

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F410692**

**ANDY SEVERNS, EMPLOYEE**

**CLAIMANT**

**PILGRIM'S PRIDE CORPORATION, EMPLOYER**

**RESPONDENT**

**AMERICAN ZURICH INSURANCE, CARRIER**

**RESPONDENT**

**OPINION FILED AUGUST 9, 2005**

A hearing in this case was conducted on May 16, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Searcy, White County, Arkansas.

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

Respondents were represented by William C. Frye, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

\_\_\_\_\_A prehearing telephone conference was held on this claim on March 1, 2005; a Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to one stipulation. Although the Prehearing Order lists two stipulations, the parties confirmed the first stipulation and agreed to withdraw the second. The following stipulation is hereby accepted.

1. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.

At the May 16, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. By agreement of the parties, the second and fifth issues were withdrawn. Thus, the parties agreed that the remaining issues to be litigated and resolved

are limited to the following:

1. Whether Claimant sustained compensable injuries to his back and hip on August 10, 2004.
2. Whether Claimant is entitled to a change of physician.
3. Whether Claimant is entitled to an independent medical evaluation.

Claimant contends that he sustained compensable injuries to his back and hip on August 10, 2004. He argues that he is entitled to a change of physician, or in the alternative, an independent medical evaluation. Respondents contend that there is a lack of objective findings to support compensability.

### **DISCUSSION**

\_\_\_\_\_ On August 10, 2004, Claimant accidentally fell while stacking eighty-pound totes filled with chicken.

Anyway, I was on the last stack and I went to throw it up and my right foot slipped out from under me. It hit a steel grate that -- you know, it was a sheet of ice. And my foot slipped out from under me; I fell and hit my hip and my left shoulder.

He reported to the company nurse who took him to the local hospital "where they x-rayed me and gave me shots." He did not return to work that day. The next day, Claimant "didn't even go to work I was hurting so bad." On August 12, 2004, Claimant attempted to work but his "back was hurting so bad that I had to leave that day." Thereafter, he continued to experience problems with his hip and low back, but returned to work nonetheless.

Claimant denied that there was anything wrong with his hip or lower back prior to the August 10, 2004 injury. Since then, he has continued to experience pain in his right hip and "shooting" pain in his low back. Two witnesses generally corroborated Claimant's

testimony concerning his condition prior to the incident and his condition afterward. As to treatment, Claimant testified to injections, medications, and a back brace.

Pamela Duncan, the Respondent employer's plant nurse, confirmed that Claimant reported with an injury on August 10, 2004, and that she subsequently took him to the emergency room. Claimant called in complaining of pain on August 11, 2004, so Duncan made an appointment for him with the company doctor, Dr. Krishna Reddy. Claimant did return to work on the 12th, but left in the afternoon. Duncan has entries in her notes concerning Claimant for August 16 and 17, 2004, but she has nothing in her notes concerning Claimant between August 17 and October 11, 2004.

An Ozark Health Medical Center emergency room form dated August 10, 2004 gives the following history: "[Claimant] slipped @ work & fell on hip R side @ 1430 today also c/o lower back pain." Another emergency room record indicates that Claimant was given a dosage of Toradol. A Dr. Groom examined Claimant at the emergency room; he noted that Claimant complained of pain in his right hip and radiating up the right side of his back. Dr. Groom checked a box on the form marked "NEG" for lacerations or abrasions, and he referred to an August 10, 2004 Radiology Report; its impression was "[n]egative five views of the lumbar spine." He diagnosed Claimant with "[b]ack sprain/strain" and prescribed "OTC Ibup," a lumbar belt, and work restrictions.

Dr. Reddy completed an AR-3 on August 11, 2004, the same date that he examined Claimant. Upon examination, he diagnosed "muscle sprain lower back." He prescribed a moist heating pad and medications (the copy of this record is not entirely legible, but one medication may be Flexeril) and noted that Claimant's prognosis is good. He indicated that Claimant did not suffer permanent impairment due to this injury.

## **A. Compensability**

Claimant must prove a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). Among the elements that must be proven to demonstrate compensability, an injury must be established 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)(A)(i). Thus, as one element of a compensable injury claim, Claimant must sustain his burden of proving objective findings by a preponderance of the evidence. See Ark. Code Ann. §§ 11-9-102(4)(E)(i) and 11-9-704(c)(2); see also Mays v. Alumnitec, Inc., 76 Ark. App. 274, 278-79, 64 S.W.3d 772, \_\_\_ (2001) (finding that an appellant failed to prove a compensable injury by the preponderance of the evidence “because the abstract is devoid of any objective findings”). “Preponderance of the evidence” means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

Respondents contend that there are no objective findings in support of this claim. When asked to respond at the hearing, Claimant’s counsel referred to Claimant’s lumbar strain diagnosis as well as the Toradol and Hydrocodone “given” to Claimant. Claimant’s counsel confirmed that his argument is based on the doctors’ diagnoses and their prescriptions.

Claimant’s objective findings argument appears to be based on the recent Arkansas Supreme Court decision in Fred’s Inc. v. Jefferson, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 31, 2005). On appeal, the respondents argued the absence of objective medical findings,

contending “that the Commission erroneously relied on the ALJ’s speculation that medicine prescribed to Jefferson was for muscle spasms, because no physician or physical therapist reported witnessing or feeling Jefferson’s muscle spasms.” Id. at \_\_\_\_, \_\_\_\_ S.W.3d at \_\_\_\_.

The Court applied the substantial evidence standard of review to affirm a Commission decision in favor of compensability. The Court noted:

This case is distinguishable from Estridge [v. Waste Management], 343 Ark. 276, 33 S.W.3d 167 (2000)], however, in that [the doctor] did not indicate specifically what the medications were for or specifically why he prescribed physical therapy. Yet, following the logic expressed in Estridge, a reasonable inference from the chronology of events is that the medication and physical therapy were prescribed to aid Jefferson and to treat her injury. Any other construction of these events does not withstand scrutiny or pass the test of reasonableness.

Id. at \_\_\_\_, \_\_\_\_ S.W.3d at \_\_\_\_.

The Fred’s, Inc. v. Jefferson opinion does not compel a decision in Claimant’s favor. The Supreme Court’s duty to apply the substantial evidence standard of review on appeal is distinct from the Commission’s duty to apply the preponderance of the evidence standard and weigh the evidence to make a determination in the first instance. Compare Ark. Code Ann. § 11-9-711(b)(4)(D) (standard of appellate review) with Ark. Code Ann. § 11-9-704(c)(2), (4) (Commission’s duty to apply the preponderance of the evidence standard and impartially weigh evidence). The Fred’s, Inc. v. Jefferson opinion makes it clear that a doctor’s diagnosis and prescriptions should be considered when addressing the objective findings issue, but the Commission still has the duty to weigh all of the evidence - and here, there is additional evidence.

In addition, there is one material consideration that distinguishes this case from Fred’s, Inc. v. Jefferson. In that case, Jefferson made at least one documented complaint

of muscle spasms. In the evidence before me, I do not see any complaint of spasm by Claimant; for that matter, he did not complain of anything that might otherwise constitute an objective finding.

I find that Claimant did not prove a compensable injury, because he did not sustain his burden of proving by a preponderance of the evidence the existence of objective findings. The record is devoid of any findings beyond Claimant's voluntary control; there are, for example, no findings of broken bones, swelling, abrasions, muscle spasms, or straightening of Claimant's lordotic curve. The only study in the record, the August 10, 2004 Radiology Report, recorded normal findings and produced a normal impression. Neither doctor recorded either the existence of objective findings or Claimant's complaint of such findings. I find that this evidence outweighs the doctors' diagnoses and prescriptions; the preponderance of the evidence - the normal study, the absence of any recorded findings beyond Claimant's voluntary control, the lack of objective finding-type complaints by Claimant - weighs against Claimant.

To summarize, Claimant failed to prove objective findings in support of the medical evidence. Regardless of the other elements of a compensable injury that could be demonstrated, this claim is not compensable.

## **B. Remaining Issues**

Claimant seeks a change of physician under Ark. Code Ann. § 11-9-514, or in the alternative, an independent medical evaluation under Ark. Code Ann. § 11-9-511. However, an employer is not liable for payments under these codes sections, in a case of contested liability where the Commission decides that the injury does not come within the provisions of the Workers' Compensation Law. See Ark. Code Ann. § 11-9-510.

The Commission considered § 11-9-510 in Johnson v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Opinion filed June 8, 2000 (E705919). It reversed an administrative law judge's award of an arthrogram at respondent's expense, prior to a finding of compensability. The Commission noted: "We base our finding on the fact that Ark. Code Ann. Section 11-9-510 precludes respondent from liability for non-compensable injuries and that there appears to be no authority in the Commission to require respondent to pay for that which has not been proven to be its liability." Johnson, supra. The Commission flatly stated that "[i]t is our opinion that we are barred by Section 11-9-510 from requiring respondent to pay for an arthrogram prior to a finding of compensability." Johnson, supra.

Based upon my finding that this claim is not compensable, the mandate of Ark. Code Ann. § 11-9-510, and the Commission's Johnson decision, I find that Claimant's request for a change of physician, or in the alternative, an independent medical evaluation, must be denied. Respondents cannot be required to pay for that which has not been proven to be their liability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.
3. Claimant did not sustain his burden of proving by a preponderance of the evidence that his August 10, 2004 incident is a compensable injury. Specifically, the record does not contain objective findings in support of Claimant's medical evidence, as required by Ark. Code Ann. § 11-9-102(4)(D).

4. Claimant is not entitled to a change of physician, or in the alternative, an independent medical evaluation, because, under Ark. Code Ann. § 11-9-510, Respondents' liability has not been proven. In the absence of a finding of compensability, this relief cannot be awarded.

**ORDER**

Claimant failed to sustain his burden of proving that he suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

---

D. FRANKLIN AREY, III,  
Administrative Law Judge

---

DFA/ml