

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F502367

JOHN R. LANE, EMPLOYEE

CLAIMANT

**ORTHOFLEX SADDLEWORKS, INC.,
EMPLOYER**

RESPONDENT

**FIRSTCOMP INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 9, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on October 21, 2005, in Monticello, Drew County, Arkansas.

Claimant represented by Mr. Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

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

A hearing was held on October 21, 2005, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on February 23, 2005. It was further stipulated that claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$178.00 for temporary total disability, based on an average weekly wage of \$268.00.

Claimant amends his contentions from those noted in the Prehearing Order filed June 13, 2005, to assert that on February 23, 2005, he sustained a compensable

injury to his back and his right shoulder and is entitled to past and future medical treatment, as a result. He had previously contended he was also entitled to temporary total disability indemnity benefits and attorney's fees; however, he withdrew those contentions at the hearing.

Respondents contend that claimant has had long-standing back problems that are chronic in nature and not related to an incident at work. Further, respondents contend that claimant is alleging an incident on February 23, 2005; however, no injury was reported to respondent-employer until after claimant had been terminated for cause on February 25, 2005.

STATEMENT OF THE CASE

Claimant is forty-one years old and testified that he had worked for respondent-employer for approximately ten months at the time of his alleged injury on February 23, 2005. He testified that he was employed as a saddle-frame builder for respondent-employer.

Claimant testified that at approximately 11:45 a.m. on February 23, 2005, he and another employee, Dallas Davis, had been told by either James Camp or Kelly Gudenoge to tear down parts of the leather cage. As they were bending the chicken wire and prying the 2x4s up from the floor, claimant began using a crowbar to pry back a particularly hard panel. Claimant testified that he was on his knees and, when the nail finally gave way, he was thrown back two or three feet onto the concrete

floor. He testified that he could not get up for approximately three to five minutes. He testified that Dallas Davis ran over to check on him. Mr. Davis was not called to testify.

Claimant then testified that Mr. Davis left, and he got up and went over to some foam to lie down for about ten minutes until lunchtime. He testified that he then got up and reported the incident to Kelly Gudenoge, the quality control technician, whom he thought was the person he was supposed to tell, because Mr. Gudenoge had previously given him orders just like a supervisor would. However, claimant later testified that he knew James Camp was his actual supervisor and was there that day, but he did not say anything at all to Mr. Camp about having injured himself. Claimant testified that Mr. Gudenoge told him just to “take it easy.”

Claimant testified that they then had lunch and, afterwards, Mr. Gudenoge went into the office. He claims he does not know who Mr. Gudenoge talked to, but he came out of the office and told claimant not to be working on tearing down the leather cage. Claimant testified, “Then I pretty much drove nails or something fairly easy the rest of the afternoon.” Mr. Gudenoge was not called to testify, but later testimony revealed that he had left his employment with respondent-employer shortly after this alleged incident, moved to Oklahoma, and was thought to be in jail there.

Claimant testified that he went home from work at approximately 3:30 p.m. that afternoon, “laid around and went to bed.” He continued:

I had trouble sleeping because of the pain in my back and my legs. I couldn't get out of bed the next morning. So I laid around that day. I went in Friday morning and was going to ask to go to the doctor, and they said I was fired.

When asked who "they" were, he responded, "James Camp." Claimant testified that when he first arrived that morning, Mr. Camp pulled him aside and advised him that he was terminated. When asked if he told Mr. Camp about his back, claimant testified on direct examination that he told "them" he was hurting on February 23rd. Claimant testified, "I figured Kelly Gudenoge told them because he had talked to somebody in the office." Claimant asserts that he also told Ms. Taylor about the incident on the 23rd and let Brian Rhodes know that he had been fired, although he admits that he did not ask for workers' compensation papers at that time.

Claimant admitted on cross-examination that when he went to work on February 25, 2005, and was told by Mr. Camp that he was being terminated, he did *not* mention to Mr. Camp that he had been injured on the job. Claimant admitted that he immediately left respondent-employer, went to the unemployment office, and filed for unemployment. He admits, and the evidence reflects, that he was deemed "disqualified" as of February 25, 2005, because he was absent and failed to properly notify his employer, although he claims he does not remember receiving that notification from the unemployment office. Claimant admits that the next thing he did was to call OSHA to report some of the "deficiencies" respondent-employer had. He further admits that he did not call a doctor that day.

Claimant testified that he informed respondent-employer later on February 25, 2005, at about 4:15 or 4:30 p.m., that he had sustained a workers' compensation injury and wanted to pursue his rights under the Workers' Compensation Act. He testified that he told Asa Johnson. Claimant said, "I told him that I'd hurt my back, and he said that he wasn't aware of it; and that was pretty much the conversation." None of the parties claimant testified he told about his injury – that being Ms. Taylor, Mr. Rhodes, and Mr. Johnson – was called to testify.

Claimant admitted on cross-examination that he had previously worked for Central Maloney for eighteen years and that he was terminated from his employment there because he got into a dispute with his supervisor. Claimant admitted that he was initially injured while working for Central Maloney, saw Dr. P.B. Simpson in Pine Bluff, required surgery at L4-5, and was released with a 15 percent impairment rating. Indeed, medical records indicate that claimant has had many previous back problems and leg pain over the years, has seen many doctors, and has had three previous lower back surgeries, in 1993, 1999, and 2002. Claimant admitted that each time he has seen a doctor in the past for his back, he has described his problem the same way as he described the pain associated with this alleged injury – that it is "almost like sticking a knife in your back."

Claimant admitted that he has been told by doctors who have treated him for his back that he is to avoid heavy lifting and that if he would quit smoking, it would

help his back. Despite this, he admitted that he still smokes one-half to three-fourths of a pack per day. Claimant admitted that he filed for Social Security disability in 2002, 2003, and again after this alleged incident, but it has been denied each time.

Claimant testified that when he went to work for respondent-employer, he informed them that he had had prior back problems. James Camp, production supervisor for respondent-employer in February of 2005, testified that he was *not* informed of any of claimant's back problems at the time claimant was hired. He testified that if he had known about the problems, he would have requested a waiver from claimant's physician.

Claimant admitted that he started seeing Dr. Foscue as his family physician and that Dr. Foscue had put him on Celebrex for his back in June of 2004. Dr. Foscue also put him on Ultracet, noting that claimant had "chronic low back pain." Records reflect that claimant saw Dr. Foscue again for his back problems in July of 2004, October 2004, and February 4, 2005, just nineteen days before his alleged injury on February 23, 2005. Records also indicate that he saw Dr. Foscue on February 18, 2005, just five days before the alleged injury, complaining that his medication was not working.

Claimant testified that following his alleged injury on February 23, 2005, he was experiencing muscle spasm pain, pain down his legs, and sharp pain in his back, "almost like somebody sticking a knife in you," he said. He testified that he went to

see Dr. David Foscue on February 28, 2005, and that Dr. Foscue took x-rays, gave him muscle relaxers, and sent him home. He admits that Dr. Foscue did not take him off work; however, he testified that Dr. Foscue would not have needed to, since he had been terminated by respondent-employer. Claimant further admitted that Dr. Foscue did not recommend that he file for Social Security disability, although claimant did file for it for a third time. Dr. Foscue, in fact, gave claimant no restrictions other than “no heavy lifting” and, upon claimant’s request, referred him to Dr. Bruffett.

Claimant testified that he saw Dr. Wayne Bruffett in Little Rock on only one occasion following this alleged injury. Records reflect that claimant saw Dr. Bruffett on August 8, 2005. Dr. Bruffett’s notes of that date state, in part, as follows:

HISTORY OF PRESENT ILLNESS:

Mr. Lane is a 41-year-old gentleman who I operated on back on October 22, 2002, for post laminectomy syndrome, disc degeration (sic) at L4-5, and discogenic pain. He had anterior spinal fusion, and then an endoscopic posterior instrumentation at the same sitting. He actually did very well with this. He was last seen on April 23, 2003. *He had some residual symptoms, but really no severe back pain or significant radicular pain.*

He says he was doing relatively well until February of 2005, when he injured his back at work. . . .

DISCUSSION:

I reviewed things with Mr. Lane. I think the next step would be an MRI scan. He is right now in the process of having his case evaluated as a workman’s comp injury. I think that *based on his history*, this is probably a work

related problem. He certainly had a preexisting condition in his back that required surgery. However, *he was apparently not seeking active medical attention prior to the accident*, and was in a relatively stable situation. Now he says his pain is much, much worse. I doubt that he has a problem that is going to require further surgery, but I do think that the pain that he is experiencing is related to his work injury in February.

[Emphasis added.] Dr. Bruffett gave him Ultracet for his pain and noted that claimant was to return to see him when he “gets his finances straightened out” to schedule an MRI. Claimant admitted on cross-examination that he did not tell Dr. Bruffett about all of his visits to Dr. Foscue for his severe and “chronic” back pain just prior to this alleged injury on February 23, 2005.

Claimant testified that, as of the date of the hearing, he was still hurting. He testified:

It’s hurting, and now I’ve got pain spreading to my hips. It was just to my legs and feet. Now I’m having shooting pains just getting out of the car.

Claimant testified that he is simply asking for his past medical expenses to be paid by respondents and is asking to go back to the doctor.

Claimant admitted that on February 24, 2005, the day following his alleged injury, he did not show up for work and did not call in to say that he could not come to work. He testified that he was in pain and could not get up. However, he also admitted that he is married but did not ask his wife to call in for him because “I was

asleep when she left.” Testimony from James Camp, claimant’s supervisor, indicated that claimant had failed to show up for work or call in on two occasions prior to February 24, 2005. Claimant testified that he only remembered one prior occasion.

James Camp testified that he had had lots of problems with claimant being late for work. He testified that he was late about 75 percent of the time. Further, he testified that claimant’s attendance was a problem and, although claimant usually provided doctors’ excuses, he had three “no call/no show’s,” – with the third being February 24, 2005 – which, by company policy, called for termination.

FINDING OF FACT

Claimant has failed to prove by a preponderance of the credible evidence that he sustained any compensable injury arising out of and during the course and scope of his employment on February 23, 2005, or that any work-related injury he may have sustained was the major cause of his condition.

DISCUSSION

In order to prove compensability of a claim, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his 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 caused by a specific incident, identifiable by time and place of occurrence; and (4) the

injury must be established by medical evidence supported by objective findings. *See* Ark Code Ann. § 11-9-102(4)(A)(i); 11-9-102(4)(D); 11-9-102(4)(E)(i).

Objective findings are those that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A)(I). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra; Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*,

337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra*; *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

In this case, Dr. Bruffett's opinion that this was a work-related injury was clearly based upon a false history given to him by the claimant that claimant has had no real problems since his 2002 surgery and had not been seeking active medical care for his condition prior to the alleged injury date of February 23, 2005. Records reflect that he had been seeing Dr. Foscue for his back problems since June of 2004 and had seen him two times in February 2005, just prior to this alleged incident for his "chronic back problems."

Further, claimant admittedly never reported an alleged work-related injury to his employer until after he had been terminated, had been to the unemployment office, and had made a report with OSHA. He claims to have been in such grave pain that he could not even get up to call his employer the day after the accident; however, rather than going straight to a doctor, he first went to the unemployment office and called OSHA, and finally went to the doctor *five days* after the alleged injury. Claimant's medical history reflected by his medical records, his actions immediately following his termination, as well as his failure to give Dr. Bruffett an accurate history

upon which to base his opinion, all constrain claimant's credibility, in this examiner's opinion.

In short, claimant has simply failed to prove by a preponderance of the credible evidence that he sustained any compensable injury on February 23, 2005, or that any injury he did sustain was the major cause of his need for treatment. For all of the above-stated reasons, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge