

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM E813422

**BRUCE S. DEUTSCHER,
EMPLOYEE**

CLAIMANT

**ALUMINUM COMPANY
OF AMERICA,
SELF-INSURED EMPLOYER**

RESPONDENT

**COMPENSATION MANAGERS, INC.,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED MAY 29, 2007,

Pursuant to a hearing conducted April 11, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Terrence C. Jensen, Attorney at Law, Benton, Arkansas, appearing for the claimant and

Mr. J. Phillip Carroll, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to address the issues of compensability of the claimant's hip condition and the extent of permanent disability resulting from his admittedly compensable low back injury.

The claimant contended that the condition of his hip was either a compensable consequence of his compensable back injury or a direct result of the original incident of the injury on October 21, 1998, so that he should be awarded additional benefits for his hip condition, including reasonably necessary medical and related expenses, such as the expense of his hip replacement surgery, and indemnity benefits.

The claimant further contended that he should be awarded additional benefits for wage loss disability substantially in excess of his anatomical impairment that resulted from his admittedly

compensable back injury. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant's hip pathology was neither a compensable consequence of his compensable back injury nor a separate compensable injury, so that the related medical care, including surgery, was not reasonably necessary in connection with the compensable back injury. They also contended that the claimant's hip problems are unrelated to his employment but resulted from other causes, including alcohol and/or drug abuse.

They further contended that the claimant was not entitled to wage loss disability benefits exceeding his anatomical impairment and that his compensable back injury was minor.

The record, which included documentary evidence and the testimony of the claimant and Robert White, was closed at the conclusion of the hearing consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant sustained a compensable injury to his
3. The preponderance of the evidence fails to show that the claimant's hip condition was either a compensable injury or a compensable consequence of his compensable low back injury.

4. The preponderance of the evidence fails to show that the claimant is entitled to wage loss disability in excess of his anatomical impairment.

DISCUSSION

On or about October 21, 1998, the claimant suffered an injury to his low back during his employment when he was attempting to lift an elevator door manually. The parties do not dispute the occurrence of the back injury and the reasonableness of the treatment he received, including surgery which was performed January 6, 2003, by Dr. Jim J. Moore and Dr. John L. Wilson. Following the surgery, claimant's impairment was rated at 15% to the body as a whole, also an issue upon which the parties agree.

Thereafter, in early October, 2003, the claimant's right hip joint collapsed while he was walking through a store, causing him immediate distress which required him to assist himself to his car by leaning on a shopping cart. The claimant testified that he had been limping around because of his back injury and felt that his hip problem had been brought on by the altered gait he had adopted because of the discomfort associated with his back.

In February, 2004, Dr. Wilson diagnosed the claimant's condition as osteonecrosis and recommended hip replacement surgery on the right. Claimant consulted Dr. William Hefley for a second opinion and authorized Dr. Hefley to perform the hip replacement surgery in July, 2004. The claimant testified that he had very good result from this surgery but that he was substantially disabled as the result of his back injury.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

First, as to the issue of his hip condition, the claimant admits that his physicians disagree with his belief that the back injury contributed to his hip problems. The record shows that he has bilateral osteonecrosis and that this condition is the reason for the collapse of his right hip. The record also fails to show any medical basis for the claimant's belief that his hip condition was the result of his compensable back injury. Indeed, the record tends to suggest that there is an association between alcohol consumption or abuse and osteonecrosis of the hips and that the claimant has a history of excessive alcohol consumption, which he freely admitted during his testimony.

As to the extent of his disability, Mr. Robert White, a vocational expert, retained by the claimant, testified that he had reviewed medical records relating to the claimant's back injury, but not his hip injury. Based upon the claimant's age, education, relevant work history, and medical records, Mr. White found that the claimant was intelligent, but without transferable skills related to work, and able to participate only in part time work at an unskilled entry level, but that this would be good for him and that he would encourage the claimant to find such work. He also stated that the claimant probably would not be a reliable employee on a full time basis. He suggested the claimant

could be a part time cashier or security guard and that his rate of pay would be at minimum wage or up to \$7.00 or \$8.00 an hour or perhaps a little more. Mr. White used the age of 55, although the claimant was born in June, 1947, and, further, found the claimant's tenth grade education to be more significant than the GED he had obtained thereafter.

The claimant testified that the condition of his back has gotten progressively worse over time and is severely limiting as far as his ability to work. He confirmed that he completed the tenth grade and received his GED during service in the United States Army.

The claimant testified that, for about a year after the back surgery, he thought his back had been cured, but then slowly but surely the symptoms began to become worse and that he has pain in his lower back and numbness in his leg, so that he has difficulty with prolonged walking or standing. He stated that he feels it necessary on a daily basis to lie down to relieve back stress and to control the pain level. He also stated that he takes pain medication and does little on an average day other than piddle around the house and occasionally ride his motorcycle to Hot Springs. He said that he was limited in his ability to bend and lift. He also stated that he does not ride his motorcycle as fast or as far or as often as he did in the past.

The claimant testified that he intended to work for another ten years for Alcoa and had not given much thought to working elsewhere. The claimant acknowledged that the respondents had offered him a job as a security guard in January, 2004, and requested that he take a functional capacity evaluation which he declined at the direction of Dr. Moore. This job only lasted a short period and the employer's facility was closed, although the claimant contended that he was available to work as a security guard at the employer's facility in the Hot Springs area, although he did not think he could work more than a few hours a day. It appears that neither the claimant nor the

respondents have pursued a functional capacity evaluation for the claimant since January, 2004. At the time of the hearing, on a monthly basis, the claimant was receiving about \$1,600.00 in retirement benefits and about \$1,750.00 from the Social Security Administration. He also acknowledged that he has received fully-paid health insurance from the respondents.

His testimony indicated that his personal life had been significantly limited and he was no longer able to do things he had done in the past. For example, while in the past yard work had been something of a hobby, he now does no yard work and pays others, such as his grandson, to ride the lawnmower and do yard work. On the other hand, the claimant is still able to ride his motorcycle, which had also been a hobby for some time prior to the injury.

When the entire record is reviewed, the preponderance of the evidence shows that the claimant has, indeed, suffered a diminution in his ability to earn a living, but not in excess of the level of his anatomical impairment, which the parties agreed is 15% to the body as a whole.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge