

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506046

ROBERT STEED,  
EMPLOYEE

CLAIMANT

LEE'S TRUCKING, INC.,  
EMPLOYER

RESPONDENT No. 1

ZURICH AMERICAN INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT No. 1

SECOND INJURY FUND

RESPONDENT No. 2

**OPINION FILED JULY 3, 2007**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in El Dorado, Union County, Arkansas.

The claimant was PRO SE.

Respondents No. 1 were represented by HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas, who waived appearance at the hearing.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on May 10, 2007, in El Dorado, Arkansas. A Prehearing Order was entered in this case on February 14, 2007. The Prehearing Order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at that time. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including April 5, 2005.
3. The respondents have controverted this claim in its entirety.
4. The claimant's average weekly wage at Lee's Trucking, Inc. entitles the claimant to the maximum compensation rates in 2005 of \$466 per week for temporary total disability and \$350 per week for permanent partial disability if this claim is found compensable.

By agreement of the parties, the issues to be litigated and resolved were limited during the hearing to the following:

1. Whether the claimant sustained a compensable injury.
2. Whether the claimant is entitled to temporary total disability benefits.
3. Whether the claimant is entitled to medical benefits.
4. Attorney's fees. (Moot)
5. Whether the claimant was performing employment services when he fell out of the truck while stopped to allow his dog to go to the bathroom at a truck stop in late April or early May of 2005.

The record consists of the May 10, 2007, hearing transcript and the exhibits contained therein.

### **DISCUSSION**

The claimant contends that he sustained a neck injury at approximately 1:00 a.m. on April 5, 2005, when he swerved the tanker truck he was driving to avoid colliding with horses standing in the middle of the road after rounding a curve. His tanker was carrying sulphuric acid. The claimant testified that the horses were in the right lane and that he swerved to the left. The incident occurred on the road between Magnolia and Prescott.

The claimant testified that he never hit anything and that he is not sure if he grazed anything, but that he was bouncing all around the truck. The claimant's wife testified that the claimant called her after the incident and that "[t]he man was standing on the side of the road puking his guts up and crying because he thought he was almost dead."

The claimant called the dispatcher later that day and learned the load had been cancelled. He then drove the load back to El Dorado. The claimant described his conversation with dispatchers at the terminal as follows:

When I got back, I told Tammy and Israel what happened. They asked me if I wanted to go to the doctor, and I said I didn't. I mean, I didn't know I was hurt. I never dreamed I was hurt. I knew I was tensed up; and I stayed tense for several days, but I steadily ran.

The claimant testified that he drove until May 14, 2005, when he returned home. The claimant went to the emergency room for neck problems five days later in Hattiesburg, Mississippi.

Between the time of the April 5, 2005, incident and his last work driving on or about May 14, 2005, the claimant also had an incident in late April or early May when he fell out of the truck while stopped at a truck stop to allow his dog to "use the bathroom."

The May 19, 2005, emergency room report from Wesley Medical Center contains a history of a recent injury. The section of the report requesting information on how the injury occurred contains a checkmark by "fall/near-fall" with handwritten notations that appear to indicate "off top steps ~2wks ago & prev. strain M. while avoiding collision driving 18 wheeler." The claimant testified that he did not report to the hospital personnel an injury due to a fall from the truck and that hospital personnel must have overheard him telling that story to someone else and recorded it.

The claimant's wife testified that the hospital had the claimant so medicated that he does not remember what he told hospital personnel. She also testified that he told them about the horses and then told them about falling out of the truck.

The claimant was released with medication and told to follow up with a regular doctor or an orthopedist. The claimant came under the care of Dr. Michael Molleston, a Hattiesburg neurosurgeon, who had performed a C5-6 and C6-7 spinal fusion in the claimant's neck in 1996.

The radiologist's impression of a May 24, 2005, MRI of the claimant's neck included ACF at C5-6 and C6-7, and "Eccentric disc bulge and spurring to patient's left at C4-5 with left sided neural foramina compromise." Dr. Molleston interpreted the MRI as indicating disk rupture to the left at C4-5 with severe left foraminal stenosis. Dr. Molleston's June 14, 2005, report documents the horse incident, and Dr. Molleston opined with medical probability that the motor vehicle accident had created the ruptured disk and was responsible for the claimant's medical care and recommended surgery. Dr. Molleston recommended an anterior cervical discectomy and fusion at C4-5.

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

On the record before me, I find that the claimant failed to establish by a preponderance of the evidence that he sustained a neck injury on April 5, 2005, as he contends. In this regard, I am persuaded by the claimant's candid admission that when he spoke to the dispatchers after returning to El Dorado on April 5, 2005, he was not interested in going to a doctor because he never dreamed he was hurt at that time. Moreover, on this record I cannot

determine when between April 5, 2005, and May 19, 2005, that the claimant in fact began to experience any new symptoms in his neck or his arm.

With all due respect to the claimant's testimony that he remained "tense" after the horse incident on April 5, 2005, I note that contrary to the claimant's testimony upon my questioning that he had no neck problems after 1998 due to his 1995 neck injury and 1996 surgery, he in fact remained off work a total of four years. Notably, Dr. Molleston's last 1998 report on April 6, 1998, indicates that the claimant continued to complain of neck stiffness as well as pain in the neck and left shoulder, and Dr. Molleston's initial 2005 report on June 14, 2005, contains a history of a stiff neck over the last five years after the claimant had returned to work. In light of this history of ongoing neck stiffness before the horse incident, I do not find Mr. Steed's testimony of ongoing "tenseness" after the incident necessarily indicative of any new injury sustained on April 5, 2005.

With regard to the April 5, 2005, swerving incident and Mr. Steed's testimony regarding bouncing in the truck, the claimant has not established that the truck actually hit anything, and the claimant's description of the incident

does not indicate that the truck actually left the road. Mr. Gibat's testimony made reasonably clear that the loaded tanker would have overturned had Mr. Steed been required to turn the wheel sharply in his maneuver to avoid the horses.

Dr. Molleston's opinion on causation identified above appears to me to be based on a material mistake of fact in two regards. First, Dr. Molleston's opinion makes no reference to the fact that the claimant's neck symptoms at issue began at some unidentified point after April 5, 2005, and second, Mr. Steed has candidly acknowledged that he did not tell Dr. Molleston about the incident where he fell out of the truck later in April or in early May of 2005. Dr. Molleston's opinion suggests instead that the claimant's symptoms began contemporaneous with the swerve on April 5, 2005, which the claimant's own testimony indicates did not occur.

In summary, in light of the evidence that the claimant had no known injury when he went to the terminal in El Dorado on April 5, 2005, the evidence that the truck did not hit anything while swerving on April 5, 2005, the claimant's continued work driving between April 5 and May 14, 2005, the length of time involved before the claimant first saw a doctor after April 5, 2007, the lack of evidence indicating

when between April 5 and May 14, 2005, that the claimant began to experience symptoms in his neck, the occurrence of the claimant's fall after April 5, 2005, the claimant's failure to seek any medical treatment from the respondent before presenting on his own to the emergency room on May 19, 2005, and the incomplete history relied on by Dr. Molleston in rendering his medical opinion on causation, the claimant has failed to persuade me by a preponderance of the evidence in the record that his neck symptoms which sent him to the hospital on May 19, 2005, are in any way attributable to the swerving incident that occurred in the tanker truck on April 5, 2005.

In light of the inconclusive evidence as to when the claimant actually began to experience his neck symptoms at issue, it would also require speculation and conjecture on my part to conclude that the claimant's neck symptoms which sent him to the hospital on May 19, 2005, are in any way attributable to his fall out of his truck that occurred at some point in late April or early May of 2005.

Furthermore, even if the record had established that the fall from the truck injured the claimant's neck, I would still be constrained to deny this claim because, based on previous Court decisions, I find that the claimant was not

performing employment services for the respondents when he fell out of the truck while attempting to let his dog out of the truck so that the dog could relieve itself.

The Arkansas Court of Appeals recently summarized the current law regarding employment services as follows:

[I]n order for an accidental injury to be compensable, it must arise "out of and in the course of employment." Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002). A compensable injury does not include injuries "inflicted upon the employee at a time when employment services were not being performed." Ark. Code Ann. § 11-9-102(4) (B) (iii). And an employee is performing "employment services" when he or she is "doing something that is generally required by his or her employer." Pifer v. Single Source Trans., 347 Ark. 851, 69 S.W.3d 1 (2002).

We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." Id. The test is whether the injury occurred "within the time and space boundaries of employment, when the employee was carrying out the employer's purpose or advancing the employer's interest either directly or indirectly." White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999).

Dairy Farmers of America v. Coker, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Op. Del. April 25, 2007). In Coker, the Court affirmed a Commission conclusion that a truck driver was performing employment services while working under his truck in preparation for starting the truck.

The Arkansas Supreme Court has also held that a truck driver injured while returning to his truck after a restroom break at an employer-provided restroom located on the employer's premises was performing services. The Court reasoned that the employee's restroom break was a necessary function and directly or indirectly advanced the interests of his employer. Pifer v. Single Source Transportation, 347 Ark. 851, 69 S.W.3d 1 (2002).

However, the Arkansas Court of Appeals has held that a truck driver injured in a motel room was not performing employment services when the driver was off the clock and was not required to stay at the hotel during his break. Cook v. ABF Freight Systems, Inc., 88 Ark. App. 86, 194 S.W.3d 794 (2004). In Kinnebrew v. Little John's Truck, Inc., 66 Ark. App. 90, 989 S.W.2d 541 (1999), the Court of Appeals affirmed a Commission decision that a trucker injured while taking a shower at a rest stop during his eight hour rest was not performing employment services because showering is not inherently necessary to perform the job the trucker was hired to do.

In the present case, there is no evidence in the record that the claimant stopped at the truck stop to use the restroom himself, and there is no evidence indicating that

carrying a dog in the truck was carrying out his employer's interests directly or indirectly. Therefore, consistent with Cook and Kinnebrew, any injury sustained while opening the truck door to put the dog out, for the dog's benefit, would have occurred at a time when the claimant was not performing employment services.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed at all relevant times, including April 5, 2005.
3. The respondents have controverted this claim in its entirety.
4. The claimant's average weekly wage at Lee's Trucking entitles the claimant to the maximum compensation rates in 2005 of \$466 per week for temporary total disability and \$350 per week for permanent partial disability, if this claim is found compensable.
5. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable neck injury when he swerved his truck on April 5, 2005, or when he fell out of his truck in late April or early May of 2005. Specifically, the claimant has failed to establish by a preponderance of the evidence that the symptoms from his neck condition at issue in this claim are casually related to either one of these incidents.
6. In addition, the claimant has failed to establish by a preponderance of the evidence that he was performing employment services at the time that he fell out of the truck in late April or early May of 2005.

STEED - F506046

13

**ORDER**

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

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge