

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F206815

**ROBERT DALE DAVIS, JR.,
EMPLOYEE**

CLAIMANT

**WABASH ALLOY, LLC,
EMPLOYER**

RESPONDENT

**PACIFIC EMPLOYERS INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 15, 2003

Hearing conducted May 20, 2003, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Zan Davis, Attorney at Law, Little Rock, Arkansas, appearing for the claimant;

Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over compensability of the claimant's neck condition and benefits for temporary total disability, medical expense, and permanent impairment.

The claimant contended that on or about January 22, 2002, he suffered a compensable injury and should be awarded benefits, including temporary total disability benefits from January 22, 2002, through October 8, 2002; reasonably necessary medical and related expenses; and permanent disability benefits based upon an impairment rating of 9% to the body as a whole. An attorney's fee for controversion was also requested. Other possible issues, including wage loss disability, were reserved.

The respondents contended that the claimant did not sustain a compensable injury arising out of and in the course of his employment; that he did not sustain an injury at work; and, alternatively, if the claim is compensable, he has received benefits under his group health insurance and short term

disability policies for which respondents request an offset or credit pursuant to Ark. Code Ann. §11-9-411. They also pointed out that the claim form was filed June 25, 2002, alleging an injury in January, 2002. They further contended that his salary was continued for a period ending September 5, 2002.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including December, 2001, and January, 2002, and the claim has been controverted in its entirety.
3. The preponderance of the evidence fails to show that the claimant suffered a compensable injury arising out of and in the course of this employment.

DISCUSSION

The claimant, 44 years of age at the time of the hearing, was employed as an industrial maintenance mechanic in January, 2002, when he developed neck problems that required fusion surgery, performed January 31, 2002. On June 25, 2002, he completed a claim form attributing his condition to his employment, and he now requests the benefits stated above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

At the hearing, the claimant's testimony was that he had undergone two possible incidents of injury, one in December, 2001, and a second, more serious one on or about January 22, 2002. He stated that in December 21, 2001, while helping rebuild a rotor assembly from a crusher unit, he felt a pop right behind his head and a stinging sensation into his index finger and thumb, but it went away. He said he thought he had hit his arm on something at the time. He also testified that the symptoms came back from time to time but he thought he had strained a muscle or something and would get over it. This incident was not serious enough to cause him either to seek medical attention, to stop work or miss any time from work, or to report it to the employer.

He further testified that on January 22, 2001, he suffered a similar but more severe injury at work while helping David Williams and Gary Mashburn position a 300 to 350 pound piece of plate steel in a dryer unit. He further explained that he was using a pry bar across his right shoulder when he felt a pop and sting in his neck like where a spring is pulled. He said that he felt a shocking stinging sensation for a moment from about the bottom of his neck down to his elbow but then it seemed to go away, but not totally. He further stated that he mentioned this to his co-workers and,

later that day when he punched out, he walked by his supervisor's office, stuck his head in the door, and told him he thought he had pulled a muscle in his arm, and if it was not better in the morning was probably going to go ahead and get it looked at. He testified that later that night he began to have much more severe pain and the next morning he went to see his family physician, Dr. Martindale.

He testified that he told Dr. Martindale he was assisting two people at work positioning a piece of plate steel and using a pry bar when he felt a stinging sensation. After seeing Dr. Martindale, he went directly to physical therapy, which initially helped. Eventually, he was seen by Dr. Scott Schlesinger who performed surgery for a herniated nucleus pulposus at C5-6.

The incident described by the claimant as occurring in December, 2001, has not been shown to be a compensable injury, within the meaning of the Act. First, there is nothing in the way of contemporaneous medical reports to establish the existence of a compensable injury, based upon objective findings, as required by the Act. Secondly, the claimant's behavior after the injury is consistent with, at most, a minor problem which did not require medical attention or cause the claimant difficulty with his activity at work or elsewhere, and is not consistent with the occurrence of a herniated nucleus pulposus in his neck that would require surgery.

As to the alleged on-the-job injury of January 22, 2002, the claimant's assertion of an injury at work is inconsistent with other matters of record. For example, the medical record when the claimant first saw the doctor does not indicate that the claimant had an incident of injury lifting with a pry bar on January 22, 2002, but states that three weeks ago he pulled a muscle, was not hurting all that much and seemed to be getting better, and yesterday had a crick in his neck and today the pain has gotten intolerable. The rehabilitation services outpatient questionnaire, completed at that

time, indicates that it was “unknown” if the problem was caused by an injury or accident and does not mention the pry bar incident. Similarly, the claimant requested short term disability benefits and did not indicate on the form that he was entitled to workers’ compensation. In addition, his medical expenses were turned in on his group insurance rather than considered work-related. At most, the medical record makes reference to the incident in December, 2001, which has not been shown to have amounted to a compensable injury within the meaning of the Act.

In a letter dated September 17, 2002, the claimant’s family physician, Dr. Martindale, wrote that he clearly remembered the claimant saying he hurt his neck holding a heavy object up at work. However, the claimant testified on cross examination that he did not get a chance to spend much time with Dr. Martindale, but told him he had been lifting a heavy object at work and his neck had got worse over the night. On the other hand, Dr. Martindale’s report written January 22, 2002, indicates that the claimant pulled a muscle about three weeks ago and yesterday had a crick in his neck. This record is not consistent with the occurrence of an injury on January 22, 2002. In addition, the testimony of the other witnesses was not consistent with the claimant’s.

Jimmy Hawthorn, the claimant’s former supervisor, gave testimony indicating that the claimant never said he might have hurt himself at work and never reported an injury either in December, 2001, or January, 2002. He testified that he had been the claimant’s supervisor for about three years and that the claimant did not report an injury to his neck or shoulder in December, 2001. He said that the only time the claimant mentioned his shoulder was one morning when he said he had a crick in his neck and would probably get it worked out. He further testified that the next day or two the claimant’s wife called and they had gone to the hospital. He said that the claimant did not say the crick was because of work. He further explained that the claimant had come in on a Monday

morning, bent over, and Mr. Hawthorn had asked what's the matter with your neck. He stated that the claimant said he might have slept wrong, he had a crick, he thought he could work it out today, but said nothing about hurting his neck on the job. He further testified that when he called in about going to the doctor he did not say he had hurt himself at work and his wife did not say anything about it either.

Wade Castleton testified that he had been Mr. Hawthorn's direct supervisor. His testimony also tended to show that the claimant did not report an incident of work related injury from December or January, and further, that the claimant mentioned that he might have hurt himself while working on a car over the weekend in January. He stated that he believed it was a Monday morning at the beginning of a daily meeting for the shift when the claimant came in, showing obvious pain, and he asked what happened. He stated that the claimant said he was helping someone work on their car over the weekend, he had a crick in his neck, and he thought he would work it out. Mr. Castleton stated that he asked if there was a chance it was work related and the claimant said no.

Mr. Castleton further testified that the normal procedure for an on-the-job injury is to report to the immediate supervisor who fills out a form if they suspect it may have happened at work. He also stated that when someone fills out a form for short term disability benefits and indicates it occurred on the job or that they are entitled to workers' compensation benefits, the form is disregarded and it becomes a workers' compensation claim.

Mr. Castleton also stated that the claimant said he might have hurt himself helping somebody move. He further stated that it's a pretty relaxed atmosphere, they all know each other, and if somebody gets hurt or misses for any reason, they know about it.

The observations of these witnesses and the medical records generated in January, 2002, tend to mention the “crick”, but fail to show that the claimant had an incident of injury at work on January 22, 2002, although he may have later come to that conclusion. As noted above, the incident in December, 2001, seems to have been minor and not the occurrence of a herniated disk in the claimant’s neck. Thus, the preponderance of the evidence fails to show that the claimant suffered an injury as alleged.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge