

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F313430

**DENNIS MORRIS PARKER,
EMPLOYEE**

CLAIMANT

**PETIT JEAN
POULTRY, INC.,
EMPLOYER**

RESPONDENT

**LIBERTY MUTUAL
FIRE INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 9, 2007,

Pursuant to a hearing conducted October 12, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This hearing was primarily concerned with (1) compensability of the claimant's low back condition, which he attributes to his employment, but the respondents view as pre-existing, and (2) the Motion for Costs filed on behalf of the respondents.

The claimant contended that on August 20, 2003, he suffered a compensable low back injury as a result of a lifting incident at work and that he should be awarded benefits, including reasonably necessary medical and related expenses and temporary total disability benefits from the date of injury until September 28, 2004. The claimant further requested an independent medical evaluation at the expense of the respondents. An attorney's fee for controversion was also requested. Other possible issues were reserved. In a response to the Motion for Costs, it was admitted that \$40.92 was owed for the respondent's witnesses, although responsibility for any attorney's fees was denied.

The respondents contended that:

1. A compensable injury cannot be established by medical evidence, supported by objective findings, although there may be objective findings of pre-existing conditions, previously treated at the VA Hospital and by a chiropractor;
2. Alternatively, the claimant's problems were merely temporary exacerbations of his pre-existing conditions and have resolved;
3. The alleged injury was not timely reported as job-related until on or about December 7, 2003, so that the respondents are not responsible for benefits otherwise accruing prior to that date, pursuant to Ark. Code Ann. §11-9-701;
4. Pursuant to the previous Motion, the respondents seek costs and attorney's fees associated with the claimant's failure to pursue this matter at the hearing previously scheduled for May 2, 2006.

Consistent with Ark. Code Ann. §11-9-705(c)(1) and the Prehearing Order, the record was closed at the conclusion of the hearing and included documentary evidence and the testimony of the claimant, Ralph Williams, and Jeanie Cox.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant's average weekly wage was \$324.00 on August 20, 2003; and, although initially accepted as compensable, the claim has been currently controverted in its entirety.

3. The preponderance of the credible evidence fails to show either that the claimant sustained an injury to his low back arising out of and in the course of his employment on or about August 20, 2003, or that a compensable injury has been established by medical evidence, supported by objective findings.

4. The Motion for Costs should be granted, so that claimant's counsel, not the claimant, should be required to pay costs as follows: (1) \$40.92 for witness mileage reimbursement; (2) \$172.50 for preparation by respondent's counsel for the previous hearing; and (3) \$115.00 for attendance at the previous hearing by respondent's counsel.

DISCUSSION

The claimant, 54 years of age at the time of the hearing, went to work for Petit Jean Poultry, Inc., in 1993. He testified that on August 20, 2003, during this employment, he injured his low back when he was attempting to push over a plastic bin loaded with ice and felt a pop and burning in the lower part of his back. He stated that after he got through pushing the bin over, he felt it burning but just kind of walked it out, but after he was working he could feel the stinging. So, when he got a chance for a little break, he went and reported the incident to the nurse's station, including the lifting of the bin and the pop in his back. He testified that the nurse filled out paperwork, which he signed. He stated that he worked the rest of the day but it was getting stiffer and more painful.

The claimant stated that it was still bothering him that night but he used some Tylenol, some muscle relaxer, and Ibuprofen and returned to work the next day, where he told his supervisor that he had hurt his back but was still trying to work. He stated that the employer never offered him medical care and that he went on his own to see the doctor. He has requested benefits as stated above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Here, the record shows that the claimant has a history of chronic back pain dating back to the occurrence of injuries sustained in about 1978 while playing football during his service in the United States Army. Additionally, at the time of the alleged 2003 injury, it appears that the claimant was also employed doing relatively strenuous labor on a production line at Moss Automotive.

Under these circumstances, the claimant's credibility as a witness, and as a medical historian when dealing with his physicians, becomes significant. Credibility is affected by several factors, such as the ability to recall events, the ability to describe events clearly, and the strength of one's allegiance to the truth, especially when the truth conflicts with one's immediate self-interest. In this case, for whatever reason, the claimant's credibility was negligible and he was not reliable either as a witness in court, or as a medical historian with his physicians.

For example, on direct examination, the claimant tended to minimize his pre-existing back problems, although he admitted that after he left the service he went to the VA and they gave him pain medication. On cross-examination, he testified that during his deposition of May, 2004, he had stated that he had not gone to the VA for back problems and had no treatment before the date of injury.

The record shows that, prior to the alleged injury in August, 2003, the claimant had indeed been receiving treatment at the VA for back problems although, at the hearing, he continued to maintain that he was going there for other reasons. However, a July 7, 2003, note indicated that the claimant had chronic low back pain for 25 years and was complaining of pain, which he rated at 9 on a scale of 10, with continuous burning and pain radiating into both hips and both groin areas.

The claimant also gave curious testimony about his dealings with the employer. For example, on page 11 of the transcript, the claimant answered “no” on direct examination when asked if there was any kind of inquiry about his back condition by Petit Jean in 1993 when he went to work there. A respondent exhibit shows a 10 page pre-employment medical health questionnaire dated December 13, 1993, which asks several questions about the condition of his back. On this form, the claimant checked “no” when asked if he had ever had a back problem. Later, a similar question concerning whether he had had any problem with his back was also answered “no.” He then declined to identify any doctor who had treated him for back problems or the employer at the time of the treatment. Resp. Exh. 1 at p. 4. Thus, the claimant was not accurate on the pre-employment questionnaire concerning back problems in December, 1993, and he was not accurate in his testimony concerning pre-employment questions at the hearing in October, 2006.

At the hearing, on direct examination, the claimant testified that, after he had returned to work on August 21, 2003, he went to see the doctor, Dr. Dodson. His counsel then asked him who was the first doctor he saw after the injury of August 20 and the claimant named Dr. Gehrki. The medical record shows that on August 21, 2003, the claimant saw a different doctor, Dr. Arthur L. Neal of the VA, who wrote that the claimant reported low back pain after exercise about three days ago, without indicating that the injury was job-related. Other VA records tend to attribute the claimant's chronic pre-existing back problems to his injury playing football while in the military service in the 1970's.

The claimant also testified on direct examination that, on August 20, 2003, he reported the injury to the nurse, who filled out a report, which the claimant signed. However, the record reveals only a document labeled Employee's Treatment Record, which shows the claimant's complaints going back to July 28, 2003. This document shows that on August 20, 2003, the claimant had reported lower back pain, but does not indicate that he stated that he was injured at work. There is also no indication that the claimant signed this report, contrary to his testimony on direct examination. On this treatment record, the next injury is September 5, 2003, which shows that the claimant complained of left knee discomfort and pain in the low-mid back, but stated that he did not want any treatment, just wanted to report it, and have it in his file.

Dr. Jon Dodson saw the claimant October 15, 2003, and noted that he had a lumbosacral injury at work for which he recommended medication and referred him for an MRI of the lumbar spine. The note does not mention the claimant's history of chronic pain since his injury during military service. The report of the MRI study dated October 16, 2003, showed a transitional vertebra at the lumbosacral junction and degenerative disc bulging from L2 through L5, worse at L4-5. That

report also noted prominent facet degenerative change at the lower lumbar levels and bilateral foraminal stenosis at L4-5, along with mild central canal stenosis and bilateral lateral recess narrowing of L-5, as well as L3-4. Dr. Gehrki had seen the claimant prior to the August 20, 2003, injury. The claimant was also seen by a chiropractor and by orthopedic surgeon Dr. William F. Blankenship in March, 2004, who opined that the claimant suffered from chronic low back pain and degenerative disc disease of the lumbar spine at multiple levels. In November, 2004, Dr. Dodson wrote claimant's counsel that he had no history of an injury to the claimant in the military in 1970. However, Dr. Dodson volunteered that it was only until the accident of August 20, 2003, that the claimant began having problems, apparently unaware of his need for treatment at the VA prior to August 20, 2003, when he complained of pain at the level of 9 on a scale of 10.

In short, the record makes it difficult to find that the claimant's condition, which appears to be chronic and degenerative, is related to either employment, whether at Petit Jean Poultry, Inc., or at Moss Automotive, rather than to his prior long-term low back pathology. The claimant's increase in subjective symptoms of pain related to his chronic pre-existing degenerative condition does not meet the statutory requirement of establishing the existence of a compensable injury by medical evidence, supported by objective findings.

As to the Motion filed on behalf of respondents, a previous hearing had been scheduled, by agreement of counsel, for May 2, 2006, at 11:00 a.m. at Commission Hearing Room A in Little Rock. Respondents' counsel and witnesses appeared as did the claimant, while claimant's counsel failed to appear. The hearing had been scheduled for one hour beginning at 11:00 a.m. and the parties waited until 11:55 a.m. before adjourning, in order for claimant's counsel to make an

appearance. A Motion for Costs, a copy of which is included in this record, was filed with the Commission on May 10, 2006.

The response, which was filed on behalf of the claimant, will be taken as a response filed on behalf of claimant's counsel, since the claimant bears no responsibility for the failure of claimant's counsel to appear at the hearing. The response admits that the witnesses are entitled to mileage in the amount of \$40.92, but denies that respondent's counsel is entitled to an attorney's fee. As suggested by the response, preparation by respondent's counsel for the May hearing was not time entirely wasted, since it would likely benefit respondent's counsel in dealing with the next hearing that took place in October, 2006. Thus, the costs requested for such preparation have been reduced. However, respondent's counsel devoted at least one hour to his appearance at the hearing in May, while waiting for claimant's counsel, and should be reimbursed in full for that time. Accordingly, the Motion should be granted, as stated above.

For the foregoing reasons, the claimant's request for benefits should be, and it is hereby, respectfully, denied and dismissed.

The Motion for Costs should be, and it is hereby, granted, as described above, provided, however, that the costs are the responsibility of claimant's counsel and should not be passed on to the claimant either directly or indirectly.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge