

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308982

DONALD CORLEY, EMPLOYEE

CLAIMANT

AUGUSTA PUBLIC SCHOOLS, EMPLOYER

RESPONDENT NO. 1

**RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER**

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

OPINION FILED OCTOBER 25, 2006

Hearing before Administrative Law Judge Barbara W. Webb on July 25, 2006, in Augusta, Woodruff County, Arkansas.

The claimant appeared and was represented by Mr. Jim R. Burton, Attorney at Law, Jonesboro, Arkansas.

Respondents No. 1 were represented by Mr. Richard Lusby, Attorney at Law, Jonesboro, Arkansas.

Respondent No. 2 was represented by Mr. David L. Pake, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on July 25, 2006, before Administrative Law Judge Barbara W. Webb, in Augusta, Woodruff County, Arkansas. A prehearing telephone conference was held on this claim on May 8, 2006. A Pre-hearing Order was entered in this case on May 8, 2006. The Pre-hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee-employer relationship existed at all relevant times, including August 14, 2003.
3. That the claimant's applicable compensation rate based on an average weekly wage of \$452.00 is \$301.00 for temporary total disability, if awarded.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Compensability of the claimant's injury.
2. Whether the claimant is entitled to additional medical expenses, temporary total disability and permanent and total disability benefits.

CONTENTIONS

The claimant contends that he sustained a compensable injury to his back during the course and scope of his employment with respondent-employer; and that he is permanently and totally disabled as a result of said injury and is entitled to temporary total disability benefits, medical expenses, and permanent and total disability benefits.

Respondents No. 1 contend that there is no medical evidence supported by objective findings to prove that the alleged incident of August 14, 2003, produced a compensable injury as required by the Arkansas Workers' Compensation law; that alternatively, if the claim is found to be compensable, Respondents No. 1 maintain that the claimant is not permanently and totally disabled as a result of the August 14, 2003 incident; that the minor

incident or injury of August 2003 did not generate any permanent impairment so as to qualify the claimant for disability or wage-loss disability; and that should any wage-loss disability be found, that the Second Injury Fund would be responsible for same. Respondent No. 1 also joins in and adopts the contentions of Respondent No. 2.

Respondent No. 2 contends that the claimant cannot prove that he sustained a compensable work injury on August 14, 2003. Alternatively, if the claimant proves he sustained a work injury on August 14, 2003, he cannot prove entitlement to any degree of permanent anatomical impairment for that injury. The major cause of claimant's permanent anatomical impairment is not his alleged work injury of August 14, 2003. The major cause of any wage loss disability is not the claimant's alleged work injury of August 14, 2003. If claimant cannot prove entitlement to any degree of permanent anatomical impairment, he is not entitled to any amount of wage loss disability by law. If allowed, respondents would be entitled to a credit for any disability benefits paid by non-workers' compensation carriers pursuant to § 11-9-411 as defined by case law. Finally, Respondent No. 2 contends that § 11-9-505(b)(3), the statute on vocational rehabilitation, applies to this case.

The record consists of a one volume transcript of the July 25, 2006 hearing, consisting of the testimony of Donald Corley and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order), Joint Exhibit No. 1 (medical records), Respondent No. 2 Exhibit No. 1 (Dr. Ransom note), and Respondent No. 2 Exhibit No. 2 (medical records).

FACTUAL BACKGROUND

The claimant is 51 years of age (b. 12/24/54). He completed the eleventh grade. He has been employed in maintenance by the Augusta Public School District for twelve

(12) years. He testified that he previously injured his back in a work-related incident in January of 1999 while lifting and stacking chairs in the cafeteria. He sought medical treatment from Dr. Ransom and was diagnosed with a herniated disc. He was referred to Dr. Smith and received injections which did not resolve the problem. He eventually underwent fusion surgery on his back performed by Dr. Stephen Cathey. He returned to work approximately three to four months after the surgery and remained under the care of Dr. Ransom. He continued to take medication for pain for a period of time.

He explained that on August 14, 2003, he was back to the same job and was lifting and moving library books and bookshelves during the move to a new school. He testified he felt something pull in his back while "lifting boxes of books". He also felt pain in his right leg. He reported the incident to Mr. Blevins and returned to Dr. Ransom for treatment. He was referred to Dr. Cathey who treated him conservatively with a prescription for Celebrex. After one appointment with Dr. Cathey, he continued to treat with Dr. Ransom. He was subsequently examined by Dr. Jim Moore who recommended treatment with a TENS unit and Lidoderm. He did not receive the recommended treatment and has not been able to return to work at the school district. He explained that he is not able to hold down an eight-hour job which requires lifting. He testified that he still has pain and numbness in his right leg that comes and goes. He has good days and bad days. He has to take his time in the morning. He cannot mow the lawn or do any of the heavy lifting at the house anymore. He can only remain on his feet about four or five hours. He can only lift 20-30 pounds when he used to lift 50 pounds. He has not sought other employment.

On cross-examination, the claimant testified that he attempted to work a short time after his surgery in 1999, but took off work again and filed a claim for disability benefits with the Workers' Compensation Commission prior to the alleged injury in 2003. At the time, a videotape was taken showing the claimant working around the house and the yard. His case was dismissed and he subsequently returned to work with the school district. He testified that at the time of the August 2003 incident he was working with a co-worker, Jimmy Lee. He testified that Jimmy had stepped outside to get another load of books when he experienced the pain. He testified that he does "little odds and ends," including handyman work for cash for friends and family, but has not sought employment since the date of the injury. He testified that the only medical treatment he is receiving is Celebrex.

He testified that rods were placed in both sides of his back during the surgery in 1999 and that both remain in his back. He testified that he went to lighter work after the surgery and was given a helper. He testified that he never recovered from the 1999 surgery. He sought treatment from Dr. Ransom for low back pain and pain in both of his legs and burning in his feet on November 27, 2000. He continued to have right leg pain off and on from that time until the 2003 injury. He testified that he had "a strained back muscle" in August of 2003. He received short term disability after the incident in 1999 from a policy with USAble but dropped the policy after he returned to work and did not receive any benefits after the 2003 incident. He explained that he performs odd jobs that will not hurt him. He has some plumbing skills, i.e. repairing leaky faucets, and does light carpentry jobs, i.e. repairing a small table or other items. He performs these jobs once or twice a month and receives about \$20.00 or \$25.00 per job. He takes two doses of

Celebrex daily and has since his surgery. He explained that he didn't know how to handle being hurt the first time and was filmed after he had taken more medication than he should have in order to do things. He continues to treat with Dr. Ransom monthly. He testified that he no longer takes Ultram for pain. He recalled having a nerve conduction test on both legs which resulted in normal findings in December of 2000. He testified that he had not considered looking for a part time job in the afternoons. He explained that he also had a heart condition and had blacked out a few times.

Medical records reflect that claimant suffered from spondylolysis at L5 with minimal spondylolisthesis at L5-S1 with a broad based disc herniation at L5-S1 as reflected on a radiology report from tests conducted on January 12, 1999. He was treated conservatively by Dr. Cathey with physical therapy and muscle relaxants based on his diagnosis that he suffered from a musculoskeletal injury in his lower back from lifting at work superimposed on a congenital spondylolisthesis. Records reflect that in April of 1999, after conservative treatment failed and additional testing was performed, the claimant underwent a lumbar decompression procedure performed by Dr. Cathey. On June 21, 1999, the claimant returned for a post-op evaluation. At that time, Dr. Cathey noted that the claimant had continued to improve and was "completely relieved of his sciatica and is off all pain medication" with complaints of "paroxysmal bouts of low back pain that is not unexpected". He noted that at the time he instructed the claimant to liberalize his activities in anticipation of returning to work at regular duty on 7-26-99 in light of the claimant's contentions that no light duty was available where he works. He also noted that the claimant was entitled to a 12% permanent partial impairment rating to the whole person. On August 20, 1999 and

September 29, 1999, the clinic notes from Dr. Ransom reflect that claimant was prescribed Celebrex for complaints of constant lower back pain and pain around the left knee and right hip. He returned to Dr. Ransom on February 8, 2000, with complaints of continued pain in his lower back. The clinic notes reflect that the claimant is working but not lifting heavy objects. He returned again on September 6, 2000, with complaints of back pain and left leg pain for a month. He was prescribed Celebrex and scheduled for a follow up evaluation with Dr. Cathey on October 9, 2000. He returned on September 25, 2000, for a follow-up with complaints of back pain and was reminded to keep his appointment with Dr. Cathey. A letter from Dr. Cathey dated October 30, 2000, reflects that the claimant was examined on his complaints of chronic lower back pain. He notes that the claimant has unable to work since September 29, 2000, and is in the process of filing for Social Security disability benefits. He notes that "Although he concedes that his lumbar decompression and fusion at L5-S1 was helpful, he does not believe that he will be able to go back to work." He noted that his tests did not show any further progression of his spondylolisthesis or recurrent disc herniation, spinal stenosis, nerve root impingement, or paraspinous muscle spasm or restriction of movement. He encouraged the claimant to resume as active a lifestyle as possible and use anti-inflammatory medications on an as needed basis. On November 27, 2000, the claimant returned to Dr. Ransom with complaints of bilateral foot pain, leg pain, and secondary complaints of low back pain. He was continued on medications and referred for a nerve conduction test on both legs. On December 4, 2000, the claimant underwent an EMG and nerve conduction test in both lower extremities at the White County Medical Center. The results from the EMG and nerve conduction study were

normal with no evidence of nerve root compression, denervation, neuropathy nor myopathy.

On August 20, 2003, the claimant filed a workers' compensation claim alleging that he injured his back on August 14, 2003, while lifting and moving boxes of library books. He was initially treated by Dr. Dan Moore. He was granted a change of physician to Dr. Ransom on September 25, 2003.

On December 1, 2003, Dr. Cathey noted in a letter to Dr. Ransom that the claimant continued to complain of pain in his lower back and a "catch" on his right side. He further noted that the claimant had not identified any benefit from a month of physical therapy and remained on Celebrex as well as Percocet for pain. He observed that the fusion at L5-S1 appeared to have healed nicely and that the neurological examination and tests did not reveal any lumbar radiculopathy, muscles spasms, restriction of movement, disc herniation, spinal stenosis, or nerve root impingement. On February 2, 2004, clinic notes reflect that the claimant was seen by Dr. Ransom for a check up on his back pain. Dr. Ransom noted that he had chronic lumbosacral disk syndrome and failed back surgery syndrome. He opined that the claimant could not return to work. He stated "I think he is totally and permanently disabled to hold gainful employment." On May 25, 2004, the claimant returned to Dr. Cathey for a follow-up evaluation. He noted that the claimant was taking his wife's hydrocodone for pain control because he could not afford the Celebrex. He was unable to return to work and was denied Social Security disability benefits. He noted that nothing on examination had changed and that the only course of treatment was pain management. He observed that he would have a difficult time qualifying for disability in

light of his age, the normal neurological examination, and the MRI scan that shows no new structural abnormalities in his lower back.

On March 23, 2005, the claimant was seen by Dr. Jim Moore for a neurological independent medical examination. He reviewed the medical records from 1999 until 2004. He commented that the claimant had two industrial injuries and advised him that he had received benefits until September of 2004 which ceased related to a discussion with his attorney for unexplained reasons. He noted the claimant complains of a spot in his right low back that has given him constant pain as well as frequent pain in the right lower extremity which has not improved. He noted that the claimant had not been provided any trigger injections, Lidoderm patches or TENS unit. He opined that he did not believe there is any relationship with the current difficulties to the 1999 injury but related the same to the August, 2003 injury primarily musculoligamentous sprain and strain. He diagnosed the claimant with spinal enthesopathy and post laminectomy syndrome and noted that he would likely benefit from the use of a TENS unit or perhaps even the patches. He further noted that he did not see anything on his examination that would suggest an additional assessment of permanent impairment beyond the 12% assessed in 2000.

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”:

(i) (a)n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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) Caused by rapid repetitive motion . . . (v) A hernia as set out in § 11-9-523.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D)(Repl. 2002). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Brotherton v. White River Area Agency, ___ Ark. App. ___, ___ S.W.3d ___ (Dec.14, 2005); Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. Id. It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, the claimant had filed a previous workers' compensation claim for the injury to his lower back in 1999 which was dismissed in 2003 after the production of video showing him performing work at his home. Following dismissal of his case, the claimant contended that he suffered another work-related injury to his lower back while

lifting boxes on the job. There were no witnesses to the second incident. The claimant offered no corroborative evidence to prove the second incident occurred in August of 2003. However, even if the claimant has proven by a preponderance of the evidence that a work-related incident occurred on August 14, 2003, the medical records do not support a finding that the claimant suffered a compensable injury.

II. CAUSATION AND OBJECTIVE FINDINGS

The employee must prove by a preponderance of the evidence that he sustained a compensable injury. In addition, a compensable 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 voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the claimant does not establish a compensable injury by medical evidence supported by objective findings.

A review of the medical records offered in this case reflect there is no objective medical evidence that the claimant sustained any injury to his lower back as a result of a work-related incident in August of 2003. The medical records in the case reveal that the claimant continuously complained of chronic low back pain resulting in pain in his lower extremities from the date of his work-related incident in 1999. All of the subsequent tests performed on the claimant, including the MRI's and the nerve conduction study revealed no new findings other than the surgical repairs made during his decompression and fusion surgery in 1999. The claimant testified that he began and continued the use of pain medication, i.e. Celebrex, from 1999 until the date of the hearing.

In the instant case, it has been established that an incident involving the claimant occurred at work in 1999. It is equally clear from the medical evidence that objective medical evidence established the claimant's need for decompression and fusion surgery to his lower back. The primary dispute is whether claimant has established a causal connection between an alleged second work-related injury in 2003 and the need for further medical treatment. In a workers' compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

It appears from my review of the medical reports that the opinions of Dr. Ransom and Dr. Moore are based on the subjective complaints of the claimant and are speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B)(Repl. 1996). The Arkansas Court of Appeals has held:

the plethora of possible causes for work-related injuries includes many that can be established by a common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from

a work-related incident - but not in every case. We find the Court of Appeal's reasoning in *Millican* and *Tilley* persuasive. We therefore adopt the holding in *Millican* that objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and the work-related incident (emphasis added).

Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000), quoting Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). See Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997) and Aeroquip, Inc. v. Tilley, 59 Ark. App. 163, 954 S.W.2d 305 (1997).

Based on this reasoning, Freeman, summed up the current state of the law as such:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between the injury and the claimant's employment, but if an unnecessary medical opinion is offered on that issue, the opinion must be stated with a reasonable degree of medical certainty.

Freeman, supra, citing Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

The law is clear that medical opinions based upon "could", "may", "possibly", and "can" lack the definitiveness required by Ark. Code Ann. §11-9-102(16)(B)(Supp.1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Scott v. Middleton Drywall, 2005 AWCC 22 (Feb. 9, 1005) ("probably did" found insufficient to prove causation); Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) (overruling prior Court of Appeals decision and holding that "could" was insufficient to satisfy standard); Crudup v. Regal Ware, Inc. , 341 Ark. 804, 20 S.W.3d 760 (2001) ("theoretical possibility" did not meet standard of proof); Freeman v. Con-Agra

Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001) (to pass muster, opinion must be more than speculation and go beyond possibilities).

The Arkansas courts have frequently discussed the distinction between a recurrence and an aggravation of a preexisting injury. When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence is not a new injury but simply another period of incapacitation resulting from the previous injury. Pinkston v. General Tire & Rubber Co., 30 Ark. App. 46, 782 S.W.2d 375 (1990). The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). However, an aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998). The basic test is whether there is a causal connection between the two episodes. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). It is the Commission's duty to determine if a causal connection exists between the primary injury and any additional injuries. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). While medical evidence is not required to show a causal connection, claimant must show proof by a preponderance of the evidence. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962). If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, there is no substantial evidence to sustain the Commission's refusal to make an award. Clark v. Ottenheimer, 229 Ark. 383, 314 S.W.2d 497 (1958); Johnson v. Little Rock School District, Full Commission Opinion filed April 4, 2002 (E700511 & F011921).

At first blush, the facts of the case at hand seem to suggest that the claimant has met his burden by showing that the symptoms of low back pain manifested immediately after the incident in August of 2003. However, the medical records in the case reflect that

these were not new complaints or symptoms. The claimant testified that he had continuously suffered low back pain and had remained on pain medication since his surgery in 1999. Moreover, a comparison of the MRI's taken before and after the alleged injury in August of 2003 do not reflect any new adverse changes in the claimant's condition. Couch v. Harold Ives Trucking Co., 1999 AWCC 260 (E714521, August 16, 1999). Moreover, none of the tests, including the EMG and nerve conduction study, performed after August of 2003 reflect any additional objective medical findings.

After review and consideration of the testimony and medical records, I find that the preponderance of the evidence fails to show that claimant's current need for medical treatment to his lower back is causally related to a work-related incident of August 14, 2003.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed at all relevant times, including August 14, 2003.
3. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his lower back and lower extremities on August 14, 2003.

In the instant case, I find that claimant has failed to prove by a preponderance of the evidence that he sustained compensable injury to his lower back and extremities as a result of the alleged work-related accident in August of 2003, which is the basis for this claim. Therefore, it is not necessary for me to address whether claimant is entitled to permanent partial or total disability, wage loss, or vocational rehabilitation.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge