

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
AWCC NO. E416411**

BRIAN M. MANN, EMPLOYEE

CLAIMANT

VS.

JIM HUSONG ROOFING, EMPLOYER

RESPONDENT

ITT HARTFORD, CARRIER

RESPONDENT NO. 1

**DEATH AND PERMANENT TOTAL
DISABILITY TRUST FUND**

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 23, 2003

Hearing held August 14, 2003, in Texarkana, Arkansas, before *ADMINISTRATIVE LAW JUDGE KAREN McKINNEY*.

Claimant is represented by Ms. Lisa Wilkins, Attorney at Law, Suite Six, State Line Plaza, Box 8030, Texarkana Arkansas 71854-5945.

Respondent No. 1 is represented by Mr. Gene Williams, Attorney at Law, 500 Broadway Place, Suite 404, Little Rock Arkansas 72201.

Respondent No. 2 is represented by Ms. Judy Rudd, Attorney at Law, 501 Woodlane, Suite 101 North, Little Rock, Arkansas 72201.

STATEMENT OF THE CASE

The above-styled claim came on for a hearing in Texarkana, Arkansas, on August 14, 2003. A prehearing telephone conference was held on this claim on May 12, 2003, with a Prehearing Conference Order filed on May 13, 2003. The Prehearing Conference Order was marked as Commission's Exhibit No. 1, and introduced into evidence without objection. Pursuant to the Prehearing Conference Order, claimant and respondent/carrier agreed upon the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim;

2. The employee-employer-carrier relationship existed between the parties on June 27, 1994;

3. Respondents accepted claimant's injury as compensable;

4. Respondents accepted claimant as permanently and totally disabled;

5. The parties anticipate stipulating to January 21, 1998, as the end of claimant's healing period.

During the prehearing telephone conference the claimant and respondent/carrier agreed to limit the issues to:

1. The calculation of claimant's average weekly wage and compensation rate;

2. Whether the services of medication reminders, bathing, dressing, transferring, getting about, toileting, and memory cues provided at claimant's present wheelchair assessable assisted living facility are reasonably necessary in connection with claimant's compensable injury;

3. Whether a \$2.00 charge for delivery of claimant's prescription medication is reasonably necessary in connection with claimant's compensable injury.

The parties advised at the beginning of the hearing that issue number two, regarding payment for certain services has been resolved and accepted by the respondents as reasonably necessary medical expenses.

The Death and Permanent Disability Trust Fund was not a party to the prehearing telephone conference but appeared at the hearing to preserve the issue

of the end of claimant's healing period. Subsequent to the parties contentions, the Fund asked to be joined as a party to this hearing to join in respondent/carrier's defense of laches and estoppel with regard to the calculation of claimant's average weekly wage.

With regard to the issues for determination, claimant contends that he earned an average weekly wage of \$1,000.00 which would entitle claimant to a disability rate of \$267.00 per week. Claimant further contends that his pharmacy charges \$2.00 per delivery and that this is a reasonably necessary medical expense as he is physically unable to drive to the pharmacy.

Conversely, respondents contends that claimant carries the burden of proof with regard to seeking indemnity benefits at a higher rate. As respondent was not claimant's direct employer but rather a statutory employer, respondent is not in possession of any documentation regarding claimant's wages. Claimant does not have any tax receipts or wage records and cannot therefore, prove entitlement to an indemnity rate higher than that which has been accepted by respondents. Respondents contend that the claimant is not credible and that his testimony regarding wages conflicts with the total value of the contract entered into by respondent with its subcontractor and claimant's employer.

Respondent further asserts an affirmative defense of laches and estoppel with regard to this issue. In this regard, respondents contend that claimant filed his claim for compensation in November of 1994, shortly after the accident in June of 1994. Compensability was accepted by respondents in August of 1995. Claimant

was accepted as permanently and totally disabled in June of 1997. The carrier sought an adjustment of the indemnity rate in May of 1999 due to an overpayment. Claimant has been represented by counsel and has never raised the issue of the compensation rate until 2002. In May of 2002, claimant's attorney petitioned for payment of attorney's fees on both past and future benefits. Calculations were made and an Agreed Order was entered in June of 2002. No issue was made regarding claimant's indemnity rate until after this Agreed Order was entered. After claimant raised the issue for the first time, the parties investigated the issue. After raising this issue, the parties entered into an Amended Agreed Order regarding attorney's fees, however, no changes were made with regard to claimant's indemnity rate. Respondents contend that the claimant has sat on his rights for seven years and that this claim for additional benefits based upon a higher indemnity rate is barred by the doctrine of laches. Respondents further contend that the claimant should be estopped because of the previous orders entered into by the parties and the harm it would cause by claimant seeking additional benefits. The Death and Permanent Disability Trust Fund joined the respondents with regard to the affirmative defenses as the harm with enure to the Fund as well.

With regard to the delivery charge for prescription drugs, respondent contends that there is a dearth of information on this issue. With regard to the facts as known by respondents, respondents contend that the delivery fee is unreasonable and unnecessary as other arrangements can be made to deliver prescriptions in a timely manner

From a review of the record as a whole, to include the medical reports, documents, and all other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the prehearing telephone conference conducted on May 12, 2003, and contained in the Prehearing Order filed on May 13, 2003, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the credible evidence that he earned an average weekly wage of \$1000.00 which would entitle claimant to the maximum compensation rate.

3. Claimant did not introduce documentation regarding the total amount of fees charged and presumably collected by the pharmacy for delivery of prescription medication.

4. Claimant requires multiple medications each and every day.

5. With the exception of medications needed for breakthrough pain, or when claimant's medications have been adjusted by his doctors, claimant takes the same medications on a regular schedule.

6. Claimant has failed to prove by a preponderance of the evidence that he has required a special delivery of medications due to an adjustment in his medications since he has resided at his present living facility.

7. Claimant has failed to prove by a preponderance of the evidence entitlement for reimbursement of out-of-pocket expenses for delivery of prescription medication.

8. Claimant has failed to prove by a preponderance of the evidence that charges for multiple deliveries of medications each month is reasonably necessary, as claimant's prescriptions and delivery of medications can be better managed for a once a month delivery of regular medications.

9. Claimant has proven by a preponderance of the evidence entitlement to a reasonable charge for medical benefits for the delivery of prescription medication.

CONCLUSION

Claimant sustained an admittedly compensable injury on June 27, 1994, when he fell off a roof on a job site in Fayetteville, Arkansas. Claimant was an employee of Roofmasters when he sustained his injury. Roofmasters was a subcontractor of Jim Husong Roofing. Claimant filed a claim for workers compensation benefits, and Jim Husong Roofing eventually accepted the claim as compensable as the statutory employer. As a result of his injuries, claimant has been accepted as permanently and totally disabled.

Claimant has received indemnity benefits at the rate of \$144.00 per week. Claimant now contends that he earned sufficient wages to be entitled to the maximum compensation rate of \$267.00 per week. In this regard, claimant testified that he earned \$12.00 per square and that he could lay between eighteen and

twenty squares per day, which amounted to “about a thousand dollars” per week. Claimant explained that he is able to remember what he was earnings at the time of his injury were because it “was near about what we were making in Florida. So I knew it was a good job.”

Claimant did not present any documentation to corroborate his wages, as claimant testified that he was paid in cash and that he did not file a tax return for 1994 as he was in the hospital for months following his injury.

Claimant called Paul Buckner as an expert witness on wage rates for roofers. Mr. Buckner is an operations manager for Spec Building Material in Texarkana, Texas. Mr. Buckner described his job as a building materials wholesaler of roofing, residential and commercial material, a purchaser and seller of material, as well as, a preparer of some roofing estimating for some roofing contractors. Mr. Buckner explained his experience in roofing to including working for his father’s roofing contracting business in Asheville, North Carolina from the time he was a kid. Mr. Buckner has never operated a roofing business in Arkansas, but he has worked with roofing contractors in Southwest Arkansas for the past four and a half years as a consultant and in some situations helping contractors prepare estimations and contracts. According to Mr. Buckner, the labor market rates for a roofer in 1994 was anywhere from \$10.00 to \$12.00 per square. Mr. Buckner further testified that the claimant could have nailed 18 to 20 squares per day, as 28 squares per day would be exceptional and 12 to 14 squares would be the minimum.

A.C.A. § 11-9-705(d) provides:

Expert testimony shall not be allowed unless it satisfies the requirements of Federal Rule of Evidence 702 with annotations and amendments, that is, *Daubert v. Merrell-Dow Pharmaceuticals, Inc.*, 509 U.S.579 (1993), and *Kumbo Tire Co. v. Carnichael*, 526 U.S.137 (1999).

Presently, there are no published cases interpreting this provision of the workers' compensation statute which was added in 2001. As I read A.C.A. § 11-9-705(d), I interpret this provision to require the Administrative Law Judge to determine whether expert testimony complies with Federal Rule of Evidence 702 with annotations and amendments, regardless of whether a party objects to the introduction of expert testimony. In *Children's Broadcasting v. Walt Disney Co.*, 2455 F.3d 1008 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit reversed a lower court's decision to admit expert testimony regarding damages as the testimony was "speculative and based solely on conjecture." The court stated; "When evaluating the admissibility of expert testimony under Federal Rule of Evidence 702, the district court must look to both the relevancy and the reliability of the testimony." As I review Mr. Buckner's testimony, I find that his opinion regarding roofers' wages in Fayetteville, Arkansas in 1994 is simply not reliable and not relevant to the facts in this claim. Mr. Buckner has never laid roof in Northwest Arkansas, paid a roofer in Arkansas, or prepared a contract for a roofer in Northwest Arkansas. Mr. Buckner's experience in Arkansas only relates to the past four and a half years, in selling building supplies. Claimant's actual roofing business experience is in Asheville, North Carolina. Mr. Buckner offered no credible

evidence regarding wages earned by roofers in Northwest Arkansas in 1994, and he offered no reliable expert testimony regarding his knowledge of wages earned by roofers in Northwest Arkansas in 1994. Mr. Buckner gave a general statement that wages are uniform throughout the south and southeast due to the snow loads required on roofs in these areas, but he did not offer any data to support his conclusion. Almost ten years have lapsed since claimant's injury, yet Mr. Buckner testified that wages for roofers have not changed during this period of time. Again, Mr. Buckner did not offer any data to support this conclusion. Mr. Buckner offered testimony regarding the subcontractors agreement of earning \$19.00 per square, however this contract was not introduced into evidence. Even though an expert witness may offer testimony based upon hearsay evidence, the reliability of Mr. Buckner's testimony would have been bolstered by the documents used to reach his conclusions, if such documents were introduced into evidence. After weighing Mr. Buckner's testimony, I find that his testimony regarding wages is not sufficiently reliable and his expertise in his father's roofing business in North Carolina is not sufficiently relevant to wages earned by a roofer in Northwest Arkansas in 1994 to satisfy A.C.A. § 11-9-705(d). Therefore, no weight has been given to Mr. Buckner's testimony.

Consequently, the only remaining evidence regarding wages consists of the claimant's unsupported testimony and the letter from Mr. Husong reflecting payment to Roofmasters of Northwest Arkansas of \$10.00 per square for the job on which the claimant was working. If claimant had credible evidence contradicting this letter,

claimant should have introduced such into evidence. Mr. Husong testified in his deposition that he was unable to make contact with the owners of Roofmaster after claimant's injury other than to pay them for the work perform. Claimant's attorney claimed to have the subcontractor's agreement, yet this document was not introduced into evidence. It is unknown how claimant's attorney was able to acquire this document. No evidence was offered from claimant's co-workers or his immediate employer regarding the wages claimant earned at the time of his accident.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). A claimant's testimony is never considered uncontroverted. 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).

In my opinion claimant's testimony simply is not sufficiently credible to support a finding that he earned an average weekly wage of \$1000.00. Mooney v. Monday & Associates, Full Commission Opinion filed August 15, 1996 (E4104794); Riley v. Craighead Nursing Center, Full Commission Opinion filed

January 13, 1998 (E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion filed December 12, 1998 (E700104); and Arnold v. Dino's, Inc., Full Commission Opinion filed August 1, 2002 (F001514). Claimant was unable to recall certain facts concerning his job including the name of his boss. Claimant admitted that his memory has been affected by his injury. Claimant testified that his wages were near what he was making in Florida, yet there is no credible evidence regarding or substantiating claimant's Florida earnings, let alone claimant's Northwest Arkansas earnings. Almost ten years have past since claimant's injury and since claimant last earned wages, and the only evidence regarding wages is speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Hemdon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I find that the claimant has not carried his burden of proof with regard to wages and an increase in indemnity benefits.

The second issue for determination is whether a \$2.00 delivery charge for medications is reasonably necessary in connection with claimant's compensable injury. A.C.A. § 11-9-508(a) provides:

The employer shall promptly provide an injured employee such medical, surgical, hospital, chiropractic, optometric, podiatric, and nursing services and medicine, crutches, ambulatory devices, artificial limbs, eyeglasses, contact lenses, hearing aids, and other apparatus as may be reasonably necessary in connection with the injury received by the employee.

What constitutes reasonable and necessary medical treatment is a fact question for the Commission. Dep't of Cor. v. Holybee, 46 Ark. App. 232, 878 S.W.2d 420(1994). Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Commission Opinion, Dec. 13, 1989 (D512553).

Claimant contends that payment of a \$2.00 delivery charge for prescription medication is reasonably necessary as he is unable to go to the pharmacy to pick up his medications. In this regard claimant is absolutely correct. However, the record is void of precisely how many such deliveries have been made to the claimant since he moved to his present living facility. Claimant testified that his "best recollection" is that he has been charged for 30 deliveries. Claimant's mother testified that she has been present for about 9 or 10 deliveries which she personally paid and that the claimant has had between 30 and 50 deliveries since moving to Louisiana. No efforts have been made to mail claimant's prescriptions to him at his

present location. Claimant's mother testified that mailing prescriptions stopped in Texas when the claimant had to have his medications adjusted. There is no evidence that the claimant has required an adjustment in his medication since moving to his present living facility which would necessitate an immediate delivery of additional medications. If anything, claimant testified that he has only required a adjustment to lower one of his medications since moving.

Claimant requires the delivery of medications as his is physically unable to pick up his medications from the pharmacy. However, claimant has failed to prove by a preponderance of the evidence that he has had to pay a sum certain for these deliveries. Claimant's mother estimated that she has paid for nine or ten deliveries, but she has not produced any documentation to support her testimony. Was it nine, was it ten, or was it something more or less than this two figures? Claimant testified that he has had approximately 30 deliveries, while his mother testified that the claimant has had 30 to 50 deliveries. Claimant's attorney stated that claimant has received 27 to 30 deliveries. The evidence does not support a finding by a preponderance of the evidence that a reimbursement for deliveries is required as the amount of money expended for such deliveries is speculation at best. Again, speculation is no substitute for proof. Dena Construction Co. v. Herndon, supra.

I further find that a more economical method of delivery of medications is the only reasonable method for which respondents are liable for in the future. Multiple deliveries of medications per month when the claimant is on a regulated regime of daily medications is unreasonable and unnecessary. The parties are hereby

instructed to coordinate a means of delivery of medications to the claimant either via the mail, via coordination of a once a month delivery of all daily medication, or via some other means to control the costs of delivery. However, in no case shall the claimant be denied exceptional deliveries for new or altered prescriptions.

AWARD

Claimant has failed to prove by a preponderance of the credible evidence that he earned an average weekly wage sufficient to entitle claimant to the maximum compensation rate. Claimant has further failed to prove entitlement to reimbursement for payment of delivery charges for prescription medications. However, claimant has proven entitlement to a reasonable delivery charge in the future for his prescription medication as he is physically unable to retrieve his prescriptions from the pharmacy.

IT IS SO ORDERED.

HON. KAREN McKINNEY
Administrative Law Judge