

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202296

RICKY HOOPER, EMPLOYEE

CLAIMANT

MAVERICK TUBE, EMPLOYER

RESPONDENT

**CROCKETT ADJUSTMENT,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED DECEMBER 17, 2003

Hearing before Chief Administrative Law Judge David Greenbaum on November 14, 2003, at Osceola, Mississippi County, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. John D. Davis, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 14, 2003, to determine whether the claimant was entitled to additional workers' compensation benefits. As reflected by the non-medical, documentary evidence, this claim has a lengthy procedural history which will be addressed further below.

A prehearing conference was conducted on September 24, 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 correctly 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; that the claimant sustained an admitted injury to his right lower extremity as the result of a specific incident identifiable in time and place of occurrence on January 18, 2001; that he earned sufficient wages to entitle him to compensation rates of \$301.00 per week for temporary total disability and \$226.00 per week for permanent partial disability; that respondents paid medical and related treatment to the right foot and ankle through January 26, 2001; and that respondents controverted all benefits after January 26, 2001.

By agreement of the parties, the issues presented for determination include:

- 1) Whether, in addition to the admitted injury, claimant sustained additional injuries as the result of the accident on January 18, 2001, specifically, an injury to the left upper extremity; and,
- 2) whether the Statute of Limitations is a bar to this claim.

Claimant contended, in summary, that, in addition to the admitted injury, he also sustained a compensable injury to his left wrist as the result of the incident on January 18, 2001; that he was entitled to payment of all past medical treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning January 19, 2001, through February 5, 2001, and, again beginning

October 5, 2001, and continuing until April, 2002, less credit for any unemployment benefits received; and that a controverted attorney's fee should attach to any benefits awarded. At the hearing, claimant requested that his entitlement to permanent impairment benefits and/or temporary total disability beyond the periods claimed be reserved.

The respondents contended that claimant could not prove that he sustained an injury to his left wrist which arose out of and during the course of his employment on January 18, 2001. As an affirmative defense, respondents maintained that any claim for additional benefits related to the admitted right foot injury or the controverted left wrist injury were barred by the Statute of Limitations.

In addition to the claimant, his girlfriend, Hershanna St. Arbor, was called as a corroborating witness. Tyrone Anthony Pope and Danny Dean Harris were called as witnesses by the respondents. The record is composed solely of the transcript of the November 14, 2003, hearing containing numerous exhibits, including a joint medical exhibit consisting of forty-four (44) pages, together with substantial non-medical exhibits to address the Statute of Limitations defense.

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 witnesses and to observe their

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 stipulations agreed to by the parties are hereby accepted as fact.
3. The within claim for benefits related to the claimant's controverted, left wrist injury is not barred by the Statute of Limitations.
4. The claimant has proven, by a preponderance of the evidence, that, in addition to the admitted injury to his right lower extremity, he also sustained an injury to his left wrist as the result of the same work-related incident on January 18, 2001, entitling him to appropriate workers' compensation benefits for the left wrist injury.
5. Respondents are responsible for payment of all past medical treatment related to the controverted left wrist injury, and respondents remain responsible for continued, reasonably necessary medical treatment, if warranted.
6. Respondents are entitled to a credit or offset for any medicals paid by other insurers pursuant to A.C.A. §11-9-411.
7. The claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to any temporary total disability, to date.

8. Respondents have controverted all benefits beyond those previously paid.

DISCUSSION

The record in this case is replete with inconsistencies and contradictions. Some of the inconsistencies may be attributed to the fact that so much time has passed since the admitted incident resulting in claimant's injuries occurred which affected the memories of the various witnesses. Some of the inconsistencies may be attributed to the claimant's educational limitations, including his limited ability to read and write, as well as his lack of understanding of any procedural requirements for obtaining workers' compensation benefits. Some of the inconsistencies must be attributed to the lack of communication between the claimant and management. Specifically, as will be set out further below, the record reflects that the claimant reported his physical problems to his immediate supervisor, Matt McCormick. Although, as reflected by the Prehearing Order, respondents identified Mr. McCormick as a witness, he was not called. Admittedly, Mr. McCormick was no longer employed by the respondents at the time of the within hearing, however, his attendance could have easily been compelled.

HISTORY

The claimant, Ricky John Hooper, testified in his own behalf. He is twenty-six (26) years old. On January 18, 2001, claimant was employed by

the respondent in its shipping department. It is undisputed that the claimant sustained an injury on said date when a forklift operator knocked him to the ground and ran over him while backing up a forklift. The claimant's description of the accident is set out below:

Q Okay. Now, will you tell the Judge what happened on January 18th of 2001?

A It was – the night that it happened it was raining real bad. I had just got done loading a truck, and I got off and I talked to James Williams, the forklift operator, and he told me to go down the hill and to get ready for the next truck. He said he was going to go after it. So I grabbed the pipe stakes and put them on my shoulder and started walking that way. The next thing I know, I got smacked in the back and I was on the ground, and then I seen the forklift roll over my head coming past me. I curled up and it run over my foot and my hand. My wrist was wrapped underneath me on the ground when I fell. Then he left, and then next thing I know, Tyrone Pope come running up and asked me if I was all right and asked me what happened. I said, "I guess I got run over, man." I said, "I don't know what happened." I said, "Next thing I know I was laying on the ground." He said, "It looks like you are pretty bad hurt." I said, "I'm hurting pretty bad." The next thing I know, the truck driver that was there run down to the shipping office and got a hold of Joe Velasquez, and he come running up there and called Matt McCormick on the radio to come down there and check me out. Matt picked me up, put me in the back of his truck and took me to the shipping office, cut my boot off. My foot was swelled up real bad, and they asked me if I wanted an ambulance or did I want them to take me. A fellow that was working there named Jason gave me a ride. He was getting off work, so he gave me a ride to the hospital and they done a drug test on me, x-rayed my foot and my back. I told them my wrist was hurting and everything, but he told me that it didn't look like it was –

MR. DAVIS: I'm going to object to anything he repeats someone told him. (Tr.11-12)

* * * * *

Q Okay. So the forklift went completely over your body?

A Yes, it ran completely over me.

Q And you said you were carrying some kind of tubing or something?

A I was carrying pipe stakes. It was two that we used to put on the back of the trucks to keep the – when we loaded the trucks to keep the pipe from falling off to the other side. (Tr.13)

* * * * *

Q When you fell, what position were you in?

A I was laying on the side cramped up like this, and my foot – the tire run over my foot. When I first – it hit me in the back. The weight in the back of it hit me. I realized what was going on and I curled up, because I didn't know where the tire was at or anything. I thought it was going to run over my head, so I curled up and it run over my foot and I was pinned underneath me like this, my hand was.

MR. McNEELY: For the record, let me show he's curling his left arm up to his hip and he's pointing toward his right ankle. (Tr.14)

The claimant was initially examined and treated at the emergency room of the Baptist Memorial Hospital in Blytheville, Arkansas. The claimant's primary complaints and treatment involved his right lower extremity and back. X-rays taken at the emergency room were negative. The claimant was released on crutches, prescribed medications, Anaprox, and Percocet and advised to elevate the foot and apply ice, and to follow-up with the "workmen's compensation doctor." (Jt. Ex. A, pp.1-7)

The claimant was next examined and treated by the company doctor, Dr. John Williams, on January 19, 2001. Dr. Williams noted that the emergency room x-rays of the right lower extremity were negative. He further noted that the claimant had a known seizure disorder and was taking Dilantin, in addition to the meds prescribed at the emergency room. Because the claimant also complained of pain in his neck and thoracic back areas, Dr. Williams took x-rays which were normal. He advised the claimant to stay on the medications prescribed from the emergency room and released the claimant to light-duty work, and to return to his office the following week. Dr. Williams last evaluated the claimant on January 26, 2001, at which time the claimant was released to return on an "as needed basis." Dr. Williams' diagnosis and treatment related solely to the right lower extremity. (Jt. Ex. A, pp.8-11)

The claimant maintained that, in addition to complaints involving his right leg and back, he also made complaints of left wrist pain which is not documented in the initial medical evidence. The claimant further asserted that he reported the problems involving his left wrist to his immediate supervisor, Matt McCormick. The claimant also stated that he attempted to return to Dr. Williams to receive treatment for his left wrist, as well as his foot, while maintaining that Dr. Williams could not immediately schedule him. The claimant related that because of pain and swelling in his left hand, he went to the emergency room at the Hayti Hospital in Hayti, Missouri, with complaints

involving his left wrist, and that the hospital x-rayed the wrong hand. The record reflects that the claimant is limited in his ability to read and write. The record further reflects that indeed an x-ray of the claimant's right hand was taken on February 28, 2001, which was normal. (Tr.16-17)(Jt. Ex. A, p.12)

The claimant stated that he next went to his family physician, Dr. Timothy McPherson, for treatment of his left wrist. Dr. McPherson subsequently referred the claimant to Dr. Edmond C. Landry, an orthopedic surgeon in Kennett, Missouri. Unfortunately, no medical records were received from Dr. McPherson. The parties explained that medical reports were requested from Dr. McPherson; however, Dr. McPherson sent the medical records of the claimant's father rather than the claimant. The medical reports from Dr. Edmond Landry do confirm referral from Dr. McPherson with a history of a left wrist injury six (6) months previously, which the claimant related by history, to his employment. Admittedly, some of the history contained in Dr. Landry's July 18, 2001, report, which was the first time he examined the claimant, contains several inconsistencies concerning the prior medical histories. Dr. Landry diagnosed tendonitis involving the left wrist, and recommended conservative treatment including physical therapy. (Jt. Ex. A, pp.13-14)

Dr. Landry remained the claimant's primary treating physician. He ultimately determined that the basis of the claimant's left wrist problem involved a ganglion cyst that was impinging under the extensor compartment

of the left wrist. He treated the claimant with an injection on September 19, 2001, while permitting the claimant to continue working. (Jt. Ex. A, p.33)

The claimant last saw Dr. Landry on December 3, 2001, at which time he was released to return on an "as needed" basis. Dr. Landry related the claimant's ganglion cyst to the January 18, 2001, injury. A portion of his final report is set out below:

MEDICAL DECISION MAKING: The patient has a dorsal ganglion cyst as a result of his injury. I expect that there is a better than 50% chance of recurrent problems due to swelling of the cyst within the next nine to ten months. Beyond that, I would expect that he probably would be without chance of much in the way of difficulty. As time goes on, he is less likely to have difficulty from it. I have explained the natural history of the cyst type of structure to him, that it can come and go, but that if it should swell up, he would have recurrent problems and need another injection. There is also a small chance of the need of surgery to excise the cyst. He will see me for follow-up on an as-needed basis. (Jt. Ex. A, p.38)

It was stipulated that respondents last paid medical treatment on January 26, 2001, at which time the claimant was released by the company doctor, Dr. Williams. All of the claimant's subsequent medical treatment, including the treatment by Dr. Landry, was paid by respondents' health insurance provider. Accordingly, respondents are entitled to a credit or offset for said benefits pursuant to A.C.A. §11-9-411. The record further reflects that the claimant continued working for the employer herein, driving a forklift through October 5, 2001, earning more money than he was making at the time of his admitted

accident. The record reflects that the claimant was laid-off on October 5, 2001, for reasons unrelated to his injury, and that thereafter, he applied for, and drew, unemployment compensation through on or about April, 2002, at which time he went to work on a farm driving a truck. The claimant was not working at the time of the within hearing, primarily because of medical problems unrelated to his left wrist. (Tr.21, 35-37)

Hershanna St. Arbor was called a corroborating witness by the claimant. Ms. Arbor is the claimant's girlfriend. She testified that the claimant complained about difficulties involving his left hand following the January 18, 2001, incident while denying the claimant experiencing any problems prior to that date.

Tyrone Anthony Pope was called as a witness for the respondents. His testimony was of little probative value. Other than confirming observing the claimant laying on the ground following the accident, he could not recall any of the claimant's specific complaints.

Danny Dean Harris, respondents loss control manager was called as a witness. He stated that the claimant filled out a Commission Form AR-N in his office on January 25, 2001, which only reflected an injury to the right foot. He maintained that the claimant never mentioned anything about problems involving his left wrist to him. Mr. Harris also stated that he brought the claimant's attendance records to the hearing and that the records reflected that

the claimant only missed one day of work following the admitted injury, specifically, January 19, 2001, and that the claimant continued working until his termination in October, 2001.

STATUTE OF LIMITATIONS

The time for filing a claim for benefits is set out in Ark. Code Ann. §11-9-702 which provides, in part:

(a) Time for Filing.

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

(B) For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in §11-9-102(4).

* * * * *

(b) Time for Filing Additional Compensation. (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater.

(2) The time limitations of this subsection shall not apply to claims for the replacement of medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies, but replacement of such items shall not constitute payment of compensation so as to toll the

running of the Statute of Limitations.

(c) A claim for additional compensation must specifically state that it is a claim for additional compensation. Documents which do not specifically request additional benefits shall not be considered a claim for additional compensation.

(d) If, within six (6) months after the filing of a claim for additional compensation, no *bona fide* request for a hearing has been made with respect to the claim, the claim may, upon motion and after hearing, if necessary, be dismissed without prejudice to the refiling of the claim within the limitation period specified in subsection (b) of this section.

(e) **Failure to File.** Failure to file a claim within the period prescribed in subsection (a) or (b) of this section shall not be a bar to the right unless objection to the failure is made at the first hearing on the claim in which all parties in interest have been given a reasonable notice and opportunity to be heard.

The claimant filed a Commission Form AR-C on or about March 8, 2002, claiming benefits for an injury to his left upper extremity related to the January 18, 2001, accident which is clearly within the time required by A.C.A. §11-9-702, set out above. As previously noted, this claim has an unusual and lengthy procedural history. The claim was originally filed by claimant's former attorney, Wendell L. Hoskins, II, an attorney in Caruthersville, Missouri. Respondents, by and through its claims representative, Ogden Berry, on multiple occasions, requested that the claim be dismissed for want of prosecution. Ultimately, an Order of Dismissal without prejudice was filed by this administrative law judge on February 13, 2003, for failure to request a hearing within six (6) months after the filing of the claim pursuant to A.C.A. §11-9-702(a)(4). However, in

hindsight, the Order of Dismissal should never have been entered because the record reflects that just ten (10) days earlier, an Order was entered allowing claimant's former attorney, Wendell Hoskins, to withdraw as attorney of record, following a Motion for Leave to Withdraw as Attorney. The record reflects that the claimant, *pro se*, timely requested a hearing on February 25, 2002. In fact, a Prehearing Questionnaire was sent to the parties before the filing of the Order of Dismissal without prejudice. Again, the claimant failed to file timely responses to the Prehearing Questionnaire, which resulted in the claim being returned to the general files, prompting subsequent requests for dismissal of the claim, to which the claimant objected, ultimately, resulting in a hearing on the merits. Both parties introduced non-medical exhibits to address the Statute of Limitations defense. (Cl. Ex. A, pp.1-16)(Resp. Ex. A, pp.1-5)

I find that the statute of limitations was tolled by the filing of the claim on March 8, 2002. In the event respondents argue that the Order of Dismissal filed March 10, 2003, extinguished this claim under a theory that the "savings statute", Ark. Code Ann. §16-56-126, does not apply in workers' compensation claims, the facts in this case do not support such an argument. First, as previously noted, the Order of Dismissal was filed in error, contemporaneous in time to the Order permitting claimant's attorney to withdraw as attorney of record, and without giving the claimant sufficient notice. Further, the claimant, *pro se*, promptly requested a hearing, and

procedurally, this claim proceeded to a hearing, indicating that the Order of Dismissal without prejudice had been set aside. Finally, it can be argued that the Order was defective on its face because no hearing was conducted on respondents' request that the claim be dismissed. Accordingly, for the foregoing reasons, I find that the Statute of Limitations is not a bar to this claim.

COMPENSABILITY

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).

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, *Wal-Mart Stores, Inc. vs. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas Courts have recognized that a causal relationship may be established between an employment related incident and a subsequent, physical injury based upon evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall vs. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Co. vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974).

The record reflects that the claimant made multiple complaints of physical problems following the January 18, 2001, admitted injury, including, but not limited to, complaints of left wrist pain. It is understandable that the claimant's primary complaints and initial medical treatment was directed at the most compelling injury which was his right lower extremity. The claimant and his corroborating witness both testified that the claimant experienced difficulties with his left wrist following the work-related incident. The claimant maintained that he returned to work wearing a wrist brace on his left wrist and that he complained about problems with his left wrist to his immediate supervisor, Matt McCormick. Although respondents identified Mr. McCormick

as a witness, he was never called. Where no explanation is offered for the absence of a company employee as witnesses, who are in a position to contradict the claimant's testimony, if it was not true, the Commission, as triers of fact, can properly draw the inference that their testimony would have been unfavorable to the company. *Brower Mfg. Co. vs. Willis, et al*, 252 Ark. 755, 480 S.W.2d 950 (1972).

Further, the record reflects that the claimant went to the emergency room with complaints of pain and swelling in his left hand on February 28, 2001, approximately five (5) weeks following the admitted incident, and claimant maintained that they x-rayed the wrong extremity which appears to be consistent with the record as a whole, including the medical evidence, which ultimately confirmed and diagnosed claimant's problem as a ganglion cyst in the left wrist.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven that his left wrist problems are directly and causally related to the January 18, 2001, admitted injury.

TEMPORARY TOTAL DISABILITY

Although the claimant contended that he was entitled to temporary total disability for the period beginning initially January 19, 2001, and continuing through February 5, 2001, and, again, beginning October 5, 2001, when his

employment with the employer herein was terminated, and continuing until April, 2002, when he returned to work for another employer, less credit for any unemployment received, the record simply does not support a claim for temporary total disability.

As previously noted, Danny Harris, the employer's loss control manager, testified that the claimant's attendance records reflected that the claimant only missed one day of work after his admitted injury through the date of his termination on October 5, 2001. Further, although the medical evidence reflects that the claimant last saw Dr. Landry on December 3, 2001, it appears that the claimant's healing period ended prior to said date. In view of the claimant's course of conduct and work history through October 5, 2001, followed by his application for, and receipt of, unemployment compensation, indicating that he was at all times, ready, willing and able to work, I find that the claimant was never disabled within the meaning of the Arkansas Workers' Compensation Laws, entitling him to temporary total disability benefits. The claimant has the burden of proving both that he is within his healing period and unemployed in order to be entitled to temporary total disability. The record reflects that the last treatment the claimant received was on September 19, 2001, when Dr. Landry injected his left wrist. Accordingly, I find that claimant's initial healing period ended on or before said date. The claimant's entitlement to future benefits, if any, has been reserved. Due to a lack of

medical evidence, the claimant cannot prove entitlement to accrued temporary total disability. Entitlement to future benefits, if any, depends upon the claimant's subsequent course of medical treatment.

AWARD

Respondent, by and through its third-party administrator, Crockett Adjustment, is hereby directed and ordered to reimburse the appropriate insurance carrier for all past medical and related treatment. Respondents remain responsible for continued, reasonably necessary medical treatment, if any.

Additionally, claimant's attorney, Mr. Steven R. McNeely, is hereby awarded the maximum statutory attorney's fee pursuant to, and limited by, Ark. Code Ann. §11-9-715; *Coleman vs. Holiday Inn*, 31 Ark. App. 224, 792 S.W.2d 345 (1990); and *Chamness vs. Superior Industries and Sedgwick James of Arkansas, Inc.*, Arkansas Workers' Compensation Claim #E019760, (March 5, 1992).

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge