

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206948

JASON RUSSELL, EMPLOYEE	CLAIMANT
CHARLES W. IVEY, EMPLOYER	RESPONDENT
SAFECO/AMERICAN STATES INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 26, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on July 23, 2004, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Jim R. Burton, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 23, 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 19, 2004, and a Prehearing Order was filed on May 20, 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 subject to certain amendments set out below. 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

parties at all relevant times through May, 2002, and that the claim had been controverted in its entirety for purposes of attorney's fees. At the hearing, the parties agreed that the claimant's average weekly wage was \$280.00, entitling him to a compensation rate of \$187.00 per week in the event compensability was overcome.

By agreement of the parties, the primary issue 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 back injury as the result of a specific event identifiable in time and place of occurrence on or about May 22, 2002; that respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for various and extended dates which will be identified upon completion of the medical evidence; and that a controverted attorney's fee should attach to any benefits awarded. At the hearing, claimant's attorney requested temporary total disability from the date of injury through at least June 4, 2002, when the claimant was last seen by Dr. Tim Young. As will be set out further below, the claimant testified that he remained totally disabled through the date of the within hearing both as the result of an alleged back injury, as well as

psychological problems which the claimant asserted resulted from the disputed back claim.

The respondents contended that the claimant did not sustain a compensable injury within the course and scope of his employment, and, further, that the claimant did not timely report a work-related injury. At the hearing, respondents further contended that the medical records did not contain objective medical findings to support any compensable injury.

The claimant testified in his own behalf. Alan Lynn Phelps, Gerald Alan Wiles, and Charles Ivey were called as witnesses for the respondents. The record is composed solely of the transcript of the July 23, 2004, hearing containing a joint medical exhibit consisting of forty-seven (47) pages.

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 a compensable back injury as the result of a specific event identifiable in time and place of occurred which arose out of and during the course of his employment.

4. The claimant has failed to prove, by a preponderance of the credible evidence, that his need for medical treatment and alleged disability is in any way causally related to an injury sustained while working for Charles W. Ivey.
5. The claimant has failed to prove, by a preponderance of the credible evidence, that he's psychological problems, need for psychiatric treatment, and disability related to his psychological problems are in any way causally related to a work-related injury.
6. The claimant has failed to prove entitlement to any workers' compensation benefits.
7. Respondents have controverted this claim in its entirety.

#### DISCUSSION

The record in this case is replete with inconsistencies and contradictions. This claim turns entirely upon the credibility of the claimant. I did not find the claimant to be a credible witness. At the time of the within hearing, the claimant was drawing social security disability benefits as the result of psychological rather than physical problems. As will be set out further below, a preponderance of the credible evidence reflects that the claimant's

psychological problems are unrelated to any physical injury, but, rather, related to personal problems which were apparently exacerbated by marital difficulties.

The claimant, Jason Russell, is twenty-nine (29) years old. He has a high school education. The claimant began working for Charles W. Ivey in January, 2000. The employer is an automotive repair shop. The claimant was initially hired to perform clean up around the shop. He later began performing minor automotive repair and maintenance. The claimant testified that he injured his low back while taking a rear-end out of a truck. He stated that while lifting and twisting, he experienced back pain. The claimant maintained that at the time of the alleged injury, he was working with Charles Ivey and Buzz Wiles. Although the Prehearing Order reflected an alleged event on or about May 22, 2002, at the hearing, the claimant indicated that the injury occurred in early May, 2002. He stated that his condition grew progressively worse. The claimant related that he worked until May 20, 2002, at which point his back was so painful that he was unable to continue working. The claimant was initially seen by Myra Kendall, a nurse practitioner associated with Dr. Tim D. Young on May 22, 2002. The history contained in Nurse Kendall's notes reflects that his problems began two (2) days earlier. There was no history given of any work-related incident. The claimant returned to see Dr. Young on May 30, 2002, at which time he reported a three (3) week history of back pain. The claimant last saw Dr. Young on June 4, 2002, at which time he was

referred to Dr. Bruce L. Safman for further evaluation. (Jt. Ex. A, pp.2-3)

The record reflects that the claimant was first examined by Dr. Safman on June 14, 2002, which is the first time the claimant related his problems to a work-related injury. Dr. Safman treated the claimant with trigger point injections, together with samples of the medication Mobic; however, the claimant did not follow-up with Dr. Safman because respondents disputed compensability of the claim. (Jt. Ex. A, p.4)

The claimant stated that he had seen additional medical providers, including Dr. Cochran at the Cherokee Village Hospital who subsequently referred the claimant to Dr. Clara N. Applegate. Dr. Applegate first evaluated the claimant on September 8, 2003. Dr. Applegate conducted various diagnostic studies. Dr. Applegate last evaluated the claimant on January 7, 2004. Following the claimant's evaluation by Dr. Applegate on October 21, 2003, she opined that the claimant had a lot of atypical complaints with a paucity of physical findings. She also expressed concern about the claimant's hyperactive reflexes which she related to anxiety. At that time, she scheduled the claimant for a cervical spine MRI. Again, Dr. Applegate last evaluated the claimant on January 7, 2004. Her impression is set out below:

This gentleman continues to have symptoms that are far out of proportion to any physical signs or radiologic findings. I had a strong suspicion that he is malingering. He has failed to respond normally to physical therapy (his records from Eastern Ozarks PT are enclosed and document that the patient failed to show any benefit from multiple modalities) and he tells me today that

methadone “didn’t help me at all”. I think he is seeking Disability. (Jt. Ex. A, p.44)

The claimant has also been treated at the North Arkansas Human Services System for various psychological problems. Rather than conduct an exhaustive analysis of the medical reports related to said treatment, suffice it to say that they appear to be related to personal problems, marital separation, depression, and drug use. The medical history did reflect back pain related to an alleged work injury, but there is no credible evidence whatsoever attributing the claimant’s psychological problems to his back complaints.

Ark. Code Ann. §11-9-113 (Repl. 2002) provides, in part:

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee’s body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

First, the claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable, physical injury. Even if the claimant did sustain a work injury, which is contrary to the findings herein, the alleged mental injury is unrelated to a physical problem, and, further fails to satisfy the requirements of §11-9-113(a)(2).

Alan Lynn Phelps was called as a witness for the respondents. Mr.

Phelps is a service manager for the respondent. He stated that he first became aware that the claimant was experiencing back problems on or about May 8, 2002. He stated that the claimant related his back problems to a wrestling episode with his wife. Mr. Phelps testified that he questioned the claimant concerning whether his back problems were in any way related to his employment because he knew that the claimant did not have health insurance. He stated that the claimant denied any causal relationship to his employment. Mr. Phelps also stated that the claimant knew that he was required to report any work-related injury and that the claimant in fact had a prior claim.

Gerald Alan Wiles was also called as a witness for the respondents. Mr. Wiles also observed the claimant experiencing physical problems in early May, 2002, which he stated the claimant related to wrestling with his wife.

Charles Walker Ivey, the owner of the respondent company, also testified. He stated that the claimant had a prior workers' compensation claim for which the respondents promptly provided medical treatment. Mr. Ivey denied the claimant ever reporting a work-related injury to him during May, 2002.

It must be further noted that the respondents' witnesses all testified that the because of the claimant's small stature, he was not permitted to perform any heavy lifting such as the rear-end of a vehicle. The record reflects that the employer terminated the claimant's employment based upon suspicion that he

had been charged for selling marijuana while off-work and allegedly disabled.

It should further be noted that on cross-examination, respondents pointed out that the claimant had been less than fully candid concerning his prior criminal record when answering interrogatories propounded by the respondents. (Tr.26-27)

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).

As previously noted, the record in this case is replete with inconsistencies and contradictions. I did not find the claimant to be a credible

witness. In my opinion, respondents' witnesses would not each perjure themselves in order to defeat this claim. 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 an injury arising out of and during the course of his employment with Charles W. Ivey. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge