

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F506517

DANNY SWANIGAN, EMPLOYEE	CLAIMANT
FULLER SEED & SUPPLY, EMPLOYER	RESPONDENT
AG-COMP SIF, CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on January 19, 2006 at Helena, Phillips County, Arkansas.

Claimant represented by the HONORABLE MIKE J. ETOCH, Attorney at Law, Helena, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant and benefits must be denied.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on June 17, 2005 at which time the claimant was earning sufficient wages to entitle him to a

compensation rate of \$266.00/\$200.00, in the event this claim is found to be compensable.

The claimant contends he injured his neck and back in an altercation with a co-worker. He seeks payment of medical expenses, temporary total disability benefits from June 18, 2005 to a date yet to be determined, and attorney's fees.

The respondents contend this claim is not compensable because the claimant was not performing employment services at the time of the injury. Additionally, respondents contend that the claimant suffers from a preexisting condition and there is no objective medical evidence to establish a new injury.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript, along with the claimant's deposition and two surveillance videotapes incorporated by reference.

The following witnesses testified at the hearing: the claimant; the claimant's cousin and co-worker, Joseph Holder; co-worker, Mark English; and owner, Terry Fuller. The claimant was evasive and argumentative in his testimony. He gave numerous inconsistent answers in his answers to interrogatories, deposition and hearing testimony. The claimant cannot be considered a credible witness.

The claimant, age 46 (D.O.B. April 13, 1959) has some vocational training in automotive repair but most of his sporadic work experience has been as an unskilled manual laborer (construction, farming, shining shoes, operating a forklift and

handling warehouse materials). At one time the claimant owned a remodeling business with a family member. The claimant has a police record for driving with a suspended license, assault and battery, (Depo. p. 33-38, 45-46).

The claimant's health history includes a gunshot wound to his left leg as a result of an altercation with the police. The claimant has also been involved in at least four motor vehicle accidents. In each instance, the claimant required medical treatment for neck and back complaints and missed two or three months of work (compare Tr. p. 26-28 with Depo. p. 56-62).

The claimant's health history also includes three prior workers compensation injuries to his back and left wrist, (Tr. p. 20, 23-24). In June, 2000 the claimant had back surgery. The claimant has given inconsistent statements about his injuries and whether or not the surgery alleviated his symptoms (compare Tr. p. 21, 24-25 with Depo. p. 54-55/65-66).

The claimant began work for the respondent employer about three months prior to his injury on June 17, 2005. The claimant was in charge of loading and unloading grain.

The claimant became involved in a dispute with his cousin and co-worker, Joseph Holder. The incident was observed by co-workers but I noticed, Mark English is not listed as a witness on the form notifying the employer of an injury, the ARN. The claimant testified his cousin, Mr. Holder pushed him (Tr. p. 11-15, 29-32, 49-52/Depo. 68-73), and bloodied his lip as a result of the altercation. The claimant

filed criminal charges against his cousin for assault and battery but failed to pursue the matter.

Both Mr. Holder and Mr. English testified the incident was minor, there were no visible signs of injury, and the claimant was the aggressor. Mr. English confirmed that the claimant grabbed his neck, indicating that he had been injured, (Tr. p. 54-61, 63-65, 70-75).

The claimant's supervisor, Richard Smith, took the claimant to the clinic in Marvell. The claimant was referred to the Helena Hospital for x-rays of his neck and back and excused from work. The claimant was scheduled for an MRI scan but the workers' compensation carrier controverted the claim and the claimant is financially unable to pursue medical treatment. He has not been employed since June, 2005 but he did help family members in September, 2005 apply siding to a house, (Tr. p. 32-36, 44, 48). The claimant has applied for Social Security Disability benefits for his neck and back problems, along with Medicaid and food stamps.

Terry Fuller testified the claimant reported that his neck and back were injured in an altercation with his cousin. Mr. Fuller also stated the claimant came by the office on January 17, 2006, just before the hearing and asked to either settle the workers' compensation claim or return to work (Tr. p. 36). Mr. Fuller told the claimant that the carrier made the decisions on the claim and no job was available.

On cross-examination Attorney Wade pointed out numerous inconsistencies in the information the claimant provided in discovery and at the hearing. For

example, in answering interrogatories about his work history, the claimant failed to disclose his prior work-related injuries or identify those employers, (Tr. p. 38, 46-47). He also denied any workers' compensation claims even though he represented himself in a workers' compensation hearing before Judge Marshall (Tr. p. 39-44, 47). The claimant also failed to disclose all of his motor vehicle accidents (Tr. p. 44) and gave inconsistent answers about his symptoms from prior injuries (Tr. 45).

MEDICAL EVIDENCE

Medical records show the claimant was treated by Dr. Jackson for a back strain in 1984 or 1985. He was injured in a fall down stairs in March 1995. X-rays were taken in June 1995 for a commercial drivers license. The claimant was given lifting restrictions for disc space narrowing at L4-5, L5-S1.

The claimant filed a workers' compensation claim for a back and shoulder injury on April 14, 1995 with Haverty's (E507753). This claim was dismissed December 1, 1995 after the claimant failed to provide any medical documentation of the injury. Another workers' compensation claim involved a November, 1997 neck and back injury at United Refrigeration (E715432). The claimant was diagnosed with degenerative disc disease at L4-5 and a soft tissue injury to his neck. The claimant failed a Function Capacity Evaluation (FCE) in January 1998. Judge Marshall issued an opinion on June 2, 1998 denying this claim based on credibility. A third workers' compensation claim was filed for a February, 1998 injury at Watkins Motor Lines. The claimant did not disclose his previous injuries on the employment application.

A fourth workers' compensation claim concerned a November 1998 back injury at Speedco (F506517). Records show the Waddell's sign (testing for symptom magnification) was positive. This claim was also dismissed on August 20, 1999.

The claimant was involved in a MVA in February, 2003, reporting neck and back pain. He requested a neck brace which the doctor refused to provide. X-rays showed osteophyte formation in the neck at C5-6 and C7-T1, but no acute abnormality.

After the incident at work, the claimant reported neck and back pain based on this history:

was at work and a man he works c (with) walked up and put hand on face & pushed him and snapped neck back then turned around & hit in in (sic) face, neck in (sic) hurting. Bystander heard neck pop.

I could find no mention of facial bruising or a split lip in the medical records. X-rays showed no fractures but there was evidence of multilevel degenerative disc disease in both the cervical and lumbar spine. Medication was prescribed for leg pain and trouble sleeping. An MRI scan was scheduled for the neck and back but the carrier controverted the claim.

SURVEILLANCE

The investigator submitted a report, still photographs, and two videotapes.

The videos taken in July and September 2005, show the claimant working on a house with no visible signs of discomfort. He is depicted driving a car, bending,

lifting , climbing a ladder and carrying groceries. Based on this evidence, I find the claimant is able to work and is not entitled to temporary total disability benefits.

FINDINGS & CONCLUSIONS

_____The evidence of record shows the claimant was returning from a lunch break when he was confronted by his cousin and co-worker in the warehouse. An argument ensued about a work-related dispute. The claimant pushed his cousin's face away and the cousin retaliated.

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

_____ or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has a long standing history of neck and back pain emanating from multilevel degenerative disc disease. The claimant also has a history of multiple workers' compensation claims and motor vehicle accidents. Therefore, I find the claimant's condition did not arise out of and in the course of his employment. The evidence of record shows no physical bodily harm was caused by the altercation. And because I find the claimant is not a credible witness (compare the inconsistent answers in interrogatories, deposition and at the hearing along with the surveillance videos), there is no credible evidence that the altercation caused the need for treatment and disability.

A compensable injury does not include an "injury which was inflicted upon the employee at a time when employment services were not being performed...." Ark. Code Ann. 11-9-102(4)(B)(iii)(Supp. 2003). An employee is performing "employment services" when he or she "is doing something that is generally required by his or her employer." White v. Georgia-Pacific Corp., 339 Ark. 474, 478, 6 S.W.3d 98, 100

(1999). The test for determining whether the employee was performing employment services at the time of the injury is “whether the injury occurred within the time and space boundaries of the employment, when the employee [was] carrying out the employer’s purpose or advancing the employer’s interest directly or indirectly.” Pifer v. Single Source Transp., 347 Ark. 851, 69 S.W.3d 1 (2002).

After reviewing the testimony, I find that at the time of this incident, a minor shoving match, the claimant had not resumed his job duties and was not performing employment services.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the claimant was earning sufficient wages to entitle him to a compensation rate of \$266.00/\$200.00, in the event this claim is found to be compensable.
2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim is respectfully denied and dismissed.

A copy of this opinion has been sent to the Fraud Unit for review pursuant to Ark. Code Ann. §11-9-106.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge