

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F607512

KELLY S. COLLINS, EMPLOYEE

CLAIMANT

CAMP MITCHELL, EMPLOYER

RESPONDENT

**LIBERTY MUTUAL INSURANCE COMPANY,
CARRIER/TPA**

RESPONDENT

OPINION FILED DECEMBER 18, 2007

Hearing before Administrative Law Judge O. Milton Fine II on September 19, 2007, in Conway, Faulkner County, Arkansas.

Claimant represented by Mr. Scott Adams, Attorney at Law, Morrilton, Arkansas.

Respondents represented by Mr. David Jones, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 19, 2007, the above-captioned claim was heard in Conway, Arkansas. A prehearing conference took place on August 20, 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. With two additional stipulations reached at the hearing, they are the following, which I accept:

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

2. The employee/employer/carrier relationship existed on or about June 3, 2006.
3. Respondents have previously accepted this claim as a "medical only" claim, and have previously paid for the Claimant's initial testing and treatment.
4. On February 9, 2007, Respondent responded by letter from David C. Jones, attorney for Liberty Mutual Insurance Co.
5. Respondents accepted the claim as compensable but controverted the extent of injury caused by the accident, the medical expense, the need for surgery or further medical treatment or expenses. As a result, Dr. Saer withdrew his scheduled surgery for cervical herniation.
6. Claimant has previously been granted her one-time change of physician from Dr. Melissa Seme to Dr. Jacky Dunn pursuant to Order entered by the Hon. Pat Capps Hannah.
7. Respondents have denied the Claimant's request for temporary total disability benefits and the request for additional treatment.
8. Claimant drew unemployment benefits from August 19, 2006 to November 12, 2006.
9. Respondents are controverting this claim in its entirety.
10. If called, Reverend Helen and Mr. Hargreaves would testify as to the accuracy of the wage figures in the Form AR-W that is Respondents' Exhibit 3.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. With the addition of one regarding the valuation of Claimant's average weekly wage, the following were litigated:

Claimant:

1. Whether Claimant is entitled to temporary total disability benefits.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to a controverted attorney's fee.

Respondent:

1. Whether Claimant sustained a compensable injury on June 3, 2006.
2. Whether the Claimant's cervical herniation and further need for treatment are causally connected to and associated with the incident alleged herein. Furthermore, whether the "major cause" of the Claimant's need for treatment is associated with the incident herein.
3. Whether the Claimant merely sustained a temporary aggravation of her preexisting condition.
4. Whether there was an independent intervening cause between the time of the original incident and the need for the treatment being sought, which should relieve the Respondents of liability.
5. Whether Respondents are entitled to an offset against Claimant's unemployment benefits.

Administrative Law Judge

1. Whether Claimant's former attorney, R.H. "Bud" Mills, is entitled to an attorney's lien, and if so, in what amount.
2. What was Claimant's average weekly wage?

Contentions

Claimant:

1. The Claimant contends she is entitled to temporary total disability benefit payments now.
2. Claimant contends she is entitled to surgery coverage and medical and pharmaceutical expense payments, past and future.
3. Claimant contends that she is entitled to attorney's fees for the controverted hearing.
4. Claimant contends she is entitled to permanent partial disability as established after healing period has run.
5. Claimant's rate of pay was \$6.00 per hour.
6. Claimant contends that Respondent, Liberty Mutual Group, by letter of January 23, 2007 to Dr. Edward Saer, certified the surgery as medically necessary and appropriate and authorized discectomy and related services.

Respondents:

1. Respondents contend that the Claimant's cervical issues and need for further treatment are not causally connected to the incident alleged herein. Furthermore, Respondents contend that the "major cause" of the Claimant's need for treatment is not associated with the incident alleged herein.

2. In the alternative, Respondents contend that the Claimant merely sustained a temporary aggravation of her preexisting condition, and no further benefits should be warranted.
3. Respondents contend that the Claimant may have sustained an independent intervening event between the time of the original incident alleged herein and her need for possible surgical intervention, which should relieve Respondents of liability.
4. Respondents contend that the Claimant would not be entitled to any temporary total disability benefits, as she left her employment with the insured when work was still available. Respondents contend that the Claimant continued to work for the insured after the incident herein, and left her employment for reasons apparently unrelated to the incident and injury in question. Respondents anticipate that they will be able to narrow the disputed period of temporary total disability benefits following the Claimant's deposition.
5. Respondents would reserve the right to join the Second Injury Fund at a later date, if or when wage loss becomes an issue.
6. Respondents contend that the Claimant has previously received and been granted her one-time change of physician from Dr. Melissa Seme to Dr. Jacky Dunn pursuant to the Order entered by Hon. Pat Capps Hannah.
- G. Respondents are entitled to an offset due to the unemployment benefits Claimant has received.

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 witnesses and to observe their 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. The record will not be left open to admit a second MRI report regarding Claimant because the report was never proffered to the Commission and because admission of a document not provided to Respondents at least seven days prior to the hearing would violate both the prehearing order and Ark. Code Ann. § 11-9-705(c)(2)(A) (Supp. 2007).
4. Since Claimant did not comply with Ark. Code Ann. § 11-9-705(c)(2)(A) (Supp. 2007), her testimony concerning the results of the excluded MRI report will not be considered.
5. Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury.
6. All of the other issues are moot in light of the above finding regarding compensability.

PRELIMINARY RULING

Admission of MRI Not Offered at Hearing

At the hearing, the following colloquy occurred:

MR. ADAMS: Your Honor . . . Ms. Collins advises she's had a recent MRI which the record of that apparently has not made it into my file. And we would ask for leave of the Court file that later, if possible.

. . .

JUDGE FINE: All right . . . [t]here was also your second request, as I understand it--this morning you say you--there is a MRI report that you do not have in your possession today, and you're asking that the record be left open for submission of that MRI report? Did I hear you correctly?

MR. ADAMS: That's correct, Your Honor.

JUDGE FINE: Mr. Jones, what is your response to that?

MR. JONES: Judge, we would obviously object. We don't know what that MRI report shows. Obviously, we would have to have an opportunity to depose doctors, plus I believe in the blue-back documents, there is a MRI that was tak[en] on 9/14/06 that's already in evidence. So I don't know what--what relevance a new MRI would be at this point. So we'd obviously object to the submission of any documents after today's date. It wasn't submitted, obviously, in compliance with your Prehearing Order, plus there's already an MRI in the reports. So--

JUDGE FINE: Mr. Adams, any--any response to that objection?

MR. ADAMS: Your Honor, as to whether the MRI, the latest MRI, would be relevant, I obviously couldn't speak to that. I think that would take a physician to speak to that issue. In fairness to the Claimant, I believe that since it is a recent test, that the Claimant should have the opportunity to submit that to the Court.

JUDGE FINE: Are you aware of the reason why you don't have possession of the MRI report, Mr. Adams?

MR. ADAMS: Ms. Collins says that she brought it to my office, had my secretary copy it. I don't--I don't see it in the file. I did not know until today that she had a more recent document that should have made it into the file.

I took the matter under advisement. Later, during Claimant's testimony, her counsel sought to elicit from her the results of the MRI. Respondents again objected. The objection was taken under advisement, and the testimony was proffered.

At the outset, I note that Claimant never proffered this record after the hearing. The Commission's file on the instant claim does not reflect that the MRI report was ever sent to the Commission. For that reason alone, the record will not be held open.

But even had the record been properly proffered, the record should not have been left open to receive it. First, Claimant admittedly had notice of this later MRI test prior to the hearing, which mitigates against leaving the record open to receive it. *Cf. Mason v. Lauck*, 232 Ark. 891, 340 S.W.2d 575 (1960)(in order to submit new evidence, a claimant must show, *inter alia*, that he or she was diligent in presenting the evidence to the Commission); *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982)(same). Second, admission of the record without providing it to Respondents at least seven days prior to the hearing contravenes not only the prehearing order in this case, Commission Exhibit 1, but Ark. Code Ann. § 11-9-705(c)(2)(A) (Supp. 2007) as well. 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). Hence, Claimant's request to leave the record open is denied.

As for the proffered testimony concerning the MRI results, I find that because Claimant did not comply with § 11-9-705(c)(2)(A), the testimony should not be admitted.

CASE IN CHIEFSummary of Evidence

Two witnesses testified at the hearing: Claimant and Rev. Helen Hargreaves.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Respondents' Exhibit 1, medical records of Claimant, consisting of one index page and six individually numbered pages; Respondents' Exhibit 2, non-medical records of Claimant including a Form AR-N, unemployment records and W-2s, consisting of one index page and 17 individually numbered pages; Respondents' Exhibit 3, a Form AR-W for Claimant consisting of one page; and Respondents' Exhibit 4, a note from Dr. Jacky Dunn regarding Claimant dated November 21, 2006. Also, at the request of Claimant and without objection from Respondents, ten pages of medical records from the Commission's file that were attached to Claimant's prehearing questionnaire response were blue-backed to the record.

Testimony

Kelly Collins. Claimant testified on direct that she worked for Respondent Camp Mitchell as a helper in the kitchen and in the laundry. She earned \$6.00 per hour; and while she stated that her hours varied, she estimated that she normally worked around 30 hours per week. Claimant began working there in February or March of 2006.

As for her alleged work injury on June 3, 2006, she testified as follows:

I was working in the kitchen and I was picking up a big can [misprint in transcript—presumably “pan”] of carrots. It had water in it. And I brought it over to the stove. I went to put it up on the stove and I—I was kind of in a hurry and went to throw up on top of the stove, and somebody hollered my name and I turned to talk to—see what was happening with this other person that hollered at me. And I twisted and about that time, it was like—the pan was like up in mid-air, and something popped in my back.

Claimant stated the woman who hollered at her was standing there when her injury occurred. She further testified that she continued with her work that day and performed housekeeping at Camp Mitchell the following day. It was approximately one month before she sought medical treatment. Claimant first stated that she worked "quite a lot" that month. She then stated that after a couple of days, she began to hurt so much that she talked to Helen Hargreaves, who told her to take the week off. Later, she testified that she only continued to work for approximately one week after the June 3, 2006 incident. Apparently, the discrepancy is due at least in part to Claimant's failure to differentiate between her work for Camp Mitchell and her work for EDS, discussed *infra*.

Claimant stated that she saw Dr. Melissa Seme, who was the physician in Perryville. Dr. Seme took an x-ray, diagnosed her as having a pulled muscle, gave her some pain pills, and sent her to two weeks of physical therapy. She stated that the therapy did not help her. Claimant testified that other tests were conducted, and she was ultimately diagnosed as having a C5-6 disc herniation. She also treated with Drs. Jacky Dunn and Edward Saer. Dr. Dunn referred her to Dr. Saer, who decided to perform surgery to repair the herniation. But the Respondent carrier refused to approve the procedure. From there, Claimant was returned to physical therapy in Morrilton for two more weeks. However, the therapy again did not help. Ultimately she underwent an MRI that showed a cervical disc herniation.

She stated that prior to the June 3, 2006 incident, she had never experienced any problems with her back, neck or spinal column, and had never been treated for an injury to or abnormality in her neck or spinal column. She had no pre-existing problem that the incident aggravated, and never before experienced anything that led her to believe that she

had a pre-existing herniation. Claimant testified that had never missed any work due to a hurting back.

After leaving her job at Camp Mitchell, Claimant stated that she continued to work for EDS, which is a home health care program. She had started there in March 2006, and her employment there overlapped with her tenure at Camp Mitchell. At first, she testified that her work at EDS was not substantially different than at Camp Mitchell. Then, she stated that unlike at Camp Mitchell, where she lifted heavy pots, the EDS job did not require heavy lifting. There, she cared for patients in their homes by running errands, washing dishes, and cleaning house. She left EDS on July 2, 2006 after she began dropping things and hurting badly, along with being told by her client that he was afraid of a lawsuit and had nothing for her to do.

Claimant testified that she has not worked since leaving EDS. She has tried to find other employment, but has been unable to do so because of the instant claim. Currently, she remains under the care of Dr. Dunn, who has given her a three-to-five-pound lifting restriction and a restriction on frequent bending over and sitting up.

When questioned by Respondents on cross-examination, Claimant admitted that it was possible that she only earned a total of \$253.50 while working at Camp Mitchell. She changed her testimony to state that she began work there in May 2006. But she disagreed that she only worked 16½ hours in all prior to the alleged injury and only 17 hours total thereafter.

Claimant again testified that at the time she was lifting the pan of carrots, it was her back that popped, although she is claiming a neck injury. Her arms, neck and back hurt, and the numbness in her left arm remained for awhile. She stated that she had never had

those problems in the past, and had not been previously treated for her back, legs, or arm numbness. Claimant did not report the injury to Rev. Hargreaves that day because it was around 10:30 p.m. and Hargreaves was in Little Rock getting groceries. Claimant stated that she also was hurt that evening while moving groceries. But when asked by Hargreaves why she was rubbing her neck, she did not mention the incidents involving the pan and the groceries. A lady in the housekeeping area spoke with Hargreaves about Claimant; but when Hargreaves asked her if she wanted to file a claim, she was reluctant to do so because she “did not think it was as bad as it was.” However, Claimant attributed the month’s delay in filing a claim to Hargreaves’ failure, after promising to do so, to promptly supply her with the necessary paperwork. She stated that Hargreaves did not have the paperwork the day they first visited about her injury. Hargreaves also asked her if she wanted to see a doctor, but Claimant stated that she “didn’t think it was that bad.”

As for her prior work history, Claimant stated that she had performed construction work. This included sheet rock and finishing work, along with roofing. Once, because a machine had broken down, she had to throw over her shoulder shingles weighing 20 to 50 pounds per square and carry them up a ladder. Another job, for American Imaging, required that she carry big boxes of copy paper.

With respect to her home health job, she stated that she worked for a certain gentleman 35 hours per week. After leaving that job in July 2006, she filled out an unemployment application on August 15, 2006 in which she stated that she could begin full-time work immediately. She continued to receive unemployment benefits through approximately November 11 or 12 of 2006, when she had exhausted her benefits. During

this time, Claimant was attempting to work and was holding herself out as being fully able to work.

According to Claimant, she had previously suffered domestic abuse, including several blows to the head. She was presented with records showing that she sought treatment in October and November 2005, seven to eight months prior to the alleged injury, for low back pain that had been present for two months due to being “thrown through a wall,” along with numbness in her left arm and leg. In response, Claimant stated that she did not remember this, that the numbness did not relate to her neck, but instead to “sugar problems,” and that the pain was in her low back and not her neck. But she admitted that these were the same symptoms she stated she had following the alleged June 2006 injury, and that she did not mention this treatment in her deposition or otherwise in her discovery responses. She attributed this failure to forgetfulness instead of deception. Claimant agreed that because she did not have an MRI contemporaneously with the Fall 2005 treatments, it is unknown whether she had the cervical disc herniation prior to the June 2006 incident.

Claimant testified that she has not had any further injuries since June 2006. When confronted with the November 4, 2006 from Dr. Dunn’s office reflecting that Claimant had recovered from the June 2006 injury and had reinjured her neck the date before the visit, Claimant denied this occurred. But then she stated that she injured herself while pushing a television that was on rollers. She admitted that she did not mention these injuries in her deposition when asked then if she had had any subsequent injuries. She also admitted that she did not make her doctors who have treated her for the injury at issue aware of the past abuse or of her November 2005 treatment for similar problems.

Claimant stated that she does not have any health care coverage. And she admitted that she was convicted of a class C felony for participating in an Internet-type scam in which she was sent a check for \$115,000.00, cashed it, and attempted to purchase some vehicles for \$75,000.00. She is still on probation for that offense.

On redirect examination by her attorney, Claimant testified that the physical abuse she suffered related to an incident where her head was shoved into a television. She stated that she experienced no back pain, but had numbness in her arms that went away after two days, well before the time she went to work at Camp Mitchell. The pain was not similar to that she experienced following the June 2006 incident. No one recommended that she have an MRI in the Fall of 2005. And the injuries she suffered as a result of the abuse were not significant enough to keep her from working or to mention to her treating physicians in 2006. She had not suffered back pain or problems within the three-month period prior to the injury at issue. Claimant did not feel like she had a herniated disc prior to June 2006. When asked to explain why she did not mention the abuse to her doctors, she testified:

Yes, sir, I've been abused on several different-different times. You go through abuse and you try to forget that. You go on. You do what you got to do to make it from day to day. You don't think back to being beat on every single day, or whatever day, how many other times it may occur. Especially when you have children that you have to raise . . . And yes, sir, I did totally forg[e]t about this.

With regard to her felony conviction, Claimant explained that she was scammed by someone she was conversing with over the Internet and that she pled *nolo contendere* because she did not have a capable lawyer.

Under re-cross examination, Claimant admitted that the numbness in her arms was the same both before and after the alleged accident. And while she previously testified that her physical problems resolved quickly in the Fall of 2005, they had been around for two months at that point. The November 2005 record reflects that she had had the back injury since February 2005. While she did not have an MRI after being seen at the Good Samaritan Clinic, it was a free clinic, and Claimant did not have coverage to obtain an MRI herself.

When questioned by me, Claimant stated that she probably reported her injury to Rev. Hargreaves the day after it occurred. Claimant testified that she had no neck problems before June 3, 2006. When she was lifting the pan of carrots, she felt a “pop” in her back in an area on her spine about five inches below her neck. Later in the evening, she felt a “pop” and a burning across her left shoulder when she slung five bags of groceries over her left shoulder. She did not feel any numbness until later in the evening, and had trouble exiting her car when she got home. However, upon further recross-examination by Respondents, Claimant testified that she did feel numbness right after lifting the pan of carrots.

Helen Hargreaves. Called by Respondents, Rev. Hargreaves testified that she shares with her husband the position of Executive Director of Camp Mitchell. She lives at the camp. She is employed by the Episcopal Diocese of Arkansas. Rev. Hargreaves stated:

I remember the night that it happened, going into the kitchen and Kelly was in there and she was rubbing her shoulder and—and I asked her if she was okay and she said—I think she said that, yeah, it was okay. She was sore. Her shoulder was sore.

Claimant did not tell her about lifting a pot. And the hearing was the first Hargreaves had heard of the grocery-lifting incident. Hargreaves had not witnessed either incident. She stated that she found out the next day about the carrots accident when another worker told her. She approached Claimant and told her she needed to fill out an incident report, but Claimant did not wish to. Later, maybe that same day, Claimant returned and decided to fill out an incident report. Hargreaves could not recall whether she asked Claimant at that time if she wished to see a doctor. She identified the Form AR-N in Respondents' Exhibit 2 as the one that was filed, on July 5, 2006. Claimant decided to file because she did not feel she was making much progress. Hargreaves stated that she was unaware of Claimant's prior medical history.

When questioned by Claimant, Rev. Hargreaves testified that Claimant was able to do her job, including lifting, while she was at the camp.

Records

Respondents' Exhibit 1. The medical records of Claimant in this exhibit reflect that Claimant presented to the Good Samaritan Clinic on October 28, 2004 with "low back pain x2 months." She also presented with trauma. The note states, "was thrown thru a wall pt. lives [with] an abusing 'friend.'" An x-ray was scheduled, but the results are not in the record.

On November 14, 2005, she saw Dr. Melissa Seme. The record states:

The patient comes in with complaints of a left-sided back pain and headache. She said like her head is about to blow off. She said that she has some period where her left side feels numb in the chest and back. She said that the left arm will go numb, sometimes it is the leg, it lasts 30 minutes. It usually happens to [sic] work. States she is unable to do anything to make the numb feeling pass. She also reports that she has been off of her Premarin for the last 4 months. She says she has a feeling of

pressure in both of her eyes, pain under her left breast that will shoot through her back. She said that the shooting pain the breast always happens with the numbness. She said sometimes she has a brief stab like a knife in the upper abdomen. She has woken up at night with pain like this twice in the last week and has noticed no changes with food eating. She has had a lot of stress recently, some shortness of breath, nausea with pain. She has had a history of low blood sugars. She does admit that she has not been eating regularly. She does a lot of work at her job where she is hauling paperwork back and forth preparing them for the people who scan them on to film. She removes staples. She has had a history of an injury back in February of this year. She had an abusive boyfriend who kicked her into a dresser that caught her across the low back, and she thinks she has re-injured that at work.

Claimant underwent an x-ray of her vertical spine on July 10, 2006. It showed normal alignment of the cervical vertical bodies, with interspaces maintained and no fracture observed. In a note by Dr. Dunn on September 6, 2006, Claimant was diagnosed as having a suprascapular muscle spasm on the left. Dr. Donald Hill saw Claimant on November 4, 2006 and observed "considerable spasm in her neck." He prescribed Flexoril and Lorcet. Dr. Hill stated that Claimant 'did have an injury in June and had pretty much recovered from that." A handwritten notation on that date reads: "cc: Reinjured an injury from June 2006. Reinjured yesterday Neck at L shoulder."

Respondents' Exhibit 2. Claimant signed a Form AR-N on July 5, 2006 that reads that she injured her left shoulder, along with her neck, spine and upper arm on June 3, 2006 between 11:30 and 3:30 (a.m. or p.m. is not noted) when she was "lifting a heavy pan of food onto stove [and] turning to the right at the same time."

Her documents from the Arkansas Department of Workforce Services reflect that she applied for and received unemployment benefits from April 22, 2006 to May 27, 2006 and from August 15, 2006 to November 18, 2006, when her benefits were exhausted. She was working as a personal care aide for Luther Warren, but was laid off "for personal

reasons due to lack of work” on August 7, 2006. In reapplying for benefits after this severance, Claimant (in an unsigned application) stated that she could begin a job immediately and work full-time, she had disabilities that limited her ability to perform normal job duties.

Her W-2 from the Episcopal Diocese of Arkansas reflects that she earned a total of \$253.50 in 2006 while working for them.

Respondents' Exhibit 3. This is the Form AR-W for Claimant, in which Respondents have arrived at a calculation of \$76.50 as her average weekly wage at the time of the injury.

Respondents' Exhibit 4. In a note dated November 21, 2006, Dr. Dunn wrote:

This patient comes in today for re-evaluation. She has continued to have back pain. The patient states that the Workman's [sic] Compensation Commission has denied her ability to have evaluation by Dr. Garvin in Little Rock. Dr. Garrison had referred her to him for operative procedure of the cervical spine. The patient has continued to have pain in her neck along with neuropathy involving the left upper extremity involving the thumb and 1st finger. She also has been dropping objects with her left hand. The nerve conduction velocity study indicated that the patient had a left C-6 radiculopathy. The MRI indicated that she had a C5-C6 left pericentral disk herniation that acutely narrows the neuroforamina and it does cause effacement of the thecal sac. There is mild cord impingement with defacement of the left side of the cord seen and it was for these reasons that the patient was sent to have the operative procedure. It was felt that this was imperative as her symptomology has escalated even since that MRI was obtained by Dr. Garrison on 9/14/06. I am writing a letter on her behalf to the Workmen's Compensation Commission. The patient states she has had another injury in this area. Approximately 1 week ago she was helping someone move a TV and had sudden onset of sharp pain in the cervical region at that time. It was felt that she aggravated the previously herniated disk.

On physical examination today she continues to have paravertebral muscular fullness and spasm in the cervical region on the left greater than right and upper thoracic region on the left greater than right. We will try to expedite her getting in to see the neurosurgeon.

Blue-backed Exhibit. In addition to the copy of Claimant's pay stub from Camp Mitchell (which reflects that she was paid a total of \$231.00), copies of medical bills (including prescriptions) for treatment given Claimant, and a chart of her physical therapy, there are two substantive medical records. The report of the cervical MRI Claimant underwent on September 16, 2006 reflects that she had a left paracentral disc herniation at C5-6. The September 21, 2006 EMG conducted by Dr. Robert Garrison showed electrodiagnostic evidence of left C-6 radiculopathy.

ADJUDICATION

A. Compensability

Claimant has made no specific allegations in her contentions regarding which areas were injured on June 3, 2006 while working for Respondent Camp Mitchell. In the Form AR-N in evidence, she reported injuries to her left shoulder, spine, neck and upper arm, which occurred while "lifting a heavy pan of food" Her testimony focused on her arms (specifically left arm numbness), neck and back. While Respondents initially accepted the claim as compensable, they ultimately controverted it in its entirety, arguing, *inter alia*, that Claimant's cervical issues are not causally connected to the incident alleged herein

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Supp. 2007), which the I find applies to the analysis of all of Claimant's alleged injuries, 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. Ark. Code Ann. § 11-9-102(4)(D) (Supp. 2007). "Objective findings" are those

findings which 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).

The medical records in evidence show objective findings of a cervical injury, in that her September 14, 2006 MRI showed left paracentral disc herniation at C5-6. Also, the September 21, 2006 EMG showed evidence of left C6 radiculopathy. While Dr. Donald Hill’s November 4, 2006 examination showed spasms for which he prescribed Flexoril, he attributed it to an injury that occurred the previous day, when Claimant stated that she moved a television. He added that by this time, she had “pretty much recovered from” her June 2006 injury.

After review of the evidence presented in this case, I cannot find that Claimant has proven by a preponderance of the evidence that her injuries at issue were caused by a specific incident identifiable by time and place of occurrence, nor can I find that there is a causal connection between the June 3, 2006 incident at Camp Mitchell and these injuries.

At the outset, I will address the matter of Claimant’s testimony. 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.*

I do not find her to be credible. This is not based simply on her past conviction of a Class C felony, which she admitted she is still on probation for. It is also grounded in my observation of her and her demeanor, along with consideration of her testimony when arrayed against the balance of the evidence. Her testimony was replete with inconsistencies. She testified that she began to work at Camp Mitchell in February or March 2006 before changing the date to May 2006 on cross-examination. She testified that she had no back or neck problems prior to June 3, 2006, and no previous treatment for arm or leg numbness. But as shown in Respondents' Exhibit 1, she presented for treatment on October 28, 2005, a little over seven months before the incident at issue, with low back pain that had been present for two months. She told the Good Samaritan Clinic on that date that she had suffered abuse when a "friend" threw her through a wall. The next month, on November 14, 2005, she presented to Dr. Seme with, *inter alia*, periodic numbness in her left arm and leg. Claimant reported then that she had an abusive boyfriend who had kicked her into a dresser that had caught her across the low back. Further, she stated that she thought she had reinjured her back at work. On redirect examination by her attorney at the hearing, Claimant testified that she also suffered abuse when her head was shoved into a television. She stated that as a result of this abuse, she experienced no back pain, but had numbness in her arms that went away after two days, well before the time she went to work at Camp Mitchell. When asked by Respondents why she had neglected to inform them about these prior incidents of abuse and prior treatments

during discovery, she claimed to have forgotten them. This is belied by the similarity of her physical complaints at that time and her ability to recall the incidents earlier to both the Good Samaritan Clinic and to Dr. Seme.

Again, Claimant admitted that these were the same symptoms as she had following the June 3, 2006 incident, and that she had not told her doctors who ostensibly were treating her for a June 2006 injury about these past incidents of abuse recounted above. In addition to the inconsistency regarding numbness prior to the incident at issue, Claimant was also inconsistent about when her numbness began following the June 2006 incident. She first testified that did not feel any numbness until later in the evening, and had trouble exiting her car when she got home. However, Claimant later stated that she did feel numbness right after lifting the pan of carrots. And while Claimant stated that she had not suffered any injuries after June 3, 2006, the November 4, 2006 note of Dr. Hill, contained in Respondents' Exhibit 1, shows otherwise.

The above not only casts strong doubt on Claimant's credibility, but it also casts doubt on the compensability of her claim. It is true that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). The problem with that here is that the evidence does not support Claimant's contention that her physical problems first emerged after her alleged work-related injury. She was presenting with the same symptoms in Fall 2005 that she was in June 2006. But no tests in the record show whether she already had a herniation with

radiculopathy seven months before the incident at bar, after the abuse occurred and after she had held jobs requiring much heavier lifting than the one at Camp Mitchell. Moreover, the “pop” she stated she felt after lifting the pan was below the C5-6 level. While she testified that she felt a “pop” and burning across her left shoulder when she slung five bags of groceries over her shoulder later that evening, her testimony did not indicate whether this occurred at work or elsewhere—and this incident was not even mentioned in the Form AR-N. All of the foregoing, coupled with the normal cervical x-ray that Claimant had on July 10, 2006, shows that I cannot tie Claimant’s problems to the alleged June 3, 2006 incident at Camp Mitchell without resorting to speculation and conjecture, which 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). In sum, Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury.

B. Balance of Issues

Because of the above finding, the other issues litigated at the hearing are moot and will not be addressed.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that her alleged injuries are compensable. She has been unable to do this. Therefore, her claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge