

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409853

KELLY M. TAYLOR, EMPLOYEE	CLAIMANT
FRITO LAY, INC., EMPLOYER	RESPONDENT
SEDGWICK CMS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 18, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on February 11, 2005, at Jonesboro, Craighead County, Arkansas.

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

Respondents represented by Mr. Lee J. Muldrow, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted February 11, 2005, to determine whether the claimant sustained a compensable right shoulder injury arising out of and during the course of her employment with Frito Lay, Inc.

A prehearing conference was conducted in this claim on January 5, 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, as well as an amendment concerning respondents' contentions. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed between the parties at all relevant times, including February 2, 2004; that the claimant earned sufficient wages to entitle her to compensation rates of \$337.00 per week for temporary total disability and \$253.00 per week for permanent partial disability in the event the claim was found compensable; and that the respondents had controverted the claim in its entirety.

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

Claimant contended, in summary, that she sustained a compensable injury to her right shoulder as the result of a specific incident identifiable in time and place of occurrence on February 2, 2004; that she was entitled to temporary total disability benefits beginning on or about September 20, 2004, at which time she underwent surgery, and continuing through a date yet to be determined, maintaining that her healing period had not ended; that respondents should be held responsible for outstanding medical treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant's condition did not arise out of and in the course of her employment; that there was no objective medical evidence of a compensable shoulder condition or injury; and that the claimant cannot

establish that a work-related injury was the major cause of the claimant's disability or need for treatment. At the hearing, respondents pointed out that part of its reason for controverting the claim was that the injury was not promptly reported. Said defense was not raised for the purpose of establishing when liability begins pursuant to A.C.A. §11-9-701, but, rather on the issue of whether the claimant sustained a job-related injury.

The claimant testified in her own behalf. Wayne Hendrix and Tracy Lawson were called as witnesses for the respondents. The record is composed solely of the transcript of the February 11, 2005, hearing containing a joint medical exhibit consisting of forty-six (46) pages.

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 failed to prove, by a preponderance of the credible evidence, that she sustained a compensable injury to her right shoulder as

the result of a specific incident at the workplace on February 2, 2004.

4. The claimant has failed to establish, by a preponderance of the credible evidence, that her right shoulder problems, need for medical treatment related to her right shoulder, and disability are causally related to a work injury.

DISCUSSION

The record in this claim is simply replete with inconsistencies and contradictions. This claim turns entirely upon the claimant's testimony. 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's description of her job duties, how her alleged injury occurred, as well as the reporting of the injury is set out below:

Q But, first, let me ask you were you working at Frito Lay on February 2, 2004?

A Yes.

Q And what was your job on that date? What was your position or title or what did you normally do on that date?

A Assistant processing operator.

Q Assistant process operator?

A Yes.

Q Okay. And what does that person do? Just tell us in general terms.

A I run tests on the potatoes, set up the abrasive peelers, run a chroma sort, it separates the good chips from the bad chips, and I also help when the fry operators need help, help them.

Q How long had you – how many years or how long had you worked at Frito Lay at that time?

A About four and a half, right at four and a half years.

Q Right at four and a half years. Okay. When you began on – what time did you go to work on February 2, 2004?

A 5:48 a.m.

Q Okay. Was that an earlier time than you would normally go to work?

A Yes.

Q Where you pulling a longer shift that day?

A Yes.

Q Why?

A I had to be called in. No one was coming in to set up, I was called in to set up.

Q Okay. At this time tell the Judge how you injured your shoulder on that date.

A Okay. On February 2nd I went in to set up the abrasive peelers. I was picking up the guards to put on the top of the peelers. When I lifted the peelers, I went to lift it over onto the machine and I felt a pop in my right shoulder. I put the guard down and went in and reported I had hurt myself.

Q Okay. Now, I'm sorry, tell us again what you were lifting.

A Guards, guards to go inside the abrasive peeler machine.

Q Guards?

A Yes, sir, side guards.

Q Can you describe or explain to us what these guards are? We don't have a pictures [sic] of it, but if you can just give us a brief explanation of what the guard is, what size it is, how much it weighs, what you have to do to lift it?

A Okay. In order for me to lift the guards, I'm 5'5", I have to stand on a two step ladder. The machines are about six feet tall. The guards weigh anywhere from, I estimate, 40 to 50 pounds. The side covers that cover the brushes in the machines, in order for me to pick them up I have to grab them, bear hug them, bring them up, stand on the step ladder and pick them up over the machine over my head and put them on.

Q How long are they?

A I'd give about six feet.

Q How wide are they?

A Wide, three to four – I have to do like this.

Q Is it kind of made of metal?

A Yes.

Q Okay. Now, you say you told somebody that you got hurt. Who did you tell?

A I told Tony Wallace.

Q And is Mr. Wallace a supervisor?

A No.

Q Who is your supervisor or who was the person to tell at that time?

A Wayne Hendrix.

Q Why did you not go to Mr. Hendrix at the time that you hurt yourself?

A He wasn't there.

Q What time of the morning did you hurt yourself?

A Around 6:00 a.m.

Q What time does Mr. Hendrix normally get to the plant?

A 8:00 a.m.

Q Okay. Then did you later in the day tell Mr. Hendrix?

A Yes.

Q Do you know about what time you told Mr. Hendrix that day?

A I met Mr. Hendrix coming out to the floor around 8:00, little after 8:00.

Q Okay. So about two hours after you – you didn't tell Mr. Hendrix until about two hours after you were hurt?

A Correct. (Tr.8-11)

The claimant also maintained that she reported her injury to the company nurse, Tracy Lawson, after allegedly reporting it to Mr. Hendrix, as reflected below:

A After I told Mr. Hendrix about my shoulder, he told me to go see the nurse. I went down to see the nurse, she wasn't in the office.

Q The nurse at that time was?

A Tracy Lawson.

Q Okay. Then what happened?

A Tracy wasn't coming in until 10:00. I went back to the floor and continued to do my job. The line came up at 8:00 a.m. –

Q Okay.

A – I started doing my job, waiting for the nurse to come in.

Q And when she came in, did you go see her?

A I was able to go see the nurse.

Q Tell us what happened then.

A I told her that I had hurt my shoulder. She asked me how. I said I was called in to put the guards together, the peelers together, put third shift's –

Q Did you tell her essentially what you told us already here this morning?

A Yes, yes.

Q And then did she treat you?

A She gave me Biofreeze, rubbed Biofreeze on it. First, she checked me. I told her it was hurting. She put Biofreeze on it and gave me Ibuprofen tablets. (Tr.15-16)

The record reflects that prior to February 2, 2004, the claimant sustained work-related injuries, specifically, deQuervains tendonitis with both upper extremities which was accepted as compensable beginning on or about August, 2002, when her physical problems were reported to the employer herein. Respondents exercised good faith in meeting its obligations under our workers' compensation laws by providing the claimant with prompt medical treatment related to the deQuervains syndrome after it was reported. In fact, the record reflects that respondents provided the claimant with suitable, light-duty work at all times for the admitted work-related injury. The claimant was treated conservatively for her prior injury until undergoing surgical releases of the deQuervains in April and May, 2004. (Jt. Ex. A, pp.14-23)

The claimant's primary treating physician for the deQuervains syndrome was Dr. Jeffrey Cole, an orthopedic surgeon in Memphis, Tennessee. Although the claimant testified that she reported her alleged February 2, 2004, injury to Dr. Cole,

there is no history contained in Dr. Cole's reports of any work-related injury. Dr. Cole's records do reflect a new onset of right shoulder pain which was first reported on March 15, 2004, again, without any history of injury. (Jt. Ex. A, p.9)

The first history of a work-related shoulder injury was provided to Dr. Michael Lack, the company doctor on August 16, 2004. (Jt. Ex. A, p.28) Dr. Lack subsequently performed an MRI of the claimant's right shoulder which revealed a right rotator cuff tear at which time the claimant was referred to Dr. Guinn, an orthopedic surgeon in Jonesboro, Arkansas. Dr. Guinn performed surgery on December 13, 2004. Respondents controverted compensability of claimant's right shoulder injury. The claimant's medical treatment was paid under group health insurance. In addition, the claimant applied for, and received, short-term disability benefits. At the time of the within hearing, the claimant had not returned to gainful employment. It was pointed out at the hearing that although respondents provide light-duty employment following work-related injuries, these accommodations are not provided for injuries or physical conditions that are not work-related.

No corroborating witnesses were called by the claimant.

Wayne Hendrix, the claimant's supervisor, was called as a witness by the respondents. Mr. Hendrix specifically denied the claimant reporting a work-related injury to him on February 2, 2004. He stated that he first became aware that the claimant was alleging that she sustained a shoulder injury in February, 2004, during the summer of 2004, at which time he advised her to see Fredna Nichols, the

human resource manager, to fill out necessary paperwork. Mr. Hendrix maintained that had the injury been reported in February, he would have initiated a claim at that time.

Tracy Lawson was also called as a witness by the respondents. Ms. Lawson was not employed by the respondents at the time of the within hearing. She was formerly employed as the company nurse on and before February 2, 2004. I found Ms. Lawson to be a most credible witness. She denied the claimant coming to her office complaining of shoulder pain in February, 2004. She further denied the claimant ever reporting a work-related shoulder injury to her and denied ever treating the claimant for shoulder complaints. She acknowledged observing some notes from Dr. Cole on March 15, 2004, who was treating the claimant for deQuervains syndrome, reflecting complaints to him about shoulder problems. However, Ms. Lawson clearly indicated that the claimant never reported a work-related shoulder injury to her, which was inconsistent with the claimant's testimony that she reported the injury to Tony Wallace, Wayne Hendrix, and the company nurse.

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 her 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 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).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has simply failed to prove that she sustained an injury arising out of and during the course of her employment on February 2, 2004. As previously noted, the claimant's testimony is disputed by both Wayne Hendrix and Tracy Lawson. The first medical report containing any mention of right shoulder problems is Dr. Cole's March 15, 2004, report which fails to recite a history of a work-related injury. Admittedly, Dr. Lack's August 16, 2004, report contains an explanation of the injury consistent with the claimant's testimony; however, the explanation in the claimant's own words was not provided until more than six (6) months after the alleged injury and following surgeries related to her 2002 deQuervains syndrome claims. Further, I find the claimant's description of the alleged injury to be suspect. The claimant was being provided light-duty work on February 2, 2004, due to a prior work-related injury. Clearly, lifting guards weighing

approximately fifty (50) pounds is inconsistent with light-duty. If the injury was promptly and properly reported, some corroboration should be offered.

The burden of proof lies with the claimant. The claimant has failed to meet her burden of proof. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge