

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F808835

KENNETH NOCKS,  
EMPLOYEE

CLAIMANT

OZARK TIMBER TREATING, INC.,  
EMPLOYER

RESPONDENT

CINCINNATI INDEMNITY COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 15, 2009

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,  
Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE WILLIAM C.  
FRYE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed April 29, 2009. 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 over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he sustained a compensable cervical injury.

4. Because of the above finding, the balance of the issues presented are moot and will not be addressed.

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.

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

Therefore we affirm and adopt the April 29, 2009 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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A. WATSON BELL, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion in this claim. I would award the claimant medical and indemnity benefits for his compensable neck and shoulder injury.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the

injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant testified that he was injured on August 27, 2008 when he was lifting 2x7 boards and felt a sharp stabbing pain in his shoulder which caused him to drop to one knee. There is no evidence to the contrary, and the claimant consistently described this incident in his testimony at deposition and hearing, and in his history to Dr. Crabtree on September 5, 2008. I note that there is an error in the index of the medical records in evidence, and that the claimant saw Dr. Crabtree on September 5, 2008 and not on September 30, 2008. While the claimant is a remarkably poor historian, evidenced by his inability to remember the name of his high school, the fact is that the claimant consistently described the incident. The claimant identified several employees of the respondent who could have easily testified as to the circumstances of the injury. However, the respondents did not call them as witnesses. I find that the claimant demonstrated by a preponderance of the evidence that there was a specific

incident on August 27, 2008 while he was performing employment services, in the form of stacking boards.

The existence of objective findings supporting the medical evidence establishing the injury is also crucial to a successful claim. An MRI performed on September 4, 2008, showed that the claimant had cervical spondylosis of C5-6 and C6-7 with disk narrowing and shallow posterior disk protrusion with osteophytes at both of these levels. There was also asymmetric left-sided foramen narrowing at C5-6, caused by a suspected superimposed left lateral disk herniation in this area. There was mild foramen narrowing by osteophytes on the right at C5-6 and on both sides at C6-7. Minimal degenerative changes were noted elsewhere with no significant encroachment. Foraminal narrowing is an objective finding, supportive of the claimant's reported neck injury and of the diagnosis of a C5-6 herniation, as noted in the September 5, 2008 doctor's report to the respondent employer. Dr. Crabtree, a neurologist, also saw the claimant on September 5, 2008 and felt that his symptoms were "likely secondary" to disc herniation. He planned a CT myelogram to further investigate.

The claimant must demonstrate, by a preponderance of the evidence, that there is a causal

connection between the incident on August 27, 2008 when he was stacking boards and his need for treatment. An important factor in favor of a causal connection is the fact that the medical records do not reflect that the claimant had ever complained about shoulder pain or pain in the back of his neck until August 27, 2008. His complaints related to his neck were all on the front of his body and related to his stomach problems. Furthermore, the claimant consistently reported to Dr. Crabtree and at deposition and the hearing that he had a sudden onset of neck and shoulder pain while stacking lumber at work when he felt his shoulder pop while turning.

The claimant's main primary complaints were of pain on the right side of his neck and in his right shoulder. The claimant's right-sided complaints coincide with his right-sided foraminal narrowing by osteophyte on the right at C5-6 and bilaterally at C6-7 as shown in the claimant's September 4, 2008 MRI. Likewise, they coincide with the disk narrowing and shallow posterior disk protrusion with osteophytes at C5-6 and C6-7. The presence of an asymmetric left-sided foramen narrowing at C5-6 and a possible superimposed left lateral disk herniation in this area do not void a

causal relationship between the event and his need for treatment. The claimant was asymptomatic before the incident, became symptomatic primarily on the right at time of the incident, and there are objective findings of damage in his neck, discovered close in time to the incident. I find that the record supports a causal connection between the claimant's work-place injury and his need for treatment.

The majority's evaluation of the claimant's credibility was his undoing. As noted, the claimant was a remarkably poor historian, and his inconsistencies seem to be colored by his attempts at self-diagnosis as well as, and more significantly, his very complicated emotional and mental health.

A history of alcoholism, in remission since 2004, does not equal lack of credibility in 2008 and 2009. It may in fact explain certain of the inconsistencies in the claimant's testimony about his history.

The claimant did relate that he had been sober for nine years while the medical records indicate that the claimant got his alcoholism under control in early 2004, five years ago. The records show no indication that the claimant suffered a relapse since early 2004,

despite many difficult times. The records mentioning his alcoholism all give qualify that diagnosis as "in remission." Certainly, nine years is not equal to five years, and therefore the claimant's assertion was not accurate. However, the error is immaterial. The exact date of his attaining sobriety is of no importance to the claim. The fact that he has remained sober for an extended period is supportive, in a broad sense, but the specifics of nine or five years makes no difference to the conclusions to be drawn here. Given the claimant's 2005 diagnoses of post-traumatic stress syndrome, major depression and alcohol dependence in remission, with limited medical care, and his history of abuse, poverty, homelessness and significant marital problems, the claimant's error pales in importance.

The claimant sought treatment again in California on September 28, 2005, after an episode with his brother, a member of his abusive family, resulting in three days of involuntary shaking. There is no mention of seizures in the medical record. The claimant and the therapist discussed his request for SSI disability, and the therapist noted that the claimant stated "his primary concern is continued treatment not disability." At the hearing, the claimant but did not

recall seeking disability benefits at the hearing. At deposition, when asked if he had filed for "social security," he answered in the negative. The next question was whether he had filed for SSI, which he answered in the affirmative, a long time ago, for alcoholism, and with no success. This is indicative of an imperfect understanding of the terms involved and of his being a poor historian. However, it is not an insurmountable hurdle to compensability.

The claimant underwent a successful Department of Transportation exam on May 9, 2008 by Dr. Ken Collins, and received a two year commercial driver's license, as a prerequisite to his employment with Asplundh. His answers to the questions about his health status were made in terms of his current status and did not span his adult life. They were also made in terms of his understanding of his health.

The claimant testified about and the medical records of May 27, 2008, show a history of neck pain since approximately 2004 or 2005. The record is clear that this pain was located along the claimant's jaw line and the front of his neck, and that while the claimant suspected the cause was lymphoma based upon a relative's symptoms, the claimant had a history of a hiatal hernia

and acid reflux which would fully explain that type of pain.

At his September 5, 2008, visit with Dr. Crabtree, at deposition, and at the hearing, the claimant consistently reported that he felt a pop and pain in his shoulder while stacking lumber. I note that at the September 5, 2008 visit, his claim was accepted by the respondents. I also note that no one who was a witness to the events on August 27, 2008 was called as a witness to challenge the veracity of the claimant's version of the events. I concede that there are inconsistencies in the claimant's review of his history. First, however, these inconsistencies are not crucial to a determination in this claim. Second, the claimant's history is fraught with tragedy, emotional and mental upset and illness, and financial and personal instability, sufficient to explain historical inconsistencies. The claimant has consistently described the incident and the difficulties he experienced, the medical record supports those descriptions, and there is no evidence to the contrary.

Dr. Lee noted that on September 24, 2008, the claimant presented with pain and weakness, that his reflexes were equal when tested while the claimant was

distracted, and that he had a positive Waddell's sign. However, after the doctor's examination of the claimant, he diagnosed mild lower cervical spondylosis and possible left lateral disk herniation C5-6 with foramen narrowing, and planned a nerve conduction study to determine the extent of the claimant's nerve damage. Whatever magnification the claimant might have presented, the doctor still found that he had damage which needed to be addressed.

I also note that this is a claim in which the respondents have attempted to time the controversion in a way to prevent the obtaining of objective findings. By preventing the claimant from undergoing a CT myelogram, the claimant was prevented from proving the existence of the herniated disc and was limited to the results of the MRI scan. I do find that the MRI is sufficient for compensability purposes, but I also find that the denial of this claim was strategically made to avoid the CT myelogram.

After my de novo review of the entire record, I must dissent from the majority opinion. I find that the claimant's testimony as to the August injury and his need for treatment is credible and supportive of his claim. I find that the claimant satisfies all of the

elements of compensability for his August 2008 injury and that he is entitled to medical and indemnity benefits for that injury to his shoulder and neck.

For the foregoing reasons, I respectfully dissent.

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PHILIP A. HOOD, Commissioner