

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F612973

**JOSEPH C. INGOLL,
EMPLOYEE**

CLAIMANT

**WARDS ASBESTOS
REMOVAL, INC.,
EMPLOYER**

RESPONDENT

**LIBERTY MUTUAL
INSURANCE CORP.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 21, 2007,

Pursuant to a hearing conducted August 20, 2007, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. Joseph C. Ingoll, Little Rock, Arkansas, proceeding without an attorney and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to consider compensability of the claimant's low back condition.

The claimant, who had been previously warned to obtain appropriate counsel, represented himself at the hearing, without counsel. At the beginning of the hearing, the claimant was reminded that he should retain counsel to present his case.

The claimant contended that he suffered a compensable injury to his back during his employment on November 14, 2006, when he fell from a track hoe. He requested benefits, including medical expenses and temporary total disability benefits from the date of injury until January 15, 2007. Other possible issues were considered reserved.

The respondents contended that a compensable injury cannot be established by medical evidence, supported by objective findings, although there are objective findings consistent with the

pre-existing pathology. They further contended, in the alternative, that medical benefits were initially paid and that no more medical care is reasonably necessary in connection with the claimant's compensable injury. Further, in the alternative, they contended that the claimant was not totally incapacitated to earn wage wages and, in fact, worked elsewhere during the period in question.

The record, which included documentary evidence and the testimony of the claimant, 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 employee-employer insurance carrier relationship existed at all pertinent times, including November 14, 2006, when the claimant's average weekly wage was \$562.00.

3. The preponderance of the evidence shows that the claimant suffered an incident at work for which he received medical care at the direction of the respondents who are responsible for payment of that medical care.

4. A compensable injury has not been established by medical evidence, supported by objective findings, as required by the Act. Thus, the respondents, although responsible for medical care which the claimant has previously received at their direction, are not responsible for additional benefits.

DISCUSSION

On November 14, 2006, the claimant, a heavy equipment operator, was using a track hoe to knock down a structure from which the employer had removed asbestos. He stated that he suffered an injury to his back when he attempted to step down from the track hoe and slipped on the muddy surface of the track, just outside the cab. He stated that he felt a sharp pain, laid there for a few minutes, and was seen by a co-worker who was driving a dump truck. The claimant testified that the co-worker called the employer who advised the claimant to seek medical care at Concentra.

Pursuant to the direction of the employer, the claimant consulted the physicians of Concentra that day. The medical record shows that he was also seen at Concentra on November 20, 2006, and quotes him as saying that he “was going around a pile of concrete and fell and injured back”. The only other item in the medical record is the report of an MRI scan indicating that the examination took place November 28, 2006, and that the claimant then had low back pain and bilateral lower extremity pain. This report indicates that a previous MRI of the lumbar spine from 2005 was available for comparison, and also that the claimant’s body size prevented use of the standard flex coil so that a lumbar spine MRI was performed using a body coil, with motion artifact due to patient breathing.

This report concluded that there was no marked interval change morphologically. The report noted developments in the claimant’s lower back which were described as unchanged from prior exam or prior study. The report also noted osteoarthropathy of the SI joints “again”, more pronounced on the left, manifested as anterior osteophytosis and attempted bridging. The impression included a comment that there was no high grade disc protrusion, critical canal stenosis, or neural effacement involving the lumbar or visualized lower thoracic segments. The report also stated that

the MRI of the pelvis could not be performed due to patient body habitus and difficulty breathing. Thus, the pathology noted in the report was seen to be the same as that shown on the September, 2005, MRI scan.

The November 20, 2006, physician report does reflect that the claimant injured his back on November 14, 2006, and was having pain in the lumbosacral region. The report also indicated that, while the claimant had tenderness in some muscles, there were no objective signs of injury such as swelling or bruising and the claimant seemed to have full range of motion in the cervical spine, the shoulders, the arms, the hands, the hips, and the legs.

This report further indicated that claimant was prescribed Oxycodone, Skelaxin, and Celebrex. The report also recommended that the claimant modify his activity, imposing a 20 pound limit on pushing, pulling, or lifting, as well as no stooping, no reaching above the shoulders, no climbing stairs or ladders and no operation of machinery or company vehicles.

The claimant had some disagreement with the medical record, based on his recollection and personal notes that he had kept. For example, he did not think that he had been seen at Northside Open MRI on November 28, 2006, although he concedes that he was there on other occasions. He also asserted that the technicians were unable to perform an MRI of any kind, including the partial MRI indicated by the report. Toward the end of the hearing, the claimant stated that he should have been sent to the same place that had performed the MRI scan on him in September, 2005, because they were able to accommodate the size of his body. The claimant admits that he is a large person, weighing 374 pounds at 5'8" tall. He also volunteered that he suffers from other ailments, including hypertension, diabetes, asthma, and poor circulation in his legs.

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).

As noted above, the respondents have now disputed this claim on the basis that a compensable injury cannot be established by medical evidence, supported by objective findings, as required by Ark. Code Ann. §11-9-102. This objective findings requirement can have the effect of denying benefits for a claimant who requires medical attention, but whose injury is not associated with objective findings, such as those revealed by an MRI scan, x-rays, or other objective tests or observations. This may indeed be the result in this case.

Nevertheless, the burden is on the claimant to produce evidence sufficient to meet the statutory requirements, including the requirement that the existence of an injury be established by medical evidence, supported by objective findings. In this case, there is little in the medical record to suggest that the objective findings on the MRI scan were related to the claimant's November, 2006, accident, instead of the pathology revealed on the previous MRI scan of September, 2005.

For the foregoing reasons, this request for additional benefits should be, and it is hereby, respectfully, denied and dismissed, although respondents are ordered to pay for medical benefits incurred by the claimant at the direction of the employer at Concentra and Northside Open MRI.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge