

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205391

TOMMY J. RATLIFF, EMPLOYEE	CLAIMANT
KELLOGG BROWN & ROOT, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 10, 2004

Hearing before Administrative Law Judge J. Mark White on July 8, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. James C. Baker, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 8, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on April 19, 2004, and a Prehearing Order was entered on April 20, 2004. A copy of the April 20, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee-employer-carrier

relationship existed at all relevant times, including April 24, 2002; that on April 24, 2002, the claimant sustained a compensable injury to his left elbow; that respondents accepted the April 24, 2002, injury as compensable and paid benefits; and that the claimant earned an average weekly wage of \$657, entitling him to the maximum compensation rates.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to his neck on April 24, 2002; whether the claimant is entitled to additional temporary total disability benefits from May 3, 2003, to a date yet to be determined; whether additional medical treatment is reasonably necessary in connection with the compensable injury; and controversion and attorney's fees.

The claimant contends that he sustained compensable neck injuries on April 24, 2002; that he is entitled to temporary total disability benefits from on or about May 3, 2003, to a date yet to be determined; that the additional medical treatment he seeks is reasonable and necessary and related to his compensable injuries; and that he is entitled to attorney's fees as permitted by law.

Respondents contend that the claimant did not sustain a compensable cervical injury arising out of and in the course of his employment; and that to the extent that he did suffer a compensable left elbow injury, that injury has now

resolved and does not entitle the claimant to any further benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that the existence and extent of his alleged April 24, 2002, neck injury is established by medical evidence supported by objective findings.
4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury to his neck on April 24, 2002.
5. A preponderance of the evidence establishes that the claimant remained in

- his healing period for his compensable elbow injury until October 28, 2003.
6. A preponderance of the evidence establishes that the claimant had not returned to work as of October 28, 2003.
 7. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 3, 2003, through October 28, 2003.
 8. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with a compensable injury.
 9. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant sustained a compensable injury to his left elbow on April 24, 2002, when he fell onto the blade of a large paper roller. He had been working on a construction project at the Domtar paper mill in Ashdown. He testified that he primarily remembered the injury to his elbow, because it sliced his arm. He later determined that he also hit his head, because his hardhat was cracked. He testified that immediately after the accident he was “dizzy” and “kind of like seeing little

black spots." Treatment was initially denied him, but he eventually was treated at a hospital in Hammond, Louisiana. He was diagnosed with an elbow laceration and contusion; apparently the doctor also thought the claimant had injured his ulnar nerve, though this was later determined not to be the case.

When he continued to have pain and swelling in his arm, he was referred to a neurosurgeon, Dr. Robert Tiel. Due in part to the respondent-carrier's delay in approving treatment, the claimant did not see Dr. Tiel until May 27. Dr. Tiel noted that the claimant had a history of "severe pain in the [left arm], postoperative swelling, infection, and swelling of the arm with significant pain and limitation of motion." Dr. Tiel recorded the claimant's complaints as "weakness and numbness in the left arm" and recommended physical therapy. When the claimant returned to Dr. Tiel on September 9, he noted the claimant's condition was "much improved" and released him from care, though he did refer him to an orthopaedist.

The claimant saw an orthopaedist, Dr. H. Reiss Plauche, on October 4. Dr. Plauche noted "marked swelling" in the left forearm and hand and complaints of numbness in the left hand. He prescribed medication and ordered an MRI, an EMG test, and a Doppler ultrasound. The MRI exam revealed only "evidence of a soft tissue injury to the elbow superficially." The EMG revealed a mild left carpal tunnel syndrome, but nothing else. The Doppler ultrasound, however, revealed a "non-

occlusive thrombosis of the left internal jugular and subclavian veins.” The claimant returned to Dr. Plauche on November 15, and Dr. Plauche noted that the swelling had decreased. He speculated that the claimant might have “a component of RSV,” and he referred the claimant to a vascular surgeon, Dr. Phillip Gardner, for evaluation of the thrombosis.

Dr. Gardner saw the claimant on December 12; he speculated that the claimant had post-phlebotic syndrome in the left hand, but he also recommended the claimant be evaluated for a cervical rib or a cervical compression syndrome. Dr. Gardner performed a venogram on December 18, which revealed evidence of a prior thrombosis but no stenosis nor active thrombus. The next day the claimant returned to Dr. Plauche, who noted that the swelling had resolved and that most of the claimant’s problems “are vascular.” Conversely, when the claimant returned to his vascular surgeon, Dr. Gardner, on January 16, 2003, Dr. Gardner opined that most of the claimant’s problems “are orthopedic.”

When the claimant last saw Dr. Plauche on March 27, 2003, Dr. Plauche noted that the claimant had developed a “flexion contracture” in his elbow and that the swelling had returned. He recommended pain management treatment and again speculated that the claimant might have reflex sympathetic dystrophy (RSD). A pain management specialist, Dr. Richard H. Morse, evaluated the claimant on April 14

and recommended an extensive, inpatient course of treatment. The respondents controverted further benefits and the claimant never received the treatment.

Several months passed with no medical treatment, until October 28, 2003, when the respondents sent the claimant to Dr. Michael M. Moore for an independent medical evaluation. Dr. Moore concluded:

It is my opinion Mr. Ratliff presents with a complex problem. He describes chronic pain in the neck, arms, and legs and recurrent swelling in the left hand and arm. His previous evaluations, including venograms, MRI scans, and nerve conduction and EMG studies were unremarkable. In addition, Mr. Ratliff's physical examination and x-ray studies of his left elbow on 10/28/03 were unremarkable. He does have stiffness in the left elbow, which I suspect is related to disuse.

Finally, I am concerned that Mr. Ratliff's physical examination reveals collapsing pattern weakness during muscle testing. Based on his clinical history, physical examination, and previous x-ray studies, it is unlikely his left arm symptoms will improve following any therapy or surgical treatment. In regards to the left elbow injury, it is my opinion Mr. Ratliff has reached his maximum medical improvement. I would recommend that his pain complaints be evaluated by Dr. Reginald Rutherford, a neurologist and pain management physician who could render an opinion regarding Mr. Ratliff's persistent pain complaints and neurological status. Finally, if Mr. Ratliff should report persistent left elbow pain or swelling, it may be reasonable to evaluate the left arm and elbow with a triphasic bone scan. If the scan is unremarkable, it is unlikely he would require any further evaluation for the left elbow complaints. These statements are made within a reasonable degree

of medical certainty.

Dr. Rutherford examined the claimant the next day and concurred with the recommendation of an MRI and bone scan. The bone scan proved negative, but the MRI revealed a disc herniation at C5-6. Dr. Rutherford opined that the disc herniation “may well” account for the claimant’s chronic pain, but not the collapsing weakness noted by both he and Dr. Moore on examination. In his deposition, Dr. Rutherford described this “collapsing weakness” as “weakness that does not have a physiologic basis.” He also testified that he ruled out a diagnosis of reflex sympathetic dystrophy (RSD) based on the negative MRI and bone scan results.

II. Adjudication

A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the

existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.* Moreover, it is not enough that the claimant prove the existence of objective findings; he must also show a causal connection between those objective findings and his alleged compensable injury. *Id.*

The claimant contends that his work accident of April 24, 2002, resulted in compensable injuries to both his neck and left elbow; the respondents stipulate only to the injury to the elbow. I can find only one objective finding of an injury to the neck in the record herein: the cervical MRI exam performed January 12, 2004, nearly 21 months after the accident. The MRI revealed a disc herniation at C5-6; the question, then, is whether the claimant has proven by a preponderance of the evidence that this objective finding of injury is related to his work injury. I find that he has failed to do so.

At the time of his original injury, the claimant's complaints of pain and problems were limited to his left upper extremity. There is no evidence in the record, other than his own testimony, to show that he had headaches or pain or

weakness in his neck until more than a year after the accident. It was not until December, 2002, that a doctor first mentioned even the possibility of a spinal injury. The record does show that the claimant complained of numbness and weakness in his left hand and arm within a month of the accident, and it is conceivable that these symptoms were caused by a herniated disc at C5-6. But there is simply insufficient evidence in the record for me to make that causal connection without resorting to conjecture and speculation. Unfortunately for the claimant, such cannot substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

It is true that the record does contain subjective reports by the claimant of muscle spasms. But I can find nothing in the record to show that a physical therapist or medical provider actually observed spasms until many months after the work accident.

It is also true that Dr. Rutherford states in his report that the claimant's left extremity symptoms "may well" be connected to the disc herniation at C5-6. However, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. ARK. CODE ANN. § 11-9-102 (16)(B); *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). Expert opinions based upon "can," "could," "may" or "possibly" are not opinions stated within a reasonable

degree of medical certainty. *Frances v. Gaylord Container Corporation*, 341 Ark. 527, 20 S.W.3d 280 (2000). Therefore, Dr. Rutherford's speculative opinion may not support a finding of compensability.

In short, while it is plausible – perhaps even probable – that the claimant's April 24, 2002, work injury caused the disc herniation at C5-6, I can find a causal connection only by conjecture and speculation. Therefore, I must find that the claimant has failed to prove by a preponderance of the evidence that the existence and extent of his alleged April 24, 2002, neck injury is established by medical evidence supported by objective findings. Because he has failed to prove a causal connection between the objective findings within the record and his alleged neck injury, I must conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his neck on April 24, 2002.

B. Temporary Total Disability Benefits

An injury to the elbow is a scheduled injury. ARK. CODE ANN. § 11-9-521(a)(1); *see, e.g., Pride v. Eudora Garment*, A.W.C.C. E912671 (June 14, 2001). An employee who suffers a compensable scheduled injury is entitled to benefits for temporary total disability during his healing period or until he returns to work, whichever ever occurs first. ARK. CODE ANN. § 11-9-521 (a); *Wheeler Construction Co. v.*

Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period continues until the underlying condition has become stable, the employee is as far restored as the permanent character of his injury will permit, and there is nothing further in the way of treatment that will improve his condition. *Id.* Whether the healing period has ended is a question of fact. *Id.*

The claimant seeks temporary total disability benefits from the date those benefits were terminated, May 3, 2003. There is nothing in the record to show why the respondents terminated benefits on that date, other than that extensive pain management treatment had been recommended to the claimant on April 14, 2003. The claimant had not returned to work, and by his testimony he still has not returned to work. It cannot be said that the pain management treatment recommended in April, 2003, was intended for the claimant's spine, for the disc herniation had not yet been discovered.

The claimant received no more medical treatment until October 28, 2003, when he was seen by Dr. Michael M. Moore for an independent medical evaluation. Dr. Moore evaluated the claimant, reviewed his medical records, and performed a number of diagnostic tests. Dr. Moore finally concluded,

Based on his clinical history, physical examination, and previous x-ray studies, it is unlikely his left arm symptoms will improve following any therapy or surgical treatment. In regards to the left elbow injury, it

is my opinion Mr. Ratliff has reached his maximum medical improvement.

There is no medical opinion or evidence in the record to show that the claimant reached maximum medical improvement at any point prior to Dr. Moore's opinion. Therefore, given Dr. Moore's opinion, I find that a preponderance of the evidence establishes that the claimant remained in his healing period for his compensable elbow injury until October 28, 2003. Given the claimant's testimony and the lack of any contradictory evidence, I find that a preponderance of the evidence establishes that the claimant had not returned to work as of October 28, 2003. Therefore, I conclude that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 3, 2003, through October 28, 2003.

C. Additional Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

Pain management treatment was recommended for the claimant in the spring

of 2003 but denied by the respondents. Since that time, he has been examined both by Dr. Moore and Dr. Rutherford. As noted above, Dr. Moore has opined that no further treatment is necessary for the claimant's compensable elbow injury. Dr. Rutherford opined in a letter that the claimant needed a neurosurgical consultation, but in his deposition Dr. Rutherford makes it clear that this recommended treatment is for the claimant's spine, not his compensable elbow injury. Given this evidence, I find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with a compensable injury.

AWARD

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from May 3, 2003, through October 28, 2003. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Gregory R. Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to Ark. Code Ann. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge