

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. FF412489

BRANDON NICHOLS, EMPLOYEE	CLAIMANT
AMERICAN EAGLE AIRLINES, EMPLOYER	RESPONDENT
SPECIALTY RISK SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JANUARY 6, 2006

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

Claimant represented by the HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE RANDY MURPHY, 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 July 29, 2005. 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 15, 2004, the relationship of employee-self-insured employer-third

party administrator existed between the parties.

3. On May 15, 2004, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$271.00 for total disability and \$203.00 for permanent partial disability.
4. On May 15, 2004, the claimant sustained a compensable injury to his back.
5. On May 15, 2004, the claimant also sustained a compensable injury to his cervical spine. Specifically, he has proven by the greater weight of the credible evidence that on that date he sustained a physical injury to his cervical spine that arose out of and occurred in the course of his employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal physical harm to his body, and that required medical services.
6. There is no dispute over the payment of medical expenses incurred for services provided by or at the direction of Dr. Knox through December 7, 2004.
7. The medical services provided to the claimant for his cervical difficulties by and at the direction of Dr. Clay Berger, Dr. Luke Knox, Dr. Martin Greenberg, and Dr. Cyril Raben represent reasonably necessary medical services for the claimant's compensable injury. The medical services recommended to the claimant by Dr. Martin Greenberg for treatment of his cervical complaints also constitute reasonable and necessary medical services for the claimant's compensable cervical injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the

medical fee schedule established by this Commission.

8. There is no dispute, at the present time, over the claimant's entitlement to temporary disability benefits.
9. The respondents have accepted and paid permanent partial disability benefits attributable to a permanent physical impairment of 2% to the body as a whole, as a result of the claimant's admittedly compensable thoracic injury.
10. The issue of the claimant's entitlement to permanent benefits for his compensable cervical injury is premature.
11. Some portion of the controverted medical expenses herein awarded have been paid under a policy of group insurance and would be subject to the provisions of Ark. Code Ann. §11-9-411.
12. The respondents have denied the occurrence of any compensable cervical injury on May 15, 2004, and have controverted the claimant's entitlement to any benefits attributable to his cervical difficulties.
13. As no controverted benefits are awardable to the claimant, at the present time, no controverted attorney's fees can be awarded to his attorney.

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 July 29, 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 that the claimant met his burden of proof that he sustained a compensable injury to his cervical spine on May 15, 2004. 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 cervical spine injury on May 15, 2004. Therefore, I find that the decision of the Administrative Law Judge should be reversed and all associated benefits should be denied.

According to the claimant, on May 15, 2004, he was engaged in unloading luggage from an aircraft cargo compartment when a stack of luggage toppled over, landing on his back. The claimant testified that he did not feel pain when the incident happened, and that he

did not report the incident to his supervisor on the date in question. Rather, the claimant completed his shift, giving the incident no further consideration. The claimant further testified that he was awakened the next day by a "sharp stabbing" pain, and that he had a slight headache. Believing that he had "just pulled something", the claimant took ibuprofen for his symptoms. Although the claimant's pain did not subside during that day, he testified that he accompanied his family to a bull riding event that evening. Immediately following the bull riding event, the claimant was driven to the emergency room of a nearby hospital.

ER documents verify that the claimant was treated on May 16, 2004, for complaints of severe back and rib pain. Emergency room X-rays of the claimant's thoracic spine revealed a minimal compression fracture at T-7, of an undeterminable age. The claimant was diagnosed with a thoracic sprain for which he was prescribed Darvocet and Robaxin. In addition, the claimant was taken off of work for the next two days, and restricted to a week of light duty thereafter.

The medical records reflect that the claimant was seen by a chiropractor, namely Dr. Clay Berger, on May 19, 2004. On May 20, 2004, the claimant came under

the care of Dr. Robert Wilson. In his report of that initial visit, Dr. Wilson stated:

Patient states that some luggage fell on him Saturday night, and he woke up Sunday morning with lots of muscle aches in mid back area. Did not hurt initially. He went to the emergency room and was told he had separated rib on left back area.

Dr. Wilson took the claimant off of work and ordered a CT scan of the claimant's thoracic spine. This test, which was conducted on June 3, 2004, revealed no evidence of an acute traumatic injury. On June 4, 2004, Dr. Wilson diagnosed the claimant with thoracic muscle strain and released him to return to work with restrictions. Dr. Wilson also referred the claimant for physical therapy. On June 30, 2004, Dr. Wilson noted in his follow up report that the claimant complained of outward spreading pain "just below the shoulder blades and in the midline". Although Dr. Wilson noted no radicular pain in the claimant's upper or lower extremities, he added that the claimant complained of intermittent headaches that started in his cervical area. Dr. Wilson continued the claimant on restricted work duty.

The claimant continued to complain of back pain, headaches, and neck pain. Therefore, Dr. Wilson

referred the claimant for an examination by physiatrist, Dr. K. Marty Hulburt. On July 28, 2004, Dr. Hulburt referred the claimant for a total body bone scan, which revealed normal findings. Thereafter, Dr. Hulburt referred the claimant for an MRI of his thoracic and lumbar spine, which also returned normal results. Based upon the results of these two diagnostic studies, on September 22, 2004, Dr. Hulburt diagnosed the claimant with myofascial pain syndrome and trapezius rhomboid. Concerning the claimant's headaches, Dr. Hulburt opined that these were muscular in origin. Dr. Hulburt referred the claimant for a neurosurgical evaluation. On November 15, 2004, Dr. Luke Knox of the Northwest Arkansas Neurosurgery Clinic examined the claimant and reviewed his diagnostic studies. In his report of that evaluation, Dr. Knox stated:

Reviewing his cervical spine films, there is no evidence of acute trauma; however, I question the possibility of a mild instability at C5-C6. He did have loss of normal cervical lordosis. I understand that Brandon's [the claimant] initial injury is to the mid-thoracic spine and, that his primary complaints were over this area. The cervical findings detailed above were probably spurious and preexisting in nature. From the standpoint of his worker's compensation injury, I can see no overt evidence of thoracic spinal injury and, from the

standpoint of his negative bone scan, MRI scans and CAT scans. He is well over six months into his thoracic injury. From the workers' compensation standpoint, he would probably do well from closing out his workers' compensation claim, as he has reached that point of maximum medical improvement. According to the Guides to the Evaluation of Permanent Impairment, page 40, table 15-7, II, section D, under the subheading of thoracic, he would qualify for a 2% permanent partial disability to the body as a whole. If Brandon would like to workup his cervical discomforts further, I would recommend that he consider a cervical MRI scan to further assess the subtle findings we noted on plain films.

In a later report, Dr. Knox noted a typographical error in reference to the Guides he used to evaluate the claimant's permanent partial impairment. Dr. Knox stated that the determination was made using subsection "B" as opposed to subsection "D". In that same report dated, December 7, 2004, Dr. Knox further stated that the claimant might benefit from a functional capacity evaluation. In the meantime, the claimant had returned to his chiropractor, Dr. Berger, whose spinal adjustments were said by Dr. Knox to be beneficial in relieving the claimant's headaches.

The claimant eventually underwent a cervical MRI as recommended by Dr. Knox. In interpreting the

findings from this study, Dr. David L. Brown made the following comments:

The cervical spine has a right kyphosis at the C5-6 vertebral body. This could be as result of spasm or degeneration.

Otherwise, this study was said to be within normal limits. The results of a thoracic MRI conducted in March of 2005 also revealed normal findings.

On March 2, 2005, the claimant was seen for a third opinion referral by neurosurgeon, Dr. Martin Greenberg, who assessed the claimant with cervical disc disease with stenosis at C5-C6, and bilateral radiculopathy. In addition, Dr. Greenberg stated that the claimant's recent cervical MRI showed a right herniation at C5-C6 with stenosis. As for the claimant's thoracic spine, Dr. Greenberg opined that the claimant had thoracic disc disease at T6-7 and T7-T8. In addition, Dr. Greenberg stated that the claimant had underlying evidence of kyphoscoliosis with osteoarthritis at multiple levels of his thoracic spine, which were non-surgical. "These," continued Dr. Greenberg referring to the claimant's arthritic discs, "are related to Scheuermann's disease which is congenital degenerative in nature." Dr. Greenberg

recommended that the claimant forego surgery at that time and continue with his chiropractic treatment. A cervical spine CT myelogram conducted on March 31, 2005, confirmed a minimal bulging disc at C5-C6. According to this study, however, there was no evidence of disc herniation, spinal stenosis, or destructive lesion in the claimant's cervical spine.

The claimant came under the care of Dr. Cyril Raben and Dr. Rick Tutt in April of 2005, who took him completely off of work through April 18, 2005. In a letter dated May 4, 2005, th claimant's chiropractor, Dr. Berger, stated, "In my opinion, the accident Mr. Nichols sustained on May 15, 2004, probably caused his cervical disc herniation."

Under Ark. Code Ann. §11-9-102(4)(A)(i), for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id. Additionally, a finding of compensability must be established by medical evidence, supported by objective findings as defined in §11-9-102(16).

In the present claim, the credible objective medical evidence fails to support a finding that the claimant sustained a compensable neck injury on May 15, 2004. Rather, the record demonstrates that the claimant sustained a thoracic strain on the date in question, which had resolved with slight permanent physical impairment by November 15, 2004. To illustrate, as previously discussed, the emergency room records reflect that the claimant presented and was treated on May 15, 2004, for severe pain in his center of his back, his shoulder blade and his lower left rib. Although emergency room x-rays showed the presence of some cervical lordosis, Dr. Knox later opined that the claimant's cervical problems were "probably spurious and preexisting in nature". Moreover, the claimant testified that he noticed weakness in his extremities shortly after the incident in question. However, the medical records reflect that he did not report these symptoms until he was seen by Dr. Berger in November of 2004; nor did the claimant show clinical signs of motor or sensory loss contemporaneously with his accident. In fact, the claimant did not report arm pain until January 2005. And although the claimant testified that he was experiencing pain in his cervical spine and upper extremities the day

after his emergency room examination, his testimony reflects, and the medical records corroborate, that the claimant's onset and progression of cervical problems developed slowly. Although it is plausible that, according to the Administrative Law Judge, the work related incident described by the claimant could have "reasonably and logically" caused physical injury to the claimant's C5-C6 area, the record, particularly the medical evidence, demonstrates that the claimant's cervical problems were preexisting. And, while the Administrative Law Judge acknowledged that Dr. Knox's opinion that the claimant sustained no physical injury to his cervical spine, and that his cervical problems were, therefore, preexisting, was based upon information provided to him by the claimant, the Administrative Law Judge also found the claimant to be a credible historian. Therefore, it is just as reasonable and logical to conclude that the information the claimant gave to Dr. Knox concerning the nature of his injury was accurate, and that Dr. Knox's opinion was well founded and should be given proper weight. Furthermore, a review of the claimant's cervical spine films by Dr. Knox on November 15, 2004, revealed no signs of acute trauma to that area. Likewise, although subsequent MRI's and a CT

scan of the claimant's cervical spine revealed a *bulge* at C5-C6, of all the claimant's treating and examining physicians, only the claimant's chiropractor, Dr. Berger, opined that the claimant's "cervical disc herniation" was "probably" caused by his May 15, 2004 accident.

The medical reports consistently reflect that the claimant was struck by falling boxes in his mid back and ribs - not his neck. Further, the claimant was initially diagnosed and treated for a thoracic sprain and rib injury, which resolved no later than November 15, 2004. Finally, the weight of the objective medical evidence demonstrates that the claimant's cervical problems were not causally related to his work related incident of May 15, 2004.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that his cervical problems are related to his work related incident of May 15, 2004.

Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner