

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F302406

**LOWELL M. GARRETSON,
EMPLOYEE**

CLAIMANT

**CENTRAL MASONRY, INC.,
EMPLOYER**

RESPONDENT NO. 1

**MID-CENTURY INS. CO.,
INSURANCE CARRIER**

RESPONDENT NO. 2

SECOND INJURY FUND

RESPONDENT NO. 3

OPINION FILED JUNE 5, 2006,

Pursuant to a hearing conducted April 6, 2006, before Administrative Law Judge Richard B. Calaway in Russellville, Pope County, Arkansas, with

Ms. Laura J. McKinnon, Attorney at Law, Fayetteville, Arkansas, appearing for the claimant;

Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 1 and 2; and

Ms. Judy W. Rudd, Attorney at Law, Little Rock, Arkansas, representing Respondent No. 3, appearance excused.

STATEMENT OF THE CASE

This is a dispute over compensability of a hip injury which the claimant alleges occurred at the time of his admittedly compensable back injury.

The record shows that on or about July 5, 2001, the claimant, a bricklayer, injured his low back while helping a co-worker move a heavy stone. The claimant currently contends that he also sustained a compensable hip injury during the incident and he has requested related benefits, including payment of accrued reasonably necessary medical and related expenses, as well as an attorney's fee for controversion. Other possible issues, including entitlement to indemnity benefits, were reserved.

The respondents contends that the claimant's hip condition is not a compensable injury but represents pre-existing osteoarthritic or degenerative conditions which had caused him to seek medical care prior to the injury to his hip on July 5, 2001. Alternatively, they contended that any additional medical treatment for his hip is related to pre-existing conditions and is neither reasonably necessary for, nor related to, the alleged 2001 hip injury.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained compensable injuries to his low back July 6, 2001; and his average weekly wage was \$786.00.

3. The preponderance of the evidence fails to show that the claimant sustained a compensable injury to his hip, established by medical evidence, supported by objective findings, and arising out of and in the course of his employment on or about July 5, 2001.

DISCUSSION

As noted above, the claimant suffered a compensable back injury on or about July 5, 2001, during an incident where he and a co-worker were moving a large stone. He testified that the incident occurred as they were standing on a scaffold and stepped off onto a walk board, which unexpectedly dropped down about a foot or a foot and a half and jolted him. He felt that he had injured his back, leg, hip, right shoulder, knees, the right side of his body, and he sought medical

care, including the attention of Dr. Terrald J. Smith and Fort Smith orthopedic surgeon Dr. Claude L. Martimbeau.

The first medical record related to this incident is dated July 13, 2001, and shows that the claimant complained of pain in his right hip above the hip bone without radiation, as well as back pain, which was associated with muscle spasm and muscle tightness. The diagnosis at that time was muscle spasm and sprain and the claimant was given medications and limitations on his activity were suggested.

The report of an x-ray dated July 23, 2001, stated that there were mild degenerative changes in the claimant's right hip. The report also noted mild narrowing of the superolateral right hip joint space more so than the left; small acetabular spurs on both sides, but slightly more prominent on the right; and no fracture or subluxation. Related medical records indicated that the claimant was continuing to complain of hip pain. A form dated August 8, 2001, indicated that Dr. Smith released the claimant to return to work, with no restriction, as of August 3, 2001.

By January 17, 2002, the claimant had returned to Dr. Smith, complaining that he was still having trouble with his hip/groin/back, with pain again radiating into the right hip/groin. Medication and physical therapy was recommended. On February 20, 2002, Dr. Smith indicated that the claimant was off work until he saw an orthopedic surgeon.

On March 20, 2002, Dr. Martimbeau wrote that he had examined the claimant who was complaining of back pain and right groin pain which he related to heavy lifting at work in July, 2001. Dr. Martimbeau also commented that he had taken an x-ray of the right hip which showed deformity of the femoral head with impingement and degenerative change. He diagnosed arthritis of the right hip and the lumbosacral spine, for which he prescribed medication, physical therapy, and a brace,

and he recommended that the claimant return to work if he did not do any repetitive heavy lifting. He also noted that the hip will definitely aggravate to where he will need a total hip arthroplasty.

Thereafter, the claimant continued to see Dr. Smith and Dr. Martimbeau, who wrote on July 9, 2003, that the claimant had degenerative arthritis of the lumbosacral spine and the right hip; that no specific permanent disability related to his condition; and that the only future medical treatment required will be a right total hip replacement but, again, the hip condition is not a work-related injury. In response to a letter from claimant's counsel dated July 28, 2003, Dr. Martimbeau's office advised that the work injury did not exacerbate and is not an aggravating factor to a pre-existing condition. Similarly, in response to the letter of claimant's counsel dated August 5, 2003, Dr. Martimbeau indicated that the claimant's work-related injury was not a substantial contributing factor (51% or more) to his current disability.

The claimant's testimony and the medical record also show that approximately one year before his July, 2001, injury, the claimant had injured his hip while working for Metro Construction. The medical record indicates that on June 23, 2000, the claimant had sought medical care in Stillwater, Oklahoma, and stated that for the past two weeks his hip had been tight while working and, yesterday, it had become acutely worse when he stepped in a hole on the work site. He reported a sharp pain in his right hip and now had pain that goes down the back of his leg. The diagnosis was right hip strain with sciatic pain for which medication and ice on the hip twice a day were recommended. A note dated July 1, 2000, indicated that the claimant had a hip strain but had received "good relief".

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

In this case, the medical record shows that the claimant had suffered from pain and discomfort related to the condition of his hip about one year before the incident during his employment with Central Masonry, Inc. However, any objective pathology of his hip as of June, 2000, was not been established by the medical record. On the other hand, the pathology shown by diagnostic studies following the incident in July, 2001, has been described by his treating physicians as degenerative, arthritic, and not related to his employment.

Part of the burden imposed on the claimant by current law is that he establish the existence of the alleged injury by medical evidence, supported by objective findings. Ark. Code Ann. §11-9-102(4)(B). Here, the only objective findings of pathology have been described as degenerative and arthritic and have not been related to the lifting at work in July, 2001, or, for that matter, to the incident in June, 2000, when the claimant had stepped in a hole. Nevertheless, the law requires

objective proof of a compensable injury and reports of the claimant's subjective symptoms of pain and discomfort, no matter how genuine, are not sufficient to meet the requirements of the law, although such reports may provide an adequate basis for medical care.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge