

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NOS. F114039 and F207329

CARL D. KING, EMPLOYEE	CLAIMANT
PEOPLEWORKS, EMPLOYER	RESPONDENT NO. 1
ZURICH AMERICAN INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
TELETOUCH COMMUNICATIONS, INC., EMPLOYER	RESPONDENT NO. 2
FEDERAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED JANUARY 5, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on October 7, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Terence C. Jensen, Attorney at Law, Benton, Arkansas.

Respondent No. 1 represented by Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Melissa Criner, Attorney at Law, Little Rock, Arkansas.

A hearing was held on October 7, 2004, to determine the compensability of claimant's February 7, 2001, injury and, if compensable, to determine whether it is considered a new injury or a recurrence of claimant's December 15, 1999, compensable injury.

The parties stipulated to the following:

- 1) the existence of the employee-employer relationship between claimant and respondent-employer No. 1, Peopleworks, on December 15, 1999;
- 2) the existence of the employee-employer relationship between claimant and respondent-employer No. 2, Teletouch Communications, Inc., on February 7, 2001;
- 3) that claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$323.00 for temporary total disability and \$242.00 for permanent partial disability benefits between claimant and respondent-employer No. 1, and \$360.00 for temporary total disability and \$270.00 for permanent partial disability benefits between claimant and respondent-employer No. 2;
- 4) that respondent No. 1 accepted claimant's December 15, 1999, back injury as compensable, paid some medicals on it, and paid for surgery by Dr. Wilbur Giles on June 30, 2000;
- 5) that claimant did not lose time from work up until the date of the surgery; and, after the surgery, he was off work for approximately two months and received temporary total disability indemnity benefits for that period of time;
- 6) that respondent No. 1 accepted and paid a 5 percent permanent impairment rating as a result of claimant's compensable December 15, 1999, injury;
- 7) that claimant returned to work for respondent-employer No. 1 at light duty on August 22, 2000; then, in September of 2000, respondent-employer No. 2

purchased respondent-employer No. 1, and claimant continued then to work for respondent-employer No. 2, Teletouch Communications Inc.;

- 8) that on October 22, 2000, after claimant was working for respondent-employer No. 2, claimant was released to full duty by Dr. Giles; he continued to work for respondent-employer No. 2 through September 7, 2001, when he was terminated.
- 9) that claimant was working for respondent-employer No. 2 at the time of the February 7, 2001, incident;
- 10) that claimant requested some additional treatment after the February 7, 2001, incident; respondent No. 1 denied and controverted the additional treatment; claimant then turned it in to respondent No. 2, who also denied and controverted it.

Claimant contends that he was injured while employed with respondent-employer No. 1 on December 15, 1999. As a result of his injury, claimant contends that he has incurred medical expenses that have not been paid but are the responsibility of respondent No. 1. Claimant contends he is entitled to additional temporary total disability (TTD) indemnity benefits and shall continue to be entitled to additional TTD benefits until a date yet to be determined in the future. Claimant contends he is entitled to additional medical treatment and that he is also entitled to additional anatomical impairment. The claimant alternatively contends that his

current problems and need for additional treatment, TTD benefits, additional anatomical impairment, controversion, and attorney's fees are the responsibility of respondent No. 2.

Respondent No 1 contends as follows: that all benefits owed to the claimant by respondent No. 1 have been paid; that the claimant is not entitled to any additional benefits from respondent No. 1; that the claimant sustained a new injury or an aggravation of the pre-existing condition on February 7, 2001, after leaving the employment of respondent No. 1.

Respondent No. 1 contends that because there are records indicating that claimant was noted on March 5, 2001, while attending physical therapy, as having "muscle spasms," this constitutes objective medical findings to support that the February 7, 2001, incident was an aggravation or a new injury. Respondent No. 1 contends that because claimant was never taken off work by any doctor following the February 7, 2001, incident, that he would not be entitled to additional temporary total disability because he continued working until he was terminated in September of 2001.

In the alternative, respondent No. 1 contends that if the claim is found to be the responsibility of respondent No. 1, respondent No. 1 is entitled to a setoff for unemployment benefits received by the claimant, as well as a setoff for any benefits paid by claimant's group health insurance.

Respondent No. 2 contends that the claimant did not suffer a compensable injury on or about February 7, 2001. Further, respondent No. 2 contends that the claimant's current condition is a recurrence of his previous compensable injury with respondent No. 1 and that if he is found to be entitled to any additional benefits associated with his physical condition, it should be the liability of respondent No. 1. Alternatively, in the event it is found that the claimant suffered a compensable injury on or about February 7, 2001, it is respondent No. 2's contention that the claimant did not provide notice of any alleged injury until July 2, 2002, and the respondent should not be liable for benefits prior to receiving actual notice. Further, respondent No. 2 contends that if the claim is found to be the responsibility of respondent No. 2, respondent No. 2 is entitled to a setoff for unemployment benefits received by the claimant, as well as a setoff for any benefits paid by claimant's group health insurance.

STATEMENT OF THE CASE

Claimant testified that he was working as a radio frequency technician, repairing paging systems, for respondent-employer No. 1 at the time of his December 15, 1999, compensable back injury. Claimant was injured in December of 1999 when he was helping his supervisor replace a crate in front of the door of a storage building and the supervisor's feet slipped out from under him, causing the weight of the crate to drop on claimant. Claimant injured his back and right leg. Claimant originally

saw his general practitioner, Dr. Johnston, in Benton. However, his back injury required surgery, which was performed by Dr. Wilbur Giles in June of 2000.

As was stipulated by the parties, respondent No. 1 accepted claimant's December 15, 1999, back injury as compensable, paid some medicals on it, and paid for the surgery by Dr. Giles on June 30, 2000. Claimant did not lose time from work up until the date of the surgery; and, after the surgery, he was off work for approximately two months and received temporary total disability indemnity benefits for that period of time.

Claimant testified, and records reflect, that he had a previous low back injury in 1989, while employed with RDV industrial remodeling. As a result of that injury, claimant underwent a laminectomy and returned to work. Dr. Giles had been claimant's surgeon for the 1989 injury, as well. On May 30, 1990, Dr. Giles opined that as of June 1, 1990, claimant would have reached maximum medical improvement from that injury and issued claimant a permanent partial disability rating of 10 percent to the body as a whole. Dr. Giles stated in a letter dated June 15, 1990, that he had issued the 10 percent rating to claimant, "taking into consideration the fact that claimant might have to have surgery in the future."

Claimant testified that on February 7, 2001, he had traveled to Jonesboro and then to Newport to work on transmitters in those locations. He testified that when he arrived in Newport, he got his laptop computer out of his vehicle, carried it over, and

sat it down to open the door to the building. When he turned around to get his laptop, so he could connect it to the equipment, he squatted down to open it up; and, when he started to get back up again, he felt a severe pain in his back and his right side. He testified that the pain knocked him back down to the ground; and, after he finally got up, he went back to his truck and called his supervisor, Mike Zemeth, to tell him that he could not continue the job. He claims he told Zemeth that he would have to go to the doctor the next day, and that Zemeth told him to go ahead and go.

Medical records reflect that claimant saw Dr. Johnston the next day, February 8, 2001. Dr. Johnston recommended physical therapy and that claimant see Dr. Giles. Claimant testified that he took two weeks vacation at that time, and then followed up with a couple of weeks of physical therapy.

On February 18, 2002, following claimant's December 1999 compensable injury, as well as the February 7, 2001, incident, Dr. Giles opined:

[Y]our disability *secondary to your second back surgery* would be *five percent* to the body as a whole, *over and beyond any disability you may have had prior, or previous to, that rating*. I would expect as a result of what you had, just as I stated in August of 2000, that you would be in occasional need of anti-inflammatory drugs, muscle relaxants, and even mild analgesics from time to time in the future.

[Emphasis added.]

Respondent No. 1 accepted and paid a 5 percent permanent impairment rating, only, as a result of claimant's compensable December 15, 1999, injury. Claimant

returned to work for respondent-employer No. 1 at light duty on August 22, 2000; then, in September of 2000, respondent-employer No. 2 purchased respondent-employer No. 1, and claimant continued then to work for respondent-employer No. 2, Teletouch Communications, Inc.

On October 22, 2000, after claimant was working for respondent-employer No. 2, claimant was released to full duty by Dr. Giles. He continued to work for respondent-employer No. 2 through September 7, 2001, when he was terminated. Claimant testified that he had had to take off work a lot to attend physical therapy and had taken a two-week vacation immediately following the February 7, 2001, incident in order to recover from his back injury. Claimant testified that he feels this was the reason he was terminated.

Although respondent No. 2 asserts that claimant gave no notice of an alleged February 7, 2001, injury until July 2, 2002, claimant testified that he inquired with respondent-employer No. 2 about filing a workers' compensation claim right after the February 7, 2001, incident, but respondent-employer No. 2 told him that it would be respondent No. 1's liability, since it was the same injury as that of December 1999. Claimant, therefore, requested some additional treatment after the February 7, 2001, incident from respondent No. 1, and respondent No. 1 denied and controverted the additional treatment. Then, after claimant received nothing from respondent No. 1,

on July 2, 2002, claimant filed a workers' compensation claim against respondent No. 2, who also denied and controverted the claim.

Respondent No. 1 asserts that the February 7, 2001, incident constitutes a new injury or an aggravation of a pre-existing injury, thereby making respondent No. 2 liable, as claimant was employed by respondent-employer No. 2 on February 7, 2001. Respondent No. 2 asserts that any incident occurring on February 7, 2001, constitutes a recurrence of claimant's prior, December 1999 injury, at which time claimant was employed with respondent-employer No. 1, and the December 1999 claim was compensable. Respondent No. 2 asserts, therefore, that respondent No. 1 is liable for this recurrence.

Claimant testified that he continued to have back pain on a daily basis after the June 2000 surgery, following the December 1999 compensable injury. However, claimant testified that he could not return for follow up treatment with Dr. Giles because respondent No. 1 would not pay for it. He testified that after receiving TTD benefits for the two months he was off work following his surgery, respondent No. 1 just "quit paying altogether." Claimant testified that he returned on his own to see Dr. Johnston for his back pain, as needed, through and since the second incident on February 7, 2001.

Claimant testified that although he continued working the entire time between his return to work after the June 2000 surgery and the February 7, 2001, incident, he

continued to have back pain the entire time. In the interim, between his surgery for the December 15, 1999, injury and the February 7, 2001, incident, respondent-employer No. 1 was bought out by respondent-employer No. 2, as was stipulated above, and claimant became an employee of respondent-employer No. 2.

Claimant testified that he kept the same job duties for his new employer, although respondent-employer No. 2 used slightly different equipment than he had used for respondent-employer No.1, and that the new equipment was heavier than the old and the job required slightly longer working hours. However, although claimant was under lifting restrictions following the December 1999 surgery, claimant testified that the new equipment, while heavier, was still within his lifting restrictions from Dr. Giles.

Claimant testified that the pain he had after the February 7, 2001, incident was in the same location of his body that it was before February 7, 2001. He stated, "It was my right leg and my rump, all the way down through my thigh and into my calf." He testified that the location of the pain has never changed over the years. He stated, "It's never changed. It was the same as my injury from 1999 when I had my back injury and it started affecting me."

He testified that he was in pain all the time before the February 7, 2001, incident, but not to the point that he had to take off work. After the February 7, 2001, incident, the pain was debilitating for two to three weeks; therefore, he took vacation

time from work for a two-week period so his back could get better. After claimant returned to work from his vacation-time, he attended physical therapy for a couple of weeks and testified that after this therapy, he was “pretty much” back to where he was before February 7, 2001, as far as his level of pain. Claimant testified that he still takes the same medications at the same dosage as he did prior to the February 7, 2001, incident.

Claimant testified that he believes all of his back problems relate to his December 1999 injury. He testified:

[I]t’s all to that [1999] injury. It’s the same location in my back, the same pain down my leg. It’s just, you know, nothing’s changed. I mean, other than being able to go to work every day.

He relates all of the treatment he is now seeking, including medical, possibly chiropractic, and pain management to the December 1999 injury. He testified that he has had continuous swelling in his back since December of 1999 in the same area of his back. Claimant testified that although the result of the February 7, 2001, incident was painful, the incident itself that caused the pain was a very minor incident.

Claimant submitted to an Independent Medical Evaluation (IME) at respondents’ request on November 18, 2003, with Dr. Jim Moore. Basing his conclusions on a history from the claimant, as well as the medical records, and his own evaluation, Dr. Moore opined, “As the patient gives a *very minor incident*

creating the problem as occurred on 3-01-01, it would be my inclination to consider this *aggravation* of pre-existent.” [Emphasis added.]¹

Dr. Moore further opined, with regard to claimant’s anatomical impairment ratings:

As I am looking at the records it would seem to me that the patient *should have been* provided a total of 15% PPD on the basis of the *initial surgery he had in 1990* which is not related to the current problem. Years later he had the surgical procedure, this being on the right side at the L4/5 level this being one level above and opposite the initial surgery. I believe a more appropriate rating would have been *10% permanent partial to the body as a whole*.

[Emphasis added.] These ratings were in addition to one another.

Each time Dr. Moore saw claimant, he recommended a TENS unit, which claimant testified that he finally received in September of 2004. Dr. Moore also recommended that claimant submit to a Functional Capacity Evaluation (FCE), which he did on September 16, 2004. The FCE reflected that claimant gave reliable effort and was noted as giving “very good effort passing all criteria for reliable evaluation.” The FCE concluded that claimant’s capability to return to work was in the medium work category, based upon USDL criteria. According to Dr. Moore’s notes of September 22, 2004, this conclusion suggests that claimant could withstand occasional lifts of maximum of fifty pounds, frequent of eleven to twenty-five

¹All parties agreed that although Dr. Moore noted an incident date of March 1, 2001, the date of alleged incident was actually February 7, 2001.

pounds, and constant of one to ten pounds. Dr. Moore noted that he would recommend continued physical therapy, medication, and, again, a TENS unit.

Claimant testified that he presently has muscle spasms, and his back is twisted. He testified that he has severe pain, so much so that he has to stay off his feet at his house for three or four days at a time. Claimant testified that he has not worked since he was terminated in September of 2001. He claims that he has had a couple of job interviews and that he would like to return to work, but that any employer who hires him would have to understand his weight lifting limitations, as well as his pain medication use.

Claimant testified that he would like to have some sort of treatment or therapy that would help eliminate his pain medication usage. Claimant testified that he believes the drug usage affects his judgment, as he has to use it so often. Claimant testified that he had not been released from Dr. Johnston's care, as of the date of the hearing.

FINDINGS OF FACT

1. Claimant's February 7, 2001, injury is a recurrence of his compensable December 15, 1999, injury.

2. Claimant is entitled to treatment, both past and future, for complaints associated with the recurrence of his December 15, 1999, compensable injury.

3. Claimant is entitled to additional temporary total disability benefits from the date of his employment termination, September 7, 2001, and continuing through a date yet to be determined.

4. Claimant is entitled to an additional 5 percent anatomical impairment, for a total of 10 percent permanent partial to the body as a whole as a result of this recurrence. This is in addition to the 10 percent impairment rating given to him as a result of his 1989 injury.

5. Respondent carrier No. 1 bears liability, as said respondent was on the risk at the time of claimant's December 15, 1999, compensable injury.

6. Respondent No. 1 is entitled to a setoff for unemployment benefits received by the claimant, as well as a setoff for any benefits paid by claimant's group health insurance.

7. Respondents have controverted the compensability of the claim.

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).

In this case, claimant's injury falls squarely within the legal definition of a recurrence. Claimant testified that he believes all of his back problems relate to his December 1999 injury. He testified:

[I]t's all to that [1999] injury. It's the same location in my back, the same pain down my leg. It's just, you know, nothing's changed. I mean, other than being able to go to work every day.

Claimant testified that although he continued working the entire time between his return to work after the June 2000 surgery and the February 7, 2001, incident, he continued to have back pain the entire time. Claimant testified that he kept the same job duties for his new employer (respondent-employer No. 2), although respondent-employer No. 2 used slightly different equipment than he had used for respondent-employer No.1, and that the new equipment was heavier than the old and the job required slightly longer working hours. Although claimant was under lifting

restrictions following the December 1999 surgery, claimant testified that the new equipment, although heavier, was still within his lifting restrictions from Dr. Giles.

Claimant testified that the pain he had after the February 7, 2001, incident was in the same location of his body that it was before February 7, 2001. He testified that the location of the pain has never changed over the years. The medical records reflect that claimant's complaints following the February 7, 2001, incident were the same as before.

Dr. Moore's medical opinion with regard to claimant's February 7, 2001, incident being an "aggravation of pre-existent," is simply inconsistent with his finding that the incident was "very minor" and is completely inconsistent, therefore, with our legal definition of the terms "aggravation" versus "recurrence." The general, everyday usage of the word "aggravate" generally means to "irritate"; however, the *legal* definition of "aggravation," as it pertains to workers' compensation law, is clear and obviously means more than a mere "irritation," requiring an "*independent cause.*"

There is absolutely no evidence in the record that would indicate an "independent cause" of claimant's February 7, 2001, incident, as he relates the details of it. He was simply squatting down to open his laptop; and, then, as he started to rise, he felt severe pain in his back. In this examiner's opinion, this does not constitute an "independent cause," but, rather, a natural and probable consequence of his prior, December 1999, injury.

Despite Dr. Moore's erroneous label of the February 7, 2001, incident, Dr. Moore opined, based upon claimant's history, medical records, and his own evaluation and expertise, that claimant's anatomical impairment ratings should have been higher. Dr. Moore stated in his IME:

As I am looking at the records it would seem to me that the patient *should have been* provided a total of 15% PPD on the basis of the *initial surgery he had in 1990* which is not related to the current problem. Years later he had the surgical procedure, this being on the right side at the L4/5 level this being one level above and opposite the initial surgery. I believe a more appropriate rating would have been *10% permanent partial to the body as a whole*.

[Emphasis added.] These ratings were in addition to one another. Dr. Giles had given the opinion that claimant should receive a 5 percent rating on top of the 10 percent he had received from his 1989 injury. However, Dr. Giles's opinion in this regard was based upon a letter request from claimant to Dr. Giles and not following further treatment or examination from Dr. Giles after the February 7, 2001, incident.

As such, it is my opinion that the more appropriate rating would be that of Dr. Moore, that being a 10 percent permanent partial to the body as a whole, as opposed to the 5 percent Dr. Giles gave.² This rating is in addition to the 10 percent permanent

²Although Dr. Moore also opines that he would have given a higher impairment rating following the 1989 injury, that injury and the rating given therein is not presently at issue before this Commission and will not, therefore, be addressed.

partial impairment rating claimant received following his 1989 injury, therefore, totaling 20 percent permanent partial to the body as a whole.

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).

It is this examiner's opinion that the preponderance of the credible evidence proves that claimant's back problems manifesting on February 7, 2001, were a

recurrence of claimant's original December 15, 1999, compensable back injury, rather than a new injury or an aggravation of a pre-existing injury, and that claimant is entitled to an increase in anatomical impairment. As such, respondent No. 1 would be liable for the claim.

AWARD

Respondent carrier No. 1 is directed to pay the claimant benefits in accordance with the findings of fact above.

Respondent carrier No. 1 is 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.

Respondent carrier No. 1 is directed to pay the claimant temporary total disability indemnity benefits commencing on the date his employment was terminated, September 7, 2001, through a date yet to be determined. However, respondents are entitled to a setoff for unemployment benefits received by the claimant, as well as any benefits paid by claimant's group health insurance.

Respondent No. 1 is directed to pay the claimant's attorney, Mr. Terence C. Jensen, 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