

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312511

THEODORE CHASE,  
EMPLOYEE

CLAIMANT

FARMERS COOP, INC.,  
EMPLOYER

RESPONDENT NO. 1

FARMLAND MUTUAL INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED APRIL 18, 2005

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE MICHAEL HAMBY,  
Attorney at Law, Greenwood, Arkansas.

Respondents No. 1 represented by the HONORABLE DAVID  
LANDIS, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 2 represented by the HONORABLE TERRY  
PENNY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the  
Administrative Law Judge filed October 25, 2004. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation  
Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship  
of employee-employer-carrier existed between

the parties.

3. The claimant earned an average weekly wage of \$550.00.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his neck on or about October 17, 2003, while working for the respondent.

5. The respondent should pay for all reasonable and necessary medical treatment for this claimant's compensable neck injury.

6. The claimant is entitled to temporary total disability from November 12, 2003, until his release by Dr. Queeney on March 18, 2004.

7. The respondents have controverted this claim in its entirety.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 25, 2004 decision of the Administrative Law Judge, including all findings

of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

---

OLAN W. REEVES, Chairman

---

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

---

DISSENTING OPINION

I would respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he sustained a compensable neck injury on or about October 17, 2003.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he sustained a specific incident injury to his cervical spine arising out of and in the course of his employment on October 17, 2003.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (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 Ark. Code Ann. §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. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present claim, the claimant testified that he sustained a herniated disc on October 17, 2003, as a result of being "bucked" around in a rough riding company delivery truck. The claimant was seen for a previously scheduled "wellness physical" at the Cooper Clinic on October 23, 2003, at which time the examining physician, Dr. Allen Beachy, noted that the claimant complained of tingling of the medial fingers of his right hand at night, and numbness and tingling in his left arm. In addition, the claimant reported to Dr. Beachy that he had experienced substantial neck pain over the past three days with pain radiating down into his left shoulder. An MRI taken on October 27, 2003, revealed a large-sized herniation at C6-C7, lateralizing to the left. In addition, this test revealed mild to moderate stenosis at C5-C6, thought to be secondary to

spondylitic ridge formation with bulging disc and spur; a broad based disc bulge at C7-T1, producing mild stenosis; a moderate disc bulge at C4-C5; and, mild multi-level broad disc bulges. Dr. Beachy treated the claimant conservatively with medications, physical therapy, and eventually, spinal traction. On December 4, 2003, the claimant was examined by Dr. Joseph Queeney, who confirmed the claimant's diagnosis and recommended surgery. On December 16, 2003, Dr. Queeney performed an anterior cervical discectomy on the claimant's spine at C5-6 and C6-C7. In a letter dated February 13, 2004, Dr. Beachy opined that, although the claimant had pre-existing degenerative disc disease, the claimant's work activities were "probably" at least 70 percent the cause of his herniated disc injury. In a subsequent clinic note dated March 18, 2004, Dr. Queeney stated that the claimant's cervical problems were likely caused from repeated injuries throughout the claimant's lifetime, with the herniated disc likely occurring on the job.

The record establishes and the claimant admits that he has had numerous problems with his neck and spine prior to his alleged injury in October of 2003. The claimant's pre-existing medical problems are roughly described as follows:

1. In March of 2000, the claimant's vehicle was rear-ended by another vehicle traveling approximately 55-60 miles per hour. During his medical examination of March 2, 2000, the claimant reported "pain between his shoulder blades and in the posterior neck area, particularly with extension and flexion of the neck." The claimant's physician, Dr. Beachy, assessed him with cervical strain, took him off of work, ordered physical therapy, and scheduled a CT scan.

2. A Ct scan taken of the claimant's neck on March 9, 2000, revealed "multi-level disc bulges/spondylosis" at each level from C2-T1, with the bulge at level C4-C5 being "slightly asymmetric to the right side and of moderate severity." In addition, this test revealed slight asymmetry to the left at C6-C7 with "mild acquired" stenosis at C5-C6 and C6-C7.

3. On April 10, 2000, the claimant was released from care for his neck injury which resulted from his March 2000 MVA. In a clinic note from his final visit, Dr. Beachy, stated "He still has problems with stiffness of his neck at night, but that was present prior to the accident."

4. On January 2 and 6, 2003, the claimant was seen for complaints of lower back pain and pain radiating into his right hip area. Concerned that he might have a herniated disc or radiculopathy, Dr. Beachy ordered an MRI.

5. On April 28, 2003, the claimant was seen by Dr. Beachy for mid-back pain and spasms, reportedly caused by a work related injury which had occurred three days earlier, on April 25th. Specifically, the claimant reported having "turned just right" while hooking a trailer to his work truck, thus sustaining a pull-type injury to his mid-back. The claimant presented to Dr. Beachy with complaints of pain "localized between his shoulder blades, mostly on the right side." Dr. Beachy restricted the claimant's lifting

to 25 pounds and referred him for more physical therapy. A radiology report dated May 8, 2003, revealed no acute bony abnormality in the claimant's thoracic spine. A clinic note from May 8<sup>th</sup>, revealed that the claimant had "pulled his back again today" and was, therefore, "not doing well."

6. On May 23, 2003, the claimant was given a "full and complete release" for his April injury.

It is undisputed that the claimant was diagnosed with herniated discs at C5-C6, and C6-C7, which were surgically repaired in December of 2003. Furthermore, it is evident from the record that the claimant drove a "rough riding" truck in the course of his employment, specifically when delivering farm supplies. The record confirms that the claimant experienced some mechanical problems with his work truck on October 17, 2003, which required repairs to be made to that truck's hydraulics. The record fails to establish, however, that the claimant's cervical spine problems, specifically his herniated discs, were caused by a specific, work related incident, which occurred on October 17, 2003. Based upon the above and foregoing, it is more likely than not that the claimant's cervical problems were a result of a gradual deterioration of his pre-existing condition. This conclusion is supported by

statements made by Dr. Queeney in his clinic note of March 18, 2004:

He is questioning whether or not this is due to a Worker's Comp injury. I did discuss my philosophy with him and he is requesting that I give him an estimation of the percentage/probability of whether or not this is a Worker's Comp injury. I feel my philosophy for this remains as it does for all sorts of disc herniations. I feel that you never herniate a normal disc, that most likely this is the result of repeated injuries throughout his lifetime.

Dr. Queeney would not state definitively whether or not he thought the claimant's herniations were work related. Rather, Dr. Queeney stated that, based strictly upon information provided to him by the claimant, the claimant's herniations "most likely" occurred while on the job. It is well established that a medical opinion based solely upon a claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). Moreover, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Horticare Landscape Mgt. V. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Dr. Queeney's opinion

that the claimant's injury "most likely" occurred on the job was based upon information provided to him solely by the claimant. Therefore, this opinion fails to meet the degree of certainty required to prove compensability.

Moreover, as previously mentioned, on February 13, 2003, Dr. Beachy wrote the following in a letter to the claimant's attorney:

In my opinion he [the claimant] certainly did have pre-existing degenerative disc disease that most likely was aggravated by his work conditions, including the bouncing in the seat while driving his truck. Certainly, other everyday activities could have contributed as well, but in discussion with him I think his work activities were probably the most vigorous of the activities in which he engaged.

Further, Dr. Beachy ascribed a 70 percent likelihood of the claimant's cervical injury being worked related. In doing so, however, Dr. Beachy conceded that this probability rating was not "derived scientifically," but simply based upon his years of practical experience.

According to Ark. Code Ann. §11-9-102(e), the claimant bears the burden of proof that his injury occurred or arose from a specific incident or is identifiable by time and place of occurrence.

Alternatively, an injury may be compensable even if it is not identifiable by a specific incident or time and

place of occurrence if the injury is a result of a rapid repetitive motion, back injury, or hearing loss. Ark. Code Ann. §11-9102(4)(a)(ii). Finally, neck injuries - that is injuries above the thoracic spine - do not qualify as back injuries for the purpose of determining compensability. Hapney v. Rheem Manufacturing Co., 342 Ark. 11, 26 S.W.3d 777 (2000).

The claimant has failed to prove that his cervical problems occurred or arose from a specific incident or is identifiable by time and place of occurrence. In the alternative, the claimant has failed to prove that his cervical problems were the result of rapid repetitive motion. Testimony was presented that corroborates that the claimant's work truck was very rough to ride in. Testimony was also presented that corroborates that the claimant complained of his rough riding truck and of aches and pains associated with his herniated discs. However, I find that the preponderance of the evidence, primarily the objective medical evidence, presented in this claim reveals that the claimant's herniated discs were likely the result of a degenerative process that occurred over a period of time rather than an injury from a specific incident.

Therefore, based upon the above and foregoing,  
I would respectfully dissent from the majority opinion  
finding that the claimant has proved compensability.

---

KAREN H. McKINNEY, Commissioner