

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500590

RICKIE HAWLEY, EMPLOYEE

CLAIMANT

**BEMBERG IRON WORKS, INC.,
EMPLOYER**

RESPONDENT

**LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 23, 2006

Hearing before Administrative Law Judge Barbara Webb on May 10, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Philip M. Wilson, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on May 10, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on April 3, 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:

1. The employer/employee relationship existed at all relevant times.
2. If the claim is found to be compensable, the applicable compensation rate for temporary total disability is \$408.00 and for permanent partial disability is \$306.00.
3. Claimant's alleged injury was a ventral incisional hernia and does not meet the five criteria required to establish a compensable inguinal hernia under applicable law.

By agreement of the parties, the issue to be litigated is:

1. Whether claimant sustained a compensable gradual injury, i.e. a ventral incisional hernia, due to rapid and repetitive movement.

The record consists of a one volume transcript of the May 10, 2006, hearing, consisting of the testimony of Rickie Hawley, and all documentary evidence consisting of claimant's Exhibit No. 1 (medical records).

FACTUAL BACKGROUND

The claimant is forty-four (44) years of age (b. 12/30/61). He graduated high school and took a vocational class in welding. He has worked for Bemberg Iron Works for twenty-five (25) years. He had gallbladder surgery in 1993-1994. He worked at Bemberg as a machine operator and welder. His job duties include running a press brake used to bend sheets of steel. He described his job as repetitive work, i.e. lifting heavy sheets of steel:

“sometimes it's hundreds of pieces, and sometimes, you know, it's less. But, you know, some pieces have got to have multiple bends in it, so I'm picking it up and putting it in multiple times, and turning it and putting it in and stuff. It's, you know, it's labor, you know, constantly moving, picking it up, bending it, you know, receiving, you know, setting dies, and stuff in it.”

The claimant testified that in August of 2004, he noticed a bulge in the middle of his stomach when he was lifting at work. He did not feel any pain but did notice a “twinge”. He went to his family doctor and eventually filled out an accident report shortly before he was scheduled for surgery. On cross-examination, the claimant testified that he could not remember the specific project he was working on in August of 2004, when his symptoms first appeared. He testified that he did not have a specific quota of pieces per hour and was paid by the hour. He testified that he underwent laparoscopic surgery in January of 2006 and missed approximately four weeks of work. He returned to light duty work after the surgery and, within a

few weeks, went back to his regular job duties. He was fully released from the doctor and has had no problems since his operation.

The medical records reflect that the claimant presented to the Pulaski Surgery Clinic on January 5, 2005, for evaluation of a ventral hernia. The patient's history reflects that the claimant complained that over the last four to five months he noticed a painful bulge in his upper mid abdomen. It is further noted that his condition was worse when he did heavy lifting or coughing. He was scheduled for a laparoscopic ventral hernia repair on January 10, 2005. Records from Babbitt Medical Center reflect that the surgical procedure was performed by Dr. David W. Bevans, III, as scheduled. A follow-up clinic note dated February 2, 2006, reflects that the claimant returned for a follow-up status post laparoscopic ventral incisional hernia repair. During the procedure, it was determined that the claimant technically had two incisional hernias in his midline abdomen, both secondary to previous port sites placed at the time of his cholecystectomy in the past. The doctor attributed the hernias to heavy lifting over a period of time resulting from weak spots that had developed from the claimant's previous surgery. The claimant was released to return to work on Monday, February 7, 2005, with restrictions and directions to return on an as needed basis.

The claimant alleges that he sustained a compensable injury caused by repetitious heavy lifting over a gradual period of time, and that he is entitled to temporary total disability benefits from January 10, 2005 through February 7, 2005, as well as medical expenses and attorney's fees. The respondents contend that the claimant cannot establish by a preponderance of the evidence the elements necessary to prove a gradual injury caused by rapid and repetitive movement. Respondents further contend there is no medical opinion with any degree of certainty linking causation of the alleged injury. Both parties acknowledge that

claimant's injury does not meet the requirements for a hernia injury as set out in § 11-9-523, and that it does not constitute an "accidental" injury, i.e. one caused by specific incident and identifiable by time and place of occurrence within the meaning of § 11-9-102 (5)(A)(i). The issue presented is whether the claimant has established by a preponderance of the evidence that the claimant's incisional hernias constitute a compensable injury caused by rapid repetitive motion.

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.
3. The applicable compensation rate for temporary total disability is \$408.00 and for permanent partial disability is \$306.00.
4. Claimant's alleged injury is a ventral incisional hernia and does not meet the five criteria required to establish a compensable inguinal hernia under applicable law.
5. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury.

DISCUSSION

I. COMPENSABILITY

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

- (i) (a) an accidental injury causing internal or external physical harm to the body or accident 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).

Once the presence of an injury is established by objective medical findings, a claimant seeking workers' compensation benefits for a gradual-onset injury also must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of the employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. § 11-9-102(4) (A) (ii) and (E)(ii) (Repl. 2002).

The Supreme Court of Arkansas has established a two prong test to determine whether an injury is caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1988). As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. Westside High School v. Patterson, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. Id.

In the instant case, the claimant relies on his own testimony concerning his duties as a welder and press brake operator. While the claimant testified that his job tasks included “machine operator” work involving repetitive bending and heavy lifting, he offered no evidence that the repetitive action was rapid. The claimant testified that there were no performance quotas or piece per hour requirements. He also testified that the amount and type of work performed varied depending on the particular project requirements.

In determining whether a worker’s injury was the result of repetitive and rapid motion, the appellate courts have required some showing of how rapidly the repetitive actions were performed. See Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2000) (benefits awarded where movements repeated every twenty seconds); Parker v. Atlantic Research Corp., ___ Ark. App. ___, ___ S.W. 3d ___ (June 30, 2004) (benefits awarded where claimant was required to perform multiple tasks at high volume with quick and fast movements of a repetitive nature over the course of ten-to-twelve hour shift, six to seven days a week); Boyd v. Dana Corp., 62 Ark. App. 78, 966 S.W.2d 946 (1998) (series of repetitive motions performed 115 to 120 times per day separated by periods of only 1.5 minutes constituted rapid

motion); High Capacity Prods. v. Moore, 61 Ark. App. 1, 962 S.W.2d 831 (1998) (movements repeated every fifteen seconds found to be sufficiently “rapid”).

In the instant case, although Hawley’s testimony establishes that his work activities were repetitive, there is no evidence in this record to indicate whether these activities were performed rapidly. While it is evident that the claimant’s job included lifting of heavy pieces of steel, the claimant has failed to prove by a preponderance of the evidence that his work was rapid. Jobe v. Wal-Mart Stores, Inc., 66 Ark. App. 114, 987 S.W.2d 764 (1999).

II. OBJECTIVE PROOF OF INJURY

Respondents further contend there is no medical opinion with any degree of certainty linking causation of the alleged injury. 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).

In addition to his own testimony, claimant has offered the medical opinion of Dr. David Bevans to establish that the incisional hernias were caused by heavy lifting on the job. In a clinic note dated February 2, 2005, Dr. Bevans opines: "I think there is a good chance that these hernias were related to heavy lifting over periods of time as incisional hernias are basically weak spots that have developed from previous surgery that are brought about usually by heavy lifting."

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, 2005) ("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. , 3341 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).

When considering the use of the words "good chance", it is evident that the medical opinion of Dr. Bevans is not stated within a reasonable degree of medical certainty. 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). Moreover, it is only the claimant that attributes any heavy lifting to work activities. Where claimant's case for causation rests mainly on his own testimony, the issue is that of credibility and ultimately left to the discretion of the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996).

While objective medical evidence clearly exists to show the claimant suffered from ventral incisional hernias, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable gradual-onset injury caused by rapid repetitive motion in connection with his work activities.

ORDER

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

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge