

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F500037

OLEN R. HOWELL, EMPLOYEE	CLAIMANT
K & D TIRE & AUTO, EMPLOYER	RESPONDENT
FIRST COMP INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MAY 9, 2006

Hearing held before the HONORABLE S. DALE DOUTHIT, ADMINISTRATIVE LAW JUDGE, on February 23, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by HON. WILLIAM K. MORITZ, Attorney at Law, of Hot Springs, Arkansas.

Respondents were represented by HON WILLIAM C. FRYE, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-captioned claim on February 23, 2006, in Little Rock, Arkansas, 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 January 19, 2006, in the above-styled case. A Prehearing order was entered on January 20, 2006. At the hearing, the parties announced that the stipulations and their respective contentions were properly set out in the Prehearing Order, subject to an additional contention which respondents expressed at the hearing. The Prehearing Order listed two (2) issues; however, at the hearing claimant desired to only litigate the issue of compensability. All other issues were reserved. A copy of the Prehearing

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Order was introduced, without objection, as "Commission Exhibit 1" and made a part of the record.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including December 20, 2004, and that on December 20, 2004 the claimant was earning sufficient wages to entitle him to compensation rates of \$241.00 per week for TTD benefits and \$181.00 per week for PPD benefits.

By agreement of the parties, the sole issue to be presented for determination concerned compensability.

The claimant contended at the full hearing that he injured his back on the job. And, that the employer provided health care, set up an MRI, but refused to go forward with the MRI on the second day.

The respondents contended at the hearing that the claimant did not sustain a compensable injury. Respondents contended the claimant indicated to the insurer he thought he had a kidney infection and did not indicate any type of injury; and during the same period of time, claimant was witnessed working on trucks and a four-wheeler. Additionally, respondents contended the claimant indicated to the insurer that he began having back problems after rewiring and re-tiling his home. Respondents contended that if compensability was overcome by the claimant, the claimant only has off-work slips for the periods 12/22/04 through 12/27/04, and 1/3/05 through 1/10/05, and therefore would only be entitled to TTD for those periods. Respondents contended claimant's MRI only shows mild degenerative dystrophy, which is not objective findings related

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to this incident.

The claimant testified on his own behalf, and Tammy Howell was called to testify by the claimant. Kenny White, Lanny Nichols and Ricky Barton were called as witnesses by the respondents.

The record is composed of the transcript of the February 23, 2006, hearing containing numerous medical records, a criminal record report, and the claimant's deposition taken April 11, 2005.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with A.C.A. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The parties' stipulations recited herein are reasonable and 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 the respondent on December 20, 2004.
- 4) Respondents have controverted this claim in its entirety.

DISCUSSION

A. HISTORY

The claimant, age 33, began working for the respondent-employer in August of 2004. The claimant's job duties included mounting and dismounting tires, and general mechanic work. At the full hearing, the claimant testified as follows regarding what happened at work on December 20, 2004:

Q. Was there a specific tire that you recall lifting that caused you to be injured?

A. Just one tire.

Q. So it was just one tire that you were loading?

A. No. We loaded, like, two.

Q. And the second one is when you had a problem?

A. Yes sir.

Q. Tell us what happened to you when you were loading that second tire into the truck.

A. I had sharp pains, and it took me to my knees.

Q. At that point, was there anybody out there with you?

A. No sir. (*T. pg. 12, lns 14-24*)

Q. You were there by yourself?

A. Yes.

Q. Okay. Did you stay on your knees? Did you rise from your

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knees? What happened next?

A. I went ahead and worked the rest of the day.

Q. Did you report your injury to anyone after it happened?

A. I was talking to Lanny.

Q. When did you talk to Lanny?

A. Probably 15 minutes afterwards.

Q. What exactly did you tell Mr. Nichols.

A. I told him that I thought I pulled a muscle, but I wasn't sure because I've had trouble with my kidneys ever since I was 13 years old.

Q. Okay, and what did he tell you?

A. Nothing.

Q. And you finished up the day that day?

A. Yes. (*T. pg. 13, lns 1-18*)

The claimant testified that when he got home after work on the 20th of December, 2004, he just "laid around," but that the next morning he could hardly walk, and had no feeling in his right leg. The claimant testified that on the 21st of December 2004, he went to the Mercy Medical Clinic at about 11:30 a.m., but that when he left work at 11:30 a.m. he told no one he was going to the doctor. (*T. pg. 25, lns 4-14*)

The claimant testified that when he first went to the doctor on December 21, 2004, they gave him a shot. The next day the claimant testified he still had no feeling in his right leg, and

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went back to the doctor who gave him a prescription and set up an MRI. The medical records show the claimant returned to Mercy Medical Clinic on December 27, 2004, and still reported numbness in his right leg and back pain. The record from Mercy Medical Clinic of December 27, 2005, shows the claimant was advised to continue medication, get an MRI of the lumbar spine, and be off work until the MRI was completed. (*CX-1, pg. 10*)

The claimant went back to Mercy Medical Clinic on January 3, 2005 and January 11, 2004. At both visits, the claimant reported no improvement from his back pain. Accordingly, the medical recommendation for those visits remained nearly the same, "still need MRI" and "continue meds."

The claimant testified at the full hearing that he was unable to get an MRI of his lumbar spine until October 4, 2005, due to the respondents controversion. The October 4, 2005, MRI of the claimant's lumbar spine included the following remarks:

- "1) Mild degenerative disc changes at L4-5 and L5-S1 characterized by mild disc bulges at this level and disc desiccation.
- 2) Mild facet joint hypertrophy at L5-S1 without evidence for canal stenosis.
- 3) No evidence for herniated disc." (*CX-1, pgs. 24 & 25*)

B. ADJUDICATION

The claimant contends he sustained a compensable back injury during his employment with the respondents on December 20, 2004. 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) must be established:

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- 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 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 findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of 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 compensability of the claim, and compensation must be denied. *C. Mickel v. Engineered Specialty Plastics*. 56 Ark. App. 126, 938 S.W. 2e 876 (1997). The claimant has the burden of proving the job relatedness of an alleged injury without the aid of any kind of prescription in his favor. *Farmers v. Little Knight Co.*, 220 Ark. 353, 247 S.W. 2d 111 (1952). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee was required to show that a causal connection existed between the injury and his employment. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W. 2d 879 (1985).

In the present case, the claimant's varied accounts of how the alleged accident occurred and who was present at the time of the alleged accident caused this examiner to question the credibility of the claimant with regard to the events on December 20, 2004. The record has far too many inconsistencies and contradictions for the claimant to prove by a preponderance of the evidence that his injury arose out of and in the course of his employment with K & D Tire and

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Auto.

Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. *White v. Gregg Agricultural Ext.*, 72 Ark. App. 309, 38 S.W. 3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. With respect to the claimant's testimony considering his alleged compensable injury to his back on December 20, 2004, I find the claimant was not a credible witnesses. The claimant testified at the hearing in this matter that while lifting a tire alone on December 20, 2004, he hurt his back and went to his knees. However, the claimant testified at his deposition on April 13, 2004, that he was with Kenny White when he hurt his back and that he told Mr. White at that time he thought he pulled a muscle.

A. We were loading some big truck tires up in the back of a truck,
and - -

Q. And who's we?

A. Me and Kenny.

Q. Okay.

A. And whenever we loaded them up, we had to take one back
down, and whenever we took that one back down, a real sharp pain
hit me in the back , and I went to my knees.

Q. Did you mention anything to Mr. White at that time?

A. Yes.

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Q. Okay, Tell me what you told Mr. White.

A. I told him that, you know, I thought I pulled a muscle or something, and he said it was my kidneys.

Q. Had you ever said anything to him about your kidneys?

A. No. (*RX-1, pgs 17 & 18, lns 19-25 & 1-19*)

The claimant's account of who was with him and who he told about possibly pulling a muscle greatly changed between his April '05 deposition and the full hearing on February 23, 2006. Also, at the full hearing, the claimant testified that after he "went to his knees," he told Lanny Nichols about possibly pulling a muscle within 15 minutes of the incident. But, at the full hearing, Mr. Lanny Nichols testified the claimant never mentioned going to his knees or a pulled muscle.

Q. On December 20th, did you work with Mr. Howell that day?

A. Yes sir.

Q. Did anything unusual happen that day?

A. Nothing out of the ordinary.

Q. Did Mr. Howell ever report any type of injury to you on that day?

A. Not a job-related injury, no.

Q. What did he tell you that day?

A. He did confront me with a question about having a kidney infection and asking me if I knew of anything he could take to help

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it. I told him what my mother told me all my life - just drink some cranberry juice.

Q. At that time, did he indicate to you anything being work related?

A. No sir. (*T. pge 51, lns 10-21*)

Also, Mr. Kenny White testified that he never witnessed the claimant go to his knees while lifting a tire on December 20, 2004; as the claimant testified to at his April '05 deposition. In fact, the claimant admitted at the full hearing that his account of what happened on December 20, 2004, changed between his deposition and the full hearing:

Q. Okay. So would you agree with me that what I just read to you out of pages 17 and 18 of your deposition is different from what you're telling us here today?

A. Yes sir.

Q. All right. Because at the deposition you told me that you and Mr. White were lifting and you went to your knees, correct?

A. Yes.

Q. And you told me that on April 13th, 2005, which was then roughly five month (sic) after this occurred, correct?

A. Yes sir. (*T. pgs 18 & 19, lns 20-25 & 1-4*)

The claimant testified at his deposition that at some point on December 20, 2004, he told both Mr. White and Mr. Nichols that he had hurt his back with the tires:

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Q. What did you tell Mr. Nichols was the problem?

A. I told him I thought it was my back. I didn't know.

Q. Did you tell him at that point you had hurt yourself as well?

A. Yeah, I told him it was hurt.

Q. Did you tell him how you hurt it as well? Did you tell him the same thing you told Mr. White, that you hurt it with the tires.

A. Yes. (RX-1, pgs. 18 & 29, lns 25 & 1-8)

Mr. Nichols and Mr. White both credibly testified the claimant never told them that he had hurt his back while lifting tires on December 20, 2004. In fact, Mr. White testified the claimant told him on December 20, 2004, that his back was already hurting due to performing home maintenance the prior weekend:

Q. Now, I want to take you back during Mr. Howell's employment. Do you remember him making any complaints of back problems before December 20th of 2004?

A. Yes sir. When he was removing the gas lines and electrical wiring from the floor in his house, he said he had to get his gas lines fixed because the gas company wouldn't turn his gas on. He had to get it fixed before the cold weather got here.

Q. And what did he tell you as far as his back?

A. He told me he was redoing the tile in his kitchen. He said taking the tile up and putting new tile down was killing him, going

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around on his hands and knees.

Q. Did he say anything about his back?

A. Yes. He was hurt in his back. He would stretch his back when

he came in. *(T. pgs. 37 & 38, lns 16-24 & 1-2)*

In comparing the claimant's testimony to the preponderance of the evidence, I find there were too many contradictions to find the claimant a credible witness with respect to his alleged back injury. After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury that arose out of and during his employment with the respondent-employer on December 20, 2004. I feel compelled to point out that respondents argued the claimant's injury was not confirmed by objective medical findings; to that end, the respondents introduced the claimant's lumbar MRI from October 4, 2005 that was void of page two. Luckily, the complete findings from the MRI were introduced by the claimant. The respondents are cautioned to fully examine all records before submitting such to the Commission, and if a report is going to be entered, it must be the complete report. *(See RX-1, pg. 8)*

Nevertheless, the claimant has failed to prove that an injury requiring medical treatment arose out of and during the course of his employment. Accordingly, this claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

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