

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306316

HOWARD I. BENNETT, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 14, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on October 6, 2006, at Forrest City, St. Francis County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Andrew M. Ivey, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 6, 2006, to address various issues as set out further below.

First, it should be pointed out that the claimant has, at all times, been advised of his right to legal representation. In addition, the claimant has been advised that an attorney could not charge him a fee for representing him in a workers' compensation claim without approval of this Commission; that fees were normally awarded only out of benefits obtained in his behalf and that he would only be responsible for a portion of the fee if an attorney was successful in obtaining benefits for him. In addition, the claimant has been advised that he had the burden of proving his claim; that he was only entitled to one hearing; and, that for any reason, if he was

unsuccessful, he could not request another hearing while maintaining that the reason for the failure to prove the claim was lack of legal representation. The claimant elected to proceed in his own behalf.

A prehearing conference was conducted in this claim on August 16, 2006, 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. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" without objection.

It was stipulated that the employment relationship existed between the parties at all relevant times, including June 2, 2003; that the claimant sustained a compensable low back injury on said date; that he earned sufficient wages to entitle him to compensation rates of \$406.00 per week for temporary total disability and \$305.00 per week for permanent partial disability; that this claim has been the subject of a prior hearing, specifically, on November 12, 2004; that an Opinion was issued on December 14, 2004, from which no appeal was taken and which is now a final decision and the law of the case.

By agreement of the parties, the primary issue presented for determination was whether, in addition to the admitted low back injury, the claimant also sustained a cervical injury which was directly and causally related to the June 2, 2003, admitted incident. If overcome, claimant's entitlement to associated benefits must be addressed. In addition, as reflected by respondents' contentions set out below,

additional issues which must be addressed is whether the claim for benefits related to treatment for the claimant's cervical spine is barred by statute of limitations and/or barred by the doctrine of *res judicata*.

Claimant contended, in summary, that all his cervical complaints were directly and causally related to the June 2, 2003, injury; that respondents should be held responsible for all hospital, medical, and related expenses, including, but not limited to, a cervical surgery; that he was entitled to temporary total disability benefits beginning June 16, 2006, and continuing until such time that he was released by his treating physician. At the hearing, the claimant pointed out that he was released on September 30, 2006, and, therefore, amended his contentions to request temporary total disability beginning June 16, 2006, and continuing through September 30, 2006.

The respondents contended that they accepted a June 2, 2003, low back injury as compensable and have paid all appropriate benefits due to the claimant; that the treatment the claimant was seeking for his cervical spine was unrelated to the compensable low back injury; that any treatment provided by Drs. Robert Abraham, Frank Schwartz, Sunil Gera, and Jeffrey Kornblum was unauthorized and, therefore, not the responsibility of the respondents. In addition, respondents contended that the claimant's claim for benefits related to treatment for the neck and/or cervical spine was barred pursuant to Ark. Code Ann. §11-9-702(a)(1) because the claimant did not file a claim for benefits related to treatment of the cervical spine within two (2) years from the date of his compensable low back injury.

Respondents further contended that the claimant's claim for benefits related to treatment of the neck and/or cervical spine was barred by the doctrine of *res judicata*, which bars the re-litigation of issues which were not actually litigated or could have been litigated at an earlier suit.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the October 6, 2006, hearing containing a joint medical exhibit consisting of thirty-two (32) pages. The transcript of the November 12, 2004, hearing, as well as the December 14, 2004, Opinion was incorporated by reference and made a part of the record.

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 claimant and to observe his 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 evidence, that he sustained a cervical injury arising out of and during the course of his employment with Wal-Mart Stores, Inc., on June 2, 2003.

4. The claimant has failed to prove, by a preponderance of the credible evidence, that his need for treatment, and disability for his cervical injury is causally related to a June 2, 2003, work-related incident.
5. The immediate claim is not barred by statute of limitations.
6. The immediate claim is not barred by the doctrine of *res judicata*.
7. The claimant's entitlement to additional benefits related to his compensable back injury is specifically reserved.

DISCUSSION

As reflected above, the claimant sustained an admitted, compensable low back injury on June 2, 2003. The claimant description of the accident provided at the initial hearing on November 12, 2004, is set out below:

THE CLAIMANT: I was asked to go get some fixtures from the fixture cage, and when I went in, it was a mess. I had to climb over fixtures in order to get to them. As I would retrieve one, I'd have to back up, set it down and, you know, go back over some other stuff. As I was pulling one out and backing up, a sharp part of a shelf jammed me in the middle part of my back, and this caused me to step forward quickly. I stepped on a shelf that was on the concrete, and I slipped. I had what they call a deck plate under my arm, and this kept me from falling completely, but it twisted my back. I went ahead and finished getting the deck plates that I needed, and I went in. The first person that I saw, the first member of management that I saw, was Arthur Nelson. I explained to him that I had slipped and that I had hurt myself, but I didn't want to go to the doctor because it would be charged against the company; that I had hurt myself in times past similar to that, and it was just probably a sprained muscle, and I would try to work it off.

BY MS. TALBOTT:

Q Where exactly – when you said you twisted your back, what part of your back?

A I twisted the lower and evidently the upper part, too. I was not aware of the

upper part being twisted, but as it turned out, according to Dr. Trash –

Q We'll just let the medical records speak for themselves. Where did you notice pain?

A I noticed pain in the lower part and in the mid part where the shelf had jabbed me.

Q What about muscle pain in the middle?

A Yes, it was more so against the spine rather than – at that time than muscle.

Q So you did report the injury to a supervisor, but you did not file a claim?

A No, not until the next day. I believe it was the next day that I went ahead and filed the claim.

Q Because it was not being done?

A Then I believe it was the following Monday I just filed it just so that it would be on file, but I believe it was the following Monday that I actually went to the doctor – no, the following Tuesday.

Q On the 10th?

A Yeah, yes, ma'am.

Q All right, and what doctor did you go see?

A Dr. Meredith. (Tr.9-11)

The claimant was first examined and treated by the company physician, Dr. James T. Meredith, on June 10, 2003. Physical examination and x-ray revealed degenerative findings with narrowing of the L4-5 space. He was diagnosed as having sustained a lumbar strain. The claimant was treated with medication and rest and was to avoid lifting. The claimant returned to Dr. Meredith on June 16, 2003, complaining of increased pain and difficulty walking. Dr. Meredith suggested an MRI

and referred the claimant to Dr. Kenneth Rosenzweig, an orthopedic with Arkansas Specialty Centers in Little Rock, Arkansas. The claimant was initially examined by Dr. Rosenzweig on July 10, 2003. He remained under Dr. Rosenzweig's care through March 4, 2005. The claimant maintained that he complained to Dr. Rosenzweig of pain in the low back, mid back, neck, as well as migraine headaches. Dr. Rosenzweig was the claimant's primary treating physician. The record does reflect that the claimant subsequently received a change of treating physicians to Dr. Thrash, a chiropractor, prior to returning to Dr. Rosenzweig for the last time in March, 2005. Since that time, the claimant has seen a number of medical providers, all of which were paid by the claimant's health insurance except for co-payments required by the claimant's health insurance. Following Dr. Rosenzweig's final evaluation on March 4, 2005, it was suggested that the claimant undergo an independent medical evaluation. Thereafter, respondents provided an evaluation by Dr. J. Michael Calhoun at the Central Arkansas Neurosurgery Clinic in North Little Rock, Arkansas, who evaluated the claimant on July 8, 2005. At that time, the claimant reported multiple complaints which Dr. Calhoun opined were unrelated to the work injury in 2003. Dr. Rosenzweig also noted multiple complaints following his evaluation on March 4, 2005, while indicating that he had no medical records regarding any treatment between September, 2003, and February, 2005, during which time the claimant sought medical treatment on his own, again, from unauthorized medical providers, paid by health insurance.

The record reflects that the claimant was evaluated by numerous physicians. The claimant ultimately underwent an anterior cervical discectomy and fusion at C4-5 performed by Dr. Robert E. Abraham on May 24, 2006, which by history the claimant related to the fall several years previous. (Jt. Ex. A, pp.27-28)

The claimant filed a claim for additional benefits related to the alleged cervical injury on July 26, 2006. (Jt. Ex. B, p.4)

The primary issue presented for determination is whether, in addition to the admitted back injury, the claimant also sustained a cervical injury which was causally related to the June 2, 2003, incident.

The record in this claim is replete with inconsistencies and contradictions. Again, it is undisputed that the claimant sustained an admitted back injury. Although the claimant, at various times, made multiple complaints, he did not file a claim for additional benefits related to his cervical complaints until following cervical surgery. On cross-examination, the claimant first denied having sustained any neck injuries requiring medical treatment prior to the within claim. However, on further cross-examination, the claimant admitted sustaining neck injuries as the result of motor vehicle accidents in both 1978 and 1994. On further cross-examination, it was pointed out that the claimant's complaints to both the medical providers, as well as in his discovery depositions concerned complaints in the mid and lower back without mention of any neck pain which was further confirmed by the claimant's filing of the initial claim form AR-C on October 19, 2003, which only identified low and mid back

injury.

The claimant is an extremely nice gentleman. He sincerely believes that his subsequent cervical complaints are related to the admitted injury as reflected by his testimony below:

BY JUDGE GREENBAUM:

Q Would you like to respond to the questions from Mr. Ivey?

A Yes, sir. I had in my original put this pamphlet in there as evidence, and he asked that it be taken out, and that I could respond with this. And this it shows – it's a little doctor's pamphlet, it says, "Cervical Disk Surgery. How was your life been affected and (1) physical effects: Do you miss work because of your pain? Yes. Does your neck pain shoot down your arm?" It does now. At the time, all my neck was was stiff. It was not hurting. "Does your arm or hand feel numb or weak? Yes. Do you have headaches or pain between your shoulder blades?" Exactly where I was having problems. "Are you unable to join in family activities because of your pain? Yes. Does your pain force you to spend time alone away from family and friends? Yes. When you are with other people do you find yourself distracted by your discomfort and unable to enjoy yourself? Yes. Does your pain make you feel frustrated or depressed? Yes. Are you afraid of losing your job due to too much time off? Yes. Do you feel that other people think your pain isn't real? Yes. Do you feel that you have no control over your life? Yes." And Dr. Rosenzweig was stating, "depression, depression." Yes, I was depressed, because I was hurting so bad and no one was treating the problem. And at that point the muscles in my back were pulling down and keeping my neck from moving, and the muscles bowing up in my back is what was giving me so much problem. After I've had the surgery on my neck, I don't have the muscle spasms and pain in my back. I don't have the headaches. I don't have the dizziness. I'm not depressed. You know, I can function again. Beforehand, when I was in your Court, I couldn't even hardly talk because I couldn't concentrate. I still can't talk very well, but I never have been able to talk to people. But I am no longer depressed. I am no longer in pain. I'm no longer dizzy, and it had got, as I said, progressively worse. When I would turn my head, it would feel like snap, crackle, pop in my head. That's gone.

Q When did those symptoms first manifest themselves?

A In August, August the 10th of 2003.

Q Of course, you saw multiple medical providers after that, after August of '03?

A Yes, sir. I was desperately trying to find what was wrong with me. I knew it was not in my head. I knew it wasn't just because I was just depressed and feeling sorry for myself. I was hurting. That's why I begged you, "I want my back fixed." I was not aware that it was in my neck. My neck was stiff, but it wasn't hurting at the time.

Q Have you returned to work since your neck has been fixed?

A Yes, sir.

Q When did you return to work?

A September the 30th.

Q That's just been a few days?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Back for Wal-Mart?

A Yes, sir.

Q Doing your same duties?

A Yes, sir, full day. (Tr.39-41)

ADJUDICATION

No matter how sincere a claimant's belief that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. *Killingberger v. Big D Liquor*, AWCC #E408248, Full Commission Opinion filed August 29, 1995. Rather, the Workers' Compensation Act requires that the claimant bear the burden of proving the compensability of his claim by a

preponderance of the evidence. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995).

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 v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Further, medical evidence is not ordinarily required to prove causation. *Wal-Mart Stores, Inc., v. Van Wagoner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but, if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

The claimant obtained, and relies on the medical opinion of his treating surgeon, Dr. Robert Abraham, to support the causation issue. Clearly, the report offered by the claimant, is not stated within a reasonable degree of medical certainty. Rather, Dr. Abraham opines that the, “fall three years ago could have possibly caused neck problems.” (Tr.27-28)(Jt. Ex. C)

None of the other medical providers have causally related the claimant’s cervical complaints and need for surgery on May 24, 2006, to the job-related incident three (3) years earlier. The claimant did not file a claim related to his cervical complaints until July 26, 2006.

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 v. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer v. 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 v. 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 the 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 v. Mr. C.Cavanaugh’s*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663

(1987).

_____It would require sheer speculation and conjecture to attribute the claimant's cervical problems, need for treatment and surgery to his June 2, 2003, work-related incident. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company v. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital v. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Respondents affirmatively raised additional issues in defense of this claim. Although the issue of the statute of limitations, as well as the doctrine of *res judicata* are rendered moot by the foregoing findings and conclusions, I feel compelled to address these issues in the event of any possible appeals.

Respondents contended that the claimant's claim for benefits related to treatment of the cervical spine is barred pursuant to Ark. Code Ann. §11-9-702(a)(1) because the claimant failed to file a claim for benefits related to treatment of the cervical spine with the Commission within two (2) years from the date of his compensable low back injury. Clearly, as reflected by the second Commission Form AR-C filed by the claimant on July 26, 2006, this was a claim for additional benefits. Accordingly, pursuant to Ark. Code Ann. §11-9-702(b), the time for filing a claim for additional benefits must be within one (1) year from the date of the last payment of compensation or two (2) years from the date of injury, whichever is greater. The claimant filed a claim for benefits within one (1) year from the date of last payment

of compensation. Accordingly, this claim is not time barred.

Respondents also contended that the claimant's claim for benefits related to treatment for his cervical spine is barred by the doctrine of *res judicata*. Said contention is without merit.

The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who has had one fair trial on a matter from re-litigating the matter second time. *O'Dell v. Rickett*, ___ Ark. App. ___, ___ S.W.3d ___ (Sept. 28, 2005); *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003). Re-litigation is barred by *res judicata* when (1) the first suit resulted in a judgment on the merits; (2) the first suit was based upon proper jurisdiction; (3) the first suit was fully contested in good faith; (4) *both suits involve the same claim or cause of action that was litigated or could have been litigated but was not*; and (5) both suits involve the same parties or their privies. *Id.* (Emphasis added.) The test in determining whether *res judicata* applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein. *Id.* Although the Commission is not a court, its awards are in the nature of judgments, and the doctrine of *res judicata* applies to Commission decisions. *Gwin v. R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983).

The issue decided following the previous hearing in this claim concerned claimant's entitlement to additional benefits related to his admitted low back injury. The issue of claimant's entitlement to benefits related to his cervical complaints was

not litigated and could not have been litigated because the claimant's surgery occurred subsequent to the prior hearing. Accordingly, the doctrine of *res judicata* does not apply to the immediate claim.

The claimant has failed to sustain his burden of proof. Specifically, the claimant has failed to prove that his need for treatment and disability for his cervical problems arose out of and during the course of his employment, and that the injury was the result of the specific incident of June 2, 2003. Despite the claimant's assertion that his symptoms of neck problems manifested themselves shortly after the admitted incident, the record does not support this contention. Rather, it was only after claimant's surgery that he attempted to seek benefits for his cervical problems under workers' compensation. Prior to that time, the claimant made a claim under his health insurance provided by the employer. He also received short-term disability until returning to work for the employer herein.

The burden of proof lies with the claimant. 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 is entitled to any benefits related to his cervical complaints and resulting cervical surgery. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge