

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F506878

BILLY W. ROGERS, EMPLOYEE **CLAIMANT**

**PERRITT & VICKERS, INC.,
EMPLOYER** **RESPONDENT NO. 1**

**BITUMINOUS CASUALTY CORP.,
INSURANCE CARRIER/TPA** **RESPONDENT NO. 1**

**SOUTH ARKANSAS EXCAVATING,
UNINSURED EMPLOYER** **RESPONDENT NO. 2**

SECOND INJURY FUND **RESPONDENT NO. 3**

OPINION FILED JUNE 6, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 was represented by Mr. Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was unrepresented and did not appear at the scheduled hearing.

Respondent No. 3 was represented by Mr. David Pake, Attorney at Law, Little Rock, Arkansas, and their appearance was waived for this hearing.

STATEMENT OF THE CASE

On March 11, 2008, the above captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on October 29, 2007, and a Prehearing Order was filed on that same date. A copy of the Prehearing Order was marked as Commission Exhibit "1" and made a part of the record herein without

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objection, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times, including May 20, 2005.
- 3) The parties agree that the claimant's compensation rates are \$257.00 per week for temporary total disability and \$193.00 per week for permanent partial disability.
- 4) Respondent No. 1 stipulated that the employee-employer relationship existed between the claimant and the uninsured Respondent-Employer No. 2, South Arkansas Excavating, on or about May 20, 2005.
- 5) Respondent No. 1 stipulated that Respondent-Employer No. 1, Perritt & Vickers, Inc., was the prime contractor and that Respondent No. 2, South Arkansas Excavating, was the subcontractor at the construction site where the claimant was working for the subcontractor on or about May 20, 2005.
- 6) Respondent No. 1 stipulated that the claimant sustained a compensable injury to his left lower leg only in a fall on May 20, 2005.
- 7) Respondent No. 1 accepted the claim as compensable and paid all due medical benefits related to the left lower extremity.
- 8) Respondent No. 1 agrees that they have controverted all other injuries as a result of that May 20, 2005, fall.
- 9) All issues not addressed herein are reserved.

At the full hearing, the parties agreed to litigate the following issues:

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- 1) Whether claimant sustained a compensable neck injury on May 20, 2005.
- 2) Whether claimant sustained a compensable back injury on May 20, 2005.
- 3) Whether claimant sustained a compensable right shoulder injury on May 20, 2005.
- 4) If compensability is overcome, whether claimant is entitled to temporary total disability benefits from May 20, 2005, through a date yet to be determined, all associated medical benefits, and attorney's fees.

At the full hearing, claimant contended that he sustained compensable injuries to his leg, shoulder, neck, and back as a result of a compensable incident on May 20, 2005. The claimant contends that as a result of his May 20, 2005, compensable injuries that he is entitled to TTD benefits from May 20, 2005, to a date yet to be determined, all associated medical treatment, and attorney's fees.

At the full hearing, Respondent No. 1 contended that they have paid all due and owing benefits for the compensable healed left lower leg injury. Respondent No. 1 further contended that the claimant is not entitled to the requested benefits for the alleged neck, back, and right shoulder injuries because the claimant cannot establish that he sustained accidental injuries with objective findings. Respondent No. 1 further contends that claimant cannot prove by a preponderance of the evidence that his neck, back, or right shoulder injuries arose out of and in the course of his employment with

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the uninsured Respondent-Employer No. 2 on or about May 20, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From a review of the record as a whole, to include 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, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties and recited herein are reasonable and are hereby accepted as fact.
- 3) Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury which arose out of the course of his employment with respondents on or about May 20, 2005.
- 4) Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable right shoulder injury which arose out of the course of his employment with respondents on or about May 20, 2005.
- 5) Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable neck injury which arose out of the course of his employment with respondents on or about May 20, 2005, which is supported by objective medical findings.

DISCUSSION

The claimant, 39 years of age, sustained an admittedly compensable leg injury

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when he fell into a hole on May 20, 2005. The claimant testified as follows regarding the incident:

Q Would you describe for the Judge what happened when you were injured?

A I was standing on the edge of the hole, fixing to go in and set pin flags to try to square it up, to pour a manhole, a concrete manhole, and the edge of the embankment give way and I fell into the hole and what I hit, I don't know. I fell so quick I don't know what I hit.

Q Were you stunned?

A Yes, I was stunned and I just –

Q When you came to your senses –

A I thought I hit the wall but she says I hit the concrete pipe. She was sitting there watching it so I might have.

Q So you fell to the bottom. How big was that hole? She said three or four feet. Is that about right?

A About four feet, give or take half a foot.

Q And it was a dirt hole?

A Yes, a clay hole. It had been compacted by a roller so it was like concrete.

Q Do you remember if you had any clay or dirt on any parts of your body that you remember?

A On my legs and –

Q Any place else that you remember?

A On my side over here.

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(T. pp. 21-22, lines 22-25 & 1-22).

The medical records reflect that immediately following the fall on May 20, 2005, the claimant went to the Magnolia Hospital emergency room. After treating at the emergency room, the claimant treated with Dr. Antoon from May 22, 2005, through May 15, 2006. The claimant also treated with Drs. Gonzales, Collins, Sprinkle, and Chakales.

The parties stipulated that the claimant sustained a compensable leg injury as a result of his May 20, 2005, fall; however, claimant also contends that he sustained compensable back, neck, and right shoulder injuries as a result of the same fall. The claimant contends all three additional injuries he is now claiming were caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in Henry Weaver v. Precision Packaging, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- 1) Proof by a preponderance of the evidence of an injury arising out of and in the course of employment;
- 2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- 3) medical evidence supported by objective findings, as defined in

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A.C.A. § 11-9-102(16), establishing the injury; and,

- 4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

With regard to the claimant's alleged compensable right shoulder injury, I find that the claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable right shoulder injury which arose out of and in the course of his employment with the respondents. First, it must be noted that immediately after the claimant's fall, he reported to the Magnolia Hospital emergency room where he had complaints of severe pain to his left lower leg just below the knee. The emergency room report from May 20, 2005, specifically states, "He denies any other injuries." (Cl. Ex. 2, pg. 5).

Additionally, the medical records show that the claimant never reported a shoulder problem until September 21, 2005, as evidenced in Dr. Antoon's report found at Claimant's Exhibit 2, page 29. Between the claimant's fall of May 20, 2005, and his first report of shoulder pain on September 21, 2005, the medical records show the claimant sought treatment with Dr. Antoon on eleven different dates and those reports from Dr. Antoon indicate that no mention was ever made about the claimant's alleged right shoulder problems. Additionally, the medical records show the claimant also reported to the Magnolia Hospital twice before his initial report of shoulder pain

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on September 21, 2005, and no mention of shoulder pain was ever indicated in any reports from Magnolia Hospital.

It is true that the medical records indicate a right shoulder MRI was performed on August 17, 2006, which showed a posterior superior labral tear of the shoulder. Clearly, there are objective medical findings which indicate a right shoulder injury; however, I cannot find that the claimant's right shoulder tear arose out of and in the course of his employment with the respondents on May 20, 2005, for a number of reasons. First, for the claimant to have a significant tear of the right shoulder and never have it show up in any of the medical records for over four months is troubling. Second, the medical report on September 21, 2005, contained at Claimant's Exhibit 2, page 29, which is the first mention of shoulder pain states, "Rt shoulder pain - old football injury." Third, in a medical report from Dr. David Collins found at Claimant's Exhibit 2, page 57, Dr. Collins states, "He denies previous problems with the right shoulder." Dr. Collins goes on in his report to state that the claimant had complaints regarding his right shoulder ever since the fall. The medical reports contained in the record herein clearly show that the claimant did not have complaints regarding his right shoulder until four months after his fall and when he finally did have it, he mentioned a previous injury to his right shoulder while playing football which is in direct contradiction to what he indicated to Dr. Collins on August 28,

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2006. Lastly, it must be noted again that when the claimant reported to the emergency room on May 20, 2005, he specifically denied any injuries other than his left lower extremity. For all of the reasons outlined herein, I find that the claimant has failed to prove by a preponderance of the evidence that his right shoulder injury arose out of and in the course of his employment with the respondents on May 20, 2005.

The claimant also contends that he sustained a compensable back injury on May 20, 2005. After reviewing the evidence impartially and without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable back injury which arose out of and in the course of his employment with respondents on May 20, 2005. Once again, it must be noted that on the day of the incident the claimant report to the Magnolia Hospital emergency room and reported no injuries other than his left lower leg. The medical records go on to show that the claimant sought treatment with Dr. Antoon on five different occasions for over one month after the May 20, 2005, fall before he ever indicated back pain. The first mention of any problem with the claimant's back was on June 21, 2005, in a report found at Claimant's Exhibit 2, page 17. Prior to that the claimant had sought treatment with Dr. Antoon on five different occasions and treated at the Magnolia Hospital and never indicated back pain.

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The claimant's MRI of his lumbar spine contained in the medical records herein show that the claimant does have a "shallow left lateral disc displacement at L5-S1 with moderate biforaminal encroachment also slightly greater on the left." On August 30, 2006, the claimant was examined by Dr. Brent Sprinkle who commented on the claimant's EMG. Dr. Sprinkle stated that the EMG "shows no evidence of lumbar nerve root impingement, and further the H reflexes were normal which have great sensitivity to detect any compression along the S1 nerve root or along the sciatic nerve which is not present." (Cl. Ex. 2, pp. 59-60). Dr. Sprinkle went on to state that the claimant had lumbar degenerative disc disease which preexisted his May 20, 2005, fall. Dr. Sprinkle also opined that there is a greater than 51% chance that the degenerative disc disease and disc dissection phenomenon described on the claimant's MRI were more than likely preexisting the claimant's May 20, 2005, fall.

The credible evidence contained in the record herein shows that the claimant never mentioned any problems with his low back until a month after his fall. The records also indicate that the claimant's back condition is due to his preexisting degenerative disc disease and not the result of any acute injury. Based upon the credible evidence, I find that the claimant has failed to prove by a preponderance of the evidence that his lumbar back injury arose out of and in the course of his employment with the respondents on May 20, 2005.

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The claimant has also alleged a compensable neck injury which occurred as a result of his fall on May 20, 2005. As outlined above, in order to prove a compensable neck injury that occurred by a specific incident, the claimant has to show medical evidence of a neck injury supported by objective findings as defined in A.C.A. § 11-9-102(16). The record now before the Commission is void of any objective findings of a neck injury. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable neck injury by specific incident on May 20, 2005, because there is no medical evidence of a neck injury supported by objective findings.

With regard to the claimant's back and shoulder, Dr. Antoon's report of February 22, 2006, found at Claimant's Exhibit 2, page 41, was not overlooked. I note that Dr. Antoon in his February 22, 2006, report stated that the claimant sustained injuries to his lumbar back and right shoulder at the time of his fall on May 20, 2005, and was under Dr. Antoon's care for those injuries since that time. However, Dr. Antoon's medical reports are simply not consistent with his February 2006 letter. I find it odd that Dr. Antoon states that he was treating the claimant for his back and shoulder during periods of time in which his medical reports are clearly void of any assessment of back or shoulder injury and certainly void of any treatment plan for those injuries. Given the evidence presented, I find that the claimant has failed to

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meet his burden of proving by a preponderance of the evidence that he sustained compensable injuries to his back, neck, or right shoulder by specific incident on May 20, 2005.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered compensable injuries to his back, neck, or right shoulder while employed by respondents on May 20, 2005. Therefore, his claim for compensation benefits is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb