

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507250

ROY DUNN, EMPLOYEE	CLAIMANT
SUPERIOR INDUSTRIES, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT

**OPINION FILED MARCH 27, 2007**

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

Claimant represented by HONORABLE LAURA J. McKINNON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN ,Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed June 2, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 31, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$495.00 which would entitle him to compensation at the rate of \$330.00 for temporary total disability benefits and \$248.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his cervical spine and right shoulder on or about February 9, 2005.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The claimant has alleged that he sustained a compensable injury to his neck as a result of an employment related accident which occurred on February 9, 2005. There is no dispute that the accident described by the claimant occurred. The respondent accepted the claim as compensable

to the extent that the claimant sustained injury to his left shoulder. However, they have denied the claim in its entirety as it applies to any other part of the claimant's body.

After a hearing, an Administrative Law Judge issued an Opinion dated June 2, 2006, in which the claim was denied and dismissed. The Judge concluded that the claimant failed to offer sufficient evidence to establish that he sustained an injury to his neck as a result of his accident on February 9, 2005. From that decision, the claimant filed the present appeal. The Majority now affirms and adopts the decision of the Judge as their own. For the reasons set out below, I must respectfully dissent.

At the time of his injury, the claimant was employed as a material handler in the respondent's manufacturing facility. Among the claimant's job duties was lifting tire rims from a conveyor belt and hanging them on moving hooks that carried them into other areas of the plant for further work. The claimant described this system as having two sets of hooks, one above the other, with the

higher hook being somewhat higher than his head. The claimant testified that he had just placed tire rims on both hooks and was turning to pick up another set when a tire rim fell off the upper hook. Apparently, it fell, striking the lower rim and then hitting the claimant on his left shoulder. According to the claimant's testimony, the impact caused him to twist, and in order to keep from falling, he grabbed onto the conveyor belt with his right arm, straining his shoulder and neck.

The claimant promptly notified his employer of the injury and was referred to Dr. Konstantin Berestnev, who the claimant saw on the same day that he was injured. In a letter dated February 9, 2005, Dr. Berestnev stated that he was seeing the patient for an injury sustained while he was hanging wheels. According to Dr. Berestnev's letter, the injury occurred when the claimant turned to get another wheel and one fell on his shoulder. The claimant was diagnosed with a left shoulder bruise, was prescribed medication, directed to perform stretching exercises, and to avoid lifting more than ten (10) pounds.

Dr. Berestnev saw the claimant again on February 16, 2005. In a report of that date, the doctor notes that the claimant was having pain in his right shoulder and that, while the left shoulder bruise was healing, there was some radiation and pain in his neck. The doctor's report also documents the claimant as having a decreased range-of-motion in his neck and pain upon extension. The doctor prescribed the claimant additional medication and directed him to include neck stretching exercises.

The claimant was seen again by Dr. Berestnev on February 21, 2005, and in his report of that date, he notes that the claimant continues to have problems in his left shoulder and is also complaining of pain on extension and rotation of his neck. In a Form 3, which Dr. Berestnev prepared in regard to this visit, he also notes that the claimant was having radiating pain in his neck and that his right shoulder was now hurting worse than his left shoulder.

Surprisingly, given that the claimant's problems were focused on his neck and right shoulder pain,

Dr. Berestnev directed the claimant to undergo an MRI scan of his left shoulder. The MRI did not discover any abnormalities. Nonetheless, the claimant was directed to undergo physical therapy for his left shoulder problems at the physical therapy facility which is part of Dr. Berestnev's clinic.

In a report dated February 25, 2005, prepared by John Lee, a physical therapist at Dr. Berestnev's clinic, the claimant's physical condition was described. Interestingly enough, Mr. Lee notes that the claimant has tenderness in the right side of his cervical spine at C5-C6. He also states that extension results in radiation of pain into the claimant's right shoulder. It is also noted that the claimant had tenderness in the midline of the cervical spine, once again, at the C5-C6 level.

The claimant last saw Dr. Berestnev on March 2, 2005. In a report of that date, Dr. Berestnev stated it was his opinion that the claimant's neck and right shoulder were not related to the bruise on his left shoulder. After noting that there were no abnormalities from the claimant's left

shoulder MRI, the claimant was released to return to regular duties.

Because the respondent was no longer willing to provide the claimant medical treatment, the claimant sought treatment from the Gravette Hospital emergency room. As a result of that visit, he was referred to Dr. Joel Jones, a general practitioner in Rogers, Arkansas. Dr. Jones saw the claimant on March 8, 2005. In his progress note from that visit, the claimant explained that he was seeing the claimant because of complaints of neck and right shoulder pain which he has had for about four weeks. Dr. Jones then relates a description of the claimant's accident at work, in which he recites that a tire fell off of an assembly line, striking the claimant's left shoulder, causing him to be off balance and catching himself. Dr. Jones noted the presence of right shoulder and neck spasms, tissue texture changes, asymmetry, restricted range-of-motion and tenderness in the musculature of his spine and right shoulder. Dr. Jones prescribed conservative treatment. After a follow-up visit on March 11, 2005, Dr. Jones referred the claimant to

Dr. Jacob Kaler, an orthopedist and sports medicine specialist in Rogers, Arkansas.

Dr. Kaler saw the claimant on March 15, 2005. In his treatment notes regarding that visit, Dr. Kaler once again sets out a history of a job related injury caused by a falling object striking the claimant's left shoulder wherein he then caught himself with his right arm. After reviewing the claimant's symptoms, Dr. Kaler directed the claimant to undergo a cervical MRI. That MRI was performed on March 18, 2005. In the radiology report, the claimant was found to have a mild circumferential disc bulge at C4-C5 and a right paracentral and lateral disc protrusion at C5-C6. The report also notes that the herniation may compromise the right C6 and C7 nerve root at that level. The claimant was also found to have a paracentral disc protrusion (HNP) which appeared to result in mild to moderate left lateral recessed stenosis.

As a result of those findings, the claimant was referred to Dr. Cyril Raben, an orthopedist specializing in spinal injuries in Fayetteville, Arkansas. On April 13,

2005, the claimant saw Dr. Doug Foster, an associate of Dr. Raben's. Dr. Foster noted that an MRI showed a disc herniation at C5-C6 with cervical radiculopathy secondary to an acute disc herniation with persistent pain. Dr. Foster stated that it was his opinion that the injury was work related. Dr. Foster prescribed physical therapy and directed the claimant to return for a recheck.

The claimant was again seen on June 6, 2005, this time by Dr. Raben. In his clinic note of that date, Dr. Raben described that the claimant is suffering a decrease in his triceps tendon reflexes and stated his concern that the claimant's discs herniation had turned into a "full blown radiculopathy." Dr. Raben, at that time, directed the claimant to receive an epidural steroid injection and directed that he return in two to three weeks. When Dr. Raben saw the claimant again on July 11, 2005, the doctor's clinic notes indicate that the claimant had not obtained any relief from the epidural steroid injection and Dr. Raben recommended surgery to correct his disc herniation.

At the hearing, the claimant testified about his injury and his resulting neck condition. The respondent called four witnesses to provide testimony regarding the events surrounding the claimant's injury. The only one of those witnesses who actually saw the injury was Orlando Viveros, who testified that in February 2005, he was employed by the respondent in a position similar to the claimant. He also testified that since the injury, he had been promoted to a position of forklift driver.

Mr. Viveros generally agreed with the claimant's description of how his job was performed. He also testified that he actually saw the claimant being hit by the falling tire rim. At the time that occurred, Mr. Viveros testified that he was "throwing wheels," which he described as placing the tires on a conveyor belt but not actually throwing them. According to Mr. Viveros, he was about five feet from the claimant when he saw a tire rim fall from the top hanger and strike the claimant. Mr. Viveros specifically testified that the hanger struck him in the upper part of his arm, not his shoulder. He also stated that the claimant was not knocked

to the ground or against the conveyor belt. In fact, according to Mr. Viveros, the impact of the wheel did not cause the claimant's body to move at all. Lastly, Mr. Viveros agreed that the claimant had been a good employee and a good worker who seemed like an honest person and who had not ever, to his knowledge, lied.

The other respondent's witnesses were Tony Lewis, David Helm, and Scott Morris. All three of these gentlemen were in supervisory capacities at the respondent employer at the time of the claimant's February 9, 2005 accident. None of them actually witnessed the accident. All of them acknowledged that the claimant had promptly reported the injury, but none of them were able to see any bruises, marks, or swelling on the claimant's left shoulder. Both Mr. Lewis and Mr. Helm, who were immediate supervisors of the claimant and saw him on the date of the injury, acknowledge that he was a good worker who received a number of raises, a reflection of his hard work.

In denying the claim for benefits based upon a neck injury, the Judge and now the Majority essentially rely

upon three factors. First, they believe Mr. Viveros' testimony that the falling wheel did not cause the claimant to fall into the conveyor belt or otherwise force him to grasp anything with his right arm to hold himself up; thus, they conclude that the claimant's testimony was not credible and entitled to little weight.

Secondly, they note that Dr. Berestnev did not mention the claimant's neck pain in his initial visit of February 9, 2005. They are of the opinion that this calls into question the claimant's assertion that he had injured his neck as a result of the falling wheel.

Lastly, they find the claimant did not report neck pain until February 16, 2005, approximately one week after the injury. Also, while the claimant did complain of neck pain on that date, he did not specifically relate the pain to grabbing the conveyor belt in an attempt to remain upright, further casting doubt on the claimant's version of events.

When those three factors were considered, the Majority concludes that the claimant did not meet his burden

of proof. In my opinion, the Majority has misinterpreted the relevant evidence and reached the wrong result.

I believe that the testimony of Mr. Viveros is unreliable. His testimony was that he was "throwing tires," a job which required him to lift the tire rims from one location and place them on the conveyor belt, which then moved them to the claimant. While it is possible that he might have been able to observe the claimant from time-to-time while doing this, it seems unlikely, were he fully engaged, he would have been able to carefully watch the claimant as he stated. Also, he testified that when the tire rim fell and struck the claimant, it caused no movement in his body whatsoever. I find it hard to believe that a seventeen (17) pound tire rim could fall from above head height and, when striking someone, that person could remain immobile. The impact of such an object would almost certainly cause anyone to stagger, stumble, or be displaced. Also, Mr. Viveros was certain that the tire rim had struck the claimant, not in his shoulder, but on his arm. During the trial, Mr. Viveros specifically indicated the spot on the

arm where the tire rim had struck the claimant. However, Dr. Berestnev, the company's physician of the respondent, stated in his report that, when he examined the claimant later on the date of the accident, a bruise had formed on the claimant's shoulder.

Obviously, Mr. Viveros was in error when he stated that the tire rim did not strike the claimant in the shoulder. Further, the testimony of Mr. Lewis and Mr. Helm was that, immediately following the injury, the claimant showed them where the tire rim hit and the location of the injury was on the claimant's shoulder, not on his arm. Since Mr. Viveros, Mr. Lewis, and Mr. Helm all testified that the claimant was a good worker and had a reputation of honesty, it seems unlikely that he would have not been truthful at this point as to where the tire rim struck him.

In denying the claim, the Majority relies upon the medical reports from Dr. Berestnev. It is true that in Dr. Berestnev's original note report, which was prepared on the date of the injury, no mention was made of the claimant suffering from neck pain. However, this is not surprising,

since Dr. Berestnev had seen the claimant only a short time after the injury happened. Any cervical disc herniation caused by the claimant's job related accident most likely would not have manifested itself by the time the claimant saw Dr. Berestnev. Further, it is quite logical for someone who has been injured by a falling object to be concerned with the part of the body actually struck by the object. Consequently, the claimant's complaints and Dr. Berestnev's attentions were directed toward the bruise on his shoulder.

The Majority also notes that the claimant did not complain of neck pain to Dr. Berestnev until his visit of February 16, 2005, and that Dr. Berestnev did not report a history of the claimant injuring his neck in a February 9<sup>th</sup> incident in any of his reports. However, I believe it is significant that in the February 9<sup>th</sup> report, the claimant's version of how he was injured is almost exactly the way he described it in his trial testimony. That is, the claimant told Dr. Berestnev and testified that he had hung the tire rim on the overhead hooks and when he was turning to get another set of tire rims, the rim fell off the higher hook.

In fact, the claimant has consistently given this version of this events throughout his conversations with his medical providers.

The Majority is essentially penalizing the claimant because Dr. Berestnev failed to accurately diagnose the nature of the claimant's injury. As indicated above, it would not be unusual for the effects of a disc herniation to not be present only a short time after the occurrence of the injury. However, by February 16, 2005, when the claimant's neck pain was reported to Dr. Berestnev, he continued to try and relate those symptoms to his bruised left shoulder. Even after the claimant's symptoms of right shoulder and neck pain seemed to worsen, Dr. Berestnev's only action was to direct the claimant to undergo a left shoulder MRI. Obviously, Dr. Berestnev's entire focus was on the claimant's left shoulder injury, to the exclusion of all else.

I also find it highly significant that the physical therapist, who was employed by Dr. Berestnev's clinic, discovered evidence of cervical pain and

radiculopathy emanating from the C5-C6 level of the claimant's neck. This is the level at which subsequent MRIs found that the claimant had a disc herniation. Yet, when Dr. Berestnev saw the claimant again on March 2, 2005, and the claimant was still complaining of symptoms in his neck and right shoulder, Dr. Berestnev merely commented that he did not believe that the problem was related to his left shoulder bruise. Dr. Berestnev obviously had no interest in treating or otherwise dealing with the problem the claimant was having in his neck and right shoulder.

I also believe that the Majority does not give proper weight to the findings and opinions of other physicians who treated the claimant. Dr. Joel Jones saw the claimant on March 8, 2005, and in his progress note of that date, he sets out his treatment of an accident involving the claimant being struck by a tire and catching himself. He then refers the claimant to Dr. Kaler, who notes that the claimant's problem is neck and shoulder pain. Eventually, Dr. Kaler directs the claimant to undergo an MRI scan, which detected the claimant's herniated disc. Likewise, Dr. Foster

and Dr. Raben also concluded that the claimant was suffering from neck pain originating from, what Dr. Foster described as, a disc herniation. Eventually, Drs. Jones, Raben, Kaler, and Foster all affirmed their opinions that the claimant's injury was job related.

My evaluation of the medical evidence leads me to conclude it substantially preponderates in favor of the claimant. Four physicians have opined that the claimant's acute disc herniation occurred as a result of the incident with the falling wheel. Of those opinions, three of them were from orthopedists, two of whom specialize in spinal injuries. The only medical report supporting the Majority's decision is that from Dr. Berestnev, a general practitioner, who failed to diagnose the claimant's problem. In my opinion, his report should be given little weight, especially when compared to the overwhelming medical evidence of doctors who specialize in the type of injuries suffered by the claimant and who are much more experienced in the areas of spinal injuries and their causes.

The testimony in the case also weighs heavily in favor of the claimant. While it is true that Mr. Viveros testified that the falling wheel had essentially glanced off the claimant, causing no particular effect, his testimony is contradicted not only by the claimant, but by the other witnesses called by the respondent. For example, both Mr. Lewis and Mr. Helm testified that, based upon their investigation, which took place immediately following the accident, the wheel rim had struck the claimant on the top of the shoulder. Whereas, Mr. Viveros stated that it had struck him on the arm. Further, the claimant's history of injury, which he gave not only to Dr. Berestnev, but consistently gave to other medical providers, was that he was turning to pick up another wheel rim when he was struck. Mr. Viveros stated that the claimant was not moving at all and was merely standing when he was struck. Also, as noted above, it seems unlikely to me that Mr. Viveros' version of events could be true in that it is highly unlikely that even a muscular individual such as the claimant would be able to absorb the impact of falling tire rim without any effects.

I also note that all of the witnesses testified that the claimant was an honest and truthful person and a hard worker. None of them had any reason to disbelieve the claimant's version of events. I also note that the claimant's statement to Dr. Berestnev that the wheel rim struck him as he was turning to pick up other wheels occurred at a time before the respondent controverted this case and before he had realized that he had injured his neck. In addition, the claimant consistently repeated that story throughout his interview with other doctors and his testimony at the hearing. Clearly, the testimony of the claimant and the respondent's other witnesses is entitled to more credibility than that of Mr. Viveros.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner