BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511346

GARY L. ELLIS, EMPLOYEE	CLAIMANT
GREAT DANE TRAILERS, EMPLOYER	RESPONDENT
GALLAGHER BASSETT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 27, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on May 26, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Jim R. Burton, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Frank B. Newell, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 26, 2006, 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 February 8, 2006, and a Prehearing Order was filed on February 9, 2006, at which time the claim was scheduled for a hearing. 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 additional stipulations announced at the hearing, as well as further clarification concerning respondents' contentions. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

At the prehearing conference, the parties agreed that the employment relationship existed at all relevant times, including August 30, 2005, the date of the alleged injury, and that the claim had been controverted in its entirety. At the hearing, the parties stipulated that the applicable compensation rates were $351.00 per week for temporary total disability and $256.00 per week for permanent partial disability, in the event compensability was determined.

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 he sustained a compensable cervical injury as the result of a specific incident identifiable in time and place of occurrence on August 30, 2005; that respondents should be held responsible for all medical and related treatment, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for the period beginning October 4, 2005, and continuing through the present, maintaining that his healing period had not ended; and that a controverted attorney's fee should attach to any benefits awarded.

The respondents maintained that the claimant did not sustain a compensable cervical injury on August 30, 2005. In the alternative, respondents contended that no notice of injury was given to the employer before the termination of employment on September 29, 2005, and that it would not be responsible for any benefits prior

to said date. At the hearing, respondents amended its alternative contention, maintaining that a claim form was not filed until February 1, 2006, and that if compensability was overcome, the notice requirements would preclude respondents from being responsible for any benefits prior to February 1, 2006.

The claimant testified in his own behalf. Dave England and Demetrius D. Taylor were called as witnesses by the respondents. The record is composed solely of the transcript of the May 26, 2006, hearing containing several 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 hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained a compensable injury arising out of and during the course of his employment with Great Dane Trailers, and which was the result of a specific incident identifiable in time and place of occurrence on August 30, 2005.
4. The claimant has failed to prove that his physical problems, need for medical

treatment, and disability, if any, are casually related to an injury sustained while working for the respondent herein.

DISCUSSION

This claim turns entirely upon the claimant's credibility and testimony. A claimant's testimony is never considered uncontroverted. 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 record in this claim is replete with inconsistencies and contradictions. As will be set out further below, during his testimony, the claimant appeared to contradict himself. Further, his testimony was disputed by respondents' witnesses. The initial medical evidence failed to contain any history of a job-related injury. The claimant did not attribute his physical problems and need for medical treatment to his employment until following his termination for excessive absenteeism. The claimant only gave a history of a work-related incident to a medical provider on October 4, 2005, after learning the nature of his condition. The record reflects that the claimant had a prior workers' compensation claim. He knew, or should have known, about the importance of reporting work-related injuries. Despite the claimant's declaration that he reported an injury to his employer, there is no credible evidence of any such report. It would require sheer speculation and conjecture to attribute

the claimant's injury and need for medical treatment to a job-related incident. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The claimant, Gary L. Ellis, began working for Great Dane Trailers on April 25, 2004. The claimant was hired to install and repair bumpers for tractor-trailer rigs. His job title was Class A assembly. The claimant pointed out that several months before his termination, he was promoted to lead-man on the Class A assembly. The claimant's immediate supervisor was Steve Spencer. On the date of the alleged injury, the claimant was working with Demetrius Taylor, repairing a trailer. The claimant stated that John Andrews was the inspector in the work area. The claimant described a procedure where he used a sledgehammer, weighing approximately twenty (20) to twenty-five (25) pounds to beat the bumper into place on the trailer. The claimant related that Mr. Taylor would apply pressure with a bumper jack while he hit the bumper with the sledgehammer. The claimant's description of the injury and his initial complaints to Mr. Taylor are set out below:

Q Can you show the Court, and you may need to stand up to do this, how you were positioned, what you were doing?

A Well, I was squatting down, and I had to keep an eye – the curb side and the jack is directly in front of me, and I'm lined up with the bumper going this way.

Q Okay.

A Where I can watch Demetrius, because I have to watch what he's doing, and I have to tell him when to add pressure to it and when to back off, to keep the bumper from coming out from under there.

Q Okay.

A And as he's adding pressure to it, I've got the hammer between my legs and I'm swinging up and hitting the bottom part of the bumper, so, you know, when it hit, it doesn't leave any spots, damage the customer can see.

Q Okay.

A And you drive it and you hit it, and, usually, you know, most of the time it would just tap on up there with three or four good licks. But this one was a little rough, and we had to beat on it for three or four minutes.

Q You say you were squatting down doing this?

A Well, bent over.

Q Okay.

A I was bent over like this with a hammer between my legs and raising my hand up, and I was swinging in between my legs up underneath the bumper. The bumper only stands at that point about a foot and a half off the ground. So you've got to be down low in order to hit the bottom of it.

Q Okay. And can you describe when you hit that, did you have any problems from it? What happened to you?

A Well, after beating on it about 10 or 12 times, I felt kind of a burning sensation in my neck. At that point, I had it up to where it was all but about three-eights of an inch all the way to the top. You don't really want to send one out like that, but they have been done – sent out like that before. So I told them, "That's it, that's far enough." I told Demetrius, "I've done pulled something in my neck," or something. I don't remember the exact words I told him. And he was kind of –

Q You mentioned that to Mr. --

A Yeah. Yeah, he just kind of laughed at me, you know, because you work a job

like that, you are all the time getting pulled muscles or stuff like that, cricks in your neck. (Tr.15-17)

The claimant maintained that Mr. Spencer was not in the building at the time of the injury. He stated that, in addition to reporting the injury to Mr. Taylor, he also allegedly reported the injury to John Andrews, a personal friend and the head of quality control for trailer repairs. The claimant was unclear concerning at what point he reported the injury to his supervisor while asserting that he reported the injury to Mr. Spencer after first seeking medical attention on September 2, 2005. (Tr.19-21)

The claimant was first examined and treated by his family physician, Dr. Roger Cagle, on September 2, 2005. The claimant did not relate any job-related incident or injury to Dr. Cagle. He did report a chief complaint of low back pain, as well as a prior back surgery in 1993. Dr. Cagle referred the claimant for an MRI of the cervical spine which indicates that the claimant also made complaints of neck pain in addition to the back pain. (Jt. Ex. A, pp.1-3)

After seeing Dr. Cagle, the claimant reportedly took an off-work slip to David England, the human resource manager, at which time he applied for emergency vacation time to address his medical needs. The claimant's initial medical treatment was claimed under group health insurance. The claimant was subsequently terminated for excessive absenteeism. The record reflects that the claimant missed a significant amount of work both before and after the date of the alleged injury.

The claimant's testimony vacillated on cross-examination. Although on direct-examination, as well as in his discovery deposition, the claimant indicated that

he reported neck pain to Demetrius Taylor on August 30, 2005, on cross-examination, he acknowledged that he was not sure. The claimant conceded that he did not tell Dr. Cagle about any incident involving the sledgehammer. Although the claimant maintained that he subsequently reported his injury to both Dave England and Steve Spence, he admitted that he did not relate the alleged symptoms to his work with the sledgehammer on August 30, 2005. (Tr.49-50)

Again, the claimant's testimony varied greatly and appeared to be self-contradicting. In response to questions by the Commission, the claimant responded as follows:

Q I've listened to your testimony for about an hour now, and I want to know with regard to the reporting, did you ever go to Mr. Spence and say, "I hurt myself on the job and this is how I hurt myself"?

A No, I don't think I ever told him how I hurt myself. I did tell him that I hurt myself on the job.

Q Toward the end of your cross-examination with Mr. Newell, you indicated that from your previous claim that you knew you had to fill out forms where it asked you various questions about how the injury occurred and who you reported it to and things like that. Is that correct?

A Yes, sir.

Q Did you ever fill out such a form with Great Dane?

A No, Steve Spence never brought one out. I'm not accessed to the form. I can't get a form.

Q Did you ever go to Mr. Spence and say, "We need to fill out a form"?

A After I come back from emergency vacation, I asked him, I said, "This is a work-related injury." I told him it needed to be filed and he just walked off. He didn't say a word to me.

Q And when would that have been?

A That would have been – I can get you the date on it, but it's the Monday right after I come back from my emergency vacation where Dr. –

Q Okay. Was there any reason why you didn't ask him to fill out that form before then?

A I assumed he would have done it. I was waiting on him to do it. I didn't understand why he hadn't. There was only a week there. (Tr.56-57)

The claimant maintained that after Mr. Spence ignored his complaints, he contacted Mr. England in the H.R. department, while asserting that Mr. England refused to talk to him.

Dave England was called as a witness by the respondents. Mr. England recalled the claimant bringing a doctor's note from Dr. Cagle in September, 2005, requesting eligibility for vacation; however, specifically denied the claimant ever requesting workers' compensation benefits or filing a workers' compensation claim until the later part of January or early February, 2006.

Demetrius Taylor, a witness called by the respondents, stated that the claimant never told him that he had injured himself at work doing anything.

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

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.Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

I did not find the claimant's testimony to be credible.

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