

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F304729**

<b>PHILLIP TOWNSEND, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>A M X CORPORATION, EMPLOYER</b>	<b>RESPONDENT</b>
<b>FEDERATED MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 30, 2003**

Hearing before Chief Administrative Law Judge David Greenbaum on September 19, 2003, in Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted September 19, 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 August 13, 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 introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant

times, including July 15, 2001; that claimant earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability; and that the claim had been controverted 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 addressed.

Claimant contended, in summary, that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on July 15, 2001; that respondents should be held responsible for all medical and related expenses, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for various dates that he was required to miss work as a result of his alleged injury; and that a controverted attorney's fee should attach to any benefits awarded. Claimant reserved the issue of permanent disability, if applicable. At the prehearing conference, the claimant was asked to identify the specific periods of time in which he was claiming temporary total disability. At the hearing, claimant contended that he was entitled to approximately one (1) month of temporary total disability following July 15, 2001, together with medical bills incurred for treatment at the VA hospital.

The respondents contended that the claimant did not sustain an injury

within the course and scope of his employment on July 15, 2001; that they were not aware of any work incident of any nature or kind at that time; that there was no medical evidence supported by objective findings to support compensability and controverted the claim in its entirety. Alternatively, respondents maintained that it did not receive notice of any purported injury until May, 2003, and that it would have no liability prior to the reporting of the claim. Specifically, respondents maintained that the claim was filed after the claimant was terminated for cause by the employer in May, 2003.

The record in this case is composed solely of the transcript of the September 19, 2003, hearing containing numerous exhibits.

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 claimant has failed to prove, by a preponderance of the credible evidence, that he sustained an injury arising out of and during the course

of his employment with A M X Corporation on July 15, 2001.

4. The claimant has failed to prove, by a preponderance of the evidence, that his need for medical treatment was caused by a work-related incident on July 15, 2001.
5. In the event the claimant could prove that he sustained a compensable injury on July 15, 2001, which is inconsistent with the foregoing findings and conclusions, nevertheless, the claimant has failed to prove that he missed sufficient time from work to entitle him to temporary total disability. Further, save a one-time visit to the VA hospital on July 19, 2001, the claimant has failed to prove, by a preponderance of the credible evidence, that his subsequent course of medical treatment was related to a July 15, 2001, incident.
6. Respondents have controverted this claim in its entirety.

#### DISCUSSION

\_\_\_\_\_ Respondent, A M X Corporation, is a small business, owned and operated by Dean McDonald. The business installs farm field irrigation systems. Mr. McDonald runs the business and also works in the field. The corporation which has been in business for approximately twenty (20) years has always carried workers' compensation insurance. Mr. McDonald pointed out that he usually employs two (2) to three (3) workers. At the time of the within hearing, he had two (2) employees. He stated that, at the time of the claimant's alleged injury,

he probably had three (3) employees, specifically, the claimant, Phillip Townsend, Brian Trammel and Avery Lewis, although he was unsure when Mr. Lewis started. Mr. McDonald was called as a hostile witness by the claimant. He confirmed that the claimant missed a few days of work beginning in the middle of July, 2001, because of back problems for which the claimant received treatment at the VA hospital. Mr. McDonald pointed out that the claimant did not miss any extended time from work. He did confirm that the claimant's general back condition declined between July, 2001, and May, 2003, when he terminated the claimant's employment. Mr. McDonald repeatedly testified that the claimant never related to him that his back problems were in any way causally related to his employment. He stated that he first became aware that the claimant was relating his back condition to an alleged garage door incident in July, 2001, after the claimant's employment was terminated in May, 2003. The record reflects that both the claimant and Avery Lewis were terminated for cause, specifically, for failing and/or refusing to perform work assigned by Mr. McDonald.

The claimant, Phillip Lewis Townsend, testified in his own behalf. He began working for respondent in 1997 or '98, installing irrigation systems. He described the work as hard labor. The claimant denied having any back problems prior to going to work for the respondent, which is inconsistent with the record as a whole. Specifically, as will be set out further below, the VA

records reflect that the claimant has had low back problems since being involved in a motor vehicle accident at age eighteen (18). In addition, there is evidence that the claimant sustained a back injury for a different employer in 1993. The claimant maintained that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence on Sunday, July 15, 2001. The claimant related his physical problems to closing a garage door after using a lawn mower, allegedly to cut the grass of the employer's premises on July 15, 2001. The claimant also used the lawn mower to cut his own yard which was near the employer's premises. It is apparent that the claimant was not performing his usual and customary work at the time of the alleged injury. A portion of the claimant's testimony is set out below:

Q How long have you worked for Dean McDonald at AMX, do you know?

A Approximately five years, sir.

Q What was the condition of your back in 1997, 1998, whenever you started with him?

A I had no problem. I had pulled muscles and stuff like that before, pulled muscles in my legs and my arms, but I never had no problem with my back, sir.

Q Okay. Now, was that hard labor, the irrigation work?

A Yes, sir. Everything is heavy.

Q Were you able to do that work?

A Yes, sir, I was when I first started.

Q And were you working 40 hours and overtime a week sometimes?

A Yes, sir, I was.

Q Did you do anything else on your own – I say on your own, did you do any work around the shop for Mr. McDonald?

A Yes, sir.

Q Did you have access to the garage?

A Yes, sir, I did. I had a key. I lived right across the field and he left me with a key. What he said about I'd go over there and use his stuff and his tire machine stuff is absolutely true, but I'd always call Dean and ask him at home before I went over there, because he'd get mad if he come in and you were there and you didn't have permission.

Q Do you recall whether or not you worked in July of 2001? Did you do any work?

A Sir, I have dates and years – my memory is – I don't remember the exact dates. I know I was working for him. I'm positive I was working for him, but the dates and the days and stuff like that, I've never been able to remember stuff like that.

Q Did you have occasion to go to the VA Hospital with a complaint about lifting or pulling the garage door?

A Yes, sir, I did.

Q And what happened to you when you reported that complaint?

A I'm not understanding – you mean at the VA or –

Q Yeah, I mean, did you –

A Can I just say what – Brian had run into the door with the boom truck. The door is still messed up, the track is bent. It took two of us to get it open, but you can pull the door down usually. Well, this day it come off the roller, and like Dean said, we had been working but we were behind on the yard work, and Dean would let me go over there – because at the time I was buying a trailer and I was hurting for money. He let me go over there when I wanted and mow the grass and he would pay me.

Q Okay.

A And I pulled the door down, it came off the roller, and I was about like this (demonstrating), and the door just stopped, and I hear a pop in my back. I went home, I laid down.

Q Let me first ask you, was this after you cut the yard that you were pulling the door down?

A I'm not sure. I believe we never even got the whole thing done. I think we had one side left to do, but we had done the front and the other side, if I'm not mistaken.

Q Okay, but you certainly were cutting part of the yard that day?

A Yes, sir. Yes, sir, and I did use it on my yard also. Yes, sir, I did.

Q Now, but cutting the yard didn't hurt you at all, did it?

A No, sir, none at all.

Q Okay. And you were – why were you closing the door or were you opening it, which one was it?

A I was closing it because we were just going to be done for the day. I laid down and went to sleep when I got – at first when it popped, I felt it, and I knew something was wrong, but when I laid –

Q Tell me exactly what you were doing when you felt the door

– your back pop.

A I was pulling the door down but it didn't hurt as bad until after I went home, laid down and took a nap, got up, I could not move. (Tr.57-59)

The claimant was initially examined and treated at the VA hospital on July 19, 2001, at which time he gave a history consistent with the foregoing. The record further reflects that the claimant filled out a VA hospital health insurance claim form, indicating that the condition was related to claimant's employment. The claimant was treated with medication and discharged to return as needed. In addition, the claimant was allowed to return to normal activities as tolerated. (Cl. Ex. A, pp.1-3)(Cl. Ex. B, p.1)

The employer's payroll records do confirm that the claimant missed several days of work. He was not totally disabled for approximately thirty (30) days following the injury as alleged. It must be pointed out that farm irrigation work is a seasonal occupation with increased hours during the Spring and Summer, however, the pay records did reflect that the claimant worked fewer hours after July, 2001. (Cl. Ex. C)

Nevertheless, the claimant did return to work in July, 2001. He did not seek any further medical treatment until November 7, 2001, when he returned to the VA hospital. The following history is contained in the VA records of said date:

37 y/o C/male who was awoken with cramp-like pains in his right

hamstring Thursday, 11/1/01, that he was able to walk off. They have become increasingly worse since. The pains extend into his popliteal fossa to his Achille's tendon and 4th/5th MT's. He has chronic, recurrent central LBP since MVA when 18 y/o which is OK now and hurts him more when inactive. Works installing farm field irrigation systems. (Cl. Ex. A, p.3)(emphasis supplied)

Again, despite the claimant's assertions to the contrary, the VA records are replete with references of longstanding, intermittent low back pain for a number of years which clearly pre-dated a July 15, 2001, incident. Although the medical record reflects that the claimant visited the VA hospital for various complaints, numerous references indicate that the claimant's low back problems pre-existed the incident reported to the VA concerning pulling down a garage door in mid-July, 2001. Admittedly, the claimant did report that his job activities installing irrigations systems was physically demanding, but this is not a claim for gradual onset injury. Even if the claimant had amended his claim to include a gradual onset injury, it would fail because the claimant has failed to show that the major cause of his physical complaints and need for treatment was a work-related injury. It should further be noted that the VA records also indicate that the claimant was physically active and spent a lot of time water skiing which is inconsistent with this claim. (Cl. Ex. A, pp.10, 14, 23)

Based upon my observations of the character and demeanor of the claimant, he did not appear to be credible. His testimony contained numerous

inconsistencies and contradictions. He appeared extremely cautious and hesitant in his responses. On cross-examination, he asserted that he simply forgot about an earlier workers' compensation claim. On further cross-examination, he admitted committing a fraud by giving police officers false information in order to avoid compounding a poor driving record, which the claimant attributed to his prior drinking, in order to avoid going to jail.

The claimant called Avery F. Lewis as a corroborating witness. Suffice it to say that Mr. Lewis' testimony was of little probative value. Mr. Lewis is a close friend of the claimant. In addition to having an extremely poor memory, he was hesitant and cautious. His testimony was self-contradictory. It appeared that he had been coached by the claimant to recall a specific incident to corroborate the claimant's testimony. I did not find Mr. Lewis to be a credible witness.

Admittedly, the July 19, 2001, history contained in the VA records corroborates that the claimant attributed his physical complaints at that time to pulling down a garage door five (5) days earlier and reporting the injury as a workers' compensation claim. However, there is no credible evidence that the injury arose out of and during the course of claimant's employment. To the contrary, the record reflects that the claimant had access to the employer's garage, and, in fact, used the employer's equipment to mow his own lawn on the date of the alleged injury. The claim turns almost entirely upon the

claimant's credibility, which I found extremely suspect.

Even if it was determined that the claimant sustained a minor injury on July 15, 2001, in the form of an aggravation of a pre-existing condition, which is not conceded herein, nevertheless, the record as a whole reflects that the claimant visited the VA hospital one-time only as the result of the incident and that he did not miss sufficient time from work to qualify for temporary total disability.

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).

The record in this case is replete with inconsistencies and contradictions. Further, the claimant's work history and course of conduct is totally inconsistent with this claim. The medical evidence reflects that the claimant had a long history of chronic low back complaints which pre-dated the July 15, 2001, incident. As previously pointed out, after the July 19, 2001, VA visit, the claimant resumed his normal activities without seeking any additional medical care of any nature or kind until returning to the VA on November 7, 2001, with increased complaints which were related to a recurrent, low back problem which pre-dated the alleged injury. To attribute the claimant's physical problems and need for medical treatment to a July 15, 2001, incident would, in my opinion, require sheer speculation and conjecture. Conjecture and speculation, however 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).

The burden of proof lies with the claimant. 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