

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513122

BILLY R. PEARROW, EMPLOYEE	CLAIMANT
ARKANSAS ENVIRONMENTAL WASTE RECYCLING, EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JUNE 6, 2006

Hearing before Chief Administrative Law Judge David Greenbaum on May 4, 2006, at Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Marc I. Baretz, Attorney-at-Law, West Memphis, Arkansas.

Respondents represented by Ms. Melissa Ross, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted May 4, 2006, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas workers' compensation laws.

This claim was the subject of prehearing conference conducted on April 5, 2006. A Prehearing Order was filed on said date. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection. As will be reflected below, the parties disregarded instructions contained in the Prehearing Order, and the cover-letter scheduling the claim for a hearing. Specifically, the parties were to review the Prehearing Order and advise immediately, in writing, of any corrections or additions contained in the Order. In

addition, the parties were advised that they would be required to stipulate to the applicable compensation rates at the hearing or be prepared to document same, together with submitting trial briefs relative to any conflicting contentions which was not accomplished. It is apparent that the parties failed to read and/or completely disregarded the prehearing instructions.

At the prehearing conference, the parties stipulated that the employment relationship existed at all relevant times, including November 28, 2005, and that the claim had been controverted in its entirety. Further, at the prehearing conference, respondents proposed an average weekly wage of \$384.55, and compensation rates of \$256.00 for temporary total disability and \$191.00 for permanent partial disability, respectively.

At the hearing, the parties offered conflicting contentions concerning the applicable compensation rates. The claimant introduced copies of two (2) W-2's representing wages for 2005 earned by the claimant while working for two (2) separate entities purported to be the respondent-employer, specifically, Arkansas Environmental Waste and Riverside Environmental Disposal. The claimant maintained that his combined wages earned from the respondent-employer entitled him to the maximum applicable compensation rates. However, the claimant failed to submit a trial brief in support of this contention while maintaining that it was purely a mathematical calculation. Clearly, this assertion was incorrect because the compensation rate became an issue. Conversely, respondents contended that the

claimant's average weekly wage and compensation rates remained the same as proposed at the prehearing conference, and offered an unverified employee report showing various paychecks issued to the claimant by Arkansas Environmental Waste. Respondent, likewise, failed to submit a trial brief in support of its contentions relative to the applicable compensation rates.

Suffice it to say that neither party's contentions relative to the applicable compensation rates is mathematically correct. The record reflects that the claimant worked for two (2) separate entities, Arkansas Environmental Waste Recycling, Inc., and Riverside Environmental Disposal, LLC, both owned and operated by the Looney brothers, David Looney and Joe Ed Looney, Jr., who were partners in the aforementioned enterprises. The claimant worked for both and received separate checks from each. While the duties of each entity were distinguishable, the claimant worked for both simultaneously and his combined wages with both entities should determine his average weekly wage and compensation rates. The respondents' proposed exhibit only included checks received from Arkansas Environmental Waste and not Riverside. Further, it was apparent from the testimony of David Looney that respondents' exhibit was the net wages rather than the gross. (Resp. Ex. 1) Clearly, respondents' proposed compensation rate is incorrect as reflected by the employer's W-2s. Nevertheless, the claimant's contention that he is entitled to the maximum compensation rates is, likewise, erroneous. The record reflects that the claimant worked approximately thirty-four

(34) weeks for the employer herein, specifically, the period beginning April 6, 2005, through November 28, 2005, which was the date of the alleged injury. When the claimant's gross wages are added together, the claimant's average weekly wage was \$542.75, entitling him to compensation rates of \$362.00 per week for temporary total disability and \$272.00 per week for permanent partial disability and not the maximum compensation rates of \$466.00 per week for temporary total disability and \$350.00 per week for permanent partial disability alleged.

Because the claimant cannot overcome the threshold issue concerning compensability, reflected by the findings of fact and conclusions of law, hereinafter discussed, an exhaustive analysis of the applicable compensation rates is not deemed warranted.

At both the prehearing conference and the hearing, the parties agreed that the primary issue to be 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 back injury as the result of a specific incident identifiable in time and place of occurrence on November 28, 2005; that he was entitled to temporary total disability benefits beginning November 29, 2005, and continuing through at least January 3, 2006; that respondents should be held responsible for all outstanding medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. The

claimant reserved entitlement to additional temporary total disability after January 3, 2006.

The respondents contended that the claimant did not sustain a compensable injury within the meaning of the Arkansas workers' compensation laws, specifically maintaining that no injury occurred which arose out of and during the course of employment, and, further, that there was no medical evidence supported by objective findings to support a compensable injury. If compensability was overcome, respondents contended that the claimant could not prove entitlement to benefits after January 3, 2006.

In addition to the claimant, his girlfriend, Sandra Martin, was called as a corroborating witness. David Looney and Bobby Cayton were called as witnesses for the respondents. The record is composed solely of the transcript of the May 4, 2006, hearing containing several exhibits.

I feel compelled to point out that documentary evidence proffered by the respondents was excluded at the hearing. Specifically, respondents attempted to introduce written statements from alleged witnesses not subject to cross-examination. In addition, respondents requested the opportunity to submit an evidentiary deposition of one Melvin Grand who failed to appear at the hearing after the employer requested his attendance. Alternatively, respondents requested a continuance in order to offer the testimony of Mr. Grand. Respondents failed to subpoena any witnesses. The claimant objected to both an evidentiary deposition

of Mr. Grand and/or a continuance. All of respondents' requests were denied.
(Tr.10-13)

Finally, it must be noted that for some unexplained reason, at the hearing, the employer testified that the claimant voluntarily quit his job the week before the date of the alleged injury, inferring that the employment relationship did not exist on November 28, 2005. Although the record contains some evidence that the claimant may have had a disagreement with his employer and voluntarily left his employment for a time over a dispute concerning his job duties, a preponderance of the credible evidence reflects that the claimant had returned to work for the employer herein and that he was working for Arkansas Environmental Waste on November 28, 2005. In fact, the parties stipulated that the employment relationship existed at all relevant times, including November 28, 2005. As previously pointed out, the parties were instructed to review the Prehearing Order carefully and advise, in writing, of any corrections or additions. If the stipulation concerning the employment relationship was going to be withdrawn (which the record does not reflect), the Commission and the claimant should have been advised in advance to allow the claimant an opportunity to offer evidence to rebut any testimony relative to the employment relationship. The prehearing process is necessary in order to assist the Commission and the parties at narrowing the issues and formulating stipulations. Any changes require notification as a condition precedent.

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 parties at all relevant times, including November 28, 2005, at which time the claimant's average weekly wage was \$542.75, entitling the claimant to compensation rates of \$362.00 per week for temporary total disability and \$272.00 per week for permanent partial disability in the event the claim is found compensable.
3. The claimant has failed to prove, by a preponderance of the evidence, that his alleged back injury was caused by a specific incident identifiable by time and place of occurrence which arose out of and during the course of his employment with Arkansas Environmental Waste.
4. The claimant has failed to prove, by a preponderance of the credible evidence, that there is a causal connection between his need for treatment and alleged disability and any employment related injury with the respondent herein.

5. Respondents have controverted this claim in its entirety.

DISCUSSION

The record in this case is replete with inconsistencies and contradictions. The claim turns almost 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).

For reasons set out further below, I did not find the claimant to be a credible witness. Likewise, I did not find David Looney, the employer, to be credible or his testimony persuasive. The only disinterested party that testified at the hearing was Bobby Cayton who specifically contradicted the claimant's testimony concerning the reporting of the alleged injury.

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

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. 2005), 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).

As reflected by the Prehearing Order, respondents' initial defense to this claim is that there was no medical evidence supported by objective findings to

support a compensable injury. Clearly, the claimant's medical proof is weak. However, in view of various court holdings concerning whether questionable language in medical reports constitutes objective medical findings, I am constrained to conclude that the claimant has offered sufficient medical evidence supported by objective findings to establish an injury. The claimant has failed, however, to prove, by a preponderance of the evidence, that the injury arose out of and in the course of his employment.

The claimant, Billy Ray Pearrow, Jr., is thirty-eight (38) years old. The record reflects that the claimant was hired by David Looney, one of the owners of the employer, on April 6, 2005. The employer operates two (2) separate, yet interconnected businesses. Arkansas Environmental Waste is a landfill where garbage is disposed under a contract with Crittenden County. Riverside Environmental Disposal is the name of the company that picks up waste and hauls it to the landfill. The claimant was initially hired by Mr. Looney as a truck driver for Riverside. Apparently, the pay was better for driving a truck versus working at the landfill. The claimant worked for both companies and was paid separately from each entity. However, the same owners and supervisors directed the claimant's work between the two (2) companies. The claimant stated that he would perform whatever work David Looney assigned him to perform which included working on equipment, running equipment at the landfill, as well as driving the garbage trucks. The claimant denied having any physical problems with his back prior to November 28,

2005. The claimant maintained that he hurt his back while picking up paper at the landfill on November 28, 2005. The claimant maintained that he reported his injury to a co-worker, Bobby Cayton, at the time the injury occurred. The claimant could not recall whether he reported the injury to David Looney on the same day as the alleged occurrence, but recalled reporting the injury the following day to Mr. Looney, at which time he requested medical treatment. The claimant was a poor historian. His testimony was extremely vague. When questioned concerning Mr. Looney's response to the report of injury and request for medical treatment, the claimant reported that Mr. Looney stated, "I don't know if you hurt your back at home or what you did. It ain't my problem. Do what you got to do." (Tr.22-26)

The claimant was initially examined and treated at the Crittenden Memorial emergency room on November 30, 2005. He was diagnosed as having an acute myofascial strain and prescribed Darvocet for pain and Flexoril for muscle spasm. An appointment was made for follow-up examination with Dr. Onyia. (Cl. Ex. A, p.2)

After declaring that David Looney informed him that his alleged back injury was not his problem, the claimant testified that Joe Ed Looney, Jr., David Looney's brother and partner, encouraged him to see Dr. Wah, the company doctor in West Memphis, Arkansas. The claimant related that he called Dr. Wah and was told that they did not take workers' comp cases from the employer and that he called Mr. Looney back and was referred to Betty Smith in the company office. The claimant maintained that Ms. Smith told him that Dr. Onyia was on the list of approved

physicians. The claimant followed-up with Dr. Onyia on December 2, 2005. He maintained that Dr. Onyia took him off work pending approval for an MRI which was never approved by the employer or its insurance carrier. The claimant has not returned to any gainful employment since the day of the alleged injury. (Tr.27-30)

The claimant was examined by Dr. Onyia on December 2, 2005. The history provided by Dr. Onyia reported back pain beginning four (4) days earlier, on Monday, November 28, 2005, at work while, "leaning over picking up rod ets when he suddenly developed an acutely severe back pain." Dr. Onyia did author a report dated December 7, 2005, taking the claimant off work, to return on January 3, 2006, pending test results from MRI. (Cl. Ex. A, pp.4, 8) Again, the claimant has not returned to gainful employment since November 28, 2005.

On cross-examination, the claimant reported that he did not intend to return to work without the benefit of the recommended MRI. However, on further cross-examination, claimant acknowledged having recently taken and passed a D.O.T. physical in April, 2006, allowing him to driving a truck with the only restriction related to lifting. (Tr.40)(Cl. Ex. C)

On further cross-examination, the claimant's credibility was questioned, specifically, concerning criminal convictions. Again, the claimant was evasive concerning the number of prior criminal convictions stating, "Could be 20 or less. It could be 10 or less, could be 5 or less. I don't know. I didn't know I needed that." The claimant acknowledged that he had a felony conviction

approximately a year and a half prior to the hearing for paraphernalia charge.
(Tr.41)

Finally, on cross examination, the claimant denied telling Gil Fowler that he had injured himself at home.

Sandra Martin, a witness called by the claimant, is the claimant's live-in girlfriend. She testified that the claimant did not have any problems with his back until November, 2005, when he told her that he hurt his back at work.

David Looney was called as witness by the respondents. His testimony was of little probative value. Mr. Looney maintained that the claimant allegedly called his brother the Wednesday before Monday, November 28, 2005, and quit his job. Mr. Looney denied talking to the claimant on November 28, 2005. He acknowledged that the claimant reported an injury on November 29, 2005, while maintaining that the company offered to send him to a doctor which makes Mr. Looney's testimony that the claimant quit somewhat suspect. Mr. Looney also testified that the claimant was, at one time, written up for forging time cards, but was not terminated for said, alleged activity.

Bobby Cayton was called as a witness by the respondents. Mr. Cayton works as a dozer operator at the Crittenden County Landfill for Arkansas Environmental Waste. Mr. Cayton specifically denied the claimant ever reporting a work-related injury to him.

The burden of proving the job-relatedness of an alleged injury rests upon the

claimant. As reflected above, the record in this case is replete with inconsistencies and contradictions. I did not find the claimant to be a credible witness. Compensability of this claim turns almost entirely upon the claimant's credibility. 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.

I feel compelled to address respondents' contention that there is no medical evidence supported by objective findings to support a compensable injury. In the event an appellate review concludes that a preponderance of the evidence supports an injury arising out of and in the course of employment, which I do not find, an injury has been established by medical evidence supported by objective findings as defined in A.C.A. §11-9-102(16).

Although Dr. Onyia, in his physical examination on December 2, 2005, and again on December 7, 2005, did not observe any muscle spasm, it must be noted that x-rays taken at the emergency room on November 30, 2005, revealed straightening of the curvature of the lumbar spine which was seen as preventing exclusion of muscle spasm or soft tissue injury and that the physicians at the emergency room prescribed Darvocet for pain and Flexoril for muscle spasms. (Cl. Ex. A, pp.2-3)

Our Supreme Court has held that a medical findings which consisted of a

straightened lumbar spine is normally associated with muscle spasm in the straightened area and establishes an objective medical finding within the meaning of the Workers' Compensation Act. Further, the Court has held that a Flexoril prescription also constitutes objective findings, concluding that a physician would not prescribe a medication for muscle spasm if he did not believe the muscle spasms were existent. *Estridge vs. Waste Management*, 434 Ark. 276, 33 S.W.3d 167 (2000). See, also, *Fred's, Inc., vs. Jefferson*, 89 Ark. App. 95, ___ S.W.3d ___ (2004).

In view of the foregoing, it is herein concluded that the claimant has offered sufficient medical evidence supported by objective findings to establish an injury. However, the claimant has failed to prove that the injury arose out of and during the course of employment. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge