

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504230

TYRONE L. FUTRELL, EMPLOYEE	CLAIMANT
UNITED PARCEL SERVICE, INC., EMPLOYER	RESPONDENT
LIBERTY INSURANCE CORPORATION, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 15, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on August 11, 2006, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Kenneth A. Olsen, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. David C. Jones, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted August 11, 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 May 24, 2006, and a Prehearing Order was filed on said date. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

At the prehearing conference, the parties stipulated that the employee/employer/carrier relationship existed at all relevant times, during December, 2004; and that respondents had controverted compensability of the claim. The parties were advised that they would be required to stipulate to the

applicable compensation rates of be prepared to document same at the scheduled hearing. At the hearing, the parties agreed that the employment relationship existed for the period beginning December 2, 2004, and continuing through December 30, 2004, during which time the claimant's average weekly wage was sufficient to entitle him to a compensation rate of \$113.00 per week for both temporary total disability and permanent partial disability.

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

At the prehearing conference, the 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 during December, 2004; that respondents should be held responsible for all hospital, medical, and related expenses, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability for the period beginning December 31, 2004, and continuing through June 14, 2005; that he was entitled to a seven percent (7%) whole body impairment as the result of his injury and resulting surgery; and that a controverted attorney's fee should attach to any benefits awarded.

Subsequent to the prehearing conference, the claimant's discovery deposition was taken. At the hearing, it was pointed out that the claim for a specific incident injury was a mistake and that the claim was for a gradual onset cervical

injury which the claimant maintained arose out of and during the course of his employment with United Parcel Service during December, 2004. The claimant also amended his request for temporary total disability benefits because he received unemployment compensation and claimed temporary total disability beginning April 22, 2005, the date he underwent cervical surgery, and continuing through June 14, 2005. The remainder of claimant's contentions remain as set out above.

The respondents contended that the claimant did not sustain an injury arising out of and during the course of his employment while maintaining that the claimant's physical problems were the result of a pre-existing injury. Respondents further contended that the claimant could not meet his burden of proof concerning a gradual onset injury, specifically raising the major cause of claimant's alleged disability and need for treatment. Alternatively, respondents contended that the claimant would not be entitled to any benefits prior to the date notice was received of an alleged injury on or about April 25, 2005. In addition, respondents contended that it would be entitled to an offset or credit for any benefits paid by other providers pursuant to A.C.A. §11-9-411, as well as an offset for unemployment compensation received between February, 2005, and April, 2005.

The claimant testified in his own behalf. Samuli Kilpi was called as a witness for the respondents. The record is composed solely of the transcript of the August 11, 2006, hearing containing a joint medical exhibit consisting of twenty-six (26) 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 evidence, that he sustained an injury arising out of and during the course of his employment with United Parcel Services, Inc.
4. The claimant has failed to prove, by a preponderance of the evidence, that his cervical complaints, need for treatment including surgery, and disability beginning April 22, 2005, were in any way casually related to this employment with the respondent herein.

DISCUSSION

The claimant, Tyrone L. Futrell, testified in his own behalf. The claimant is fifty-one (51) years old. He has a high school education. In addition, the claimant has taken various college courses, but did not obtain a degree. He retired from the Army National Guard after twenty-four (24) years of services. In addition to guard

service, the claimant was self-employed as a painter. The claimant retired from the Guard in June, 1997, at which time he worked in law enforcement until on or about June, 2004, first in Carruthersville, Missouri, and later in Blytheville, Arkansas. The record reflects that the claimant was involved in a motor vehicle accident during 1999 while working as a police officer in Carruthersville, Missouri. The claimant's primary injury was a cervical injury. The claimant maintained that after returning to work, he did not have any physical limitations or require additional medical treatment between 1999 and the immediate claim. After the 1999 injury, the claimant continued working in law enforcement. He stated that he was a police officer in Blytheville, Arkansas, until on or about June, 2004. The claimant then drew unemployment compensation from June, 2004, until going to work at U.P.S. on or about December 2, 2004. The claimant was hired as a part-time, seasonal worker. His primary duties were as a package handler at the loading dock. The claimant's description of his work, as well as when his alleged symptoms first manifested themselves is set out below:

Q What was the job consisting of?

A The job was consistig of unloading the trailer trucks that comes in with the packages, unloading them onto the conveyor, you know.

Q How much of the hours that you worked did you spend doing that, unloading of the trucks?

A June 20 hours a day.

Q A week rather?

A Yeah, a week.

Q Twenty hours a week?

A Yeah, yeah, 20 hours a week.

Q Was the whole time that you worked there consisting of unloading trucks and putting boxes on conveyors?

A Correct.

Q Do any other job duties?

A Well, I kind of helped, just sorted just a little bit, you know, but other than that, that was basically what I done.

Q When you started there, how was your physical condition regarding your neck and arms?

A Oh, my physical condition was, I mean, I didn't have any kind of problems.

Q Specifically with your neck or your arms?

A No, no problems out of my neck or my arms.

Q Okay. Did you begin to have some physical symptoms or signs of injury after you worked there a while?

A Yes, I did.

Q What was that symptom you began to have?

A I started having symptoms in my right wrist.

Q How would you describe that?

A Well, it was kind of like I had sprung my wrist, you know. I just thought it was just from lifting the boxes.

Q Was it sharp pain, aching, tingling, numbness, how would you describe it?

A It was between kind of tingling and numbness.

Q What side of your wrist was it on? As you hold your hand flat down on the table, palm down, which side was it on?

A Which side?

Q Yeah, what side of your wrist did it hurt on?

A Well, it was basically down on top and around the wrist joint there.

Q Was there any kind of activity that you did at UPS which seemed to make that pain begin or get worse?

A Well, lifting boxes. I mean, a 51-year-old man, I mean, you might think you're in shape, but, you know, if you hadn't did that type of work in a while, you know, that's how I look at it, you know. I didn't complain about it, you know. I just said, "Well, maybe that's because I hadn't did this type of work."

Q How long had you been there before that started to bother you?

A I guess around about the third week, I think I mentioned it to one of the guys that was there. I said, "May, my wrist is kind of hurting." I said, "I'm not complaining or anything, but my wrists are still kind of hurting. I don't know if it is from lifting the boxes or what."

Q Was that a coworker or supervisor?

A He was the supervisor. I mentioned it to Fred.

Q What's Fred's name? Fred Williams – (Tr. 18-20)

The record reflects that the claimant did not request medical attention and did not file a workers' compensation claim. The claimant continued working through December 30, 2004, at which time all seasonal employees were laid-off. Thereafter, the claimant applied for, and drew, unemployment compensation until starting working at the Blytheville High School as a substitute teacher. The claimant testified that he began experiencing additional and increasing symptoms beginning

on or about April 9, 2005. The claimant stated that, at that time, he began having numbness in his right hand, as well as pain in his neck for the first time. The claimant indicated that the symptoms gradually progressed from his wrist to his neck.

The claimant first sought medical treatment from his family physician, Dr. William Hurst, at which time the claimant asked Dr. Hurst to set up a CT scan which apparently revealed a herniated cervical disc. Dr. Hurst referred the claimant to Dr. Stephen Eichert, a neurosurgeon at the Mid-South Neurosurgery Clinic in Jonesboro, Arkansas. The claimant underwent surgery. The claimant was disabled for the period beginning April 22, 2005, when he first saw Dr. Eichert and was released on June 14, 2005, as having reached maximum medical improvement, at which time Dr. Eichert assigned a seven percent (7%) permanent impairment to the body as a whole. (Jt. Ex. A, p.26)

It is undisputed that the claimant did not report a work-related injury until after undergoing surgery. The claimant stated that the reason he reported his injury as being work-related was because he did not have any injuries prior to going to work at U.P.S.

On cross-examination, claimant again acknowledged that he did not file a claim until following surgery. The claimant first reported an alleged work-related injury on April 25, 2005. The claimant acknowledged that he knew how to report an injury, but failed to report an injury or request medical treatment until following his

surgery, almost five (5) months after the claimant left respondent's employment. On further cross-examination, the claimant conceded that he did not experience any neck pain until several months after leaving U.P.S., at which time he was working at the school district. At the time claimant first sought medical treatment, on April 10, 2005, he complained of right arm pain from the wrist to the elbow. The claimant denied having sustained any injury. In fact, when the claimant first saw Dr. Hurst on April 18, 2005, he also failed to report any history of injury while, at the same time, reporting having problems requiring medical treatment for approximately three (3) weeks. Again, the only reason the claimant subsequently filed a workers' compensation claim was because he was allegedly asymptomatic before going to work for U.P.S.

In the present claim, the claimant does not contend that his injury was caused by a specific incident and identifiable by time and place of occurrence. Instead, he contends that he sustained an injury as the result of repetitive work activities. Accordingly, in order to receive benefits, the claimant must satisfy all of the following requirements:

- (1) Proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) Proof by a preponderance of the evidence that the injury cause external or internal physical harm to the body;
- (3) Medical evidence supported by objective findings as defined in A. C. A. §11-9-102(16);
- (4) Proof by a preponderance of the evidence that the injury was caused by rapid

repetitive motion; and,

(5) Proof by a preponderance of the evidence that the injury was the major cause of disability or need for treatment.

If a claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish compensability of the claim, and compensation must be denied. *Lay v. United Parcel Service*, 58 Ark. App. 35, 944 S.W.2d 867 (1997).

This 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 v. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The record in this case is replete with inconsistencies and contradictions. Further, the claimant's course of conduct in failing to timely report an injury, as well as his subsequent work history is inconsistent with his claim of injury. Further, the claimant did not manifest cervical symptoms until several months after he left respondent's employment. To attribute the claimant's cervical injury and need for surgery to his employment would require sheer speculation and conjecture. 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).

The burden of proof lies with the claimant. The claimant has failed to prove, by a preponderance of the credible evidence, that he sustained an injury arising out of and during the course of his employment with United Parcel Service, Inc. Further, although the record reflects that the claimant's job duties were repetitive, they were not rapid which is required for a cumulative trauma, cervical claim. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998); *Hapney v. Rheem Mfg., Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

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).

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, this claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge