

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NOS. F411615 and F411616

RICK SCHUETZE, EMPLOYEE

CLAIMANT

**D & G TRANSPORT, INC.,
EMPLOYER**

RESPONDENT

**WESTPORT INSURANCE CORPORATION/
GALLAGHER BASSETT SERVICES, TPA,
INSURANCE CARRIER**

RESPONDENT NO. 1

**GREAT WEST CASUALTY COMPANY/
CRAWFORD & COMPANY, TPA,
INSURANCE CARRIER**

RESPONDENT NO. 2

OPINION FILED NOVEMBER 30, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on September 1, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by Mr. William C. Frye, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

A hearing was held on September 1, 2005, to determine the compensability of the claims filed herein.

The parties stipulated to the existence of the employee-employer relationship at all relevant times. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$307.00 for temporary total

disability and \$230.00 for permanent partial disability benefits. The parties further stipulated that Respondent No. 1, Westport Insurance Corporation, was on the risk from October 26, 2003, and that Respondent No. 2, Great West Casualty Company, went on the risk on October 26, 2004.

Claimant contends that he sustained compensable injuries to his neck and spine on or about late October or November of 2003 or on or about January 1, 2004, and again on November 1, 2004. Claimant contends that he has incurred expenses in connection with his injuries and that these claims have been controverted for purposes of attorney's fees.

Respondent No. 1, Westport Insurance Corporation, contends that the claimant did not suffer a compensable injury on or about late October or November of 2003 or on or about January 1, 2004. Respondent No. 1 further contends that no notice was provided to it of this alleged injury. Further, respondent No. 1 contends that if the claimant has sustained an injury, that it was on the report dated November 1, 2004, during the policy period of respondent No. 2, Great West Casualty Company, and, as such, respondent No. 1 has no liability.

Respondent No. 2, Great West Casualty Company, contends that the claimant did not sustain a compensable injury while it was on the risk on or about November 1, 2004. In the alternative, if it is found that claimant did sustain an injury on or about November 1, 2004, respondent No. 2 contends that it was a recurrence of a

preexisting compensable or non-compensable condition for which respondent No. 2 has no liability.

STATEMENT OF THE CASE

Claimant is a thirty-eight-year-old man who testified that he had worked as a dump truck driver for respondent-employer since sometime in 2002. Although claimant originally asserted at the prehearing in this matter that his first injury date was on or about January 1, 2004, and testified in his deposition of May 3, 2005, (introduced as Respondent No. 1's Exhibit No. 1 at the hearing) that the first pain he experienced was in January of 2004 while he was driving a truck to Jeffrey Sand, he testified at the hearing that the first incident of injury actually occurred sometime in late October or November of 2003 in respondent-employer's shop. He further testified that he subsequently injured himself again on the job in November of 2004 and that he has been off work ever since that time.

He testified that in late October or November of 2003, he was at his employer's shop and had opened the hood of his truck to turn the heater on or off – he could not remember. He explained that in order to do this, he had to lift the hood of the truck, crawl in between the fender and the tire, and shut off a hose-like valve so that the air conditioner would work or not, depending on which he wanted it to do at the time. He testified that it was very early in the morning and that it was still dark outside. He testified that he could hardly see and that after turning the valve, he started to come

out and hit his head and his eye on what he believes was the quarter fender. He testified:

And I hit it in my eye and my eye burst with blood. And I jerked back real hard, and I went across, got it all cleaned up from the blood and everything, went to make my run.

I was on my second run coming back and my neck just locked up and started hurting so bad that it dang near put me in tears.

No witnesses were present at the time of claimant's alleged injury, but he testified that he went back to the yard and told Jerry Wadkins, the shop foreman, what had happened. He testified that Mr. Wadkins asked him if he thought he could take some time off and get better. He testified that he did, in fact, take about one week off work but that he did not seek medical treatment at that time.

Claimant testified that he tried to return to work but after about three or four days, he was no better, and told Mr. Wadkins that he needed to go to a doctor, but Mr. Wadkins fired him. He testified that three or four days after Mr. Wadkins fired him, he called claimant and asked if he was coming back to work. Claimant testified that although he had some pain, he needed to work. Wage records submitted into evidence indicate that claimant was continually paid, with no gap in payment history.

Mr. Wadkins testified that he does not remember the exact date but that he remembers sometime in November of 2003 claimant telling him that he had hurt his neck while working on his pick-up truck at home and that he needed to take off to go

to the doctor. Mr. Wadkins testified that claimant said nothing about hurting himself at work at that time and that, if he had, Mr. Wadkins would have sent him to Dr. Abrams in Cabot.

He testified that he first went to the doctor about two weeks after the incident took place because he was not feeling any better. He testified that he chose Dr. Waterhouse at the Jacksonville Medical Clinic by picking his name out of the telephone book, and records indicate that claimant was seen on November 10, 2003, complaining of neck pain, but did not mention a work-related injury. Claimant admitted that he did not tell the doctor that he had hit his head/eye so hard that it had bled; further, there was no bruising around his eye by the time he saw the doctor. Claimant testified that Mr. Wadkins had told him not to say it was work-related. Claimant testified that Dr. Waterhouse simply prescribed medication for him.

Claimant testified that he paid for his medical bills from Dr. Waterhouse himself. He further testified that he was continuing to work but that his productivity was lessened by three or four loads a day. He testified that this was due to the bouncing of the truck, which aggravated his neck as he drove from Little Rock to Cabot making his runs.

Claimant testified that in November of 2004, he hit a pothole while driving his dump truck, which jerked his neck, and that this made the sharp pain in his neck worse. He testified that he also had some arm numbness and finger numbness after

this incident. He testified that he told Mr. Wadkins about it, and Mr. Wadkins gave him a check to pay to see Dr. Ballinger. Claimant testified that Dr. Ballinger referred him to a specialist, Dr. Terry Green, but that when claimant told Mr. Wadkins that he had been referred to a specialist, Mr. Wadkins fired him.

Mr. Wadkins denies having ever told claimant to tell anyone that his alleged injuries were not work-related. In fact, Mr. Wadkins testified that he was unaware that claimant was even asserting a work-related injury had occurred until November of 2004. Mr. Wadkins testified that he *had* written a check for claimant to see Dr. Ballinger but only because claimant stated he was going to have to take off work because he did not have the money to go to the doctor. Mr. Wadkins needed the truck to be running, so he agreed to pay for that visit. Mr. Wadkins testified that it was *after* this visit to Dr. Ballinger that he learned claimant was asserting a work-related injury.

Claimant testified that he did see Dr. Green, who recommended surgery. Claimant testified that he has not had the surgery because he is waiting for the outcome of this hearing to determine who will have to pay for it. Claimant testified that he has not been able to work since he was last fired from respondent-employer because the pain is too severe, and driving and turning his head aggravates it. Claimant testified that he now takes pain medication, and he does not believe he could even pass a DOT physical.

Claimant admitted that he had had a wreck in 2001 while driving a truck for a previous employer, National Home Center. He testified that he had whiplash, filed a workers' compensation claim, and was paid benefits by the driver of the other vehicle's insurance company – but not by workers' compensation. He testified that this injury resulted in light duty employment for a couple of weeks but that, after that, he resumed full duty employment and continued working for National Home Center for almost one year with no problems before going to work for respondent-employer.

Medical records indicate, and claimant admitted, that he had complained of arm pain and neck pain after allegedly hitting a pothole in July of 2002. Claimant further admitted that he has aggravated his neck at home quite a few times and admits that he roofed his mother's house during the period that he alleges he was injured, among other activities. No medical records, prior to claimant's workers' compensation claim being filed and claimant's hiring of an attorney, note claimant's problems as being "work-related"; in fact they state "unknown causes." Claimant testified that he did note that his problems were "work-related" at the physical therapist's office, but they told him that they could not help him if it was work-related, so he "scratched that out."

Dr. Green's notes of November 8, 2004, state under "History of Present Illness" as follows:

He has had two injuries to his neck. The *first was in January* when he was under a truck and felt his neck

“crick up.” The next day he was working on a heater on a truck and turned and hit a fender. Just recently, this month, he was driving and looked down and hit a bump and felt a jerk in his neck. He has had pain since that time. The pain is either 5 to 10 on a scale of 10, it is burning and aching in the posterior and anterior aspect of the neck and he has some numbness in the anterior left arm.

[Emphasis added.] Under “Litigation,” Dr. Green has noted, “There is a workers’ comp issue and he has hired an attorney.” Dr. Green’s diagnosis was a cervical sprain/cervical disc herniation. He ordered a cervical MRI and noted that claimant was not, at that time, able to return to work.

On November 15, 2004, Dr. Green’s notes state as follows:

Patient returns for follow-up on his MRI. He did have a cervical disc herniation at 6-7. It is not a massive disc herniation, it is a small one, but it is probably the etiology of his symptoms. We recommended some physical therapy for a few weeks to see if he can get a good resolution with conservative measures. If all else fails, we will consider an anterocervical discectomy.

Claimant admitted that Dr. Waterhouse had not ordered an MRI following his first alleged injury in late October or November of 2003 -- the injury that he indicated to Dr. Green and in his deposition occurred in January of 2004. Claimant further admitted that he had neck problems prior to the injuries he alleges occurred while employed with respondent-employer. However, claimant maintained that although he did have prior neck problems, he was able to work full time. When asked about prior inconsistencies given in his deposition and answers to interrogatories to that of

his testimony at the hearing, he stated that he “could not remember” what he had testified to in his deposition or what responses he had given in his answers to interrogatories (also introduced as an exhibit).

Dr. Green, when asked in his deposition of July 1, 2005, whether he had an opinion within a reasonable degree of medical certainty about when claimant first had a cervical disc bulge or when he first had a cervical herniated disc, responded as follows:

You know, without the information regarding the prior, the neck problem, I would have said with a reasonable medical certainty that he hurt it in January of '04, *because that's the only history we had*, and we would have, you know, given the patient credibility for having it injured on that day, *but with a history of previous neck problems I cannot say, and I can't say with reasonable medical certainty when this happened.*

[Emphasis added.]

FINDINGS OF FACT

1. Claimant has failed to meet his burden of proving by a preponderance of the evidence that he sustained a compensable injury arising out of and during the course and scope of his employment in late October or November of 2003 or on or about January 1, 2004, or an aggravation of any preexisting condition, or that any condition from which he suffered was causally related to his employment.

2. Claimant has, likewise, failed to meet his burden of proving by a preponderance of the evidence that he sustained either a compensable injury on

November 1, 2004, or an aggravation of a preexisting compensable condition arising out of and during the course and scope of his employment, or that any condition from which he suffered in November 2004 was causally related to his employment.

DISCUSSION

There is a requirement in all workers' compensation cases that the claimant must demonstrate a causal connection between the injuries complained of and the work activity. *See Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Moreover, 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.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Kildow v. Baldwin Piano*, 333 Ark. 335, 969 S.W.2d 190 (1998). 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 and Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003). Where there is conflicting medical evidence in a case,

it is well settled that it is the Commission's duty to resolve such conflicts. *Polk County v. Jones*, 74 Ark. App. 159, 47 S.W.3d 904 (2001).

Clearly, Dr. Green based his assessment of claimant's condition on claimant's subjective account of the history of his problems. Further, Dr. Green testified that he did not have a *complete* history of claimant's 2001 neck problems when making his assessments and that because he was given an incomplete history, he cannot state within a reasonable degree of medical certainty when claimant's cervical herniation or cervical disc bulge occurred or what the etiology was.

Further, claimant has given inconsistent dates and accounts of his alleged injuries and never mentioned to any medical provider that he had experienced a work-related injury until *after* he had filed a workers' compensation claim and had, according to Dr. Green's notes, "hired an attorney." No report in evidence states objectively that the cause of claimant's problem or any aggravation thereof was his alleged work-related injuries of October/November of 2003, or January of 2004, or November of 2004.

Claimant testified that he did not tell the doctors, at first, that he had a work-related injury because Mr. Wadkins had told him not to. Mr. Wadkins denied ever telling claimant this. Furthermore, claimant maintains that he was fired and out of work for some period following his first alleged injury, when his wage records show that he was continually on the payroll.

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).

In this examiner's opinion, there are simply no objective findings to support the claimant's claims. The only findings that do exist were admittedly in reliance upon claimant's history as told to his physicians by him. Moreover, based upon Dr. Green's testimony and the medical records in evidence, claimant obviously failed to disclose a complete, accurate medical history to his treating physicians. Dr. Green acknowledged that his conclusions were subjectively based and that his opinion regarding causation would be different if he had had the benefit of claimant's complete prior history of neck problems.

A number of factors and inconsistencies brought forth in this case work together to constrain claimant's credibility, in this examiner's opinion. In short, claimant has simply failed to prove by a preponderance of the credible evidence that he sustained any compensable injuries on any of the dates he alleges. For all of the above-stated reasons, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge