

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F410373

CHARLIE WILBORN, EMPLOYEE **CLAIMANT**

**HELENA PAVING & MATERIAL COMPANY,
EMPLOYER** **RESPONDENT**

**COMMERCE & INDUSTRY INSURANCE COMPANY
C/O AIG CLAIMS SERVICES (TPA),
CARRIER** **RESPONDENT**

OPINION FILED MARCH 2, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on December 2, 2005, in Helena, Phillips County, Arkansas.

Claimant appeared pro se.

Respondents represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

A hearing was held on December 2, 2005, to determine compensability of claimant's claim, as well as claimant's entitlement to additional benefits.

The parties stipulated to the existence of the employer/employee relationship on September 23, 2004. It was further stipulated that the claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$223.00 for temporary total disability benefits and \$167.00 for permanent partial disability benefits, based on an

average weekly wage of \$333.90. The claim was initially accepted as compensable and some medical expenses have been paid by respondents.

Claimant contends that he was injured while employed with respondent-employer on September 23, 2004, and that he is entitled to the payment of all his medical expenses, medication, and mileage that was not paid in association with this injury, in addition to temporary total disability benefits. Claimant was initially treated at the Helena Regional Medical Center and was seen by the company doctor, Dr. Johnny Paine. Both of those treatments were paid by respondents. However, claimant contends that he, on his own, sought treatment by Dr. Webber, and other physicians referred to by Dr. Webber, and that these expenses were not paid by respondents. Claimant contends that he sought a change of physician by the Commission, which was denied.

Respondents' contentions, as stated at the hearing, are that this claim was initially accepted as compensable and benefits were paid in association with claimant's injuries. However, based upon a lack of objective findings subsequent to some initial medical treatment, the claim was then controverted. Claimant then sought treatment from an unauthorized treating physician, Dr. Webber, without a change of physician order first being entered by the Commission. As such, it is respondents' position that any treatment by Dr. Webber, or any doctors to which

claimant was referred by Dr. Webber, was not authorized and was, in any event, not reasonable and necessary, and respondents are not liable for same.

Respondents further contend that medical records do not show entitlement to temporary total disability benefits in the event additional medical is found due and owing. Respondents contend that claimant was released to return to work by Dr. Paine, was offered light-duty work, and that claimant refused same. As such, respondents contend that they should not be liable for temporary total disability indemnity benefits, even if medicals support the same. Respondents contend that all appropriate benefits have been paid with regard to this claim.

STATEMENT OF THE CASE

_____ Claimant is a fifty-year-old highschool graduate, who attended five years of college, following highschool, although he did not obtain a degree. According to claimant's deposition of August 1, 2005, which was introduced as an exhibit, claimant has had various jobs over the years and has been diagnosed as being paranoid schizophrenic and bipolar, with multiple personality disorder.

Claimant testified in his deposition that he had been working for respondent-employer for a little over a year, at the time of his September 23, 2004, injury. At the hearing, claimant testified that on September 23, 2004, he was working for respondent-employer in Marianna, Arkansas, planting seeds and spreading hay at an airstrip they had built. He testified that as he started to pass a bale of hay to another

worker, his left leg went down into a hole and caused him to fall. He asserts that he injured his neck, lower back, and left ankle, which already had pins in it from an unrelated matter.

Claimant testified that he told Bobby Pritchard, who was in charge on the job site that day, about his injury and that Mr. Pritchard told him that the rest of the crew would finish unloading the hay. Claimant testified that he got up the next morning and could not move. He called Theresa Hill, the owner's wife who runs the office, and she told him to go to the hospital and to see Dr. Johnny Paine, the company doctor.

Medical records indicate that claimant was seen by Dr. Paine in the emergency room at Helena Regional Medical Center on September 24, 2004. X-rays were ordered by Dr. Paine, and the radiology report of September 30, 2004, indicates normal findings for the ribs and lumbosacral spine series, as well as the following: "Moderate degenerative disk disease at C5 through C7, with mild degenerative facet changes from C3 through C7. *No acute traumatic changes.*" [Emphasis added.]

Also contained in the records is a return-to-work slip from Dr. Paine, stating that claimant will be able to return to work on October 7, 2004, and will be on light duty for seven days. No other records from Dr. Paine were introduced into the record, although claimant testified that he had seen Dr. Paine in his office, as well as at the hospital.

Raymond Hill, owner of respondent-employer business, testified that light-duty work was made available to claimant, pursuant to Dr. Paine's orders, but that claimant never returned to work for them until July of 2005. Claimant admitted that he knew light-duty work was available and that he had been released to return to light-duty work by Dr. Paine; he contends, however, that he was not able to return to work because he would have to walk three miles to work every day and he "couldn't hardly even walk a hundred yards." Mr. Hill testified, however, that he frequently picked workers up and drove them to the work site and that he would have picked claimant up if claimant had asked. Claimant admitted that this was true.

Claimant testified that he began seeing Dr. Webber right after Dr. Paine released him and that Dr. Webber kept him off work until November 17, 2004. Other than off-work slips, no records from Dr. Webber were introduced. The first slip notes that claimant had been under Dr. Webber's care from "10/7/04." In order for his treatment by Dr. Webber to be paid by respondents, claimant then petitioned the Commission for a change of physician on October 22, 2004; however, it was *after* he had already begun seeing Dr. Webber on October 7, 2004, according to the off-work slip in the record.

Respondents had controverted the claim and filed their AR-2 form with the Commission on November 2, 2004, indicating that the claim had been controverted. On November 23, 2004, claimant's petition for a change of physician was denied by

the Medical Cost Containment Department, due to respondents' controversion of the claim. The letter notes that in the event claimant's claim is found to be compensable, he would then be able to re-submit his request for a change of physician. Claimant continued, nonetheless, to see Dr. Webber, who then referred claimant to various other doctors.

During the hearing, claimant presented unpaid radiology and physical therapy bills. Claimant testified that Dr. Paine had referred him to physical therapy before the claim was controverted. Respondents agreed on the record to accept responsibility for those bills, as they were incurred prior to controversion of the claim.

Claimant further asserted at the hearing that he had incurred expenses for travel to and from his medical treatment and physical therapy. Claimant seeks reimbursement for said travel expenses.

FINDINGS OF FACT

1. The stipulations agreed to herein by the parties are accepted as fact;
2. All unpaid expenses for authorized medical treatment, including physical therapy, and medication expenses, incurred by claimant prior to controversion of the claim and in relation to the alleged injury of September 23, 2004, shall be the responsibility of respondents;
3. Any and all travel or mileage expenses incurred by claimant during the time period between the date of alleged injury, September 23, 2004, and

the date the claim was controverted, in relation to authorized treatment or therapy for this injury, shall be the responsibility of respondents, if claimant will submit an itemized travel expense or mileage statement to respondents;

4. 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 September 23, 2004, or that any work-related injury he may have sustained was the major cause of his condition;
5. Claimant was released to return to work by Dr. Paine on October 7, 2004, with the first seven days of his return being light duty;
6. Light-duty work was made available to claimant, and claimant refused same;
7. Claimant began unauthorized treatment from Dr. Webber prior to requesting a change of physician from the Commission and after the claim had been controverted;
8. Claimant has failed to prove entitlement to any additional benefits, whether they be temporary total disability indemnity benefits or medical benefits.

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, the only medical evidence submitted found that claimant's problems were degenerative and that claimant had sustained "[n]o acute traumatic changes." Other than that radiology report, the only other items submitted from doctors as evidence were the slips from Dr. Paine, stating that claimant could return to light-duty work on October 7, 2004, and off-work slips from Dr. Webber, an unauthorized treating physician, with no medical records attached.

Respondents acknowledge that they did accept the claim as compensable at first and, therefore, have now agreed to pay for any and all expenses incurred by claimant with regard to this alleged injury that were incurred prior to the controversion of the claim. With regard to claimant's request for temporary total

disability indemnity benefits, however, the claim has been found to be non-compensable; as such, claimant is not entitled to an award of temporary total disability indemnity benefits.

With regard to claimant's assertion that his change of physician request should have been granted and that his unauthorized treatment by Dr. Webber, as well as the physicians Dr. Webber referred him to, should be paid for by respondents, Ark. Code Ann. § 11-9-514 states, in pertinent part, as follows:

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, *shall be at the claimant's expense.*

* * *

(f) *When compensability is controverted,* subsection (b) of this section shall not apply *if:*

(1) The employee requests medical assistance in writing prior to seeking the same as a result of an alleged compensable injury;

(2) The employer refuses to refer the employee to a medical provider within forty-eight (48) hours after a written request as provided above;

(3) The alleged injury is later found to be a compensable injury; *and*

(4) *The employer has not made a previous offer of medical treatment.*

[Emphasis added.]

Certainly, in this case, the employer had made a previous offer of medical treatment from the company doctor, Dr. Paine, who found that claimant's injuries were not related to his work and released him to return to work. The claim was

controverted once Dr. Paine released the findings from the radiology report. Moreover, claimant began seeing Dr. Webber *before* seeking a change of physician from the Commission and after the claim had been controverted. In addition, the claim has been found to be non-compensable. For these reasons, claimant has failed to establish entitlement to treatment from Dr. Webber at respondents' expense.

In short, a preponderance of the credible evidence fails to establish that claimant sustained a compensable injury. As such, other than the medical expenses and mileage expenses incurred prior to controversion of this claim, for which respondents have agreed herein to be responsible, claimant has failed to prove entitlement to any additional benefits. For the above-stated reasons, the remainder of this claim is respectfully denied and dismissed.

AWARD

_____ Respondents have agreed and are ordered to pay all unpaid expenses for authorized medical treatment, including physical therapy, and medication expenses, incurred by claimant prior to controversion of the claim and in relation to the alleged injury of September 23, 2004.

Respondents are further ordered to pay any and all travel or mileage expenses incurred by claimant during the time period between the date of alleged injury, September 23, 2004, and the date the claim was controverted, in relation to authorized

treatment or therapy for this injury. Claimant must submit an itemized travel expense or mileage statement to respondents in order to be reimbursed.

This claim is respectfully denied and dismissed as to all other issues.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge