BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603699

CHRIS KOLLN, EMPLOYEE	CLAIMANT
HANKE BROTHERS, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 16, 2007

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

Claimant represented by the HONORABLE C. BURT NEWELL, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed May 2, 2007. The administrative law judge found that the claimant proved he sustained a compensable specific-incident injury on March 15, 2006. After reviewing the entire record *de novo*, the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the claimant did not prove he

sustained a compensable specific-incident injury on March 15, 2006.

I. <u>HISTORY</u>

In May 2004, the claimant reported a stiff shoulder and pain in his right shoulder, and arm weakness, after slipping off the step of a trailer. The claimant was assessed as having a muscle strain and mild osteoarthritis.

The claimant testified that he began working for Hanke Brothers in about February 2005. The claimant testified that his job involved manual labor, helping to build sunrooms. The claimant testified that he "tore" his right rotator cuff in October 2005. Dr. Mark W. Lefler noted the claimant's past medical history in December 2005: "Significant for osteoarthritis of neck and shoulders, plantar fascitis. Patient has pain in neck and at times in right shoulder. Patient notes it is difficult to lift his arm over his head. Has a lot of pain at night sometimes....Works for Hanke Brothers Siding." Dr. Lefler's assessment included "Rotator cuff syndrome on right."

The claimant underwent physical therapy for his right shoulder symptoms beginning in December 2005.

The parties stipulated that there was an employment relationship on March 15, 2006. The claimant testified on direct examination:

> Q. So what happened? What time did you get hurt?
>
> A. It was right after lunch. It was about 1:30 in the afternoon. I'd loaded pretty much everything up except for the roof panels....And I tried to lift a roof panel and take it around to load it on the trailer....So I was picking it up, and, as I was walking around to get it on the trailer, I slipped on the grass, because the grass was a little bit wet. And I fell. And, when I first felt some pain, it wasn't really a heavy pain. It was just a little more than a slight pain. And I continued through the day, but I wasn't doing such heavy lifting and everything.
>
> Q. When you had this pain, where was it?
>
> A. That was in my neck and shoulder area and in the back of my back....Where my shoulder blade is....
>
> Q. Did you tell either Mike or Teddy about what happened?
>
> A. Michael was on the roof at the time, and Teddy was standing about ten or twelve feet from me and saw me fall. And we let Michael know right away that I fell....
>
> Q. Did you drive back to Hot Springs?
>
> A. Then we drove back to Hot Springs. When I got home - It was like a 12- or 13-hour shift; it was long. And, when I got home, I laid down on the couch

> and just propped my feet up in the air on the couch....And, when I woke up,
> my whole shoulder, neck, and back area just felt like I was kicked by a mule.
> I was in a lot of pain....

A physical therapist noted the following on March 21, 2006:

> The patient reports that he has recently experienced a severe onset of neck pain and radiating pain in the right arm, forearm and right hand. He states that he began developing symptoms while at work doing sun room installation and looking upward with his neck bent backward. He reports that symptoms developed while on the job and gradually increased over a two to three day period. He states that even though pain was increasing he kept trying to work
> in order to maintain good job security....
>
> Symptoms developed over a two to three day period, exclusively while the patient was at work and looking upward with his neck in an extended position.
> The patient is also required to hold materials over his head with his arms overhead for prolonged periods of time while doing sunroom installations....
>
> The patient does exhibit muscle spasm in the right trapezius, right cervical and right upper arm musculature....The patient was seen in physical therapy for specific problems related to the right shoulder back in December of 2005 and January of 2006. The symptoms completely resolved in the right shoulder, he gained full range of motion and full strength. Problems he is now presented with are different issues and according to the patient reports specifically started while he was on the job and did develop gradually over a two to three day period and exacerbated to a point where he was no longer able to carry out his normal job duties,

> he reported this to his employer and is now being seen by his primary care physician Dr. Mark Lefler....

The claimant presented to Dr. Martin A. Koehn on March 23, 2006:

> 46 year old man comes in with complaint of severe pain in his right neck and shoulder, upper scapula and right arm. Has noted some tingling in his hand intermittently. Symptoms present the last 8 days. Noted onset after just awakening from dozing on the couch....He works building sunrooms and works a lot with his neck bent back looking upward....

Dr. Koehn gave the following impression: "(1) Cervical radiculopathy, rule out cervical disc disease."

The claimant saw Dr. Lefler on March 27, 2006:

> Patient with history of right rotator cuff pathology. Had been doing well in physical therapy. Going back to work. Was at home working and notes he was looking up and developed significant pain and stiffness in his neck now with radiation down his shoulder.

Dr. Lefler's assessment was "Neck pain concerning for herniated disc. Obtain MRI. Intensive physical therapy."

An MRI of the cervical spine was taken on March 29, 2006, with the following impression:

> 1. Diffuse cervical disc disease, most significant at the C5-6 level, where there is mild cord compression and possibly mass effect upon the exiting right C6 nerve root.
> 2. No intrinsic cervical cord signal abnormalities are seen.

The physical therapist wrote on March 30, 2006: "Chris came to the therapy clinic on March 21, 2006 with complaints of intense neck pain, right upper shoulder pain and radiating pain down the right arm....Chris stated the symptoms started at work within the past few days while doing sunroom installation for Hanke Bros....Chris was treated with therapy modalities and gentle manual therapy to stretch muscle spasm."

On April 11, 2006, the claimant filled out a Workman's Compensation Accident Report in Dr. Lefler's family medicine clinic. The reported Date of Injury appears to have been March 8, 2006. The claimant described the Accident/Injury: "After working 3-12 to 13 hr shifts at work on the third shift I was feeling sore after being home for ½ hour my back started really hurting around my shoulder blade & neck stiff."

Dr. Lefler reported the following on April 11, 2006:

> Previously I had thought injury had occurred at home, but really is the result of work. He had been taking down a sun room and loading it on a truck. About 30 minutes after work the patient developed neck pain with radicular symptoms going into the right shoulder and arm. The patient continues to have these symptoms. MRI recently demonstrated herniated nucleus pulposus at C5-6. The patient is having radicular symptoms even with sitting down using a computer at home.

Dr. Lefler's assessment was, "1. Herniated nucleus pulposus C5-6, work related. Will refer to neurosurgery."

The therapist reported on May 1, 2006 that the claimant's pain symptoms had "gradually eased and showed improvement ever since the onset of injury on March 15, 2006 that occurred while at work lifting roof panels."

Dr. John R. Pace saw the claimant on May 4, 2006:

> [H]e is status post an on the job injury March 15, 2006 when he experienced neck and right upper extremity pain thirty minutes after moving a sun room....
>
> His MRI scan reveals an acute herniated disc at C 5,6 on the right with disc protrusion at C 6,7....

The claimant testified that he was laid off on May 30, 2006.

Dr. Pace performed surgery on June 19, 2006: "Anterior cervical discectomy and fusion with removal of osteophytes at C5-6 and C6-7." The pre- and post-operative diagnosis was "Osteophyte formation and disc herniation at C5-6 and C6-7."

Dr. Pace returned the claimant to work with no restrictions on July 20, 2006.

The claimant filled out a Form AR-C, Claim For Compensation, on August 16, 2006. The claimant described

the injury: “Neck injury after slipping & falling while carrying building material.”

The claimant testified that he began working for Wal-Mart on September 23, 2006.

A pre-hearing order was filed on December 12, 2006. The claimant contended that he sustained a specific-incident injury. The claimant contended that he was entitled to reasonably necessary medical treatment, and temporary total disability compensation from March 27, 2006 through July 20, 2006. The respondents contended that the claimant did not sustain “a specific incident or a gradual onset injury.”

The parties agreed to litigate the following issues: “1. Compensability. 2. Medical benefits. 3. TTD benefits. 4. Attorney’s fees.”

A hearing was held on February 23, 2007. The respondents called a supervisor, Woody Morgan, to testify:

> Q. You heard [the claimant] testify earlier that he’s claiming an injury when he fell. Is that correct?
>
> A. Yeah, I heard him say that.
>
> Q. Did he ever tell you about an injury where he fell?
>
> A. I don’t recall him telling me....

> Q. Do you recall him telling you that he hurt himself falling?
>
> A. No....
>
> Q. Did he, at some point, say something had happened that was work related?
>
> A. Yeah. When he went up to the office, that's when he said it had happened on a building over at Whitley's, or putting insulation up....
>
> Q. What did you say? Something about insulation?
>
> A. Fiberglass insulation he was putting up for a few days. He said that hammering it up and looking up was hurting his arm or hurting his shoulder, or something....
>
> Q. Did you ever try to talk him out of filing a claim?
>
> A. Yes.
>
> Q. Why?
>
> A. I told him, "If it's not work related," - because he told me at the beginning it wasn't work related - "you can't file, because it's not work related."

Michael Morgan, the son of Woody Morgan, testified that he was a sunroom installer for the respondent-employer. Michael Morgan testified for the respondents:

> Q. Were you working with [the claimant] on March 15th of 2006?
>
> A. Yes....
>
> Q. Do you recall anything about an injury that day?

> A. I really don't; I don't recall it. It could have happened; I don't really recall.
>
> Q. Did he ever tell you he was injured that date?
>
> A. I'm going to say, "No." It's possible I just don't remember.
>
> Q. Tell me what you do remember.
>
> A. I remember we were working, and it's possible he fell at some point during the day. But it wasn't anything that was so big that it would stick out in my mind, you know, that he extremely complained about....

The administrative law judge found that the claimant proved he sustained a compensable specific-incident injury on March 15, 2006. The administrative law judge found that the claimant was entitled to reasonably necessary medical treatment and temporary total disability compensation. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) defines "compensable injury":

> (i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

The statute does not require, as a prerequisite to compensability, that the claimant identify the precise time and numerical date upon which an accidental injury occurred. Instead, the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001).

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16)(A)(i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that he sustained a compensable specific incident injury on March 15, 2006." The Full Commission reverses this finding. The Full Commission finds that the claimant

did not prove he sustained an accidental injury caused by a specific incident identifiable by time and place of occurrence.

The claimant testified that he sustained an accidental injury on March 15, 2006. The claimant testified that he slipped and fell on wet grass. The record before the Commission does not corroborate the claimant's testimony. The first treatment of record occurred from physical therapist on March 21, 2006. The therapist noted that the claimant's symptoms developed "while at work doing sun room installation and looking upward with his neck bent backward." There was no report of a specific incident, that is to say, a slip and fall on March 15, 2006. Dr. Koehn on March 23, 2006 did not report that there had been a specific incident, i.e., a slip and fall. Instead, Dr. Koehn reported that the claimant's symptoms began "after just awakening from dozing on the couch....He works building sunrooms and works a lot with his neck bent back looking upward." Dr. Lefler on March 27, 2006 noted that the claimant "was at home working and notes he was looking up and developed significant pain and stiffness in his neck now with radiation down his shoulder."

On March 30, 2006, the physical therapist reported that the claimant's symptoms "started at work within the past few days while doing sunroom installation for Hanke Bros." The physical therapist still did not report a history of a specific incident occurring on March 15, 2006, that is, the purported slip and fall testified to by the claimant. The Full Commission is aware of Dr. Lefler's April 11, 2006 note, to wit: "Previously I had thought injury had occurred at home, but really is the result of work. He had been taking down a sun room and loading it on a truck. About 30 minutes after work the patient developed neck pain with radicular symptoms going into the right shoulder and arm." Hurting at the end of a long work day does not constitute a specific incident. *Edens, supra; Howard v. Wal-Mart*, Workers' Compensation Commission E814194 (Nov. 3, 1999). Pursuant to Ark. Code Ann. §11-9-102(4)(A)(i), there must be a specific incident identifiable by time and place of occurrence. *See, Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

Neither Dr. Lefler's April 11, 2006 report, nor the other medical reports and therapist's notes preceding April 11, 2006, identified a specific incident, that is, the

alleged slip and fall occurring on March 15, 2006. The Full Commission further notes the Workman's Compensation Accident Report filled out by the claimant on April 11, 2006: "After working 3-12 to 13 hr shifts at work on the third shift I was feeling sore after being home for ½ hour my back really started hurting around my shoulder blade & neck stiff." The claimant still did not report that he had slipped and fallen on March 15, 2006.

The physical therapist reported on May 1, 2006 that the claimant's symptoms had begun "while at work lifting roof panels." There still was no report of a slip and fall accident. Dr. Pace reported on May 4, 2006 that the claimant "experienced neck and right upper extremity pain thirty minutes after moving a sun room." Dr. Pace did not report that there had been a slip and fall. Finally, after the claimant was laid off and after undergoing surgery, the claimant filled out a Form AR-C, Claim For Compensation, on August 16, 2006. The claimant described the alleged injury: "Neck injury after slipping & falling while carrying building material." The Full Commission finds that the claimant's description of injury on the Form AR-C was not corroborated by the preponderance of evidence of record.

Nor was the claimant's testimony corroborated by the two other witnesses, Woody Morgan and Michael Morgan.

Based on our *de novo* review of the entire record, and pursuant to Ark. Code Ann. §11-9-102(4)(A)(i), the Full Commission finds that the claimant did not prove he sustained an accidental injury caused by a specific incident or identifiable by time and place of occurrence on March 15, 2006. The claimant did not prove by a preponderance of the evidence that the surgery performed by Dr. Pace or the abnormalities shown on MRI were the result of an accidental injury caused by a specific incident or identifiable by time and place of occurrence on March 15, 2006. The Full Commission therefore reverses the administrative law judge's finding that the claimant sustained "a compensable specific incident injury" on March 15, 2006. This claim is denied and dismissed.

IT IS SO ORDERED.

____
OLAN W. REEVES, Chairman

____
KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion which reverses a prior decision from the Administrative Law Judge awarding benefits to the claimant. The Majority finds that the claimant is not entitled to benefits based on the finding that the claimant's medical reports are allegedly not consistent with slipping and falling while carrying building materials. The Majority further finds that the claimant was not credible because the testimony of Woody and Michael Morgan did not corroborate the claimant's testimony that he sustained a work-related injury which he reported.

However, after reviewing the record, I find that the Majority has erred in denying benefits. Specifically, I find that the Majority has erred in finding that the claimant is not credible. In my opinion, the medical records are consistent with the testimony of the claimant and are consistent with an injury which was sustained due to slipping and falling while carrying solar panels. While there are minor inconsistencies in the medical records, it is apparent

that the claimant was actually very consistent in regard to his report that his injury occurred while he was at work doing installation for a sun room.

Though the Majority would suggest that simply because the initial medical reports do not explicitly indicate that he was injured when he slipped and fell while carrying a solar panel, it is evident that the claimant reported a work related injury when he was seeking medical attention. In fact, in a note dated March 30, 2006, it is clearly stated that when the claimant initially presented for treatment on the 21st, he reported an onset of pain while working on a sunroom installation. Furthermore, it is evident that the claimant was consistent in reporting that the injury occurred when he was in the process of lifting materials while at work. This is entirely consistent with the claimant’s testimony that he was injured while carrying materials and slipping and falling. Additionally, when considering the claimant’s testimony that he was not asked exactly how the injury occurred until he received treatment with Dr. Lefler, it becomes even more obvious that the reason for the minor inconsistencies is simply

because the medical personnel was not asking the claimant questions in order to clarify the reasons for his symptoms.

It is well established that in workers' compensation cases, a claimant need not give a detailed report of his injury to his physicians in order to show that his claim is compensable. Just as the Act does not require an immediate diagnosis, it also does not require that the claimant insist that the doctor's history contain the gory details of the occurrence. Siders v. Southern Mattress Co., 240 Ark. 267, 398 S.W.2d 901 (1966).

In this instance, it is evident that the claimant consistently reported that his injury was work-related and that it occurred while he was lifting solar panels and fell. This is entirely consistent with the medical reports which indicate that he was at work. In my opinion, the Majority has chosen to use an overcritical approach and determined that simply because there is any, even inconsequential inconsistency between the claimant's testimony regarding his injury and the medical records immediately after the accident. This is

unfortunate because the Commission rarely sees a case where there are no inconsistencies.

I further reject the finding that the claimant has failed to meet his burden of proof because Dr. Kohn noted the claimant had an onset of symptoms after "dozing on his couch". The claimant's injuries are simply not consistent with having been caused by sleeping on the couch. Rather, the claimant's testimony that on the day of the injury, when he went home, he dozed on the couch and then when he awoke he felt a dramatic increase in pain, is entirely consistent with the medical report from Dr. Kohn. In fact, while the Majority attempts to assert that somehow the claimant injured himself while dozing on the couch, the remainder of the evidence does not logically support such a conclusion. Additionally, the Majority's assertion that the claimant injured himself while dozing on the couch simply because of Dr. Kohn's notation simply underscores this Majority's unwillingness to consider the evidence as a whole rather than to take a highly critical and illogical approach in reviewing the

medical records in conjunction with the testimony of the claimant.

It is also important to note that, as noted by the Administrative Law Judge, there was no direct contradictory testimony to the claimant’s contention that he slipped and fell, and then reported his injury. Additionally, both witnesses from the respondent, in my opinion, came across as unbelievable. I make this finding because the two witnesses largely seemed unable to recall any particulars of the case unless it happened to be damaging to the claimant. This is simply too convenient. Additionally, both of the witnesses that appeared for the respondent both specifically testified that their memories from around the time of the incident was poor. In my opinion, this indicates that either the claimant had the best recollection of events or that the other two witnesses are simply not telling the truth. In contrast, the claimant was clear in his testimony and gave precise testimony regarding how and where he was injured, how he reported that injury, and what occurred throughout the course of his medical treatment. As such, I find that the Majority erred in finding that the

testimony of the Morgans was entitled to more weight than that of the claimant.

In sum, I found the claimant's testimony regarding his injury to be plausible given the nature of his work. The claimant clearly and consistently indicated that he injured his neck and shoulder while lifting solar panels and slipping on wet grass. The medical records also reveal that the claimant reported sustaining an injury when he was lifting solar panels. Though if one looks for inconsistencies with the claimant's testimony and the medical records, I can scarcely think of a case where there are no inconsistencies in the record. In an instant such as this, where the medical records repeatedly indicate the claimant purported to have a work injury, and where the claimant's testimony is precise and clear as to how and when the injury occurred, I simply do not think minor inconsistencies should be used as a basis to deny a claim.

Accordingly, I must respectfully dissent.

____

PHILIP A. HOOD, Commissioner