

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F512993**

**EDDIE C. WILLIAMS, EMPLOYEE**

**CLAIMANT**

**PASLODE WHITE RIVER, EMPLOYER**

**RESPONDENT**

**ZURICH AMERICAN INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED NOVEMBER 21, 2007**

Hearing before Administrative Law Judge Barbara Webb on August 23, 2007, in Augusta, Woodruff County, Arkansas.

Claimant appeared pro se.

Respondents were represented by Mr. Eric Newkirk, Attorney at Law, Rieves, Rubens and Mayton, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on this claim on August 23, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on June 6, 2007. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed in August and September of 2005.

3. The applicable compensation rate is \$394.00 for temporary total disability and \$296.00 for permanent partial disability benefits in the event compensability is established.
4. Respondents have controverted this claim in its entirety.\_\_\_\_\_

By agreement of the parties, the issue to be determined is compensability of claimant's alleged neck injury which occurred in August of 2005.

The record consists of a one volume transcript of the August 23, 2007 hearing, consisting of the testimony of Eddie Williams, Huey Bush, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (Letter of Edward Brown); Claimant's Exhibit No. 2 (Medical Records); Respondents' Exhibit No. 1 (Employment records); and Respondents' Exhibit No. 2 (Medical records). In addition, I have blue-backed and made a part of the record a copy of a letter dated September 10, 2007, from the claimant and received by the Commission on September 13, 2007, with 24 pages of medical records attached, and the October 9, 2007, letter from respondents objecting to the introduction of the correspondence and records submitted by the claimant.

### **CONTENTIONS**

The claimant contends he injured his neck in August of 2005, while working for respondent employer and that he is entitled to appropriate benefits.

The respondents contend that the claimant did not sustain a compensable neck injury in August or September of 2005, and that they did not receive notice of any alleged injury until notified by correspondence dated March 8, 2006. The

respondents further contend that there are no objective medical findings causally connected to the purported work incident and that any objective medical findings are the result of a degenerative/arthritis condition and/or claimant's work as a carpenter outside his employment with respondent employer. Alternatively, if the claim is found to be compensable, respondents assert an offset for any group health payments which have been made to or on behalf of the claimant. The respondents also assert an offset for any unemployment benefit payments received by the claimant.

### **PRELIMINARY EVIDENTIARY RULINGS**

At the pre-hearing conference, the claimant listed Dorothy Smith, Eddie Brown and Huey Bush as potential witnesses to testify. The respondents identified John King, Darran Richardson, Huey Bush, and Eddie Brown. However, at the hearing, the claimant sought to introduce the testimony of Eddie Brown by handwritten letter. (Claimant's Exhibit No. 1) Respondents objected on the basis of hearsay and that the witness was not present and available for cross-examination. Counsel further argued that he had not been able to find Brown prior to the hearing and that the statement was not provided at least seven days prior to the hearing as required by the Pre-hearing Order.

The Pre-hearing Order provides, in pertinent part,

No documents, including medical reports, will be allowed into evidence unless exchanged by the parties at least **seven (7) days** prior to the scheduled hearing. Any evidence, whether documentary or testimonial, that is not disclosed or exchanged in compliance with this Order and applicable law shall not be considered at the hearing except with prior leave of the Commission and upon a showing of

good cause. The record will not remain open at the conclusion of the hearing for the parties to obtain additional evidence. Failure to comply with these directives may result in sanctions, including the exclusion of exhibits, medical or otherwise, from evidence. Evidence not disclosed through the prehearing questionnaire or as set forth within the terms of this Order shall not be considered as evidence except with prior leave of the Commission and upon a showing of good cause.

\_\_\_\_\_ While this Commission is not bound by the formal rules of evidence, I find that Claimant's Exhibit No.1 should be excluded. The letter is handwritten. It is not dated or authenticated by notary or witness of any kind. The witness was not present and available for cross-examination. The letter was not filed or provided to respondents at least seven days prior to the hearing as required by the Pre-hearing Order. There is nothing offered to authenticate the letter or to otherwise establish its reliability or credibility.

The claimant also offered into evidence the September 10, 2007, letter and attached medical records. Respondents object on the basis that the documents were not provided in the time limits set by the Pre-hearing Order or as set forth at the hearing (Transcript, pages 67-72). I find that the medical records submitted with the September 10, 2007 letter were filed in substantial compliance with the 20 day time limit set forth at the hearing. The letter from the claimant and response from the respondents will be received as post-hearing briefs. Moreover, the documents are medical records which the respondents had the opportunity to obtain and review during discovery and at the hearing. I find that there is no prejudice shown and that the medical records are clearly relevant to the issues before the Commission.

**FACTUAL BACKGROUND**

Eddie Williams is 53 years of age (b.d. 3/10/54). He graduated from Tuckerman High School and then attended White River Vo-Tech School in Newport, Arkansas. He completed a course in residential carpentry and auto body. He also attended a course at Foothills Vo-Tech offered through his employer, Paslode. He worked for Frank Rogers Construction for 13 years as a building erector. He worked as the lead man in a crew that put up metal buildings. He then went to work for Paslode in 1996. He explained that Paslode is in the business of manufacturing nails. He worked as a machine operator and has worked for Paslode for ten and a half years. He was trained to report injuries to his supervisor. He testified that he hurt his neck in August of 2005 and that he saw the doctor in September. He explained that he would work on the machines quite a bit every night and sometimes all night long. He testified that he was tall and that the machines were waist high and he stayed "bent over all the time." He testified that "all of a sudden my neck just started hurting real bad, and it kept on and kept on and kept on and, you know, I just eventually went to a doctor." He testified that he was six foot three and a half inches tall and that he was required to lean over the machines to repair them. He testified that the machines were BG-90s that produced nails. He testified that he reported the injury to Huey Bush, his supervisor, when he was standing in the break room with Dan Brown and Dot Smith. He said, "My neck is really hurting, you know, really.' And I went on and went outside and sat for a while to see if – I thought it might stop hurting from bending over so much, but the more I worked on

machines after then, it got worse and worse, so I started going to the doctor on my own.” He testified that he first saw the doctor about a month after the problems began when his arm started getting numb and his hand started drawing. He explained that he couldn’t sleep at night. He couldn’t lay down and put his head on a pillow. He went to see Dr. Lochala and was given muscle relaxers and a nerve pill. He testified he had never had problems with his neck before August of 2005 and had not been medically treated for any problems with his neck. He testified that he didn’t tell his supervisor or anyone at Paslode that he was going to see the doctor because he didn’t think it was serious and thought it was just bending over too much. He thought his neck was just being tired. He testified that he continued to see the doctor until such time as his doctor recommended an MRI. He explained that he was terminated on the 30<sup>th</sup> of November, 2005. At that time, he told Paslode that he had been seeing a doctor about his neck. He testified that he was terminated due to production matters. At that time, he claimed he reported the injury to Jim Chocohn, the personnel manager. He testified that the personnel manager told him that it was too late. He filed a workers’ comp claim in December of 2005. He explained that his neck was still hurting and he was still under a doctor’s care and his insurance was running out so he filed the claim so he could keep going to see a doctor. He saw Dr. Lochala three times between August and October. He explained that he was first given muscles relaxers and a pain pill. He went to physical therapy for two weeks and his condition somewhat improved. He was referred to Dr. Ricca in Jonesboro, a neurologist. He had an MRI at the

Newport Hospital. Dr. Ricca wanted to do surgery but he didn't have insurance or money. He continued to work from August through November. He was never given a release to stay off work.

On May 30, 2006, he began working for Arkansas Steel as a press helper inspecting railroad plates. He explained that in his current job he does not have to bend over at this job and can keep his head level. He is able to drive and perform other daily functions outside of his work without interruption. He cannot look up overhead for a long period of time. He has not had any recent medical treatment for his neck. He most recently saw Dr. Lochala in May.

On cross-examination, the claimant admitted that he had a prior workers' comp injury relating to his ankle when he worked for Frank Rogers Construction and was aware of the procedure for filing workers' comp claims. He recalled that he was working on a machine in August when he had neck pain and had to take a break. He could not recall the exact date in August. He admitted that on his Prehearing Questionnaire he stated that he had reported that the date of the accident was September 5<sup>th</sup>. He explained that date was when he began seeing the doctor. He admitted that in his personnel file he had thirteen Notes to File for performance issues, three verbal warnings, four written warnings and one suspension in the year of 2005. He also admitted that he had been suspended in May of 2005 for performance issues. He admitted that his termination was the second suspension which resulted in termination in accordance with company policy. He admitted that they had no knowledge of his neck injury until he was fired. He admitted that he told

the Newport Physical Therapy center that his pain began in October rather than August or September. He testified that he drew unemployment immediately after he was fired. On his unemployment application he stated that he had no disabilities that would limit his ability and that he was available to work full time. He drew unemployment until he started his job with Arkansas Steel. He testified he was doing some small carpentry jobs during the period he was working for Paslode. He testified that he worked under the name of Eddie's Home Repair and believed that he only performed one or two jobs in 2006 and had not performed anything in 2007. He testified that he had been on his wife's insurance or his own since January of 2007, but that he had not had any treatment since May of 2006.

He did not recall a sudden pop or flip of his neck. He testified that in a typical hour at work he would bend over three or four hours at a time just standing in one spot to get the machines put back together. He testified he could stand up and stretch his back a little bit and then go back. He also had ten minute breaks and a thirty minute lunch. He testified he could take his breaks based on work demands. He testified that all of his medical bills had been paid and that he had paid for Cobra insurance. He testified that he made co-payments at the doctor and paid for his prescription medication. He testified that his insurance paid 80% for the medication. He stated that his Cobra insurance was running \$390.00 a month and could not testify what his co-pay for prescription medication was. He testified that he collected \$290.00 a week in unemployment benefits.

Huey Bush testified on behalf of the respondents. Mr. Bush testified that he was employed as a supervisor with Paslode from 2001 until the company closed in December 2006. He testified that he was the claimant's supervisor. He did not recall the claimant reporting to him a complaint of neck pain. He explained that any time an employee reported an injury, it was company procedure to make a Note to File which would be turned in. He testified that he was not saying that it didn't happen, but that he had no recollection that it did and there was no Note to File. He explained that the Note to File would go under Safety and that although there were several Notes to File made on the claimant there was no Note to File for safety in September or August. He testified that there were thirteen Notes to File for performance and a verbal warning for safety. Overall, he testified that there were about 25 different warnings or suspensions in the claimant's personnel file. He testified that most BG-90 operators were constantly working on their machines and that the machines were very tedious. He explained that some operators were more skilled than others. He explained that the claimant worked on his machines quite a bit all of the time. He was slower than the others. He explained that the claimant seemed to have more trouble getting the machine adjusted so that it could get running again. He agreed that when the machines would run, they would run good, but when they were down, they were down. He also agreed that there were nights when maintenance had to be done and that the claimant would do the maintenance on the machines. He explained that there were three shifts that worked on the BG-90 machines with eighteen operators all together. He explained that this work

would be done until the machine was back up and running and that it was done at a steady pace but not in a rapid manner. He explained that the repetitive nature of the work would depend on how much trouble you were having with the machine. He explained that he would be doing different tasks throughout the whole time and it would not be the same task over and over. He also explained that there would be some nights where the machine would run and there would not be any repairs. He was not aware of anyone else at Paslode having a neck injury doing this type of activity. He was familiar that the claimant had performed carpentry work during the day shift. He explained that the claimant had a lot of personnel issues as far as performance in 2005 which eventually led to his termination. Prior to his termination, the claimant had not told him about any sort of work injury or claim. The first knowledge he had of the filing of a workers' comp claim was when his attorney notified him of it. He explained that there was an improvement process plan implemented when an operator appeared to have problems with efficiency. He said that such a plan had been implemented with the claimant. He explained that the claimant had worked all six lines with this process trying to get his efficiency back up but was not able to get his efficiency back up. The rotation system was used to eliminate the issue of a bad machine or working with newer trainees on the machines. He testified that the claimant had been put on different machines and assigned with other co-workers during the improvement process but his performance remained the same. He agreed on cross-examination that they had

used a lot of temporaries on the second shift. He testified that when the machine was running, the operator was not required to bend over the machine.

Medical records show that the claimant sought medical treatment from Dr. Lochala on September 16, 2005, for neck and upper back pain which he contended symptoms had started three or four days prior to the visit. He indicated there was constant soreness and stiffness. He was given prescription drugs and a lumbar strap for his back. He returned for further medical attention on October 21, 2005, complaining of neck, shoulder and arm pain. He stated that the muscles would draw in his arm and symptoms started in his neck with a numbness. He was diagnosed with 1) degenerative disc disease in his cervical spine with radicular symptoms; 2) diabetes, type II; and 3) hypertension. He was referred for an MRI of his cervical spine and advised to continue Naproxen and Cialis. He returned for follow-up after the MRI on November 3, 2005. It was noted that his symptoms were chronic and constant with no particular modifications. It was noted that his MRI showed the posterior osteophytic complex but no spinal cord compression. It was noted that the claimant did not want any further treatment for the numbness and that he did not want any further work up. He was given samples of Cialis and Crestor and advised to return in two months. He returned for follow-up with complaints of his neck still hurting on December 5, 2005. He also complained of numbness in his neck and left arm with burning type of pain in his left arm. He was diagnosed with radicular cervical spine pain and prescribed naproxen and Skelaxin for muscle spasms. He was ordered into physical therapy three times a week for

three weeks. He began physical therapy on December 6, 2005, and went to physical therapy through December 27, 2005. A progress report dated December 23, 2005, from the Newport Physical Therapy clinic to Dr. Lochala reflects that the claimant had completed three weeks of physical therapy and had shown short-term relief with treatments. However, it was noted that the claimant continued to have neck pain when raising his left arm and prolonged neck extension (while looking up continuously). It indicated the claimant had demonstrated good compliance with home program. The claimant returned to Dr. Lochala for a follow-up evaluation on January 5, 2006, continuing to have radicular neck pain symptoms. It was noted that his physical therapy had been ineffective and he had burning and numbness in his hands.

On February 1, 2006, the claimant was evaluated by Dr. Gregory Ricca, a neurosurgeon. He indicated that the claimant had complaints of neck pain and left upper extremity pain with numbness and tingling to the anterior lateral left forearm and hand. He noted that the claimant believed he was injured at work in October of 2005 while repairing a nail-making machine. He noted the claimant first believed he had a "crick" in his neck however his symptoms continued and his subsequent treatment with medications and physical therapy only made his symptoms worse. He reviewed the cervical MRI done on October 24, 2005, and noted a compression of the spinal cord and exiting left C6 nerve root at C5-6 from spondylosis and probably a large HNP. He was diagnosed with neck and left upper extremity pain and symptoms within the left C6 distribution and multi-level degenerative changes

at the cervical spine with spondylosis and probable generous HNP centrally and to the left at C5-6. He noted that reasonable non-surgical measures had failed. He further noted, "Based on his history, I also believe that it is his work injury that caused his present symptoms." He proposed to do a cervical myelogram and post myelogram CT.

The unemployment records reflect that the claimant filed and received unemployment benefits for the period beginning December 3, 2005, until May 30, 2006. His application indicated that he could begin work immediately, that he could work full time, that he had transportation for a job and did not have any disabilities that limited his ability to perform normal work duties.

The employment records reflect that the claimant received thirteen Notes to File regarding performance and two others. There were no notes for safety or injuries in September through October 2005. The only safety note was found in June of 2005.

## **DISCUSSION**

### **I. COMPENSABILITY**

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (a)n accidental injury causing internal or external physical harm to the body or accident injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, there is dispute over whether a specific incident occurred in August or September of 2005 at work. The claimant testifies that he injured his neck while leaning over for extended periods of time to repair machinery. He testified that he complained of neck pain immediately to his supervisor, took a break, and remained at work. The respondents contend that the claimant did not report the alleged injury until he was fired and that his work was neither repetitive

nor rapid. His supervisor testified that he did not recall an event and that he would have noted the incident in the claimant's records. He further testified that the claimant continued to work without complaints performing his job duties until he was terminated for performance related issues.

Based on my review of the credible evidence, I find that claimant has failed to prove by a preponderance of the evidence that he was injured while performing employment services for Paslode in August or September of 2005. The only testimony offered by the claimant to support his claim that his injury was work-related is his own testimony, notwithstanding the fact that he recalled complaining in front of his supervisor and other co-workers. He did not file a formal claim until he was terminated from his job. He sought treatment from his own doctors using his personal health insurance. He did not tell any of his doctors that the problem was work-related until he saw Dr. Ricca after he had been terminated.

## **II. CAUSATION**

In a workers' compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

In the instant case, it is clear that claimant suffered from degenerative neck problems. While the evidence demonstrates that the claimant first reported symptoms in September of 2005 to his doctor, there is no credible evidence that the

condition was work-related. The facts further reflect that the claimant was not diagnosed with a herniated disc until six months following the alleged incident at work, notwithstanding examination and treatment from several doctors, including x-rays and an MRI. If a disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the Commission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1961).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). However, an aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

Claimant contends that he sustained a herniated disc to his cervical spine which requires surgery. Claimant's supervisor testified that the claimant continued to work with no apparent problems. Dr. Ricca based his statements regarding the cause of the claimant's neck condition as based on the claimant's own history. This arguably makes any opinion of Dr. Ricca speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. This is true especially

in light of the other carpentry work admittedly performed by the claimant, his statements on his unemployment application, and the failure to file his claim until his insurance ran out due to his termination.

Based on my review of the entire record, I find that claimant failed to prove that the work-related incident was the cause of the need for his medical treatment.

### **III. NOTICE**

The respondents further contend that the claimant did not give notice of his injury until March of 2006. The claimant admits that he did not give notice of his injury until he was terminated other than the complaint of sore neck and did not file his claim until March of 2006, when his insurance ran out. Based on this evidence, I find that the claimant did not provide notice of his injury until March of 2006 and that any claim for medical benefits prior to that date would be barred by Ark. Code Ann. § 11-9-701, assuming arguendo that the injury was work-related (a finding that I do not make).

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed in August and September of 2005.
3. The applicable compensation rate is \$394.00 for temporary total disability and \$296.00 for permanent partial disability benefits in the event compensability is established.

4. Respondents have controverted this claim in its entirety.
5. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury in August or September of 2005.
6. Claimant as failed to prove that he gave notice of a work-related injury to Paslode prior to the filing of his claim in March of 2006.

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**ORDER**

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

**IT IS SO ORDERED.**

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**BARBARA WEBB**  
Administrative Law Judge