

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412552

WINFRED M. HARMON, EMPLOYEE	CLAIMANT
EAST ARKANSAS AREA AGENCY ON AGING, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 19, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on April 22, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. John C. Bartelt, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Betty J. Demory, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted April 22, 2005, 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 March 16, 2005, 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 concerning the applicable compensation rates.

It was stipulated that the employment relationship existed at all relevant times, including March 31, 2004; that the claimant's average weekly wage was

\$154.50, which would entitle him to a compensation rate of \$103.00 per week for both temporary total disability and permanent disability; and that the respondents have controverted the claim in its entirety.

By agreement of the parties, the primary issue presented for determination was whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

Claimant contended, in summary, that he sustained a compensable hearing loss injury as the result of a specific incident when a tire exploded; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment, including, but not limited to responsibility for payment of hearing aids, while reserving his entitlement to indemnity benefits, both temporary total and permanent impairment, if applicable.

The respondents contended that the claimant did not sustain a hearing loss arising out of and in the course of his employment, specifically maintaining that the claimant could not meet his burden of proof pursuant to Ark. Code Ann. §11-9-102.

The claimant testified in his own behalf. Sherry Calderono was called as a witness by the respondents. Katherine Copeland was also called as a rebuttal witness, as well as corroborating witness by the claimant. The record is composed solely of the transcript of the April 22, 2005, hearing containing a voluminous packet of medical and documentary evidence consisting of one hundred forty-six (146) pages, introduced by the respondents, together with eleven (11) pages of medical

documentation submitted by the claimant.

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 evidence, that he sustained an injury arising out of and in the course of his employment with East Arkansas Area Agency on Aging which caused internal, physical harm to his body, specifically, a loss of hearing which required medical services as confirmed by medical evidence supported by objective findings and which was caused by a specific incident identifiable in time and place of occurrence on March 31, 2004.
4. Respondents are responsible for all medical and related treatment, to date, including, but not limited to responsibility for payment of hearing aids previously recommended by treating physicians, and respondents remain responsible for continued, reasonably necessary medical treatment.

5. The claimant has specifically reserved issues of entitlement to indemnity benefits, both temporary total disability and permanent impairment benefits, if applicable.
6. Respondents have controverted this claim in its entirety.

DISCUSSION

The relevant facts in this claim are basically undisputed. The claimant, Winfred M. Harmon, is seventy-one (71) years old. At the time this claim was filed, the claimant was seventy (70) years old. On and before March 31, 2004, the claimant was employed by the respondent as a non-emergency medical transportation driver. He had been employed as a driver for approximately seven (7) years. The record reflects that the claimant retired from full-time employment in 1996. He subsequently began working part-time for the respondent transporting its clients to various locations as directed. It is undisputed that a work-related incident occurred on March 31, 2004, which is set out below:

Q. All right. Then on – I believe it's March 31, 2004, you had an incident on the job. Would you describe that to the Court, please?

A. I was going into Rector and I told my passenger, I said I believe I've got a tire going flat. And I got out and looked and I did. And I pulled over to the Flash Market, and I was putting air in it when it exploded and blew me backwards on the pavement. And I got up and my head was ringing, and I mean I knew – I knew I had a problem.

Q. You were putting air into the tire?

A. Yes.

Q. Okay. And in so doing the tire exploded?

A. Correct.

Q. You said it blew you back. Did it blow you down to your knees or on your back?

A. No. I was squatting down by the tire and it blew me completely backwards on my back.

Q. On your back. How close was your head or your ear to the tire when it blew?

A. I'd say a couple feet away.

Q. A couple of feet away?

A. Maybe three, but I – I wasn't sitting right on top of the tire, but I was close enough I could put the air in it.

Q. Sure. And prior to – before March 31st, did you have good hearing?

A. Yes, I did.

Q. Had you had to have any type of hearing aid before that period of time?

A. No.

Q. Had you ever had to have any kind of surgery or any treatment on your ears at any time?

A. No.

Q. Did you feel personally like you'd ever had any problems hearing before March 31st?

A. No.

Q. Okay. After the tire blew and it blew you back on your back, what happened?

A. I got over on my hands and knees and I got up, and I went inside the building and my head was just filled with noise from the blowout. And I found that there was four people in that store that saw what happened.

Q. All right. When you got back to the Area Agency on Aging that day, did you

report it to a supervisor?

A. I didn't get back that day. I came in the next morning.

Q. Came in the next morning. Well, there you were sitting at the Quick Shop with a blown tire, a van I guess, and some passengers. What happened at that point in time?

A. I had them to call a man to make a service call. He changed the tire for me and put on their little old donut we call them, little old half tire. And when I got down to Jonesboro the next morning, I told them what had happened and I needed a new tire. I also told them they needed to file a claim with workman's comp. I was having trouble with my ears.

Q. Who did you tell that to?

A. Kay Greenway.

Q. Kay Greenway. And who is Kay Greenway? What is her position at the Agency?

A. She was the one that was in charge of directing the van traffic, I guess you could say.

Q. Is she your direct supervisor?

A. Yes. (Tr.10-13)

Although the claimant reported the incident to his supervisor on April 1, 2004, the Employee's Notice of Injury form was not filled out until the claimant specifically requested medical treatment on or about April 13, 2004, at which time the employer filled out a Commission Form AR-N. In addition, the employer sent the claimant to its company doctor, Dr. Michael Lack, with Occupational Health Partners in Jonesboro, Arkansas. It is apparent that the claimant related a loss of hearing to both the employer and the company doctor related to the March 31, 2004, incident.

(Resp. Ex. A, pp.98-99)

However, the record reflects that prior to being sent to the company doctor, the claimant related a hearing problem to his family physician. The claimant was examined by Dr. Gregory Mallard at the Piggott Family Medical Clinic on April 2, 2004. Although the claimant saw Dr. Mallard primarily for a toe injury, which the claimant related to hitting his toe on a cabinet at home, the claimant also reported, for the first time, difficulty with his hearing. Dr. Mallard diagnosed some decreased hearing, primarily in the left ear, at which time he referred the claimant to Dr. William J. Bulkley for evaluation of the hearing loss. (Resp. Ex. A, p.93)

The claimant was next evaluated by Mr. Allen Craig, an audiologist in Dr. Bulkley's office. At the time of Mr. Craig's evaluation, the claimant reported difficulty hearing and understanding conversational speech, particularly with women and young children, as well as bilateral tinnitus while denying any significant symptoms of disequilibrium or vertigo. Mr. Allen recommended repeat audiometric evaluations in three (3) to six (6) months and possible ENT consultation at that time. He recognized that because of the circumstances surrounding the claimant's symptoms, secondary gain must be considered; however, based upon the time spent with the patient, he did not believe that to be the case in the immediate claim. The hearing problems were, by history, related to the March 31, 2004, incident. (Resp. Ex. A, p.95)

It is undisputed that the claimant promptly reported the incident to his

supervisor, Kay Greenway. Although the claimant reported experiencing problems with his hearing, the employer did not provide medical treatment until after the claimant had already seen his own physicians, and after the claimant filled out an Employee's Notice of Injury. Ms. Greenway is not longer employed by the respondent. It appears that Ms. Greenway filled out an employer's first report of injury which was never filed with the Commission.

Sherry Calderono, the H.R. manager for the respondent, was called as a witness for the respondent. She stated that the claimant always talked in a very loud volume. However, she acknowledged that the claimant never complained about any hearing problems prior to March 31, 2004. A portion of Ms. Calderono's testimony in response to questions from this examiner, is set out below:

BY JUDGE GREENBAUM:

Q. What was Ms. Greenway's position with the Area Agency on Aging?

A. She was transportation manager.

Q. Okay. As a transportation manager, she was the claimant's immediate supervisor, is that right?

A. That is correct.

Q. Would she – do managers, are they instructed to go through any orientation on what to do if someone reports or asks to file a workers' compensation claim?

A. That was covered with him by Human Resources during his first day of employment.

Q. Are you talking about –

A. Our department – my department.

Q. And what – and what is your instructions – or what were your instructions six years ago to Mr. Harmon about filing a workers' comp claim?

A. To report it to his supervisor immediately, and if he needed medical attention, we had him sign a list of doctors that were in the area that we would have him to go see.

Q. Okay. And his testimony this morning was that he promptly reported it or the next day to Ms. Greenway?

A. That was his testimony, yes, sir.

Q. And requested medical treatment?

A. That was his testimony.

Q. And if his testimony is truthful and credible, what should have Ms. Greenway done, if anything?

A. Ms. Greenway would report the injury or the need for medical attention to Human Resources.

Q. When is the first notice that the HR department had that the claimant was claiming a work-related injury?

A. I believe the date was April 13th.

Q. And is that when you made arrangements for him to be seen by Dr. Lack?

A. That is correct.

Q. He had already seen a doctor at that time, right?

A. He had.

Q. And who took the information from the claimant and filled out the claim form?

A. Kay Greenway took the information from the claimant, reported the information to my assistant, Pam Newton, who filled out the First Report of Injury.

Q. Do you have the form that Ms. Greenway filled out?

A. Not with me, no.

Q. Okay. Have you seen it?

A. Yes.

Q. Does it reflect when the claimant first reported his injury to her?

A. The form reflected that she was aware of the incident after it happened, but she was not aware of any injury to him. That her first knowledge of the injury was on the date that she reported it to Human Resources.

Q. Well, did – did the form reflect that he was complaining of hearing problems the day following the incident?

A. It did not.

Q. Other than speaking very loud and demonstratively, in your previous conversations with the claimant, did he have difficulty understanding you?

A. I had to repeat myself in explaining various items with the 401K. I did not know if that was due to his hearing or if he just did not understand what I was saying.

Q. So you don't know whether it was technical or –

A. Right.

Q. Well, with the exception of the 401K, on your day-to-day contact with him, did he have any difficulty understanding what you said?

A. Not – not that I'm aware of.

Q. Okay. Thank you. (Tr.31-33)

The claimant was next seen by Dr. Lack, the company doctor. Dr. Lack evaluated the claimant on April 14, 2004, at which time he recommended serial audiograms to determine whether the claimant's hearing loss was related to loud noises that he was exposed to when the tire blew or due to normal aging. Dr. Lack

permitted the claimant to return to work with the restriction that he avoid any job requiring good hearing and to allow time for spontaneous recovery. Dr. Lack referred the claimant to Dr. Gary W. Woodward, an ENT specialist, for further evaluation. The medical record reflects that while the ringing in the claimant's ears was resolved, his hearing loss did not improve. Dr. Woodward diagnosed sensorineural hearing loss which was noise induced. (Resp. Ex. A, p.113)

It has been recommended that the claimant be fitted for hearing aids. To date, the claimant has been unable to obtain follow-up medical treatment, and obtain the hearing aids due to the high cost of such appliances.

COMPENSABILITY

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).

The respondents contend that the claimant did not sustain a hearing loss arising out of and in the course of his employment, maintaining that the claimant could not meet his burden of proof pursuant to A.C.A. §11-9-102. While the respondents did not specify which specific requirement of the amended act that the claimant failed to prove, and while I did not diligently press for the particular requirement that was lacking, I find that the claimant has satisfied each and every requirement necessary to establish compensability. I anticipate that respondents may attempt to argue that the claimant has failed to establish compensability with medical evidence supported by objective findings as defined in A.C.A. §11-9-102(16). "Objective findings" are those findings which cannot come under the voluntary control of the claimant. Admittedly, audiological evaluations require subjective responses from a patient. The same is required of eye examinations. However, a training evaluator administers a blind test repeatedly to ensure the accuracy of the test. Audiological evaluations by a trained audiologist are the best and most accurate, scientific evaluations available to test for hearing loss. The results by a training specialist must be objective findings within the meaning of our act. To hold otherwise, would only lead to the absurd conclusion that hearing loss and loss of vision are not compensable injuries. Clearly, our act compensates for such injuries.

Respondents introduced a one hundred forty-six (146) page medical exhibit. A review of the medical index reflects that a substantial portion of the medicals are not relevant to the issue before this Commission. It appears that the only relevance of these medicals is to confirm that the claimant never reported or received treatment for hearing loss prior to March 31, 2004.

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 a thorough review of the entire record, weighing the evidence impartially, and without giving the benefit of the doubt to either party, I find that the claimant has sustained his burden of proving, by a preponderance of the credible

evidence, that he sustained a hearing loss injury within the meaning of the workers' compensation act.

There is no credible evidence that the claimant experienced any hearing problems before March 31, 2004. Based upon my observations of the character and demeanor of the claimant, I found him to be most credible. The claimant's testimony that he did not have hearing problems before March 31, 2004, was corroborated by both a friend, Katherine Copeland, and by respondents' HR manager.

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, *Wal-Mart Stores, Inc. vs. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other explanation for the injury. *Hall vs. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). However, if the disability does not manifest itself until months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. *Kivett vs. Redmond Co.*, 234 Ark. 855, 355 S.W.2d

172 (1962). *See also, Wentz vs. Servicemaster*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

The claimant's credible testimony, together with the testimony of the corroborating witnesses, and the medical evidence establishes the causal connection.

AWARD

Respondent, Risk Management Resources, is hereby directed and ordered to pay all medical and related treatment as the result of claimant's hearing loss, together with continued, reasonably necessary medical treatment, including, but not limited to hearing aids.

All additional issues have been specifically reserved.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge