

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209561

JOSEPH LANG, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 26, 2007

Hearing before Chief Administrative Law Judge David Greenbaum on February 20, 2007, at Forrest City, St. Francis County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Andrew M. Ivey, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted February 20, 2007, 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 December 6, 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. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It was stipulated that the Arkansas Workers' Compensation Commission had jurisdiction over this claim; that the employment relationship existed between the parties at all relevant times, including July 27, 2002; that the claimant's average

weekly wage was sufficient to entitle him to compensation rates of \$167.00 per week for temporary total disability and \$154.00 per week for permanent partial disability; that the respondents initially paid for the medical evaluation by the company physician, Dr. James Meredith, prior to controverting the claim in its entirety.

By agreement of the parties, the primary issue presented for determination was whether the claimant sustained a compensable back injury on July 27, 2002. If answered affirmatively, claimant's entitlement to associated benefits must be determined. In addition, respondents have raised various affirmative defenses that the claim is barred by time.

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 July 27, 2002; that respondents should be held responsible for all hospital, medical, and related expenses as the result of the July 27, 2002, injury, together with continued, reasonably necessary medical treatment; that he was entitled to temporary total disability benefits for a period of approximately two (2) years, the exact dates identified at the hearing as July 27, 2002, through September, 2004, while reserving permanent disability, if applicable, pending a determination on the agreed issue.

The respondents contended that the claimant was not entitled to the requested benefits, maintaining that the claimant cannot establish that he sustained

accidental injuries resulting in objective findings of injuries to his low back which arose out of and during the course of his employment with Wal-Mart on or about July 27, 2002. Respondents further contend that this claim is barred pursuant to Ark. Code Ann. §11-9-702(a)(1) because, following the dismissal of this claim without prejudice on September 7, 2004, the claimant failed to file a claim for benefits with the Commission within two (2) years from the date of his alleged injury. Alternatively, if the claim for original benefits was not barred pursuant to A.C.A. §11-9-702(a), respondents contend that the claim for additional benefits is barred pursuant to Ark. Code Ann. §11-9-702(b) because, following the dismissal of this claim without prejudice on September 7, 2004, the claimant failed to file a claim for additional benefits with the Commission within two (2) years from the date of either his alleged injury and/or within one (1) year from the incurrence of any benefit. Respondents further contend that the claimant's claim for benefits is barred pursuant to Ark. Code Ann. §16-56-126, the savings statute because claimant failed to file a new action or request for benefits within one (1) year after the dismissal of this claim. As a further alternative, respondents contend that the claimant has waived his alleged entitlement to benefits pursuant to the doctrine of laches, as the claimant failed to re-file his claim following dismissal without prejudice on September 7, 2004, for more than one (1) year following the dismissal. Finally, in the event the claimant was awarded any benefits, respondents maintain that the claimant should be assessed costs for which respondents request a credit related

to time and other general costs associated with the claimant's failed deposition on October 23, 2006.

In addition to the claimant, Robert Edwards and Shirley Hawkins were called as corroborating witnesses. The record is composed solely of the transcript of the February 20, 2007, hearing containing numerous exhibits.

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 claimant and to observe his 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 establish, by a preponderance of the credible evidence, that he sustained an injury arising out of and during the course of his employment with Wal-Mart Stores on July 27, 2002, which is confirmed by medical evidence supported by objective findings.
4. The claimant has failed to prove, by a preponderance of the evidence, that his injury, need for medical treatment, and alleged disability are directly and causally related to a work-related incident on July 27, 2002.

5. In the event the claimant sustained a work-related injury on July 27, 2002, as the result of a specific incident, the injury was merely a temporary aggravation of a pre-existing condition, and claimant has failed to prove entitlement to benefits related to said temporary aggravation.
6. In the event the claimant sustained a compensable injury on July 27, 2002, which is contrary to the aforementioned findings and conclusions, I specifically find that the claim is not barred by the statute of limitations. Specifically, the Order of Dismissal filed September 7, 2004, without prejudice was issued before the holding in *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, \_\_\_ S.W.3d \_\_\_ (2004). However, the issue of whether the claim is barred by statute of limitations is moot in view of the finding that the claimant failed to prove a compensable injury within the meaning of the Arkansas workers' compensation laws.

#### DISCUSSION

This is an extremely difficult claim. Clearly, it has been made more difficult by the passage of time and because the claimant failed to pursue his claim for benefits in a timely manner. Obviously, the claimant's course of conduct and failure to promptly pursue the claim, as well as promptly seek legal assistance has complicated the collection and preservation of evidence which makes the claim suspect. The claim turns almost entirely upon the claimant's credibility. Although I found the claimant's description of the injury to be credible, as will be set out

further below, the claimant has failed to prove that the incident was more than a temporary aggravation of a pre-existing condition and has failed to prove that the incident resulted in an injury, entitling him to benefits. In fact, the claimant's reporting of an incident was corroborated by Shirley Hawkins, but, again, because of the passage of time, Ms. Hawkins' recollection of the date and time were extremely vague. I am further constrained to comment on respondents' submission of documentary evidence in support of the denial of this claim. Respondents offered self-serving statements from Anthony D. Coleman, an assistant manager, and the claimant's immediate supervisor on July 27, 2002, as well as a witness statement by Jo Devazier, the personnel manager for the respondent. In addition, respondents offered the unverified statement of one Angela Boyd. (Resp. Ex. A, pp.1, 4, 5, 7)

Clearly, the aforementioned witness statements should not be considered as evidence because the claimant has not been afforded the right to cross-examine said alleged witnesses. No proffer was made concerning why the witnesses were not at the hearing. The claimant's testimony contradicts, and is inconsistent with the statements made by Mr. Coleman. Under the prior law, respondents should have produced said witnesses to dispute the claimant's testimony if it was untrue. Under the prior law, respondents' failure to do so would allow the Commission to infer that the testimony would have been unfavorable to the employer. *Brower Mfg. Co. v. Willis, et al*, 252 Ark. 755, 480 S.W.2d 950 (1972). However, the Commission has

previously held that the *Brower* decision is no longer the law and that the Commission can no longer draw this inference. *Hooper v. Maverick Tube*, AWCC #F202296, Full Commission Opinion filed February 15, 2005.

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 claimant, Joseph Lang, is sixty-one (61) years old. He has a Bachelor of Science Degree, together with hours towards his Masters Degree. In addition to his work history, the claimant has more than twenty (20) years in active military, as well as military reserve. He retired from the military in 1996. After he retired from the military, the claimant worked for the Department of Agriculture for approximately one (1) year and then went to work for the Arkansas Department of Corrections until on or about 2000. After leaving the Arkansas Department of Corrections, the claimant both taught school, and, in addition, worked for the respondent, Wal-Mart, contemporaneously. The claimant last worked for the respondent on July 27, 2002, the date of his alleged injury. The claimant's description of the injury is set out below:

Q Okay. So July 27<sup>th</sup> of '02, the date of your alleged injury, is the last time you worked for Wal-Mart, right?

A Yes, sir.

Q Okay. Tell us what you were doing and how you got hurt on the 27<sup>th</sup> of July of '02.

A I has hanging a bicycle in the ceiling. The supervisor had told a young lady and myself to zone toys, and she was zoning the aisles, picking up the toys.

Q I'm sorry. I don't understand what zoning means.

A Picking up things, cleaning up things, straightening up.

Q Zoning means picking up?

A Yes.

Q Okay.

A The kids had been through there looking at the toys and had them all over the place.

Q Okay.

A And people had been shopping for bicycles, and instead of a person showing those persons the bicycles, instead of him putting – them putting them back, they left them all in the aisle.

Q Okay.

A And the supervisor told us to zone it, which was clean it up, straighten it up, and I was in the process of doing that when I hurt myself.

Q And were you actually hanging a bicycle?

A Yes.

Q And what happened when you were hanging the bicycle?

A They have hooks, S-hooks, hung on the ceiling.

Q Yes, sir.

A I was trying to hang this bicycle and I missed that hook, and when I missed it, all the weight went forward, and I tried to hold it, and that's how I injured my back.

Q And did you know immediately that you had hurt yourself?

A Yes, sir, the pain went down through my spine.

Q Okay. When this incident occurred, did you report it to anyone?

A That's what I did. I went to – I got down off the ladder, and I eased back to layaway.

Q Well, who did you first report it to?

A The lady working in layaway.

Q Was she your supervisor?

A No, my supervisor – we called for my supervisor, or someone, and no one came.

Q Okay. So who was your supervisor?

A Anthony Coleman.

Q And he was the head of your department?

A He was my supervisor. They rotate them over different areas.

Q Okay. And your immediate supervisor, Anthony Coleman, wasn't there?

A No.

Q Okay.

A If he was there, he didn't come. He was there. There was three supervisors there. I saw them.

Q Okay. Did you report it to any other supervisor?

A Didn't see anyone that night. They wouldn't come.

Q Okay.

A I clocked out and went to the doctor.

Q Let me ask you this. Before you clocked out, had you gone through any orientation as to what procedure to follow if you got hurt on the job?

A If I did, I don't recall it, but I was always told to report it to your immediate supervisor if you get hurt.

Q Okay.

A And that's what I was trying to do. When that failed, I was in pain, I left. I clocked out. I got off the clock, and went to the VA.

Q Did you in any way attempt to document or write up the incident at that time?

A No, sir.

Q Okay. So you clocked out after reporting to – do you know the individual you reported it to in layaway?

A Yeah, Shirley Hawkins.

Q Shirley Hawkins?

A Yeah, she's one of my witnesses.

Q Okay. And what did you tell Ms. Hawkins?

A I told her I had gotten hurt, and I needed to get a supervisor, would she please page one.

Q And did she attempt to do that?

A She did.

Q And then what happened when she couldn't get a supervisor?

A I stayed there for – it was about 30 minutes, and I was hurting. So I just went on and clocked out, and I told Shirley I was going to the doctor.

Q And did you tell her to report this to a supervisor if they ever showed up?

A No, I didn't. (Tr.20-23)

The record reflects that the claimant sustained a number of low back injuries during his time in the military. In fact, the claimant has a long history of treatment related to his low back, including, but not limited to undergoing back surgery. All of the claimant's prior medical treatment has been at the VA hospital. The medical evidence set out further below reflects that the claimant obtained medical treatment for his back just prior to the date of his alleged injury. In fact, the record reflects that the VA hospital, as part of its follow-up evaluation, conducted diagnostic studies, including a series of spinal x-rays during July 18 and 19, 2002, approximately one week prior to the immediate claim. (Jt. Ex. A, pp.11, 15-17)

The claimant did return to the VA hospital on July 27, 2002, at which time he gave a history of injury consistent with the immediate claim. (Jt. Ex. A, p.19)

After seeking treatment at the VA hospital, the claimant reported his alleged injury to the employer on July 29, 2002. (Resp. Ex. A, pp.2-3)

For some unexplained reason, the claimant failed and/or refused to request medical treatment from the employer. Nevertheless, after the claimant reported the injury, the employer sent the claimant to the company physician, Dr. James T. Meredith. Apparently, Dr. Meredith saw the claimant one time only on August 19, 2002. His report addressed to Jo Devazier in the personnel department is set out below:

Dear Jo:

As you know, I saw Joseph Lang on 08-19-02 for back problems. At that time he told me he had already been treated at the VA Hospital for his back problem and had even been referred to Campbell Clinic for consideration for surgery. He told me

it did not matter to him if this was approved by Worker's Comp. since he had insurance that would pay for him to have surgery if he needed it, and he wanted to go on through with his referral and treatment through them in any event.

He realizes that he will be responsible for the bills and not Worker's Comp. if he went outside of the usual referral pattern. Again, he just said that did not matter to him.

I hope this clears things up for you. Let me know if I can be of assistance. (Jt. Ex. A, p.25)

The only medical provider that the claimant has seen other than the VA hospital and Dr. Meredith was Dr. Andrew Crenshaw at the Campbell Orthopedic Clinic. Dr. Crenshaw diagnosed the claimant's condition as post-laminectomy syndrome. He released the claimant to return to regular duty with a return on an as needed basis only as of August 24, 2002. (Jt. Ex. A, pp.26-27)

Finally, it must be noted that the claimant underwent diagnostic studies on both July 18, 2002, (prior to the within claim), as well as in August, 2002, approximately one week following the work-related incident, and that the impression was that the claimant's examination had not changed since July 18, 2002. (Jt. Ex. A, p.24)

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).

It would require sheer speculation and conjecture to attribute the claimant's need for treatment after July 27, 2002, to the work-related incident described by the claimant. The record reflects that the claimant was actively seeking medical treatment for his low back immediately prior to the incident. He has a long history of back problems. 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).

At most, even if the claimant sustained a work-related injury, the record reflects that the claimant's injury was merely a temporary aggravation of his pre-existing condition. The medical evidence reflects that the claimant was released to return to work on August 24, 2002. In the event the claimant sustained a compensable injury, which is not conceded herein, he would not be entitled to temporary total disability beyond that date.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *Arkansas State Highway and Transportation Department v. Breshears*, 272 Ark. App. 244, 613 S.W.2d 392 (1981); *Johnson v. Rapid Die & Molding*, 46 Ark. App. 244, 878 S.W.2d 790 (1984).

"Disability" means incapacity because of injury to earn, in the same or any other employment, the wages which the employee was receiving at the time of the injury. The Commission may consider the claimant's physical capabilities and evaluate her ability to engage in any gainful employment. The claimant bears the burden of proving both that he remains within his healing period and, in addition, suffers a total incapacity to earn pre-injury wages in the same or other employment. *see, Palazolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994).

The claimant is highly educated. There is no reason that the claimant cannot return to various forms of gainful employment.

Although, based upon the foregoing findings and conclusions, respondents' affirmative defense of statute of limitations is moot, I specifically find that if compensability was overcome the immediate claim is not barred by statute of limitations. I feel compelled to further point out that the Order of Dismissal in this claim filed September 7, 2004, was issued before the holding in *Dillard v. Benton County Sheriff's Office*, 87 Ark. App. 379, \_\_\_ S.W.3d \_\_\_ (September 22, 2004).

Because the claimant was never afforded a hearing on the Motion to Dismiss, any such Order must be rescinded and the claimant afforded an

opportunity for a hearing. The claimant has now had a hearing on the merits. This issue is, likewise, rendered moot because the claimant has failed to prove a compensable injury within the meaning of the Arkansas workers' compensation laws.

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 is entitled to workers' compensation benefits. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge