

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F211398

ALBERT M. BENDER, EMPLOYEE

CLAIMANT

CITY OF STRONG, EMPLOYER

RESPONDENT

**ARKANSAS MUNICIPAL LEAGUE
WORKERS' COMPENSATION TRUST,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED FEBRUARY 8, 2005

Submitted on the record before Administrative Law Judge Cynthia Estes Rogers.

Claimant represented by Mr. Michael R. Landers, Attorney at Law, El Dorado, Arkansas.

Respondents represented by Mr. J. Chris Bradley, Attorney at Law, North Little Rock, Arkansas.

_____A hearing was held on August 24, 2004, to determine whether the claimant sustained a compensable vascular injury on April 11, 2002, for which he is entitled to indemnity and medical benefits.

The parties have stipulated that the employee-employer-carrier relationship existed between the parties on April 11, 2002. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$425.00 for temporary total disability and \$318.00 for permanent partial disability benefits, based on an average weekly wage of \$658.07. The parties additionally

stipulated that the claimant lost no time from work until December 15, 2002. It was further stipulated that all issues relating to permanency shall be reserved.

_____ Claimant contends that on April 11, 2002, he suffered a vascular injury to his right leg during the course of his employment with the City of Strong, Arkansas. He further contends that he continued to work light duty as prescribed by his treating physicians until on or about December 15, 2002, when he was no longer able to perform in the workplace. Claimant contends, therefore, that he was temporarily and totally disabled from December 15, 2002, to a date yet to be determined, as he is still in his healing period.

Respondents controvert the claimant in its entirety, contending as follows: that claimant's vascular problems are not related to his employment; that an accident was not the major cause of any physical harm sustained by the claimant; that the exertion of work done by the claimant was not extraordinary or unusual in comparison to his usual work and that no unusual or unprotected incident occurred which was the major cause of physical harm sustained by the claimant.

STATEMENT OF THE CASE

Claimant is a fifty-seven-year-old man with a high school education and some military experience, who has worked manual-labor jobs most of his life. With the exception of one three-to-four-year time period, claimant testified that he has worked for the City of Strong since 1972 as Water Superintendent. He testified that this is a

manual-labor job, entailing the reading of meters, fixing water lines, and patching streets, among other things.

Claimant testified that he began having vascular problems with his right leg in 1997. He saw Dr. C. D. Williams and required surgery on the right artery in his right leg. Claimant testified that in 1998, he injured himself while working on a busted sewer line for respondent-employer. Claimant testified that he was working in deep mud and hurt his right leg while working. He testified, however, that he did not file a workers' compensation claim for that injury. He again saw Dr. Williams and again required another surgery, a re-operative femoral-popliteal bypass on the right.

Claimant testified and medical records reflect that after the second surgery, Dr. Williams placed claimant on restrictions. Dr. Williams wrote letters to claimant's employer after the 1998 surgery, noting that claimant must be under the guided restrictions due to his serious condition. Dr. Williams wrote as follows:

September 11, 1998

Re: Albert Bender – patient

To Whom It May Concern:

Mr. Bender was admitted to the Arkansas Heart hospital on 9-9-98. He underwent re-operative right femoral popliteal bypass surgery on 9-10-98.

A year ago, he underwent right ilio to right femoral, to right supragenicular popliteal arterial bypass surgery on 5-27-97. He has severe peripheral vascular disease on his lower extremity, and disabling claudication.

Due to his condition, I have advised Mr. Bender to take care of his legs. He can no longer do ditch work which he has been performing. Thank you for your cooperation in this matter. If further information is needed, please contact our office.

Sincerely,
C.D. Williams, M.D.
CDW/sv

December 16, 1999

To Whom it may concern,

Due to medical conditions Albert Bender can not work in ditches, read meters or bend below the waist. He has severe peripheral vascular disease and has had his legs operated on several occasions. He is unable to perform the above duties. If you have any questions please contact my office.

Sincerely,
C.D. Williams, M.D.

Claimant testified that despite the restrictions he had been placed under, he eventually had to start performing the manual-labor tasks again for his employer about six months after the 1998 surgery, because respondent-employer was short-handed. Claimant testified that he loved his job and was always available and on-call twenty-four hours a day, seven days a week. Claimant's supervisor, Mayor Noah Moses, testified that claimant was a good, hard-working employee, who was always available and willing to work and was very honest. Moreover, claimant testified that his leg

was not bothering him during the period following the 1998 surgery; therefore, he continued working as needed.

Claimant testified that on Thursday, April 11, 2002, at approximately 11:00 a.m., he and his helper were setting a culvert that was about eighteen feet long in a “wet place cement driveway.” Claimant testified that he had dug the trench out with a backhoe; then, they had to fill it up with pea gravel so it would hold up; next, they had to grade it out. He testified that he was on one end of the culvert, and his helper was on the other end. They were taking grades on it and making sure it was level. Claimant testified that the pea gravel was wet and “boggy,” or muddy, and he had been standing in one place for about ten to fifteen minutes. He testified that when he started out of the ditch, he had to “snatch” his leg up and out of the gravel to get up on the bank and felt a sudden onset of pain down his hip and down the back of his right leg.

Claimant stated that his rubber boot was covered with mud and gravel at the time he tried to pick it up out of the mud. He testified that he knew he was injured at that time. He testified that he sat down on the bank and that Mayor Moses, who was there at the time, told him to just sit there. Claimant testified that he went home for the rest of the day. Then, the next day, Friday, he went to work, but was back and forth to his house all day long, trying to prop his leg up in hopes it would get better.

Both claimant and Mayor Moses testified that the work claimant was doing on April 11, 2002, was unusual in the course of his regular duties because normally his work would not require the use of pea gravel in order to set a culvert. Mayor Moses testified that normally this type of work would simply be done with a backhoe; however, due to the ground being exceptionally wet, pea gravel was required to grade it out. Both Mayor Moses and claimant testified that normally this type of work would be done during the dry season; however, Mayor Moses testified that one citizen of Strong had been complaining to the City to the point that the Mayor simply decided to take care of it, even though the conditions were not optimal for that type of work.

Mayor Moses testified that walking in pea gravel is extremely difficult. He testified:

You've got a lot of weight around and on top and it's almost like being buried up in concrete that has – I'm not going to say set up but that doesn't have a lot of water – not soupy.

Q So this was unusual?

A Yes, sir. I would say so, yes, sir.

Records reflect and claimant testified that following his injury, on Monday morning, April 15, 2002, he went to see Dr. Kenneth Prather, his family physician, who then referred claimant back to Dr. C. D. Williams in Little Rock. Dr. Williams saw claimant and performed an ultrasound of claimant's graft from his previous surgeries. Dr. Williams found the graft to be occluded and treated him medically for

awhile. When this apparently was not helping, Dr. Williams referred claimant to Dr. Bruce Murphy in May of 2002, who attempted to open claimant's graft with a catheter. Records reflect that he attempted this on two different occasions and was unsuccessful.

Claimant then underwent re-operative surgery in September of 2002 to replace his graft, which lasted about one month and then occluded again. Dr. Murphy then attempted to open his new graft in the cath lab in October of 2002 and was, again, unsuccessful. Medical records indicate that claimant's treating physicians are of the opinion that he will have to be treated medically in the future and is no longer a candidate for surgery.

Following all of claimant's procedures and treatment with these doctors, Dr. Williams wrote the following letters, in an attempt to demonstrate the seriousness of claimant's condition and his need to quit performing manual-labor jobs:

October 23, 2002

RE: Albert Bender

To Whom it may concern,

Albert Bender was admitted to the Arkansas Heart Hospital on September 10, 2002 for re-operative right fem-pop bypass surgery. He was discharged home on September 12, 2002. He was instructed to stay off work for 12-14 weeks. He was re-admitted on October 7, 2002 with an occluded graft with an ischemic leg. He underwent two procedures with Dr. Bruce E. Murphy to try to open his graft that were not successful. He was

discharged home on October 10, 2002 and instructed to stay off work until January 2, 2003. He is able to do paperwork until he is released back to work. Mr. Bender is not a candidate for another surgery and it is imperative that he take care of his leg so he may keep from having it amputated. We will consider light duty work for Mr. Bender after the first of the year. We will need to see how he is able to deal with activity and very little blood supply to his leg before we make a final determination of his work abilities. If you have any questions please call my office.

Sincerely,
C.D. Williams, MD

November 14, 2002

Arkansas Workers' Compensation Commission
324 Spring Street
Little Rock, AR 72201

RE: Albert Bender

Dear Ms. Boswell,

Mr. Albert Bender had a right femoral-popliteal artery bypass graft in 1999. He was working on 04-11-02 in wet soil and felt pain and a pull in his right thigh. He continued to have pain in his right leg and notified our office. He was seen in our office and had an ultrasound of his graft. It was found to be occluded. We treated him medically for awhile. When this did not help we sent him to Dr. Bruce Murphy. Dr. Murphy attempted to open his graft with a catheter. He attempted this on two different dates and was not successful. Mr. Bender then underwent re-operative surgery to replace his graft. This lasted about a month and then occluded. Dr. Murphy then attempted to open his new graft in the cath lab and

was not successful. Mr. Bender will have to be treated medically from this point on. He is no longer a candidate for surgery.

Please contact our office if you have any further questions.

Sincerely,
C.D. Williams, MD

January 22, 2003

Amy Boswell
Phone (501) 374-3484
Ext. 241
Fax (501) 374-0541

Re: Albert Bender

Dear Ms. Boswell,

I am writing this letter to try to help expedite Mr. Albert Benders Worker's Compensation claim. I am enclosing letters that have been written in the past outlining the duties that Mr. Bender was no longer able to perform at work.

Mr. Bender has had multiple surgical and intervention procedures for peripheral vascular disease. Mr. Bender was instructed and letters were sent to his employer stating he could no longer do ditch work, read meters or bend below the waist. He needed to have other people perform these duties. Mr. Bender continued to perform the above jobs and occluded his bypass graft in the process. We tried to open the graft with a catheter and then operated on it when this failed. His surgery was not successful in restoring blood flow to his leg. We have advised Mr. Bender to quit work and try to save his leg.

There are no other options for revascularizing his leg at this time. Mr. Bender's symptoms will continue to worsen over time.

If you have any questions regarding Mr. Bender's case please contact my office.

Sincerely,
C.D. Williams, MD

April 21, 2003

Ms. Glenda Robinson
Phone (501) 374-3484 Ext. 243
Fax (501) 374-0541

Dear Ms. Robinson,

We have written several letters stating that Mr. Albert Bender's last surgery was to try to repair a work related injury to his previous bypass graft. We sent letters to his employer after his first surgery listing the limitations Mr. Bender had to help save his leg. His employer still required Mr. Bender to perform these tasks and now he does not have proper blood flow to his leg and is at great risk of eventually losing his leg. His last interventions were not successful in restoring blood flow to his leg.

I left a message on your voice mail asking you to return my call so we could discuss his case, but you did not return my call. If this is not the information you need to help expedite this case please let me know. Mr. Bender is now unable to work at all and he needs help getting this case resolved so he can pay his medical bills.

Sincerely,
C.D. Williams, MD

December 4, 2003

Michael Landers
200 North Jefferson
Suite 620
El Dorado, AR 71730

RE: Albert Bender

Dear Mr. Landers,

Mr. Albert Bender has been a patient of mine for years. My office has sent his medical records to your office but I wanted to clarify some things for you. Mr. Bender was seen in my office on 04-17-02 after seeing his local physician. Mr. Bender stated that while working in a ditch he experienced pain in his right leg. He then had claudication after walking a short distance. His family doctor recommended we see him to follow up on his graft. The graft was found to be occluded on this visit. Mr. Bender's employer had been sent a letter by my office instructing them that Mr. Bender could no longer do ditch work or his graft would be at risk. I have every reason to believe that Mr. Bender lost his graft do [sic] to this incident. We did everything we could to revascularize Mr. Bender's right leg and failed. He is at risk of eventually losing his right leg. If Mr. Bender had been able to limit his job as we instructed his employer to do his graft might still be patent. Please let me know if you need further information.

Sincerely,
C.D. Williams, MD

Respondents introduced as an exhibit a "Peer Review Analysis" conducted by Dr. James Estes, who is board-certified in vascular surgery in the state of

Massachusetts. In issuing his opinion, Dr. Estes stated that he reviewed the following data: “ARKANSAS MUNICIPAL LEAGUE referral form, the submitted documents, office notes, procedure notes, discharge summaries.” Dr. Estes never treated or saw claimant. Dr. Estes opined as follows:

The graft occlusion most likely resulted from a technical problem and not due to physical activity at the time of symptom onset.

The claimant’s problems with peripheral vascular disease which manifest from 04/11/2002 are not due to work-related injury and should be covered under personal medical insurance.

Claimant testified that he attempted to work light duty until December 15, 2002, at which time his employment was terminated. Dr. Williams has opined that claimant is unable to work.

Claimant testified that based solely on his medical records, he was approved for Social Security disability benefits in July of 2003. Claimant and his wife testified that they have had to purchase a golf cart so that claimant can get around outside his home, due to the fact that he cannot walk any real distance without pain. They testified that he previously performed all of the yard work and gardening and other duties around the house; however, now he is unable to do those things. Further, he has trouble sitting or standing for any length of time.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact.

2. Claimant's April 11, 2002, injury was the major cause of his physical harm, in relation to other factors; specifically, claimant has shown that he injured his leg while performing extraordinary and unusual work duties, the necessary exertion of which precipitated his injury and subsequent treatment and disability.

3. Claimant is entitled to treatment, both past and future, for complaints associated with his April 11, 2002, vascular injury.

4. Claimant is entitled to temporary total disability indemnity benefits commencing December 15, 2002, and continuing through a date yet to be determined.

5. Respondents have controverted the claim in its entirety.

6. All issues related to permanency are specifically reserved.

DISCUSSION

Arkansas Code Annotated § 11-9-114 states as follows:

(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm.

(b)(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the *exertion of the work necessary to precipitate the disability* or death was *extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment* or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm.

(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof.

[Emphasis added.]

A claimant has the burden of proving the compensability of his claim by a preponderance of the evidence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (1998). Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16).

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, both the claimant and Mayor Moses testified that the conditions under which claimant was working on April 11, 2002, were “unusual,” compared to his normal working duties and conditions. Further, they testified that claimant would have had to exert himself physically more than normal in order to move his feet out of the pea gravel and mud mixture in which he was standing while performing his work.

The medical records reflect, and claimant admits, that he had vascular problems that pre-existed April 11, 2002. Records also reflect, however, that claimant’s condition had stabilized prior to the April 11, 2002, incident, and that claimant had been able to resume his regular work duties prior to April 11, 2002,

although his employer had been notified that he should be under restrictions. Claimant testified that he was not having problems and was not seeking medical treatment for his vascular condition after he had returned to work following the 1998 surgery until this April 11, 2002, incident.

The claimant obviously has a history of vascular problems. However, the law is clear 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). Notwithstanding, the claimant still must prove that a work-related injury occurred in order to aggravate or worsen his pre-existing condition; and, in this examiner's opinion, the claimant herein has certainly so proven.

Prior to this injury, he had had previous surgeries; however, testimony from both he and his wife, as well as his employer revealed that after the 1998 surgery, he was back to doing the duties he always had for his employer. Claimant testified that he knew he was restricted, and the medical records from Dr. C. D. Williams indicate that his employer was certainly made aware of these restrictions; however, claimant testified that his employer was, at times, short-handed and that he had to do the job, which included the manual-labor duties he had been restricted from performing.

The testimony and credible evidence in this case reveal that on April 11, 2002, claimant injured his leg while performing unusual work duties, the necessary exertion of which precipitated his injury and subsequent treatment and disability. It is this

examiner's opinion that claimant has met his burden of proving the compensability of his claim by a preponderance of the credible evidence.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay claimant temporary total disability indemnity benefits commencing on December 15, 2002, and continuing through a date yet to be determined.

Respondents are directed to pay past and future reasonable, necessary, and related medical expenses the claimant has and may incur as a result of his compensable injury.

Respondents are directed to pay the claimant's attorney, Mr. Michael R. Landers, 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