

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306422

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| WILLIE F. JORDAN, EMPLOYEE | CLAIMANT |
| McNEILL TRUCKING, EMPLOYER | RESPONDENT |
| VIRGINIA SURETY COMPANY, INSURANCE CARRIER/TPA | RESPONDENT |

OPINION FILED JUNE 4, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on April 8, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Kenneth A. Harper, Attorney-at-Law, Monticello, Arkansas.

Respondents represented by Mr. Bill H. Walmsley, Attorney-at-Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 8, 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 November 5, 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 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, including February 28, 2002, and continuing through on or about March 24, 2003; that the claimant earned sufficient wages to entitle him to compensation rates of \$429.00 per week for temporary total disability and \$322.00 per week for permanent partial disability in the event his claim was found compensable; 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 determined.

Claimant contended, in summary, that he sustained a compensable back injury arising out of and during the course of his employment with McNeill Trucking Company as the result of a specific event identifiable in time and place of occurrence on February 28, 2002; that he continued working through March, 2003, at which time he required medical treatment related to the alleged February 28, 2002, event; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for the period beginning March 24, 2003, when he last worked, and continuing through an undetermined date, maintaining that his healing period had not yet ended; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant could not sustain his burden of proving a compensable injury on February 28, 2002; and that the claimant's physical problems and need for treatment beginning in March, 2003, were unrelated to a work injury.

In addition to the claimant, his wife, Angela, was called as a corroborating witness. The record in this case is composed solely of the transcript of April 8, 2004, hearing containing numerous exhibits, together with the claimant's discovery deposition which was introduced as "Respondent's Exhibit 3" 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 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 evidence, that he sustained a compensable injury arising out of and during the course of his employment with McNeill Trucking Company, Inc., on

February 28, 2002.

4. The claimant has failed to prove, by a preponderance of the evidence, that his physical problems, need for treatment, and disability were in any way directly and causally related to an injury sustained while working for the respondent.

DISCUSSION

_____The record in this case is replete with inconsistencies and contradictions. The claim turns entirely upon 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).

I did not find the claimant to be a credible witness. As will be reflected further below, the claimant's own testimony is self-contradicting. On cross-examination, respondent's attorney pointed out numerous inconsistencies between the claimant's discovery deposition and his testimony at the hearing. Further, the claimant's course of conduct, his work history following the alleged injury, together with the claimant's failure to request that his employer provide medical treatment, renders this claim extremely suspect. In fact, as reflected further below, the only medical treatment that the claimant ever requested that

the employer provide was after he became ill on or about March, 2003, when the claimant was examined and treated by Dr. Keith Cooper for either a bladder infection and/or kidney failure. The claimant did not return to any gainful employment following this medical condition; however, continued working for more than one year following the alleged, February 28, 2002, injury.

The claimant, Willie F. Jordan, is forty-four (44) years old. He has a high school education. Following high school, the claimant enrolled in a vo-tech course in auto mechanics which he attended for approximately two (2) years and did not complete. The claimant's primary occupation during his adult life has been as a long-distance truck driver. The claimant attended Amtech Truck Driving School in Crystal City, Missouri. He has been driving trucks since 1985. The claimant has worked for a number of trucking companies. He stated that he began driving for the respondent, McNeill Trucking Company, during May, 2000, and that he drove for this company two (2) full years. McNeill subsequently became PAM Trucking. Since the claimant continued to drive for the respondent until on or about March 24, 2003, it is unclear whether he began working for said employer in the year 2000 or 2001. The claimant's duties included driving a tractor-trailer rig cross country, as well as loading and unloading freight. The claimant maintained that his injury occurred on February 28, 2002, while unloading La-Z-Boy recliners and La-Z-Boy sofas. The claimant stated that he picked up a load of La-Z-Boys in Siloam Springs, Arkansas and

made various drops in and around Indianapolis, Indiana. The claimant asserted that he was unloading the furniture manually. His description of the injury is set out below:

Q All right. You get up to the Indianapolis area with a truckload of La-Z-Boys, tell the Judge what happened?

A Well, when I got there, I thought I was going to have some help taking them off. There was two guys standing on the dock, and I said, well, maybe they will help me. I stood there a while and I said, "Are ya'll going to help me?" and they said, "No, it's not our job. Your job is to get them to the dock." I said, "That's mighty heavy." I said, "I can't pick up them heavy chairs." I said, "They are too heavy." He said, "Well, that's your job." He said, "We not going to –" –

MR. WALMSELY: Objection to what the third party said.

THE CLAIMANT: We not going to –

MR. HARPER: Stop.

JUDGE GREENBAUM: Sustained.

BY MR. HARPER:

Q Willie, try not to say – it's fair to say that they didn't assist you, is that right?

A Well, I didn't have no assistance, and I had to haul them all the way from the front, you know, all the way from the truck to the dock. That's what I did.

Q Okay.

A That's what I did. I done it myself.

Q And then you went to the next place?

A Done it too, done it at the second stop. I unloaded them by myself.

Q Okay.

A And the third one I got help. That's when I was taking them off and I heard something pop, you know, and I felt bad. I said, "I done hurt something. I couldn't straighten back up."

Q Let me stop you. What were you doing? You said you heard something pop?

A Right.

Q Where?

A In my lower back.

Q Lower back. What were you doing when that occurred?

A I was pulling that – you know, I got to the front of the truck. I was unloading the very top. It was a couch they had sat on top of the chair, you know, on top of the chair. And I was pulling it off, and when it fell, it was too heavy for me, and that's when I hurt it.

Q Were these things in boxes?

A No.

Q They weren't?

A No.

Q Were you able – was there anybody there to tell?

A No, sir.

Q What type – you said it popped. Was there any sensations? Did you feel anything?

MR. HARPER: Do we need to take a break, Willie?

THE CLAIMANT: (The Claimant began weeping.) It's just – I'm used to working.

JUDGE GREENBAUM: Do you need to take a break, Mr. Jordan?

THE CLAIMANT: No sir. I'm going to be all right.

JUDGE GREENBAUM: Okay.

THE CLAIMANT: It's just, you know, it's just –

JUDGE GREENBAUM: Okay. We've established you felt a pop.

THE CLAIMANT: Yeah, I felt a pop in the back, so I got the chairs off and then I called in for the next load, and they give another load.

MR. HARPER: Let me stop you there, Willie.

BY MR. HARPER:

Q You said you popped. Did you feel anything? If so, describe it.

A Yes, my lower back just give away for a minute. For a minute or two it just gave away, give out on me. So I straightened up, you know, I got back up and I took the rest of the recliners off and they standing there looking at me. I got them back to the back some and I closed the doors. I was hurt. I closed the doors and I eased back into the truck and I sat there for a little while. And then I called in, and I saw it on the message that I had hurt myself, on the computer, that I had kind of hurt my lower back, you know, while I was unloading the truck.

Q And you say on the computer?

A Yes, they have a little computer in the truck, some kind of little computer. They have a little in-line computer, and I didn't get a response from that at all. They didn't say –

Q Do you talk into this thing?

A No, sir. You type it in, you type it in, but sometimes the satellite doesn't send the message and sometimes it don't receive messages.

Q Okay. So you're in Indianapolis and you've got an unloaded truck. What are you supposed to do next?

A All right. You wait on your next load. You call your empty load in and you let them know you're empty, then they'll send you to your next place. You drive on to your next place and reload again, then you take it on to wherever you got to take it to. (Tr.15-18)

The claimant stated that later on the day of his alleged injury, his left leg began going numb. He stated that he continued working while taking over-the-counter medications. The claimant related that he returned to his home base in Little Rock and reported his injury to Curt (last name unknown), the safety director, and requested medical treatment. The claimant asserted that despite requesting medical treatment on numerous occasions, each time he was dispatched to deliver another load as reflected below:

Q As the best you can recall, and, again, just say what you recall, what kind of conversations did you have with Curt?

A Well, okay. They had dispatched me on another load on that yard out there to leave out with that truck, but I was in the office trying to call Curt. I said, "Curt, my back is hurting me pretty bad." I said, "I think I need to go to the doctor." He said, "Well, I don't know." He said, "You think you can go on and make this other load and maybe you'll go the next time, maybe you'll get a chance to go." Every time I get to the yard and I tell them I want to go to the doctor, I always had to get back in the truck and go another 1,000 miles. They didn't care.

Q Let me ask you, when you talked to Curt that day, that first time, did he ever give you a definitive response about going to the doctor?

A No, sir, he never did. He never did. He never did. He acted like, "Well, you think you can make it?" "You can make this one," or "It's getting worse or something, you might have to go."

Q Now, in fact, you continued to work, did you not?

A Yes, sir, I drove it like that for a year with this hurting.

Q What type of – now, this is back after February of 2002, and I think everybody agrees you stopped working around March 24, so – does that sound about fair?

A Yes, sir, that's about right. I remember it. I remember it. It was in about March.

Q Let's talk about that time frame, okay? You continued to drive a truck over the road, is that correct?

A Yes, sir, I sure did. (Tr.21-22)

Again, it is undisputed that the claimant continued to work, performing his regular duties, for almost thirteen (13) months without seeking medical treatment. During March, 2003, the claimant contacted Cindy (last name unknown) who handled the insurance claims for the employer and requested medical treatment. The record reflects that the claimant was initially examined and treated by Dr. Keith Cooper. Unfortunately, the medical records from Dr. Cooper, including any history given to Dr. Cooper, are not part of the record in this case. However, it is apparent from the claimant's own testimony that he saw Dr. Cooper for either a bladder infection or possible kidney failure which was the reason for his need for medical treatment in March, 2003. At the time, the claimant had developed extremely high fever and requested medical treatment for an illness rather than a work-related injury. Dr. Cooper apparently resolved the claimant's kidney problems; however, because of continuing, low back complaints, Dr. Cooper subsequently referred the claimant to Dr. Scott Schlesinger, a neurosurgeon in Little Rock, Arkansas, for evaluation of

claimant's additional complaints. Dr. Schlesinger saw the claimant one time only for a neurosurgical consultation on May 7, 2003. His medical history states:

Mr. Jordan is a 43-year-old male who gives a two-year history of intermittent back pain and left leg pain. He had an exacerbation in March. He complains of pain radiating to the left leg. He has not had physical therapy or epidural steroid injections. He says the pain began after a work injury. He comes in now for neurosurgical consultation. The rest of the comprehensive past medical history questionnaire form has been reviewed and is otherwise noncontributory to the current illness. (Jt. Ex. A, p.8)

On cross-examination, it was pointed out that in claimant's discovery deposition, he reported seeing Dr. Schlesinger three (3) times. On further cross-examination, when questioned concerning this inconsistency, as well as the history contained in Dr. Schlesinger's report that he had experienced intermittent back and leg pain for two (2) years rather than one year, the claimant became extremely defensive and argumentative, accusing respondents' counsel of trying to confuse him. The claimant denied aggravating his back in March, 2003. The claimant did admit that he went to Dr. Cooper in March, 2003, for a bladder infection rather than a back injury. It was further pointed out that the claimant reported to Dr. Ackerman, to whom he had been referred by Dr. Schlesinger, that he went to Dr. Cooper because of extremely high fever in March, 2003, at which time he thought he was experiencing kidney failure. On further cross-examination, the claimant vacillated concerning the number of times he reported his alleged injury and

need for treatment to his supervisor, Curt. Despite the claimant's testimony on direct that following numerous trips, he requested medical treatment, in the claimant's discovery deposition he stated that he only talked to Curt one time following the alleged incident in February, 2002, and refused to talk to him after that date, maintaining that Curt ignored his request. (Tr.21, 39-47) (Resp. Ex. 3, pp.23-24)

The claimant's course of conduct and work history is simply inconsistent with sustaining a back injury on February 28, 2002. The claimant continued working until March 24, 2003, without seeking medical treatment. He drove over 200,000 miles during the next thirteen (13) months. The fact that the claimant worked without seeking medical treatment because the employer did not provide him medical treatment is also suspect because the claimant's wife worked at the Chicot Memorial Hospital where the claimant lived. In response to another question on cross-examination, the claimant opined that his physical condition on the date of the hearing was about the same as following the alleged February 28, 2002, incident as about the same as when he quit working. The claimant, in fact, worked regularly until March 24, 2003, when he took off work for a bladder infection or kidney problem while, which is inconsistent with the claim that he is now physically unable to return to work. (Tr.51)

Another significant, self-contradicting statement given by the claimant

concerned whether his injury occurred as the result of a specific incident identifiable in time and place of occurrence rather than a gradual onset injury. As previously pointed out, on direct examination, claimant maintained that he heard a pop in his back and could not straighten up after lifting a third La-Z-Boy which was inconsistent with the claimant's testimony in his discovery deposition. (Tr.54) (Resp. Ex. 3, p.19)

I also found it interesting that, in a history questionnaire given to Dr. Schlesinger, the claimant related that he had a strong family history of back problems which was noted by Dr. Schlesinger and which the claimant related "runs in the family." (Tr.59)(Jt. Ex. A, p.7)

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, 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 employment;
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 medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,
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).

Other than the claimant's self-serving testimony, there is no credible evidence that the claimant sustained an injury which arose out of and during the course of his employment as the result of a specific incident identifiable in time and place of occurrence on February 28, 2002. The record in this case is replete with inconsistencies and contradictions. The claimant did not seek any medical treatment between February 28, 2002, and on or about March 24, 2003, at which time he sought medical treatment for an illness unrelated to his employment. The claimant subsequently sought medical treatment for back complaints. To attribute the claimant's physical problems, need for treatment, and disability, if any, to a February 28, 2002, injury would require sheer speculation and conjecture. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company 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).

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).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has simply failed to prove that he sustained a compensable injury arising out of and during the course of his employment. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge

/jg