

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800633 (12/20/06)

RICKY D. COFFMAN, EMPLOYEE

CLAIMANT

CITY OF JONESBORO, SELF-INSURED EMPLOYER

RESPONDENT

MUNICIPAL LEAGUE WCT, TPA

RESPONDENT

OPINION FILED AUGUST 18, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 30, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant appeared pro se.

Respondent represented by the HONORABLE J. CHRIS BRADLEY, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above style claim to determine the claimant's entitlement to workers' compensation benefits. On April 15, 2008, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Ricky Coffman- the claimant, Rebecca Robbins, Chuck Hartley, Jason Oleson, Darrin Grogan and Kenny James, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Ricky Coffman, the claimant, with a date of birth of March 6, 1963, is a high school graduate with some post secondary education. Claimant commenced his employment with respondent on May 1, 1989, at the Fire Department. Claimant has been a Captain with the Jonesboro Fire Department for eight (8) years.

Claimant maintains that he sustained an injury on December 20, 2006, within the course and scope of his employment which serves as the basis for the present claim. In describing the mechanics of the injury claimant testified:

We had went to Station One (1) to do our daily workout and, while using one of the lifting machines, I injured my neck.

At the time, I wasn't sure. I felt a pop in my neck.

Oh, it was - I think, at this time, we was going at - this one here was at ten-thirty (10:30). At that time, we was going at around ten (10:00), I believe. (T. 12).

During the December 2006, time frame claimant worked a 24-hour shift, from 7:30 a.m. until 7:30 a.m, the next morning. At the time of the workout exercise program the claimant was accompanied by Chuck Hartley and Jason Olsen.

Claimant testified regarding his activities following the incident/injury:

I quit lifting, of course. I had a little bit of pain in my shoulder on the right side. After about two (2) or three (3) shifts, it didn't go away. I spoke with Mr. Grogan and asked him if he had any ideas of what I might do to relieve maybe the pinched nerve, the muscle strain, whatever I might have - might have done - because the pain that I was suffering at that time, although the pop was in my neck, was mainly right her in this [right] shoulder. (T. 13).

Claimant denied ever having experienced any problem with his neck or shoulder previously that

required medical treatment. Claimant testified that in discussing the complaint with Mr. Grogan, he was attempting to obtain some relief from his symptoms without going to a doctor. Regarding the reporting of the incident to supervisory personnel claimant's testimony reflects:

Well, that's what the NFPA - the 1500 and the 1583, I believe it was - anyway, the City had got Mr. Grogan to help them set up the workout program, order the machines, get in set up, put up the paperwork around the walls so you could see and kind of keep track of what you're doing and try to get you on a routine program, and he was the go-to guy.

To me, the Fire Chief, Mr. James, they don't know anything about weight-lifting to the extent . . .

To me, he was the - to me, seeing as he was the City's go-to guy, he was the coordinator over that, and that should have been sufficient because the coordinator over the fitness program - I don't know if we can use the NFPA quote in here . . . (T. 14).

The claimant testified that he was given specific recommendations with respect to further workouts within the exercise program by Mr. Grogan when he relayed the incident and the resulting symptoms. After following the suggestions claimant noted that the pain was still present. Thereafter claimant testified that he talked to another friend, who is also a personal trainer, about his symptoms and complaints.

The testimony of the claimant reflects that he first sought medical treatment in connection with the complaints and symptoms growing out of the December 20, 2006, incident in March 2006. The claimant testified that in March 2006, he sought treatment from his family doctor, Dr. McDaniel. Claimant maintains that he relayed to Dr. McDaniel the history of the onset of his pain:

Yes, I did. I told him what I was doing at the time. I told him what - the pop that I felt. I told him about the pain in my shoulder, and we both discussed it, and I told him, I said, I think it's a pinched nerve

or strained muscle, and that's what he treated me for. (T. 17).

Claimant asserts that his medical treatment under the care of Dr. McDaniel consisted of a steroid shot and some pain pills. Claimant explained that he did not file a workers' compensation claim with the City of Jonesboro during the time frame that he was receiving medical treatment under the care of Dr. McDaniel because "we wasn't sure what was wrong". (T. 18).

The evidence in the record reflects that the claimant continued to perform his regular job duties, with the exception of the work-out part, even during the period that he was receiving medical treatment under the care of Dr. McDaniel. The testimony of the claimant reflects that Dr. McDaniel referred him to Dr. Behren for the EMG study. After obtaining the results of the EMG study the claimant filed a claim for workers' compensation benefits with the City of Jonesboro. The medical treatment received by the claimant prior to receiving the results of the EMG study, to include that under the care of his family physician, was filed with his regular health insurance carrier.

The claimant testified that he went to Human Resources of the City of Jonesboro once he received the test results from the EMG, talked with Ms. Gloria Roark and relayed that he needed to file a workers' compensation claim. The respondent contested the compensability of the claim.

The testimony of the claimant reflects that once Dr. McDaniel received the results of the EMG study he was referred by same to Dr. Abraham. Claimant testified that under Dr. Abraham's care he was referred for a MRI. Claimant's testimony reflects that respondent was notified prior to his visit to Dr. Abraham. On December 14, 2007, claimant underwent surgery under the care of Dr. Abraham. Regarding the time off from work attributable to the treatment of

the injury claimant testified:

That, I was mistaken on, because it was - there was three (3) weeks I wasn't to ride or drive anywhere, and then, I believe it was two (2) or three (3) weeks after that, that I actually got to come back to work on light duty. (T. 19).

From December the 14th to, I believe, January 10th, I wasn't to ride or drive anywhere. After that, I could drive, as long as I wore a neck brace. That went on for two (2) to three (3) weeks. (T. 20).

The testimony of the claimant reflects that during the above-mentioned latter two (2) to three (3) three weeks he was not back at work. The claimant did receive six (6) weeks of sick time, which amount to his regular pay. As of the May 30, 2008, hearing date the claimant was back at work at light duty and had been so since his released in January/February 2008.

The testimony of the claimant reflects that he was last seen by Dr. Abraham on April 14, 2008. Claimant had a scheduled return appointment with Dr. Abraham for July 14, 2008. With respect to any residual symptoms or complaints as of the May 30, 2008, hearing date claimant testified:

I still have severe burning and numbness in my leg and finger is starting to go numb at times. My neck - my neck has pain, but nothing like the lower extremities. For two (2) weeks after the surgery, everything was fine. My leg didn't burn, I had no pain in the shoulders, nothing. Around the third (3rd) week, it started coming back. On the second (2nd) MRI, we found that there was what - what's called residual - I don't know if it's scar tissue or what it is, but it's residual, and it is still pressing on the same point of the spinal cord as what the disc was. It's not pressing to the extent, to where it was - where that was - but it's still in the same spot. I think once he gets that relieved, then that will clear up. (T. 21-22).

During cross-examination the claimant acknowledged that as Fire Captain he has men and women who report to him. Claimant further acknowledged the personnel under his supervision are to report their injuries to him. With respects to the afore, the claimant testified:

I write it down - once it's reported to me, I put it on the daily log, and either me or whoever is reporting it, reports it to the Battalion Chief. (T. 23).

Claimant concedes that some of the months may have gotten mixed up when he spoke to the doctors regarding his injury. Claimant acknowledged completing the Form AR-N on December 13, 2007. Regarding the discrepancy in the dates that he asserts he first notified personnel of the City of Jonesboro of his injury, the testimony of the claimant reflects:

Yes, it was. This one [Form AR-N] here's different. I actually went up there and talked to them, I believe, prior to that, cause I wasn't sure that I was gonna have surgery. But I knew that, due to the EMG, that it was probable, and I had mentioned it to them, and I did fill out the paperwork. As far as the dates go . . .

. . . . I don't recall the exact dates but, yes, 12/13 of '07 is when I filled that out, yes. (T. 25).

The testimony of the claimant reflects that his earlier conversations were with Gloria Roark and Kenny James:

That would have been Gloria and - I believe I talked to Mr. James, and told him that I was afraid I was gonna have surgery and, at that time . . (T. 25).

As to whether he relayed to the above that he had hurt himself in the workout room in December 2006, claimant responded:

No, we - well, in a round-about way, we discussed it, but, no, there was no exact date, no. (T. 25).

The claimant offered that after receiving the results of the EMG on November 20, 2007, that he notified personnel with the City of Jonesboro of the injury. With respect to his conversation with Battalion Chief James claimant testified:

The conversation me and Mr. James had - I don't know if it was

before that, or after it. It was around that time.

It was just casual conversation. It's not something that I would document or anything like that. (T. 26).

Claimant's testimony reflects that Mr. Grogan was the go-to guy for the Department anytime the Fire Chief had a question about anything to do with the physical fitness part.

Claimant concedes that Mr. Grogan was not in the chain of command. Mr. Grogan is a Fire Fighter - a line hoseman.

In explaining the delay in going to the doctor from December 2006 until March 2007, claimant testified:

Yes. It took that long to try the stuff that I was being told by Mr. Grogan to do, and the other persons. (T. 28).

Claimant concedes that it was his responsibility to report his injury up the chain of command, however added:

If I would have thought and known that it was the extent that it was, yes, I would have - I would have. (T. 28).

The claimant testified regarding a typographical error in the December 12, 2007, report of Dr. Abraham, explaining:

Like I said earlier, the way he has written this - there's no periods and stuff, and while he's typing - I mean, he's also talking with you and anybody that goes to the doctor knows they do that. In the second sentence, we'll say of the second paragraph, where somebody had wrote the arrow pointing to it?

The second sentence in that line - he felt as if he had stained a muscle. He stopped lifting in May - should not be he stopped lifting in May. It should be he stopped lifting, and in May, he wen to Dr. McDaniel and was treated with a steroid shot, is the way that should be, because Dr. Abraham had asked me when I went to the doctor. And, like I said, I wasn't sure of the exact month

. . . but I knew that I did go to Dr. McDaniel for that problem and he did give me a steroid shot. (T. 29-30).

The testimony of the claimant reflects that the onset of shoulder pain following the December 20, 2006, popping sensation in his neck was in the right shoulder. Claimant testified that he later developed pain in the left shoulder. Claimant denies that the popping sensation was any place else in his body. When asked to specifically identify the symptoms that he presently experiences which he attributes to the December 2006, work-related injury the claimant testified:

I have moderate neck pain.

This finger and this arm [right] (indicating) has started to start tingling again.

The left - from the left hip, all the way down to my toes, burns, tingles, goes numb. That right here, itself, is worse than actually what the pain is the neck is. As far as the back, I have no pain in my back. (T. 33).

The testimony of the claimant reflects that the symptoms in his hip and leg “started slow, around the third (3rd) week after the December 2007 surgery by Dr. Abraham. Regarding his understanding of the surgery, the claimant’s testimony reflects:

They took out the disc between the C-5 and C-6.

And replaced it, from what Dr. Abraham had told me, with a cadaver bone and a plate. (T. 34).

Claimant acknowledged that he did not have any surgical procedure on his hip during the December 2007, procedure by Dr. Abraham. The testimony of the claimant further reflects that before the surgery he had some leg numbness and hip pain before the surgery. Claimant’s testimony reflects, regarding the afore:

But, the surgery had alleviated them for approximately two (2) weeks. Around the third (3rd) weeks is whenever it started coming

back, and that's where - that is where the residual scar tissue, what-have-you, is - has started pushing against the spinal cord again. It's in the same spot - where the spinal cord had died, there's a little white spot on the MRI, and it's still hitting in the same spot, in the middle of that spot.

I mean, all I can say is, you know, and it was hard for me to get Dr. Agram to understand this - that I can sit still, I can stand still, and just move my head, you know. If I move it that far, I feel the pain, the burning in my leg. I turn it to the right that far, I feel it in my leg. I turn it to the left that far, I feel it in my leg. I look up, I feel it in my leg. (T. 34-35).

Chuck Hartley, a Fireman with the City of Jonesboro, testified that while he was assigned to one fire station and the claimant was at a different fire station their stations worked out together. Mr. Hartley has been employed by the City of Jonesboro as a fireman since September 1999. Mr. Hartley added that he has know the claimant all of his career. Mr. Hartley testified that he recall that while working out in December 2006, he heard the claimant say that he felt something pop. Mr. Hartley's testimony reflects that the claimant did not lift weights following the incident.

Regarding the exercise program, Mr. Hartley testified that he was under the impression that the workout program was mandatory. As a result of participating in the exercise program Mr. Hartley testified that he felt more physically fit and confident in performing his regular job duties. Mr. Hartley has participated in the exercise program since in its beginning, approximately two (2) years earlier. Regarding the circumstance surrounding the claimant's statement about feeling a pop, Mr. Hartley elaborated:

Okay. It's kind of hard to recall since it's been so long, but me and Rick, we smoked and stuff after workouts, and, you know, usually go outside on a picnic table or something, and, he'd say, boy, you know, I don't know, I think I might have done . . .

He, you know, moved his shoulder, and said, I think I done something, you know. And the following shifts, later, you know, he would talk about - I remember his specifically talking about hurting right in here [fold of his right arm] (indicating).

And then, later shifts, he's like, well, I can't work out with you guys, you know, today, cause, you know, I'm hurting. And then he would talk about his legs hurting sometimes and . . . (T. 39-41).

Mr. Hartley's testimony further reflects, regarding the reporting of incidents:

I - we've got, you know, there's - I can tell you - I felt like I did something one time, too, myself, but, you know, you just don't - you just don't report something like that. You just - it's - you think, well, it might have not been too bad, you know. (T. 41).

In describing the exercise facility, Station One, Mr. Hartley testified:

We have an outside mezzanine and an upstairs over the engine bay, and there's various workout machines up there and . . . (T. 42).

Mr. Hartley was uncertain of the names of the workout machines. The testimony of Mr. Hartley reflects that the equipment includes free weights, a shoulder machine.

Mr. Jason Oleson, a fireman with the City of Jonesboro Fire Department, has been so employed since February 2006. In 2006 Mr. Oleson was stationed at Fire Station Six. The testimony of Mr. Oleson reflects that in December 2006, he worked out with the claimant, noting that they went through the same routine workout - specific muscle groups each day. Regarding their usual workout routine Mr. Oleson testified:

Not on any one given day. We usually had four (4) or five (5) machines and there's probably seven (7) or eight (8) machines up there.

No, we gradually worked our way up. As we got stronger, we lifted more weights, cause we got physically stronger. When we were using less weight, it became easier for us, and we just weren't feeling anything out of the workout, so it's, you know, it's the natural progression - as you get stronger, you use more weight to continue getting stronger. (T. 45).

Mr. Oleson testified that the claimant did mention having injured himself while working out:

Yes, I recall you saying something while we were there at Fire Station One (1) up there in the workout area, and I asked how bad you thought you were hurt, and then, later on, at the Fire Station - back at the Fire Station, later that shift, when we went back, you said

Something was said about the level of discomfort as we were back in the Fire Station. (T. 46).

Mr. Oleson testified regarding his observation of the claimant around the Fire Station following the injury:

Yes, I noticed - I noticed some when you were sitting in the recliner, you seemed to - or as we were watching TV that evening, it was - it seemed as though it was difficult for you to get comfortable. And then, later on that evening, when it came time for us to quiet down and go to bed that night, it seemed like he was having a really tough time getting comfortable in his bed. (T. 46-47).

It is the testimony of Mr. Oleson that he was also under the impression that the exercise program was mandatory. During cross-examination Mr. Oleson acknowledged that the claimant did not mention the specific exercise he was performing at the time of his injury.

Darrin Grogan, a 12-year employee of the City of Jonesboro Fire Department, provided testimony regarding his involvement in the department's exercise program:

Chief James asked me because of his back. I do have a four (4) year college degree in it. I also have twenty (20) years' experience in doing it, also, as a personal trainer. I own my own fitness center, also.

* * *

Chief Jagers got the grant, and he and I went around, looked at all the different equipment in different gyms and, yes, I'd be the one that helped him to get it. (T. 50).

As a consequence of the above, Mr. Grogan asserts that he was the go-to guy for the Fire

Department regarding the exercise equipment/program. The testimony of Mr. Grogan reflects that Chief Jagers would solicit advise regarding the physical fitness aspect of the exercise program.

Regarding his knowledge of the claimant's injury, Mr. Grogan testified that the claimant came to him at Station 6 approximately two (2) to three (3) shifts following the December 20, 2006, date to ask what he should do about his symptoms attributable to the work-out equipment.

Mr. Grogan's testimony reflects, regarding his conversation with the claimant:

I stated that you needed to lay off of it and you needed to rest it, ice it, compress it, elevate it, just like you're supposed to do for the first seventy-two (72) hours, and then to lay off of it, see what it looks like in the next two (2) to three (3) weeks, and then after that, then you need to advisably come back and talk to me again and we'll go from there. (T. 51).

The testimony of Mr. Grogan reflects that he considered himself the coordinator of the fitness program. Mr. Grogan has a four (4) year college degree in Exercise Physiology.

During cross-examination Mr. Grogan quantified the two (2) to three (3) shifts to a period of probably ninety-six (96) hours. The testimony of Mr. Grogan reflects that the operation of the fitness center was his assignment in that he helped to pick out the exercise equipment. As to when the equipment was secured, Mr. Grogan's testimony reflects:

Yes, sir, we got it in May of 2006, and we were supposed to - and the way I understood, also, it was mandatory the we had to go work out for every shift that we were on duty. (T. 55).

Regarding his conversation with the claimant in December 2006, Mr. Grogan testified:

He just basically asked me - he pointed to the area where he thought he hurt it at, and asked me what I thought he should do with it and how to take care of it and what he needed to do.

He said he had been injured when he was working out at Station

One (1). (T. 55-56).

Kenny James, Battalion Chief with Jonesboro Fire Department, testified that he has so held his current employment position for four (4) years. In describing his employment duties, Chief James' testimony reflects:

I oversee - right now, we've got two (2) battalions - I oversee four (4) fire stations and all the people that work at those stations, and, also, oversee fires when we have fire in the that District.

I have a Captain at each Substation that I'm over, and I have Firefighters under the Captain, but I'm over all of them, directly. (T. 57).

Chief James testified that in December 2006, the claimant as a Captain reported to him. When questioned regarding the City's action in posting notices regarding the reporting of work-related injuries, Chief James' testimony reflects:

Well, usually, every time we have a different policy come down from Human Resources, they send it out to the Department wide, and we get it out to all the Stations, put them on bulletin boards where everybody can read it. (T. 58).

Chief James testified that employees under the claimant's command are supposed to report injuries to the claimant. Thereafter, Chief James testified regarding the claimant's responsibility:

Report it to me, and, also there's paperwork that has to be filled out, also. You can't just report it, you have to have paperwork filled out on how the injury occurred and then if there's anything you could do to prevent it, and if they need medical treatment, then we have to call Human Resources and get it okayed to send them to a doctor.

My position, I'm supposed to start the paperwork, and then I bring it to him and he fills out how the accident happened. (T. 58-59).

Chief James testified regarding his knowledge of the claimant having hurt himself in December 2006:

My only knowledge of Mr. Coffman being hurt was in - prior to December of '07, just prior to him having surgery, cause I do the scheduling for all the people - and he came to me and said he was going to have to have surgery, he was going to be off work. So I had to make arrangements to have somebody fill in his position.

He just told me he was having neck problems and - I can't remember exactly what the conversation was. He told me he was going to have to have surgery. But, to my knowledge, I don't ever know of him saying it was a work-related injury. (T. 59).

Chief James testified that he was not familiar with the Form AR-N, which reflects the claimant's signature and a December 13, 2007, date. Chief James offered that the document was one that Human Resources would probably have the claimant fill out. Chief James testified that he was not aware of a job-related injury involving the claimant until after the fact, and, as such, did not provide any instruction to same about going to Human Resources.

Regarding NAPA, Chief James testified:

It's just a - it's a national standard that most fire departments go by. But Jonesboro has never adopted that standard. But, I can also say, if something was to happen to one of our firemen - if he gets hurt on the job or gets killed - NFPA - we would probably be held under NFPA 1500, even though we're not - we haven't adopted it - if you can understand that.

I'm probably speculating. That's what I've heard. I heard that we're held under it, even though we haven't adopted it. (T. 61).

During cross-examination Chief James was questioned regarding a conversation he had with the claimant wherein the claimant relayed having hurt himself:

To be honest, I can't remember the conversation, but I do remember the part where I did say I noticed you hadn't been working out, but, the conversation before that, I don't know what we were talking about, but I do remember noticing that you hadn't been working out. (T. 62).

Chief James concedes that there is no written requirement that an employee go through him

before going to Human Resources:

I don't know if there's anything in writing, but it's out of courtesy for the position, you should. I'm your commanding officer - I need to know if you're hurt, because if we have a fire, I need to know if you've got an injury. (T. 62).

Chief James testified that he learned of the claimant's pending surgery prior to the procedure in December 2007. Chief James' testimony reflects that he makes out the schedule a month in advance, and that while making out the schedule the claimant came to him and relayed that he was going to have neck surgery and would be off work for a while. Chief James testified:

Well, it's on a twenty-seven (27) day cycle, and I can't tell you exactly without looking back. It might have been a part of December and part of January. (T. 63-64).

Regarding the claimant's pending surgery, Chief James's testimony reflects:

He just told me he was having neck surgery. He was having trouble with his neck, but he never told me how the injury - how he hurt his neck, or anything like that, that I know of. I can't remember it. (T. 64).

Chief James maintains that he did not inquire further when told by the claimant of the pending neck surgery.

Chief James acknowledged that he commented to the claimant that he had noticed that the claimant had not been working out, however does not know if his observation was the product of the claimant saying that he had hurt himself lifting weights.

No, I have to be honest with you - you know, they mentioned earlier that it's mandatory. It is mandatory that they come up and work out. But, we don't stand there and watch over them and force them to work out. Some guys come up there and work out, some of them sit on the picnic table and talk.

So, sometimes they work out, and sometimes they don't. So, when they don't, a lot of times I don't pay any attention.

Because, some shifts, they don't feel like working out; next shift, they may work out. That's just the way it is. And, as administration, we don't force them to work out. We can't stand over them and force them to work out. (T. 65).

The testimony of Chief James reflects that the firemen are allowed one (1) hour each shift to work out. Chief James explained that had the claimant reported to him that he had injured himself during one of the workout sessions:

Well, yes, because if he'd have reported it to me then, we'd have filled out the paperwork right then, and he could explain on the form how he hurt his back - or hurt his neck. (T. 66).

With respect to the role in the performance review of a firefighter under his command not working out, Chief James testified:

Not really. We just started this program two (2) years ago, and it's like a lot of things, we started out, we're gonna have good intentions, and then, a lot of times we have training that takes precedence over working out. We have fires, and sometimes, if you're busy, you don't have time to allow, so it's sort of mandatory that they come up, but we don't force them. We don't stand there and say, you've got to lift this weight. We encourage them to do something, if it's nothing but ride a bicycle or get on a treadmill, we encourage them, but we don't really enforce it. We don't punish them if they don't. (T. 67).

Chief James acknowledged that the claimant took workout session/program serious, and that it made a difference in the claimant's attitude. Chief James' testimony reflects that when he noticed that the claimant had quit working, it did not cross his mind why. Chief James is uncertain when he first learned that the claimant was asserting a work-related injury, noting that once the claim is made to Human Resources it is out of his hands at that point, and he is out of the loop. Chief James testified that once he learned a work-related claim he did look through his files to see if anything had been written up, "because I was thinking well, maybe he told me

something, and I wrote it on my report, but I couldn't find anything". (T. 69).

Rebecca Robbins, Human Resources Technician and Safety Coordinator, for the City of Jonesboro, testified that she reports to Gloria Roark. Ms. Robbins testified that the Form AR-N is the initial claim form, "that we send directly to workers' comp". (T. 70). Regarding the mechanics of the completion of the Form AR-N, Ms. Robbins' testimony reflects:

They have to come to my office and start the initial paperwork, and that's usually accompanied by a doctor's statement where they have gone to the Municipal League appointed physician. (T. 70).

Regarding her recollection of the claimant, Ms. Robbins testified:

He called the office, roughly, probably early December. I don't remember the exact date, but he did say that he had, he thought, an on-the-job injury from working out, and I asked him initially did he make a first report to his supervisor - he said, no. And I said, well, when did it happen, and he said, December, roughly the 20th, of 2006. And I said, there's no paperwork to back it up, nothing, you know, and it is standard procedure that if something does happen, they have to at least report it to their supervisor. There is a standard form that we direct them to fill out with their statement, the supervisor's statement, and whether they seek medical attention or not. And we have a separate file for those that do not, but it is on file for if they do. (T. 70-71).

Ms. Robbins testified that the claimant came into the office and filled out the Form AR-N on December 13, 2007. Prior to completion of the Form AR-N, the testimony of Ms. Robbins reflects that she had acquired information from the claimant during the early December 2007, telephone conversation:

I do not recall the actual date that he called the office and said that he was having problems and he thought he needed surgery. And we explained to him that without an initial report, a claim being made to the Municipal League, that he would probably have to file that on his medical insurance, because there wouldn't be time available to get Municipal League to approve it in the necessary time that he needed the surgery done for relief. (T. 72).

Regarding the urgency in the instant claim, Ms. Robbins explained:

It had been a year since he claimed the injury had occurred, and, like I said, it's normal practice that - I mean, it's stated in the handbook of the City, that it is - that we are notified of an incident that happens so we can be aware - just for instance in this case - whether he seeks medical attention at the time of the injury or not. (T. 72).

Ms. Robbins further relayed regarding the claimant's conversation and surgical treatment:

He just said he was in a lot of pain and the doctors were recommending surgery and I told him that it could take weeks for Municipal League to approve it, and that he would be going at it basically at his own risk cause his medical insurance had paid it.

I think he told me he had it scheduled for sometime in December, and that's when I said, well, you will have to come up and fill out the paperwork before I can even notify workers' comp. (T. 72-73).

The testimony of Ms. Robbins reflects that she has been employed by the City of Jonesboro in the Human Resources Department for one (1) year. Ms. Robbins acknowledged that the claimant did relay that he had injured himself while working out. Ms. Robbins testified the Human Resources did not conduct an investigation of the claimant's claim noting, "we strictly relied on the Municipal League to go back and take care of it". (T. 77).

The medical in the record reflects that the claimant was seen by his family physician at the NEA Clinic on March 6, 2007, and relayed complaints of right shoulder pain. The Patient Progress Notes relative to the March 6, 2007, visit reflect the entry of "no known injury", however noted repetitive motion of arm at work. The Patient Progress Notes of the March 6, 2007, visit reflect the presence of objective finding of crepitus with anterolateral pain in right shoulder. (RX #1, p. 20). The claimant was again seen at the NEA Clinic on July 9, 2007. The afore clinic note reflect the claimant's chief complaints as "possible pinch nerve. When

stretching feels like warm water pouring down left side”. The progress note reflects objective finding of positive for paraspinous trigger points. (RX. #1, p. 19). The claimant was also seen at the NEA Clinic on August 13, 2007. Both the July and August 2007 Patient Progress Notes reflect possible diagnoses of fibromyalgia. (RX #1, p. 18-19).

The claimant was seen at the NEA Clinic on November 8, 2007. Entries in the afore reflect:

See Urgent Care notes from summer & chest X-Ray from St. B’s 9-17-2007. He continues to have burning sensation in L arm & axilla when he moves certain positions. Also c/o L leg pain when he sits or lays on it & sometimes it tingles & “goes to sleep.” (RX. #1, p. 12).

As a consequence of the above, the claimant’s physician recommended an EMG & NCV of the left arm and leg.

On November 20, 2007, the claimant underwent the NCV/EMG study. The afore report reflects, in pertinent part:

HISTORY: This is a 44-YO man who presented with numbness and tingling in the left upper and lower extremity. He also has neck and back pain.

IMPRESSION: This is an abnormal EMG and unremarkable NCV of the left upper and lower extremity, which is consistent with chronic radiculopathy at around the C7 and L4-5 level on the left. (RX. #1, p. 9).

Following a November 29, 2007, visit to Dr. McDaniel, arrangement were made for the claimant to undergo a MRI of his cervical spine and lumbar spine. (RX. #1, p. 7-8). The December 8, 2007, MRI scan report reflects, in pertinent part:

OPINION:

1. MRI Cervical Spine: Large disc herniation C5-C6 causing fairly severe canal stenosis as described above.
2. MRI Lumbar Spine: Mild Degenerative change and small

annular tear at L5-S1 without nerve root compression in the lumbar spine. (RX. #1, p. 6).

The claimant was seen by Dr. Robert Abraham, a Jonesboro neurosurgeon, on December 12, 2007, pursuant to a referral of Dr. McDaniel after the results of the MRI scans were obtain. The December 12, 2008, report reflects, in pertinent part:

HPI

Mr Coffman is a 44-year-old white male with a history of left shoulder pain since May. The pain is actually is from the top of his head to the toes. He states the whole side of his body aches He feels as if someone has poured water on his head. He has a numb tingling sensation when he moves his head or looks down When he laying in the bed he has a sensation of “hitting his funny bone” all in the left side.

He states he was lifting weights at the Fire Station when this first occurred. He did not have pain at that time, he felt as if he had strained a muscle He stopped lifting in May He went Dr. McDaniel and was treated with a steroid shot and medication He has had no PT He has also saw Dr. Behrens and had EMG/NCV Studies has also had a cervical and lumbar MRI

* * *

-- Cervical Spine --
Flexion: 75 - painful
Extension: 50
Rotation: 30/30 painful to L
Muscle Spasms: mild ps and traps
Tenderness: mild in front of L shoulder

-- Lumbar Spine --
Flexion: 90
Extension: 20
Lateral Flexion: 20/20
Muscle Spasms: Mild ps alone entire back
Tenderness: none
SLR: positive on left
Heel/Toe: intact

* * *

Test Conclus.

PT Cervical MRI revealed: C5/6 HNP root and cord impingement with cord changes C5/6 min disk bulge

PT Lumbar MRI revealed: min bulge at L5/S1 Amended by: Robert E. Abraham; 12/12/2007

Assessment

1: R Cervical Radiculopathy

Plan

- 1 Patient counseled
- 2 Operative therapy ACDF C 5/6
3. Get pre op done
4. RTC after #2
5. Send letter to Dr. McDaniel (RX. #1, p. 1-4).

After a thorough consideration of all the evidence in this record, to include the testimony of the witnesses, review of medical records and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 20, 2006, the relationship of employee-employer existed between the parties.
3. On December 20, 2006, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$488.00/\$366.00, for temporary total/permanent partial disability.
4. On December 20, 2006, the claimant sustained an injury arising out of and in the

course of his employment, which required medical treatment and rendered him temporarily totally disabled for the period commencing December 14, 2007, and continuing for six (6) weeks thereafter until the claimant returned to work.

5. The respondent shall pay all reasonable hospital and medical expenses arising out of the claimant's compensable injury of December 20, 2006.

6. The respondent has controverted this claim in its entirety.

CONCLUSIONS

The claimant asserts that he sustained an injury within the course and scope of his employment on or about December 20, 2006, which required medical treatment, to include surgery, and resulted in a period of total incapacitation. Claimant seeks corresponding workers' compensation benefits. Respondent takes the position that the claimant did not sustain compensable injury while providing employment services to the employer. Alternatively, respondent asserts that if the claimant did sustain a compensable injury workers' compensation benefits were not owed until the claimant reported the injury.

The present claim is one governed by the provisions of Act 796 of 1993 in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provisions. In order to prove 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: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that

the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i).

The facts in this claim are not greatly disputed. The claimant is a Captain with the Fire Department of the City of Jonesboro. There is no evidence in the record to reflect that the claimant experienced physical restrictions or limitations prior to December 20, 2006. Further, there is no evidence in the record to reflect that the claimant sought, obtain, or required medical treatment relative to his neck, shoulder, low back or hip prior to December 2006.

In March 2006, the Fire Department instituted an exercise program. In preparation of the afore exercise equipment was purchased and a fitness center was set up at Station One. Darrian Grogan, a 12-year employee of the City of Jonesboro Fire Department with a four year college degree in exercise physiology and twenty (20) years experience as a personal trainer as well as a former owner of his own fitness center, was the Fire Chief to assist in selecting the equipment and setting up the fitness center.

Employment Services

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). Pursuant to Ark. Code Ann. §11-9-102 (4)(b)(iii), a compensable injury does not include injuries “inflicted upon the employee at a time when employment services were not being performed.” 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 Transportation*, 347 Ark. 851, 69 S.W.3d 1 (2002).

The credible evidence in the record reflects that participating in the fitness/exercise program was mandatory. The Fire Department allows the firemen one (1) hour each shift to

work out. The evidence preponderates that in addition to being mandatory, allowing and encouraging the firemen to workout was a benefit to respondent in that it improved the attitude of its personnel and enhanced their ability to perform their job duties.

The credible testimony of Chuck Hartley, Jason Oleson, and Darrin Grogan all corroborate the claimant's account of sustaining an injury while participating in the mandatory exercise program on or about December 20, 2006. The claimant sought advise and recommendations regarding his symptoms growing out of the December 20, 2006, accident from the individual charged with the responsibility of securing equipment and setting up the exercise program. The claimant remained symptomatic following the December 20, 2006, incident, although he did not seek medical treatment until March 6, 2007.

The evidence preponderates that the medical treatment received by the claimant subsequent to his March 6, 2007, visit to Dr. McDaniel was reasonably necessary in connection with the injury he received on December 20, 2006. The claimant underwent diagnostic studies which disclosed the presence of objective findings establishing the injury. Claimant identified a specific incident which resulted in a popping sensation, and following which he refrained from lifting weights. The claimant also relayed the occurrence of the specific incident to the individuals with whom he was working out. The claimant ultimately underwent a an anterior cervical discectomy and fusion at C5-6 (ACDF) under the care of Dr. Robert E. Abraham, a Jonesboro neurosurgeon.

The claimant has sustained his burden of proof by a preponderance of the credible evidence that he sustained an accidental injury on December 20, 2006, while within the course and scope of his employment which caused internal harm to the body requiring medical services

and resulting in disability. Further the evidence preponderates that the claimant was performing employment services at the time he sustained the December 20, 2006, injury. Respondent has controverted this claim in its entirety.

Notice of the Injury

Ark. Code Ann. §11-9-701 provides, in pertinent part:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

* * *

(b)(1) Failure to give the notice shall not bar any claim:
(A) If the employer had knowledge of the injury or death;
(B) If the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or
(C) If the commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

While the claimant did consult Mr. Grogan following the occurrence of the December 20, 2006, injury, the credible evidence reflects that the afore was not for the purpose of reporting the injury, but rather to obtain information, directions, and guidance on how to precede with the workout program. The claimant had a conversation with his supervisor Chief James, who had observed that the claimant had ceased working out. During the afore the claimant relayed that he was hurting. The conversation did not result in further inquiry by Chief James regarding whether the claimant's complaint was the product of a work-related injury. Indeed, when the claim was referred to the Municipal League following the filing of the Form AR-N on or about December

13, 2007, the same was denied as not being work-related.

The credible evidence in the record reflects that respondent was formally notified of the claimant's claim associated with injury growing out of the exercise program prior to December 13, 2007, via a telephone conversation of the claimant with personnel in the Human Resources Department of the City of Jonesboro. Human Resources did not conduct an investigation of the claimant's claim, but rather relied of the Municipal League. There is no indication in the record that either of the witnesses identified by the claimant was contacted regarding the claimant's injury. Chief James did review his files to see if he had anything written regarding the claimant reporting an injury to him. Chief James candidly testified that the exercise program was mandatory. Accordingly, clearly any injury sustained while participating in the exercise program would encompass "employment services". It would appear, given the position taken by respondent regarding employment services that an investigation by the Municipal League was not had in this claim.

The credible evidence reflects that the claimant was unaware of the true extent of his injury until the EMG/NCV studies and later MRI scans were obtained in November/December 2007. Claimant obtained medical treatment from his family physician beginning on March 6, 2007, for his complaints growing out of the incident. Prior to the March 2007, medical treatment claimant had followed the recommendation of Mr. Grogan and another personal trainer. The claimant's failure to give notice is excused in light of his reliance of the guidance of the individual responsible for setting up the program and the fact that he had mention in injury to his supervisor, Chief James, who had noticed his absence for participating in the work out program.

Corresponding Workers' Compensation Benefits

A claimant is entitled to the payment of temporary total disability benefits during his healing period if he shows by a preponderance of the evidence that he had a total incapacity to earn wages. *Carroll General Hospital v. Green*, 54 Ark. App. 102, 923 S.W. 2d 878 (1996). In the instant claim, after respondent denied the compensability of the claimant's claim he filed it on his health insurance. The claimant was totally incapacitated from engaging in gainful employment while within his healing period for a period of six (6) weeks following his surgery December 2007 cervical spine surgery. During the afore period claimant received six weeks of sick pay, which corresponded to his regular salary.

The respondent is not entitled to an off-set pursuant to Ark. Code Ann. §11-9-411 with respect to the sick pay that the claimant received in the present matter unless it can demonstrate that the payment received by the claimant was the product of a group disability plan or a self-insured employee health or welfare benefit plan. Ark. Code Ann. §11-9-411 provides, in pertinent part:

- (a) Any benefits payable on an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or or welfare benefit plan, or a group hospital or medical service contract.

If in fact the pay received by the claimant in the present claim was for leave time he had accrued the provisions of Ark. Code Ann. §11-9-411 do not apply. *Looney v. Sears Roebuck Company*, 236 Ark. 868, 1371 S.w.2d 6 (1963); *Southwestern Bell Telephone Company v. Siegler*, 240 Ark. 132, 398 S.W.2d 531 (1966); *Varnell v. Union Carbide*, 29 Ark. App. 185, 779 S.W.2d 543

(1989); *Norman v. North Hills Service, Inc.*, 2005 AWCC 232, Claim No. F408828 (Full Commission Opinion filed November 21, 2005).

AWARD

Respondent is herein ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation benefit rate of \$488.00, for the period commencing the date of his surgery in December 2007, and continuing for six (6) weeks thereafter, as a result of his compensable injury of December 20, 2006. Said sums accrued shall be paid in lump without discount.

Respondent is further ordered and directed to pay all reasonably necessary medical, hospital, nursing and other apparatus expenses in connection with the claimant's compensable injury of December 20, 2006, to include medical related travel.

This award shall bear interest at the legal rate, pursuant to Ark. Code Ann. §11-9-809, until paid.

Matters not addressed herein, to include permanent physical impairment, are expressly reserved.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE