

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510086 & F510084

RODNEY COHNS, EMPLOYEE	CLAIMANT
DILLARD'S STORE SERVICES, EMPLOYER	RESPONDENT NO. 1
FIDELITY & GUARANTY INS. COMPANY, INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JANUARY 5, 2009

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

Claimant represented by the HONORABLE TERRENCE C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL R. MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 1 appeal an opinion and order of the Administrative Law Judge filed July 15, 2008. 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 February 21, 2005, the relationship of employee-employer-carrier existed among the claimant and respondents #1, when the claimant earned an average weekly wage of \$450.00, which generated compensation benefit rates of \$300.00/\$225.00, for temporary total/permanent partial disability.

3. On February 21, 2005, the claimant sustained an injury to his cervical spine arising out of and in the course of his employment, which rendered him temporarily totally disable for the period June 30, 2005, through September 6, 2005.

4. Respondents #1 shall pay all reasonable and medical expenses in connection with and growing out of claimant's February 21, 2005, cervical spine injury.

5. Medical treatment rendered to the claimant under the care of Dr. Jack Somers and Dr. J. Zachary Mason, was reasonably necessary in connection with the claimant's February 21, 2005, cervical spine injury.

6. Respondents #1 have controverted the compensability of the claimant's February 21, 2005, cervical spine injury 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. 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 15, 2008 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable cervical injury on February 21, 2005. In my opinion, the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer in the shipping and receiving department. On February 21, 2005, the claimant was working on a conveyor and fell. He was thrown into a wall and immediately reported the incident to Mr. Mike Mason, the respondent employers Shipping Manager. Mr. Mason completed an injury report. On February 22, 2005, the claimant sought treatment from Dr. Scott Carle. The claimant complained of a shoulder injury but makes no mention of a neck injury. Dr. Carle noted that the claimant's "neck moves in all planes without limitation. No involuntary muscle spasm is noted. Reflexes are symmetric at the biceps, triceps and brachiorandialis muscle groups." Dr. Carle assessed the claimant with a right shoulder strain and physical therapy. The claimant was put on light duty. On March 7, 2005, Dr. Carle released the claimant from his care and to full

duty. The medical records from the claimant's treatment from Dr. Carle contain no mention of neck pain.

The claimant testified at the hearing that he told Dr. Warren, another physician in Dr. Carle's clinic, that he was still hurting in his neck. However, the medical records do not indicate that Dr. Warren treated the claimant.

The claimant contended that after his release to full duty he still suffered from neck pain. However, the claimant sought treatment from his primary care physician, Dr. A. Jack Somers, on March 9, 2005, March 21, 2005 and April 14, 2005 and the medical records from those visits do not mention neck pain. The claimant complained of chest pain, chronic back pain triggered by physical activity and groin pain.

On June 2, 2005, the claimant complained to Dr. Somers of upper and lower back pain. Dr. Somers ordered an MRI of the claimant's cervical and lumbar spines. Based on the results, Dr. Somers referred the claimant to Dr. Zachary Mason.

The claimant sought treatment from Dr. Mason on June 14, 2005. Dr. Mason noted: "This is a 50 year old male, who states for years without cause he has had neck pain which has gotten progressive, radiating into the bilateral shoulders and traveling out into the arms

and fingers. He also has some low back pain...." Dr. Mason ultimately diagnosed cervical spondylosis and performed an anterior cervical discectomy at C5 and C6 on July 5, 2005. The claimant returned to work on September 6, 2005.

Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2005) defines "compensable injury" as "[a]n 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." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Objective medical evidence, while necessary to establish the existence and extent of an injury, is not essential to establish a causal relationship between the injury and the work related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). Except in the most obvious cases where causation

is established through common sense observation and deduction, the existence of a causal relationship may require the assistance of expert medical evidence. Cotton v. Ball & Prier, Full Commission Opinion, September 23, 1997 (Claim No. E512437); Jeter v. B & R McGinty Mechanical Co., Full Commission Opinion, March 6, 1997 (Claim No. E208256), Affirmed by the Court of Appeals, See, Jeter v. B & R McGinty Mechanical Co., 62 Ark. App. 53, 968 S.W.2d 645 (1995); and Jackson v. Bosley Construction, Inc., Full Commission Opinion, March 6, 1997 (Claim No. E009401). "To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident but not in every case." Van Wagner, supra.

In my opinion, a review of the evidence demonstrates that the claimant has failed to meet his burden of proof. The medical evidence demonstrates that the claimant had a long standing history of neck pain prior to the February 21, 2005, incident. This coupled with the claimant's inconsistent testimony is sufficient to reverse a finding of compensability.

The claimant gave inconsistent testimony that was contradicted by the evidence. In my opinion, the claimant's credibility is suspect at best. For

instance, at the hearing, the claimant could not even recall which shoulder he injured on February 21, 2005. He said he thought it was his left shoulder but the medical records indicate it was his right shoulder.

Furthermore, the claimant testified that "several times" he told Dr. Carle his neck was hurting. However, not one single report from Dr. Carle mentions neck pain. In fact, the first three visits with Dr. Somers fail to mention neck pain as well. This is contrary to the claimant's assertion he reported neck pain to Dr. Somers. Moreover, when confronted with Dr. Mason's records indicating he had neck pain for years, disputed the accuracy of Dr. Mason's records.

I find the claimant is not a credible witness and that the medical records fail to show the claimant's cervical problems were related to his fall on February 21, 2005. Simply put, I cannot find that the claimant proved by a preponderance of evidence that there is a causal connection between his February 21, 2005, incident and his cervical problems. Accordingly, I must dissent from the majority's finding that the claimant sustained a compensable neck injury on February 21, 2005.