

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203394

THOMAS HARVEY, EMPLOYEE	CLAIMANT
SEARS ROEBUCK & COMPANY, EMPLOYER	RESPONDENT
LIBERTY MUTUAL FIRE INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 16, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on May 9, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant appeared pro se.

Respondents represented by Mr. Eric Newkirk, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 9, 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 April 6, 2005, and a Prehearing Order was filed on April 7, 2005. 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. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" without objection.

It was stipulated that the employment relationship existed on November 19, 2001, and that the claim had been controverted in its entirety. At the hearing,

respondents acknowledged that if compensability was determined, the claimant earned sufficient wages to entitle him to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be determined.

Claimant contended, in summary, that he sustained a compensable injury to his left hip, back, and left lower extremity as the result of a specific incident identifiable in time and place of occurrence on November 19, 2001; that he had been totally disabled since that date and entitled to either temporary total disability or permanent disability benefits; that, in addition, respondents should be held responsible for any outstanding medical and related treatment, together with continued, reasonably necessary medical treatment.

The respondents contended that the claimant did not sustain a compensable injury on November 19, 2001; that any of the claimant's physical problems were unrelated to his employment, and were not supported by objective medical findings as required by the Act. Respondents pointed out that the claimant had not submitted any medical records whatsoever to support his alleged injury or connect his physical problems, if any, to the work environment. As an affirmative defense, respondents maintained that the claim was barred by the Statute of Limitations.

The claimant was the only witness to testify. The record is composed solely of the transcript of the May 9, 2005, hearing containing numerous exhibits.

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 observe the character and demeanor of the claimant, 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 filed a Commission Form AR-C on or about April 18, 2002, reporting an alleged accident on November 19, 2001, as well as a second AR-C on or about October 21, 2004, claiming additional benefits for the same, alleged injury. The initial claim filing tolled the Statute of Limitations, and, therefore, this claim is not time-barred.
4. The claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury arising out of and during the course of his employment with Sears Roebuck & Company on November 19, 2001.
5. The claimant has failed to prove, by a preponderance of the credible evidence, that there is a causal connection between any of the claimant's

physical and psychological problems after November 19, 2001, and his employment with the respondent herein.

#### DISCUSSION

The record in this claim is replete with inconsistencies and contradictions. In fact, the claimant's own testimony is self-contradicting. The claim turns entirely upon the claimant's credibility. For reasons set out further below, I did not find the claimant to be a credible witness. Admittedly, the record reflects that the claimant has significant physical and mental problems. In fact, the claimant has been declared permanently totally disabled by the Social Security Administration. However, there is no competent evidence that the claimant's physical or mental problems are in any way causally related to his employment. In fact, the record reflects that the claimant's physical problems pre-dated the alleged incident and injury. The record further reflects that the claimant has significant psychological problems. Although the claimant maintained that his mental problems were the result of being over-medicated for his alleged injury, there is no evidence to make this connection either.

The claimant, Thomas Harvey, is fifty-six (56) years old. He graduated from high school. In addition, the claimant obtained vocational training in appliance repair, as well as heating and air conditioning installation and repair. The claimant began working for the respondent in 1977. He last worked on November 19, 2001, which was the date of his alleged injury. The claimant's employment was primarily

related to servicing heating and air conditioning units. The claimant's description of the alleged accident, its reporting, and his medical treatment is set out below:

Q Okay. And tell me, since you say that your injury – your multiple injuries were a result of a specific event, what happened on November the 19<sup>th</sup> of 2001 that caused your injury?

A The last time I come in, I crawl out from under this house. I hit my hip, you know, which could be – well, a lot of fellows – well, I hit something. You know, I was used to rolling and crawling and doing this and finding an easy way of getting out. I got faced with a door, and I bumped myself, and I felt funny.

Q All right. So you were crawling out from under a house, is that right?

A Yes, sir.

Q And you bumped your head?

A No, not my head.

Q Well, what did you bump?

A This part of my body here.

Q The record won't describe –

A It just be –

Q So as you were crawling out from under the house, you bumped your left hip?

A Yes, that's what I would call it, sir.

Q Okay. And do you know what you bumped your left hip on?

A The crawl space door, sir.

Q The access door?

A Yes, sir.

Q And when you did this and you bumped your hip, for the record, tell us what

kind of pain you experienced and where you experienced that pain.

A I ain't experienced any real pain at that time. I felt a tingling sensation.

Q Okay. And where did you feel that tingling sensation?

A It was going down my foot up into my leg.

Q Down your left leg into your left foot?

A Yeah.

Q Basically, the entire left lower extremity, is that right?

A That's what it felt like to me.

Q Okay.

A It just felt weird. It wasn't something that I had felt before this.

Q Okay. So you weren't in a great deal of pain, but you felt or experienced something that was different than what you had ever experienced before, is that right?

A That is correct.

Q Okay. And did you continue doing your job?

A No.

Q No?

A I finished doing the paperwork, and that was the last job I was going to anyway.

Q All right. Well, then, tell me what did you do after you filled out the paperwork on this job? Did you contact your employer?

A I called him on the cell phone, just the supervisor, to say something is wrong, something –

Q I'm sorry, slow down so we can get all of this on the record.

A Yes, sir.

Q You called your supervisor on your cell phone, is that right?

A Yes, sir.

Q Who was your supervisor?

A Dan Banker, B-a-n-k-e-r.

Q And what did you tell Mr. Banker when you called him on the phone?

A I say, "Something is wrong. Something happened to me." And he said – do you want to know what he said?

Q Yes, sir, I do.

A He said, "Hold that thought."

Q "Hold that thought"?

A "Don't you get paid for overtime? Don't you get paid for maintenance agreement?" I say, "You know I do." And I went home. I was about nine or ten blocks from home.

Q You were close to your home when this happened, right?

A Yes, sir.

Q And how did you get home?

A I drove that truck. I kept the truck all the time.

Q Okay. So you were in a company truck. You drove the company truck home, right?

A Yes, sir.

Q Okay. And you didn't work any more on the 19<sup>th</sup> of November?

A I couldn't walk.

Q You couldn't walk.

A No, I tried to get up and go to the bathroom, and I was – it was like my equilibrium was screwed up.

Q Okay. And then did you seek immediate medical treatment on the 19<sup>th</sup>?

A I am not certain, but I did surely seek immediate – I mean, medical treatment. I was having trouble with my wife seeking it also. I even checked into the crazy house, because it was driving me insane. It was making me cry. And –

Q I'm sorry. You checked into what?

A A psychiatric hospital, because I don't want to hurt. I knew I was going insane. That was sometime after it all got glued up.

Q I don't want to jump ahead about after. I want to try to focus on what you did immediately after this incident on November the 19<sup>th</sup>. Okay?

A Okay.

Q I know you went home. You didn't work anymore. Did you talk – when is the next time you talked to your employer?

A Seem like I talked to them almost every day almost or something. I told them I was sick.

Q Did you ever fill out an incident report on the job with regard to your claim?

A No, I never filled out one.

Q You never filled one out?

A No, he – I was protecting this guy. He just got a new job and he didn't want no problems, and I thought –

Q When you say you were – I'm sorry.

A Excuse me, sir. I'm sorry, I shouldn't have went ahead of you.

Q When you say you were protecting that guy, the record doesn't tell us – are you talking about Mr. Banker?

A Yes, sir. (Tr.22-26)

The claimant maintained that he first obtained medical treatment through Dr. Elwyn Joe Perser who subsequently referred him to a neurologist, Dr. J. Brett Ironside, for his multiple left-sided complaints. However, Dr. Perser's clinic notes reflect that the claimant first visited his clinic on April 3, 2001, at which time the claimant complained of left arm pain that had been going numb for about one month. The claimant also described having undergone knee surgery the prior year. The claimant was taking multiple medications at the time of his visit to Dr. Perser. The claimant returned to Dr. Perser on April 19, 2001, with further complaints, at which time he was referred for a nerve conduction study. (Resp. Ex. C, pp.1-5)

The claimant next returned to Dr. Perser on December 10, 2001, which was the first visit following his alleged injury. Without giving any history of any injury, Dr. Perser's notes reflect the following:

S: Mr. Harvey presents in somewhat of an unusual fashion. He has a suitcase that contains recent MRI's dated just earlier this week ordered by another physician. These MRI's are of his back and there is no report with them. I have requested the report to try to ascertain what is transpiring in the report order by Dr. Nunn and done 12-6-01 reports some mild disc desiccation at L4-5, mild disc bulging without stenosis and mild narrowing of the L4 feramina without nerve root compression. I have urged Mr. Harvey to follow up with Dr. Nunn since he ordered these films and he says he will do so. Otherwise, today he says that the films were done for his left leg having some questionable numbness vs. weakness. He does stumble several times around the examination room while talking to him and on examination of his knee there is appreciable laxity to the knee with varus and valgus stressing which reproduces pain of his knee. I am wondering if he does not have some tears of the lateral colateral ligaments leading to instability of the knee causing him to fall. We are going to set him up for an MRI of his knee as I feel that he probably has some pathology in this area but otherwise he needs to follow up with Dr. Nunn for his previous MRI. (Resp. Ex. C, p.6)

Because of the claimant's ongoing and progressive complaints, Dr. Perser subsequently referred the claimant to Dr. J. Brett Ironside. Dr. Ironside eventually diagnosed some neuropathic abnormality which he attributed to alcohol use. (Resp. Ex. C, p.14)

Another interesting observation was made by physical therapist Dan Myers on February 21, 2002, which is set out below:

Mr. Harvey is in today for therapy and recheck of the left leg. I noted he had seen Dr. Perser earlier and was walking across to the therapy waiting room. I noted that he was walked [sic] without a limp. However, when I called him back he was limping on the right side today. Muscle testing in the left lower extremity is grossly five today. He is showing good rom. He is complaining of tingling in the leg down to the foot like something is crawling on it. I explained to him that in all likelihood that this is probably due to the neuropathy [sic] of the leg and there is no cure for this. I have talked with Dr. Perser and he has placed him on Neurontin and Elavil. I would like to continue to monitor him next week. (Resp. Ex. C, p.16)

Dr. Perser concluded that the claimant has documented peripheral neuropathy. There is no medical evidence whatsoever attributing the neuropathy to any work-related injury. As reflected above, and as subsequently confirmed by Dr. Perser, the most reasonable explanation for the claimant's peripheral neuropathy is secondary to alcohol consumption. (Resp. Ex. C, p.19)

I feel compelled to point out that during the prehearing conference, I detected an extremely heavy smell of alcohol about the claimant which I was remiss in not pointing out in the Prehearing Order, but which appears to support the conclusions of the physicians.

On cross-examination, claimant acknowledged having back problems which

pre-existed his alleged injury, and having been diagnosed as having degenerative arthritis. The claimant further, candidly, admitted that he never reported a work-related injury to medical providers. He maintained that his primary problems were psychiatric problems which he attributed to being over medicated for his work-related injury. In addition, the claimant acknowledged that he had served time in prison which further questions his credibility.

In addition, when the claimant filed his workers' compensation claim on April 18, 2002, he attributed his hip and lower extremity problems to either a toxic spider bite or exposure to chemicals on November 19, 2001, which is totally inconsistent with his current contentions. (Comm. Ex. 2)

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 reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that he sustained a compensable injury arising out of and during the course of his employment with Sears Roebuck & Company. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge