

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410905

JENNIFER FARIES, EMPLOYEE	CLAIMANT
TOBACCO SUPERSTORES, INC., EMPLOYER	RESPONDENT
WESTPORT INSURANCE CORPORATION, INSURANCE CARRIER; GALLAGHER BASSET SERVICES, INC., TPA	RESPONDENT

OPINION FILED FEBRUARY 7 , 2006

Hearing before Chief Administrative Law Judge David Greenbaum on January 6, 2006, at Luxora, Mississippi County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Michael R. Mayton, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted January 6, 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 November 16, 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 contention which respondents expressed at the hearing. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1" and made a part of record.

The claimant was, on numerous occasions, specifically, prior to the prehearing conference, during the prehearing conference, and at the hearing, advised of her right to legal representation; that an attorney could not charge her a fee for representing her in a workers' compensation claim without approval of this Commission; that attorney's fees were normally awarded only out of benefits obtained in her behalf which would not apply in the instant claim because the claim was for medical benefits only. In addition, the claimant was advised that she had the burden of proving her entitlement to benefits; that she was only entitled to one hearing; and that for any reason, if she was unsuccessful in proving her claim, she could not subsequently request an additional hearing, maintaining that her failure was due to a lack of knowledge of the workers' compensation law or a lack of legal representation. The claimant elected to proceed in her own behalf.

It was stipulated that the employment relationship existed between the parties at all relevant times, including September 23, 2004; 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 back injury as the result of a specific incident identifiable in time and place of occurrence on September 23, 2004; that respondents should be held responsible for all

hospital, medical, and prescription drug expenses in the amount of \$3,594.00. The claimant did not request indemnity benefits.

The respondents contended that the claimant did not sustain a compensable injury arising out of and during the course of her employment. Alternatively, respondents contended that it was not notified of the alleged injury until October 6, 2004, and was, therefore, not responsible for any benefits until said date. At the hearing, respondents further contended that there were no objective medical findings to support an injury.

The claimant testified on her own behalf. Pat Hamm was called as a witness by the respondents. The record is composed solely of the transcript of the January 6, 2006, hearing containing numerous medical records, together with a video tape reflecting a portion of the claimant's work activities between 3:00 p.m. and 8:00 p.m. on September 23, 2004, which was introduced as "Respondent's Exhibit B" and retained in the Commission file.

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 employment relationship existed between the claimant and Tobacco Superstores, Inc., on September 23, 2004.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained an injury arising out of and during the course of her employment with the respondent on September 23, 2004.
4. The claimant has failed to prove, by a preponderance of the evidence, that her physical problems and need for treatment beginning September 25, 2004, were causally related to an injury and/or her employment with Tobacco Superstores, Inc.
5. Respondents have controverted this claim in its entirety.

#### DISCUSSION

The record in this case is replete with inconsistencies and contradictions. The claim turns entirely upon the claimant's credibility. 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 claimant, Jennifer Faries, is thirty-four (34) years old. She has a high school education, together with some college. The claimant stated that she had

been working for the employer approximately one year before her September 23, 2004, alleged injury. The claimant specifically denied experiencing any back problems before September 23, 2004. The claimant was a working, assistant manager at the Tobacco Superstore. Her duties included opening and closing the store, making deposits, running the cash register, as well as stocking merchandise. The claimant testified that she sustained an injury as the result of a specific incident at approximately 2:30 to 3:00 p.m. on September 23, 2004, while picking up and stocking twelve packs of Cokes. The claimant stated that she bent over to pick up a pack of Cokes and felt pain and a burning sensation in her back. The claimant's asserted that she reported the injury to Pat Hamm, the store manager, and Donna Nichols, another assistant manager. The claimant reported that another employee, Sharon Buford, was present, as well as Ms. Hamm's sister, Tammy Hamm. The claimant failed to call any corroborating witnesses. When questioned concerning what she specifically reported. The claimant testified as follows:

Q Okay. And what did you tell your manager and co-workers, what did you tell them had happened?

A I told them that I had done hurt my back. I said, "I don't know if it's a kidney infection or if I hurt my back lifting the Cokes." Those were my exact words.

Q Okay. And what happened after you made these comments to the –

A Nothing.

Q Well, did you feel like at that time that you needed any type of medical treatment?

A Well, it was just burning. I mean, it was tolerable at that time. I could, you

know – it was just a burning sensation is what it was.

Q Okay. And did any of the management or co-workers leave after you reported this incident?

A Yes, they did.

Q Who was left at the store?

A Me and Sharon was left.

Q Okay.

A Pat was there, and Pam was there for a little while. I don't know how long after –

Q When did – who is this lady? Is she one of the –

A That's the manager of the Tobacco Store. It's Pat Hamm.

Q Okay. And when did she leave?

A I'm not sure. I really don't know.

Q What is her normal shift?

A She works different hours. She was running two stores then. She popped in and out. She just – she came and went as she pleased.

Q And your shift is what, 2:00 till when?

A Till 8:00.

Q Okay. Did you work your full shift?

A Yes, I did. (Tr.24 – 25)

The claimant was not scheduled to work Friday, September 24, 2004. She stated that she, again, reported her physical problems and need for medical treatment to both Donna Nichols and Pat Hamm on Saturday, September 25, 2004,

while maintaining that she was required to work because no one could cover her shift. The claimant first sought medical treatment at the Baptist Hospital Emergency Room in Osceola, Arkansas, on the afternoon of September 25, 2004. She maintained that after being seen at the emergency room and determining that her complaints were not related to a kidney problem, she again told Ms. Hamm that her problems were related to the lifting incident two (2) days earlier. The claimant was next examined and evaluated by her family physician, Dr. Sumner Cullom, who took the claimant off work until September 30, 2004. The claimant never returned to work for the employer which she maintained was because she never obtained a full release to return to work. The claimant stated that she subsequently reported the injury to the corporate office in Forrest City, Arkansas.

Although the claimant testified that she gave the emergency room a history of a work-related injury on September 25, 2004, the emergency room records reflect that the claimant denied a history of trauma or unusual exertion. Apparently, the claimant returned to the Baptist Memorial Emergency Room after her claim was controverted and requested a revised history of back pain caused by her work. In an addendum to the initial report dated December 8, 2004, the author opined that he was doubtful that the patient expressed an injury while lifting during the emergency room visit. (Cl. Ex. A, p.5)

The medical records do reflect that the claimant reported to Dr. Cullom, her family physician, that her condition was related to her employment by history.

Pat Hamm, a witness called by the respondent, was the store manager, as well as the claimant's immediate supervisor. Ms. Hamm specifically denied the claimant's report of a work-related injury.

Respondents also introduced a video surveillance tape maintained on the employer's premises which is utilized to spot potential shoplifting. The tape covers approximately five (5) hours between 3:00 p.m. and 8:00 p.m. on September 23, 2004. The tape was proffered to reflect that the claimant was not experiencing any physical problems on the date of the alleged injury. Respondents pointed out that in her deposition, the claimant stated that she injured her back around 2:30 to 3:00 p.m. and that by the end of the shift, she was barely able to walk or get around and was having a great deal of trouble while pointing out that the video tape showed her dancing and playing around the facility between 7:00 and 7:15 p.m. on the date of the alleged injury. In response, the claimant pointed out that the tape also showed her holding her back and that the whole tape needed to be viewed. (Tr.14-16)

A cursory review of the five (5) hour tape failed to reflect any apparent discomfort that the claimant may have allegedly experienced. The tape did reveal the claimant placing her hands on her hips while stocking merchandise at approximately 3:00 p.m. However, the remainder of the tape failed to reflect a potential injury. Rather, the tape showed the claimant stocking throughout the day which included frequent stooping, bending, and squatting without apparent discomfort. In addition, it reflects the claimant vacuuming with one hand at

approximately 6:46 p.m. I also observed the claimant performing some type of minimal dancing at approximately 7:12 p.m. which I did not find to have near the probative value that the frequent stocking of merchandise and vacuuming showed.

Although at the prehearing conference the claimant identified her husband and Sharon Buford as corroborating witnesses, none were called. Accordingly, as previously pointed out, the claim turns entirely upon the claimant's testimony which is contradicted by Pat Hamm, and not supported by the medical history.

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 a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. I feel compelled to point out that respondents also allege that the claimant's injury is not confirmed by medical evidence supported by objective medical findings. This assertion by the respondents is clearly incorrect. The medical evidence is replete with observations of muscle spasm observed by Dr. Cullom. Nevertheless, the claimant has failed to prove that the injury requiring medical treatment arose out of and during the course of her employment. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge