

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F412035

**ROBERT C. WARD,
EMPLOYEE**

CLAIMANT

**ARKANSAS BLUE
CROSS & BLUE SHIELD,
EMPLOYER**

RESPONDENT

**ST. PAUL FIRE &
MARINE INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED MAY 7, 2007,

Pursuant to a hearing conducted February 7, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Steven R. McNeely, Attorney at Law, Little Rock, Arkansas, appearing for the claimant and

Mr. Philip Cuffman, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider the threshold issue of compensability of the claimant's back condition and the secondary issue of entitlement to related benefits.

The claimant contended that on or about September 20, 2004, he sustained a compensable injury to his back as a result of lifting 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 forward, as well as an attorney's fee. Other possible issues were reserved.

The respondents contended that the claimant did not sustain a compensable injury at work. Alternatively, they contended that the claimant failed to give notice of a workers' compensation injury until November 24, 2004, after his employment had been terminated. They also contended

that, if the claim is compensable, the claimant's period of temporary total disability does not extent beyond January 25, 2005, the end of his healing period.

The record, which included documentary evidence and the testimony of the claimant and Faye Paulette Jones, was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c), except that, with the agreement of the parties, the February 6, 2007, deposition of Dr. Joe Lee Buford was included in the record as a joint exhibit after the hearing.

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 employee-employer-insurance carrier relationship existed at all pertinent times and the claimant's wages entitled him to the maximum benefit rates.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury arising out of and in the course of his employment on or about September 20, 2004, or that his current condition is related to such an injury.

DISCUSSION

The claimant, 50 years of age at the time of the hearing, worked approximately 11 years for the respondent employer as a supervisor over the Medicare collections department, where checks were collected from physicians who had been overpaid by Medicare. He had been hired by Paulette

Jones who had also been his supervisor during his employment. He, in turn, had supervisory responsibility for 10 to 15 people at various times. Both testified at the hearing.

The claimant's testimony was that he had not had any problem with his back before injuring it at work in September, 2004, but, since that occasion, he had developed significant health problems for which he should be awarded workers' compensation benefits.

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).

The claimant stated at the hearing that he injured his back while lifting a box in his office in preparation for the arrival of visiting auditors. He testified that he lifted the box, turned to the left, and walked about four feet to put it under a credenza desk, when he felt something in the very bottom of his back which he described as "just a twing, a twang, whatever." Tr. at 14. He stated that he continued to work, showing the auditors around the building, and the more he walked the worse it got. He said that after work that evening, he put a heating pad on his back and, by the next

morning, he was unable to come to work, so he called in and told Paulette Jones that he hurt his back and couldn't get off the couch. However, he did not indicate that he was asserting a workers' compensation claim. He further testified that he had not been able to return to work since September 20, 2004.

The claimant also testified that he called Dr. Joe Lee Buford, his physician and apparently a friend, who called in pain medication, which was picked up by a friend at the pharmacy. He further stated that he thought his condition was merely a strain at that time, but that he later learned that he had ruptured four lower discs in his back. He also acknowledged receiving additional medication and treatment from Dr. Susan K. Delap, an infectious disease specialist, and Dr. F. Richard Jordan, a North Little Rock neurosurgeon.

The claimant also stated that before the incident he had neither back problems nor problems working or showing up for work and that he enjoyed vigorous activities such as swimming, skiing, and wind surfing. He further stated that, since the injury, he has become very limited in his daily activities, he cannot work, and he has declined from 6', 160 pounds, to 5'8", 134 pounds.

The medical record includes a note showing that the claimant was seen October 15, 2004, by Dr. Jordan who administered an epidural steroid injection at L4-5 and described the claimant as a 48-year-old man in "chronically poor health", a very dedicated smoker, who has rather marked osteoporosis and a history of as many as 20 fractures, most of them in the ribs, and recently developed severe back pain with vague non-segmental weakness of the legs associated with the pain. Medications and physical therapy have had little effect. Cl. Ex. at 25. Elsewhere in the medical record, the claimant was described as suffering from discitis, severe osteoporosis, and osteomyelitis. The report of a MRI scan dated September 23, 2004, indicated that the claimant had a broad based

disc bulge with small superimposed central protrusion at L4-5, as well as mild AP canal stenosis due to a combination of this defect and posterior facet arthropathy/ligamentum flavum hypertrophy; mild disc degenerative changes at L3-4 and L5-S1. Cl. Ex. at 20.

At the hearing, Paulette Jones testified on behalf of the respondents, confirming that she had hired the claimant approximately 11 years ago and that he was a good employee with whom she had a cordial working relationship. Nevertheless, portions of her credible testimony were not consistent with that of the claimant.

For example, Ms. Jones testified that when the claimant called in September 21, notifying her that his back “was hurting him”, she asked him what he did to his back and he stated that he did not know, and she wrote that down on a piece of paper. She also testified that the claimant said nothing about hurting himself lifting a box the day before. Tr. at 37, 38. She also indicated that, if the claimant had mentioned an injury at work, she would have advised the personnel office that an employee had said he had been hurt at work. Tr. at 39. She further testified that the claimant’s employment was terminated November 1, but she kept in touch with him by telephone between September 21 and November 1 and he did not ever say he had hurt himself at work during that time and did not indicate that he wished to file a workers’ compensation claim. The claimant’s testimony varied concerning his conversation with Ms. Jones at the time of the injury but, on cross-examination, he stated that during subsequent conversations he told Ms. Jones many times that he had hurt his back at work lifting a box. Tr. at 27.

Ms. Jones also contradicted the claimant’s account of a discussion of FMLA benefits. She recalled that in October, 2004, she had discussed with the claimant protecting his job by filling out FMLA forms and had also sent forms to him on more than one occasion, once having someone from

the office bring the forms to his residence. She further testified that filling out these forms had nothing to do with workers' compensation. However, the claimant had previously testified that it was only when he told her that his injury occurred at work that she had become concerned about FMLA forms. This is inconsistent with the credible testimony of Ms. Jones at the hearing.

Moreover, the claimant's testimony had an uncertain if not protean quality about it which undermined its credibility. For example, on direct examination, the claimant was asked when he told Ms. Jones that he had injured his back on that lifting incident and he stated that he knew he told her he injured his back that day. Tr. at 15. Then, he stated that he did not tell Ms. Jones about the injury until the next day. Tr. at 16. When asked at the hearing, in the presence of Ms. Jones, if he had told her he had hurt his back at work, the claimant stated that, "Uh, Steven, I wish I could be absolutely clear with that, but I would think so, you know. ... But I cannot be absolutely clear that I said it was a box." Tr. at 16. He avoided clearly testifying in her presence that he told Ms. Jones initially that he was hurt at work, although, at best, he stated that he advised Ms. Jones and Dr. Buford that he had injured himself lifting "a box", without mentioning that this allegedly occurred at work. The claimant finally testified that he did not clearly state that he was injured at work until Ms. Jones began to discuss FMLA leave. Tr. at 33. This was curious behavior for a supervisor who was well aware of the need to report a job-related injury clearly and promptly.

The medical record at the time of the injury does not indicate that the claimant's condition was job-related, although a recent letter from Dr. Buford, written at the direction of the claimant, does attribute his condition to his work. Somewhat later, a December 7, 2004, note from Dr. Delap indicates that the claimant stated that he moved a box at work September 20. However, in Dr. Buford's notes, there is no mention of an injury to his back due to lifting boxes or any activity

at work, in contrast to the claimant's testimony and the letter written by Dr. Buford October 2, 2006, as directed by the claimant.

Dr. Buford's deposition testimony indicated that the claimant's advice that he had been injured at work would not necessarily have been recorded in the medical record. However, it is well known that medical providers have an interest in clearly ascertaining and noting whether or not a condition is work-related and thus payable by workers' compensation insurance. In spite of this, the records of Dr. Buford do not describe the claimant's condition as work related, his October, 2006, note notwithstanding. The credible testimony of Paulette Jones was that, when she specifically asked what the claimant did to his back and he answered that he did not know, she, unlike his physician, did make a written notation. The record suggests that the claimant had good personal relationships with Ms. Jones and Dr. Buford and would have had little reason to fail to confide in them immediately concerning the alleged job-related nature of his injury, especially in light of his knowledge as a supervisor that it was important for employees to give this information to the employer.

In short, although the claimant's condition could be related to lifting boxes, at work, and the claimant may have come to hold such a belief, his condition could as well have been related to his chronic poor health and could have developed over time, unrelated to the employment, a circumstance more consistent with the testimony of Ms. Jones and the condition of the notes from Dr. Buford's office. Thus, whether these inconsistencies are due to a bad memory, insincerity, or some other factor, they diminish the credibility of the claimant's testimony to the point that the preponderance of the evidence does not support a conclusion that his injury was work-related.

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

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge