

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F308465

RANDALL POWELL, EMPLOYEE

CLAIMANT

SELECT CONCRETE COMPANY, EMPLOYER

RESPONDENT

**BITUMINOUS CASUALTY CORPORATION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED OCTOBER 27, 2006

Hearing before Administrative Law Judge Barbara W. Webb on July 26, 2006, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. C. Michael White, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on July 26, 2006, before Administrative Law Judge Barbara Webb. A prehearing telephone conference was held in this case on December 13, 2004, before Administrative Law Judge Cynthia Estes Rogers. The Prehearing Order was entered in this case on December 13, 2004. The case was subsequently assigned to this Administrative Law Judge for the purpose of conducting a hearing on the merits and all further proceedings in the case. The Prehearing 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 Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations were submitted by the parties in the Prehearing Order and as adopted on the record are hereby accepted:

1. Existence of the employer/employee relationship on June 27, 2003.

2. Compensation rate: average weekly wage of \$509.00 resulting in a TTD rate of \$339.00.

By agreement of the parties, the issues to be litigated are:

1. Compensability.
2. Claimant's entitlement to associated benefits.

The record consists of a one-volume transcript of the July 26, 2006 hearing, consisting of the testimony of Randall Powell, James Wilson, Robert Avery, Vanessa Sanford, Jerry Word, McKinley Reese, and Jessie Wright, and all documentary evidence, consisting of Commission Exhibit No. 1 (Pre-hearing Order), Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (medical records); and Respondents' Exhibit No. 2 (non-medical records and Deposition of John L. Fox, M.D.)

FACTUAL BACKGROUND

The claimant is forty-one years old (DOB 10-27-65). He completed twelfth grade but did not receive his high school diploma. He received specialized training in welding and truck driving and earned a welding certificate and a CDL license. He worked for Select Concrete for two years. His primary job duties involved driving a cement-mixer truck. If he was not on the road, he worked in the shop performing various job tasks, including changing oil, tires, etc.

He testified that on June 23, 2003, he suffered a compensable on the job injury to his low back while changing tires on an 18-wheeler used to haul sand and gravel. He described the incident: "I was helping Reese take tires off the truck. After we got the lugs off the tire, I turned my back to the tire to try to lift it up over the axle. It got hung or

something and I couldn't get it up, and that's when I hurt my back." He explained that he backed up to the tire and was lifting the tire at waist level behind him. He felt a sharp pain and became dizzy. The pain was in his lower back and hip. He rested for about 10 minutes and tried again to break the tire off the rim with tire tools and a sledgehammer. He testified that he told his co-worker, McKinley Reese, that he had hurt his back at the time of the incident. He explained that he continued to work after the incident but asked Jessie Wright to drive for him due to the pain. He testified that he reported the incident to Jim Farrell, his supervisor. He explained that Farrell responded "That I didn't have a back; I had a gristle" and required him to drive the truck. He testified that he reported the incident to the owner, Jerry Word, the next morning. He testified that he had not had problems with his back prior to June 23, 2003. He explained that he had a previous back injury at Westside Tree Service in 1999 when a tree limb fell and hit him in the middle back. At that time, he sought medical treatment and was off work for two weeks. He explained that during the previous incident, he was injured in a different part of his back and the pain was more like a sore muscle. He testified that after the incident on June 23, he was in more agony and had real sharp pains in his lower back.

He testified that he sought medical treatment on Friday, June 27, 2003. He presented to his family doctor, Dr. Maxwell, and told the doctor that he had hurt himself at work. He testified that he could not explain the absence of any notation of the injury in the report provided. He was ultimately referred to Dr. Simpson. He underwent an MRI and could not explain why the report of the MRI states "no known injury". He understood that the test showed he had two herniated discs. He testified that he underwent surgery at UAMS performed by Dr. Fox through a program for people who can't otherwise afford

medical treatment. He worked light duty for the period between June 23 and August 4. He quit working in August of 2003 in order to have the surgery. While he worked for Select Concrete, he also performed odd jobs for Mr. Word at his home and his nickname at work was "Jerry's son." He explained that he was still having problems with standing too long and sitting too long.

On cross-examination, the claimant testified that his supervisor listed the date of June 27, 2003, as the date of his injury on his claim form by mistake. He had previously filled out workers' compensation forms when he was injured in 1999. He denied telling Dr. Simpson that he had the pain for about two months. He testified that he continued working by driving a load after the incident because Jim Farrell "got in my face and told me if I didn't take that load out, he was going to fire me or something." He clocked out about 3:30 or 4:00 that afternoon after the incident and returned to work for three days. On Friday, he went to see a doctor, Dr. Maxwell. He explained that he returned to Dr. Maxwell for a follow-up visit on July 14, 2003. He could not explain why the July 14, 2003 report had a line drawn through the word "accident". He has applied for social security disability and been turned down twice. He is paying child support on three children and is delinquent on his payments.

On redirect, the claimant testified that he provided the doctors a consistent history that he hurt his back while changing a tire at work. He testified that he had not been able to work due to the pain. He did not have trouble with his back between 1999 and June of 2003. He explained that he worked continuously except for the period of time that he was incarcerated in 1997. He felt like his lumbar surgery was successful and his condition improved but since then he understood that arthritis had set in and he has problems when

it rains. He continues to take Lorcet, an arthritis pill, a blood pressure pill, a muscle relaxant, and Hydrocodone. He went to therapy and was supposed to have another MRI.

James Wilson testified for the claimant. He works for Select Concrete and was the claimant's father-in-law for a period of time. He was not aware the claimant had any back problems until the day he told him he had hurt his back picking up a tire. He told the claimant to report the incident to the secretary or the supervisor so they could get him to the doctor. He could not recall the date he was told. He explained that he told him to report it because he was familiar with the policy since he had a previous claim. He testified that he had worked for Jerry Word for six years and three days. He testified emphatically that the way to file a workers' compensation claim was communicated to the employees. He was limping and appeared to be having some problems. He testified that Jim Farrell was good about reporting claims. He explained that the company policy is posted to report any injury to your supervisor or the secretary.

The claimant also called Robert Avery. Avery worked with the claimant and became aware of the claimant's back injury when the claimant came in and laid down across the bench next to where he was loading concrete. When Avery questioned the claimant as to what was wrong with him, the claimant responded "I hurt my back yesterday changing a tire." He asked the claimant if he had told anybody and the claimant told him that he hadn't yet. Avery testified that he had a workers' compensation injury that was reported and his medical bills were paid. He explained that if you report an injury, the company tells you which doctor to go see.

The claimant also called Vanessa Sanford. She is the claimant's girlfriend and was living with the claimant on June 23, 2003. She explained that she could tell the claimant

was hurting from her observations of the pain in his face and he was holding his back. He told her that he hurt his back helping Reese change a tire. She had not observed the claimant with any back problems prior to June 23, 2003. After the June 23rd incident, the claimant could not mow the yard or work on the cars like he had previously.

The respondents called Jerry Word. Word owns Select Concrete along with his partner, Cary Qualls. He explained that Select Concrete sells ready-mix concrete and hauls gravel, sets forms, and finishes concrete. He explained that there is a poster on the wall telling employees what to do in case they get hurt, and that the policy is gone over with everybody who is hired there. He explained that the policy is that the employee should tell the supervisor, Word, or Karen Peters, the secretary in the office. He testified that Jim Farrell was his manager and had been in the concrete business for 31 years. He testified that there had been some workers' compensation claims. He explained that after a report of injury, the person is taken to the doctor and paperwork is completed and sent to the insurance company. He explained a record is made whether they go to the doctor or not. He explained that Jim Farrell has always followed the policy. He testified that the claimant did not report an injury to him on June 23 or June 24, 2003. He explained that he learned that Powell was claiming an injury on July 30, 2003, the date of the First Report of Injury. He testified that he was traveling to Pine Bluff to pick up materials when Powell called him on his cell phone. He turned around and called his office. Powell's words were "I hurt my back. I don't know how I hurt my back, but I know I hurt it at work." He replied that if Powell could not tell him how he hurt his back at work, he could not help. Powell did not mention lifting a tire or having reported the incident to anyone else. He testified that if the claimant had reported the incident, he would have been taken to doctor either of his choice or one

normally used by the company. He explained that Powell was a good employee and there was a good working relationship (including a lot of horseplay) between them. He testified that during the time of his employment, Powell had complained of back problems off and on. On cross-examination, he testified that he knew that Powell had seen Dr. Maxwell but believed he went to the doctor for diarrhea. He did not recall knowing that Powell had an MRI but had heard some talk in the shop that Powell had been hurt.

The respondent also called McKinley Reese to testify. Reese testified that he had worked for Select Concrete for about six years. He testified that he was familiar with the workers' compensation procedures at Select Concrete. He explained that if there's an accident where you get injured, the employee should report it as soon as possible. He testified that he was not a supervisor. He explained that part of his job duties at Select Concrete included changing tires and driving an 18 wheeler materials truck that hauled rock, sand, and gravel. He testified that there were times over the six-year period where Powell would work with him changing tires on trucks. He testified that he did not have a recollection of Powell ever telling him that he had injured his back while changing a tire on a truck. He remembered Powell saying that he had hurt his back when he came over to Reese's house two or three weeks after Powell filed the claim. He testified that it could have happened but he just didn't remember it. He did not recall ever hearing the claimant say he was going to have to sit down and rest for a few minutes since he had an injury. On cross-examination, he testified that he could not say one way or the other whether the claimant had hurt his back. He recalled working with the claimant changing the tire but could not recall the specific date.

The respondent also called Jessie Wright. Jessie Wright has worked for Select Concrete for five years. Wright testified that he recalled an incident when the claimant was at the batch house and mentioned to him that he had hurt his back. He did not recall the claimant telling him in the shop or that the claimant said anything about working with McKinley and lifting a tire. He did not recall the claimant asking him to take out a load for him because he had hurt his back. He was familiar with the procedure for reporting workers' compensation injuries. He did not recall the claimant telling him that he had gotten hurt at work or needed medical treatment, but did remember hearing the talk around the shop about Powell hurting his back when he was lifting a tire. He did not recall the claimant ever asking him to drive a load because he couldn't for health reasons and could not explain why his name was provided as a witness by Powell on the incident report.

The medical records in the case reflect that the claimant presented to the Family Health Care Center on June 27, 2003, complaining that he was nauseated with left hip pain. He denied an injury. The record of the visit reflects that the claimant's weight was 279 pounds. He was diagnosed with obesity and x-rays were taken of his left hip. He was treated conservatively with prescription medication and asked to return on July 14, 2003. The claimant once again presented to the Family Health Care Clinic complaining that his left hip and leg was still hurting, numbness in his big toe, and tingling down the back of his leg. He was referred for an MRI. An MRI was performed on July 17, 2003, at the request of Dr. Maxwell. The history provided was "low back pain; left hip and leg pain; left leg numbness; no known injury." The results of the MRI reflected degenerative disk disease, a left paracentral disk herniation at L4-5 and a second left paracentral disk herniation at

L5-S1 with involvement of the L5 and S1 nerve roots, respectively, suggested. On July 23, 2003, the claimant again presented to the Family Health Care Center for purposes of reviewing the MRI results and complaining that he was still hurting bad and requesting pain medications. He was referred by Dr. Maxwell to a neurological specialist, Dr. P. B. Simpson, Jr.

On August 4, 2003, the claimant presented to Dr. Simpson complaining of pain in his lower back and left hip that goes down his left leg and also complains of numbness in his left foot. Dr. Simpson notes "this gentleman was working, changing a tire at Select Tire about two months ago. He hurt his back, but actually when it happened he had a little back pain and thought that he might have a kidney problem. He went to his doctor twice for a kidney problem and then he finally complained of having some pain in his back going down into his right hip and his left leg." Simpson reviewed the MRI films and recommended the claimant undergo surgery. He prescribed Percocet and noted that the claimant would call when he had obtained workers' comp status to be authorized for surgery. He indicated that the claimant would remain off work until he could be scheduled for surgery and then remain off work pending recovery from surgery.

On August 15, 2003, the claimant returned to the Family Health Care Clinic, presenting with bad left hip pain. His prescription medications were continued.

On August 28, 2003, he was examined by Dr. Abramson, a neurosurgery resident at UAMS. The notes reflect that he was assessed as a 38 year-old male with low back pain that began when he was changing a tire on an 18-wheeler several months ago. The claimant was given a prescription of Vioxx and instructed not to lift anything.

On September 18, 2003, he returned for evaluation by Dr. Fox at UAMS. At that time, he stated that he had left hip pain and tingling in his left toes. He stated that the symptoms started after he changed a tire on his truck and felt back pain acutely. He was scheduled for surgery on October 6, 2003. On October 6, 2003, claimant underwent an L5 microdiscectomy. On November 18, 2004, claimant underwent a second MRI of his lumbar spine. The impression was

left L4-5 laminectomy and left-sided L4-5 discectomy. No focal residual or recurrent disk herniation is seen. However, there is a moderate amount of hypertrophic scar in the left lateral and epidural space surrounding the left L5 nerve root. There is a diffused residual bulge of the L4-5 disk. Number two, approximately three to four millimeters left-sided central disk protrusion of the L5-S1 disk associated with a full thickness annulus tear which contacts the left S1 nerve root which may be possibly impinged.

On June 6, 2005, Dr. Fox indicated by letter that he had reviewed the claimant's records and had no question that he injured his back while he was changing a tire on an 18-wheeler at work in June 2003. As a result, he notes that the claimant developed a ruptured disk at the L4-5 level on the left side of the lumbar spine which ultimately resulted in a microlumbar discectomy at L4-5 on 10/06/03. He further stated "with a reasonable degree of medical certainty, the injury (the only injury that we have in our records) occurred while he was at work changing the tire on his truck."

The records further indicate that the claimant filed a workers' compensation claim in connection with a back injury on March 15, 1999, while working for West Tree Service. The respondents offered medical records reflecting that claimant sought treatment on March 16, 1999, in connection with a back injury when a limb hit him in the back. Clinic notes reflect that he fell approximately 30 feet and had pain in the low back worse with

movement of the lower left extremity and left lumbar. He was treated conservatively with heat and prescription medications, and x-rays were taken of his spine. On March 16, 1999, the x-ray results showed that there was "no active disease and no fracture." On March 23, 1999, he returned for a follow-up at the Monticello Medical Clinic, complaining that his back was better but still that it still hurt to bend over. He was evaluated on March 30, 1999, and released to return to work.

Records further indicate that claimant was released by Dr. Maxwell to return to work on July 15, 2003, after the examination on July 14, 2003. The records further show that when the claimant present to Dr. Simpson on August 4, 2003, he was continuing to work. The First Report of Injury or Illness filed by Select Concrete Company reflects that the claimant had reported an injury on July 30th of 2003, contending that he had injured himself on June 27, 2003 while taking a tire off a rim.

The respondents further offered the testimony of Dr. John Fox by deposition. Dr. Fox testified that he first treated the claimant on August 28, 2003. The claimant was evaluated and, subsequently on October 6, 2003, underwent an L4-5 microdiskectomy. The doctor testified that the surgery was successful and that he continued to see the claimant for follow-up. On February 19, 2004, the claimant returned for follow-up and was still having pain in his back and leg. He was referred for physical therapy for eight weeks. A second MRI was performed to determined why the claimant was still having pain and to determine the amount of scar tissue versus recurrent disk protrusion or a missed disk. Dr. Fox testified that, at the time of the surgery, the doctors had elected not to do anything about the L5-S1 disk herniation because they did not believe it was significant. He indicated that the doctors had looked at both MRIs, did not see any changes, and therefore

did not recommend treatment based on the findings at L5-S1. Dr. Fox testified that he could not determine whether the claimant had reached maximum medical improvement after surgery because he had not seen him for almost a year. At his last follow-up treatment, he was put on Bextra, an anti-inflammatory medication and over-the-counter Tylenol and was referred to his family doctor for pain medications. He testified that the records reflected that the claimant had a form of arthritis that often develops around ruptured disks as time goes by. He noted that the claimant had degenerative disk disease. He noted calcifications and explained their presence as a form of osteoarthritis. He explained that people experience herniated disks without an inciting incident probably 50 percent of the time. He testified that the opinion given in his letter that the ruptured disk was caused by an injury that the claimant experienced at work was based on the patient's history that the claimant provided. He further testified that the history did not include the doctor's records who initially treated him. He indicated that he based his opinion on the history that was given to Dr. David Abramson on August 28, 2003. He indicated that the findings upon examination of the claimant were consistent with the description and the lifting of the tire that could weigh in excess of 100 pounds. He indicated that if it was the claimant's testimony that he wasn't having any problem until he lifted the tire, but then had immediate low back pain and pain going down his leg, that would be consistent with his opinion of when the disk had ruptured. He indicated that the calcification was probably there before the disk ruptured and that the observation of degenerative disk disease does not have clinical significance in trying to determine when the disk ruptured, but rather the acuteness of pain and the onset of pain has more clinical significance. He testified that the

second MRI reflected that Powell mainly had scar tissue attributable to the surgery and that he did not find anything that would change his opinion as expressed in his June 6 letter. He testified that normally people are back to work in six weeks following the surgery. He testified that the claimant would have been back to work at least within a year, but could not testify as to what he was doing now since he had not examined him recently. In conclusion, Dr. Fox testified as follows:

Q. I think, Doctor, and please correct me if I'm mischaracterizing your earlier testimony, but I think you told me that about half the time these disk ruptures occur as a result of some specific incident and about half the time there is no inciting incident.

A. That's right.

Q. Is that based upon what you've observed clinically over the years, based on research question or what is that based upon?

A. What I have observed clinically over the years.

Q. And so a disk problem like the one that this claimant experienced is something that does happen to people even without an inciting incident?

A. Yes.

Q. And so we simply have to rely upon the claimant's word for the causation opinion that you have given in this case?

A. Right.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employee/employer/carrier relationship existed at all relevant times, including February 10, 2005.

- 3.. Claimant has failed to establish by a preponderance of the evidence that he had a compensable injury on February 10, 2005.
4. Respondent has fully controverted the payment of all additional benefits.

DISCUSSION

The claimant contends that he suffered a compensable injury to his back on June 23, 2003, while lifting a tire; and that he is entitled to temporary total disability benefits until a date yet to be determined and medical benefits related to his compensable injury. The respondents contend that the claimant did not suffer a compensable injury to his low back on June 23, 2003; and that claimant suffers from a preexisting condition.

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”: (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. A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). 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. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). 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 has offered the testimony of his co-workers and medical records to corroborate his version of the events leading to his alleged injury. However, none of the other co-workers testimony is consistent with the testimony of the claimant. The claimant testified that he was working with Reese McKinley when the incident occurred. McKinley had no recollection of the incident in question. Although other co-workers remembered the claimant complaining of back pain, none of the witnesses offered evidence of when such an incident occurred. Word specifically recalls that he was first contacted by the claimant almost five weeks after the alleged incident but that the claimant could not tell him how he had been injured at work. Moreover, the medical records reflect that the claimant did not report an injury on the job until after receiving the MRI results indicating that he would need surgery.

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000). In addition to his own testimony, the claimant relies primarily on the testimony of the opinion of Dr. Fox. Dr. Fox rendered a medical opinion that the claimant's need for medical treatment was caused by an on the job injury. However, on examination, even though Dr. Fox stated that the claimant's medical problems were caused at work, the doctor is clearly relying on statements of the claimant.

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 the instant case, It is clear from the medical evidence that objective medical evidence established the claimant's need for surgery to his back. The primary dispute is whether claimant has established a causal connection between an alleged 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. Simpson and Dr. Fox 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. Van Wagner, 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).

Although Dr. Fox's letter dated June 6, 2005, appears to be stated in terms "within a reasonable degree of medical certainty," his deposition testimony clearly demonstrates that his opinions were based on the claimant's version of the events without reference to earlier medical reports. In addition, Dr. Fox acknowledged that the claimant had

degenerative problems and that there was a 50% chance that the rupture could have occurred without an inciting event.

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