

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F114278

PATRICIA HALES,  
EMPLOYEE

CLAIMANT

L & H LOGGING,  
EMPLOYER

RESPONDENT

AMERICAN INTERSTATE INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 19, 2004

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

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

Respondents represented by HONORABLE MICHAEL RYBURN,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed.

OPINION AND ORDER

Respondent appeals an opinion and order of the  
Administrative Law Judge filed June 12, 2003. The  
Administrative Law Judge found that claimant sustained a  
compensable lower back injury in addition to a cervical  
injury during the December 22, 2001 work-related accident.

Claimant has the burden of proving by a  
preponderance of the evidence that she is entitled to  
compensation. Jordan v. Tyson Foods, Inc., 51 Ark. App.  
100, 911 S.W.2d 593 (1995). Questions of credibility and  
the weight and sufficiency to be given evidence are matters

within the province of the Workers' Compensation Commission. Swift-Eckrich, Inc. v. Brock, 63 Ark. app. 118, 975 S.W.2d 857 (1998). After our de novo review of the entire record, we find that claimant has met her burden of proof and, accordingly, affirm the opinion of the Administrative Law Judge.

Claimant works in the logging industry and was cutting timber on December 22, 2001 when she was hit on top of the head by a falling tree. Respondent accepted and began paying benefits for a cervical injury.

Claimant presented credible testimony that she was also experiencing lower back symptoms but believed "it was all coming from the top," meaning her cervical spine. Claimant testified that she believed all her symptoms would resolve once her cervical problems were addressed. Granted, claimant did not specifically identify low back complaints to the initial providers or to Sheila Rauls, the claims representative for respondent. However, claimant credibly testified that at that time, she believed all her problems were coming from the "top."

Claimant was eventually referred to Dr. Anthony Russell, a neurosurgeon. Her primary and overriding pain and other symptoms seemed to be originating from the

cervical region. In a report dated July 10, 2002, Dr. Russell stated that claimant "had mentioned her lumbar spine on previous occasions, but we had chosen to concentrate on the cervical region due to the findings there."

Finally, on January 13, 2003, Dr. Russell provided in more detail the history of claimant's complaints, as well as her progress and treatment.

Patsy Hales returns to the neurosurgery clinic today in follow-up having apparently been denied her workman's compensation benefits in regards to her lumbar spine. This is a lady who was involved in an accident while on the job in which the tree that she was cutting struck her in the head, rendering her unconscious. She subsequently presented to an outside hospital and to this office with a complaint of neck pain as well as a lesser complaint of low back pain. At that time, the neck pain was of such significance that we elected to concentrate on that area and essentially ignored the lumbar spine. The reasoning behind this was the severity of the cervical spine made it priority one in regard to treatment. She ultimately underwent a cervical diskectomy and fusion. When she returned in follow-up she noted that the back pain had remained present. At this time, in light of the fact that her neck was no longer hurting the back pain had become more noticeable. During this time, while she remained on restriction as far as her activities the back pain became increasingly worse. Interestingly enough, her workman's compensation was denied due to the fact that the

disk/lumbar spine problem was felt to have occurred after she started treatment for her cervical spine. That is interesting in that, that entire time she was on strict restriction of activity due to the cervical spine activity.

I am convinced that the description of Ms. Hales original injury is certainly consistent with both the finding of a cervical disk as well as a lumbar disk herniation. The MRI scan confirms the presence of a L5-S1 disk on the left with direct nerve root compression.

I have recommended that Ms. Hales undergo surgical intervention. However, due to this injustice she continues to await surgery and continues to have a significant amount of pain, to the point where we have not been able to release her to resume her normal activities....

Respondent challenges the opinions expressed by Dr. Russell by citing Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000) for the proposition that use of the words "consistent with" is not sufficiently definite to support a finding that a causal connection exists between claimant's lumbar problems and the work-related accident. First, we point out that the decision of the Court of Appeals was reversed by the Arkansas Supreme Court in Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Second, Dr. Russell's opinion certainly contradicts respondent's speculation that "[i]t is also

inconsistent physically that the claimant's low back was injured in the December 22, 2001 incident." Finally, Dr. Russell's opinion is not critical to our determination of causation. See Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001).

Based on claimant's credible testimony about the work-related accident, her testimony that she also experienced pain in her lumbar area but that the overriding pain and concern involved her cervical injury, Dr. Russell's report that claimant complained of lumbar difficulties early on in his treatment of her but he chose to treat the much more serious cervical complaints first, his opinion that the mechanics of the injury would be consistent with an injury to her cervical and lumbar spine, and the absence of any nonwork-related explanation for claimant's lumbar condition, we find that claimant has met her burden of proof that she sustained a lumbar injury at the time of the December 22, 2001 work-related accident and is, therefore, entitled to appropriate benefits.

Accordingly, we affirm the opinion of the Administrative Law Judge finding that claimant sustained a compensable lumbar injury. All accrued benefits shall be paid in a lump sum without discount and with interest

thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. Respondents appeal from a decision of the Administrative Law Judge filed June 12, 2003, finding that the claimant sustained a compensable lumbar injury on December 22, 2001. Based upon my de novo review of the

entire record, I find that the decision of the Administrative Law Judge should be reversed.

Claimant sustained a compensable injury to her cervical spine on December 22, 2001. Claimant now contends that she also sustained an injury to his lumbar spine on December 22, 2001, for which he is entitled to medical benefits. With regard to the injury, claimant described the incident as follows:

I cut a large oak tree, and I looked up to see which way it was going to go. And it fell the way I wanted it to go, but after it had already hit the ground, something hit me in the top of the head.

The next thing I knowed, I was laying on the ground. My hard hat was way over here. And I got up and I had a big old hole in my head that I could stick my fist through.

I just laid there a little while and kind of shook it off and walked to the truck, and they had to take me to the emergency room.

Claimant described her initial complaints to include:

Neck and headache and my arms was, the right arm I couldn't hardly pick up, just pains down my arms. And I was having back pain then, but I thought it was all coming from the top.

Claimant completed a Form-N on January 8, 2002, with regard to her injury. On this form, claimant only indicated that she had injured her neck and head. Claimant underwent cervical surgery in April of 2002. The medical records do not mention claimant's low back until three months after claimant's surgery. Dr. Anthony Russell's July 10, 2002, report states:

... The major radiating component of pain she had into her arm has resolved. In fact, she had few concerns with the cervical region. Instead, she spent most of her evaluation discussing her lower back pain. Apparently since the surgery, she has had increasing pain there with radiation down the legs. There is a significant amount of numbness and tingling associated with this as well. Since she had a traumatic incident which predated the cervical disc disease, it would not be out of the question to consider the possibility of a lumbar abnormality as well. She had mentioned her lumbar spine on previous occasion, but we had chosen to concentrate on the cervical region due to the findings there.

Despite Dr. Russell's comment that the claimant had previously mentioned low back problems, the medical records do not corroborate this statement. Moreover, the claimant testified that the physical therapist treated her

low back pain, prior to July of 2002, but again the medical records do not corroborate claimant's testimony.

Claimant clearly has objective medical findings of mild bulging discs in the lumbar spine. However, I find that the claimant has failed to prove by a preponderance of the evidence that this condition is causally related to her compensable injury of December 22, 2001. Objective medical evidence while necessary to establish the existence and extent of an injury, is not essential to establish a causal relationship between the injury and the work related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). Except in the most obvious cases, the existence of a causal relationship may require the assistance of expert medical evidence. John Cotton v. Ball & Prier, Full Commission Opinion, September 23, 1997, (E512437); Billy Wayne Jeeter v. B & R McGinty Mechanical Company, Full Commission Opinion, March 6, 1997, (E208256), affirmed May 6, 1998; Ortho O. Wells v. Armstrong Rubber Company, Full Commission Opinion, April 14, 1997, (D100998); and Carolyn Jackson v. Bosley Construction, Inc., Full Commission Opinion, March 6, 1997, (E009401). Nevertheless, a preponderance of other non-medical evidence

is sufficient to establish a causal relation to a work-related incident. Wal-Mart Stores, Inc. v. VanWagner, supra.

At best claimant did not complain of an injury to her lumbar spine until at least four or five months after her injury. Claimant's medical care providers did not even mention claimant's lumbar complaints until seven months after her injury in July of 2002. Claimant has worked as a logger her entire life. The diagnostic studies reveal evidence of mild disc bulging. The only physician to offer an opine regarding causation has failed to state his opinion with sufficient medical certainty to establish a causal relationship. Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B). 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. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Tech., 343 Ark. 297, 35 S.W. 3d 300 (2001). Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. § 11-9-102(16)(B) ( Supp. 1999) which requires that medical opinions

be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances v. Gaylord, supra, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. § 11-9-102(16)(B). In Frances v. Gaylord, the Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities.

Dr. Russell has opined that claimant's back problems could "possibly" be related to the December 22, 2001, incident and that he is convinced that the description of claimant's accident is consistent with a lumbar disc

herniation. I find that these opinions lack the certainty to establish causation. Claimant's low back problems could possibly be related to her December 22, 2001 incident, or they could possibly not. Claimant's degenerative findings are consistent with the description of claimant's injury, but they are also consistent with the natural process of aging. Utilizing Dr. Russell's causation opinion as a basis to find compensability is simply not sufficient, as I find that his opinion does not pass muster. Claimant did not complain of back problems when she reported to the emergency room for treatment following her injury. Claimant did not mention a back injury when she completed the Form N in January of 2002. Claimant's physicians and medical care providers did not note any complaints of back pain until July 10, 2002, seven months after claimant's compensable cervical injury. Claimant has worked in the logging industry her entire life. Claimant was involved in a vehicle roll-over accident prior to the December 22, 2001, incident which necessitated emergency room treatment and x-rays of her back. In my opinion to find that the December 2001, incident is the cause of claimant's back problems is nothing more than sheer speculation. 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).

Therefore, for all the reasons set forth herein, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner