

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305078

BRENDA HUGHES, EMPLOYEE

CLAIMANT

HOLLAND GROUP, INC., EMPLOYER

RESPONDENT

**ROYAL AND SUNALLIANCE INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT NO. 1

**TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT NO. 2

OPINION FILED SEPTEMBER 23, 2004

Hearing before Administrative Law Judge Cynthia Estes Rogers on June 25, 2004, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondent No. 1 represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

A hearing was held on June 25, 2004, to determine the compensability of claimant's February 28, 2003, claim and, if compensable, to determine which respondent carrier bears liability.

The parties stipulated to the existence of the employee-employer relationship on both June 21, 1999, at which time claimant received a compensable injury for which benefits have been paid, and on February 28, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$287.00 for temporary total disability and \$215.00 for permanent partial disability benefits for the June 21, 1999, injury. Not having a current wage record for claimant for purposes of stipulation, the parties agreed at the hearing to obtain a current wage rate and apprise the Commission as to the compensation rate pertaining to the February 28, 2003, alleged injury. Pursuant to a letter from claimant's counsel dated July 13, 2004, with wage information extract attached, which

is being made part of the record subsequent to the full hearing in this matter, claimant's earnings on February 28, 2003, were sufficient to entitle her to weekly indemnity benefits of \$352.00 for temporary total disability benefits, based on an average weekly wage of \$528.66.

Claimant contends that she sustained a compensable injury on February 28, 2003. Claimant contends that she is entitled to temporary total disability benefits from February 28, 2003, through a date yet to be determined, as well as attendant medical benefits, and attorney's fees.

Respondent carrier No. 1 contends the claimant did not sustain a compensable injury on February 28, 2003. Respondent carrier No. 1 contends that if the claimant sustained a compensable injury on February 28, 2003, the liability for that claim would rest with respondent carrier No. 2. Respondent carrier No. 1 contends that any injury sustained by the claimant on February 28, 2003, would constitute a recurrence of an injury she sustained on June 21, 1999, when respondent carrier No. 2 was on the risk.

Respondent carrier No. 2 contends that any injuries the claimant sustained on February 28, 2003, would constitute an aggravation or new injury and would thus be the liability of respondent carrier No. 1.

STATEMENT OF THE CASE

Claimant is employed as a welder for respondent employer and has worked for respondent employer for nine and one-half years. On June 21, 1999, claimant suffered a compensable carpal tunnel injury to the left wrist, for which benefits were paid, including a left carpal tunnel release in July of 1999, performed by Dr. P. B. Simpson, Jr. After the left carpal tunnel release, claimant eventually resumed her employment with respondent employer, first on light duty and, ultimately, regular duty.

On February 28, 2003, claimant reported to her supervisor that she was experiencing severe pain in her left arm extending all the way up into her shoulder and neck. She was treated by Dr. Obama Asemota. The accident report on the date of injury notes as a

description of what happened: “same injury,” meaning the June 21, 1999, injury. Claimant testified that it felt like the same pain she had had with her 1999 left wrist injury but that on February 28, 2003, it was then radiating all the way up her left arm into her shoulder and neck.

Dr. Asemota ordered an MRI and nerve conduction studies, which ruled out carpal tunnel syndrome as the cause of her problem. Dr. Asemota eventually referred claimant to Dr. Reza Shahim, a neurosurgeon. Dr. Shahim first saw claimant on April 9, 2003. He testified at his deposition that, based on his notes, claimant had told him that her symptoms started after a work injury in 1999. He testified that she said she had continued to have neck pain, shoulder pain, and left arm pain after that injury and despite her left carpal tunnel release in 1999.

After reviewing and re-reviewing claimant’s cervical spine MRI, Dr. Shahim diagnosed claimant on November 3, 2003, with having cervical ligamentous hypertrophy at C5-6 posteriorly, resulting in canal stenosis and nerve root and thecal sac compression. He further found that she had EMG evidence of left ulnar neuropathy due to nerve root compression at the elbow. Cervical disc surgery, as well as ulnar nerve transposition, were discussed. Claimant is desirous of having surgery but has not done so, as of this date.

Dr. Shahim testified that although epidural injections or physical therapy are conservative treatment options, they are, in reality, usually not effective for patients who have very chronic symptoms, such as claimant. He notes that she has very chronic symptoms; and, although he cannot confirm, based on the tests, how she was actually injured or how long her symptoms have persisted, he did testify that EMG tests are usually delayed, meaning that if she had EMG findings, she would have had the symptoms for many months before the nerve tests were positive. He stated, “At the minimum, she has had symptoms for many months.” He stated that claimant’s MR scans are chronic in nature, evidencing no acute injuries that he could see on the MR scan. Dr. Shahim further testified that, based on

the test results, claimant has experienced the ulnar nerve symptoms for “more than a year at a minimum.”

Dr. Asemota testified at his deposition that he saw claimant in August of 2000, when she presented with complaints of left arm pain and swelling. Dr. Asemota confirmed that claimant was still having problems with her left arm, despite having had the left carpal tunnel release by Dr. Simpson in July of 1999. Dr. Asemota confirmed that Dr. Thomas Frazier’s notes from claimant’s visits to him in 2001 assessed that claimant was evidencing recurrent left carpal tunnel syndrome and possible right carpal tunnel, as well.

Dr. Asemota testified that he did not see claimant again until February 28, 2003, when she presented to him with pain from her neck down to her left hand, and she described it as the “same injury” as that of June 1999. Nerve conduction tests were ordered again and were performed on March 14, 2003. The results ruled out carpal tunnel syndrome as the cause and noted abnormalities of the left arm ulnar nerve. Dr. Asemota testified that these findings were consistent with claimant’s previous complaints that she had had in 1999, 2000, and 2001 with Dr. Frazier.

When asked by counsel for respondent carrier No. 1 if this appeared to him to be a recurrence of her previous problems, Dr. Asemota answered as follows:

A: Not really, no.

Q: Why not?

A: Well, I think I would say *persistent* of a previous problem.

Q: Okay.

[Emphasis added.]

When asked about why claimant’s problems are presenting differently now, meaning in the ulnar nerve rather than the median nerve, Dr. Asemota testified that it was because no ulnar nerve conduction tests were performed the first time (in 1999), as the pattern looked

like that of the median nerve; and, since she had seemed to get some relief from the carpal tunnel surgery, it looked as though the problem had been corrected.

Dr. Asemota testified that he believed what happened in this case was that the entrapment she is now experiencing in her left elbow is a continuation of her symptoms or problems dating back to 1999; that it can just progressively get worse. The colloquy between counsel for respondent carrier No. 1 and Dr. Asemota was as follows:

Q: Have you seen this type of progression before where you might have carpal tunnel syndrome and the median nerve is released and maybe with some relief, but the symptoms continue?

And we know she was having some problems in 2000, 2001. She saw Dr. Frazier - - you saw those records - - to the point where her ulnar nerve has reached the point where it's giving her problems and the test is abnormal. That all dates back to the same problem in 1999.

A: Yeah. I want to say so. The reason is that most - - the ulnar nerve has a different pattern of symptoms than the median nerve. But when both of them are involved the one that is more severe, predominant. And then when you relieve that, then the other one gradually creeps up.

Q: I see what you're saying. This problem may have been somewhat masked. I don't know if masked is the right word.

A: That's right. Yeah, that's right.

Q: When one is released and it leads as a natural progression to the problems with the other one, in this case the ulnar.

A: That's right.

Q: When she saw you in 2003, she didn't report to you a new injury, but rather as you put it, it was the same injury as before.

A: *That's - - she was complaining of the same problem.*

Q: Same. *And you believed it was the same injury as 1999.*

A: *Yes.*

[Emphasis added.]

Dr. Asemota testified that the last time he saw claimant was in October of 2003, when she was still complaining of pain in her left arm and forearm. He gave her some pain medication, and referred her back to Dr. Shahim for nerve injectional steroids. Dr. Asemota released claimant to return to work with restrictions, and he has not seen her since. He has left the treatment in the hands of claimant and Dr. Shahim. Dr. Asemota further testified that his answers were stated within a reasonable degree of medical certainty.

FINDINGS OF FACT

1. Claimant's February 28, 2003, injury is a recurrence of her compensable June 21, 1999, injury.
2. Claimant is entitled to treatment, both past and future, for complaints associated with the recurrence of her June 21, 1999, injury.
3. Claimant is entitled to additional temporary total disability benefits for appropriate periods beginning February 28, 2003, and continuing to a date yet to be determined.
4. Respondent carrier No. 2 bears liability, as said respondent was on the risk at the time of claimant's June 21, 1999, compensable injury.
5. Respondents have controverted the compensability of the claim.

DISCUSSION

Claimant's injury of June 21, 1999, was accepted as compensable and benefits were paid, including the carpal tunnel release in July of 1999. The medical evidence in this case indicates that claimant had complained prior to and since her June 21, 1999, injury of pain extending through her left arm and into her neck and shoulders. No ulnar nerve tests were conducted originally, in regard to the June 1999 injury.

Respondent carrier No. 1 contends that this is a recurrence of claimant's original injury. Respondent carrier No. 2 contends that it is an aggravation of the original injury.

A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Atkins Nursing Home v. Gray*, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Crudup v. Regal Ware, Inc., supra*; *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc., supra*; *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Crudup v. Regal Ware, Inc., supra*; *Ford v. Chemulpulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D); *Crudup v. Regal Ware, Inc., supra*; *Kildow v. Baldwin Piano, supra*. Objective findings are those that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A)(I). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra*; *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of

belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra; Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

From the onset of claimant's original injury in 1999, she has complained of left arm pain extending up her arm to her neck and shoulder area. Her complaints continued despite her left carpal tunnel release performed by Dr. Simpson in July of 1999. When asked if he believed claimant's problems were a recurrence of her original problem, Dr. Asemota said that he did not, but that he would say it was "*persistent* of a previous problem." [Emphasis added.] I find the doctor's distinction of the use of the terms to be compelling.

The definition of "persistent" in The American Heritage Dictionary, 2nd College Edition, is as follows:

1. Refusing to give up or let go; persevering obstinately.
2. Insistently repetitive or continuous[.]
3. *Enduring*.
4. Lasting past maturity without falling off, as certain leaves or flowers.
5. Retained permanently, rather than disappearing in an early stage of development.

[Emphasis added.] It is interesting to this examiner that the doctor chose to use the word "persistent," which is stronger in this regard than even the term "recurrent." Obviously, according to Dr. Asemota's choice of words, claimant's initial problems did not have to "recur," because they never actually went away.

It is undisputed that claimant reported no new injury on February 29, 2003, resulting from an independent incident. Claimant, in fact, herself described it on the accident report as the "same injury" as in 1999. Further, Dr. Asemota's testimony suggests that claimant's most recent problems occurred as a natural and probable consequence of the prior injury.

Therefore, claimant's February 28, 2003, injury falls squarely under the definition of a "recurrence," rather than an "aggravation."

Further, Dr. Asemota's explanation of why claimant's ulnar problems were not originally detected, in 1999, and why ulnar nerve conduction tests were not performed in 1999 is reasonable, credible, and was stated within a reasonable degree of medical certainty. It is this examiner's opinion that claimant's problems manifesting on February 28, 2003, were a recurrence of claimant's original 1999 injury.

AWARD

Respondent carrier No. 2 is directed to pay the claimant benefits in accordance with the findings of fact above.

Respondent carrier No. 2 is directed to pay past and future reasonable, necessary, and related medical expenses the claimant has and may incur as a result of her compensable injury.

Respondents are directed to pay the claimant's attorney, Mr. Kenneth Buckner, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge