

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005245

DANIEL GUERRA,
EMPLOYEE

CLAIMANT

LANGSTON GIN CO., INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 5, 2004

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE BETTY DEMORY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals and the respondents cross-
appeal an administrative law judge's order and opinion filed
May 8, 2003. The administrative law judge found, "The
claimant has proven by a preponderance of the evidence that
the medical treatment he pursued after March 1, 1999 and
continuing was reasonable, necessary and related to the
compensable February 8, 1999, injury." The administrative
law judge found that the claimant proved "that he remained
in his healing period and was totally unable to earn wages
from March 28, 2001 through April 30, 2001." After
reviewing the entire record *de novo*, the Full Commission

reverses the opinion of the administrative law judge. We find that the claimant failed to prove he was entitled to additional medical treatment or temporary total disability compensation after March 1, 1999.

I. HISTORY

The parties stipulated that Daniel Guerra, age 51, sustained a compensable back injury on February 8, 1999. Mr. Guerra testified, "we were picking up some heavy equipment - a trough. And I was walking backwards, and I had it picked up like this (demonstrating). And I raised up my right leg to go over some tools that were on the floor, and I just felt like a big tear right in my back....I'd never felt a pain like that before."

Dr. S. R. Cullom reported "marked spasm" on examining the claimant's lumbar spine area on February 12, 1999 and assessed "back pain." A CT of the lumbar spine was taken on February 15, 1999:

L3-L4: The bony structures appear normal. There is no evidence of a herniated disc or encroachment of the nerve root at this level.

L4-L5: The bony structures appear normal. There is no evidence of a herniated disc or encroachment of the nerve root at this level.

L5-S1: The bony structures appear normal. There is no evidence of a herniated disc or encroachment of the nerve root at this level.

IMPRESSION: NORMAL CT OF THE LUMBAR SPINE.

Dr. Cullom diagnosed "lumbar sprain" on February 18, 1999 and prescribed physical therapy. The claimant testified that the respondent-employer paid for his physical therapy. The claimant testified that he continued to work, "On and off, depending on how I was feeling." Dr. Cullom continued to report "marked spasm" on February 19, 1999. On March 4, 1999, Dr. Cullom reported "no success w/PT." Dr. Collum assessed "back pain" and appears to have referred the claimant to Dr. Tuck. The claimant was apparently denied this referral.

An MRI of the lumbosacral spine was taken on March 10, 1999:

Disc signal degeneration L4-5 and L5-S1, but without herniation. No significant loss of height. The cord is clear. Bony structures are intact.

IMPRESSION: LOSS OF CURVATURE WITH DISC DEGENERATIVE SIGNALS L4-5 AND L5-S1.

Dr. Hamza Brimah examined the claimant on June 2, 1999, assessed "Left lumbosacral radiculopathy," and arranged additional diagnostic treatment. The claimant agreed with the respondents' attorney at hearing that he did not inform the company about treating with Dr. Brimah. Dr. Brimah assessed on June 9, 1999, "Lumbosacral radiculopathy/severe

lumbago. His labs are reviewed with him....Anterior spur over the L5 of his x ray. At this time he is being referred to the neurologist."

The impression of a neurologist, Dr. Karen Plunkett, on July 30, 1999 was "Chronic low back pain, rule out herniated disc."

An MRI of the lumbar spine without contrast was taken on August 7, 1999, with the following impression:

Small central herniation present L4-L5 with slight effacement of the ventral thecal sac and extension towards the left paracentral margin with encroachment of the exiting left nerve root and slight posterior extrusion of disc material retro to the L5 vertebral body.

Dr. Plunkett referred the claimant to a neurological surgeon, Dr. Andrew S. Chiou, who reported on August 25, 1999:

To summarize, Mr. Guerra has severe back pain with mild left L5 radiculopathy. On neurologic exam his strength is full, sensation is intact and his reflexes are normal.

His MRI does reveal moderate herniations at L4/5 and L5 S1. I've discussed with him the relatively minor symptoms he has from those discs. At this point an L4/5 discectomy is not indicated, because that would not help his back pain. I will obtain a flexion extension L-spine series as well as an EMG/NCV to confirm radiculopathy....

A radiologist reported after a lateral flexion extension lumbar spine series on August 25, 1999, "There is

no subluxation with either flexion or extension." Dr. Plunkett's impression on an EMG nerve conduction study report dated October 19, 1999 was "This is an abnormal EMG nerve conduction study. There is electrophysiologic evidence of changes consistent with an L5 radiculopathy."

The respondents' attorney indicated at hearing that the respondents controverted the claim in May 2000, after the claimant filed a Form AR-C on or about May 25, 2000.

Dr. Chiou informed Dr. Plunkett on June 14, 2000, "I saw Mr. Guerra in my office today. He states worsening of his symptoms of left L5 and S1 radiculopathy and low back pain. At this point, I have prescribed Motrin, Zantac and an abdominal binder, but as he does not have any financial resources he is working on getting assistance. He wishes to return to see me in August."

Another lumbar spine MRI was taken on February 24, 2001:

No large disc protrusions or severe degenerative changes are identified at L1-L2, L2-L3, or L3-L4. Central HNP's are present at L4-L5 and L5-S1 resulting in moderate impression upon the L5 nerve roots at L4-L5 and significant impression upon the S1 nerve roots at L5-S1. The exiting nerve roots at these levels do not appear significantly compromised. Moderate facet degenerative changes are present at L4-L5 and L5-S1 not significantly contributing to the degree of central canal or bilateral foraminal stenosis.

IMPRESSION: 1.) Congenital spinal stenosis secondary to foreshortened pedicles along the entire lumbar spine. 2.) Superimposed central HNP at L4-L5 and L5-S1 resulting in moderate central canal stenosis at L4-L5 and significant central canal stenosis at L5-S1.

After diagnosing "L4-S1 stenosis, L4-5 and 5-1 herniated disc," Dr. Chiou performed an "L4-S1 laminectomy, medial fasciectomy, foraminotomy, and bilateral L4-5 and 5-1 discectomy" on March 23, 2001.

The claimant testified that he began working for another employer on January 7, 2002.

On March 20, 2002, Dr. Chiou responded to a query from the claimant's attorney, stating, "It is within a reasonable degree of medical certainty that Mr. Guerra's surgery in March 2001 may have been related to the February 1999 incident."

Mr. Guerra claimed entitlement to additional worker's compensation. The claimant contended that he was entitled to additional medical treatment and additional temporary total disability compensation from March 1, 1999 to a date to be determined. The respondents contended that the claimant "sustained a minor injury and medical was paid." The respondents contended that additional medical treatment

was not reasonably necessary, and that they had paid all benefits for which the claimant was entitled.

Hearing before the Commission was held on June 5, 2002. The claimant testified that he was still having problems with his back, and that he had continually felt pain with no relief since the compensable injury.

The administrative law judge filed an initial order and opinion on July 12, 2002. Following a remand from the Full Commission, the administrative law judge filed another order and opinion on May 8, 2003. The administrative law judge found, "The claimant has proven by a preponderance of the evidence that the medical treatment he pursued after March 1, 1999 and continuing was reasonable, necessary and related to the compensable February 8, 1999 injury." The administrative law judge found that the claimant proved "that he remained in his healing period and was totally unable to earn wages from March 28, 2001 through April 30, 2001."

The claimant appeals to the Full Commission, contending that he is entitled to temporary total or temporary partial disability compensation from March 1, 1999 through a date yet to be determined. The respondents cross-appeal, contending that the claimant failed to prove he was entitled

to additional medical treatment. The respondents also contend that the claimant failed to prove he was entitled to temporary total disability compensation.

II. ADJUDICATION

A. Medical treatment

The employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant has the burden of proving that he is entitled to requested medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a fact question for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

Based on the preponderance of evidence in the present matter, the Full Commission finds that the claimant failed to prove he was entitled to additional medical treatment after March 1, 1999, including the surgery performed in March 2001 by Dr. Chiou.

The parties stipulated that the claimant sustained a compensable back injury on February 8, 1999. A CT of the lumbar spine taken February 15, 1999 showed no abnormalities

at L3-L4, L4-L5, or L5-S1. The impression from this first objective diagnostic test, performed one week after the injury, was "Normal CT of the lumbar spine." The claimant was diagnosed with "lumbar sprain" and was provided physical therapy. The claimant reported no improvement after physical therapy. An MRI of the lumbosacral spine, administered on March 10, 1999, showed disc degeneration at L4-5 and L5-S1, but "without herniation." The impression was "Loss of curvature with disc degenerative signals L4-5 and L5-S1." The record before the Commission therefore shows that the claimant did not suffer a herniated disc as a result of his February 8, 1999 lumbar sprain.

The claimant began treating on his own with Dr. Brimah in June 1999, four months following the lumbar sprain. Dr. Brimah assessed "Left lumbosacral radiculopathy" and "severe lumbago." Dr. Brimah did not causally relate this degenerative condition to the claimant's February 1999 lumbar sprain or to any other workplace incident. Dr. Plunkett's impression in July 1999 was "chronic low back pain," but Dr. Plunkett did not causally relate the claimant's chronic pain to the workplace injury.

An MRI of the lumbar spine without contrast, taken August 7, 1999, showed "Small central herniation present L4-

L5 with slight effacement of the ventral thecal sac and extension towards the left paracentral margin with encroachment of the exiting left nerve root and slight posterior extrusion of disc material retro to the L5 vertebral body." The Full Commission does not find that the conditions shown in the August 1999 MRI were the result of the claimant's February 1999 lumbar sprain. We note Dr. Chiou's subsequent report on August 25, 1999, "His MRI does reveal moderate herniations at L4/5 and L5 S1. I've discussed with him the relatively minor symptoms he has from those discs. At this point an L4/5 discectomy is not indicated, because *that would not help his back pain* (our emphasis)."

The preponderance of evidence before the Commission demonstrates that the claimant did not sustain a herniated disc as the result of his February 1999 lumbar sprain, and that, based on the August 1999 report of the treating physician, surgical treatment was not reasonably necessary in connection with the compensable injury. We recognize that, in June 2000, the claimant reported to Dr. Chiou that the claimant's symptoms from his degenerative condition were worsening. A February 2001 MRI showed congenital stenosis along the entire lumbar spine, with superimposed central

herniations at L4-L5 and L5-S1. Dr. Chiou did not link this degenerative condition to the claimant's compensable injury. The record before us does not indicate why Dr. Chiou changed course and opted to perform two-level surgery on March 23, 2001. Nevertheless, Dr. Chiou's implicit decision in March 2001 that surgery was indicated was not the result of the claimant's February 1999 lumbar sprain. As Dr. Chiou had predicted in August 1999, Dr. Chiou's reports do not show an improvement in the claimant's condition following surgery. The claimant testified that he had experienced no improvement in his condition. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. Winslow v. D&B Mech. Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The instant claimant's lack of post-surgical improvement is probative evidence that Dr. Chiou's surgical treatment was not reasonably necessary.

The Full Commission also notes that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B). A physician does not have to incorporate the precise phrase, "reasonable degree of medical certainty" in his opinion. Service Chevrolet v. Atwood, 61 Ark. App. 190, 966 S.W.2d 909 (1998). Nor does a doctor have to be

"absolute" in his opinion. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Howell v. Scroll Tech., 343 Ark. 297, 35 S.W.3d 800 (2001).

In the present matter, Dr. Chiou wrote on March 20, 2002, "It is within a reasonable degree of medical certainty that Mr. Guerra's surgery in March 2001 may have been related to the February 1999 incident." Expert opinions based upon "may" lack the definiteness required to meet the claimant's burden to prove causal connection. Frances v. Gaylord Container Corp., 341 Ark. 527, 20 S.W.3d 280 (2000). Dr. Chiou's expert opinion authored on March 20, 2002 is just not definite enough to meet the claimant's burden. The claimant's attorney directs the Commission to the record at Claimant's Exhibit No. 34, where counsel in a letter to Dr. Chiou writes:

In summary, we are in need of your opinion as to whether or not the surgery (of March 2001) was probably related to the February 1999 incident (assuming that no intervening incident occurred).

We ask that your opinion regarding the above be stated "within a reasonable degree of medical

certainty", as is required by Arkansas workers' compensation law.

An unidentified individual has handwritten "yes" between the two above-cited paragraphs. The word "probably" essentially satisfies the statutory requirement of reasonable medical certainty. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). In the present matter, though, the word "yes" is penciled by an unidentified person in the white space between two paragraphs on Exhibit 34. The Commission simply cannot rely on this exhibit as a medical opinion "stated within a reasonable degree of medical certainty" pursuant to Ark. Code Ann. § 11-9-102(16) (B).

The Full Commission therefore reverses the administrative law judge's opinion that the claimant proved "that the medical treatment he pursued after March 1, 1999 and continuing was reasonable, necessary, and related to the February 8, 1999, injury." The Full Commission finds that the claimant failed to prove that such medical treatment was reasonably necessary, and we specifically find that the claimant failed to prove that Dr. Chiou's surgery was reasonably necessary.

B. Temporary total disability

An injured employee is entitled to temporary total disability compensation during the time that he is within his healing period and is totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). An injured employee is entitled to temporary partial disability compensation during the time that he is within his healing period and suffers only a decrease in his capacity to earn the wages that he was receiving at the time of the injury. *Id.*

The present claimant contends that he is entitled to temporary total disability compensation from March 1, 1999 through a date to be determined. The Full Commission notes, however, that the claimant was not taken off work following his February 1999 lumbar sprain. We note the claimant's testimony that he continued to work "On and off, depending on how I was feeling." The claimant testified that he worked for several different employers after March 1, 1999, and the claimant's testimony indicated that this work effectively constituted full-time employment. The Full Commission finds that the claimant failed to prove that he remained both within his healing period and totally or

partially incapacitated to earn wages at any time after March 1, 1999.

The administrative law judge determined that the claimant "remained in his healing period and totally unable to work from March 28, 2001 through April 30, 2001." The administrative law judge apparently determined that the claimant underwent surgery on March 28, 2001, although the record before us indicates that the surgery date was actually five days earlier on March 23, 2001. The administrative law judge also referred to a note from Dr. Chiou indicating that the claimant could return to work on April 30, 2001. In any event, the Full Commission has determined *supra* that the claimant's treatment after March 1, 1999 was not reasonably necessary in connection with the claimant's February 1999 lumbar strain. We therefore find that the claimant did not remain in his healing period and totally or partially incapacitated to earn wages at any time after March 1, 1999. Nor did the claimant become entitled to temporary total disability beginning on March 23, 2001, the date of surgery, because said treatment was not reasonably necessary in connection with the claimant's compensable injury. The Full Commission therefore reverses the administrative law judge's finding that the claimant

"remained in his healing period and was totally unable to earn wages from March 28, 2001 through April 30, 2001."

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant failed to prove that medical treatment provided after March 1, 1999 was reasonably necessary in connection with the claimant's compensable injury. We find that the claimant failed to prove he was entitled to temporary total disability compensation at any time after March 1, 1999. The Full Commission therefore reverses the administrative law judge's award of temporary total disability and additional medical treatment. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority opinion, which reverses the decision of the Administrative Law Judge that claimant proved entitlement to additional

medical and temporary total disability benefits for his compensable injury.

As to the claimant's entitlement to additional medical benefits, the majority apparently concludes that the claimant failed to establish that any of his medical treatment subsequent to March 1, 1999 was causally related to his February 8, 1999 compensable injury. My review of the medical evidence indicates that this conclusion of the majority is erroneous. First, it must be observed that the claimant had no documented prior history of significant back problems prior to the February 8, 1999 compensable injury. Second, the claimant consistently reported the same symptoms to his treating physicians from the time of the February 8, 1999 compensable injury to the date of the hearing. This fact standing alone militates strongly against a finding that the claimant's problems subsequent to March 1, 1999 were somehow no longer causally connected to the compensable injury.

The majority also concludes, apparently in support of its finding that claimant's problems subsequent to March 1 were not causally connected to the compensable injury, that the claimant did not experience a herniated disc as a result of the February 8, 1999 compensable injury. The

majority seems to conclude that because an initial CT scan and an MRI (which Dr. Rutherford characterized as being of "poor quality,") did not detect herniation, the claimant must not have had any herniations immediately after his compensable injury. Initially, even if this conclusion on the part of the majority is conceded as correct, I am somewhat at a loss to understand how such fact would indicate that claimant's problems subsequent to March 1 bore no causal relation to the claimant's compensable injury. The majority simply does not explain why the absence of herniation immediately after the compensable injury would indicate that none of claimant's subsequent back problems could have borne any causal relation to the claimant's compensable injury. There are a multitude of ways, other than disc herniation, in which the claimant's symptoms could have borne a causal relation to the compensable injury subsequent to March 1, including aggravation of his pre-existing degenerative condition. General Electric Railcar Repair Servs. v. Hardin, 62 Ark. App. 120, 969 S.W.2d 667 (1998). The fact that the claimant consistently reported the same symptoms from the time of his compensable injury to the date of the hearing indicates that whatever the precise

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etiology of his symptoms was, they bore *some* causal relation to the compensable injury.

SHELBY W. TURNER, Commissioner