

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307223

VIRGINIA E. SMITH, EMPLOYEE	CLAIMANT
DEPARTMENT OF HEALTH, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 30, 2005

Hearing before Chief Administrative Law Judge David Greenbaum on September 9, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Jim R. Burton, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Mr. Richard S. Smith, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted September 9, 2005, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on August 17, 2005, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order, subject to the claimant's clarification as to the period of temporary total disability claimed. A copy of the Prehearing Order was introduced, without objection, as "Commission's Exhibit 1."

It was stipulated that the employment relationship existed between the parties

at all relevant times, including June 24, 2003; that the claimant's average weekly wage was \$137.12, entitling her to compensation rates of \$91.00 per week for both temporary total disability and permanent partial disability in the event the claim was held compensable; and that the respondents had controverted the claim in its entirety for purposes of attorney's fees.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that she sustained a compensable back injury as the result of a specific incident identifiable in time and place of occurrence on June 24, 2003; that she was entitled to temporary total disability benefits for the time she was required to be off work; that respondents should be held responsible for medical and related treatment, together with continued, reasonably necessary medical treatment; and that a controverted attorney's fee should attach to any benefits awarded. At the hearing, the claimant identified the period of temporary total disability to run for the period beginning July 23, 2003, which is the date she underwent a surgical procedure by Dr. Robert Abraham and continuing until her release by Dr. Abraham on January 15, 2004.

The respondents contended that the claimant had severe medical problems, including extensive spinal disease which pre-existed the alleged injury of June 24, 2003, and continued thereafter, maintaining that the claimant's physical problems,

need for medical treatment and disability, if any, were related to the pre-existing condition and that the medical evidence does not establish a causal connection between any work-related incident and the claimant's problems.

The claimant was the only witness to testify. The record is composed solely of the transcript of the September 9, 2005, hearing containing a joint medical exhibit consisting of seventy-five (75) pages.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the evidence, that she sustained an injury arising out of and during the course of her employment with the Arkansas Department of Health on June 24, 2003.
4. The claimant has failed to prove a causal connection between her physical problems beginning on and after June 24, 2003, and any work-related injury.

DISCUSSION

The record in this claim is replete with inconsistencies and contradictions. In fact, the claimant's own testimony is self-contradicting. In addition, as will be set out further below, the record reflects that the claimant had significant, pre-existing physical problems, including, but not limited to, back problems which pre-dated the alleged injury and continued thereafter. Further, the claimant candidly admitted that in addition to her severe physical problems she also experienced a memory loss which makes her credibility suspect.

The claimant, Virginia Smith, is sixty-nine (69) years old. On and before June 24, 2003, the claimant worked part-time as a nurse's aide through the Arkansas Department of Health. The claimant's description of the incident and alleged injury, as well as confusing testimony concerning the nature of the injury is set out below:

Q Okay. Ms. Smith, at the time of this accident back in '03, it was said to be June 24 of '03, would you tell the Court what kind of work you were doing, and, specifically, what you were doing that day?

A I was a nurse's aide for Poinsett County In-home Services, and I was taking care of a Mr. Ivory that day. I had done everything except make the beds. I made one bed up. I tried – I was doing the other one. I was going to move it over just a small amount so I could get behind the bed and straighten it. Well, the bottom of the – or the back end of the table of the bed fell. It just seemed like it come into pieces. I jumped backwards. I thought I could get back out of the way, but I couldn't. It landed on my foot, and I hit the other bed.

Q Was this like a wood end of a bed, or metal, or what was it?

A The one that fell was wood.

Q Okay.

A The one I fell into had iron sidings on it.

Q All right. Did the piece that fell strike you?

A No.

Q Okay.

A I just went backwards. Yes, I finally got out of it.

Q Did you lose your balance?

A I did, because part of the footboard of the bed that fell was on my foot.

Q It landed on your foot. Which foot?

A My right foot.

Q Okay. You lost your balance and you fell backwards, it's my understanding?

A Yes, sir. Yes, sir.

Q And did you fall onto the other bed?

A I just fell back against it.

Q All right. What part of your body struck the bed frame?

A The top part of my spine.

Q Okay.

JUDGE GREENBAUM: Are you pointing between your shoulder blades, ma'am?

THE CLAIMANT: Right. In there.

JUDGE GREENBAUM: Okay, I'd say between your shoulder blades. Go ahead.

BY MR. BURTON:

Q Did you injure your low back in this accident?

A No, it was just that one thing.

Q All right. What doctors did you see after this injury?

A Dr. Abraham. That was the only one.

Q That would be Dr. Robert Abraham, who is a neurosurgeon here in Jonesboro?

A Yes.

Q Okay. And what kind of treatment did Dr. Abraham recommend for you?

A He didn't recommend any kind except for what he did. He redone the disk that was shattered.

Q All right. Well, let me stop you here just a minute. It looks like prior to seeing Dr. Abraham or at his instance, it looks like it was ordered by Dr. Crawley – is that your family doctor?

A Yes.

Q On July 14th, it looks like you had a fairly extensive MRI exam of the lumbar spine. It was with and without contrast, so they took a lot of pictures. These all involve the L4 or lumbar, the L3, L4, L5-S1. Were these affected by your fall?

A No. As far as I know, the doctor never told me that any of the rest of my back was injured at all.

Q Well, okay. Let me ask you this then. You went to surgery with Dr. – the medicals, and I'm at page 68 in the joint exhibit, Dick – you went to surgery with Dr. Abraham about July 23rd, at that time he did an injection procedure with some wire placement at the L2 disk level.

A Yes.

Q Now, does that relate to this accident?

A Yes.

Q Okay.

A That's the only time.

Q All right. Well, we may have our terms confused. I mean, L2 would be considered to be down in the lumbar spine?

A No, he did nothing there. He just done the –

Q Well, okay.

A I'm not saying that the lumbar region is very good right now, but it wasn't –

Q I understand that, ma'am, but L2 is a lumbar disk. L2 is a lumbar disk level, okay?

A Yes, sir.

Q Was that procedure related to your treatment for this injury?

A No.

MR. SMITH: Your Honor, I think that's the third time she's answered that question.

THE CLAIMANT: That has to do now, not then.

BY MR. BURTON:

Q I'm sorry, you want to elaborate?

A My back degenerated after the fall, and when he put in – when he refilled the disk in my back, and it degenerated after that over the years.

Q Okay. And, Ms. Smith, I guess my question again is what treatment was necessary for this particular work injury?

A The four vertebra in my back, the disks that goes between them were shattered, and Dr. Abraham refilled and replaced the disks. Most people say it can't be done, but he did do it.

Q Do you know what disk levels those involve, Ms. Smith?

A No, I don't. He never told me that.

Q Well, when was this done?

A Let me see, it had to be right after I fell, a day or two after I fell, because I wound up in the hospital and that's where he found me.

Q Okay. Well, it looks like your initial evaluation with Dr. Abraham was on July the 18th. Now, did Dr. Abraham see you in the hospital before that?

A Yes.

Q You saw him in clinic?

A I was in the hospital, and he looked at my back and then redone them.

Q Well, again, this refers to L2 compression with questionable etiology, and the plan is operative treatment with kyphoplasty. So based on your examination then evidently is when Dr. Abraham decided that you had this lumbar compression fracture, am I right?

A He never told me if he found one.

Q He didn't?

A No.

Q Okay.

A Now, the lumbar is down low. This was up high. (Tr.7-12)

The claimant repeatedly maintained that she did not experience any back problems before June 24, 2003, which is inconsistent with the medical evidence reflecting that the claimant had consulted her family physician, Dr. Crawley, less than one month prior to the within claim with a history of back and right lower extremity pain at which time Dr. Crawley ordered two (2) separate MRIs of the lumbar spine. The claimant acknowledged undergoing significant treatment between 1998 and 2001 for both left shoulder problems and left knee problems, as well as pre-existing arthritis. In fact, the claimant underwent a total knee replacement during the later

part of 2001, after which the claimant was permitted to return to work. Again, despite the claimant's assertion that she did not have any prior back problems, as previously noted, Dr. Crawley ordered two (2) separate lumbar spine studies on May 30, 2003, and June 5, 2003, because of a history of back and right lower extremity pain. In fact, the radiology report notes that the claimant was unable to remain motionless during the MRI, apparently due to the back pain on May 30 which was why she was brought back and re-imaged on June 5, 2003. (Jt. Ex. A, p.44)

The claimant was also seen on June 13, 2003, for a bone scan, again with a history of low back pain. The claimant was next seen at the Regional Medical Center on June 24, 2003, with a history of back pain after falling. On June 25, 2003, the claimant gave a history of falling the previous day at work and experiencing pain in the lower back and tailbone which was totally inconsistent with the claimant's description of being struck between the shoulder blades. (Jt. Ex. A, pp. 47-48)

I feel compelled to point out that the claimant underwent additional diagnostic studies on June 25, 2003, at the same clinic that the prior radiology reports were conducted which incorrectly state that no prior studies were available for comparison. (Jt. Ex. A, pp.44, 49)

The claimant was initially evaluated by Dr. Robert Abraham on July 18, 2003. At that time, the claimant provided a history that the pain began on January 24, 2003, after a fall when she struck her tailbone which, again, is inconsistent with the claimant's prior description. Dr. Abraham compared the MRI studies previously

conducted on May 30, 2003, which he pointed out reflected a minimal, twenty percent (20%) compression at L1 down to L2. Dr. Abraham pointed out that an MRI on July 14, 2003, revealed more collapse at L2, without comment as to any findings made in the June 5, 2003, MRI. Dr. Abraham's diagnosis was L2 compression with questionable etiology. (Jt. Ex. A, pp.57-59)

On June 23, 2003, Dr. Abraham performed a surgical procedure, identified as kyphoplasty. Dr. Abraham released the claimant on January 15, 2004, while noting that she was performing most activities. Apparently, claimant's medicals have been paid by either health insurance and/or Medicare.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C.Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark.

App. 196, 737 S.W.2d 663 (1987).

Medical evidence is not ordinarily required to prove causation, *Wal-Mart Stores, Inc. vs. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). However, if medical opinion is offered, the opinion must be stated within a reasonable degree of medical certainty. *Freeman vs. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2000). Where the only evidence of a causal connection is speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup vs. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *K I I Construction Company vs. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

The record in this case is replete with inconsistencies and contradictions. The histories contained in the medical reports are inconsistent with the claimant's testimony at the hearing concerning the alleged incident. As previously pointed out, the claimant sought medical treatment for low back complaints just days before the immediate claim while denying any prior back problems. Dr. Abraham, the claimant's primary treating physician stated that the etiology of claimant's injury was unknown. It would require sheer speculation and conjecture to attribute the claimant's physical problems, need for treatment, and disability to the alleged incident. Conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Company vs. Hearndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that she sustained an injury arising out of and during the course of her employment with the Department of Health on June 24, 2003. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge