2. Compensability of Injury Allegedly Sustained on December 8, 2003

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Mr. Harder seeks benefits for injuries which he allegedly sustained during an automobile accident on December 8, 2003. Prior to the accident, Mr. Harder had traveled from his home in Clinton to a job site in the Gravel Ridge or Sherwood area, picked up company tools, and was transporting those tools to a different work site in Little Rock. As Mr. Harder was traveling on the Interstate, he saw metal debris fall out of the back of a truck onto the

highway and swerved, but failed to miss the debris. A metal rotor weighing approximately 100 to 150 pounds hit the fender, door, and window Mr. Harder's vehicle. After the police arrived and worked the accident, Mr. Harder arrived at the Little Rock work site at approximately 5:00 p.m., approximately two hours after he was originally scheduled to arrive.

Because Mr. Harder was traveling from job site to job site carrying company tools when the accident occurred, I find that the circumstances of this case fit within the job site to job site exception to the going and coming rule discussed by the Arkansas Supreme Court in Moncus v. Billingsley Logging, ___ Ark. ___, ___ S.W.3d ___ (05-1353 delivered May 18, 2006). Because Mr. Harder was transporting tools owned by the employer, and was transporting those tools for the benefit of the employer by having them made available to other employees at the new work site in Little Rock, I also find that the travel directly furthered the interest of his employer so that he was performing employment services for Searcy Acoustical and Drywall when the accident occurred. Id.

After reviewing the conflicting evidence in the record, however, I find that the claimant has failed to establish by a preponderance of the credible evidence that he sustained any injury as a result of the incident that occurred on December 8, 2003. In reaching this conclusion, I have considered the testimony of Mr. Harder and Mr. Hale, who both testified that Mr. Harder was complaining of back pain on December 8, 2003 after the incident. However, Mr. Harder acknowledged that he did not report any physical injury to the police. Mr. Harder acknowledged that he was not struck by any metal debris, but instead asserts that he became injured by swerving his car while trying to miss the debris. Furthermore, contrary to the testimony of Mr. Harder and Mr. Hale that Mr. Harder's symptoms began on December 8, 2003, the December 15, 2003 emergency room report from Conway Regional Health Center contains a history that Mr. Harder developed low back pain two days after the accident. In addition, a December 16, 2003 report from Conway Therapy Services appears to corroborate the emergency room report that Mr. Harder did not develop back pain on December 8, 2003. According to the December 16, 2003 report, the

accident occurred on December 8, 2003 (a Monday), and Mr. Harder woke up in some degree of pain on Friday thereafter.

Complicating any understanding of the sequence of events which occurred in this case, I further note that Dr. Waller, on January 16, 2004, reports to have reviewed x-rays from October 2003 (i.e., before the incident in December 2003) and to have identified an incomplete fusion of the sacral ala, resulting in a lumbarization of the S1 level. Dr. Waller stated that "Mr. Harder's history is definitely consistent with low back pain in most of his adult life. This is consistent with what we are seeing on x-rays." After considering the nature and extent of the automobile incident described by the claimant, in light of the medical records indicating that the claimant did not present to any hospital until after consulting an attorney and not until seven days after the incident at issue, in light of the medical histories indicating that Mr. Harder reported his back pain starting two or more days after the incident on the Interstate, and in light of Dr. Waller's history indicating that Mr. Harder may have reported a history of low back pain most of his adult life, which Dr. Waller considered consistent with the abnormalities indicated on x-

ray performed before the December 8, 2003 incident, I find that the claimant has failed to prove by a preponderance of the credible evidence that he sustained any degree of physical injury as a result of the incident which occurred on December 8, 2003.

Because I find that the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury, I find that any other issues regarding the claimant's request for specific benefits, and the respondents' request for an offset on those benefits, are all moot issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employer-employee-carrier relationship existed between the parties on all relevant dates, including December 8, 2003.

2. The respondents have controverted this case in its entirety.

3. The claimant's average weekly wage on December 8, 2003 was \$429, establishing a temporary total disability compensation rate of \$286 per week and a permanent partial disability compensation rate of \$215 per week if this claim is found compensable.

4. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

HONORABLE MARK CHURCHWELL
Administrative Law Judge