

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F308477

JOHNNY JACOBS, EMPLOYEE

CLAIMANT

**WOODRUFF COUNTY NURSING HOME,
EMPLOYER**

RESPONDENT

**COMMERCE & INDUSTRY INSURANCE COMPANY
C/O AIG CLAIM SERVICES, INC.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 1, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on March 3, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Ben E. Rice, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

A hearing was held on March 3, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on October 9, 2002. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$201.00 for temporary total disability and \$154.00 for permanent partial disability benefits.

Claimant contends that although he has, admittedly, had back problems in the past, he was perfectly able to work until a particular incident occurred on October 9,

2002. He contends that, on that date, he was stripping a floor for respondent-employer and, while in the course and scope of his employment, he slipped and fell, injuring his back and aggravating his preexisting back condition. Claimant contends that he was working with his supervisor at the time of his injury, filled out an accident report, and was sent by his supervisor to the McCrory Health Center.

Claimant contends that he attempted to return to work for a couple of weeks, but then reached the point that he could no longer work. He then saw his family physician, Dr. Fred Wilson, who took him off work and referred him to Dr. Carl Covey. Claimant contends that Dr. Covey authorized him to return to light duty and, after a period of time, Dr. Covey referred claimant to Dr. Harold Chakales for surgery.

Claimant contends that he had surgery on May 27, 2003, and was kept off work until November 3, 2003, when he was released to return to light duty by Dr. Chakales. Claimant contends that, as a result, he is entitled to certain periods of temporary total disability indemnity benefits, as well as attendant medical benefits, and attorney's fees. Claimant reserves the issues of permanency and wage loss.

Respondents controvert the claim in its entirety, contending that the claimant did not sustain an injury arising out of and during the course and scope of his employment on October 9, 2002. Respondents assert that claimant's medical treatment is associated with claimant's preexisting problems, as documented by an MRI report dated February 16, 1999, and introduced into evidence. Respondents

further assert that, with regard to a causal relationship between the claimant's need for medical treatment with an alleged work-related injury, any doctors' opinions indicating a causal relationship are based upon speculation and conjecture and are not supported by the medical records themselves.

Respondents further contend that claimant continued to receive his regular wages through March 17, 2003, and that he then worked half-days through June of 2003. Respondents assert that claimant was then released to return to work by Dr. Chakales on November 3, 2003. Respondents, therefore, assert that in the event the claim is found to be compensable, respondents should be entitled to a credit for amounts paid to the claimant during that time frame.

STATEMENT OF THE CASE

Claimant is thirty-seven years of age and testified that he began working in janitorial/housekeeping for respondent-employer in 1991. Claimant testified that on the morning of October 9, 2002, as he was stripping floors for respondent-employer, he slipped on a wet floor and fell, injuring his back. Claimant testified that his supervisor, Doris Wright, was present when the accident occurred and that she had claimant fill out an accident report and go to the health clinic. Doris Wright was not called to testify, and no accident report of that date was introduced into evidence.

Medical records in evidence indicate that claimant was seen at the McCrory Medical Center on October 9, 2002, complaining that he "fell at work and hurt his

[right] side.” [Emphasis added.] Claimant was thoroughly checked and assessed as having a contusion on the right side of his body without trauma and was released to return to work without restrictions.

Medical records further indicate that claimant also saw Dr. Wilson, his family physician, on October 9, 2002. Dr. Wilson’s notes state that claimant complained of back pain and right leg pain. His notes state that claimant “fell this a.m.” and that claimant complained of pain radiating to his right leg. No mention is made in Dr. Wilson’s notes of October 9, 2002, of any work-related injury. Dr. Wilson’s notes also indicate that an x-ray was taken of claimant’s lumbar spine, although no x-ray results from that date were introduced into evidence.

Dr. Wilson’s clinic notes indicate that he saw claimant again a month later, on November 11, 2002, and that claimant was again complaining of back pain radiating into his thighs. Dr. Wilson notes that claimant’s last MRI was conducted in February of 1999 and showed, at that time, that claimant had a herniation at L4-L5. Dr. Wilson notes: “Pain is [greater] since then and [claimant] wants herniation repaired.” Dr. Wilson ordered another MRI; then, following that MRI, he referred claimant to Dr. Covey. Dr. Wilson noted that the pain medication he had prescribed for claimant was not helping claimant.

The MRI ordered by Dr. Wilson was conducted on November 15, 2002. The findings were essentially the same as that of the 1999 MRI and were as follows:

FINDINGS: Significant changes of spondylosis appear at L4-5. Disk space narrowing and subchondral changes are seen. Left paracentral herniation of bulging disk at L4-5 is found causing indentation on ventral aspect of thecal sac and encroachment on left lateral recess. There also appears to be some right posterolateral herniation of this disk with encroachment on right neural foramen.

Minimal disk bulge, L5-S1, does not create any significant compression.

No intrathecal abnormalities. No marrow signal abnormalities.

IMPRESSION:

Changes of spondylosis at L4-5 and L5-S1 as described.

Dr. Covey first saw claimant on December 19, 2002. Dr. Covey's notes make no mention whatsoever of a work-related injury. The history he took from claimant simply indicates that claimant had an "episode of this pain three years ago in 1999," and that claimant had a couple of epidurals that had helped him somewhat, allowing him to return to work. Dr. Covey then mentions that claimant had had a "*recurrence* of these symptoms again over the past couple of months," (emphasis added), which had taken claimant back to see Dr. Wilson, who then referred claimant to Dr. Covey.

Claimant testified that Dr. Covey administered three separate epidural steroid injections on him. Claimant testified that these did not seem to help. Dr. Covey ordered another MRI post-discogram, which was performed on March 13, 2003. The impression from that MRI states as follows:

There is a Grade 5 annular tear on the *left* at the L4-5 level. There is a disc herniation identified with inferior fragment extension of the L4 vertebral body. This is noted to displace the *left* L5 nerve root.

There is an anterior grade 4 tear at L5-S1 level. The L3-4 level shows Grade 1 tear.

[Emphasis added.]

Off-work slips introduced into evidence indicate that claimant was taken off work as follows: from November 18, 2002, through mid-January 2003, by Dr. Wilson; from January 7, 2003, through “at least 2 weeks until I see him again,” by Dr. Covey; from January 21, 2003, through February 4, 2003, by Dr. Covey; and, from February 8, 2003, through February 22, 2003, by Dr. Wilson. On March 13, 2003, Dr. Covey issued a slip stating, “Patient may try to return to light-duty, [half] time work on 3/17/3.” On April 25, 2003, Dr. Covey issued another slip stating, “Continue [half]-time light-duty work.”

Claimant was referred by Dr. Covey to Dr. Chakales for surgery. Claimant first saw Dr. Chakales on May 21, 2003. The history Dr. Chakales took from claimant on that date indicates that claimant’s complaints of pain began initially on October 9, 2002, but, again, no mention of a work-related injury is made. In addition, his notes state that claimant has “actually had back trouble for many years.” Dr. Chakales found upon physical examination that claimant had a “positive sciatic stretch on the *left* side,” (emphasis added) and that claimant “has true sciatica.”

Dr. Chakales stated in a letter to Dr. Covey: “This gentleman has an extruded disc at L4-5 *on the left* and is a suitable candidate for hemilaminotomy at that level.” [Emphasis added.] Notes from Dr. Chakales indicate that claimant was released to return to light duty from May 21, 2003 through May 26, 2003, and was then scheduled for surgery on May 27, 2003. He was advised to remain off work for an undetermined period of time, following surgery.

Claimant underwent surgery on May 27, 2003. On May 30, 2003, Dr. Chakales noted that claimant was to remain off work sixteen weeks. When asked on direct examination if claimant felt that the surgery helped him, he responded, “not really.” Claimant testified, and medical records indicate, that claimant underwent two months of physical therapy following the surgery. He was released on November 3, 2003, by Dr. Chakales, to light duty with restrictions on stooping, bending, and carrying. On May 11, 2004, Dr. Chakales issued a 10 percent impairment rating to claimant to the body as a whole.

Drs. Wilson and Covey were each asked by counsel for claimant to give their opinion as to whether a work-related accident was the major cause (more than 50 percent) of the injury which resulted in their treatment of claimant following the alleged date of injury, October 9, 2002¹. Dr. Wilson checked the “yes” answer on the opinion letter sent to him in March of 2004. Dr. Covey, on the other hand, checked

¹On the letters sent to Drs. Wilson and Covey, counsel for claimant put October 7, 2002, as the date of injury, rather than October 9, 2002.

neither “yes” nor “no,” but rather hand-wrote the following: “I have never discussed the cause with Mr. Jacobs.”

Dr. Chakales wrote in part, in a letter to claimant’s counsel on May 11, 2004, as follows:

I have reviewed letters from Dr. Wilson and Dr. Covey. Dr. Wilson, the primary care physician, saw Mr. Jacobs initially and stated this gentleman’s problems were from his work-related injury. Dr. Covey stated he did not inquire as to the circumstances which precipitated Mr. Jacobs’ injury. *If these statements are correct, we must assume that the problem Mr. Jacobs’ (sic) suffers is a result of the compensable injury treated initially by Dr. Wilson, then by Dr. Carl Covey.*

[Emphasis added.]

Medical records indicate, and claimant admits, that he has been treated for lower back pain since 1998. Medical records include notes from Dr. Wilson on February 6, 2002, stating that claimant complains of back pain and that an MRI shows a ruptured disk, and again on February 20, 2002, noting claimant’s complaints of back and neck pain.

Claimant admitted during testimony that he did not file a workers’ compensation claim for this alleged injury until September 27th of 2003. Claimant testified that he filed for short-term disability in December of 2002 and noted on the form he filled out for same that his problems began in 1998. Claimant did note on the Group Disability Income Claim form, however, that his injury happened at work on

October 9, 2002. Despite this, records indicate that claimant further requested short-term disability in May of 2003 from a different policy and got Dr. Chakales to sign off on it; however, on this form, he stated that it was *not* work-related; and, the physician's statement section says, "not related to his employment." Claimant testified that he did not receive short-term disability.

Claimant testified that prior to his release by Dr. Chakales in November of 2003, he was terminated from his employment with respondent-employer. Claimant's wife testified on claimant's behalf and, although claimant's wife was also employed at the time by respondent-employer, claimant admitted that she was not present when he allegedly fell at work on October 9, 2002. Notwithstanding, Mrs. Jacobs testified that she remembered claimant coming home on that date and stating that he had to go to the clinic because he fell. She testified that he began taking a lot of pain medication, and she became worried about him. Testimony revealed that Mrs. Jacobs was also later terminated by respondent-employer.

FINDING OF FACT

Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable back injury on October 9, 2002, while acting within the course and scope of his employment, or that any work-related injury he may have sustained was the major cause of his condition.

DISCUSSION

The Arkansas Supreme Court has defined the legal definitions in workers' compensation law of a "recurrence," as opposed to an "aggravation." 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. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Arkansas Code Annotated § 11-9-102(5)(A),(E), and (F) provide in part:

(5)(A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) . . .

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence;

. . .

(E) Burden of Proof. The burden of proof of a compensable injury shall be on the employee and shall be as follows:

(i) For injuries falling within the definition of compensable injury under subdivision (5)(A)(i) of this section, the burden of proof shall be a preponderance of the evidence;

(ii) For injuries falling within the definition of compensable injury under subdivision (5)(A)(ii) of this section, the burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

(F) Benefits.

(i) When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary disability as provided by this chapter.

(ii)(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a preexisting disease or condition or the natural process of

aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

“Major cause” means more than 50 percent of the cause. Ark. Code Ann. § 11-9-102(14)(A).

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).

In the instant case, there is no doubt that claimant has suffered from back problems. The question in this case, however, is whether claimant sustained an injury, or aggravation thereof, caused by a specific incident identifiable by time and place, on October 9, 2002, while in the course and scope of his employment. There are records, both medical and otherwise, that indicate claimant did seek medical treatment on October 9, 2002, for his back. However, claimant must still prove by a preponderance of the credible evidence that the injury, or aggravation, occurred within the course and scope of his employment. It is this examiner's opinion that he has failed to do so.

There are only two documents to suggest that he did injure himself at work. The first is the record from the McCrory Medical Center on October 9, 2002, and the

second is the claimant's first application for short-term disability, on which he noted that he injured himself at work on October 9, 2002. There were no witnesses who testified that they saw him and no accident reports filed by his employer on that date, although he testified that he told his supervisor and that she had him fill out a report.

Notably, the record from the McCrory Medical Center of October 9, 2002, indicates that claimant slipped and fell on his *right side* and that he suffered a contusion on the *right side* without obvious trauma. The later MRIs and examinations of his back problems indicate that his back problems are on the *left*, and not the *right* – the side he complained of injuring on October 9, 2002. In addition, no medical record after the McCrory Medical Center record even mentions a work-related injury. Moreover, claimant did not file a workers' compensation claim until nearly a year after the alleged injury date. Further, on the second application he made for short-term disability, he indicated that it was *not* due to a work-related injury; and the physician's statement agreed that it was *not* related to his employment.

The opinions as to cause, summoned from the doctors by claimant's counsel, were not compelling. First, Dr. Wilson's opinion is obviously based on the history, as given to him by claimant. Next, Dr. Covey could not give an opinion as to cause, as he never discussed cause with claimant. Finally, Dr. Chakales opines that, "if these statements are true," meaning if the history as given to the doctors by claimant is true, then we must "assume" it is work related. *Assuming* an injury is work-related based

on the statements of claimant alone is hardly a sufficient basis for an objective opinion.

In this examiner's opinion, claimant has simply failed to prove by a preponderance of the credible evidence that he sustained a compensable back injury on October 9, 2002, while acting within the course and scope of his employment, or that any work-related injury he may have sustained was the major cause of his condition.

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

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge