

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F510767**

<b>DAVID T. AUSTIN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>EPOXYN PRODUCTS, LLC, EMPLOYER</b>	<b>RESPONDENT</b>
<b>NEW HAMPSHIRE INSURANCE COMPANY, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 29, 2007**

Hearing before Administrative Law Judge O. Milton Fine II on August 1, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

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

**STATEMENT OF THE CASE**

On August 1, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A pre-hearing conference took place on April 9, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

**Stipulations**

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. An additional one was added. These stipulations, which I accept, are the following:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including September 24, 2005.
3. Respondents have controverted this claim in its entirety.

### Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Respondents withdrew the issue concerning whether the claim should be dismissed pursuant to AWCC R. 099.13. Claimant added an issue concerning the constitutionality of the Workers' Compensation Act. That left the following, which were litigated:

1. Whether the Arkansas Workers' Compensation Act is constitutional.
2. Whether the Claimant sustained a compensable injury on September 24, 2005.
3. Whether the Claimant is entitled to reasonable and necessary medical treatment, including the treatment recommended by Dr. Travis Richardson.

### Contentions

Claimant's contention concerning the motion to dismiss has been removed because that issue has been withdrawn. The contentions of the parties are now as follows:

#### Claimant:

1. The Claimant contends that he sustained a compensable injury to his back arising out of and during the scope of his employment with the Respondent and is entitled to all reasonable and necessary medical treatment and all related workers' compensation benefits.
2. The Claimant sought medical treatment by Dr. Beth Knight and Dr. Travis Richardson since the Joint Petition hearing. The Claimant has sent two

letters to the Respondent advising that Mr. Austin was seeking medical treatment.

Respondents:

1. Respondents contend that the Claimant did not suffer a compensable injury on September 24, 2005 while working for Respondent employer.
2. Respondents contend that the Claimant refused to submit to a drug/alcohol test and that such refusal allows Respondents to deny this claim in its entirety.
3. Respondents contend that the Claimant's alleged injury was substantially occasioned by the use of drugs or alcohol and that they are not liable for benefits associated with the same.
4. Respondents further contend that there is no medical evidence supported by objective findings that a work-related injury occurred.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant/witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant's proffered Exhibit 2 should be admitted into evidence.

4. As held by the Arkansas Court of Appeals, the Arkansas Workers' Compensation Act is constitutional on the points argued by Claimant, and his motion to recuse is without merit.
5. As a result of Claimant's refusal to submit to a blood alcohol contest test on September 28, 2005, under Ark. Code Ann. § 11-9-102(4)(B)(iv) there is a presumption that his injury was substantially occasioned by the use of drugs or alcohol.
6. The sole evidence offered to rebut the presumption was Claimant's bare, unsupported testimony. I do not find Claimant to be a credible witness.
7. The claim is not compensable under Ark. Code Ann. § 11-9-102(4)(B)(iv).
8. Claimant has failed to establish the existence of a compensable injury by medical evidence supported by objective findings.
9. Because Claimant on May 13, 1999, exhibited the same symptoms, in the form of left ring and small finger numbness as documented in his medical records, as he did following the alleged September 24, 2005 accident, it would require speculation and conjecture to tie Claimant's symptoms to the alleged September 24, 2005 incident.
10. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his neck or back on September 24, 2005.
11. The reasonable and necessary medical care issue is moot in light of the above findings.

**PRELIMINARY RULINGS**

Admissibility of Claimant's Proffered Exhibit 2

At the close of the hearing, the following colloquy occurred:

JUDGE FINE: Thank you, Mr. Spencer. Let me ask you, just quickly, Mr. Austin testified as to having had two MRIs, one on, the first one on the lower back, then one on the upper.

MR. SPENCER: Yes, sir.

JUDGE FINE: Are those reports in the record?

MR. SPENCER: Yes, Your Honor, they are . . . .

JUDGE FINE: Okay. This on page 5 of Claimant's One

MR. SPENCER: Yes, Your Honor.

JUDGE FINE: the radiological data, that's the report on the MRI. I saw the reference to that. Did we have a regular radiological report in evidence from the MRI itself? I know that refers to one as if, it's from the person that's writing this report, but is the report itself in evidence?

MR. SPENCER: I would think the MRI report is there, Your Honor. I think it's in the Respondents'--

JUDGE FINE: Mr. Parrish, do you have, is it in your exhibits?

MR. PARRISH: No, Your Honor, we're not introducing it.

JUDGE FINE: Okay.

MR. SPENCER: Well, do you have it?

MR. PARRISH: You have it.

MR. SPENCER: All right.

JUDGE FINE: Okay. I just wanted to see--I saw that reference, but I did note that I didn't see where there was a radiological report in the exhibit. [T. 45-46]

Claimant then sought to admit the MRI report by moving for the admission of an extremely large stack of documents that he hoped contained the report. However, after reviewing the proffered exhibit and ascertaining that it did not contain the report, he located it. Respondents' counsel had faxed it to him on July 30, 2007—two days prior to the hearing.

The following colloquy then occurred:

JUDGE FINE: Okay. Let me state for the record it's a two page exhibit. The first page is a letter purported[ly] from Mr. Parrish, dated July 30, 2007, and the second page is marked or entitled Community Medical Center of Izard County Radiology Report. It's a two page exhibit. Mr. Parrish, what is your response to this exhibit?

MR. PARRISH: First of all, for clarity's sake, I would like to note that the fax, or the MRI report itself has a fax receipt indicating it was faxed to me on Friday. I did not review it until Monday. I believe there's an indication at the top when it went through, July 25<sup>th</sup>. There's not?

JUDGE FINE: No, there's no, it appears to be, there is some mark at the top where this had been faxed prior to this copy. But that is, but that language has been cut in half. It's barely legible. I'd be speculating.

MR. PARRISH: Well, either way, I reviewed it Monday and faxed it personally. I typed the letter and everything and faxed it personally to Mr. Spencer. I do object to its introduction here at the end of the hearing on the same basis as I did the other records. I realize two days is not a great amount of time, but he has had it in his office for two days. And to introduce records here at the end of the hearing certainly doesn't comply with your prehearing order, and I think it's prejudicial to Respondents.

JUDGE FINE: Prejudicial in what respect, Mr. Parrish?

MR. PARRISH: In the fact that exhibits have previously been designated. To start introducing medical here at the end of the hearing after we've already taken testimony and already introduced what were designated as Claimant's exhibits. I don't think it's fair to my client.

MR. SPENCER: Your Honor, I fail to see how it's prejudicial to him. The only reason that I would say it's prejudicial to him is in his closing I think he indicated there is no MRI, or something to that effect, which flagged to me that the MRI was not in his exhibit. I thought it would be.

MR. PARRISH: No, I indicated there was no degenerative findings. I never said there was no MRI.

MR. SPENCER: Whatever. And Your Honor, we can't comply with the rule if we don't get the evidence until two days before the hearing. And I think it's not, Mr. Parrish has already indicated it's not, it basically is consistent with what Doctor Travis Richardson indicated in his letter which is a part of Claimant's Exhibit One. However, I think it is better when he's objecting to a finding of compensability based upon objective evidence, it's better to go ahead and have the MRI report part of the record, certainly, for the fairness of all parties.

JUDGE FINE: I have one question. We're going to need to move on, but I have a question for you, Mr. Parrish.

MR. PARRISH: Yes, sir.

JUDGE FINE: You've reviewed Claimant's Exhibit Two, Proffered.

MR. PARRISH: Correct.

JUDGE FINE: Did these documents come from your office?

MR. PARRISH: Yes. [T. 61-63]

The prehearing order in this case, Commission Exhibit 1, provides in pertinent part:

Exhibits and the identity of witnesses must be exchanged at least seven (7) days prior to the hearing . . . Medical reports must be exchanged at least seven (7) days prior to the hearing pursuant to Ark. Code Ann. § 11-9-705(c). Evidence not disclosed in compliance with this Order shall not be considered as evidence unless prior permission of the Commission is obtained and for good cause shown.

In turn, Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl. 2002) reads in pertinent part:

Any party proposing to introduce medical reports or testimony of physicians at the hearing of a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and to the commission copies of the written reports of the physicians of their findings and opinions at least seven (7) days prior to the date of the hearing.

Section 11-9-705(c)(3) provides that a party who fails to abide by the requirements of this provision may not be allowed to introduce medical reports at the hearing, "except in the

discretion of the hearing officer or the commission.” Moreover, § 11-9-705(c)(4) states that the parties may consent to the waiving of the time periods.

Claimant by his own admission failed to meet § 11-9-705(c)(2)(A) by submitting his proffered exhibit, the MRI report, at least seven days prior to the hearing. Respondents did not consent to a waiver the abridgement of the time period. Under the statute, I have the discretion to admit or exclude the evidence. See *Coleman v. Pro Transportation, Inc.*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 7, 2007).

Based upon my review, I find that this evidence should be admitted. The statements of counsel establish that the report did not come into Respondents’ hands until after the passing of the seven-day deadline. Not until two days prior to the hearing was the report provided to Claimant’s counsel. The deadline had long since run by this point. Respondents cannot avail themselves of the seven-day period when they did not disclose the evidence within the period necessary to enable Claimant to meet the deadline. I note that Respondents did not argue that Claimant was capable of obtaining the MRI report on his own—and therefore, I will not take that into account. Cf. *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006)(improper for administrative law judge to address issues not raised at hearing), *rev’d on other grounds*, No. CA06-398 (Dec. 6, 2006)(unpublished).

Respondents did argue that admission of the evidence would be prejudicial to them; but they did not, and cannot, show that they were unfairly surprised by this evidence. They were aware of the existence of the document. Moreover, it was brought out during Claimant’s testimony, affording Respondents the opportunity to question him about it. See

*Stutts v. Catfish Plus*, 1997 AWCC 143, Claim No. E515182 (Full Commission Opinion filed March 17, 1997)(“Respondents simply cannot claim that they would be surprised or otherwise prejudiced by our consideration of medical records that they themselves have previously submitted with their pre-hearing questionnaire.”)

Claimant argued in turn that he believed that the document was in Respondents’ Exhibit 1 and did not realize that this was not the case until Respondents’ closing argument. The statements made at the hearing bear out the first statement, but not the second. In fact, Respondents’ counsel readily stated in response to a question that the report was not in their exhibits and that they were not introducing it.

Again, the circumstances recounted above mitigate against excluding the document under § 11-9-705(c)(2)(A). The Commission must adhere to basic rules of fair play. *St. Paul Insurance Co. v. Touzin*, 267 Ark. 539, 592 S.W.2d 447 (1980). In addition, admission of the report, of which the parties have been aware and which is relevant to the issue of whether Claimant sustained a compensable injury, helps to “best ascertain the rights of the parties” under § 11-9-705(a)(1). On the bases of the foregoing, the report will be admitted. See *Jobe v. St. Vincent North/Sherwood*, 2005 AWCC 109, Claim No. F105594 (Full Commission Opinion filed May 27, 2005), *aff’d sub nom. St. Vincent Health Systems v. Jobe*, No. CA 05-823 (Ark. Ct. App. Feb. 8, 2006)(unpublished).

### **CASE IN CHIEF**

#### **Summary of Evidence**

Claimant was the sole witness at the hearing. In addition to the prehearing order discussed above, also admitted into evidence in this case was Claimant’s Exhibit 1, a

compilation of his medical records, consisting of one unnumbered index page and six individually numbered pages; Claimant's Exhibit 2, a letter from Respondents' counsel and the MRI report discussed above, consisting of two unnumbered pages; Respondents' Exhibit 1, Claimant's medical records, consisting of two unnumbered index pages and 64 individually numbered pages; and Respondents' Exhibit 2, non-medical records, consisting of one index page and 5 individually numbered pages. Claimant's pleading challenging the constitutionality of the Workers' Compensation Act, along with Respondents' response thereto, have been blue-backed to the record.

### Testimony

David T. Austin. Claimant testified that he is 50 years old, is a high school graduate, and has two associate degrees. He was employed by Respondent Epoxyn, and testified that he was injured there on Saturday, September 24, 2005:

I was working overtime that day. And I was banding up pallets for shipment. There was a concave hole at one end of my work station. And as I was walking around the pallet, I stepped into that hole. My ankle started to give and I twisted myself. I caught myself on a pallet as I was going down. I did not fall all the way to the floor. [T. 12]

He stated that he resumed working, but that within a short time period he noticed a numbness in the middle and ring fingers of his left hand that continued to his arm pit. He did not recall experiencing pain at the time. After finishing his shift, Claimant went home. Because the sensation continued, he obtained a phone number from the front of his employee manual, called, and left a message reporting what had occurred.

According to Claimant, when he returned to work Monday morning at 6:00 a.m. At approximately 1:30 p.m. that day his supervisor took him into his office and dressed him down for not following reporting procedure. Claimant filled out an accident report. The

supervisor asked him if he wished to see a doctor, but Claimant told him he wanted to wait and see if the symptoms were only temporary. The next day, Tuesday, he was again pulled off the line in the afternoon and was given a written warning for not reporting the incident properly. On Wednesday, he called in around 4:00 a.m. and left a message that he was not coming to work and that he needed to see a physician. The plant nurse called him around 8:00 a.m. that same day and told him to be at the doctor's office at 11:00 or 11:30 a.m. Sometime before leaving for the late-morning appointment, however, Claimant consumed two beers—14-ounce cans of Old Milwaukee—with a muffin. Claimant testified that when he arrived at the doctor's office, he was taken to the laboratory because “they wanted to do a BAC.” He told them that he would not comply because (1) he was afraid of needles, (2) he did not think it was relevant because the accident occurred four days before, and (3) he “had had a couple of beers at lunch.” Claimant stated that he offered to submit to a urinalysis, but the medical personnel told him he could not see a doctor unless he submitted to a blood test. He testified that the personnel send him home and stated that they would attempt to contact someone at Respondent Epoxy.

Claimant stated that he went home and called Epoxy and left a message with the nurse concerning what had happened. She returned the call the next day, and Claimant told her that he still wished to see a doctor. However, the nurse did not contact him again, and the next day he received a letter of termination.

He testified that his symptoms have not gone away. He stated that he still has tingling in his left middle and ring fingers, which “transmits through my wrist, up underneath my arm, into my left arm pit . . . [a]nd sometimes it's more acute than others.” He described

that at the hearing, he was only experiencing numbness; but he stated that at other times he experiences throbbing and discomfort in his left arm as well.

Dr. Travis Richardson referred him to Dr. Robbins for a nerve conduction study. But Claimant has not seen Dr. Robbins and has not undergone the study. He stated that he cannot afford the procedure. However, he underwent two MRIs at his own expense. The first was inadvertently performed on his lower back. The second was correctly performed on his upper spine and neck. Claimant stated that the physician never used a pinprick test on him.

With regard to the blood alcohol content test the doctor's office wanted to perform, Claimant stated that he offered to undergo a urinalysis, and that he was not aware that they wished "to do a BAC" until the tourniquet was placed on his arm. Claimant admitted that he has had trouble with alcohol in the past and that he still drinks. However, he stated that he does not believe he has a drinking problem at present because he does not drink to get drunk.

When questioned by Respondents, Claimant stated that he had not had any back injuries prior to September 2005. However, he did treat with a chiropractor at on two or three occasions for some back pain that he attributed to wear and tear. His only major medical problem in the past was a car/train collision in 1982 that left him with broken ribs and also with glass in his left forearm that gravitated to his elbow. He stated that he was not diagnosed with arthritis at any point prior to September 2005. His records should not show any neck pain or problems, or numbness or tingling in his left arm, prior to September 2005. However, he admitted that he did not know what was in his records. He denied that he had ever had neurological problems, such as seizures or DTs, because of his drinking.

At the time he was terminated, Claimant had worked a little less than two weeks for Respondent Epoxy. On September 24, he underwent a performance evaluation that was poor—he scored 55 out of 100.

With regard to his alleged injury, Claimant testified that he stumbled and caught himself with his left arm. At the time, only an individual named Jason was working in the department, and he was in a different location. Claimant did not call him to testify.

With regard to his drinking on the morning of his doctor appointment, Claimant disagreed that the doctor needed to know how much alcohol he had consumed. Claimant mentioned that he had been a police officer. However, he was not aware whether a urinalysis, which he agreed to undergo, could have tested his blood-alcohol level.

He admitted that he drank a 14-ounce beer at 9:30 the morning of the hearing (which began at 11:34 a.m.). Claimant agreed that it was “probably not” appropriate to consume alcohol before coming to court.

Claimant testified that he experiences pain in his back and neck, but is unsure if it is due to his alleged accident. With regard to the numbness he experienced after the accident, he could not say exactly when the onset of symptoms occurred that day. He did not injure his legs, ankle or feet in the fall. He did not experience spasms in his neck or back.

Since leaving Respondent Epoxy, Claimant has had an internet marketing job. In addition, he was a claims adjuster for an after-market auto warranty company from November 2005 to July 2006. The only time he has not worked was from September to November of 2005.

When questioned by me, Claimant testified that Respondent Epoxyn manufactures laboratory tables. His job was to prepare the product for shipment. He covered the tables with cardboard and attached the tables to pallets with metal banding to keep them from sliding. On the date of the alleged accident, he stepped into a hole in the concrete floor that was 12 inches in diameter and one to two inches deep. When this occurred, his ankle started to give, and he twisted and caught himself on a pallet of product before going all the way to the floor. He described his immediate symptoms as

Instantaneous discomfort [in the mid to lower back area] because at any time that you twist yourself in a method or a fashion or a form which is unintentional and unnatural, there is going to be an associated discomfort. It was not something that put up big red flags and bells went off and, you know, I'm ready for the ambulance, take me away kind of thing.

He stated that he felt a dull throbbing and a numbness that radiated up his left arm into his armpit. The sensation is still present.

Claimant testified that Jason did not witness him stumble. Claimant stated that he had stepped in the hole before and had mentioned it to Jason. When the incident at issue occurred, he stated to Jason that "I stepped in that d-a-m-n hole again."

On the date of the alleged incident, Claimant worked from 6:00 a.m. to 2:30 p.m. When he got home that day, he called the number in his employee handbook and left a message concerning what had happened. The next day, Sunday, he was still experiencing the tingling and numbness that radiated up his arm. He worked Monday and Tuesday, and on Wednesday at 4:00 a.m. called in to Respondent Epoxyn and left a voice mail that he wanted to see a doctor. Linda, the nurse, called back and 7:30 a.m. and talked with him. She promised to call him back after she made an appointment for him. Linda called Claimant after 8:00 a.m. and told him about the appointment and that he would have to

undergo a drug screen. However, Claimant consumed a “couple of beers,” 14-ounce cans of Old Milwaukee, with lunch before going to the appointment.

With regard to his police background, Claimant stated that he had been a conservation officer in Illinois and was charged with enforcing, inter alia, criminal laws. He made DUI arrests. He admitted that he has had a past problem with alcohol. While he did not have any concerns about passing a drug test, he was aware that his beer consumption would show up on the BAC test.

After his questioning, Claimant made the following statement: “I have one thing to say, sir. At no time when I was in the employ of Epoxyn did I drink before or during my work shift. Period. At no time. And that is the truth.”

Respondents called no witnesses.

#### Records-Medical

The medical records of Claimant that were introduced at the August 1, 2007 hearing and are part of Claimant’s Exhibits 1 and 2 and Respondents’ Exhibit 1 reflect the following:

Pre-incident. In December 1991, Claimant was diagnosed as having alcoholism and being intoxicated. The records document that he was involuntarily admitted to the hospital after threatening suicide. He admitted to having a drinking problem and to using cocaine in the past.

On December 10, 1994, he presented with a chin laceration after falling while inebriated and striking a burglar alarm. He did not complain of back or neck pain. An Arkansas EMS report dated October 2, 1995 reflects that Claimant had been reported to have had seizure-like activity. He was also observed to have neurological damage in the form of a drooping left eye. Medical records from 1996 show continued problems with

alcoholism and a seizure-like incident in November 2006. He presented with contracting of fingers and hands but no convulsions. In 1997 he presented with a history of DTs.

On May 13, 1999, he had been loading and unloading tires and presented with neck pain and numbness in his left ring finger and pinky. He was diagnosed as having a probable C7 nerve irritation secondary to arthritis from overwork syndrome. In 2000 he was treated following a suicide attempt and in April 2001 again suffered a bout of alcoholism (consumption of two fifths of vodka) along with a possible Lorazepam overdose (30 .5 mg tablets). His medical history includes reference to "a possible seizure disorder," along with a "longstanding hx [history] of alcohol abuse," a left shoulder dislocation and "chronic" pain from a 1984 car/train accident. In March 2002, Claimant presented with, inter alia, bumps on the right side of his neck which were assessed to be lipomas.

Post-incident. Claimant presented to Burnett-Croom-Lincoln-Paden LLC, a family and internal medicine practice group, on September 28, 2005. A blood alcohol content (BAC) test was attempted at 11:29 a.m. that day. The record states:

D/S CANCELLED. PATIENT REFUSED THE COLLECTION FOR ALCOHOL AS REQUESTED PER EPOXYN. CALL TO KARLA MADE AND SHE WAS AT LUNCH TALKED TO RON AT EPOXYN AND INFORMED HIM OF PATIENT'S REFUSAL AND PATIENT LEFT THE BUILDING. PATIENT WAS WILLING TO SUBMIT TO THE URINE DRUG SCREEN BUT NOT THE ALCOHOL. PATIENT UPSET AND LEFT.

A note also dated September 29, 2005 on the Burnett facsimile page reads: "The lab tech stated 'he smelled of alcohol.'" However, there is no reference to Claimant by name.

Records from Regional Orthopaedic Health Care reflect that Claimant presented on December 12, 2005 with numbness and tingling, primarily in the nail and ring finger of his left arm. He stated that the numbness goes all the way from his arm pit to his left arm, and

is associated with neck pain. Claimant stated that on September 24, 2005 “he was at work and stepped into a concrete hole at the end of his workstation and he filed an accident report at that time, but he has had pain ever since.” He described his pain as a five on a one to ten scale, and as a “numbness and constant.” Claimant also stated that he has some lower back pain. This has all occurred since the accident. He stated that bending and lifting makes the condition worse, and not doing so makes it better. He did not have caudle or saddle anesthesia. The record lacks any objective findings, but Dr. Travis Richardson noted:

This is a patient that I believe has pain in his neck, as well as pain in his low back, as well as pain, tingling and numbness into his left upper extremity. I do believe that he has this pain and it is real. I have no evidence or report to indicate that it did occur at work, but from what he explains to me today it is concordant with the date that he was reporting. He did stated that he has had these symptoms ever since and he stated that he did file an absent report that day at work indicating that he had this particular pain that he is describing to me today, as well as the associated paresthesias in his left hand that he is describing to me this very day. I think that he needs a cervical series of x-rays, as well as a cervical MRI. If he does indeed have a C6-7 herniated nucleus pulposus and neural foraminal stenosis that is left and paracentral it is probably related to this particular accident. This could also be coming at the C7-8 level, but I would likely think it is more at the C6-7 level. We will see him back in the future. He is a self-pay and he states that he has a lawsuit pending on this. If he wants to see me back I would be glad to see him.

A record dated January 31, 2006 reflects that Claimant presented as being “very fatigued and stressed,” with no appetite and a cold. There is no reference to pain, numbness or tingling in his arms, back or neck. On June 22, 2006, he complained of changes in his blood pressure, along with visual changes and dizziness. Again, no complaints regarding his neck, arms or back were noted. However, his neck was noted not to have any lymphadenopathy.

A note dated March 2, 2006 from "Lindsay Simpson" of the "BCLP Clinic" reads:

Patient came into the clinic for a work comp drugscreen. Epoxyn requires their employees to have a drugscreen and alcohol test. The patient stated that he had no problem doing a drug test, but that the accident did not occur today & he would not submit to an alcohol test. He also stated that he had the injury a few days before & did not understand why it would matter if he had an alcohol test on the day of his work comp. drug screen since the incident was not that day. He did have a faint smell of alcohol.

This note does not reference Claimant by name. Moreover, the date of this alleged incident is not noted—whether it occurred on March 2, 2006 or earlier.

Claimant underwent an MRI of his cervical spine on June 21, 2007, the radiological report reads:

No abnormal widening or abnormal-signal intensity is seen in the cervical spinal cord. There are mild discogenic-end plate changes in the cervical spine. The C2-3 disc level is unremarkable. There is moderate disc space narrowing and end plate osteophyte spurring at the C3-4 level. There is mild diffuse disc bulge. The subarachnoid space is almost completely effaced. There is also left sided foraminal narrowing secondary to the osteophyte spurring. No spinal stenosis is seen. At the C4-5 level, there is moderate disc space narrowing. There is diffuse disc bulge and diffuse-end plate osteophyte bridging. There is bilateral foraminal narrowing, worse on the left. No disc herniation is seen. The subarachnoid space is largely effaced. No focal disc herniation is seen. No spinal stenosis is seen. At the C5-6 level, there is disc space narrowing and diffuse disc bulge. There is bilateral foraminal narrowing, worse on the right. The subarachnoid space is largely effaced. No spinal stenosis or focal disc herniation is seen. At the C6-7 level, there is disc space narrowing and diffuse disc bulge. There is osteophyte spurring resulting in bilateral foraminal stenosis. No focal disc herniation is seen. No spinal stenosis is identified. The C7-T1 disc level is unremarkable.

- IMP. 1. MULTILEVEL DEGENERATIVE DISC SPACE DISEASE IS PRESENT WITH DISC SPACE NARROWING, OSTEOPHYTE BRIDGING AND DIFFUSE DISC BULGE FROM THE C3-4 LEVEL THROUGH THE C6-7 LEVEL. THE CHANGES RESULT IN MILD NARROWING OF THE SPINAL CANAL, BUT NO SPINAL STENOSIS. FORAMINAL NARROWING IS PRESENT AT THE MULTIPLE LEVELS AS RECOUNTED ABOVE.
2. NO CERVICAL DISC HERNIATION IDENTIFIED.

Dr. Richardson again saw Claimant on June 22, 2007. He noted that Claimant did not have any new complaints, but still complained of pain in his ring and small fingers. Dr. Richardson opined that “[i]t is very consistent with ulnar nerve neuropathy or at least a C8-T1 dermatoma type finding.” He also noted that there is some involvement of the left middle finger, but it is primarily the ulnar side of the left hand that is involved. The doctor’s interpretation of Claimant’s MRI is as follows:

A MRI was reviewed and the data shows degenerative disc disease from the C3-4 level down to the C6-7 level. The neuroforamen do appear to be involved on the left side at the 3-4, 4-5, 5-6 and to a lesser extent the 6-7 level, but this is only noted on the parasagittal views. The central view does not show any significant central stenosis at all. On the axillary cuts there are some decreased neuroforamen primarily on the left at the 5-6 levels and there is also what I believe to be neuroforaminal encroachment from 3-4 all the way down to 6-7, but based on his physical examination it does not seem to correlate. Otherwise, I do not see any acute abnormalities at this time that could explain, be remarkable or correlative to his pain.

In his assessment, Dr. Richardson stated:

This is a 50-year-old white male that complains of a work-related injury. It appears after reviewing his cervical spine MRI that he does have involvement at the C3-4 level down to the disc at the C6-7 level. I would expect this to affect nerve roots, C4-C7, none of which seem to be correlative to his particular problem and pain. At one point with his left middle finger involvement one could have been convinced that there was a C7 involvement, but today it just does not seem that it is there. Based on the neuroforamen and the central findings on his MRI at the C7, C8 and T1 nerve root I just do not believe that this is like[ly] causing his symptomatology and I have told him that today. I think at this point he could have ulnar nerve neuropathy and I have told him that he would need to see a neurologist for nerve conduction velocity studies, as well as EMG’s. This could also verify whether or not it is indeed involved at the level of the neck. It could also show EMG changes and this could indicate acute or chronic muscular type abnormalities or involvement. Nevertheless, I have discussed his case with him in detail today and I do not believe at this point after viewing his neck that there is surgical intervention that is warranted and I do not believe his subjective examination and objective examination correlates to his MRI. At this point we have given him Dr. Robbins’ name and a phone number and he is going to try to correlate an appointment with him for nerve conduction velocity studies. I will forward a copy of this particular note from today’s examination to Dr. Robbins here in

Mtn. Home with a brief letter. At this particular point I have told Mr. Austin he can follow-up with me on a p.r.n. basis.

In his June 22, 2007 letter to Dr. Bruce Robbins referenced above, Dr. Richardson wrote:

[Claimant] has had a work-related injury and I am, at this particular point, unable to correlate his particular symptomatology to his neck exam and/or MRI. I think that he could possibly have ulnar nerve neuropathy and I have recommended that he do nerve conduction velocity studies and possibly even EMG's at this point.

### Records-Nonmedical

The non-medical records that were introduced at the August 1, 2007 hearing and are part of Respondents' Exhibit 2 reflect the following:

On May 5, 2006, Claimant's counsel wrote Respondents' counsel that Claimant would be unable to be deposed on May 12, 2006 because "[h]e will be out of town on business the night before and is unsure as to the time he will return." The exhibit also contains three pages printed from the website of Global Resorts Network, which Claimant testified that he was involved with. The final document in the exhibit is a wage statement for Claimant.

### ADJUDICATION

#### A. Constitutionality

Claimant filed on July 18, 2007, a "Motion to Recuse and Notice of Intent to Introduce Evidence at Hearing." Therein, he argues, among other things, that the provisions of the Arkansas Workers' Compensation Act that provide for the establishment of administrative law judges are unconstitutional. The motion and related documents have been blue-backed to the record in this case, as has Respondents' response thereto, which was filed on August 9, 2007.

The points raised in the motion are identical to those considered and rejected by the Arkansas Court of Appeals in *Long v. Wal-Mart Stores, Inc.*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 21, 2007), *pet. for rev. denied*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Sup. Ct. May 3, 2007). Claimant has made no attempt to distinguish *Long*, or to argue that it be modified or overruled. *Long* controls here. The Act is constitutional, and Claimant's motion is hereby denied.

B. Compensability

Claimant has alleged that he incurred an injury to his back as a result of a fall at Respondent Epoxy on September 24, 2005.

The evidence establishes that when Claimant presented for treatment at the emergency room on September 28, 2005, four days after the alleged injury, he refused to submit to a blood alcohol content test. One of the reasons he gave for doing so was that he had consumed two 14-ounce cans of beer. This is especially interesting in light of the following facts: (1) Claimant's medical records show that he is an alcoholic and has drunk to excess multiple times in the past; (2) this alcohol was consumed in the morning hours before his 11:00 or 11:30 a.m. appointment and after the company nurse had contacted him that morning and told him about the appointment; and (3) Claimant admitted on the stand that he had drunk a beer before the August 1, 2007 hearing, which began at 11:34 a.m. and at which he knew or should have known he was going to testify.

Arkansas Code Annotated § 11-9-102(4)(B)(iv) provides:

"Compensable injury does not include:

...

(iv)(a) Injury where the accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(b) The presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders.

(c) Every employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body.

(d) An employee shall not be entitled to compensation unless it is proved by a preponderance of the evidence that the alcohol, illegal drugs, or prescription drugs utilized in contravention of the physician's orders did not substantially occasion the injury or accident.

Based upon Claimant's well-documented history of alcohol abuse, it was both reasonable and responsible behavior by the medical personnel to test Claimant for the presence of alcohol, even four days after the accident. As Respondents argued, in order for Claimant to be properly treated, it had to be ascertained whether he had consumed alcohol, which, among other things, would have affected the administration of medication to him.

However, Claimant refused to submit to the testing. There is therefore a presumption under the statute quoted above that his injury was substantially occasioned by the use of drugs or alcohol. *Thompson v. Jeffrey Sand Co.*, 1999 AWCC 329, Claim No. E705151 (Full Commission Opinion filed October 17, 1999).

This is a rebuttable presumption. Whether Claimant has overcome the presumption is a question of fact for the Commission's determination. *Weaver v. Whitaker Furniture Co.*, 55 Ark. App. 400, 935 S.W.2d 584 (1996). Claimant's only rebuttal evidence was his testimony that he did not consume any alcohol before or during his shift on September 24, 2005. A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility

and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

At this point, I must state that I find Claimant's credibility to be questionable. This determination is based upon not only his testimony when arrayed against the balance of the evidence regarding his drinking, but his demeanor on the witness stand as well. I find that he has not rebutted the presumption, and that the claim is thus not compensable.

Even if this were not the case, Claimant still has not proven that he suffered a compensable injury. Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of his alleged injury, defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. *Id.* § 11-9-102(4)(D). "Objective findings" are those findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for

establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003)(citing *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947)).

Claimant testified that later in the day following his alleged accident, he felt discomfort, throbbing, tingling and numbness in his left arm. He stated that those symptoms continued to the day of the hearing. While he also testified that he had back and neck pain, he admitted that he was not sure if this had anything to do with the accident. The cervical MRI Claimant underwent, as read by both Dr. Richardson and the radiologist, appeared to contain only degenerative findings. There were no objective findings of an acute injury—certainly not the nerve root-compression injury Claimant described. Dr. Richardson could not correlate Claimant's symptoms with the MRI findings. Hence, he has failed to establish the existence of a compensable injury by medical evidence supported by objective findings.

Moreover, Claimant has primarily complained of the numbness and tingling affecting the ring and small fingers of his left hand. As set forth above, Claimant exhibited the same symptoms on May 13, 1999, after unloading tires. Then, he was diagnosed as having a probable C7 nerve irritation secondary to arthritis from overwork syndrome. It would thus require speculation and conjecture to tie the numbness and tingling to the September 24, 2005 incident—something I am not permitted to do. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979); *Gregory v. State Hwy. & Transp. Dept.*, 2006 AWCC 23 (Feb. 7, 2006).

Hence, Claimant has not proven by a preponderance of the evidence that his alleged neck and back injury occurred as a result of his work for Respondent Epoxyn.

C. Reasonable and Necessary Medical Care

Because of the above finding, the other issue litigated at the hearing— whether Claimant is entitled to reasonable and necessary medical care—is moot and will not be addressed.

**CONCLUSION**

Claimant's argument that the Arkansas Workers' Compensation Act is unconstitutional has been rejected previously by the Arkansas Court of Appeals, and is thus denied here as well. He bears the burden of proving by a preponderance of the evidence that he has suffered a compensable. He did not do this. Therefore, his claim also must be, and hereby is, denied and dismissed.

**IT IS SO ORDERED.**

---

Hon. O. Milton Fine II  
Administrative Law Judge