

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305718

JAMES SEARCY, EMPLOYEE

CLAIMANT

EXOPACK, LLC, EMPLOYER

RESPONDENT

**AMERICAN MANUFACTURERS MUTUAL
INSURANCE COMPANY, INSURANCE CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 16, 2004

Hearing before Administrative Law Judge Cynthia Estes Rogers on June 18, 2004, in Monticello, Drew County, Arkansas.

Claimant represented by Mr. Paul W. Keith, Attorney at Law, Monticello, Arkansas.

Respondents represented by Mr. David C. Jones, Attorney at Law, Little Rock, Arkansas.

A hearing was held on June 18, 2004, to determine the compensability of the claim filed herein and claimant's entitlement to additional benefits.

The parties stipulated to the existence of the employee-employer relationship on January 2, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$317.00 for temporary total disability and \$238.00 for permanent partial disability benefits.

Claimant contends that he sustained a compensable injury on or about January 2nd or January 3rd of 2003. He contends that he is entitled to periods of temporary total disability beginning on May 20, 2003 and ending on June 9, 2003, and for a period beginning on September 25, 2003 and ending on or about April 18, 2004. Claimant contends that he is

entitled to a 10 percent permanent partial disability rating based upon the opinion of Dr. P. B. Simpson, Jr.

Although respondents initially accepted the claim as compensable and paid for some testing and treatment, respondents now controvert the claim, contending that it is not a compensable injury but is based upon a pre-existing condition. In the alternative, respondents contend that claimant is not entitled to any additional benefits. Respondents further claim an offset for any benefits which have been paid by a third-party carrier.

STATEMENT OF THE CASE

Claimant is forty-one years old. He has worked for respondent employer for nineteen years, eight of which has been spent as a premounter, the job he was performing at the time he claims he was injured. Respondent employer manufactures printed paper bags. Claimant worked as a premounter, setting up the press plates for printing on the bags. Claimant contends that on either January 2nd or 3rd of 2003, while at work, he was reaching for an object on the premounting table that was somewhat adherent to the table, when he twisted and felt a sharp pain in his lower back that radiated down into his left leg. He testified that he continued working for a while, then reported the incident to his supervisor, Frank Johnson. He stated that Mr. Johnson asked him if he wanted to go to the doctor, but claimant decided to wait and see if the pain would go away. He testified that he continued working another hour or so but that the pain gradually got worse, so he decided to go to the doctor.

Claimant first saw Dr. Sandra Sheiron. She treated him with Ibuprofen 600 mg, placed him on light duty for seven days, and ordered an MRI. Claimant then saw orthopedic

surgeon, Dr. Bruce Safman, on February 17, 2003. Dr. Safman noted that claimant's MRI did demonstrate degenerative changes at L4-5, and that there was a disc protrusion in the paracentral area, right of center at L4-5. However, Dr. Safman noted that that finding was of no significance, as the claimant's symptoms were on the *left* side. Dr. Safman's impression was that claimant had left piriformis syndrome and injected his piriformis muscle with Decadron 6 mg., Depo-Medrol 60 mg., and 4 cc. of 1 percent Xylocaine. He kept claimant on the same restrictions. Dr. Safman continued to see claimant through April 28, 2003, at which time he found claimant to be at maximum medical improvement, with a zero percent disability rating. He placed claimant on a thirty-pound lifting restriction for one week and then released him to full duty on May 12, 2003.

On May 21, 2003, claimant saw Dr. Reginald Rutherford, a neurologist, for a second opinion evaluation. Dr. Rutherford found claimant to be "morbidly obese," being five foot, ten inches tall, and weighing 294 pounds. Dr. Rutherford found the same degenerative changes at L4-5 as Dr. Safman and ordered physical therapy and weight loss. He continued claimant on regular work duties.

Claimant returned to Dr. Safman on June 9, 2003, complaining that he had had an increase in pain and that his adjuster had told him to go see his family physician, who took him off work for three weeks. Dr. Safman opined:

There is no reason for me to keep this patient off work. I have returned him to full duty. I did call his adjuster's office. He was out. His assistant related that there was no documentation that the patient was ever told to see his family physician or that he was authorized to be off work by workers' comp.

Addendum: Mr. Searcy returned. He was upset that he was released to full duty. I related to the patient that he had no tenderness, guarding or muscle spasm and has been off work, I saw no reason not to return him to full duty. The patient was extremely angry when he left.

Claimant saw Dr. Safman again on June 23, 2003. Dr. Safman opined:

There is no lower lumbar tenderness. There is no hip tenderness. There is no tenderness along the iliotibial band.

I gave him samples of Effexor, which is sometimes helpful to try. I asked him to go to the custom compounding pharmacy and have a combination of 5% lidocaine and 2% amitriptyline cream made up and rub it in the painful areas and see if that is helpful. I have asked him to lose weight. I did not give him a routine appointment. If the Effexor and the transdermal medications I have prescribed for him are helpful, I would be happy to see him to resupply him with the medication. Otherwise, there is no reason to see him. The patient reported that he has seen Dr. Rutherford in the past and Dr. Rutherford recommended a prolong course of physical therapy. The patient reported that the physical therapy modalities during the two days he went were very transient and by the time he left the effects had worn off. I do not agree with that. He also stated that Dr. Rutherford recommended repeating the MRI. The MRI showed degenerative changes and most of the significant changes were on the right side and this patient's symptoms are on the left side. *Thus I cannot see that anything would show up that would relate to his initial injury on the left side, which I think is soft tissue.*

[Emphasis added.]

After being granted a change of physician, claimant saw Dr. David Foscue, who referred him to Dr. Steven Cathey. Dr. Cathey, like Dr. Rutherford, found claimant to be morbidly obese. Dr. Cathey noted that claimant admitted to having some previous trouble with his lower back and had seen chiropractors off and on for a number of years. Claimant admitted this also during cross-examination. Dr. Cathey ordered a CT myelogram of the

lumbar spine to fully image the neural canal. After this test was conducted, Dr. Cathey opined on September 3, 2003:

[I]n view of the fact that he has a normal neurological exam, a normal straight leg raise, and no sign of left-sided nerve root impingement on multiple imaging studies, we have now ruled out an indication for lumbar disc surgery or other neurosurgical intervention.

Claimant, on his own accord, went to see the company physician, Dr. Tim Simon. He had gotten his name off the bulletin boards at work. Dr. Simon referred claimant to a neurosurgeon, Dr. P. B. Simpson, Jr., who performed a hemilaminotomy bilaterally at L4-5 and L5-S1, on January 12, 2004. In a “note to chart,” dated February 25, 2004, Dr. Simpson wrote:

I talked to Mr. David Jones about Mr. Searcy today. I told Mr. Jones that the history was that Mr. Searcy was pulling on something, apparently a rubber mat off of a table, and he felt something in his back, and started having the pain after that. He weighs 300 pounds, but according to him, this was when the pain started. I can believe his story, and that *could* certainly be the cause of his problem.

[Emphasis added.] Dr. Simpson released claimant to return to work on April 19, 2004, with a 10 percent permanent partial disability rating.

In a dictation form by Dr. Simpson on April 21, 2004, in which he noted that claimant’s attorney had called him to review his chart, Dr. Simpson wrote:

I think that his hx that he gave me was that he was pulling a rubber mat and he had something pop in his back. He has had problems on and off since that time. I *think* that is consistent with what we found.

[Emphasis added.]

Claimant testified that during the periods he was off work, he continued baling hay, riding four-wheelers, and deer hunting, although not with a bow. Claimant testified that he is considerably better since the surgery and was able to fully return to his regular duties with respondent employer, where he still works today.

FINDINGS OF FACT

1. There are no “objective findings” in the medical evidence to support a finding that the claimant sustained a compensable injury arising out of and during the course and scope of his employment on January 2nd or 3rd of 2003, or that any work-related injury he may have sustained was the major cause of his condition.

2. The claimant is not entitled to past medical bills unpaid by the respondents nor is he entitled to additional benefits at the expense of the respondents.

DISCUSSION

In order to prove compensability of a claim, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was a major cause of the disability or need for treatment; and (4) the injury must be established by medical evidence supported by objective findings. *See* Ark Code Ann. § 11-9-102(4)(A)(ii)(a) and 11-9-102(4)(E)(ii); *West v. Arkansas Electric Cooperative Corp.*, CA 03-1450 (September 15, 2004); *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Kildow v. Baldwin Piano*, 333 Ark. 335, 969 S.W.2d 190 (1998). In addition to satisfying the “major cause” requirement, however, a claimant must also prove a causal connection between his

employment and the injury. *Id.* Causation remains an essential element to be proven by a claimant in order to establish a claim of compensability.

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).

In this case, claimant admitted, and records were produced establishing, that claimant has had lower back problems for many years. He admitted having seen a chiropractor on and off for a number of years. Although all of the doctors seen by claimant following his alleged injury did note that he complained of hurting his back while working, no doctor actually opined that his alleged work-related injury was the major cause of his need for treatment, within a reasonable degree of medical certainty. In fact, Dr. Safman opined that he could not see that anything would show up that would relate to claimant's initial injury on the left side, which Dr. Safman believed to be "soft tissue."

Every doctor claimant saw noted that he had degenerative changes on the right side, that he was obese, and that he needed to lose weight and engage in physical therapy exercises. No doctor seen prior to Dr. Simpson felt that claimant was a candidate for surgical intervention. Moreover, even Dr. Simpson, after performing surgery, opined that the alleged work-related injury "could" be the cause of claimant's problem and, "I *think* that is consistent with what we found." [Emphasis added.]

The Arkansas Supreme Court has held that expert opinions based upon "could," "may," or "possibly" lack the definiteness required to meet the claimant's burden to prove causation pursuant to § 11-9-102(16)(B), and amount to nothing more than a statement of theoretical possibility. *Crudup v. Regal Ware, Inc., supra.*; *Frances v. Gaylord Container Corporation*, 341 Ark. 527, 20 S.W.3d 280 (2000).

Claimant has simply failed to produce any medical evidence supported by objective medical findings of his alleged injury being the major cause of his need for treatment. The medical evidence submitted by the claimant is more indicative of a longstanding

degenerative condition, rather than an acute injury. While it is certainly the law that the employer takes the employee as he finds him, *see Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003); the claimant is still required to prove, within a reasonable degree of medical certainty, that a work-related injury occurred in order to aggravate or worsen his pre-existing condition.

In this examiner's opinion, claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury or that any work-related injury he may have sustained was the major cause of his condition, within a reasonable degree of medical certainty.

For all of the above-stated reasons, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge