

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F407595

**SAMUEL LEE OLIVE,
EMPLOYEE**

CLAIMANT

**LITTLE CAESAR'S PIZZA
OF ARKANSAS, INC.,
EMPLOYER**

RESPONDENT

**HANOVER INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 18, 2005,

Pursuant to a hearing conducted April 19, 2005, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Scott A. Scholl, Attorney at Law, Jacksonville, Arkansas, appearing for the claimant, and

Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over compensability of an alleged injury to the claimant's foot.

The claimant contended that he sustained a compensable injury to his foot June 21, 2004, and should be awarded benefits, including reasonably necessary medical and related expenses as well as temporary total disability benefits from the date of injury until August 23, 2004. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant's injury did not occur at work. They further contended that the claimant did not timely report the alleged injury and that his medical care for an infection was not reasonably necessary in connection with the alleged injury.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including June 21, 2004; the claimant's average weekly wage on that date was \$80.00; and that the claim has been controverted in its entirety.

3. The preponderance of the evidence fails to show that the claimant sustained an injury arising out of and in the course of his employment.

DISCUSSION

The claimant testified that he injured his right foot on June 21, 2004, when he was washing dishes at the respondent employer's pizza restaurant. He stated that he grabbed a handful of dough pans and, as he was putting them on the rack, they slipped and fell back and hit him on the foot. He estimated that each dough pan was about two feet by three feet by about an inch deep and all together they weighed about 40 pounds.

The claimant testified that he immediately told Shaun Tucker about the incident and was advised not to worry about it but to go home and soak it. He said that the next day he went to the hospital and received treatment in the emergency room because his foot was very swollen. He was then referred to Dr. Joe Daugherty for treatment and later saw Dr. Reed Kilgore who performed surgery July 2, 2004, an irrigation and debridement of an abscess on his right foot. Following the surgery, the claimant developed what he described as a hole in his foot which required additional treatment. He has requested benefits as described above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Shaun Tucker, testifying for the respondents, stated that he was the manager on the shift at the time of the alleged incident. He said that he was about fifteen feet away from the claimant and if twenty aluminum dough pans had been dropped to the floor, it would have made a big sound that he would have noticed. He further stated that he did not hear the dough pans hit the floor; that the claimant did not approach him about having dropped dough pans on his foot; and that he did not send the claimant home early. He also testified that if someone was injured, he would have first given him forms to fill out and then called Margie, the general manager, to let her know what had happened. He stated that he first learned of the claimant's foot problem when he came in and was limping and, when he asked him what had happened, the claimant told him he dropped either an iron or an ironing board on his foot at home, but did not mention dough pans at work.

Given the state of the evidence and the burden of proof, the preponderance of the evidence does not demonstrate that the claimant sustained an injury during his employment. It seems likely that Shaun Tucker would have noticed the commotion of 40 pounds of dough pans hitting a tile floor and would have followed up with forms if the claimant had indicated he was hurt. On the other hand, it seems unlikely that dough pans weighing anywhere in the neighborhood of 40 pounds could have landed on the claimant's foot without causing a more severe crush injury than the claimant sustained. Indeed, the injury sustained by the claimant is more consistent with an iron having been dropped on his foot, as testified by Mr. Tucker. In short, Mr. Tucker's recollection of the events is more credible than that of the claimant.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge