

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304367

ROBERT THOMPSON, EMPLOYEE **CLAIMANT**

**CONAGRA POULTRY CO.,
SELF-INSURED EMPLOYER** **RESPONDENT**

SEDGWICK CLAIMS MGMT. SVS., TPA **RESPONDENT**

OPINION FILED FEBRUARY 20, 2004

Hearing before Administrative Law Judge J. Mark White on January 27, 2004, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Billy J. Hubbell, Attorney at Law, Crossett, Arkansas.

Respondents represented by Mr. Norwood Phillips, Attorney at Law, El Dorado, Arkansas.

STATEMENT OF THE CASE

On January 27, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on August 25, 2003, and a Prehearing Conference Order was entered that same day. A copy of the August 25, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed between the parties on December 16, 2002; and that the claimant earned an average weekly wage of \$340.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury while in the employ of respondent; if the claimant sustained a compensable injury, whether he is entitled to medical benefits, temporary total disability benefits, and permanent partial disability benefits; and controversy and attorney's fees.

The claimant contends that he sustained a compensable injury and that he is entitled to temporary total disability from December 16, 2002, through the date he returned to work; that he is entitled to permanent partial disability benefits for the impairment rating assigned by his treating physician; and that he is entitled to medical expenses and an attorney's fee.

Respondents contend that the claimant did not sustain a compensable injury while in the employ of ConAgra Poultry Company; alternatively, that if the claimant sustained a compensable injury, his healing period ended on January 6, 2003, when he was assigned a permanent impairment rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment, caused by a specific incident identifiable by time and place of occurrence.
4. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury causing physical harm to the body requiring medical services, or that his injury is established by medical evidence supported by objective findings.
5. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury while in the employ of the respondent-employer.
6. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant worked for the respondent-employer from April 10, 2002, until sometime in December, 2002. He testified that on December 19, 2002, he sustained an injury to his back when he stepped into a drain. Though he initially appeared confident in the December 19 date, he eventually acknowledged that he did not know precisely which day it was. He testified that co-worker Sherry Gilmore saw the accident and instructed him to see the plant nurse. He testified that the nurse gave him medication but told him, "There ain't nothing we can do about a back." He testified that the nurse, whose name he did not remember, told him to go to a doctor the next day if he was still hurting, and that he was not told what doctor to see. The record contains a treatment note from the claimant's personal physician, Dr. Frederick Burt, dated December 16, 2002; the note is mostly illegible, but it appears to refer to the lumbar spine. The record also contains a report of an MRI performed December 18, 2002, which revealed a herniation and mild degeneration at L5-S1.

Dr. Burt referred the claimant to a neurosurgeon, Dr. Scott Schlesinger, whom he saw on January 6, 2003. Dr. Schlesinger opined that the claimant's pain was "probably coming from a musculoskeletal injury." He determined that the claimant was not a candidate for surgery and prescribed physiotherapy and other

conservative treatment.

The claimant testified that he did not return to work until going to work for another employer on September 20, 2003. He testified that he was terminated by the respondent-employer, though he did not say when this happened or why.

The medical records introduced by the parties show that the claimant treated with Dr. Burt for back pain on numerous occasions in the late summer and fall of 2002. His pain was such that he had a lumbar spine x-ray performed on September 25, 2002, revealing degenerative changes at L5-S1. The most recent visit to Dr. Burt for back pain prior to the alleged work incident was on October 25, 2002. The claimant initially denied ever seeing Dr. Burt for back pain prior to this alleged incident, but later said he did not recall whether he had done so.

Mona Johnson, the occupational health nurse manager for the respondent-employer, testified that she could locate no records of any injury report or visit to a plant nurse by the claimant for a back injury. She testified that her staff completed a first report of injury and form AR-N in May, 2003, without the claimant's input or signature after being notified of the alleged injury by the respondents' attorney. Johnson testified that a personnel record in her possession at the hearing showed that the last day the claimant worked was December 19, 2002.

Sherry Gilmore, a coordinator for the respondent-employer identified by the

claimant as a witness to his accident, testified that she did not see the claimant sustain an injury in December, 2002, and that the claimant had never reported an injury to her.

II. Adjudication

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) 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 findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of 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. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

I did not find the claimant to be a credible witness. His demeanor did not

appear credible, particularly during cross-examination. His testimony was internally inconsistent – at first he confidently testified that his alleged injury occurred on December 19, 2002, but he later said it might have been December 18. He then denied that he had ever testified to December 19 as a date of injury. He finally acknowledged that he didn't know precisely when the accident was, though he thought it "was like five days before Christmas." His testimony was inconsistent with the medical records in evidence – he flatly denied having ever had back pain prior to this alleged work injury, and he denied having ever seen a doctor for back pain prior to this alleged injury. The medical records submitted by both parties, however, establish that the claimant had a history of back pain going back until at least July 15, 2002, as noted above. Given these facts, I must find that the claimant was not a credible witness. In contrast, I found the testimony of both Mona Johnson and Sherry Gilmore to be credible, in that their testimony was plausible, internally consistent, and consistent with the documentary evidence.

The medical records submitted by the parties contain scant evidence to corroborate the claimant's testimony regarding his alleged work accident. His physical therapist noted on January 28, 2003, "Pt states he started having trouble his back. *Then* he stepped in a hole at work." (emphasis added) This note corroborates the claimant's testimony of stepping in a hole, but it contradicts his claim that his

back pain began with this alleged incident. Dr. Schlesinger's history records that the claimant "had intractable back pain on and off since September 2002 when he hurt his back at work he says." Though this record contradicts the claimant's testimony regarding his alleged work incident, it corroborates the notations of pre-existing back pain contained in the other medical records. Notably, the claimant's statement to Dr. Schlesinger is contradicted by the other medical records showing he had been treating for back pain since at least July, 2002. Nothing else in the medical record corroborates the claimant's account of back pain initiated or aggravated by a work accident in December of 2002.

The mere fact that a claimant has pre-existing pain is not a bar to compensation. A pre-existing disease or infirmity of an employee does not disqualify a claim under the arising out of employment requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). This claimant, however, has introduced no evidence beyond his own testimony to show that his pre-existing problems aggravated, accelerated or combined with his alleged work incident to produce any disability. To conclude that the claimant has met this burden would require me to engage in conjecture and speculation, and this I may not do. *Ark. Dept.*

of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

The claimant's testimony lacks credibility. His account of his alleged work incident was directly contradicted by Sherry Gilmore, even though the claimant testified that Gilmore saw the alleged accident. Little in the documentary evidence corroborates his testimony. With one vague exception, the medical evidence does not corroborate his testimony. I must therefore find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment, caused by a specific incident identifiable by time and place of occurrence.

I could conceivably find that the claimant's testimony and the physical therapy notes establish that the claimant stepped in a hole at work, but such a finding is insufficient to allow me to conclude that this incident resulted in physical harm to the claimant or caused the herniation in his lumbar spine. Considering the claimant's lack of credibility, the record is devoid of evidence to establish a causal connection between this alleged work accident and the claimant's back problems. I must therefore find that he has failed to prove by a preponderance of the evidence that he sustained an injury causing physical harm to the body requiring medical services, or that his injury is established by medical evidence supported by objective findings.

Given the above findings, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury while in the employ of the respondent-employer.

AWARD

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge