

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306421

BRADY FOWLER, EMPLOYEE	CLAIMANT
BLYTHEVILLE COUNTRY CLUB, EMPLOYER	RESPONDENT
ARGONAUT INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED JULY 15, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant, MR. BRADY FOWLER, appeared pro se.

Respondent represented by HONORABLE ANDY CALDWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by the respondents from an opinion filed herein by an Administrative Law Judge on February 27, 2004, wherein the Administrative Law Judge found that the claimant had suffered a compensable, specific incident injury on March 31, 2003. Accordingly, the Administrative Law Judge awarded the claimant temporary total disability benefits for the period beginning April 9, 2003, and continuing through September 9, 2003. The respondent was ordered to pay all reasonable hospital and medical expenses arising out of this claim.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant failed to prove by

a preponderance of the evidence that he sustained a specific injury identifiable by time and place of occurrence, or that he is entitled to temporary total disability benefits or medical benefits. For the reasons set forth herein, the decision of the Administrative Law Judge is reversed and this claim is denied in its entirety.

History

_____In March of 2003, the claimant worked as a cook for the respondent employer, with whom he had been employed since 1982. According to the claimant's testimony, shortly before ending his morning shift, at about 1 p.m., he experienced an onset of symptoms in his right heel area. The claimant notified his supervisor of his pain, and he was granted permission to obtain medical treatment relative to his right heel.

The claimant first sought treatment for his heel complaint on March 31, 2003, with his family practitioner, Dr. Merrill Osborne. This doctor referred the claimant to orthopaedic specialist, Dr. Joseph Yao. On April 17, 2003, Doctor Yao examined the claimant and assessed him with right Achilles tendinitis, and sprain of the right ankle. Doctor Yao treated the claimant conservatively with exercises and medications. When the claimant's condition did not improve within the next two months, Dr. Tao recommended him to

Dr. Ruth L. Thomas. In a letter from Dr. Thomas to Dr. Yao dated May 28, 2003, she wrote:

He [claimant] has an Achilles tendon tear at the insertion of the Achilles and obvious signs or symptoms of disease surrounding this tear.

Doctor Thomas recommended surgical intervention to repair the tear, "along with removal of any spur or calcification within the tendon and removal of the posterior superior aspect of the right calcaneus." On June 9, 2003, the claimant underwent a Haglund's deformity resection with debridement and repair of Achilles tendon, which included the removal of a spur, and curettement of a cyst with local bone grafting. The claimant was prescribed a special boot with touchdown weightbearing and expected to make a full recovery. Aside from some healing problems around his incision, the claimant's tendon problems were reportedly resolved by the surgery.

Discussion

In her deposition of December 9, 2003, Dr. Thomas described the claimant's pre-surgical condition as follows:

Essentially, there was a tear in the area of insertion. There was surrounding fibrous tissue, which is the body's attempt to try to heal it. Just changes that we commonly see with a tendon that has experienced some kind of tear and is in the process of trying to repair itself.

When questioned concerning the nature of Achilles tendinitis, Dr. Thomas confirmed Dr. Yao's depositions statements that Achilles tendinitis is an "overuse problem," by stating the following:

Well, the primary cause is overuse. It's an aging phenomenon. And, of course, you take an aging phenomenon, and you have something that suddenly puts pressure on the tendon, and you can end up with an exaggeration of the existing problem.

Doctor Thomas described the claimant's particular abnormalities as follows:

Well, certainly, the report [MRI] was abnormal because it showed a diseased tendon with a tear, and there was also a suggestion of a cyst down in the area of the calcaneus. . . .

In terms of the claimant's particular anatomical abnormalities, Dr. Thomas stated:

Essentially, he did have a spur in the area where the Achilles inserts into bone, and he also had a very prominent calcaneus, at least in the posterior area, which we commonly refer to as a Haglund's deformity.

When questioned as to whether the claimant's Achilles problem was degenerative in nature, Dr. Thomas offered the following testimony:

There was certainly some component of degenerative changes involved in this problem, and as I mentioned, I most commonly see this as a degenerative

problem, but there was also a tear in the insertion of the Achilles tendon which may have been something new on top of something old.

Doctor Thomas agreed that inflammation around the Achilles tendon will often cause pain and discomfort, and may ultimately cause a tear if left untreated. She also expressed a reluctance to state whether, in her medical opinion, the claimant's Achilles tendon was related to his work activities. Specifically, she stated:

I'm very uncomfortable with an opinion because I feel that this could be a longstanding degenerative problem, but I cannot say with any certainty that there was not something on top of this degenerative problem associated with his work, and not having seen him when the problem initially developed, I'm very uncomfortable being asked to make a statement on that.

When asked whether she could say within a reasonable degree of medical certainty if the environmental conditions in which the claimant worked were consistent with the development of problems such as the claimant's, Dr. Thomas stated:

What I can say is that he had a predisposing problem. He had a Haglund's deformity. He had an obvious Achilles tendinitis that was probably asymptomatic, and then something caused him to become symptomatic. . . .

(Doctor Thomas added ...)

I think the only way you could say that with any certainty would be to have an MRI before the fact and an MRI after the fact, because there is nothing on clinical exam or by x-ray that is going to tell you for sure that that has occurred.

In further testimony , Dr. Thomas stated:

I cannot say that his work duties caused it in any way. He's a big man who had some preexisting problem, and I believe that the work activities at most would have exaggerated it, but not have caused it.

Finally, Dr. Thomas admitted that Haglund's deformity is "something you're born with"; whereas, an Achilles spur is "something that gradually develops over time." Furthermore, without a history of "sudden movement or a sudden fall or a sudden jerk," Dr. Thomas could not state conclusively that the claimant's incident of pain which reportedly occurred on March 31, 2003, was related to the tear in his Achilles tendon.

In a letter of general concern, dated May 6, 2003, Dr. Yao stated that "Given his lack of exertional activities outside of work, the [claimant's] right Achilles tendinitis problem is most probably related to his work activities." It is apparent from the text of this letter that Dr. Yao based his opinion primarily upon information provided to him by

the claimant. For example, Dr. Yao stated, "He [the claimant] described his work as frequently involving moving/pushing tables, chairs, and stages during times when he is not performing his primary job cooking." Another example, " He [the claimant] said that he does not engage in any physical activities such as sports outside of work."

The claimant was the only witness at his hearing of December 5, 2003. During that hearing, the claimant testified that near the end of his morning shift on March 31, 2003, he was standing at the grill cooking when he felt a sudden, sharp pain in his foot. The claimant denied that he had injured his foot prior to the onset of pain. He did admit, however, that he sometimes puts down a dance floor at work, which requires moving it into place by taking his foot and kicking it. The claimant testified that he had not put the dance floor down on March 31st, prior to his injury.

The claimant acknowledged that he is six feet, two inches tall and weighed 270 pounds at the time of his "accident." The claimant admitted, and the medical records confirm, that the claimant had right knee surgery in 2000 to repair a meniscal tear, and that he suffers from Bell's Palsy and diabetes.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. The 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 that he sustained an accidental injury causing internal or external harm to the body which arose out of and in the course of his employment and which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(5)(A)(i) and § 11-9-102(5)(E)(i) (Supp. 1997). The claimant must also prove 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(5)(A)(i). Finally, Ark. Code Ann. § 11-9-102(5)(D) requires that a claimant must establish a compensable injury "by medical evidence supported by 'objective findings' as defined in § 11-9-102(16)." 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.

The Arkansas Supreme Court addressed the specificity requirement in Hapney v. Rheem Manufacturing Co. 342 Ark. 11, 26 S.W.3d 777 (2000), where the Court affirmed the Full Commission's finding that a specific incident injury claim is without merit when a claimant cannot recall anything specific happening, did not know how she was injured, or did not associate her pain with any particular, specific incident. In Hapney, the Full Commission found:

An increase or onset of pain after a long day of work is not identifiable enough to meet the definite requirement for a specific incident injury...The claimant in the present case cannot identify a specific incident identifiable by time and place of occurrence which precipitated her increased neck pain... In our opinion, simply pinpointing one day when the symptoms increased is not sufficient evidence that a specific incident identifiable by time and place of occurrence occurred. The exact day and time is not necessary, but a specific incident does require more definiteness than just an increase in pain after working.

In a similar claim, the Full Commission found that the claimant had failed to satisfy the specific incident element of compensability when she was "unable to identify any particular activity which caused her symptoms, and testified that she was merely hurting at the end of a long

work day, and that there was no specific work-related incident." See, Ruth Howard v. Wal Mart, Full Commission Opinion filed November 3, 1999 (E814194).

Like the claimants in Hapney and Howard, the claimant in the present claim offers no evidence of a specific, work-related incident to support his claim of injury. In his hearing testimony the claimant denied any work-related activity that could have caused his immediate onset of pain on March 31, 2003. When asked during his hearing what he attributed his foot complaint to, the claimant responded, "I don't know. All I know, it couldn't have been nothing else because all I would do is work and go home." The claimant offered one alternative explanation for his foot injury when he speculated that his injury might have occurred from his kicking sections of a dance floor into place. The claimant admitted, however, that he had not engaged in that activity on the day of his alleged injury. The claimant was simply standing at the grill cooking when he experienced a sudden onset of pain.

Although the Administrative Law Judge was correct in stating that the claimant was performing employment services at the time that he experienced an onset of pain in his right heel, the facts in this case do not support a finding that the claimant sustained a specific work-related injury. Moreover, the claimant has failed to prove a causal

connection exists between his pre-existing right heel condition and his employment activities.

The Administrative Law Judge was also correct in his opinion that the claimant properly reported his complaint to the respondent employer, and that he sought and received appropriate medical treatment for his condition. Moreover, it is true that a pre-existing disability or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. St. Vincent Infirmary Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996); Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 64 (1990). Additionally, in worker's compensation law the employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Arkansas Power & Light Company v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959). However, worker's compensation law requires that a claimant establish a compensable injury "by medical evidence supported by 'objective findings' as defined in § 11-9-102(16)." See, Ark. Code Ann. § 11-9-102(5) (D). The claimant here has failed to prove by a preponderance of the credible medical evidence that his employment "aggravated, accelerated, or combined with [his] disease or infirmity to produce the

disability for which compensation is sought." St. Vincent Infirmary, supra. The testimony of Dr. Thomas reflects that it is more than questionable, from a medical standpoint, to find that the claimant's employment activities contributed to his Achilles tendon or to his accompanying tear. Doctor Thomas refused to state with any degree of medical certainty that the claimant's employment activities caused his onset of symptoms. This doctor testified, however, to the evidence of the claimant's pre-existing conditions, and she stated conclusively that "There was certainly some component of degenerative changes involved in [the claimant's] problem,"

Doctor Yao did not testify in this claim, but he opined in a letter that the claimant's "right Achilles tendinitis problem is most *probably* related to his work activities." (Emphasis added) Doctor Yao's letter, however, indicates that he derived his opinion based upon statements furnished to him by the claimant. The Commission has previously found that a claimant's belief, no matter how sincere, is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, FC Opinion filed Jan. 22, 1996 Claim No. E417617) Furthermore, a medical opinion based solely upon the claimant's history and subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer, Id.

Moreover, and more importantly, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983) No credible, objective medical evidence was presented in this claim to prove that the claimant's condition was in any way caused or affected by his work activities. Furthermore, statements by the only doctor who testified in this claim, Dr. Thomas, clearly indicate that the claimant's work activities would not have caused his right heel problems. Among other things, the claimant suffered from diabetes, obesity, Bell's Palsy, and a congenital birth defect - namely, Haglund's deformity. The claimant had a right knee meniscectomy in 2000, for which he required the use of crutches for some time afterwards. The only right heel condition that may have been even remotely attributable to the claimant's work was the tear in the claimant's already diseased tendon. And, frankly, no credible medical evidence in this case was presented to prove that the claimant's tear was caused by work-related activities, especially given to fact that the claimant was merely standing when his symptoms began.

Conclusion

Based upon the above and foregoing, we find that the claimant has failed to establish by a preponderance of the evidence that he sustained a specific incident injury on March 31, 2003. Accordingly, the decision of the Administrative Law Judge is hereby reversed and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.