

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211498

CLARENCE E. BUCKLEY, EMPLOYEE	CLAIMANT
L A DARLING COMPANY, EMPLOYER	RESPONDENT
CONSTITUTION STATE SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 10, 2003

Hearing before Chief Administrative Law Judge David Greenbaum on July 25, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Mark Mayfield, Attorney-at-Law, Jonesboro, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 25, 2003, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this case on June 18, 2003, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed between the

parties at all relevant times, including July 23, 2001; that claimant's average weekly wage at the time of the alleged injury was \$420.47, which would entitle him to a compensation rate of \$280.00 per week for temporary total disability in the event his claim was found compensable; and that respondents had controverted the claim in its entirety.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be determined.

Claimant contended, in summary, he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on or about July 23, 2001; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning October 14, 2001, and continuing through December 28, 2001; and that a controverted attorney's fee should attach to any benefits awarded. Claimant reserved the issue of permanent disability, if applicable.

The respondents contended that the claimant did not sustain a compensable injury arising out of and during the course of his employment on July 23, 2001.

The claimant, Clarence E. Buckley, was the only lay witness to testify. The record is composed solely of the transcript of the July 25, 2003, hearing

containing numerous exhibits. I feel compelled to point out that respondents' Exhibit A, a medical packet consisting of forty (40) pages, included several highlighted exhibits, in violation of the Prehearing Order. Accordingly, in the event of an appeal, it will be necessary for respondents to substitute those pages before the record is prepared for appeal.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employment relationship existed between the parties at all relevant times, including July 23, 2001, at which time the claimant earned sufficient wages to entitle him to a compensation rate of \$280.00 per week for temporary total disability.
3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury which arose out of and during the course of his employment with L A Darling Company, as the result of a specific incident identifiable in time and place of occurrence on or about July 23,

2001.

4. The claimant has failed to prove, by a preponderance of the evidence, that his physical problems related to his low back, need for medical treatment, including surgery, and disability were directly and causally related to any injury sustained while working for the respondent.
5. Respondents have controverted this claim in its entirety.

DISCUSSION

_____The record in this case turns entirely upon the claimant's own testimony. A claimant's testimony is never considered uncontroverted. In fact, the testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

As will be set out further below, the claimant's own testimony is replete with inconsistencies and contradictions. The record reflects that the claimant sustained prior work-related injuries to his low back with a different employer which required low back surgery at the same level of the back as the within claim, and that claimant continued to experience significant physical problems, requiring medical treatment at all times before seeking treatment for the alleged injury herein. Further, the claimant sought medical treatment from several medical providers after July 23, 2001, without relating any history causally

connecting the problems to his employment at L A Darling Company. Rather, a preponderance of the credible evidence, reflects that the claimant's physical problems and need for treatment were the result of recurrences of the claimant's prior injuries which were settled by Joint Petition shortly before the claimant began working for the respondent.

HISTORY

The claimant, Clarence E. Buckley, age fifty-three (53), has a high school education. Before going to work for the respondent, the claimant worked for St. Bernard's Hospital in Jonesboro, Arkansas, from 1987 through 2000. The claimant sustained two (2) prior injuries while working for St. Bernard's, the first during 1996, and a second injury in 1999. Following the '96 injury, the claimant received conservative treatment only and returned to work. The record reflects that the claimant sustained a second low back injury at St. Bernard's following a slip and fall in 1999. The claimant underwent low back surgery on November 23, 1999. The claimant returned to work for the hospital following the surgery. He maintained that the surgery greatly improved the pain in his right leg while acknowledging that he continued to experience low back pain which the claimant attributed to scar tissue from the surgery. Although the claimant denied experiencing any additional problems involving his right leg following the 1999 surgery, his assertion is totally inconsistent with the medical evidence of record. The claimant left St. Bernard's employment in

2000 as a part of a negotiated separation agreement. The claimant began working for the respondents in January, 2001. The claimant's job involved spray painting in a portable paint booth or module which could be moved manually. The claimant testified that his injury occurred on July 23, 2001. He stated that he and a couple of co-workers were pushing the booth and that he "just felt a pull in my leg". The claimant reported to his supervisor, David Specky, that he must have pulled a muscle in his leg because his leg was giving him some problem, but continued working. (Tr.17-20)

The claimant stated that he was first examined and treated the following day by Dr. Johnson in Leachville, Arkansas, where he was prescribed pain pills and muscle relaxers, allegedly for leg pain. The claimant related that he paid for the treatment himself. There is no medical evidence of record from Dr. Johnson. The claimant continued working through August 14, 2001, at which time he requested that the employer provide medical treatment for his leg pain. The claimant was sent to the Paragould Medical Center where he was examined and treated by Cecil Massey, a practical nurse. The claimant was diagnosed as having a leg muscle cramp, prescribed fluids and medications for dehydration and released to return on an as needed basis. The claimant did not return. (Tr.22-23, 40)(Resp. Ex. A, pp.18-19)

The claimant was next examined and evaluated at the V.A. hospital. Following various diagnostic studies, including a CT scan which indicated a

herniated disc at the same level of the claimant's previous surgery, the claimant underwent another back surgery on November 15, 2001. The claimant maintained that the November 15, 2001, surgery relieved his leg pain. The claimant apparently returned to work for the respondent on December 28, 2001. He was performing his regular job on the date of the hearing. (Tr.25-28)

On cross-examination, respondents illustrated numerous inconsistencies and contradictions in the claimant's claim for workers' compensation benefits. As previously pointed out, the claimant settled his prior workers' compensation claim against St. Bernard's Hospital during the later part of 2000. Although the claimant, on direct-examination, maintained that his leg pain went away following his first surgery during November, 1999, and never recurred before the alleged July 23, 2001, injury, the record as a whole, including the medical evidence, reflects that the claimant continued to experience symptoms with both his low back, as well as right leg, and, in fact, returned to the V.A. hospital at various times with complaints of leg pain. Based upon my observations, the claimant was not a credible witness. On cross-examination, his testimony concerning his prior complaints vacillated. When questioned concerning inconsistencies in testimony given in a discovery deposition, the claimant appeared to have lapses in memory. In his discovery deposition, the claimant denied going to the V.A. hospital with related complaints when the

medical evidence clearly indicates the contrary. In addition, in his discovery deposition, the claimant was unsure of the date of the alleged injury other than recalling it was during cool weather which does not exist in Arkansas during July. Further, it must be noted that the claimant already had a long-standing appointment at the V.A. hospital on July 24, 2001, just one day after his alleged injury. The V.A. records reflect a three (3) year history of back pain without any recent trauma. (Tr.30-37)

In fact, none of the medical records contain a history of any work-related back injury. In addition, when questioned concerning why no work-related accident form was ever filled out, the claimant indicated that he was not aware that he was required to fill out a report of injury. However, the claimant acknowledged that his prior workers' compensation claims were denied because he had failed to report the injury. Because of the claimant's prior experiences, I found his testimony to be extremely suspect. (Tr.41-43)

ADJUDICATION

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §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 medical findings, as defined in A. C. A. §11-9-102(16), 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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. *Mikel vs. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in his favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that

evidence regarding whether or not claimant has met his burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); Wade vs. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler vs. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

As reflected above, the claimant sustained at least two (2) prior back injuries while working for a different employer. The record reflects that the claimant continued to experience back pain, as well as right leg pain which continued following a November 23, 1999, surgery. After the claimant settled his prior workers' compensation claim in the later part of 2000, he continued to obtain treatment at the V.A. hospital. Said treatment included both treatment for the low back, as well as the right leg. The V.A. records reflect that the claimant had already scheduled an appointment for July 24, 2001, which indicates that his problems pre-dated an alleged incident on July 23, 2001. Even if the alleged specific incident occurred on July 23, 2001, which is not conceded herein, the claimant described the incident as a "pull in my leg" for which he later sought treatment from the company doctor, one-time only on August 14, 2001, at which time he was treated and released to return as needed which the claimant failed to do. Rather, the claimant continued to receive treatment at the V.A. hospital which is where the claimant went after he settled his prior workers' compensation claim. To attribute the claimant's continuing

need for medical treatment, including a second back surgery to an alleged incident on July 23, 2001, would require sheer speculation and conjecture. Conjecture and speculation, how ever plausible, cannot be permitted to supply the place of proof. *Dena Const. Co. vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge