

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201760 & F303150

TONY G. ADKINS, SR., EMPLOYEE	CLAIMANT
JONES HOME FURNISHINGS, EMPLOYER	RESPONDENT
TRAVELERS INDEMNITY, INSURANCE CARRIER/TPA	RESPONDENT #1
AIGCS, INSURANCE CARRIER/TPA	RESPONDENT #2

OPINION FILED JULY 20, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on June 4, 2004, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Kristofer E. Richardson, Attorney-at-Law, Jonesboro, Arkansas.

Respondent #1 represented by Mr. Phillip Cuffman, Attorney-at-Law, Little Rock, Arkansas.

Respondent #2 represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 4, 2004, to determine whether the claimant was entitled to additional workers' compensation benefits, and, if so, which respondent/carrier was responsible for the additional benefits claimed.

A prehearing conference was conducted in this matter on April 28, 2004, and a Prehearing Order was filed on April 29, 2004. 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 between the claimant and Jones Home Furnishings at all relevant times; that respondent/carrier #1 provided workers' compensation coverage on February 5, 2002; that the claimant sustained a compensable injury on said date, at which time his average weekly wage was \$270.00, entitling him to a compensation rate of \$180.00 per week for temporary total disability and \$154.00 per week for permanent partial disability; that respondent/carrier #1 paid various medical, temporary total disability, as well as a five percent (5%) whole body impairment; and that respondent #1 has controverted all benefits beyond those previously paid. It was further agreed that respondent/carrier #2 provided workers' compensation coverage for the employer beginning September 24, 2002, and continuing through September 24, 2003; and that it had controverted compensability of alleged incidents occurring during its coverage period, specifically, on January 16, 2003, and March 1, 2003.

By agreement of the parties, the primary issue presented for determination was whether the claimant's physical problems, need for treatment, and disability, if any, were the result of a recurrence of the February 5, 2002, admitted injury or an aggravation of claimant's pre-existing condition and/or new injuries occurring on January 16, 2003, and March 1, 2003.

Claimant's entitlement to associated benefits must be addressed if claimant can prove compensability of his claim(s).

The claimant contended, in summary, that he sustained a compensable injury on February 5, 2002, while working for Jones Home Furnishings; that he was involved in subsequent, work-related incidents occurring on January 16, 2003, and, again, on March 1, 2003, which the claimant maintained were the result of compensable aggravations of his pre-existing condition or, alternatively, a recurrence of the admitted injury and that one or both carriers were responsible for benefits. Claimant further contended that he was entitled to temporary total disability beginning March 1, 2003, and continuing through an undetermined date while maintaining that his healing period had not ended; that he was entitled to payment of outstanding medical expenses, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

Respondent #1 contended that the incidents of January 16, 2003, and March 1, 2003, were either aggravations of claimant's pre-existing condition or new injuries and that the responsibility for benefits belonged to carrier #2. Further, respondent #1 contended that the claimant could not prove entitlement to additional temporary total disability.

Respondent #2 contended that the claimant's need for medical treatment was the result of the prior admitted injury or to a condition unrelated to the

most recent alleged incidents and that respondent #1 should be liable for payment of any benefits associated with said recurrences. Respondent #2 maintained that the claimant did not sustain compensable injuries within the meaning of the Workers' Compensation Act on either January 16, 2003, or March 1, 2003.

The claimant, Tony G. Adkins, was the only lay witness to testify. The record is composed solely of the transcript of the June 4, 2004, hearing containing numerous exhibits, together with the telephone evidentiary deposition of Dr. Kenneth Tonymon, introduced as "Respondent #2's Exhibit 2" and retained in the Commission file in bound form.

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 these claims.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that he sustained compensable injuries arising out of and

during the course of his employment with Jones Home Furnishings as the result of specific incidents identifiable in time and place of occurrence on either January 16, 2003, or March 1, 2003.

4. The claimant has failed to prove, by a preponderance of the credible evidence, that his physical problems and need for treatment beginning January 16, 2003, are the result of a recurrence of the February 5, 2002, admitted injury.
5. The claimant has failed to prove, by a preponderance of the credible evidence, that his physical problems and need for treatment beginning January 16, 2003, are directly and causally related to a work-related injury with the employer herein.
6. Even if the claimant could prove that his subsequent physical problems were directly and causally related to a work-related injury, he has failed to prove, by a preponderance of the credible evidence, that he is entitled to additional temporary total disability benefits.
7. Both respondents have controverted claimant's entitlement to additional workers' compensation benefits.

#### DISCUSSION

\_\_\_\_\_The record in this case is simply replete with inconsistencies and contradictions. The claimant's claim for additional benefits turns almost entirely upon the claimant's credibility. I did not find the claimant to be a credible

witness. First, as will be reflected further below, the claimant's own testimony was self-contradicting. On cross-examination, his testimony concerning his physical problems and when he began experiencing various symptoms vacillated greatly when questioned by the respective respondent attorneys. Further, the only history contained in any of the medical providers' records and reports relates solely to the February 5, 2002, incident and admitted injury. There is no credible, corroborating evidence of any subsequent incidents or injuries despite the claimant's assertions of additional events. Further, the record reflects that the claimant has a criminal record which also makes his self-serving testimony suspect.

The claimant, Tony Gene Adkins, Sr., is forty-three (43) years old. His last employment was for respondent, Jones Home Furnishings. He worked for this employer approximately two (2) years. The claimant related three (3) separate work-related incidents while employed by the respondent, each identifiable by time and place of occurrence. Each of the three (3) alleged incidents and the claimant's course of treatment is set out below:

Q All right. You understand we're here today over a workers' compensation claim, and you've got several incidents that happened at work, and I'm going to have you walk through each one of those and tell us what happened. The first one I've got is February 5, 2002, is that right?

A Yes, sir.

Q What happened that day?

A Well, we was unloading the trucks and everything that day, and then a customer come in and was wanting some linoleum. So we was trying to load the linoleum up and I felt something, you know, pull in my back. So we got it loaded in the truck, and when we got out to the job, there was supposed to be some people there to help us unload it. Well, it wasn't no people there to help us unload it in time. So they told us to back up to the door and try to get it out in there the best we could. Well, at that time the linoleum rolled off and pinned me between the bumper of the truck. It come off on my shoulder and pinned me between the bumper of the truck and the concrete down there, and so that's whenever I hurt myself the first time, was over a roll of linoleum.

Q Did you turn that in as a workers' comp claim?

A Yes, sir.

Q What specific symptoms did you feel at the time of this injury?

A Well, it felt like whenever I first done it, you know, I mean, it felt like dominos, you know, my back popped, you know, and just down through there, but, you know, I had just a burning sensation, you know, in my back and everything like right there, and some leg numbness and stuff like that on the first one. That's about all it consisted of.

Q All right. Did you see a doctor?

A Yes, sir.

Q Who did you see?

A I went to a Dr. Frankum first with it, and then he sent me to Little Rock to Dr. Ron Williams.

Q What did Dr. Williams do for you?

A They ordered some steroid injections into the disk area there in my back.

Q At this point what was your understanding of what was wrong with your back?

A The way I understood it was just some bulging disks at the time.

Q Did you ever have surgery?

A Not at that time, no.

Q If you would walk forward to January 16, 2003, what happened on that day?

A Okay. We was, like I say, we was unloading trucks again that day. We had loaded up a king-size bedroom suite from the store, and we had to bring it from Newport to Jonesboro. We got to Jonesboro, and as we was unloading it out of the truck, Ken had just about dropped his end of it and put me in a bind. When it did, you know, I felt something just pop in my back and I went to my knees. Okay. Well, we finished unloading the truck and getting it set up in the house, and then I went back to Jones'. Well, then, as soon as I got back, he sent me back to Dr. Frankum, and then Dr. Frankum sent me to Jonesboro up here to Dr. Tonymon.

Q Okay. And just so we can compare, where the symptoms any different with the January 16, '03 injury than from the February 5, 2002 injury?

A Yes, sir, there was a lot of difference, because I was hurting in my neck and all through my back, my groins, my legs. I'm constantly in pain, constantly in pain. I mean, all the way from right back here in my head all the way down. I mean, my leg, my groins, my feet even, I ain't got any feelings in them.

Q And that's still the case today?

A Yes.

Q And what did Dr. Tonymon do for you?

A Well, at that time he was just running a bunch of tests on me, and the only thing I'm on right now is just pain pills and muscle relaxers, because he had not completed his complete tests that he had wanted to run at that time, because I didn't have the money and the insurance carrier was not, you know, responsive of paying the bills.

Q Okay. Now, after this initial January 16, 2003 injury, did you turn that in to workers' comp?

A The one in January?

Q Yes.

A Yes.

Q Did you receive any benefits from workers' comp?

A Not at that time, no. I didn't receive benefits until after the injury in March.

Q Did they pay for those doctor's visits?

A I don't know. There's been doctors – I've been getting bills and bills and bills. I don't know which doctor bills have been paid and which ain't. I'd just have to pull my, you know, look and see which ones has, which ones hasn't. I don't think there's non of them been paid.

Q Okay. Well, then, go ahead and tell us about the March 1, 2003 injury.

A Then March the 1<sup>st</sup> we had – it was sleeting and snowing that morning, and Mr. Jones, the store owner, come in there and told us that, you know, we wasn't going to make no deliveries that day. Then a lady come in and her refrigerator was out and she needed a refrigerator. So Bobby, the store manager, told us that we had to take her a refrigerator out there. We told him that Mr. Jones said we couldn't make no deliveries, and he said, "Well, if ya'll want to keep ya'll's jobs, you'll do what I tell you." So we didn't have no other choice but to do it. We got to the house, and there was no way to dolly the refrigerator from the road to the house because it was mud about that deep. So we had to carry the refrigerator from the road to the house, which was about 40 yards, and, you know, by the time I got back, I just couldn't go no more. I was in tears I was hurting so bad.

Q While you were carrying that, was there something specific that happened?

A Yeah, I mean I felt – my back was on fire just burning. I mean, you know, I felt up in my neck and my back, and like I said, I felt something just like something tore up in my – between my shoulder blades, and it just set on fire, just like somebody taken a hot poker and branded me.

Q Is that any different from January 16, 2003?

A It seemed to be. I'm in worse pain now than what I was on January 16<sup>th</sup>, yes.

Q And did you report that to your employer?

A Yes, sir, I sure did.

Q Did you go see a doctor?

A I went and seen my physician, Dr. Frankum, but Dr. Tonymon would not see me no more because I don't have no insurance. I don't have no money, and without that I can't see him, you know, because nobody's wanting to pay for it.

Q Did you receive it after March 1<sup>st</sup> – I think you mentioned this – did you receive any workers' compensation benefits after?

A I received one check from AIG, and then they stopped paying. (Tr.9-14)

The record reflects that the claimant has not returned to gainful employment since March 1, 2003. He denied experiencing any physical problems before February 5, 2002. He further denied having sustained any accidents subsequent to March 1, 2003. As reflected by the stipulations, respondent #1 accepted and paid various medical related to the February 5, 2002, admitted injury. The claimant was initially examined and evaluated by his family physician, Dr. Jerry Frankum, a general practitioner in Newport, Arkansas. Dr. Frankum initially referred the claimant to Dr. David J. Marzewski, a neurologist at the Neurology Hospital in Newport, Arkansas, for a consultation. Dr. Frankum subsequently referred the claimant to Dr. Ron Williams, a neurosurgeon with Arkansas Neurosurgery Clinic in Little Rock,

Arkansas. Dr. Williams referred the claimant to HealthSouth Rehabilitation Center of Jonesboro, Arkansas, for a functional capacity evaluation prior to releasing the claimant from his care on May 16, 2002. The claimant was at all times treated conservatively. He did receive two (2) epidural steroid injections without much benefit and was released to return to medium classification of work. However, as Dr. Williams' report of May 16, 2002, indicates, and the record confirms, the claimant had already returned to work, apparently doing his regular job of driving a delivery truck and moving furniture. (Jt. Ex. A, p.11)(Tr.19-20)

The record reflects that the claimant worked for the employer herein from May 16, 2002, when he was released by Dr. Williams until he was subsequently taken off work on March 7, 2003, by Dr. Kenneth Tonymon who diagnosed thoracic herniated discs at T9-10 and T10-11 which Dr. Tonymon opined had accounted for the claimant's symptoms which had been present for more than one year. As previously pointed out, the claimant has not returned to gainful employment since March, 2003. (Cl. Ex. 1)(Jt. Ex. A, p.18)

As reflected by the stipulations, respondent #1 accepted and paid a five percent (5%) whole body impairment assigned by Dr. Ronald N. Williams in his report dated June 12, 2002. The claimant received benefits associated with the impairment rating while still working for the employer herein which was paid out prior to the two (2) alleged incidents of January 16, 2003, and March

1, 2003. (Jt. Ex. A, p.12)

Again, the record is replete with inconsistencies and contradictions. Despite the claimant's assertion that he was involved in incidents on both January 16, 2003, and again on March 1, 2003, which were compensable aggravations of his pre-existing condition or, alternatively, a recurrence of the admitted injury, the medical evidence does not corroborate additional job-related incidents. First, it must be noted that although the claimant reported returning to Dr. Frankum and Dr. Williams following his release in May, 2002, no medical reports were introduced to corroborate additional medical treatment. In fact, the only report introduced from Dr. Frankum was a January 17, 2003, office note which did confirm continuing complaints of pain in the low back, as well as both legs and toes related to the injury the previous year and without history of any new injury. (Jt. Ex. A, p.13)

Dr. Frankum referred the claimant to Dr. Kenneth Tonymon, a neurosurgeon in Jonesboro, Arkansas, who first evaluated the claimant on January 24, 2003. The claimant's complaint at that time was lower back pain and bilateral lower extremity numbness associated with genital numbness, again, by history, related to the linoleum incident the prior year, although the date of the prior injury was incorrect. Dr. Toneymon's patient history further indicated that the claimant's pain was replaced some three (3) to six (6) months prior to his evaluation with numbness in both legs and in the groin which, again,

was inconsistent with the claimant's claim concerning the additional, alleged incidents. (Jt. Ex. A, p.14)

Further, the claimant's testimony was self-contradicting. On cross-examination by respondent #1, claimant contended that following the alleged January 16, 2003, incident, he began experiencing additional symptoms specifically pain in his entire spine, as well as numbness in both legs and feet which he stated was a new sensation, as well as migraine headaches following the March 1, 2003, alleged event. This testimony is in direct conflict with the medical evidence. Further, on cross-examination by respondent #2, claimant then changed his testimony and acknowledged that he experienced the same symptoms following the February 5, 2002, admitted incident. It must further be pointed out that when the claimant was initially seen by Dr. David Marzewski for a neurological consultation on February 11, 2002, the claimant complained of pain in his lower back and upper buttocks into his inguinal regions bilaterally and down into his scrotum. In addition, the claimant's past medical history reflected vertigo related to possible high blood pressure, as well as surgical excision of two cysts in the upper to mid-thoracic levels which may be of no consequence. However, clearly, the claimant's symptoms had manifested themselves more than one year prior to the subsequent, alleged events. At which time the claimant sought medical treatment. (Jt. Ex. A, pp.1-4)

Admittedly, the claimant did report a second work-related incident to his

employer; however, the employer did not fill out a report of injury until after the claimant was taken off work by Dr. Tonymon on March 7, 2003. The first report of injury did contain a history of the activity previously described by the claimant as having occurred on January 16, 2003, but reflects that the employer was first notified on February 28, 2003, and that he last worked on March 1, 2003, which was apparently the first time that the claimant requested additional medical treatment. (Resp. 2 Ex. 1)

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).

When the primary injury is shown to have arisen out of and in the course of employment, every nature consequence that flows from the injury is compensable, unless it is the result of an independent intervening cause. *Jeter vs. B. R. McGinty*, 62 Ark. App. 53, 968 S.W.2d 53 (1998). 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 long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on 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. Pitman Const. Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). However, if the disability does not manifest until months after the accident so that reasonable men may disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. *Civett vs. Redman Co.*, 234 Ark. 855, 355 S.W.2d 172 (1962). See, also, *Wentz vs. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

This claim turns primarily on the claimant's credibility. A claimant's testimony is never considered uncontroverted. 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 reflected above, the claimant's testimony is replete with inconsistencies and contradictions. Further, the claimant's course of conduct and work history is inconsistent with his claim. After returning to work on May 16, 2002, the claimant continued to perform his normal work activities without seeking additional medical treatment and apparently without voicing any additional complaints until on or about February 28, 2003, at which time he reported another job-related incident having occurred, allegedly on January 16, 2003, which, as previously pointed out, was not reported to the medical providers. Rather, the claimant reported symptoms which had existed for more than one year. The record reflects that shortly after claiming additional benefits, the claimant was incarcerated for a parole violation and spent six (6) months in jail during a time in which he claims to have been totally disabled. Even if the claimant sustained a recurrence of his prior injury or an aggravation of his pre-existing condition, which is not conceded herein, the claimant has not proven entitlement to temporary total disability. The claimant was able to work for approximately ten (10) months for a condition which has essentially existed since the February 5, 2002, admitted injury.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department vs. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson vs. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that she remains within her healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo vs. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

While it is herein concluded that the claimant has failed to prove, by a preponderance of the credible evidence, that he is entitled to additional workers' compensation benefits, in the event the claimant is entitled to additional benefits, again, which is not conceded herein, I find that the claimant's physical problems, need for treatment, and disability, if any, is the result of a recurrence of the February 5, 2002, admitted injury rather than a new injury or an aggravation of a pre-existing condition sustained on either January 16, 2003, or March 1, 2003, as alleged.

In the event claimant is entitled to disability benefits, I feel compelled to point out that a child support lien has been filed in this claim. Because of the claimant's incarceration, if benefits were ultimately found to be due, the provisions of Ark. Code Ann. §11-9-110 (Repl. 2002) and Ark. Code Ann. §11-9-812 (Repl. 2002) may apply.

After a thorough review of the entire record, and without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he is entitled to additional workers' compensation benefits. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge