

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F507684

MARCUS F. CARPENTER, EMPLOYEE

CLAIMANT

MICRO PLASTICS, INC., EMPLOYER

RESPONDENT

TRAVELERS INDEMNITY CO. OF AMERICA, CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 5, 2008

Hearing before Administrative Law Judge O. Milton Fine II on June 25, 2008, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 25, 2008, the above-captioned claim was heard in Mountain Home, Arkansas. A prehearing conference took place on September 17, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following four, which I accept:

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

2. The employee/employer/carrier relationship existed on or about June 10, 2005 and at all relevant times.
3. The Claimant's average weekly wage was \$288.00 per week.
4. Respondents have controverted this claim in its entirety.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant withdrew the issue concerning the constitutionality of the Arkansas Workers' Compensation Act and reserved issues concerning entitlement to vocational rehabilitation, and temporary total, permanent partial and permanent total disability benefits. Respondents reserved the issue concerning whether and when they were provided with notice of Claimant's alleged injury. The following were litigated:

1. Whether Claimant sustained a compensable injury to his right elbow.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.

Contentions

Claimant:

1. Claimant contends that he sustained a compensable injury to his right elbow and is entitled to reasonable and necessary medical care. The Claimant continues to have medical problems related to his injury.

Respondents:

1. Respondents contend that the Claimant did not sustain a compensable injury while in their employ. This claim has been denied by the carrier.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission; and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his right elbow.
4. Because of the above finding, the issue regarding whether Claimant is entitled to reasonable and necessary medical treatment is moot and will not be addressed.

CASE IN CHIEF**Summary of Evidence**

_____ Claimant and Darrell Smith testified at the hearing. In addition to the pre-hearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, his medical records concerning his alleged right elbow injury, consisting of one index page and 15 numbered pages thereafter; Claimant's Exhibit 2, a December 23, 2005 letter from Respondent Micro Plastics to Claimant, consisting of one page; and Joint Exhibit 1, additional medical records concerning Claimant's lumbar spine injury, consisting of six numbered pages.

Testimony

Marcus Carpenter. Claimant testified that he is 60 years old and has an eighth-grade education. He worked for Respondent Micro Plastics, which manufactures plastic parts, for approximately three and one-half years before being injured. His position was that of machine operator. This job required him to rake and to handle parts and runners. The runners are plastic pieces that hold the parts. He stated that he broke the parts from the runners and placed the runners into a tub to be recycled. Claimant testified that the heaviest tub he has picked up weighed about 30 pounds.

Asked what occurred on June 10, 2005, he stated that

I, we'd just come back off of a break and I went out and was running my runners up to put in the grinder to grind them up. And I run around and picked up this one, and I just reached down with one hand and picked up like I normally do . . . [with my] right hand. And I picked it up, got it about half way up, and it popped and everything went to the floor. And I scrambled around and picked 'em all up. And I guess I worked for about five minutes after that to see if it would get any better, and it started hurting worse. And I called my floor supervisor over there, and she took me into to [sic] see Mr. Smith there. And I told him what happened. And he said that I could go home. Well, on the way home, it got to hurting worse, so I went to the hospital. Well, they made an appointment for me for Doctor . . . Oliver. For the next morning. So I went in and he checked it over, and he gave me a slip to take to Micro to be off work for a certain length of time to see if we could get it better. And then, I ended up having to have surgery on it.

Claimant stated that he began his shift that day at 4:00 p.m. and that the injury occurred about 8:30 to 9:00 p.m. The person he informed of his injury was someone named Barbara. He elaborated that when he reported the injury to Darrell Smith, he instructed him that if Claimant was unable to work, he should go home and see what his condition is the following day. Shown the medical record of the visit, which reflects that he told emergency room personnel that for one to two months he has had pain his right elbow that radiates

down over the back of his hand and causes tingling there, Claimant denied making such a statement. He testified that he told them what had occurred at work. Claimant denied having any problems with his arms and hands prior to the alleged injury.

In describing the current condition of his elbow, he stated that while the surgery helped some, the elbow still hurts occasionally. He added that he only has about half of his former grip strength in his right hand, and that sometimes he loses his grip entirely and drops things. Claimant is right-handed. He stated that Dr. Oliver ultimately released him after the surgery, but that his superiors at Micro Plastics did not return him to work. Later, the company informed him by letter that he was being terminated for missing too many days of work.

He testified that he no longer works for Micro Plastics because he is disabled. But he attributed this to “[m]y heart attack and stuff I had.” Claimant applied for Social Security disability benefits, but did not claim his alleged elbow injury as the basis for his disability.

When questioned by Respondents, Claimant testified that his two primary jobs were to break the parts off the runners and to deal with the accumulated runners in the tubs. He lifted the tubs and dumped the contents on the belt, which ran to a grinder. Claimant reiterated that he did not immediately inform his line lead about the elbow pop. Rather, he kept working, hoping that there was nothing to it. But the pain worsened, and he told his floor supervisor, who took him to see Smith. He stated that he told Smith how he hurt his arm. Claimant denied having any previous on-the-job injuries or arm, hand or elbow problems of any kind.

He testified that when he returned to work on June 11, 2005 after seeking treatment, he showed them the off-work slip. At that point, Smith assisted Claimant in filling out an

accident report, which was turned in to the front office. Claimant stated that Dr. Oliver operated on his arm in September 2005, and released him approximately a month after that. The release came with restrictions while Claimant was undergoing therapy. He continued to receive therapy after the release, and it was his understanding that the restrictions would be removed upon completion of the therapy. The therapist removed the restrictions three to four weeks after Dr. Oliver's release. However, Claimant stated that by this time this occurred, Micro Plastics had already terminated him. Claimant did not recall the contents of the termination letter. He received unemployment benefits for a period of time after he was let go.

When questioned further by his attorney, Claimant stated that no one witnessed the incident involving his elbow. He identified Claimant's Exhibit 2 as the letter he received from Micro Plastics.

When questioned by me, Claimant testified that the tub he picked up the night he was allegedly injured was heavy, but he was unsure of its weight. He stated that the tub was full of runners. The tubs are approximately three feet long by two feet wide, and are 12 to 18 inches deep.

Under further questioning from Respondents, Claimant gave conflicting testimony concerning whether he injured his back on the job in October 2002 and whether he underwent therapy for it. He explained that his memory was faulty concerning the episode because it had occurred so long ago. When asked whether he similarly did not recall telling the emergency room physician that he had elbow pain for one to two months before presenting for treatment, he stated that his memory was good on that point. He stated that Respondent Travelers also provided the group insurance for the employees of Micro

Plastics, and that the carrier covered all but 20 percent of the cost of his treatment, or \$600.00.

Darrell Smith. Called by Respondents, Smith testified that he has worked for Micro Plastics for 15 years. He was Claimant's supervisor on the second shift, from 4:00 p.m. to midnight. At the time, Barbara Habegger was the lead operator. She had seniority over the other operators, including Claimant. Smith stated that Claimant's description of his job was essentially correct. He confirmed that some of the presses at the plant required the lifting of a tub to drop the runners off on the belt. Smith testified that most of the parts are lightweight.

With respect to the incident at issue, he stated that Harbegger came and told him that Claimant's arm was hurting. Smith went out to the floor, five to ten feet from his office and asked Claimant what was wrong. According to Smith, Claimant said only that his arm was hurting; he did not relate what had happened. His testimony was that he assumed the pain was due to Claimant's heart problems, and that he asked Claimant if he wanted to go to the hospital. Claimant told him no, and Smith stated that he could go home and that he should see a doctor if he did not feel better in the morning. Smith denied that Claimant returned to work the next day and that the two completed an accident report together. He reiterated that Claimant never told him that he hurt his arm at work.

Under cross-examination, Smith stated that other than an attendance problem, he had no issue with Claimant's work. He admitted that the attendance issue was due to the heart problem, but then stated that he "can't remember that far back." As for the events of June 11, 2005, Smith stated that if he had done as Claimant had testified, it would have been documented; however, the incident was not documented anywhere. He stated that

he did not believe that Claimant was intentionally testifying falsely about the incident. Smith added that Claimant seemed to be honest, based upon his dealings with him. He testified that Micro Plastics has had campaigns from time to time to encourage accident-free periods.

Under further questioning from Respondents, Smith stated that he is required to document any on-the-job injury within the first hour after the accident. He stated that if Claimant had told him that he had hurt his arm on the job, he would have filled out an accident report, with the participation of whomever Claimant had reported the incident to. This would have been done regardless of whether Claimant had a witness to the incident or not. Smith denied ever failing to complete an accident report to further a safety campaign, and denied that his company ever encouraged him to do such a thing.

When questioned further by Claimant, Smith stated that he never asked whether Claimant's injury was work-related.

Under questioning from me, Smith testified that because Claimant never brought up that the incident was work-related, he assumed that it was not. He stated that if Claimant had complained about his leg, he would have asked him what happened. Smith added that "[b]ut he said his arm was numb, so that's what made me suspect." When I pointed out that he earlier had testified that Claimant told him his arm was hurting, Smith stated, "[h]urting and numb."

Records-Medical

The medical records of Claimant that were introduced at the hearing and are part of Claimant's Exhibit 1 reflect the following:

On June 10, 2005, Claimant presented to the emergency room at Baxter Regional Medical Center with right arm pain. The record reflects that he stated that "for the last 1 to 2 months, he has had pain in his right elbow radiating down over the back of his hand and causing tingling over the back of his hand." He further stated that he felt a "pop at his elbow" when he lifted something that was heavy. Claimant added that since then, he has had difficulty with his grip, and using it has caused pain. The x-rays of his right elbow were negative. Dr. Jennifer Sadler, the emergency room physician, referred Claimant to Dr. Todd Oliver at Regional Orthopedic Health Care.

In relating his history to Dr. Oliver on June 16, 2005, Claimant did not mention having pain in his elbow prior to the lifting incident. He stated that he was lifting a heavy barrel when he felt a sudden sharp pain in the right elbow, which has gradually worsened and spread to the forearm, wrist and long and ring fingers. Claimant stated that he has had numbness in those fingers as well. Dr. Oliver diagnosed him as having right acute onset lateral epicondylitis/elbow sprain, and noted that it "seems [to be] a traumatic case" After discussion with Claimant, Dr. Oliver placed him in a cock-up wrist splint and took him off work. No therapy was recommended at the time. When Claimant returned on July 14, 2005, he was fitted with a counter force brace. Again, no therapy was recommended.

The record for Claimant's follow-up appointment on August 19, 2005 reflects that Dr. Oliver previously gave him an injection in his elbow, which Claimant reported only eased his pain for one day. Oliver's note reflects, "I had asked him to call in a week or two if [his pain returned] so we could get him into therapy but he states that he does not recall this." Claimant again denied any specific numbness or tingling, and complained of severe

pain. He reported that he was still working at Micro Plastics doing repetitive work, but that he tries to protect himself. Dr. Oliver prescribed therapy and anti-inflammatories.

On his return to Oliver on September 15, 2005, Claimant reported no improvement. He elected to proceed with surgery. Oliver performed a right lateral epicondylitis debridement/extensor carpi radialis brevis debridement on September 19, 2005. The pre- and post-operative diagnosis was right lateral epicondylitis. Returning to Oliver on October 19, 2005, Claimant reported improvement; but the doctor stated that he did not see significant improvement as of yet. Oliver instructed him to continue with the brace and to perform home exercises to improve his grip and wrist extension. Claimant on November 16, 2005 reported continuing improvement. Dr. Oliver gave him a five-pound lifting restriction. On December 20, 2005, Claimant was negative for numbness, tingling and swelling, and reported that he was doing well except for pain over the lateral aspect of the elbow. Oliver reported that his grip strength is excellent, and assessed the pain as hypersensitivity over the incision site that he thought therapy would help. The note reflects that Oliver would see him again in six weeks, but the record does not reflect that Claimant returned.

Joint Exhibit 1 deals with lumbar strain Claimant suffered in 2003.

Records-Nonmedical

Claimant's Exhibit 2 is a letter from Respondent Micro Plastics to Claimant dated December 23, 2005. It reflects that his employment was terminated as of December 22, 2005 "[d]ue to the length of [Claimant's] medical status"

ADJUDICATION**A. Compensability**

Claimant has alleged that he incurred a compensable injury to his right elbow as a result of a work-related incident on June 10, 2005, when he was lifting a tub of runners at Respondent Micro Plastics. Respondents contend that Claimant did not sustain a compensable injury.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which the I find applies to the analysis of Claimant's alleged injury, defines "compensable injury" as follows:

(i) An accidental injury causing internal or external physical harm to the body . . . 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) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

After review of the evidence presented in this case, I cannot find that Claimant has proven by a preponderance of the evidence that his right lateral epicondylitis arose out of and in the course of his employment at Respondent Micro Plastics.

This finding is not based on an assessment of whether Smith was more believable than Claimant in relating whether Claimant reported the alleged workplace incident to him and whether Smith helped him fill out an accident report. I note that Smith initially testified that Claimant told him only that his arm was hurting. When he testified under my questioning that Claimant informed him that his arm was numb, and I noted the discrepancy, he hastened to add that Claimant actually told him that his arm was both hurting and numb.

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, 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 that it deems worthy of belief. *Id.* Based upon my observation of these witnesses, I do not credit the testimony of Smith over that of Claimant on this point.

However, Claimant's testimony was problematic as well. He gave inconsistent testimony concerning whether he injured his back on the job in October 2002 and whether he underwent therapy for it. While he explained that his memory not clear concerning this matter due to the length of time that had elapsed, he insisted that he recollection was clear that he did not tell Dr. Sadler that he had elbow pain for one to two months prior to

presenting for treatment at the emergency room. I note that Dr. Oliver observed on August 19, 2005 that Claimant did not recall his instruction to contact him if his pain returned so that he could be placed in therapy. Based on my observation of Claimant and consideration of all of the foregoing, I do credit his testimony denying that he related having pre-existing pain in his right elbow. In so doing, I note that he affirmatively stated that he had no problems with the elbow prior to the alleged incident on June 10, 2005.

I am also aware of Dr. Oliver's assessment that Claimant's lateral epicondylitis was traumatic in origin. But he did not opine that the injury was consistent with any particular occurrence. In *Cooper v. Textron*, 2005 AWCC 31, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examining medical opinions concerning causation:

Medical evidence is not ordinarily required to prove causation, *i.e.*, a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. See, *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

Thus Dr. Oliver's assessment does not aid Claimant here.

In light of Claimant's report of pre-existing right elbow pain, which I credit over his hearing testimony, I cannot find that his elbow condition was causally related to his employment without engaging in speculation and conjecture. However, I am not permitted to do this. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). Hence, Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury.

B. Reasonable and Necessary Medical Treatment

Because of the above finding, the other issue litigated at the hearing— whether Claimant is entitled to reasonable and necessary medical treatment—is moot and will not be addressed.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that his right lateral epicondylitis is compensable. He has been unable to do this. Therefore, his claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge