

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F401136

HENRY LITTLE, EMPLOYEE

CLAIMANT

**RICELAND FOODS, INC.,
EMPLOYER**

RESPONDENT

**LIBERTY MUTUAL FIRE INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED APRIL 5, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on January 5, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Guy Alton Wade, Attorney at Law, Little Rock, Arkansas.

A hearing was held on January 5, 2006, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on December 24, 2003. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$226.00 for temporary total disability (TTD) and \$170.00 for permanent partial disability (PPD) benefits, based on an average weekly wage of \$340.00.

Claimant contends that he sustained a compensable injury on December 24, 2003, while working for respondent-employer, when he slipped and fell off of a tractor and sustained an injury to his lower back. He contends that he is entitled to TTD benefits from December 24, 2003, through September 1, 2004, and again from January 1, 2004, and continuing through a date yet to be determined.

Respondents controvert the claim in its entirety, contending that claimant did not sustain a compensable injury within the course and scope of his employment with respondent-employer on December 24, 2003, or on any other date. Respondents contend that his condition is a result of a preexisting and unrelated condition. Respondents further contend that claimant did not timely report any injury within the course and scope of his employment and that, therefore, in the event the claim is found to be compensable, they should not be responsible for benefits prior to notice, pursuant to Ark. Code Ann. § 11-9-701.

STATEMENT OF THE CASE

Claimant is sixty-six years old and testified that he has worked for respondent-employer as a seasonal worker, loading rice, since probably September of 2002. Claimant testified that he had been working for respondent-employer at the Augusta plant for about one month at the time he was allegedly injured, although he ordinarily worked at the Fair Oaks facility.

On December 24, 2003, while the claimant was working at the Augusta storage facility, he was working with Terry Franklin, Ricky Holliman, Mark Imboden, and Benny Escue. Claimant testified that, as was his custom, he had ridden to work with Mr. Escue. He testified that approximately noon on that date, which was Christmas Eve, the following happened:

Well, my job was to – I had to step up on the tractor and start the tractor when a truck backed in, then I had to start the loader, which is attached to the tractor, then I had to tell the boys when to shut the rice, when to quit putting the rice into the loader.

So when the truck got full, I had to step down off the tractor and go get a sample and take it to the truck driver. And in the process of stepping down off the tractor, it's got two steps. When my foot, when my left foot hit the step it slipped off, and I went almost to the ground, almost to the floor. I caught myself with my hands. And in order to get back on the tractor I had to twist my back, which I did.

And then I got - - I dismounted the tractor and went and got the sample and I noticed my back was kind of tingling. That's when I first knew that I had hurt my back.

Claimant testified that prior to December 24, 2003, he had never before had a back injury, nor had he had any back trouble to the extent that he was required to seek medical treatment for it. No medical records were introduced to indicate that claimant had been treated for any prior back problems.

Claimant testified that he continued working that day but that as more time went by, his pain worsened. He testified that he began to notice that his left leg was

bothering him and he started limping, realizing then that he had injured his back worse than he had originally thought.

Claimant testified that the foreman, Mark Imboden, saw him limping and asked him what was wrong. Claimant testified that he told Mr. Imboden what had happened and that he asked claimant if he wanted to go home early. Claimant testified that he told Mr. Imboden he could not leave early because he had ridden to work with Mr. Escue.

Claimant testified that after the trucks had quit coming in, and they had a little break, he went to Mr. Escue's vehicle to lie down. He testified that he overheard Mr. Imboden ask Mr. Escue what was wrong with "Doc," which is claimant's nickname, and that Mr. Escue said, "He hurt his back, stepped off that tractor."

Mr. Imboden testified that he did not witness an injury to the claimant that date, nor did claimant report any work-related injury to him on that date. He testified that he did see claimant lying down in Mr. Escue's truck but that Mr. Escue told him it was due to an "old injury" and would be okay after a few days.

Mr. Escue testified that he did not say anything about an "old injury" to Mr. Imboden. He testified that Mr. Imboden had asked him right in front of his vehicle what was wrong with claimant and that he told Mr. Imboden that claimant had hurt his back getting off the tractor. Mr. Escue testified that he had known claimant all of his life and that they had ridden together to work most of the time over the past four

to five years they had both been working as seasonal employees for respondent-employer.

Mr. Escue testified that on December 24, 2003, claimant seemed to be fine that morning, but after they had worked for a while and then started to take their lunch break, he noticed that claimant could barely walk. Mr. Escue testified that he asked claimant what was wrong and that claimant told him he had injured his back stepping down off the tractor. Mr. Escue testified that he had never known claimant to miss any work due to any previous back problems or to ever even complain of back trouble prior to December 24, 2003.

Ricky Holliman and Terry Franklin also testified, having worked with claimant on December 24, 2003. Each of the witnesses named who were working with claimant on that date, Mr. Escue, Mr. Imboden, Mr. Holliman, and Mr. Franklin, testified that they did not witness claimant's alleged injury. However, they each admitted that in their jobs, they frequently have their back to the tractor that claimant is driving and are paying attention to their own duties.

Mr. Holliman testified that he ordinarily works at the Hickory Ridge facility and generally does not work with claimant. However, he was working with claimant at the Augusta facility on December 24, 2003. He testified that he did not know about any alleged injury to claimant's back until he was called to talk to an attorney at the Fair Oaks facility and asked to give a statement. Mr. Holliman testified that Mr.

Escue told him that claimant was “down in his back,” but that that was the extent of it. Mr. Holliman testified that he did remember seeing claimant reclined in the seat of Mr. Escue’s car, however, on the date of alleged injury. Mr. Holliman testified that claimant and Mr. Escue generally took their breaks together, and that he and Mr. Franklin generally took their breaks together.

Terry Franklin testified that he also ordinarily worked at the Hickory Ridge facility but that he had been working at the Augusta plant with claimant and the other men mentioned. He testified that he had never before met claimant until he began working with him at Augusta. He testified that he did not witness an injury to claimant on December 24, 2003, and that he cannot remember whether anyone told him that claimant had injured his back on that date, but that he does remember seeing claimant lying in Mr. Escue’s vehicle on that date. Mr. Franklin testified that he had the flu on December 24, 2003, and was really keeping to himself that day and not paying much attention to anyone else.

Mr. Holliman and Mr. Franklin each testified that they had neither one ever heard claimant complaining of back problems prior to December 24, 2003. Each of the aforementioned witnesses testified that it is not abnormal for them to go to their cars during breaks in order to warm up.

Claimant testified that since it was Christmas Eve when he was injured, and since he knew he would be off work for the next four days, he thought his back would improve on its own; therefore, he did not seek medical attention immediately.

Claimant testified that by the end of that four-day period, he could not even walk. He testified that he tried to call the plant manager at the Fair Oaks plant, Jeremy Curtis, to let him know that he needed to see a doctor. However, he testified that Mr. Curtis was not in, so he spoke with Jerry Stracener, who is the sample house foreman. Claimant testified:

And I asked Jerry, I said what - - I said, "I need to go to the doctor, I can't walk. I need to put this down on workmen's comp." And he said, "Well," he said, "I don't know how you do it, I don't know what papers you get," and said, "Ollie's not here," which is the girl that works in the office, said, "She's not here either." He said, "The best thing you can do is call Hickory Ridge."

Q What's Hickory Ridge?

A Hickory Ridge is another plant up the railroad tracks about 15 miles. It's another Riceland Foods plant. And the manager was up there then. And Mr. Stacener said, "He'll know what to tell you."

So I called him and he told me, he says, "The girl who works in the office is not here." And I told him my problem. He said, "Well, I don't think it was reported to me that you got hurt." He said, "The best - -" Do you want me to say what he said?

Q Yeah, just go ahead and tell them.

A He said, "The only thing I know, you're [expletive] out of luck."

Claimant testified that he then tried to see Dr. Ungerank, a chiropractor at Wynne, but that Dr. Ungerank would not treat him. Medical records reflect that claimant did, in fact, see Dr. Ungerank on January 5, 2004. Dr. Ungerank's records state that claimant presented on that date with low back and left leg numbness. Listed under "Probable Cause" is "Stepped off a tractor." His notes further state: "See a Neuro."

Claimant testified that he then went back to Jeremy Curtis to let him know what Dr. Ungerank had suggested. Claimant stated that Mr. Curtis asked him if he would like to try to work there, in the plant, just sitting up in a chair without having to do anything. Claimant testified that he tried that for a few days, but that the pain worsened and he was required to go to the emergency room on January 11, 2004.

Claimant testified that while he was in the hospital, Mr. Curtis called and said he was coming over to bring workers' compensation paperwork for him to sign. Claimant testified that he did bring them, and claimant did sign the papers. He stated that he then had a call from a "lady from Houston" who told him that he would be sent a check every week and a card to get medication. However, he testified that he received no checks and was later notified that his claim was being denied. There was testimony that claimant was paid through January 23, 2004; claimant does not dispute this, if the pay records show same; however, he asserts that he did not work more than a "couple of days" in January of 2004.

Medical records reflect that claimant gave a consistent history to each provider, from whom he has received treatment, that he had twisted his back stepping off a tractor on Christmas Eve 2003 and was experiencing low back and radicular pain to his left leg. He was seen in the White County Medical Center Emergency Room on January 11, 2004, at which time an outpatient MRI was ordered for January 15, 2004.

The MRI of his lumbar spine showed the following:

- 1) Marked spondylosis throughout the lumbar spine most marked at L2-3, L4-5 and L5-S1. There is *mild broad based disk herniation L2-3 causing mild thecal sac indentation.*
- 2) Marked spondylosis L4-5 and L5-S1 with *broad based disk herniation at both levels more marked at L4-5.* There is thecal sac indentation and neuroforamina narrowing bilaterally at both levels. Reduced AP diameter of the spinal canal at both levels (9 mm at L4-5 and about 10 mm L5-S1).

[Emphasis added.]

Claimant was then seen again in the emergency room on January 25, 2004, and was admitted. Dr. Jonathon Palmer noted that claimant had previously been seen following an injury in December and that he had had an MRI on January 15, 2004. Based on the findings from the MRI and a consultation with Dr. Dan Moore, Dr. Palmer referred claimant to Dr. Patrick Chan.

Dr. Chan first consulted with claimant on January 26, 2004, and noted claimant's history of a work-related injury stepping down from a machine and twisting his lower back. Dr. Chan's diagnosis and recommendations were as follows:

Severe left lower extremity pain and low back pain following work related injury about three weeks ago. MRI of the lumbar spine demonstrated herniated nucleus pulposus at L4-L5 and L5-S1 with generalized degenerative changes with significant stenosis as mentioned above. His main complaint is left lower extremity pain, i.e. lumbar radiculopathy.

PLAN: I will try the patient on OxyContin today in addition to the short-acting narcotic. I will also change his Naprosyn to Voltaren. The patient had a dose of Decadron last night. I will perform lumbar epidural steroid injection tomorrow. I will ask physical therapy to see the patient today. I expect the patient to be discharged on January 28, 2004. The patient will need to be off work for six weeks or so. I will see the patient in the clinic in follow up in about a month. However, I will repeat lumbar epidural steroid injection in two weeks if his pain is still significant.

[Emphasis added.]

Records reflect that claimant did receive a lumbar epidural steroid injection on January 27, 2004, and was discharged from the hospital on January 28, 2004, being ordered to follow up with Dr. Chan in four weeks and to remain off work until March 15. Claimant received outpatient physical therapy thereafter and received another steroid injection on March 8, 2004. Claimant was discharged from outpatient physical therapy on June 14, 2004.

Testimony revealed that claimant had heart surgery at some point and was off work as a result of *that* procedure from June through August of 2004. Medical records reflect that claimant returned to Dr. Chan on September 29, 2004, but claimant testified that he then drew unemployment from September 1, 2004, through December of 2004. Claimant testified that in 2005 he began walking, as his heart doctor had recommended, but that this began to bother his back and left leg again.

Medical records reflect that claimant saw Dr. Chan again on February 18, 2005, and had another MRI of his lumbar spine on February 21, 2005. He received more injections from Dr. Chan on March 14, 2005, and March 28, 2005. Dr. Chan's notes reflect that, after failing nonoperative treatments, the claimant had a cervical/thoracic/lumbar fusion on August 12, 2005. On August 26, 2005, Dr. Chan fitted claimant with an external bone growth stimulator. As of the date of the hearing, claimant was scheduled for a follow-up appointment on January 16, 2006.

Jeremy Curtis, dryer manager of the Fair Oaks facility, testified that the harvest season usually runs from about mid-August to the first of September through probably mid-November. He testified that he then lets claimant work at the "Taggert" overflow facility in Augusta, unloading that building. Mr. Curtis testified that claimant never reported to him that he was injured on the job in December of 2003. He testified:

Well, he was gone for about a week following that Christmas holiday, and he called me probably about a week after, say, Christmas, and he said that he was down in his back, and that usually it

takes two or three days or so to get over it, and then as soon as he'll feel better, he'd be able to come to work.

Q Now, what did you take that to mean?

A I thought it was just like being sick. I thought it was personal.

Mr. Curtis testified that if claimant had ever mentioned that he had been injured on the job, he would have filed a claim, he would have had claimant document it on paper, and he would have asked claimant if he wanted to go to the doctor at that time or taken him to a company nurse. Further, he states that he would have required claimant to submit to a drug test, if he had claimed a work injury.

Mr. Curtis testified that the first time he learned that claimant was claiming he had injured his back at work was "probably just about the last week in January." He said claimant stated he was going to go to the chiropractor and was wondering how his employer was going to pay the bill. Mr. Curtis acknowledged that the records reflect, however, that claimant's only visit with the chiropractor was on January 5, 2004.

Mr. Curtis testified that claimant continued working until around January 23, 2004, according to his payroll records, although he acknowledged that medical records reflect that claimant was being treated during this period. He testified that claimant was performing set-up duties for respondent-employer during this period. Claimant had testified that he only weighed trucks for a couple of days.

Mr. Curtis testified that he told claimant respondents were not going to pay for his medical expenses because he did not believe it was compensable. However, despite this belief, Mr. Curtis nonetheless completed workers' compensation paperwork on January 27, 2004, after claimant had been admitted to the hospital. As indicated earlier, claimant first went to the hospital emergency room on January 11, 2004, and had an MRI on January 15, 2004, dates well before January 23, 2004.

Mr. Curtis testified that he did no investigation following the paperwork and did not specifically talk to anyone at the Taggart plant. He did admit that Benny Escue told him that claimant was "down in his back because of the tractor."

Claimant testified that he was never offered to return to work for respondent-employer. However, he admitted that he never checked into returning to work for respondent-employer, even on light-duty, because he thought none would be available, even though it was the harvest season. He testified that from the date of injury until his surgery in August of 2004, his left leg and foot would go numb when he tried to walk. He testified that he never had a day that he was pain-free. He testified that after the surgery, the leg/foot problem went away, but that his back continues to hurt.

FINDINGS OF FACT

1. The stipulations agreed to herein by the parties are accepted as fact;

2. Claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury arising out of and during the course and scope of his employment on December 24, 2003;

3. Claimant has proven entitlement to TTD benefits from January 26, 2004, to March 15, 2004, and again from August 12, 2005, and continuing through a date yet to be determined.

4. Claimant is entitled to medical benefits, both past and future, that are reasonably necessary in relation to his work-related injury of December 24, 2003;

5. Respondents have controverted the claim in its entirety.

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, each medical record is consistent in the history given by claimant of the cause of his pain and the nature of his injury. The MRI indicates some degenerative problems but indicates disc herniation, as well. Claimant denied having any prior significant back problems, and no medical evidence of any prior back problem was introduced to rebut that. The claimant was very credible, in this examiner's opinion. It is no surprise to this examiner that claimant chose to wait a few days before rushing to the doctor to determine what his diagnosis was. It was the Christmas holiday, and it seems logical and understandable to this examiner that claimant believed resting his back would help. Each of the witnesses who were working at the same facility on the date of injury testified that they saw claimant lying down in Mr. Escue's vehicle and that they had never known of him to complain of back pain prior to that date.

In short, it is this examiner's opinion that claimant has met his burden of proving by a preponderance of the credible evidence that he sustained a compensable injury arising out of and during the course and scope of his employment with respondent-employer on December 24, 2003.

With regard to claimant's claim for TTD, the law is clear that temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages; the healing period is that period for healing of an accidental injury that continues until the employee is as far restored as the permanent character

of his injury will permit, and that ends when the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Carroll Gen. Hosp. v. Green*, 54 Ark. App. 102, 923 S.W.2d 878 (1996). The Court of Appeals has held that the determination of when the healing period has ended is a factual determination for the Commission and will be affirmed on appeal if supported by substantial evidence. *Id.* These are matters of weight and credibility, and thus lie within the exclusive province of the Commission. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002).

Here, claimant admits that he was paid by respondents through January 23, 2004. He was first taken off work by Dr. Chan on January 26, 2004, at which time Dr. Chan noted that he would need to be off work for about six weeks. On January 28, 2004, claimant was discharged from the hospital and it was noted that he would be off work until March 15. The Form N, First Report of Injury, is dated January 27, 2004. It is this examiner's opinion, therefore, that claimant is entitled to TTD benefits from January 26, 2004, through March 15, 2004.

Claimant was then admittedly off work from June through August 2004 due to heart surgery. Next, he admittedly received unemployment benefits from September through December of 2004, indicating to the unemployment office that he felt well enough to apply for jobs and work. Claimant did begin seeing Dr. Chan

again in February of 2005, complaining of recurrent lower back and leg pain but was placed under no restrictions at that time by Dr. Chan. It may be that since claimant was not working at that time, Dr. Chan did not note the restrictions; however, that requires speculation on this examiner's part.

Claimant did have back surgery on August 12, 2005, and obviously would have been incapacitated following that procedure. He was, at the time of hearing, scheduled for follow-up on January 16, 2006, having not yet been released from his physician's care. As such, and based on the above, it is this examiner's opinion that claimant is entitled to further TTD benefits commencing August 12, 2005, and continuing through a date yet to be determined.

AWARD

Respondents are directed to pay claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay claimant additional temporary total disability indemnity benefits commencing February 17, 2005, and continuing until a date yet to be determined.

Respondents are directed to pay all past and future medical expenses incurred by claimant that are reasonably necessary in relation to his work-related injury of December 24, 2003.

Respondents are directed to pay the claimant's attorney, Mr. M. Keith Wren, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge