

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701044

SHERDALE H. KELLEY

CLAIMANT

RIVER CITY MATERIALS, INC.

RESPONDENT EMPLOYER

INSURANCE CO. - STATE OF PENNSYLVANIA

RESPONDENT CARRIER

ORDER AND OPINION FILED NOVEMBER 15, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE SIMMONS S. SMITH, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on October 17, 2007, in Little Rock, Arkansas. A prehearing conference was held on August 7, 2007 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the evidence without objection.

The parties agreed to the following stipulations at the prehearing conference and prior to the hearing:

1. There was an employer-employee relationship on October 24, 2006.
2. The claimant's average weekly wage was \$380.
3. The claimant was involved in a motor vehicle accident on October 24, 2006 and was in the course and scope of his employment.

The claimant contends that he sustained a compensable injury on October 24,

2006 and is entitled to medical benefits, temporary total disability benefits from October 24, 2006 through December 15, 2006, an 8% permanent impairment rating and attorney's fees.

The respondents concede that the claimant was involved in a motor vehicle accident on October 24, 2006 and the claimant was referred to Concentra for medical treatment. The claimant instead sought treatment at St. Vincent's and with a chiropractor. Respondents contend the treatment the claimant sought was not authorized. Respondents further contend that the claimant is not entitled to temporary total disability benefits, as he was suspended for failure to go to the medical facility for a drug screen and a release. Respondents contend the chiropractic care was not reasonable nor necessary. Respondents terminated the claimant for failure to take a return to work drug screen.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Permanent impairment rating.
5. Attorney's fees.

From a review of the record as a whole, to include 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, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on October 24, 2006.
2. The claimant's average weekly wage was \$380.
3. The claimant was involved in a motor vehicle accident on October 24, 2006 and was in the course and scope of his employment.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on October 24, 2006, that was supported by objective findings.

DISCUSSION

The claimant, 32 years of age, worked for the respondent employer loading and unloading drywall. On October 24, 2006, the claimant was a passenger in a truck, returning back to the business, when the vehicle was hit by an 18-wheel truck. According to the claimant, the vehicle he was riding in was picked up and slammed down. The claimant reported his injury to a dispatcher and was referred to Concentra. The claimant testified that he could not find Concentra and he went to the emergency room and x-rays were taken. The claimant also sought emergency room treatment the following day for treatment for pain. The claimant returned to his workplace after the emergency room visit and went with his employer for a drug test. The claimant was off work for a week and a half, calling in each day, and attempting to speak with Jamie.

The claimant next sought medical treatment with Dr. John D'Onofrio, chiropractor at the Carter Chiropractic Clinic. According to the claimant, he was taken off work by

Dr. D'Onofrio and was released to return to work on December 15, 2006. The claimant testified that when he contacted Jamie about returning to work, he was asked to come in and he was taken to Concentra for a drug test and a release for work physical. The claimant testified that he told Jamie he did not want to take the drug test without his lawyer being present. The claimant testified that he was terminated.

ADJUDICATION

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2005). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

After reviewing the testimony and medical evidence, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury supported by objective findings on October 24, 2006. The claimant first treated at St. Vincent's emergency room on October 24, 2006, after not being able to find Concentra,

the employer's recommended medical provider. The main complaint at the emergency room was shoulder pain and two x-rays were taken with some degenerative changes noted but otherwise negative. The report noted no swelling, discoloration, deformity, broken skin or crepitus. The claimant returned to the emergency room on October 24, 2006, with low back pain and abdomen pain. The October 25, 2006, report further indicated the claimant had a hernia repair one month ago and again, no objective findings regarding the low back were noted. The claimant's next medical treatment was with the Carter Chiropractic Clinic beginning November 6, 2006. The claimant apparently received 11 treatments and was released on December 15, 2006, with an 8% impairment rating. There were no diagnostic tests performed. Dr. John D'Onofrio testified that he did not see the x-rays from St. Vincent's but figured the hospital would notify the patient if anything was found. Dr. D'Onofrio's records on the date he treated the claimant did not note any objective findings. The first indication of an objective finding was Dr. D'Onofrio's December 17, 2006, letter where he stated that his examination noted "soft tissue palpation exhibits cervical and thoracic muscle spasm bilateral." (Cl. Exh. No. 1, p. 172.) Upon cross examination of Dr. D'Onofrio, he was questioned about the spasms and Dr. D'Onofrio stated that each time the claimant came in he had muscle spasms even though he did not document such. (T., p. 25.) The doctor testified that he would normally see 20 to 25 patients a week and could not state why he did not document muscle spasms on the claimant's reports.

I was unable to find that Dr. D'Onofrio's testimony was credible. The medical reports from Dr. D'Onofrio's office that were introduced into evidence were void of any objective findings and lacked any real description of any problems the claimant was

having. It was only after the claimant was released from Dr. D'Onofrio's care that any objective findings were even noted. I simply did not give Dr. D'Onofrio's December 17, 2006, letter weight, since it did not correspond with his contemporaneous reports of treatment of the claimant, nor did I give Dr. D'Onofrio's testimony weight. It is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minn. Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). Dr. D'Onofrio presented medical bills totaling \$3,010; however, his documentation per visit lacked any specificity.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on October 24, 2006, that was supported by objective findings. The claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE