

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313260

DANIEL T. LOVELACE, EMPLOYEE	CLAIMANT
JIM'S TANK SERVICE, EMPLOYER	RESPONDENT
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 22, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on August 19, 2004, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Mark Ledbetter, Attorney-at-Law, Memphis, Tennessee.

Respondents represented by Mr. Michael E. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted August 19, 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 May 12, 2004, 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 subject to an additional stipulation submitted subsequent to the hearing. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

The parties stipulated that the employment relationship existed at all relevant times, including November 25, 2003, and December 1, 2003, and that the claim has been controverted in its entirety. Because the parties could not stipulate to the applicable compensation rates, respondents introduced claimant's pre-injury wage statement without objection. The claimant requested leave to review the pay records. Subsequent to the hearing, the parties stipulated to an average weekly wage of \$607.40, entitling claimant to compensation rates of \$405.00 per week for temporary total disability and \$304.00 for permanent partial disability as reflected by a letter received on August 20, 2004.

By agreement of the parties, the primary issue presented for determination concerned compensability. If answered affirmatively, 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 event identifiable in time and place of occurrence on November 25, 2003, which was reported to the employer; that he returned to work and sustained an aggravation of his pre-existing condition on December 1, 2003; that he was entitled to temporary total disability benefits beginning December 1, 2003, and continuing through the present, maintaining that his healing period had not ended; that respondents should be held responsible for all outstanding medical treatment, together with continued reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. Claimant

reserved the issue of permanent disability.

The respondents contended that the claimant did not sustain an injury arising out of and during the course of his employment, maintaining that there was no evidence of a specific incident in time and place of occurrence, and, if the claimant was claiming a gradual injury, the major cause of the condition was not an accident at work. Respondents further maintained that the claimant did not report an injury or accident until December 5, 2003, at which time he reported that he and his doctors speculated that climbing a ladder on a truck could have been the cause of his physical problems.

In addition to the claimant, his brother-in-law, Glen Marshall, and wife, Helen Lovelace, testified in his behalf. Deena West and Cathy Belew were called as witnesses by the respondents. The record is composed solely of the transcript of the August 19, 2004, hearing containing numerous exhibits, together with a video CD which was introduced as "Respondent's Exhibit 2" and retained in the Commission's file to be viewed outside the hearing.

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 proven, by a preponderance of the credible evidence, that he sustained a compensable injury arising out of and during the course of his employment with Jim's Tank Service, a/k/a/ ATM Oil Company, which caused internal, physical harm requiring medical services and resulting in disability which was confirmed by medical evidence supported by objective findings and which was caused by a specific incident identifiable in time and place of occurrence on November 25, 2003.
4. The claimant has proven, by a preponderance of the evidence, that he is entitled to temporary total disability for the period beginning December 2, 2003, and continuing through a date yet to be determined.
5. The claimant's healing period had not ended as of the date of the within hearing.
6. Respondents are responsible for all outstanding medical treatment, together with continued, reasonably necessary medical treatment, including, but not limited to a neurosurgical evaluation and treatment pursuant to a referral by Dr. Ilsa Sanchez as reflected by a report issued February 26, 2004.

7. A child support lien has been filed in this claim by the Lee County Office of Child Support Enforcement. Pursuant to Ark. Code Ann. §11-9-110(d), respondents are to withhold up to twenty-five percent (25%) of the accrued benefit hereinafter awarded to satisfy child support obligations which are currently in arrears.
8. Respondents have controverted this claim in its entirety.
9. The issue of permanent disability was specifically reserved.

#### DISCUSSION

The record in this case is replete with inconsistencies and contradictions. The findings and conclusions, aforementioned, are based, in substantial part, on the credibility of the witnesses for both parties. For reasons set out further below, I find that the testimony of the claimant and his corroborating witnesses more credible than the testimony and evidence offered by respondents in controverting this claim.

I feel compelled to point out that prior to the start of the hearing, claimant's attorney pointed out that respondents conducted a surveillance of the claimant purported to represent his client working at Holliday's General Service Corp., in Memphis, Tennessee. Claimant's attorney argued that the video did not show the claimant working and that its proffer was misrepresentation subject to criminal sanctions. The video was taken June 10, 2004. The claimant testified that he has not worked since December 1, 2003. His brother-in-law, Glen

Marshall, who admittedly worked for Holliday's stated that the other individual in the video was not the claimant. Both witnesses called by the respondents stated that they had each viewed the video and that it showed the claimant working. At the conclusion of the hearing, claimant's attorney objected to the introduction of the video because it could not be authenticated. Because of the conflicting testimony, and having observed the witnesses at the hearing, the video was received in order to determine whether the claimant could clearly be identified. (Tr.9-10, 113-114)

The claimant, Daniel T. Lovelace, testified in his own behalf. The claimant is thirty-one (31) years old. He stated that he was five foot six inches (5'6") tall and weighed 195 pounds. The claimant acknowledged that he was in arrears in his child support obligations and had complied with any requests for information from the Office of Child Support Enforcement concerning the within claim. It is undisputed that the claimant was employed by the respondent at the time of his alleged injury. The claimant was employed as a truck driver. He stated that he received a DOT physical on October 13, 2003, at the request of the employer because his prior physical card had run out. He denied having any back problems before November 25, 2003. The claimant testified that he worked for Holliday's Fashions six (6) months before going to work for the respondent. He repeatedly denied any work since his alleged accident. The claimant pointed out that his brother-in-law was working at Holliday's on June

10, 2004, and that he continued to work for said employer. He pointed out that his brother-in-law, Glen Marshall, was approximately one inch taller than him and weighed considerably less. The claimant also maintained that Mr. Marshall occasionally drove his truck to work. The claimant's description of the incident, his physical problems, as well as its reporting is set out below:

Q Okay. And if you would, tell His Honor what happened on or about November 25, 2003 that brings us here? What were you doing and what happened?

A I loaded the truck and I made it to New Albany, Mississippi. I got up there, got my hoses out, and got it hooked up from the truck to the tanks to pump my oil. Then I had to crawl up the ladder of the trailer to open the dome lids up. I opened the dome lids up, I come back, and I was bent down holding on to the railing with my right foot on the very top step. When I went to step down, I missed the step on the trailer and stretched my body out pretty good while I was bent over.

Q Okay. What did you feel at that time?

A At first I thought I'd just pulled a muscle and I kept on working. You know, I had to get that truck unloaded. I did everything normal, but I was getting – the more I worked the stiffer I was getting.

Q Okay. Now, what happened after that? I mean, where were you?

A I was at a construction site in New Albany, Mississippi.

Q Is this where you were sent by your employer, Jim's Tank Service?

A Yes, sir.

Q So they knew where you were and that's where you were supposed to be?

A Yes, sir.

Q And it's typical when you work with them to go to places like that and to

do your job, and you were paid for doing work out of state?

A Yes, sir.

Q But you were coming back in the truck and you were both going to be sleeping in Marion or West Memphis that night?

A Yes, sir.

Q All right. Now, what time of day was that that you had this problem?

A I would say it was about 1:30, 2:00 o'clock in the afternoon.

Q Okay. What happened next? Your foot slips or what happened after that?

A Like I said, my back was getting stiff the more I worked, and I got finished unloading, loaded everything back up, crawled back up the ladder to the top of the tank and closed the dome lids. I come down. I was having a little trouble getting back down.

Q What trouble were you having?

A Just my leg was getting like it was going to sleep.

Q Which leg?

A My left one.

Q Okay. Now, what did you do after that?

A I got in the truck, weighed out, had my paperwork signed by the gentleman in New Albany, Mississippi, and I drove back to Marion.

Q Now, who did you see in Marion?

A I got back to the office. I was in the shop trying to walk around to see if I could get my back to unstiffen up, because like I said, I thought I pulled a muscle, and then I talked to William Brown.

Q All right, who is William Brown?

A He's supposed to be a supervisor.

Q So you talked to William Brown. Did you talk to William Brown about your back?

A Yeah, he come up to me and wanted me to go help them unload some used oil filters out of some 55 gallon drums.

Q Now, what sort of labor would that have required you to do?

A Been having to bend over in them 55 gallon drums and get them oil filters out, or try to load them over in the front end of a little Bobcat front-end loader to dump them out of them barrels.

Q So what time a day did you talk to your supervisor, Mr. William Brown?

A It was approximately 4:00 o'clock.

Q Okay. And what did you tell him about your back?

A He asked me to go out there and help them, and I said, I couldn't. I said, "My back's hurting." I said, "I missed a step on that truck or something," and I said, "I'm in a lot of pain right now." I said, "I can't come out there and help you."

Q What did he say?

A He said okay and turned around and walked off.

Q Did you talk to anybody else that afternoon?

A Yes, I talked to Bill Hudgins about ten minutes later.

Q Okay. What was Mr. Hudgins' job?

A He was a safety supervisor.

Q Okay. Now, is Mr. Hudgins the person who would attend your meetings and talk to you about the job injuries and about filing it on health insurance instead of workers' comp, was he present in those meetings?

A Yes, sir. (Tr.21-25)

The record in this claim contains conflicting testimony concerning whether the employer encouraged its employees to seek medical treatment under the group health insurance policy rather than file a workers' compensation claim because of a sharp increase in its workers' compensation premiums. In fact, the claimant identified a claim involving another employee, David Peden, which he maintained was injured at work and the medical paid under his regular insurance. Ms. West testified that the claim was paid under workers' compensation insurance. She did acknowledge that all employees were advised of the increase in premiums at a safety meeting, but disputed the allegation that employees were told to file claims under health insurance.

The claimant reportedly became involved in a heated exchange on the day of his alleged injury with Deena West, a shareholder and sister of the company's owner, Mr. Berryhill. The claimant stated that during the discussion, Ms. West advised him that if he could not drive, he needed to turn his equipment in. The claimant related that the following day, he apologized for his conduct the prior day, and also told her that he needed to see a doctor, but that no work-related incident was discussed while maintaining that he had previously reported the incident to both William Brown, his immediate supervisor, and Bill Hudgins. The claimant stated that he returned to work following the Thanksgiving Holiday and drove the truck on December 1, 2003, at which time he experienced additional,

physical problems and advised his employer that he needed to see a physician. The employer suggested that the claimant see Dr. Sanchez, who was an authorized treating physician under its health insurance. The claimant was initially examined by Dr. Ilsa Sanchez on December 1, 2003. Dr. Sanchez ordered a series of x-rays, as well as an MRI of the lumbar spine to determine the extent of injury. The MRI reflected a herniated disc at which time the claimant was referred to Dr. Rodney Olinger for further evaluation and treatment. The claimant has been unable to obtain follow-up evaluation and treatment because respondents controverted the claim in its entirety.

Dr. Sanchez's February 26, 2004, letter addressed to claimant's attorney is set out, in part, below:

Daniel Lovelace was seen, for the first time, in my office on December 1, 2003 with a chief complaint of back pain. By his history of present illness, he sustained the injury to his back while working for Jim's Tank Service on or about November 25, 2003. After my examination, I ordered a series of x-rays and MRI of his lumbar spine to determine the extent of his injury. Dr. Murray was the Radiologist who reported his findings. Dr. Murray concluded that Mr. Lovelace has two bulging discs. My concern for Mr. Lovelace is that his condition suggests nerve involvement including bulging disc in L-5 and L-6. Mr. Lovelace returned to my office on December 6, 2004 [sic] to discuss his alternatives. Mr. Lovelace was referred for a neurosurgical consultation at the Semmes-Murphy Clinic, Memphis, TN and specifically to Dr. Rodney Olinger, for the further evaluation and treatment of his condition. (Cl. Ex. A, p.1)

Glen Marshall was called as a corroborating witness for the claimant. Mr. Marshall stated that he worked at the Holliday's warehouse on June 10, 2004. He specifically denied working with the claimant on that day or any other time

after November 25, 2003.

Deena West was called as a witness for the respondents. Ms. West is a part-shareholder and also performs secretarial, accounting, and bookkeeping for the company. She maintained that the heated discussion between her and the claimant concerned his complaints about the condition of the truck he was driving. A portion of her testimony follows:

A ... And he just basically said, "I'm not driving that piece of junk anymore. My head hurts, I don't feel good, and I'm not driving it anymore." So William Brown was standing there also, and I said, "Well, I have a load going out tomorrow. Are you going to deliver that load?" He said, "No, I'm not." And at that point is when he handed me his keys and his phone. I looked at William Brown and asked, "Can we cover this?" and he said, "Yes, ma'am, we can." So at that point he turned and walked out.

Q Now, you heard Mr. Lovelace's testimony about this same evening?

A I sure did.

Q And he implied that you may have fired him or terminated his services or something, or threatened to?

A Correct.

Q Is that right? Did you do that?

A He terminated his services himself.

Q Okay. Did he mention at this time falling on the back of the truck from the ladder?

A Never.

Q Did he mention that he had hurt his back to you?

A He said, "My head hurts. I feel bad. My back aches," but at that point he

never said, "I hurt myself on the truck," or "My head hurts because I bumped it on the truck," or none of that.

Q Okay. Now, did you have another discussion with him the next day?

A I did.

Q And what happened then?

A About 8:30 that morning he appeared with a child, his son, who looked to be probably four or five years old, and asked to speak to me. So I, what I considered was very gracious after the way I was treated the day before, allowed him into my office, and at that point he apologized, told me he was wrong to speak to me in that manner. He did not want to lose his job, and I said, "That's great, you're a good driver. I don't want to lose you either. You know, I'm willing to, you know, go forward with this." He said, "But my child is sick, and I told you yesterday I don't feel good. So if you don't mind, I'm going to take the day off and I'm going to take my child to the doctor so my wife doesn't have to take off from work." And I said, "That's fine." And this is, you know, the day before Thanksgiving. So at that point he left, and that was the last conversation that day.

Q Okay. Did he ever mention to you during that conversation that he had hurt himself on the truck?

A No.

Q Now, you heard his testimony about the people that he reported this incident to. He said he reported it to William Brown?

A Correct.

Q And is it William Brown or Bill?

A William Brown.

Q Okay. And a Mr. Hudgins?

A Bill Hudgins.

Q Bill Hudgins, okay. Is it possible that he could have reported this injury to

Mr. Hudgins on November the 25<sup>th</sup> of 2003?

A No, actually it isn't possible. Mr. Hudgins had left work early that day. He had taken some leave to go to, I believe, Alabama for the holiday, and he had actually left at lunchtime that day. (Tr.80-82)

On cross-examination, Ms. West acknowledged that William Brown was the claimant's supervisor on November 25, 2003, and could not dispute any conversation between the claimant and Mr. Brown prior to her involvement.

On redirect-examination, Ms. West stated that she had reviewed the video surveillance and positively identified the claimant as working in the video.

It was earlier pointed out by the parties that Bill Hudgins was no longer employed by the respondent and had moved out of state. In response to questions from this administrative law judge, Ms. West acknowledged that William Brown was still employed by the respondent. Mr. Brown was not present at the hearing.

Cathy Belew was also called as a witness by the respondent. Ms. Belew is an administrative assistant and works in the office for the employer. Much of her testimony is of little probative value; however, she also viewed the video and, likewise, identified the claimant.

As previously pointed out, the claimant objected to the introduction of the video because the videographer was not available to authenticate the video despite the fact that a request had been previously made for the surveillance investigator to be present to establish the identity of the person videotaped. I

allowed the video to be introduced because of the conflicting testimony, as well as the allegations of misrepresentation. I have since reviewed the video. Despite the quality of the video, I could clearly identify Glen Marshall as working at Holliday's warehouse on June 10, 2004. The other individual working with Mr. Marshall was more difficult to identify; however, I do not believe that the video depicts the claimant working. Most of the video surveillance obtained was side angles rather than a frontal view. Further, both Mr. Marshall and the other worker wore baseball caps. However, the other person in the video was clearly taller than Glen Marshall and appeared to weigh in excess of two hundred (200) pounds. The record reflects that the claimant is five foot six inches (5'6") and approximately one inch shorter than Glen Marshall. I find the credibility of both of respondents' witnesses to be highly suspect because each positively identified the claimant as working in the video. Although I believe that they were mistaken in their identification, I cannot conclude that they were guilty of misrepresentation.

Respondents could have easily obtained the payroll records of the Holliday's warehouse as proof that the claimant was gainfully employed after November 25, 2003. No such proof was offered. Further, respondents failed and/or refused to have the videographer present for cross-examination. Finally, although the claimant testified that he reported his injury to both William Brown and Bill Hudgins on November 25, 2003, Mr. Brown, claimant's immediate

supervisor, was not called to refute this allegation. Where no explanation is offered for the absence of company employees as witnesses who are in a position to contradict the claimant's testimony if it was not true, the Commission, as triers of fact, may properly draw the inference that their testimony would have been unfavorable to the company. *Brower Mfg. Co., et al vs. Willis, et al*, 252 Ark. 755, 480 S.W.2d 950 (1972).

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 a claimant's disability arising soon after the accident, and is logically

attributable to it, with nothing to suggest any other explanation, the Commission may find the existence of the causal connection. *Hall vs. Pittman Construction Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Co., vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1978). The claimant's credible testimony, together with the medical evidence, establishes that causal connection. *Kearby vs. Yarborough Brothers Gin Co.*, 248 Ark. 1096, 455 S.W.2d 918 (1970); *Exxon Corporation vs. Flemming*, 253 Ark. 798, 489 S.W.2d 766 (1973).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has sustained his burden of proving a compensable injury arising out of and during the course of his employment on November 25, 2003. Accordingly, I hereby make the following:

#### AWARD

Respondent, Liberty Insurance Corporation, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$405.00 per week beginning December 2, 2003, and continuing through the present and until a date yet to be determined when the claimant's healing period can be established.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are to withhold child support obligations, not to exceed

twenty-five percent (25%) of the benefits awarded, up to the amount necessary to satisfy any arrearage in child support obligations filed by the Lee County Office of Child Support Enforcement.

Respondents are responsible for all outstanding medical treatment, and remain responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. Mark Ledbetter, is hereby awarded the maximum statutory attorney's fee on the indemnity benefits awarded herein, one-half ( $\frac{1}{2}$ ) to be paid by the respondents, and one-half ( $\frac{1}{2}$ ) to be withheld from claimant's benefits pursuant to A.C.A. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge