

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F609849**

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| <b>GERALD E. LEWIS, EMPLOYEE</b>         | <b>CLAIMANT</b>   |
| <b>SUPERIOR SPRING CO., EMPLOYER</b>     | <b>RESPONDENT</b> |
| <b>LIBERTY MUTUAL INSURANCE, CARRIER</b> | <b>RESPONDENT</b> |

**OPINION FILED JUNE 10, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on March 12, 2008 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE PHILIP M. WILSON, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on December 26, 2005 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$466.00/\$350.00, in the event this claim is found to be compensable. The claimant has received disability benefits from Unum and some expenses have been paid by Blue Cross Blue Shield of

Texas. A third party claim from a motor vehicle accident (MVA) is still pending. His applications for Social Security Disability and Gulf War Syndrome were denied.

The claimant contends he sustained shoulder, neck and back injuries (aggravating pre-existing lumbar degenerative disc disease) in a MVA on December 26, 2005. He seeks payment of medical expenses, temporary total disability benefits from February 10, 2006 to a date yet to be determined and attorney's fees.

The respondents contend the claimant was not performing employment services at the time of the accident. The respondents also contend there is no objective medical evidence to substantiate an injury. Alternatively, in the event of an award, the respondents seek an offset against benefits paid by third parties pursuant to Ark. Code Ann. §11-9-411.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and his father; Drew Phillips and Dennis Ray whose testimony was stipulated to be corroborative.

The claimant, age 39 (D.O.B. August 6, 1968), has a twelfth grade education. He trained as a machinist in the Navy and was honorably discharged. His health history includes a June, 2007 MVA, cardiac problems and a 1994 right shoulder injury for which he receives a VA pension of \$117.00 monthly based on a 10% rating. He also filed a claim for Gulf War syndrome which was denied.

He began work for the respondent-employer in August 2005 as a sales and service representative, selling heavy equipment and parts. He traveled in a territory in the southern part of the state, (Tr. p. 7-9, 12-17, 25-26, 35-42, 85-89). The area was defined by Benton, Mena, El

Dorado, and Stuttgart. He called on established customers and solicited new business. He was provided with a company truck and expense account to provide gifts to his clients such as bringing donuts, taking them to lunch, or handing out promotional items like hats. Customers were also given gifts such as tools, at Christmas.

On December 26, 2005, the claimant left from his home to meet a customer for lunch and pick up a clutch part from a diesel service in Bingen, between Nashville and Murfreesboro. After lunch he took the customer to a deer lease. The claimant left and about 3:10 p.m., the front driver's side of his truck was struck by a mail truck on the wrong side of the road. He called his father who towed the truck. The county sheriff filled out an accident report but that was not found in the exhibit packet. The claimant notified Drew Phillips about the accident by telephone. Because of the incident, the claimant was not able to pick up the clutch as planned.

Initially, the claimant did not think he was injured but the next day he was stiff and sore in his neck, shoulder and back. He told his supervisors that if his condition did not improve, he would see the doctor after the new year. He returned to work for two weeks but his condition worsened.

The claimant came under the care of general practitioner, Dr. Greg Johnson, who treated him conservatively and referred him to a chiropractor, Dr. Steven Manire. The claimant drew disability benefits through UNUM for twelve months at \$311.00 per week. He used his group health insurance, Blue Cross Blue Shield of Texas to help pay some medical expenses although he testified he still owed the chiropractor \$20,000.00. After a couple of months, the employer discontinued paying their portion of the group insurance because the claimant was no longer paying his share.

The claimant stated he did not turn in his medical bills to his employer because Drew Phillips gave him the impression his job was in jeopardy if he filed a workers' compensation claim (Tr. p.

22). However, he did admit that Mr. Phillips wrote him a letter telling him he could file a claim but it was probably too late to pursue it (Tr. p. 31-32). This document is not in the exhibit packet. The claimant did inquire about light duty but Drew Phillips told him there was none available (Tr. p. 23, 33).

Presently, the claimant has lower back and radiating bilateral leg pain (worse on the right) and neck pain. He is unable to sit or stand for prolonged periods of time. His medication makes him drowsy and unable to drive. He has not worked for two years.

On cross-examination, counsel questioned the claimant about the route he drove on the day of the accident July 9 (Tr. p. 35-42, 88-89). He testified he drove from his home in Haskell, outside Benton to Hope where he called on several clients. He then drove to Prescott and met Dan Bryant for lunch. However, in his deposition, the claimant stated he met Mr. Bryant in Blevins. The claimant said he was hoping to get some business with Mr. Bryant's father. The claimant took Mr. Bryant to a hunting club on land the claimant's family leases around McCaskill on Highway 371. After that, the claimant planned to pick up the clutch in Bingen outside Murfreesboro. He admitted he did not take a direct route. The claimant testified he did not hunt that day; he merely showed Mr. Bryant the location of the property. On a gravel road around Bingen, the mail carrier came around a curve and "grazed the front end and then went down the driver's side" of his S-10 pickup truck. The claimant's father towed the truck back to Haskell. The claimant drove the truck from Haskell to Little Rock the next day.

The claimant stated that twelve months of chiropractic treatment had been ineffective (Tr. p. 45). He returned to Dr. Johnson who referred him to Dr. Thomas for nerve testing, but those reports were not in the exhibit packets. Mr. Ryburn interpreted the chiropractor's reports as showing

no evidence of muscle spasm and the claimant agreed that he did not have spasms (Tr. p. 50-51). Despite this testimony, it appears to this examiner that the doctor's form lists "C" "T" "L" and "S1" under the heading of "Objective Findings, Spasm." Usually, the first three initials are circled, which I interpret as cervical, thoracic and lumbar spasm.

Drew Phillips testified he had been the Regional Manager for the past three years. The claimant drove the damaged truck back to the office on December 27, 2008. Mr. Phillips described the damage as a "side swipe type of accident" with damage to the front quarter panel on the driver's side, the hood, and tie rod. It was driven to Russell Chevrolet for repairs. Those documents were not in the exhibit packet.

Mr. Phillips and Mr. Ray asked the claimant if he needed to see a doctor but the claimant said he was fine and that he was "off the clock... on my time, doing my thing." The claimant stated the problem was between himself and the mail service.

Mr. Phillips said his office stayed open until 6:00 p.m. but the claimant did not call on the day of the accident. He waited until the next morning to call the office before he returned the damaged truck. Mr. Phillips conceded that his predecessor had authorized a trip to Las Vegas for a client but since Mr. Phillips had been the manager, his approval was needed for all expenses except food. Receipts were turned in and the salesmen were reimbursed. Salesmen did turn in a call log listing the names and locations of the clients that were contacted. These documents were not in the exhibit packets. Mr. Phillips stated the claimant had been disciplined before this incident for making an unauthorized trip to Louisiana in the company truck.

### **MEDICAL EVIDENCE**

The claimant's exhibit packet is not in chronological order as requested in the prehearing

notice, and there is no abstract despite the fact that the packet exceeds 50 pages.

Medical records begin on January 11, 2006 following the claimant's MVA on December 28, 2005. The claimant complained of neck and shoulder pain radiating to his left arm. Dr. Johnson recommended an MRI scan, which showed only degenerative changes. The claimant was referred to a chiropractor, Dr. Manire.

January 13, 2006 MRI Scan (cervical spine):

There are relatively mild degenerative changes of the cervical spine as noted. The findings are a bit greater at the C4-5 level where there is disc desiccation with some osteophyte formation greatest anteriorly. At no level is any significant compromise of the cervical cord or neural exit foramina appreciated.

January 30, 2006 MRI Scan (right shoulder):

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Hypertrophic change of the acromioclavicular joint with evidence for tendinosis of the supra spinatus tendon.

On February 8, 2006, the claimant reported that his symptoms had worsened. Dr. Johnston excused him from work for 10 days commenting, "he aggravates his neck daily by driving."

On March 28, 2006, the claimant saw Dr. Steve Manire for complaints of neck, shoulder, upper back, lower back and right shoulder pain with headaches and numbness in his hands. According to his report of March 29, 2006, Dr. Manire was under the impression the claimant had been involved in a head-on collision. Dr. Manire diagnosed a sprain/strain based on x-rays showing loss of "normal cervical lordosis and severely limited cervical segmental mobility, cervicothoracic scoliosis, lumbar hyperlordosis, left pelvic unleveling with mild lumbar levoscoliosis, and mild thinning of the L5 disc space." He excused the claimant from work for 2-4 weeks. As this examiner interprets the medical records, the finding of lordosis is equivocal. Lordosis can be caused by spasm or simply the position of the body during testing.

Dr. Manire saw the claimant on numerous occasions from March, 2006 to December, 2006. Although many of the reports show the “improvement” box checked at the top of the page, the symptoms and treatment seem to remain the same with pain and spasm on each visit.

Reports from Dr. Manire on March 28, March 29, March 30 and March 31, 2006 show spasm of “C”, “T”, and “L” which I am interpreting as the cervical, thoracic, and lumbar spine. Dr Manire recommended Vitamin C and limiting or avoiding lifting, sitting, traveling and standing. He also diagnosed a problem with the claimant’s concentration.

The claimant saw both Dr. Manire and Dr. Johnston on the same day, April 3, 2006. Although Dr. Manire’s reports show continuing spasms, the claimant told Dr. Johnston he was improving with chiropractic care. However, Dr. Manire excused the claimant from work May to September (see notes of May 5, 2006, June 5, 2006, June 7, 2006, July 11, 2006, September 13, 2006) when the claimant applied for Social Security benefits.

On May 21, 2006, the claimant experienced an “exacerbation” of low back pain while mowing the grass. On July 13, 2006, the claimant complained of stiffness and soreness in the mornings.

Dr. Manire’s letter of July 11, 2006:

Gerald Lewis remains under the care of this clinic, and remains off work at this time. He was progressing steadily, but experienced an exacerbation of his low back (uncertain what caused it), so I’ve kept him off until August 10, 2006. I am utilizing decompressive traction for his low back, which seems to be effective for him, and may send him for a lumbar MRI. His neck and upper back have responded fairly well, and his right shoulder has improved moderately.

On August 8, 2006, the claimant complained his symptoms had worsened. Dr. Manire’s handwriting is difficult to read, but a notation seems to indicate the claimant was no longer able to

play ball.

On August 10, 2006, the claimant experienced low back pain after working outside the day before. Dr. Manire ordered an MRI scan on August 24, 2006 which showed a mild paracentral disc protrusion at L5-S1 and a minimal posterior annular bulge at L4-L5. No stenosis or impingement was found.

Dr. Manire's Letter of September 13, 2006:

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He has experienced some exacerbations of his low back a couple of times from normal lifting activities at home... I initiated decompression traction (for the L4-5 bulge and L5/S1 disc protrusion) which has proven beneficial... He has applied for Social Security for retraining for a different type of work (he'd like to coach high school sports).

In his report of October 2, 2006, Dr. Manire assessed the claimant's work restrictions (lifting less than forty pounds occasionally or 15 lbs. repetitively, limited bending, driving, pushing, pulling, reaching overhead, sitting or standing for more than 20 minutes). Dr. Manire commented, "I have encouraged him to attempt as much normal activity as possible, both to promote improvement and test his limits. While he is gradually improving in ADL abilities, relatively normal activities such as lifting a bag of potting soil, mowing the grass, using a weedeater, or lifting items exacerbate his symptoms." Dr. Manire recommended the claimant find employment that would allow for free physical movements.

On October 3, 2006, the claimant reported that his legs were going numb after sitting for more than 20 minutes. The reports of October 16, 2006 and October 23, 2006 show more "exacerbations" but I am unable to read the doctor's handwriting. On November 15, 2006 the claimant reported less back pain after buying a new mattress.

The claimant returned to Dr. Johnston on November 2, 2006 and the doctor opined that the

claimant was not a surgical candidate. On March 15, 2007 Dr. Johnston prescribed medication for back pain.

### **FINDINGS AND CONCLUSIONS**

In the case at bar, the claimant was sideswiped by a mail carrier on a gravel road on the day after Christmas near his family's deer camp. The claimant had his father, not his employer, tow the truck. The claimant told his employer that the injury was on his personal time and declined medical attention. He was treated conservatively for rather minor injuries and has not returned to the work force for two years.

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

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- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause

of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements.

Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A “compensable injury” is defined as an accidental injury... arising out of and in the course of employment...” Ark. Code Ann. §11-9-102. A compensable injury does not include an “injury which was inflicted upon the employee at a time when employment services were not being performed...” Ark. Code Ann. 11-9-102(4)(B)(iii). An employee is performing “employment services” when he or she “is doing something that is generally required by his or her employer.” White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100 (1999). The test for determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

Employment services can include those activities reasonable expected by an employer. In the case at bar, the claimant testified that he and his supervisor, Larry, had discussed taking clients hunting and fishing. Of course, Larry was not called as a witness and Drew Phillips denied any knowledge of these activities. By his own testimony, the only expenses the claimant had been incurring up to the date of the accident involved providing food (donuts, lunch, candy bars) to clients. There is simply no evidence that taking clients on hunting trips was an approved activity. Therefore, I find that at the time of the accident, the claimant was not performing employment services.

Under Ark. Code Ann. §11-9-102(4)(D) the claimant is required to establish the existence

of an injury based on medical evidence supported by objective medical findings as described in Ark. Code Ann. §11-9-102(16). Objective findings cannot come under the voluntary control of the patient.

The determination of whether the causal connection exists is a question of fact for the Commission to determine based on the evidence of record and the credibility of the witnesses. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998), Ellison v. Therma-Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

It is the claimant's burden to prove a causal connection between the work-related accident and the later disabling injury. Lybrand v. Arkansas Oak Flooring Co., 266 Ark. 946, 588 S.W.2d 449 (Ark. App. 1979). Objective medical evidence is not always necessary if there is a preponderance of non-medical evidence. Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.2d 375 (2002).

If the disability develops soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, "then the claimant has established a causal connection. However, if there is a span of time between the accident and the disability, a question of fact arises concerning the causal connection. Hall v. Pittman Constr. Co., 235 Ark. 104, 105-106, 357 S.W.2d 263, 264 (1962).

As I interpret the medical records, there is no objective evidence of a neck or shoulder injury. The MRI showed only preexisting conditions. However, there is objective evidence of a back injury. I would point out that initially the claimant complained only of neck and shoulder pain. It was not until the end of March 2006, when he began treating with the chiropractor, that the claimant reported low back symptoms, three months after the MVA. Therefore, I find the claimant's low back

problems are not causally related to the MVA.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on December 26, 2006.
2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge