

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F511493

TASHA J. HAMILTON, EMPLOYEE	CLAIMANT
BOARS HEAD PROVISION COMPANY, INC., EMPLOYER	RESPONDENT
AMERICAN ZURICH INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED DECEMBER 18, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on November 9, 2006, at Wynne, Cross County, Arkansas.

Claimant represented by Ms. Sheila F. Campbell, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Eric Newkirk, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted November 9, 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 September 13, 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, subject to an additional stipulation concerning the applicable compensation rates. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1."

It was stipulated that the employee/employer/carrier relationship existed at all

relevant times, including January 10, 2005; that the claimant's average weekly wage was sufficient to entitle her to the maximum compensation rates of \$466.00 per week for temporary total disability and \$350.00 per week for permanent partial disability in the event the claim was found compensable; and that 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 left shoulder injury as the result of a specific incident identifiable in time and place of occurrence on January 10, 2005; that respondents should be held responsible for all outstanding hospital, medical, and related expenses, together with continued, reasonably necessary medical treatment; that she was entitled to temporary total disability benefits for the period beginning January 11, 2005, and continuing through the present, maintaining that her healing period had not yet ended, less credit for any days worked; and that a controverted attorney's fee should attach to any benefits awarded. The claimant reserved the issue of entitlement to permanent disability benefits, if applicable.

The respondents contended that the claimant did not sustain a compensable work-related injury of any kind on January 10, 2005. Respondents maintained that all of claimant's problems in connection with her left shoulder were traceable to a motor vehicle accident in December, 2004, or pre-existing abnormalities. The

respondents further maintained that the claimant made no mention, whatsoever, of any shoulder problems on January 10, 2005, but instead left the respondent/employer's facility with right-side chest complaints, a non work-related problem which she indicated had been in existence the whole day and for which she had also received prior medical treatment over the previous years. Respondents alleged that they were unaware of any sort of work incident which occurred on or about January 10, 2005, and have controverted the claim in its entirety, maintaining, in essence, that the claimant's left shoulder injury was not sustained within the course and scope of her employment. Alternatively, in the event the claim was compensable, respondents assert that they had no liability for benefits until November, 2005, the date they contend notice of an injury was given. As a further alternative, respondents assert, if the claim is compensable, they would be entitled to group health offset for all medical or disability benefits paid on behalf of the claimant.

In addition to the claimant, Rosie Hamilton, Johnnie Mae Gordon, Amanda Marshall, Sallie Grady, Taconya Cottrell, and Torsha Mills were called as witnesses in her behalf. Stuart Callahan and Linda Long were called as witnesses by the respondents. The record is composed solely of the transcript of the November 9, 2006, hearing containing volumes of medical exhibits and other documentary evidence, together with the claimant's discovery deposition which was introduced as "Respondent's Exhibit D" and retained in the Commission file in bound form.

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 she sustained any work-related injury arising out of and during the course of her employment with Boars Head Provision Company, Inc., on January 10, 2005.
4. The claimant has failed to prove, by a preponderance of the evidence, that her left shoulder problems, disability, and need for treatment are in any way causally related to an employment related injury with the respondent herein.
5. Even in the event claimant has proven a compensable injury, contrary to the foregoing findings and conclusions, respondents have no liability for any benefits before November, 2005, when it first received notice of an alleged injury pursuant to Ark. Code Ann. §11-9-701 (Repl. 2002).

DISCUSSION

The record in this claim is replete with inconsistencies and contradictions. Admittedly, the record reflects that the claimant reported experiencing chest pain

while at work on January 10, 2005. However, there is no credible evidence that the claimant related her chest pain to any work-related incident. Further, the claimant has a long history of medical problems unrelated to her employment, including complaints of left shoulder pain. In addition, the record reflects that the claimant was involved in a motor vehicle accident on December 26, 2004. The claimant bears the burden of proving the job-relatedness of any alleged injury. It would require sheer speculation and conjecture to attribute the claimant's left shoulder problems to a 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).

As will be set out further below, the record as a whole simply does not support the claimant's contention that she sustained a compensable left shoulder injury as the result of a specific incident arising out of and during the course of her employment on January 10, 2005. Neither the medical evidence nor the lay testimony supports this claim. In fact, the claimant's own testimony taken alone, even if not contradicted by numerous witnesses, fails to establish a causal connection between a work-related incident and her alleged injury. A claimant's testimony is never considered uncontroverted. *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).

I feel compelled to point out that the claimant called six (6) witnesses in support of her claim. None of the claimant's lay witnesses helped to establish a compensable work-related injury. Further, the medical evidence was replete with inconsistencies and contradictions. The claimant bears the burden of proving the job-relatedness of an alleged injury by a preponderance of the credible evidence. The claimant's proof was woefully inadequate to establish any type of work-related injury.

The record does support that the claimant reported experiencing chest pain while at work. Rosie Hamilton, the claimant's mother-in-law, was called as a witness in her behalf. She stated that on January 10, 2005, she received a call from a representative of the employer. She stated that the caller wanted her to get in touch with the claimant's husband because he thought the claimant was having a heart attack. She and her son immediately drove to the plant. When they arrived, the claimant was sitting in a wheel chair. Mr. Hamilton and his wife then got into the truck that the claimant drove to work that morning and went to the emergency room. Rosie Hamilton maintained that the claimant was fine that morning when she went to work. On cross-examination, the witness stated that the claimant went to work at approximately 2:30 p.m. She stated that she was unaware that the history contained in the emergency room records indicated that the claimant had been experiencing chest pains since 1:00 p.m. which pre-dated the start of the claimant's work shift. (Resp. Ex. A, p.28)

Johnnie Mae Gordon was called as a witness by the claimant. Ms. Gordon was employed by the respondent and worked in the same department as the claimant. She stated that she was unaware of the claimant experiencing any physical problems before January 10, 2005. Ms. Gordon described the claimant's job duties. She stated that she observed the claimant crying and holding her chest area and right side after coming out of a cooler at work on January 10. On cross-examination, she expressed genuine surprise that the claimant was alleging a left shoulder injury.

Amanda Marshall was called as a witness by the claimant. Ms. Marshall is also employed at Boars Head. Ms. Marshall is a close friend of the claimant. She worked in a different department. Ms. Marshall also reported that the only complaint that the claimant voiced on January 10, 2005, was chest pain. Although she stated that she was not aware of any prior health problems that the claimant may have experienced, on cross-examination, she admitted that she was aware that the claimant was involved in a motor vehicle accident shortly before the chest-related problems experienced at work.

Another co-worker, Sallie Grady, also denied ever observing the claimant having any physical problems before January 10, 2005. Like the prior witnesses, Ms. Grady thought the claimant was having a heart attack on January 10, 2005. She stated that she was unaware of the prior motor vehicle accident.

Laconya Cottrell was also called as a witness by the claimant. Ms. Cottrell did not work for the employer at the time of the hearing. She stated that she worked on

January 10, 2005, at which time the claimant reported chest pain. Similar to Ms. Gordon, Ms. Cottrell observed the claimant holding her right side.

Torsha Mills, a witness called by the claimant, also observed the claimant on January 10, 2005, crying and complaining of chest pains. Ms. Mills assisted the claimant to get to a secure place at which time she attempted to find the immediate supervisor and the EMT at the plant which was Stuart Callahan. On further direct, Ms. Mills testified that prior to January 10, 2005, the claimant told her that she had been experiencing chest pain. Ms. Mills held a position in quality assurance and frequently talked to the claimant. (Tr.41-42)

The claimant testified in her own behalf. The claimant maintained that she hurt her chest as the result of pushing a large rack described as a tree which is on rollers and containing a large quantity of meat into a cooler on January 10, 2005. The claimant maintained that she told her supervisor that she started experiencing chest pain while pushing the tree into the cooler. In fact, the claimant, at all times, repeatedly reported only chest pain and never any shoulder pain to her employer. At the hospital, the claimant underwent a EKG. After the claimant's release from the emergency room, she was next examined by her family physician, Dr. Susan Balke at the Webber Clinic in Marianna, Arkansas, with complaints of chest pain. The claimant candidly admitted that she did not suspect that she had any shoulder injury until after being evaluated by Dr. Apurva R. Dalal who the claimant maintained advised her that the chest pain was being caused by a left shoulder injury. The claimant subsequently underwent two (2) separate surgeries for alleged rotator cuff

tears of the left shoulder. The first in April, 2005, and a second during July, 2005. The shoulder surgeries did not improve the claimant's condition. In fact, the record reflects that the claimant was actually having more problems involving her left shoulder than she experienced prior to undergoing the two (2) surgeries. The claimant has since seen additional medical providers, specifically, Dr. Rebecca Barrett-Tuck, a neurosurgeon in Jonesboro, Arkansas, who referred her to Dr. Henry Stroope, an orthopedic surgeon in Jonesboro, Arkansas. Additional surgery for the claimant left shoulder is contemplated.

On cross-examination, claimant acknowledged being involved in a motor vehicle accident approximately two (2) weeks before her alleged January 10, 2005, injury. The claimant admitted that during the motor vehicle accident, her chest struck the steering wheel. On further cross-examination, the claimant maintained that the history contained in the emergency room records reflecting chest pain since 1:00 p.m., prior to the start of the claimant's shift, was inaccurate. The claimant also denied reporting any shoulder problems following the prior motor vehicle accident; however, a medical report dated December 31, 2004, reflects complaints of chest pain, stiffness, neck, back, and shoulder pain. (Tr.62)(Resp. Ex. B, p.4)

Suffice it to say that the claimant's credibility is suspect, at best. The claimant admitted experiencing prior shoulder problems in 2002. The record reflects that the claimant has a history of multiple motor vehicle accident. The claimant sustained a prior work-related injury with the same employer herein and knew, or should have known, how to file a workers' compensation claim. After leaving respondent's

employment on January 10, 2005, the claimant took family leave and did not file a workers' compensation claim. In fact, the record reflects that the claimant did not file a claim until on or about October 26, 2005, after undergoing two (2) shoulder surgeries which is the reason respondents have asserted a notice defense in the event compensability was somehow overcome. The record reflects that the claimant failed to truthfully answer interrogatories propounded during the discovery process. Finally, the record reflects that the claimant has a medical malpractice claim against the physician that performed her earlier surgeries. Even the claim itself contains erroneous dates of injury. Specifically, the claimant initially maintained that her injury occurred on or about March, 2005, rather than January 10, 2005.

Stuart Callahan was called as a witness by the respondent. Mr. Callahan is employed as an EMT for the employer. He stated that the claimant's only complaints on January 10, 2005, involved chest pain, but that his examination indicated that she was not having a heart attack. Mr. Callahan further stated that he did not file a workers' compensation claim because the claimant reported experiencing chest pain all day long and did not relate it to any work-related incident. On cross-examination, Mr. Callahan admitted that it was "possible" for a rotator cuff tear to cause chest pain.

Linda Long, the employer's nurse, testified that she first received notice of the within claim on or about November, 2005.

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, she 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).

The claimant has failed to satisfy any of the four (4) requirements necessary to establish compensability of a shoulder injury related to a specific, work-related incident on January 10, 2005.

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 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).

The burden of proof lies with the claimant. As reflected above, the record in this case is simply replete with inconsistencies and contradictions. 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 she 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.

DAVID GREENBAUM
Chief Administrative Law Judge