

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F613152

EVERARDO GARCIA, EMPLOYEE	CLAIMANT
PORTLAND GIN & WAREHOUSE, INC., EMPLOYER	RESPONDENT
AG-COMP SIF CLAIMS (TPA), INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 17, 2007

Hearing before Administrative Law Judge Barbara Webb on July 19, 2007, in MeGehee, Desha County, Arkansas.

Claimant was represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Ms. Betty J. Hardy, Friday, Eldredge, and Clark, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on July 19, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on May 9, 2007. The Pre-hearing 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 Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed on or about October 9 or 10, 2006, when claimant alleges he sustained an injury to his left ankle and big toe.

ISSUES

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Compensability of claimant's alleged injury.
2. Claimant's entitlement to temporary total disability benefits.
3. Claimant's entitlement to medical benefits.
4. Controversion and attorney's fees.
5. What applicable compensation rate applies.

CONTENTIONS

The claimant contends he sustained compensable injuries to his left foot and ankle on or about October 9, 2006, when he slipped from a ladder and subsequently injured his big toe from metal shavings. The claimant contends he is entitled to temporary total disability benefits beginning October 15, 2006, and continuing through a date yet to be determined and further contends he is entitled to medical benefits and attorney's fees. The claimant further contends that the average weekly wage should be calculated by dividing his total wages by the number of weeks employed since claimant was a seasonal worker.

The respondents contend that the claimant did not sustain a compensable injury arising out of and in the course and scope of his employment on October 9 or 10, 2006. The respondents contend that the claimant cannot meet his burden of proof by a preponderance of the evidence that he sustained a compensable injury to his left ankle or big toe. The respondents further contend that the claimant's complaints with his big toe, which apparently resulted in amputation, are not related to the claimant's employment with respondent employer. The respondents further contend that claimant's average weekly wage would be \$93.25, resulting in a compensation rate of \$62.00, as calculated consistently with the decision in Candelario Sierro v. Griffin Gin, Full Commission Decision, Claim No. F512282, filed November 28, 2006.

The record consists of a one volume transcript of the July 19, 2007 hearing, consisting of the testimony of Victor Saldana, Everado Garcia, Eddie Scherm, and Jesse Turner, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Claimant's Exhibit No. 2 (Affidavit of Victor Saldana); Claimant's Exhibit No. 3 (Affidavit of Juan Molina); Claimant's Exhibit No. 4 (2005 Wages and Hours - Garcia); Claimant's Exhibit No. 5 (Payroll records for Portland Gin & Warehouse, Inc.); Respondents' Exhibit No. 1 (Medical records); Respondents' Exhibit No. 2 (Deposition of Everardo Garcia dated 3/5/07). In addition, the post-hearing brief of the claimant filed July 30, 2007, and the post-hearing brief of the respondents filed July 27, 2007, have been blue-backed and

are fully incorporated by reference and made a part of the record of this proceeding.

FACTUAL BACKGROUND

Victor Saldana testified by way of an interpreter. Saldana lives in Mexico but has been working in the United States. He testified that he has known the claimant for about twenty years. He worked with Garcia at Portland Gin. He has worked for Portland Gin doing seasonal work for about sixteen years. He stated the seasonal work at Portland Gin is regularly about six to seven weeks. The claimant has worked at Portland Gin for approximately twenty-six years as a seasonal worker. Saldana also works in other states doing seasonal work, including "detasseling" and farming. He works at the gin after the detasseling work in June and July. He has worked with Garcia. He is aware Garcia does janitorial work. He is aware that the claimant contends he injured his ankle on October 9, 2006. He became aware of the injury when he observed Garcia limping at work. He works at Portland Gin for twelve hours on the night shift and is provided a house along with Garcia to live. Six men stay in the house during the day and six men stay in the house at night. Garcia worked the same shift that he worked. Garcia was a bale presser. Saldana worked at the press tying bales of metal wires. He first saw Garcia limping at the home. Garcia told him that he hurt himself while cleaning a wall at work when he slipped his leg on a ladder. The home is within walking distance of the gin. Garcia walked home. Saldana saw him limping when he came in the home. He had not seen Garcia have any problems with his foot or ankle prior to this time. Saldana testified that

everyone knew Garcia was hurt because he worked for three days with a very swollen foot. He went to the clinic and hospital with Garcia and Scherm. Scherm knew that Garcia was hurt because he would come to the house to put ice on Garcia's foot. He became aware that Garcia had a piece of metal in his toe after the x-ray at the hospital and was aware of lots of scraps at the company. After the accident, Garcia's foot was too swollen to fit into his tennis shoes. Saldana went and bought him house slippers made of fabric which he wore to work for approximately three days before going to the clinic. He explained that there were metal shavings where they go sharpen wood sticks that are used to unjam the machinery. He wears regular work boots with thick soles. Garcia did not return to work and moved to Texas. Saldana worked at the gin for three weeks after he took Garcia to the hospital. On cross-examination, he explained that after he leaves the seasonal work at Portland Gin, he applies for unemployment benefits. He did not see Garcia injure his ankle while at work. He got up on October 9th and saw Garcia limping. He bought the slippers on October 10th. Garcia worked the bale press with Saldana for three or four years. He drove home from the gin to take the punch cards and Garcia walked home. He did not see Garcia get a piece of metal in his toe, his shoe, or his slipper. He did not know of any place other than work where there were metal shavings that Garcia would have been around.

The claimant lives in Progress, Texas, and previously worked as a janitor in the school system. Prior to the accident, he also performed seasonal farm work, detasseling, and work at the gin. His wife and four daughters currently

perform detasseling work in Illinois and he cooks for them, but returns to Texas at the end of July. He has worked as a seasonal worker for Portland Gin for more than twenty years, since he was eighteen years old. He is forty-six years old with a third grade elementary education. He speaks Spanish but no English. He cannot read.

He explained that he injured himself when he was coming down the ladder when he slipped and fell due to liquid on his shoe. He twisted his left ankle. The ankle was swollen for three days and he could not fit in his size shoes. He bought size 12 slippers. He used ice for about a week. He sought medical treatment on October 15, 2005. He had x-rays taken of his foot. He did not work because they did not want him to work so he went home. He later learned that he had a metal shaving in his toe and had it removed. He eventually got gangrene in his leg due to the infection. Due to the infection, he ultimately had to have his left big toe amputated.

Prior to the accident, Garcia explained that he was not sick because the school did not allow him to work if he was sick. He explained that he used a blade and a file to sharpen the stick used to unjam the machines. He testified that there were metal shavings on the floor at Portland Gin. He put the stick in a clamp and sharpened the end of the stick. He sharpened the sticks everyday. He was not aware of any other place that he might have gotten a metal shaving in his toe.

He learned from the doctor that he had fractured his left ankle. He testified that he did not do anything else to fracture his ankle since he was careful

since he had to provide for his family. He has not been able to work due to this injury. He sees a doctor every three days in Texas after the amputation. He denied having diabetes but testified that he thinks he developed diabetes after the accident due to the shock and not eating properly. He hurt his ankle on the 9th but does not know when he got the piece of metal in his toe. Saldana took him to the clinic on October 15, 2006, and Smile Garcia took him to the hospital in Lake Village later where they found the piece of metal in his big toe.

He testified that Jessie was his supervisor and that he got mad at Jessie on October 8, 2006. He denied returning to his room early or kicking the wall or something in his room while he was mad at Jessie. He did not go to the hospital until November 21, 2006.

He testified that he had not worked since he was injured. He received unemployment benefits from Texas in October of 2006. He received four checks for \$160.00. He used the benefits to pay the hospital.

Eddie Scherm testified for the respondents. He has been employed as the general manager at Portland Gin since 1980. The nature of the business is a cotton gin and a bale warehouse. They store cottonseed, have rice-grind facilities, and farmland with agricultural production. He testified that the gin hires extra employees in August - September for the rice elevator and September - November for the cotton gin operations. Garcia was employed as a worker in 2006 and as long as Scherm has been involved in the ginning operation. He explained that the workers were guaranteed six weeks of work but that they might work six to eight weeks depending on the size of the crop. Garcia was the

gin helper. He would work with the ginner and is positioned to keep the machine moving. He uses a wooden stick which is usually sharpened with a utility knife. Scherm explained there would be no metal shavings when he was sharpening his stick.

He first learned that Garcia had a problem with his left ankle on October 11, 2006, at the 7:00 evening shift change. The claimant was with Red Garcia, an interpreter, and claimed that his ankle was hurting but could not tell him when it happened and had a couple of different versions of what happened. He first said he fell from a ladder. His next story was that he was pushed or rushed by another employee. He couldn't say whether it happened on October 9 or 10. He asked the claimant if he needed medical attention and the claimant declined. Scherm looked at the ankle and did not believe it was swollen, but put an ace bandage on the ankle to humor him. He put his shoe back on. He did not observe the toe because he had socks on. He worked two more shifts and complained of swelling. Red Garcia took him to the Lake Village Emergency room. An x-ray was done and the physicians sent back a note that he should keep it elevated with ice and to stay off work for a couple of days. Scherm furnished him ice to put on his ankle and told him to stay off work and take care of his ankle. Later that afternoon, the technician called to report that the x-ray showed a broken bone in his upper ankle and to see a local physician. The next day, the claimant was taken to Dr. Bennett who stated he couldn't treat broken bones. Scherm arranged for Garcia to see Dr. Robinette that afternoon but due to confusion the claimant was not seen that day. Scherm called and rearranged

the appointment for October 18, 2007, in Dermott and personally met them at the clinic to avoid any further confusion. Dr. Robinette did not treat the ankle but noticed that the big toe was swollen and recommended that Garcia be taken back to the clinic at Lake Village. He was referred to Dr. Walker in Pine Bluff for an appointment on October 20, 2006. Scherm drove him to the appointment. Dr. Walker indicated that he did not see a break in the ankle but treated the big toe for infection, prescribed an antibiotic, and referred him to Dr. Burge in Lake Village on October 26, 2006. The claimant did not keep the appointment because he went back to Texas on October 23, 2006. Scherm said he asked Garcia not to leave since he was monitoring his care to make sure that he changed his bandages, soaked his toe, and took his prescriptions. Scherm testified that when Dr. Robinette said he saw a piece of metal on the x-ray, that Garcia and his co-worker "kind of froze up".

On cross-examination, Scherm testified that there were metal shavings in the building due to the welding and drilling, but it would surprise him if someone got a piece of metal in their foot while working there. Scherm agreed that he did not speak Spanish and required interpretation from Red Garcia. Scherm noted that the x-ray report stated that it was "metallic object" embedded in Garcia's big toe which could have happened anywhere. He explained that Garcia was only at the gin for twelve hours and could have got the metal object at the grocery store or somewhere else. Garcia never told Scherm that he got the metal piece in his toe at the gin. He did notice Garcia limping after the accident. He explained that Garcia was always wanting to borrow money and was the type of worker that if

he was sitting down when Scherm walked in, he would jump up to act like he was really busy. He was never told by Garcia that he got a metallic object in his toe and when shown the x-ray looked "like their story fell apart". The metal object shown in the x-ray was not standing up like it came through the bottom of a shoe or down through the top of the shoe. Scherm explained that the metal shavings were in the shop area which was different from the location where Garcia works. The metal piece did not show up on the x-ray taken when Dr. Walker cleaned and re-x-rayed the toe. He observed Garcia wearing slipper-type shoes with a heel and a half-inch thick rubber sole on the evening of the 11th.

Jessie Turner testified for the respondents. He is employed as a ginner at Portland Gin. Garcia worked as his helper for about five or six years. He testified that Garcia got mad at him over directions he was given and left for about an hour. He found out about two days later that Garcia had sprained his ankle.

On cross-examination, he explained that the claimant's duties involved sweeping the floor twice a night with a push broom. He testified that he was an employee that did his work and that he did not have problems with him.

The medical records show the claimant was initially treated at Chicot Memorial Hospital for left foot pain and swelling due to a fall from a ladder. He was told to elevate the ankle with ice and to follow-up with Dr. Bennett. He was seen by Dr. Uysal on October 18, 2006, for a follow-up examination. Notes reflect that the claimant stated his toe started hurting him around Friday night after he fell from a ladder. The x-rays revealed a fracture of the ankle and

cellulitis from a metal piece in his toe. On October 20, 2006, he was seen by Dr. Walker for the infection in his toe. The toe was cleaned and he was told to soak the toe, change the dressing, and given prescription medication. In his report, Dr. Walker notes that the x-rays repeated after the examination did not show evidence of the previous foreign body that was present then. The remaining medical records reflect that he continued treatment in Mercedes, Texas, ultimately resulting in amputation of his big toe.

Payroll records reflect that the claimant worked a total of seven weeks in 2005 for a total payment of \$4,849.51. In 2006, he worked for a total of six weeks for a total payment of \$ 2,260.56.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed at all relevant times.
3. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury.

DISCUSSION

I. ADMISSIBILITY OF AFFIDAVITS

At the hearing, claimant sought to introduce the Affidavit of Victor Saldana (Claimant's Exhibit No. 2) and the Affidavit of Juan Molina (Claimant's Exhibit No. 3). Victor Saldana testified at the hearing but Juan Molina was not called as a witness nor made available for cross-examination. While I recognize that the

Commission is not bound by the rules of evidence, I find that the Affidavit of Victor Saldana should be admitted into evidence, but the Affidavit of Juan Molina should be excluded. Saldana was available for cross-examination and the affidavit was used during the witness examination. However, Juan Molina was not available for cross-examination and the Affidavit constitutes an out of court statement for which there is no basis to attach credibility or determine the veracity of the statements contained in said Affidavit.

II. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”:

(i) (a)n accidental injury causing internal or external physical harm to the body or accident 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; (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is: (a) Caused by rapid repetitive motion . . . (v) A hernia as set out in § 11-9-523.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D)(Repl. 2002). 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. Brotherton v. White River Area Agency, ___ Ark. App. ___, ___ S.W.3d ___ (Dec.14, 2005); Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. Id. 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).

The Full Commission has held that in order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(E)(i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark.

Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16). Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, *supra*. 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. VanWagner, 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. , 3341 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).

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).

The only evidence in this case that attributes the cause of the claimant's injury to his big toe, and subsequent amputation, to his employment is the claimant. Where claimant's case for causation rests mainly on his own testimony, the issue is that of credibility and ultimately left to the discretion of the Commission. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). As the evidence reflects, the claimant does not know when or how he may have injured his big toe while working for Portland Gin. There is no credible medical evidence offered to establish the manner or time in which the claimant was exposed to the metal object found in his toe. As established by the evidence in this case, it is possible that claimant was exposed to the metal object at a number of places or times. It is simply too speculative to find that the metal object became embedded in claimant's toe during the course and scope of his employment.

I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury during the scope and course of his employment.

III. AVERAGE WEEKLY WAGE

Although it is not necessary for me to calculate the average weekly wage in light of my ruling denying the compensability of the claim, I would note that in accordance with the recent ruling of the Arkansas Court of Appeals, the average weekly wage in this case involving seasonal employment should be properly

calculated by dividing the claimant's total wages by the term of the contract, i.e. the number of weeks of contractual employment, to determine the average weekly wage. Candelario M. Sierra v. Griffin Gin, ___ Ark. App. ___, (CA 07-152, October 10, 2007).

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge