

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313258

MIKE SCROGGINS

CLAIMANT

COPACABANA CLUB

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 8, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on April 12, 2004, in Springdale , Arkansas. The deposition of Dr. Dan Bell was taken on March 23, 2004, and has been admitted as Respondent's Exhibit No. 2.

A pre-hearing order was entered in this case on February 25, 2004. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and hereby accepted:

1. On November 8, 2003, the relationship of employee-employer-carrier existed between the parties.
2. On November 8, 2003, the appropriate weekly compensation rates are \$187.00 for total disability and \$154.00 for permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Whether the claimant sustained a compensable injury to his lower back on

November 8, 2003.

2. The claimant's entitlement to the payment of medical expenses and temporary total disability benefits from November 9, 2003 through December 30, 2003.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

"The claimant was injured on November 8, 2003, when he was carrying a case of beer and slipped in the kitchen into the stove. He was seen by Dr. Bell and has not worked since November 8, 2003. He is currently off work under the care and direction of his neurosurgeon."

In regard to these issues, the respondents contend:

"The respondents will contend that the claimant did not sustain a compensable injury which arose out of and in the course of his employment with the respondent employer on November 8, 2003, or any other date while the respondent carrier provided coverage. Without waiving other defenses, the respondents contend that there are no objective findings to support the occurrence of a compensable injury whether the alleged compensable injury is characterized as the new injury or an aggravation of a pre-existing condition."

DISCUSSION

_____ The central issue is the question of whether the claimant sustained a compensable injury to his lower back, as the result of a specific employment related incident on November 8, 2003. The burden rests upon the claimant to prove the occurrence of this alleged compensable injury.

In order to meet this burden, the claimant must show by the greater weight of the credible evidence the occurrence of a physical injury to his lower back that satisfies all of the definitional requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-502(4)(A)(i). These definitional requirements are:

- (1) The physical injury must arise out of and occur in the course of the employment.
- (2) The physical injury must be caused by a "specific incident".

- (3) The physical injury must be identifiable by time and place of occurrence.
- (4) The physical injury must cause internal or external physical harm to the claimant's body.
- (5) The physical injury must require medical services or result in disability or death.

The claimant's testimony is the only direct evidence presented to prove the occurrence of a specific employment related incident on November 8, 2003 and the existence of a causal relationship between such an incident and the claimant's subsequent episode of lower back and left leg difficulties. Clearly, the testimony of a party is never considered "uncontradicted". However, this does not mean that such testimony can be arbitrarily disregarded. In fact, if such testimony is credible, it may be sufficient in and of itself to prove any fact it is legally competent to address. In this case, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident on November 8, 2003. His testimony would also be legally competent to prove the existence of a close temporal relationship between this incident and the initial onset of his low back and left leg symptoms. His testimony would be legally competent to prove that he had sustained no other injuries to his back, either before or after this incident. Finally, his testimony would be competent to show that he had never experienced any similar complaints.

However, after consideration of all the evidence presented, it is my opinion that the claimant's testimony is not credible. His testimony, in regard to these matters is clearly contrary to the histories he initially gave to all of his medical providers.

The medical evidence indicates that when the claimant first sought medical treatment, he consulted Dr. Dean Kirkpatrick, a chiropractor. His initial visit was on November 11, 2003. This was only three days following the alleged incident on November 8, 2003. However, Dr. Kirkpatrick records no such incident, as precipitating the claimant's complaints. In fact, he expressly records a history that these complaints had an initial onset

two to three weeks prior to this visit with no related trauma. He also expressly notes that the claimant related the cause of his complaints to long hours of standing. The claimant appears to have been treated by Dr. Kirkpatrick on November 11 and November 13, 2003.

On November 14, 2003, the claimant saw Dr. Dan Bell, his family physician. Again, the claimant failed to mention any alleged employment related incident on November 8, 2003, as precipitating his difficulties. Instead, he specially gave an entirely different date for the onset of his symptoms, and again he expressly related that these symptoms began without any traumatic cause. In fact, the initial histories recorded by Dr. Bell's nurse and Dr. Bell are identical with that recorded by Dr. Kirkpatrick. Dr. Bell notes that the claimant's difficulties began some three weeks prior to his visit and had "started insidiously". Dr. Bell also noted that the claimant had a history of chronic low back pain that would come and go over the past twenty years.

This is not merely a case where the claimant has simply forgotten or failed to mention that the onset of his difficulties occurred contemporaneously with some specific incident. Instead, on his initial visits this claimant expressly denied the occurrence of any such incident to his two treating physicians. He has also expressly given an onset date for his symptoms that would be weeks prior to the currently alleged employment related incident. The similarity between the histories independently recorded by these two separate medical providers, on two different occasions, would make it impossible to believe that both of these providers had simply incorrectly recorded the history of the claimant's difficulties.

At the hearing, the claimant appeared to be of, at least, reasonable intelligence. It is impossible to believe that he would have forgotten that this complaints initially began contemporaneously with an employment related fall only days before. There is simply no reasonable explanation for the claimant's failure to relate an accurate history to these two separate physicians. Generally, a claimant relates the most accurate history when first

seeking medical treatment for his complaints. The claimant's memory concerning any events surrounding the onset of symptoms would appear to be best at the time closest to the onset of symptoms. At such a time, the claimant's only motivation would be to allow an accurate diagnosis of his complaints and appropriate treatment for their speedy resolution, consideration of potential secondary gain has generally not occasioned.

In his testimony, the claimant offers no real explanation for the obvious discrepancy between his testimony and the histories initially recorded by Dr. Kirkpatrick and Dr. Bell. He first testifies that he did not tell Dr. Kirkpatrick how his symptoms started. He then testified that he "thinks" that he told Dr. Kirkpatrick or may have told Dr. Kirkpatrick about the accident and onset of his symptoms on November 8, 2003. In regard to Dr. Bell, the claimant initially testified that he does not recall if he told Dr. Bell about the accident or injury on his first visit, but thinks he may have told him about the accident or injury on his second visit. However, the claimant remains adamant that he did not have any difficulties or complaints with his back or left leg prior to November 8, 2003. The claimant also denied that he ever told Dr. Bell that he had experienced previous episodes of difficulties with his back for some twenty years.

The first record of any employment related incident, as the cause of the claimant's back and left leg difficulties, is found in the reports and records of Dr. Bell, dated November 25, 2003. In recording this change in the claimant's history, Dr. Bell makes the following curious statement:

"He (the claimant) has reviewed the history more carefully with his co-workers and now reports that it (his back problems) happened on the job and he has filed a workers' compensation injury."

I must admit that I am at a loss to understand how the claimant would need the assistance of his "co-workers" to recall the occurrence of an employment related incident that allegedly happened contemporaneously with the onset of his symptoms and only three days prior to his first seeking medical treatment. I would note that this change in the

claimant's story did occur after he had missed almost four weeks of work, on the same date he began to exhibit neurological changes, and on the date he learned that he was going to at least, require a relatively expensive diagnostic test and possibly surgery.

Based upon the evidence presented, I simply do not find the claimant's testimony concerning the occurrence of a specific employment related incident (on November 8, 2003), and the contemporaneous onset of his low back and left leg difficulties, to be believable or credible. Thus, the claimant has failed to prove that on November 8, 2003, he sustained a physical injury to his low back that arose out of and occurred in the course of his employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence. The claimant's failure to prove these three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i) precludes a finding that he sustained a "compensable injury" to his lower back on November 8, 2003. His claim for benefits attributable to such an injury must be denied and dismissed in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 8, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On November 8, 2003, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$187.00 for total disability and \$154.00 for permanent partial disability, should this claim have been compensable.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a "compensable injury" to his lower back, on November 8, 2003.
5. The respondents have denied the occurrence of any compensable injury to the claimant's lower back on November 8, 2003, and have controverted this

claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge