

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305872

DAVID SIMMS,  
EMPLOYEE

CLAIMANT

HECKETT MULTI SERVICES,  
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INS./ESIS,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED APRIL 21, 2005

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

Claimant represented by the HONORABLE JOHN BARTTELT,  
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE JAMES C. BAKER,  
JR., 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 March 19, 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 May 7, 2003, the relationship of  
employee-employer-carrier existed among  
the parties.

3. On May 7, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$367.00/\$275.00 for temporary total disability/permanent partial disability benefits.
4. On May 7, 2003, the claimant sustained an injury arising out of and in the course of his employment.
5. The claimant was temporarily totally disabled for the period beginning June 9, 2003 through July 22, 2003.
6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of May 7, 2003.
7. The respondents have controverted this claim in its entirety.

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. <sup>1</sup>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 March 19, 2004 decision of the Administrative Law Judge, including all

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<sup>1</sup>While the issue of reimbursement to Blue Cross/Blue Shield was not a separate finding, there is no authority under the Workers' Compensation Statute for the Administrative Law Judge to have awarded reimbursement to a non-party.

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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I respectfully dissent from the majority opinion finding that the claimant sustained a specific incident injury to his cervical spine on May 7, 2003, for which he is entitled to benefits. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of proof.

The claimant contends that he sustained a compensable injury to his cervical spine on May 7, 2003, when the piece of equipment he was operating caused a "whiplash effect" when the slack between his equipment and the equipment it was attached was suddenly taken up. Conversely, the respondents contend that the claimant did not sustain a compensable injury within the course and scope of his employment. I agree with the respondents.

The claimant was a Komatsu operator for the respondents. The Komatsu is attached to a charge bucket and both operate on railroad tracks. Claimant described the injury as follows:

...Well, I had taken off with the machine, went to travel and noticed that it had not switched. And with the tracks being unlevel, you can let off of it and let it coast and it will jump back and it will usually put you right back, right in

your little zone that you need to be in because it has a tolerance of a thousand pounds under or a thousand pounds over the setting. So, I let off of it, the number became red again, I pushed my next layer. I went to take off again and when I did it snatched - - the scale car had rolled up on the Komatsu so when I took off the Komatsu takes off and it pulls all this slack out of this knuckle and just created a whiplash effect and caused my neck to snap and that's when I first noted that my neck was bothering me.

The claimant did not report an injury on May 7, 2003, or at anytime thereafter until he learned the results of his MRI. When the claimant sought medical treatment on May 8, 2003, he provided a history to his treating physician of "...also neck pain - tight muscles. Whiplash type injury and sustained pain in his neck and upper thoracic spine..." However, the claimant did not relate a specific work related injury to his treating physician at that time. When the claimant finally reported a work related injury to his supervisor, James Haddock, the claimant did not describe the alleged specific incident he now describes as the whiplash effect from the slack between the cars. Rather, the claimant complained to his supervisor that his machine "rides rough," a common complaint the claimant has made on numerous daily report sheets.

After reporting his alleged injury to his supervisor, the claimant was seen by the company physician, Dr. Williams. In his report dated May 22, 2003, Dr. Williams recorded the following history:

33y/o WM comes in today with some lower lumbar pains. Pain in the T-spine and C-spine areas as well. He's had these off and on for about six months. There's been no pains down his legs or arms. No focal deficits either.

Following the claimant's second examination by Dr. Williams, the claimant was referred to Dr. Allen Boyd, a neurosurgeon. Dr. Boyd first examined the claimant on June 9, 2003. The claimant provided Dr. Boyd with the following history at that time:

David Simms is here seeing me today mainly because of neck and left arm pain. The pain does not go below the elbow on the left. It has been pretty severe for about two weeks. He has had neck pain before with the machine that he operates. I don't quite understand the machine but it is pretty rough apparently. The left arm pain has been mainly for the last 2 weeks or so now. He has been on light duty and that has helped a lot as far as his pain.

The respondents controverted the claimant's alleged injury prior to the claimant seeking treatment from Dr. Boyd. The claimant learned of this controversion when he arrived at Dr. Boyd's office on

June 9, 2003. Nevertheless, the claimant proceeded with treatment under his health insurance policy. Following his examination by Dr. Boyd, the claimant requested and received a short letter from his family physician, Dr. Wuthisak Soonattrakul, stating; "This is to certify that in my professional opinion David Simms has neck injury which over 51% is job related."

The first recorded history of a specific injury to the claimant's neck appears in a report prepared by Dr. Boyd on July 17, 2003, in which he wrote:

His trouble started on the morning of May 7, 2003, at about 5 in the morning. He was loading something or operating some equipment. He didn't have any neck pain prior to that injury.

The claimant continued to work for the respondents until he underwent surgery on June 25, 2003, during which time he completed daily reports. The first post May 7, 2003 daily report turned in by the claimant is dated May 12, 2003. This report mentions his machine riding extremely rough "killing my back" but it does not mention an injury or pain in his neck. After turning in similar reports for May 13 and 14, the claimant's May 17, 2003, report mentions that the rough ride is "killing his back and neck" for the first time.

Interestingly, the claimant did not attribute his neck pain to a specific incident but rather a rough riding machine.

In my opinion the claimant has failed to establish by a preponderance of the evidence that his neck injury arose out of and in the course of his employment. The only evidence of a work related injury is the claimant's uncorroborated testimony. For two and a half months following his alleged injury, the claimant provided consistent histories of a gradual onset type injury. During this two and a half month period, the claimant only attributed his neck pain to the rough ride he experienced in general while operating his equipment at work. This is specifically seen in the incident report completed by the claimant's supervisor as there was no specific incident described when the claimant first reported a work related injury on May 17, 2003. In addition, on the claimant's May 17, 2003, daily report, he noted that the rough ride of his machine was causing him neck pain for the first time. It was not until after the claimant learned that the respondents were controverting his claim, that the claimant specifically informed his medical care providers that he believed that his neck pain was related to his employment. As the claimant's claim for compensation progressed, so did the

disclosure of more details surrounding his alleged specific injury. Despite his numerous visits with medical care providers between May 8, 2003, and July 17, 2003, including his hospital stay for surgery, the claimant did not provide a history to his medical care providers or his employer of a specific work related injury until he informed Dr. Boyd on July 17, 2003, of an injury which allegedly occurred on May 7, 2003.

The claimant testified at the hearing that he had experienced previous workers' compensation claims and that he was aware of the requirement to immediately report any work related injury. The claimant offered the tenuous excuse of retribution for his failure to report a work related injury. However, the claimant's open willingness to complain in writing on his daily reports both prior to and subsequent to the alleged work related injury belies this stated excuse. Rather, the evidence preponderates in favor of finding that the claimant did not suffer a specific work related injury on May 7, 2003. This is not to say that the claimant did not suffer a gradual onset injury as indicated in the claimant's initial histories to Dr. Williams and Dr. Boyd, as well as, by the claimant's first report of injury to his supervisor. However, in the absence of proof of rapid repetitive motion, a gradual onset neck

injury is not compensable under A.C.A. § 11-9-102(4)(A)(ii)(a) and (b), Hapney v. Rheem Mfg. Co., 431 Ark. 548, 26 S.W.3d 771 (2000). The claimant has not contended, nor has he established that he sustained a gradual onset, rapid repetitive motion, injury to his cervical spine.

In my opinion, the claimant's testimony simply is not sufficiently credible to support a finding that his alleged injury arose out of and in the course of her employment. Mooney v. Monday & Associates, Full Commission Opinion filed August 15, 1996 (E4104794); Riley v. Craighead Nursing Center, Full Commission Opinion filed January 13, 1998 (E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion filed December 12, 1998 (E700104); and Arnold v. Dino's, Inc., Full Commission Opinion filed August 1, 2002 (F001514). Accordingly, I find that the decision of the Administrative Law Judge should be reversed and the finding of compensability should be denied and dismissed.

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner

