

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F701402

JOHN H. FOOT, EMPLOYEE

CLAIMANT

SEARS ROEBUCK & CO., EMPLOYER

RESPONDENT

**INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA, CARRIER**

RESPONDENT

OPINION FILED JANUARY 7, 2008

Hearing before Administrative Law Judge O. Milton Fine II on October 9, 2007, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Thomas Mickel, Attorney at Law, Conway, Arkansas.

Respondents represented by Mr. Lee Muldrow, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 9, 2007, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on July 30, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. Along with an additional stipulation reached at the hearing, they are as follows:

1. The employee/employer/carrier relationship existed on November 27, 2006, at which time the Claimant, while driving a company truck, was involved in a motor vehicle accident.

2. The claim has been controverted in its entirety. No benefits have been paid on this claim.
3. On November 27, 2006, Claimant was earning sufficient wages to be entitled to temporary total disability benefits at the rate of \$559.00 per week and permanent partial disability benefits at the rate of \$419.00 per week.

Issues

At the hearing, Claimant added an issue regarding temporary partial disability benefits and adjusted the period for which he was claiming temporary total disability benefits. An issue was added concerning whether an offset would be appropriate here.

The issues now read:

Claimant:

1. Whether Claimant sustained a compensable injury to his neck on November 27, 2006.
2. Whether Claimant is entitled to temporary partial disability benefits from January 14, 2007 to February 15, 2007.
3. Whether Claimant is entitled to temporary total disability benefits from February 21, 2007 to April 20, 2007.
4. Whether Claimant is entitled to reasonable and necessary medical treatment from December 21, 2006 to April 20, 2007.
5. Whether Claimant is entitled to a controverted attorney's fee.
6. Claimant expressly reserves the issue regarding whether his low back surgery on April 20, 2007 was related to his November 27, 2006 injury.

Respondent:

1. Whether Claimant sustained an injury arising out of and in the course of his employment.
2. Whether the motor vehicle accident on November 27, 2006 represents the major cause of Claimant's disability or need for treatment.
3. Whether there is objective evidence of a compensable injury.
4. In the event Claimant is awarded indemnity benefits, whether Respondents are entitled to an offset under Ark. Code Ann. § 11-9-411.

Contentions

The contentions of the parties are as follows:

Claimant:

1. Claimant while driving a company truck sustained a compensable injury to his neck as a result of a motor vehicle accident on November 27, 2006. There is objective evidence of the injury in the form of straightening of the Lordotic curve.

Respondents:

1. Respondents contend Claimant's current complaints are the result of a preexisting condition, not an injury arising out of and in the course of his employment. This claim is controverted in its entirety.
2. Respondents contend that the motor vehicle accident does not represent the major cause of Claimant's disability or need for treatment; and that there is no objective evidence of an acute injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the credible evidence that he sustained a compensable injury.
4. The balance of the issues litigated at the hearing are moot in light of the above finding and will not be addressed.

CASE IN CHIEF

Summary of Evidence

The witnesses at the hearing were Claimant and C.J. Kitchens. In addition to the prehearing order discussed above, also admitted into evidence in this case was Joint Exhibit 1, a compilation of Claimant's medical records, consisting of a three-page index and 90 individually numbered pages thereafter.

Testimony

John H. Foot. Claimant testified that after working on his family's farm driving tractors and plowing fields, he went to work for Respondent Sears repairing appliances. He studied major appliance repair at Crowley's Ridge Vocational Technical School in Forrest City, and obtained his HVAC license. Sears provides a van for him to drive to and from his home, and it is used strictly for business reasons.

When describing the accident that occurred on November 27, 2006, Claimant stated:

I was driving down the road and the van in front of me didn't use a signal or brake lights or nothing. He just turned and stopped. And instead of hitting the van, I turned to the right and hit a sign with my van and it hit the tire and it hit the rear-view mirror and then it scraped down the side of the van, knocked off the rear-view mirror.

The van was full of children, and Claimant's evasive maneuver kept him from striking the vehicle. He stated that at the time of the accident he had his left hand on the steering wheel. When the collision occurred, "the tire caught the sign and jerked my arm and at the time I didn't think anything about it." At the time, he felt "just a short pain, but then, more stress than pain" The police were not called to investigate the wreck, and Claimant drove home. From there, he contacted Sears and talked with Jim Davis because Robert Cutting, his supervisor, was off that day. Davis advised him to fill out an official report, which Claimant did. Later, Cutting called to discuss the accident and to instruct him how to fill out the report. Both Cutting and Davis asked Claimant if he was hurt, and he told them that he did not think so.

Claimant stated that he began to experience pain in his left shoulder, but he continued to work. He "was having real bad headaches and [his] shoulders felt like they

were closing up on [him] and pulling up.” He did not recall having any numbness in his arms. He attributed these symptoms, which had gradually worsened since November, to the wreck. So he went to the emergency room at Conway Regional Hospital in December 2006 and then made an appointment to see Dr. Keith Schluterman. The hospital gave him some pain medications and muscle relaxers, but did nothing further because of the pending appointment with Dr. Schluterman. Claimant told C.J. Kitchens with Respondent Sears about his symptoms, and she said that he needed to see a doctor. He stated that he thought she knew he was going to see Dr. Schluterman.

Schluterman, a neurologist, performed an MRI on January 11, 2007 and gave Claimant three injections in his trapezius area to address his symptoms. However, his condition continued to worsen after the treatment. From there, Claimant went to Dr. Schlesinger, a neurosurgeon. He administered three sets of steroid injections in Claimant’s neck. But the treatment did not help.

Claimant testified that some time in April 2007, he began to have problems with his low back and Dr. Schlesinger performed surgery on him. His back condition is not related to the instant claim, and he has not seen a physician for his neck alone since the surgery. However, he added that since this surgery, he still has neck problems “from time to time . . . I just get tightness in my shoulders and then I get a headache real bad.”

With respect to his previous injuries, Claimant testified that in 2002, an air conditioner fell on his right shoulder. This was treated with steroid injections, and Claimant went back to work at full duty. While working for Respondent Sears in Texas in 2004, Claimant’s van was struck by a truck and pushed up against a tree. His neck was injured. Claimant did not have surgery, but underwent treatment for three to four months and was

released by Dr. Charles Tuen on January 17, 2005 with a seven percent (7%) whole-body impairment rating. Claimant stated that he did not recall whether he missed any work or sought treatment after this release until the accident at issue.

He stated that symptoms after the Texas accident were different than the ones he experienced after the 2006 accident. After the second wreck, his muscles were very tight and it felt as if "it was closing off my head." Therapy helped to loosen the muscles, but then they would tighten again. However, he had headaches of the same type and intensity after both accidents. And he had problems with his left arm after each collision. Presently, he is back working a normal schedule at Sears at full capacity without any problems.

Claimant testified that during the time period he was off work following the 2006 accident, he was paid benefits under a short-term disability policy. However, during the time in which he was on light duty and earning less money, he received no supplement. His health insurance has paid for all of his medical treatment, but he has had to pay deductibles and co-pays.

When questioned by Respondents, Claimant admitted that following the November 2006 accident, he reported that he had not been injured. He essentially told the same thing to the officer who investigated the accident.

However, a few days later he complained of neck pain that radiated in his left scapula area and his left arm and hand, along with numbness in some of his fingers on that hand. Activity worsened the pain. He also began experiencing intermittent occipital headaches, which makes him intolerant of light. Claimant stated that the headaches were constant after the 2004 accident. The balance of his symptoms were the same after both accidents. However, he did not recall telling Dr. Schluterman that his neck shoulder and

limb pain “began in 2004 and has been intractable.” While Claimant admitted that he had been treated for depression, he did not recall asking for time off prior to the 2006 accident due to headaches or depression.

On further questioning by his attorney, Claimant testified regardless of what his records reflect, he sought no treatment for his headaches or neck problems from January 2005 until after the 2006 wreck. At the time of the visit where his pain was noted as “intractable,” Claimant was accompanied by someone who told the doctor that Claimant had experienced headaches. Claimant did not recall making the statement in question. He added that he has not tried to hide the 2004 accident and the fact that his neck was injured then, nor has he attempted to seek additional benefits in Texas for the 2004 injury.

As for the release by Dr. Schluterman, Claimant stated that he had experienced a personal dispute with Schluterman’s daughter contemporaneous with the release. But Schluterman still referred him to Dr. Schlesinger.

The accident occurred at approximately 3:30 p.m. that day. The vehicle he almost collided with was not a school bus, but simply a van full of children. The sign Claimant struck was bent, but not knocked down. It knocked off the rear-view mirror on the passenger side of the Sears van. Claimant took pictures of the accident site. Claimant testified that his injury was caused strictly by the jerking of the steering wheel in the accident; he did not suffer trauma from anything else.

The Respondent carrier has not paid Claimant any disability benefits for the 2006 accident.

Claimant testified that he switched from Dr. Schluterman to Dr. Schlesinger because Schluterman wrote him a letter discharging him from his care but not giving him a reason

for doing so. But Claimant surmised that it was because Schluterman found out through his daughter that Claimant's roommate had given one of Claimant's Soma tablets to a third party.

When questioned by me, Claimant stated that the sign he struck was a standard street sign. He clarified that he did not believe that the tire became entangled in the sign, but that it simply struck it. At the time, he was holding the steering wheel with his left hand. The striking of the sign caused the wheel to jerk to the right. At the moment, he "felt a sharp pain . . . a little pain for a minute, not like nothing that . . . [I] thought I was going to have problems with."

He testified that the headaches he experienced in 2004 were different than the ones following the 2006 accident because in 2004 the headache never completely went away but had subsided at some point before the latter accident that he no longer needed to see a physician. The headaches after the 2006 accident start at the base of his skull and extend to the area behind his eyes.

Cindy J. Kitchens. Called by Respondents, Kitchens testified that she is the Area Human Resources Manager for Respondent Sears and is familiar with Claimant. She testified that prior to his 2006 accident, Claimant would come in occasionally and discuss his depression and treatment for it, and his headaches and how they were preventing him from focusing. She was aware the Claimant had called in from time to time and miss work as a result of these symptoms.

Kitchens stated that after the 2006 accident, Sears continued to make work available for Claimant on a light-duty capacity, which he performed until February 15, 2007. Thereafter, he applied for FMLA leave to protect his job, which was granted. He also

applied for and received short-term disability benefits until July 2007. He has since returned to work in a full-time capacity and is doing very well. Kitchens testified that Claimant is a valued employee.

When questioned by Claimant, Kitchens stated estimated that she had three or four conversations with him regarding his depression. She was aware that Claimant was seeing a doctor and receiving counseling and medication. Claimant told her that he had residual pain from his previous injury, but offered no specifics. She added that Claimant's job was physically demanding, although they are required to use lifting aids.

Records

The medical records of Claimant that were introduced at the hearing and are part of Joint Exhibit 1 reflect the following:

Pre-accident. On October 17, 2004, Claimant presented to Dr. Charles Tuen with a neck injury that he stated occurred on July 18, 2004 when his vehicle was struck from the rear. An MRI performed ten days prior showed spondylosis of C4-5 and C5-6, but no herniated disc. He was diagnosed with having a flexion extension injury to his neck, with a left C7 root irritation, which radiated to his left hand and scapula with left middle and ring finger numbness. He was also noted to have, *inter alia*, an occipital muscle headache from the injury. After also undergoing a nerve conduction study and an electromyography on October 17, 2004, evidence of denervation was seen over the left C7 paraspinal muscles. The nerve conduction study of the upper extremities was within normal limits. Claimant underwent physical therapy until December 13, 2004, when he was returned to work without problems. The numbness cited above improved as well. Dr. Tuen assigned him a seven percent (7%) impairment rating to the whole person.

Post-accident. On December 21, 2006, Claimant presented to Conway Regional Hospital with a headache that he stated was due to an employment-related accident. He stated that it began on October 20, 2006, two months before the hospital visit. He also presented with tingling in his left arm which also began two months ago and was getting worse. At another point, he stated that he has had the same headaches ever since his accident in Texas two years ago, which he related to the muscle spasms in his neck. He stated that he stopped taking the medications that were prescribed to him in Texas when he moved to Arkansas, and that his symptoms have recurred. The hospital discharged him the same date, and stated that he should be able to return to work the next day.

When Claimant went to Dr. Keith Schluterman on December 28, 2006, he stated that he began to have problems with his neck two years ago, when he was involved in a motor vehicle accident. He stated that his symptoms have never completely gone away, but that he has not seen his prior neurologist since 2005 and has not sought other treatment. He gave the following description:

His worst pain feels like it is under his left shoulder blade. This radiates into the cervical paraspinals and into the head causing headaches. The headaches typically begin in the occiput and then work the[ir] way to behind the eyes. Anything with using the arms will precipitate the pain and he has poor stamina with the arms. He believes that the left arm is weaker and that he has lost muscle mass in the left bicep. The right arm becomes sore with use, but he believes the pain there is mainly in the trapezius. He has been having trouble sleeping at night due to this. He recently went to the ED and was given flexeril and hydrocodone. *He was run off the road a few months ago and was jerked around. He thinks the pain was probably exacerbated by this accident.*

(Emphasis added) Dr. Schluterman wrote:

Mr. Foot presents due to persistent neck, shoulder and limb pain. This began in 2004 and has been intractable. The pains in the shoulders and

scapula appear primarily musculoskeletal, but he has left hand numbness as well. This suggests radiculopathy vs. CTS. He did have a EMG in 2004 indicated C7 region paraspinal denervation although this is poorly localizing. Disc pathology was seen at the C4-5 and C5-6 levels, more cephalad. His headaches are likely cervicogenic and from occipital neuralgia. Migraines would only be a secondary consideration.

That date, Dr. Schluterman gave Claimant four trigger point injections in the bilateral medial trapezius, along with an occipital nerve block.

On January 8, 2007, Dr. Schluterman prescribed physical therapy and gave the diagnoses of neck tension pain and occipital neuralgia. When he presented to Baptist Health and Therapy Center the next day, he stated that he had a motor vehicle accident in 2002 and has had neck pain since then that flares up from time to time. The notes also stated that Claimant "notes having an incident about a month ago that has aggravated his neck & shoulders."

Claimant underwent an MRI of his cervical spine on January 11, 2007. It showed a reversal of the normal lordotic curvature of the cervical spine at the C3-5 levels. Also at C3-4, annular disc bulging was present, along with a small central focal disc herniation a mild effacement of the ventral thecal sac, and mild encroachment upon the bilateral neural foramen. At C4-5 annular disc bulging was present, along with a component of a broad-based central disc protrusion, effacement of the ventral thecal sac with the disc abutting the spinal cord with slight posterior displacement and moderate encroachment upon the bilateral neural foramen. With respect to the C5-6 level, there was a left paracentral broad-based disc protrusion, with effacement of the ventral thecal sac as well as mild encroachment upon the left neural foramen.

An electrodiagnostic study conducted on January 16, 2007 showed evidence of a mild chronic C4-6 radiculopathies on the left, without acute denervation changes, along with evidence of a moderate left carpal tunnel syndrome.

When Claimant returned to Dr. Schluterman on February 14, 2007, he again underwent trigger point injections and an occipital nerve block. He presented with worsening pain, which he rated as a three in the morning and “[b]y noon, his trapezii and cervical paraspinals feel like they are about to ‘bust out of his head.’” Dr. Schluterman noted that his MRI showed moderate canal and neuroforamen stenosis as a likely contributor to the neck pain. In this note, Dr. Schluterman notes that these troubles began about two years ago, and do not mention a 2006 accident at all.

On February 23, 2007, Dr. Schluterman noted that he was dismissing Claimant as a patient due to his mishandling of his Ultracet and Soma that Schluterman had prescribed for him.

Dr. Schluterman referred Claimant to Dr. Scott Schlesinger. On March 2, 2007, Schlesinger wrote that Claimant was injured in 2004 and “was doing okay until the accident on December 21, 2006. This was [a motor vehicle accident] while working.” Claimant stated that he “started having neck pain again at that time. He has numbness and tingling in the left arm which he had before 2004, but it went away and has come back again after the accident.” Dr. Schlesinger read Claimant’s MRI to show reversal of the normal cervical curvature and some degree of stenosis at C4-5. The x-rays showed “degenerative changes, particularly at C4-5 with reversal of the normal cervical curvature.” Dr. Schlesinger elected to treat Claimant conservatively, with cervical epidural injections, and post-injection therapy protocol. He did not believe the degree of stenosis warranted

surgical intervention. On March 7, March 21, and April 12, 2007, Dr. Schlesinger performed epidural steroid injections on Claimant's spine at C7-T1.

On April 20, 2007, Dr. Schlesinger wrote that the epidural injections had helped with the neck pain, but that Claimant had developed a one-week history of severe low back pain radiating down his left leg. Most of the rest of Joint Exhibit 1 deals with Claimant's treatment for this low back condition, including therapy, which relates to an issue that he has reserved.

The June 28, 2007 note from Baptist Health Therapy Center reflects that Claimant reported that his neck was doing well and that he had not had any pain since he underwent back surgery on May 16, 2007. He was discharged from physical therapy.

ADJUDICATION

A. Compensability

Claimant has contended that on November 27, 2006, he sustained a compensable injury to his neck as a result of a motor vehicle accident. Respondents, in turn, controvert this claim in its entirety.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of Claimant's alleged injury, defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those

findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element “arising out of . . . [the] employment” relates to the causal connection between the claimant’s injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant’s employment “when a causal connection between work conditions and the injury is apparent to the rational mind.” *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The parties have stipulated that Claimant was involved in a motor vehicle accident on November 27, 2006. However, despite Claimant’s contention and testimony that he injured his neck on that date, his medical records do not support an injury occurring on that date or even within a reasonable period surrounding that date. When he first presented for treatment after November 27, on December 21, 2006, he presented with a headache that he attributed to an employment-related accident that happened on October 20, 2006. When he first treated with Dr. Schluterman on December 28, 2006, Claimant stated that he was injured “a few months ago” when he was run off the road. When he went to Baptist Health and Therapy Center on January 8, 2007, he reported that he had “an incident about a month ago” that aggravated his neck and shoulders. Dr. Schlesinger in his March 2, 2007, listed December 21, 2006 as the date of the accident. Moreover, at other times when relating his medical history, Claimant did not mention any type of work-related injury in 2006.

In *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001), the Arkansas Supreme Court held that to be “identifiable by time and place of occurrence,” a claimant does not have to “identify the precise time and numerical date upon which an accidental injury occurred. Instead, the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified.” However, the court was quick to add that the Commission could take into account the inability of a claimant to specify the date of the alleged accident in weighing the credibility of the evidence. *Id.*

The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Based on the foregoing, I find that Claimant has not proven by a preponderance of the evidence that a causal connection exists between the November 27, 2006 motor vehicle accident and the neck conditions with which he was diagnosed. Not only is his testimony that he sustained an injury as the result of an accident on November 27, 2006, inconsistent with his medical records, but he was not at all consistent in his medical records in identifying even the approximate date of his injury. Moreover, at other times in his records he does not appear to attribute his neck problems to any kind of 2006 injury. For me to conclude that he injured his neck in an accident on or about November 27, 2006, in light of the evidence before me, would require that I engage in speculation and

conjecture. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979).

B. Balance of Issues

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

CONCLUSION

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

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge