

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F301895

JAMES A. HICKS, EMPLOYEE	CLAIMANT
OMNIUM, EMPLOYER	RESPONDENT
CRAWFORD & COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 19, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on July 1, 2005, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Phillip Wells, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted July 1, 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 June 15, 2005, and a Prehearing Order was filed on said date. In addition, this claim was the subject of a prior conference on November 13, 2003, at which time the claim was scheduled for a formal hearing. Prior to the scheduled hearing, the claimant was activated for military service which necessitated cancellation of the hearing. At the hearing, the parties stated that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. In addition to the prior stipulations, the parties stipulated to the applicable compensation rates.

It was stipulated that the employment relationship existed at all relevant times, including February 5, 2003; 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 on February 5, 2003, was \$613.29, entitling him to compensation rates of \$417.00 per week for temporary total disability and \$313.00 per week for permanent partial disability in the event the claim was found compensable.

By agreement of the parties, the primary issue to be 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 back injury as the result of a specific incident identifiable in time and place of occurrence on February 5, 2003; that respondents should be held responsible for all hospital, medical, and related expenses, including, but not limited to back surgery performed on May 14, 2003, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits beginning February 8, 2003, and continuing through August 18, 2003; that he sustained an eight percent (8%) permanent impairment as a result of the injury and surgery; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant did not sustain a work-related injury on February 5, 2003. If compensability was overcome, respondents maintained that it is not responsible for benefits prior to notice being received on

February 18, 2003. Additionally, respondents maintained that if compensability was overcome, it was entitled to a credit or offset for any medicals paid under the claimant's health insurance, as well as short-term disability benefits previously received, as well as an offset for unemployment benefits paid in the event there was an overlap in the period of temporary total disability. The claimant acknowledged respondents' entitlement to any offset, if applicable.

In addition to the claimant, his wife, Karen Hicks, was called as a corroborating witness. Heather L. Curtis, Troy Gene Forsythe, and Chris Crane were called as witnesses by the respondents. The record is composed solely of the transcript of the July 1, 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 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 reasonable and are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that he sustained a back injury arising out of and during the course

of his employment on February 5, 2003.

4. The claimant has failed to prove, by a preponderance of the evidence, that his injury and resulting surgery were causally related to a specific incident identifiable in time and place of occurrence at the workplace on February 5, 2003.

### DISCUSSION

The record in this case is replete with inconsistencies and contradictions. The claim turns entirely upon the credibility of the claimant. A claimant's testimony is never considered uncontroverted. In fact, the testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The claimant, James A. Hicks, began working for the employer in February, 1998, as a mill operator. The claimant's duties included lifting bags of farm chemicals to be mixed during the operation which the claimant described as physical work requiring frequent lifting of up to fifty (50) pounds of chemicals. The claimant acknowledged having sustained a prior back injury in a motor vehicle accident in 1997. He denied having any additional back or neck problems between 1997 and the immediate claim. The claimant further acknowledged several prior work-related incidents, including a chemical burn to his eyes, a cut thumb, and a back strain

which were apparently treated as medical only claims. The claimant testified that he sustained a work-related injury on February 5, 2003. He maintained that he was pouring recycle material into a barrel when he “felt a bolt of lightening go through my back” which caused immediate pain. He stated that he experienced the pain in the upper and middle part of his back. The claimant denied experiencing any back problems prior to the incident. He maintained that the incident was witnessed by a co-worker, Shawn, a/k/a Shawntel Cambell. The claimant asserted that he initially ceased working and that he reported the injury later that afternoon to his immediate supervisor, Troy Forsythe. (Tr.12-13, 26-27)

The claimant testified and the record confirms that he initially received emergency room treatment on February 5, 2003, at the Baptist Memorial Hospital in Blytheville, Arkansas. The emergency room records failed to reflect a history of work-related injury. The records did note onset of back pain that same day without any recent injury. It also noted that the claimant experienced similar symptoms a few months previously. The claimant subsequently provides history of a work-related injury to his family physician, Dr. Gallemore, on February 13, 2003, when he was first evaluated by said physician. (Cl. Ex. A, pp.3-5)(Resp. Ex. A, p.11)

Dr. Gallemore ran various diagnostic studies and eventually referred the claimant to Dr. Allen Boyd, a neurosurgeon at the Semmes-Murphey Spine Institute in Memphis, Tennessee. Dr. Boyd performed surgery for a herniated disc at L4-5. He eventually released the claimant with an eight percent (8%) permanent impairment rating. The claimant’s periods of disability, as well as the physical

impairment rating is not disputed, if the claimant can overcome the threshold issue of compensability which has been disputed. It is further undisputed that the claimant's medical treatment was paid under health insurance and that the claimant drew short-term disability beginning February 9, 2003, through August 9, 2003, as well as unemployment compensation.

Claimant's wife was called as a corroborating witness.

Heather L. Curtis, an administrative assistant in the H.R. department for the employer testified in respondents' behalf. Ms. Curtis stated that when the claimant first missed work, he came in and inquired about health insurance benefits, as well as short-term disability, but never requested any information concerning workers' compensation and never indicated a work-related injury to her. Ms. Curtis stated that it was not until she received a phone call from Dr. Gallemore on or about March 1, 2003, that she first learned the claimant was attempting to have his medical paid under workers' comp at which time she immediately contacted the claimant's supervisor, Troy Forsythe, as well as the safety leader, Dennis Turney, concerning the claim. However, the record reflects both Mr. Forsythe and Mr. Turney had apparently learned about the alleged injury and claim on or about February 18, 2003. Ms. Curtis stated that the claimant never mentioned a work-related injury to her.

Troy Gene Forsythe was also called as a witness by the respondents. He stated that the claimant reported experiencing back pain on February 5, 2003, which the claimant related to a possible kidney stone, and the claimant indicated he needed to go to a doctor. Mr. Forsythe maintained that the claimant never reported

a work-related incident to him. Mr. Forsythe declared that if the claimant had reported his problems as being related to his job, he would have immediately sent the claimant to the safety leader to fill out an incident report.

Chris Crane, another witness called by the respondents, was a laboratory leader. Mr. Crane testified that he was in Troy Forsythe's office discussing a quality issue concerning some of the products they were making at the time, when the claimant came into the office reporting back pain which he attributed to possible kidney stones. Mr. Crane recounted that the claimant did not report any work-related injury.

On rebuttal, the claimant denied telling any one that his problems might be related to kidney stones. He further maintained that Mr. Crane was not in the room when he reported his injury to Mr. Forsythe.

As reflected above, the record in this case is replete with inconsistencies and contradictions. The claim turns entirely upon the claimant's credibility. The claimant denied experiencing any back problems prior to February 5, 2003, save following a 1997 motor vehicle accident. The initial emergency room report reflects that the claimant experienced similar symptoms a few months prior to his emergency room visit, but that he did not seek medical treatment at that time. The emergency room report further fails to reflect any recent injury. The claimant's testimony is specifically disputed by both Troy Forsythe and Chris Crane. Although the claimant identified several potential witnesses in his prehearing information filing, including an eye-witness, Shawn Cambell, the claimant did not call any corroborating witnesses

except his wife; however, I feel compelled to point out that respondents identified witnesses that were not called, including the same Mr. Cambell. The record reflects that Mr. Cambell is still employed by the respondent employer.

Under the prior law, where no explanation is offered for the absence of a company employee as witnesses, who are in a position to contradict the claimant's testimony if it was not true, the Commission, as triers of fact, could properly draw the inference that their testimony would have been unfavorable to the company. *Brower Mfg. Co., et al vs. Willis, et al*, 252 Ark. 755, 480 S.W.2d 950 (1972). However, under the current law, the burden of proving the job relatedness of an alleged injury rests upon the claimant, *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); and there is no presumption to this affect. *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 her 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).

Admittedly, because this claim turns primarily upon the credibility of the claimant, I may have reached a different conclusion had the inference previously permitted, still be allowed. However, the Full Workers' Compensation Commission has held that under the reform legislation of 1987 and 1993, said decision is no longer the law and the Commission can no longer make such an inference, pointing out that the claimant carries the burden of proof and it is incumbent upon the claimant to produce all witnesses necessary to prove his claim. *Hooper vs. Maverick Tube*, AWCC #F202296, Full Commission Opinion filed February 15, 2005.

The claimant is required to prove his claim. In determining whether a claimant has sustained his burden of proof, the Commission must weigh the evidence impartially, without giving the benefit of the doubt to either party and without making impermissible inferences. 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 within the meaning of the Arkansas Workers' Compensation Laws. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge