NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502547

JEFFERY H. HUNTER,
EMPLOYEE | CLAIMANT

INTERNATIONAL PAPER COMPANY,
EMPLOYER | RESPONDENT

SEDGWICK CLAIMS MANAGEMENT SERVICES,
INSURANCE CARRIER | RESPONDENT

OPINION FILED MAY 23, 2006

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

Claimant represented by the HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 17, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed on March 3, 2005 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of $451.00/$338.00.

2. The claimant has proven 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.

3. The respondents are directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30.

4. The respondents are directed to pay temporary total disability benefits from March 3, 2005 to April 11, 2005 as the claimant remained in his healing period, unable to work.

5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990)(D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

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 November 17, 2005 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 respectfully dissent from the majority opinion finding, in relevant part, that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury on March 3, 2005, in an unexplained fall from a forklift. My 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 compensable injury on March 3, 2005, as a result of an unexplained fall. Rather, I find that claimant

sustained an injury from an idiopathic fall on the date in question.

The record reveals that on March 3, 2005, the claimant, who worked as a forklift driver for the respondent employer, was found by co-workers laying on his left side in the floor approximately 6 to 8 feet from his forklift. Witnesses described the claimant as bleeding from his mouth, shaking and jerking, and mumbling incoherently. No one was certain how long the claimant had been laying in the floor in this condition prior to being discovered.

The claimant testified that he had arrived at work at 5:00 a.m. that morning, as he always did. He further testified that the incident which is the subject of this claim occurred at approximately 4:45 that afternoon, as he was nearing the end of his shift. The claimant described the events of the day in question in greater detail as follows:

> Okay. I got to work at 5:00, as every day. It was a fairly hard day. We was running 2x10's and 2x12's, which is really a fast pace hard type of thing. At the end of the day we had to swap over to 2x12's. I started feeling a little weak. I was kind of exhausted and it passed, so I thought everything was all right. Then I ended up - - they asked me to work through my break and get everything set up, so I did that. It

> was probably about an hour later from the time I should have took my break before I got one. I ended up, the accident happened, I guess it was about 4:45. I don’t remember what happened. The last thing I remember was talking to somebody and the next thing I remember was waking up and the ambulance people were over me.

The last person the claimant talked to before the above-described incident was his co-worker, Dusty Chidester. Mr. Chidester testified that he had previously been driving the forklift that the claimant was operating at the time of the incident. Mr. Chidester stated that he turned the vehicle over to the claimant so that he could assist with another task. When Mr. Chidester next saw the claimant, he testified that the claimant was laying on his left side, facing the back rear tire of the vehicle. According to Mr. Chidester, the claimant had blood gushing out of his nose and he was “just sitting there shaking”. Mr. Chidester testified that he and two other co-workers immediately rushed to assist the claimant, while an emergency team was called. Mr. Chidester stated that the claimant kept trying to get up, so he assisted in holding him down in order to prevent him from further injury. Mr. Chidester testified

that the claimant was mumbling incoherently. He further testified that the claimant's hard hat was sitting on the seat of the forklift facing away from them, towards the passenger door. Mr. Chidester confirmed that employees are required to wear a hard hat and safety glasses at all times. The forklift itself was facing in the opposite direction from which Mr. Chidester had parked it, and its tracks indicated that it had made a U-turn.

On cross-examination, Mr. Chidester testified that the seat of the forklift is about 5 feet from the ground, with 3 steps up to the seat. He further testified that there is a handrail to help assist with climbing into and out of the forklift safely. Mr. Chidester estimated that approximately 15 minutes had passed from the time the claimant had assumed operation of the forklift until the time he was found laying in the floor. Mr. Chidester stated that the claimant was positioned approximately 7 feet from the forklift, which was turned sharply. Mr. Chidester further testified that the forklift was still in drive and the parking brake was disengaged when the claimant was discovered. Had the vehicle been "idled up", Mr. Chidester stated that it could have easily run over the claimant.

Also testifying was Gary Austin, who was one of the co-workers that rushed to the claimant's aide following his discovery on the floor. Mr. Austin stated that when he first saw the claimant, he was bleeding from his mouth and nose, and that his lip was "busted pretty bad". Mr. Austin described the claimant as laying in the floor on his left side in a ball-like position, slightly shaking and jerking. Mr. Austin agreed that the claimant tried to get up and had to be restrained by Mr. Chidester and another co-worker. Mr. Austin stated that in his estimation, the claimant had been driving the forklift approximately 5 minutes when the incident in question occurred. Mr. Austin stated that he was certain the forklift had been moved from its original position after the claimant took it from Mr. Chidester.

John Northrop also testified concerning events surrounding the claimant's accident. Mr. Northrop first observed the claimant from the catwalk above the planer floor where the claimant was laying. Upon surveying the situation, Mr. Northrop stated that he immediately sought a supervisor. Other co-workers were there assisting the claimant when Mr. Northrop arrived at the scene. Mr. Northrop stated that the claimant was "jerking, but he

wasn’t coherent”, and that they were “talking to him, but he wouldn’t respond”.

The last witness to testify was plane mill supervisor, Mr. John Romine. Mr. Romine stated that although he did not see the claimant in the mill at the time of his accident, he spoke with him about the incident later in the hospital. Mr. Romine testified that the claimant told him he had been feeling weak earlier that day, shortly after lunch, “to the point that he thought he might even pass out”. Mr. Romine said that the claimant further informed him that these symptoms had eventually passed and that he thought no more about it. Regarding the specifics of the incident in question, the claimant indicated to Mr. Romine that he was not sure what had happened. The medical records corroborate that the claimant was uncertain what had happened to him on the date in question, in that he made similar statements to emergency room personnel.

On direct examination, the claimant denied having any medical conditions, such as the flu, for which he was taking medications on the day of the incident. The claimant admitted that he had felt weak and exhausted earlier in the day, which he attributed to having worked so hard. However,

the claimant denied that he had felt like he might pass out earlier in the day. Although the claimant indicated that there was always a “possibility” of workplace conditions, such as grease or oil on the forklift steps, that might have caused him to slip and fall, he denied the presence of any workplace clutter or debris that could have contributed to such an incident. In sum, the claimant testified that he did not know what caused his fall.

The claimant stated that he injured his knee, “which is now okay”, and his lip as a result of the incident of March 3, 2005. In addition, three of his top teeth were “shoved back in [his] mouth”, with one of them being broken off. The claimant stated that he was off work due to his injuries until April 11, 2005. Approximately two weeks after the claimant returned to work for the respondent employer, he voluntarily quit.

On cross examination the claimant testified that his memory was poor concerning the incident of March 3, 2005. For example, the claimant could not remember driving the forklift just prior to the incident that day, nor could he recall putting his hard hat in the seat next to him. The claimant remembered having felt tired and weak earlier in

the day. However, he stated that after his break, which he had taken late that day, his fatigue had resolved. Whereas in earlier testimony the claimant had denied taking any medications for common illnesses, he now agreed that he was taking certain prescription medications at the time of this incident. More specifically, the claimant was taking Wellbutrin XL® and Xanax® for depression and anxiety. The claimant had been taking these 2 particular prescription medications for approximately 2 to 3 months prior to the incident of March 3, 2005. However, the claimant testified that he had been taking similar prescription medications for anxiety and depression for approximately 2 to 3 years prior to the incident in question. The claimant denied ever having experienced any physiological side-affects, such as passing out, from any of these medications. However, according to the Physician's Desk Reference (60th ed., 2006), Xanax® and Wellbutrin XL® each carry a risk of syncope and/or seizure. In addition, a common side affect of the prescription drug Xanax® is fatigue.

An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212

(1998). Because an idiopathic fall is not related to employment, it is generally not compensable unless conditions related to employment contribute to the risk by placing the employee in a position which increases the dangerous effect of the fall. Id. In the case of an accident where the cause of the harm is unknown, the injury is the result of an unexplained fall, which is generally regarded as compensable. Moore v. Darling Store Fixtures, 22 Ark. App. 21, 732 S.W.2d 496 (1987). Section 7.04(a)&(b) of Larsen's Treatise on Workers' Compensation, defines an unexplained fall as one in which there is no discoverable reason. Compensation in such a case is awarded on "but-for" reasoning which satisfies the arising out of requirement of Ark. Code Ann. §11-9-102. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. J&G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (1980). Further, the burden of proof is on the claimant to show that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. Moore v. Darling Store Fixtures, 22 Ark. App.

21, 732 S.W.2d 496 (1987). When a truly unexplained fall occurs while the employee is on the job and performing duties of his employment, the injury resulting therefrom is compensable. Moore v. Darling, supra.

Finding in favor of the claimant, the Administrative Law Judge stated that the claimant's fall was unexplained. She based this finding on the following reasoning:

> The evidence of record shows the claimant was injured when he fell at work. The claimant has no memory of this event. There is no medical explanation for his loss of consciousness. He has no history of blackouts or seizures. He was using prescription medication at the time for depression, but there is no evidence that these medications caused side-effects or otherwise interfered with his ability to work.

It is undisputed that the claimant sustained injuries, primarily to his mouth, on March 3, 2005, while at work. However, that he sustained these injuries due to an unexplained fall is highly improbable, in that, albeit the record offers no "medical explanation" for the claimant's "loss of consciousness", there is a plausible explanation,

or a “discoverable reason”, for the claimant’s episode. First, it should be noted that, with the exception of one medical reference to syncope, the medical records are otherwise devoid of conclusive evidence that the claimant ever lost consciousness during his episode of March 3, 2005. Each of witnesses who aided the claimant after he was discovered laying on the floor, stated that the claimant was shaking, jerking, and had to be physically restrained. Two of these witnesses testified that the claimant was mumbling. Therefore, it is evident that at the time he was discovered, the claimant was at least in a semi-conscious state. Further, there is no medical documentation showing that the claimant sustained a blow to his head or that he suffered a head injury which might have rendered him unconscious. A CT scan of the claimant’s head taken on March 17, 2005, was normal with no findings of hemorrhage, hematoma, edema, contusion, mass, or infarct. Further, when found, the claimant was moving involuntarily in a fashion more typical of someone seizing, as opposed to someone who was knocked out cold. In addition, the claimant admitted that he experienced faintness and weakness earlier in the day. As previously mentioned, the claimant was taking prescription

medications that carry published risks of seizure and syncope. In conclusion, it is entirely possible that the claimant may have experienced a syncopal episode wherein he lost consciousness, or even seized during the event in question. However, the preponderance of the evidence indicates that whatever happened to the claimant on March 3, 2005, was likely the result of the prescription medications he was taking, and thus personal to him in nature.

Finally, the physical evidence associated with the claimant's episode creates a puzzling, yet explainable scenario, which further bolsters the conclusion that the claimant's event was personal to him in nature, as opposed to unexplained. First, while the claimant has no memory of events subsequent to his having spoken to Mr. Chidester, credible evidence shows that the forklift had been moved from the position in which Mr. Chidester had left it. Further, according to witness testimony, the claimant had been driving the forklift for approximately 5 to 15 minutes when the incident in question occurred. However, the claimant was found several feet from the forklift, with his head facing the back tires. Further, the forklift was still in drive with the parking brake disengaged, and the

claimant’s hard hat was sitting on the seat. Based upon the undisputed fact that he had experienced weakness and fatigue earlier in the day, it is highly possible that the claimant suffered a sudden reoccurrence of those symptoms. If so, then it is logical that the claimant would have removed his hat, placing it on the seat beside him, perhaps with the intention of alerting someone of his condition. This theory is supported by testimony that the claimant’s hard hat was positioned in the seat in such a way as to suggest a deliberate action, versus having randomly been thrown or knocked from the claimant’s head during a slip and fall episode. Further, as previously mentioned, the claimant was found approximately 6 to 8 feet from the forklift. This distance places the claimant out of the vehicle at the time he collapsed, versus having fallen from the vehicle, which would have logically placed him in closer proximity. The claimant’s proximity to the forklift further supports a conclusion that the claimant deliberately exited the forklift, as opposed to falling out of it.

As previously discussed, although it is undetermined whether the claimant suffered a loss of consciousness, by his own admission, he suffered a loss of

memory concerning the events surrounding his accident. The claimant testified that the last thing he remembered prior to be surrounding by ambulance personnel, was talking to Mr. Chidester. This means that the claimant experienced at least a 5 to 15 minute gap in his memory. Had the claimant been working as usual and unexpectedly stumbled, slipped, or tripped, surely he would have some recollection of events leading up to this traumatic event. This presumption is reinforced by the fact that the claimant sustained no medically documented blow to his head. Again, the claimant's inability to remember the events that precipitated his fall strongly suggests that he was already in a state of incoherency at the time the event occurred. It is also more likely than not that had the claimant tripped or stumbled, he would have attempted to break his fall and protect his face and/or upper body, which is a normal reaction to such an event. Thus, had the claimant fallen 5 feet from the forklift, or even from one of the steps going up to the cabin of the forklift, one would expect injuries to those parts of his body, such as his arms, used to try to break his fall. The claimant sustained no such reported injuries. Moreover, the forklift was idling and the parking break was

disengaged when the claimant was found. One could speculate from this that the claimant’s event happened before he had an opportunity to disengage the forklift. However, the claimant testified that he has no memory of events leading up to his accident. Therefore, he did not offer testimony to verify whether he had an opportunity to disengage the forklift, whether leaving the forklift idling when he exited was routine for him, or otherwise. Therefore, it would be speculation and conjecture for us to make that determination, and conjecture and speculation, even if plausible, cannot take the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). However, in conjunction with the other evidence presented in this claim, it is more than plausible that the claimant was not entirely coherent at the time he existed the forklift, and was perhaps experiencing an onset of the symptoms he had admittedly experienced earlier in the day. This would certainly account for his hard hat being deliberately placed in the seat beside him, but the forklift left idling. Clearly, the claimant was incoherent by the time his co-workers arrived to assist him.

There is simply not enough evidence in this claim to amount to a preponderance of the evidence that the claimant experienced an unexplained fall on March 3, 2005. However, the weight of the credible evidence that we now have before us supports a finding that the claimant experienced some event that was personal to him, whether physiological or neurological, which resulted in injury. In sum, the credible evidence shows that the claimant was taking medications that can cause seizures, syncope, and fatigue, and that he had been having symptoms of weakness and fatigue prior to this incident. Moreover, the evidence preponderates in favor of the claimant having already exited the forklift at the time he fell, thus discounting the assumption that he fell while exiting the vehicle. Further, he sustained no injury to his head that might account for a loss of consciousness or memory, nor did he sustain injury to other parts of his body, which is normally expected when someone tries to protect themselves in a fall. Finally, when the claimant was found, he was jerking and shaking involuntarily and he was incoherent. Therefore, in view of the lack of medical evidence showing that the claimant sustained a blow to his head, whatever caused the

claimant to either loose consciousness and/or become incoherent can be logically attributed to an event that was personal to him in nature and origin. Because the claimant's event was personal to him, he has failed to prove by a preponderance of the evidence that he sustained a compensable injury from an unexplained fall on March 3, 2005. Rather, the preponderance of the evidence demonstrates that the claimant suffered an idiopathic fall on March 3, 2005, which is not compensable. Therefore, I respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner