

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203019

JERRY ADKINSON, EMPLOYEE	CLAIMANT
STAFFMARK, EMPLOYER	RESPONDENT
ATLANTIC MUTUAL INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILE AUGUST 2, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on July 9, 2004, at Jonesboro, Craighead County, Arkansas.

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

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

STATEMENT OF THE CASE

A hearing was conducted July 9, 2004, 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 claim on June 2, 2004, and a Prehearing Order was filed on said date. At the conference, it was stipulated that the employment relationship existed at all relevant times, including March 12, 2002; that the claimant's average weekly wage was \$300.00, entitling him to a compensation rate of \$200.00 per week for temporary total disability and \$154.00 per week for permanent partial disability in the event his claim was found compensable; and that respondents had

controverted the claim in its entirety.

The parties agreed that the primary issue to be presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

At the prehearing conference, the 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 March 12, 2002; that he was entitled to temporary total disability benefits for the time he was required to miss work; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. At the hearing, the claimant amended his contentions to request temporary total disability for the period beginning March 13, 2002, and continuing through May 22, 2002. In addition, at the hearing, the claimant, as an alternative contention, maintained that he sustained a gradual onset, spinal injury which arose out of and during the course of his employment, entitling him to the benefits claimed.

The respondents contended that the claimant did not sustain a compensable, cervical injury arising out of and during the course of his employment, and that the claimant could not satisfy the requirements necessary to establish compensability under the Workers' Compensation Act.

At the hearing, respondent acknowledged that it did not dispute the existence of a cervical injury, and, further, that if compensability was overcome, that the period of claimant's disability was not in dispute. Accordingly, the sole issue to be presented for determination is whether the claimant sustained a compensable injury. (Tr.4-6)

In addition to the claimant, his mother, Betty Thorne, was called as a corroborating witness. The record in this case is composed solely of the transcript of the July 9, 2004, hearing containing a copy of the Prehearing Order which was introduced as "Commission's Exhibit 1" and made a part of the record without objection, together with a joint medical index consisting of twenty (20) pages, introduced as "Joint Exhibit A," the claimant's report of injury, introduced as "Joint Exhibit B," and the claimant's recorded statement, introduced as "Joint Exhibit C."

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 Staffmark, as the result of a specific incident identifiable in time and place of occurrence on March 12, 2002.
4. The claimant has failed to prove, by a preponderance of the credible evidence, that he sustained a gradual onset, cervical injury arising out of and during the course of his employment with Staffmark. Specifically, the claimant has failed to prove that his cervical injury arose out of and during the course of employment, and, further, that the injury was the result of rapid and repetitive motion.
5. The claimant has failed to prove that his cervical injury is directly and causally related to an injury sustained while working for the respondents.
6. Respondents have controverted this claim in its entirety.

#### DISCUSSION

\_\_\_\_\_The facts in this case are basically undisputed. As reflected by the stipulations, aforementioned, respondents acknowledge that the claimant sustained a cervical injury which required surgery and a period of disability following the surgery. The only dispute is whether the claimant's cervical injury was work-related. At the time of claimant's injury, he was working at Post Cereal in Jonesboro, Arkansas, as a forklift driver in the shipping and receiving

department through Staffmark Employment Agencies. The claimant's primary work involved driving a forklift. The activity included making various stops throughout the plant at intersections, looking both ways while driving both forward and backwards. Despite the claimant's primary assertion that his injury occurred as the result of a specific incident identifiable and in time and place of occurrence at the workplace, there is no credible evidence whatsoever that a work-related injury occurred. Portions of the claimant's testimony are set out below:

Q Okay. Now, if you could, around March 12, 2002 when you started having some serious problems, –

A Uh-huh.

Q – if you could, describe what, if anything, that happened that day.

A Well, I was just doing my daily routine, and I had always, you know, it had bothered me a little, because you've got to get your body used to doing the job, you know. Nothing spectacular happened that day.

Q Did you complete your shift that day?

A Yes, I did.

Q Take it from there, how were you feeling at the time you got to work?

A Well, I was – you know, my neck, like I said, was stiff when I got off work from doing the rotating deal. I went home, sat down, went to bed, and woke up a couple of hours later and I couldn't move. My whole right side went numb.

Q All right. What did you do from there?

A Finally, that next morning I got myself up out of bed and went straight to

Staffmark and filled the paperwork out for the disability, I mean, workmen's comp, to get me to a doctor.

Q Do you remember who you filled that report out with?

A It was just one of the workers. (Tr.14-15)

Other illuminating testimony, on cross-examination, re-direct examination, and questions from this examiner, are further set out:

Q And you don't dispute the fact that on your deposition, page 14, you said that you were claiming that looking backwards over, you said that day your left shoulder, but today you think it was your right shoulder?

A Left or right.

Q Is what caused you to injure your neck, is that right?

A If that's what was said. But I dispute it in one sense, yes. Left or right because you had to look both ways.

Q And I asked you also on page 14 of your deposition if you felt like anything else besides looking backwards over your shoulder is what caused you to hurt your neck, and do you recall telling me, "No"?

A Yes, sir.

Q Now, you knew that if you thought you had injured yourself at work, you were supposed to report that immediately, is that correct?

A Yes, sir. Well, I didn't think I injured myself at work.

Q You did not? I did not understand what you said.

A That is why I went to Staffmark the next morning, because I figured it was work-related.

Q But on the night before, then, you didn't report any kind of injury?

A No, sir.

Q I think you testified that you just did your regular job of driving the forklift on the night in question?

A Yes, sir.

Q And that you were not involved in any kind of an accident that night, is that correct?

A No, sir.

Q And nothing out of the ordinary happened at work that night, did it?

A No.

MR. DAVIS: Pass the witness, Your Honor.

#### REDIRECT EXAMINATION

BY MR. RICHARDSON:

Q One thing I meant to ask you. These forklifts have like an independent rear suspension, or do they drive like a Cadillac, or how –

A No, they drive like a tank.

Q They are pretty bumpy and jerky?

A Yes.

Q Now, you are not saying, you know, any particular bump or jerk caused your problems, but the way that –

A It may have.

Q But the way those thing [sic] drive, they're bumpy and –

A Yes, there is no shocks or nothing. They even have the hard tires on them.

MR. RICHARDSON: Okay, that's all.

RECROSS EXAMINATION.

BY MR. DAVIS:

Q Just one question. Was this concrete that you were driving on?

A Yes, sir.

MR. DAVIS: Okay.

EXAMINATION BY THE COMMISSION

BY JUDGE GREENBAUM:

Q Well, I noted your attorney and you have amended your contentions here today to include an alternative contention with regard how your injury occurred. When you went to your employer on I guess March 13<sup>th</sup>, the day after you had these problems, is that right?

A Yes.

Q What did you report to your employer?

A That I could not move my neck.

Q Well, did they ask you what caused it?

A Yes, and I told them I figured it was from driving the forklift.

Q I mean, basically, you gave them what you felt caused it, which was driving the forklift, but you didn't report and even this morning you don't maintain that some incident occurred, some specific event occurred that caused your problems?

A Just looking to my right and left all night long.

Q Well, but you can't identify –

A Where I smashed into something or something?

Q Or you turned your neck and heard a pop and said, "Uh-oh, that one got

me.” There wasn’t any specific incident that you can recall that you did nay different that night than you did every other night, is that right?

A No, sir.

Q And you testified that you always had a stiff neck, is that right?

A Since I had been doing that job. (Tr.25-28)

Although the claimant’s mother was called as a corroborating witness, her testimony merely confirmed that the claimant had physical problems which required surgery and resulted in a period of disability. She was unable to establish the cause of the injury.

#### ADJUDICATION

The claimant contended that he sustained a compensable injury as the result of a specific incident identifiable in time and place of occurrence at the workplace on March 12, 2002. For the claimant to establish a compensable injury as the result of a specific incident, 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 his employment (see, A.C.A. §11-9-102(4)(A)(i); A.C.A. §11-9-102(4)(E)(i); see also, A.C.A. §11-9-401(a)(1) (Repl. 1996));

(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 findings, as defined in A.C.A. §11-9-102(16), establishing the injury (see, A.C.A. §11-9-102(4)(D) (Supp. 1999));

(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).

Rather than conduct a further analysis of the record in this cause, suffice it to say that the within claim fails because based upon the claimant's own testimony, the only incident which can arguably be identified occurred while the claimant was sleeping. The record reflects that the claimant routinely complained about a stiff neck which he felt might be work-related; however, after going to bed on March 13, 2002, he woke up experiencing sharp pain in his neck for the first time and numbness in his right side. Clearly, there was no work-related incident which caused this injury. (Tr.14-15) (See also, Jt. Ex. C, pp.8-9)

At the July 9, 2004, hearing, the claimant, for the first time, amended his contention to claim, in the alternative, that he sustained a gradual onset spine injury. The claimant's alternative claim must also be denied.

First, it must be pointed out that our Supreme Court has distinguished back injuries, spinal injuries, and cervical injuries and held that the neck is not a part of the back as defined by Ark. Code Ann. §11-9-102(4)(ii)(b). See,

*Hapney vs. Rheem Manufacturing Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

Accordingly, in order to satisfy the claimant's alternative contentions, he must prove that his injury arose out of and in the course of employment, and, in addition, was caused by rapid repetitive motion. Ark. Code Ann. §11-9-102(4)(A)(ii)(a).

The test for analyzing whether an injury is caused by rapid repetitive motion is two-pronged: (1) The tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone vs. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998).

In a workers' compensation case, the claimant has the burden of proving, by a preponderance of the evidence, that his claim is compensable, *ie.*, that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the employment. *Ringier American vs. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993); *Carman vs. Haworth, Inc.*, 74 Ark. App. 55, 455 S.W.3d 408 (2001). Further, the claimant must prove a causal connection between the work-related accident and the later disabling injury. *Bates vs. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (1992). The claimant must show a causal relationship exists between his condition and his employment. *Harris Cattle Co., vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974).

There is no presumption that a claim is indeed compensable. O.K.

*Processing, Inc., vs. Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c)(2) (Repl. 2002). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704; *Wade vs. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); and *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After a thorough review of the entire record, it is herein concluded that the claimant has failed to sustain his burden of proof and show that his injury arose out of and during the course of his employment. The record reflects that the claimant cannot show that his injury was the result of either a specific incident identifiable in time and place of occurrence or caused by rapid repetitive motion at the workplace. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge