

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211407

MIKE GABA, EMPLOYEE	CLAIMANT
SOUTHERN REFRIGERATED, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 14, 2004

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

Claimant represented by HONORABLE GREGORY B. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE ERIC NEWKIRK, 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 December 26, 2003. The Administrative Law Judge found, in relevant part, that (1) the claimant is entitled to temporary total disability benefits for the period extending from August 15, 2002, through July 23, 2003; (2) the claimant has proven by a preponderance of the evidence that he is entitled to compensation for a five percent (5%) impairment to the body as a whole; and, (3) the claimant is entitled to reasonable and necessary medical treatment in association with his compensable low back complaints.

After a carefully conducted de novo review of this claim in its entirety, we find that the claimant has not proven by a preponderance of the evidence that he sustained a compensable low back injury on January 20, 2002, and that the Administrative Law Judge erred in awarding the claimant medical benefits; temporary total disability benefits from August 15, 2002, through July 23, 2003; and, a whole body impairment rating of five percent 5%. Therefore, the compensability of this claim and all benefits associated therewith should be denied.

#### History

The claimant, a truck driver for the respondent, was exiting the respondent's truck terminal in Little Rock on January 20, 2002, when the front tires of his truck-cab went into a pot hole. The air suspension seat in his transport truck "bottomed out," causing him to jar his back and leg. The claimant testified that the seat had been leaking air on a regular basis and was not properly pressurized when the incident occurred. The claimant did not measure the pot hole, and he could not testify to its exact depth. He testified that he was traveling at a rate of speed of approximately five to seven miles per hour when the incident occurred. Upon leaving the terminal, the claimant began noticing tightening and knotting sensations in the

lower lumbar region of his back. Thereafter, the claimant began to notice gradual symptoms in his left leg, including tightness, tingling, pulling, and eventually pain. The claimant radioed his employer regarding his symptoms. His employer asked him if he wanted to see a doctor, to which he answered affirmatively. By this time, the claimant had been driving over two hours, so he sought emergency treatment at a nearby hospital in Jackson, Tennessee. X-rays taken at the Jackson Madison County General Hospital emergency room revealed, among other things, loss of intervertebral disc space height at L3-4 intervertebral with prominent anterior osteophytes, reactive end plate changes, and rounded calcifications over the pubic ramus, which were thought to be venous. The claimant was diagnosed with acute lumbar myofascial strain and acute lower back pain, given pain medication, taken off of work for two days, and instructed to follow up with his regular physician should his condition worsen within the next three to fourteen days. The claimant neither followed up with his physician nor received additional medical treatment for his back pain until some seven months after the incident of January 20<sup>th</sup>.

Evidence reveals and the claimant admitted that he has a long and somewhat complicated history of back disease

and other medical problems which include spinal stenosis; frequent muscle spasms which last three to four days per episode; significant problems with arthritis in his knees, hips, and back for which he takes Prednisone; obesity; and heavy smoking. In addition to these problems, the claimant was diagnosed and treated for juvenile epiphysitis in 1978, he broke his foot while working for Wal Mart in 1995 which resulted in foot surgery, and he has had a thyroidectomy.

#### Discussion

\_\_\_\_\_ Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n 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." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). Under the statute, for an accidental injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must

establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Moreover, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4) (E) (i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

Medical evidence in the present claim reveals that the claimant has a long history of serious health issues, including back, hip, and leg problems. For example, an X-ray taken of the claimant's dorsal lumbar spine in 1978 revealed "minimal changes within lower dorsal and upper vertebra ... consistent with juvenile epiphysitis," and an alteration of the dorsal lumbar curve which was thought to be secondary to muscle spasm. The record indicated that the claimant continued to be treated for this condition through 1978. An AP film of the claimant's pelvis region taken in 1982 revealed degenerative changes in both hips and sacro-iliac joints. In a Post Employment Health Questionnaire filled out by the claimant in September of 2001, the claimant reported

that he had problems with arthritis in his legs, knees, ankles, toes, and shoulders for which he was treated with medications. However, upon presenting to the emergency room on January 20, 2002, the claimant denied any history of prior back problems. After his visit to the emergency room, the medical records indicate that the claimant was next seen at the Martin Specialty Clinic on July 26, 2002, for an abscess on his left leg. He was seen again for this condition on July 29<sup>th</sup> and August 13<sup>th</sup>, 2002. Although the claimant testified that his back and leg problems continued to worsen during this period of time, notes from these visits do not mention any problems associated with the claimant's alleged compensable injury. After an examination of the claimant on August 15, 2002, Dr. Kevin Kleinschmidt ordered an MRI be taken of the claimant's lumbar spine. Results of this test, which was conducted on August 21, 2002, revealed a large osteophyte at L3-4, with no significant herniation, bulge, or sclerosis. An X-ray taken on this same date revealed a degenerative change in the lower thoracic and lumbar spine with areas of spurring at L3-4; moderate narrowing of the L3-4 disc space and mild moderate narrowing of the L4-5 disc space. Stimulation studies conducted on October 15, 2002, revealed an absent peroneal motor response with a mildly slowed tibial on the

left, which the doctor noted could be indicative of an L4-5 and possibly some L5, S1 radiculopathy. The doctor further noted that the absence of sural nerve responses in someone of the claimant's age are somewhat uncertain. Results from later testing and medical evaluations from various physicians confirmed the results from these earlier tests. Essentially, the claimant suffered from lumbar stenosis and spondylosis, and his condition was complicated by extreme obesity and heavy smoking. In a letter to the claimant's attorney dated January 8, 2003, the claimant's then treating physician, Dr. John A. Campbell, offered the following general assessment of the claimant's condition:

The patient did tell me that prior to 1/20/02 he had not been having these kind of symptoms. ... I have examined Mr. Gaba on October 15, 2002, although I have not treated him with any medications or other treatments. Mr. Gaba's physical complaints, according to his history, appear related to this work related incident. His complaints were back pain and left leg pain.

Objective findings based on physical examination included (1) obesity, (2) lower extremity edema, (3) normal motor strength of lower extremities, (4) intact sensory exam although some slightly decreased light touch in both his heels. He had negative straight leg raise testing. His reflexes were absent. I saw no obvious swelling, muscle spasms. He did have somewhat decreased range of motion.

Based on my examination and review of the patient's imaging studies it is my opinion that the patient probably has underlying lumbar stenosis and spondylosis and *quite possibly* his accident *might* have caused an exacerbation of these problems by impinging a nerve during the accident. (Emphasis added)

*With respect to your question regarding whether it is reasonable for Mr. Gaba to have been off work since August 15, 2002 because he continued medical care and treatment for his symptoms, I am unable to offer an opinion on this at this time.* (Emphasis added)

The doctor further opined that surgical intervention for the claimant at that time would have been "exceedingly difficult" due to the claimant's morbid obesity.

The claimant continued to receive treatment for his symptoms, including some physical therapy, and he was released to return to full work duty on February 10, 2003. In a letter to the claimant's attorney from Dr. John A. Sklar dated July 23, 2003, the doctor confirmed that the claimant suffers from degenerative disc disease which pre-dates the claimant's injury, and which will continue to worsen in spite of the claimant's alleged work related injury. Doctor Sklar further stated that EMG and nerve conduction tests show peripheral neuropathy in the

claimant's bilateral lower extremities, but that these tests did not show evidence of radiculopathy. Specifically he stated:

This claimant's history and medical findings are consistent with a diagnosis of chronic degenerative disease in the lumbar spine with myofascial pain and tightness in the lumbar paraspinals and gluteals. The claimant has "non-verifiable radicular complaints" using the terminology from the AMA Guides, Fourth Edition.

Doctor Sklar described the claimant as a poor surgical candidate due to his "multiple medical issues." Based upon the findings of functional capacity testing, the doctor opined that the claimant fell into the DOT category of "sedentary and light," but added that the claimant's condition is "difficult to quantify" due to many factors, including his general medical condition. With the exception of work hardening, this doctor stated that there was very little in terms of ongoing treatment from which this claimant would benefit. In regards to MMI, Dr. Sklar stated, "Therefore, again, with the exception of work hardening, I believe that all appropriate treatment has been rendered to this claimant, and, therefore, if he is not at MMI, he will be there shortly." In terms of an impairment rating for the claimant, Dr. Sklar commented as follows:

In regard to an impairment rating for this claimant, I believe that he would most appropriately be rated under DRE Lumbosacral Category II due to the fact that he has "non-verifiable radicular complaints." I do not believe that, in his case, there is enough evidence to place him in DRE Lumbosacral Category III as there is no "significant" signs of radiculopathy. Therefore, most likely, his impairment rating would be 5% whole person from DRE Lumbosacral Category II.

#### Conclusion

The preponderance of the medical evidence in this claim does not support a finding that the claimant sustained a compensable injury on January 20, 2002, as defined by Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002.) At best, the claimant suffered a lumbosacral strain from the incident of January 20<sup>th</sup>, for which he received emergency medical treatment and then declined to initiate recommended follow up treatment for nearly seven months thereafter. The claimant's extensive history of medical problems, including muscle spasms associated with an arthritic condition in his back and hips; that he waited so long to initiate follow up treatment for what he described as a worsening condition; and, that he continued to work during the seven months before he again sought medical treatment for his back, strongly suggests that the claimant did not sustain a

compensable injury from the incident in the truck terminal on January 20, 2002. Rather, the totality of the evidence indicates that the claimant's problems were preexisting. Nearly a year after it happened, Dr. Moore speculated that the incident at the truck terminal might have exacerbated the claimant's underlying, preexisting conditions. Although our court of appeals has stated that objective medical evidence is not essential to establish the causal relationship between an injury and a work-related accident, objective medical evidence is necessary to establish the existence and extent of an injury. Horticare Landscape Mgt. V. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Moreover, 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).

The facts in this case reveal that during his initial treatment in the emergency room on the day of the incident the claimant was instructed to seek follow up treatment should his condition worsen within the following two weeks. The claimant waited five days short of seven months before consulting another physician about his alleged injury, during which time he continued to work. The claimant had obvious opportunities to seek medical attention for his back and legs during this seven month period of time. The

record reveals that the claimant was seen by two doctors at the Martin Specialty Clinic for other health problems, including an abscess on his left leg, on July 26, 29, and August 13, 2002. Yet during these visits, the claimant failed to mention any chronic back and leg pain to his doctors. Moreover, multiple tests and examinations from several competent physicians over the course of the claimant's treatment subsequent to the incident of January 20, 2002, consistently failed to prove within a reasonable degree of medical certainty that the incident at work caused the claimant's chronic back condition. Instead, it was conclusively determined that the claimant suffers from, and will continue to suffer from, among other things, degenerative disc disease caused by osteoarthritis. And in the claimant's own words during his testimony of the hearing of September 24, 2003, "the arthritis is not" traceable to the work incident. Neither does the evidence support the contention that the claimant's stenosis is the result of his work related incident. To the contrary, the medical evidence overwhelmingly supports the fact that the claimant's spinal stenosis predated the work related incident. Specifically, all of the claimant's diagnostic testing revealed the presence of osteophytes (bone spurs), which are most likely formed due to degenerative changes to the spine over a

period of time. Although the claimant contends that his stenosis was caused by his work related incident, 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) Moreover, 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. Therefore, the claimant has failed to meet his burden of proof and the compensability of this claim should be denied.

Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation during that period of time that he is within his healing period and totally incapacitated to work. Arkansas Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981) The healing period, which is defined by A.C.A. §11-9-102(6) to be that period necessary for the healing of an injury resulting from an accident, continues until the injured employee is as far restored as the permanent character of his injury will permit. When the

underlying condition causing the disability becomes stable and when nothing further will improve that condition, the healing period has ended. Emerson Elec. v. Gaston, 75 Ark. App. 232, 58 S.W.3d 852 (2001); citing, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996). The determination of when the healing period has ended is a factual determination for the Commission. Id.; citing, Carroll Gen. Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996).

Even if it were shown by a preponderance of the evidence that the claimant sustained a compensable injury on January 20, 2002, a finding we specifically do not make, the claimant has failed to prove that he is entitled to temporary total disability through July 23, 2003. Specifically, the Administrative Law Judge in this claim found that the claimant's healing period ended on July 23, 2003, when Dr. Sklar assigned the claimant a permanent impairment rating. In his above referenced letter of July 23, 2003, Dr. Sklar stated, "if he is not at MMI, he will be there shortly." This letter, however, was drafted eighteen months after the claimant's incident of January 20, 2002. The claimant was initially diagnosed with lumbar myofascial strain, which is a soft tissue injury. After his initial treatment, the claimant received no medical treatment for

his alleged injury for seven months, during which time he continued to work for the respondent/employer driving a truck. Although he became unemployed in mid-August of 2002, the claimant was released to return to work without restrictions on February 7, 2003. Furthermore, in his letter of January 8, 2003, Dr. Campbell could not state within a reasonable degree of medical certainty that the claimant's having been off work since August 15, 2002, was medically necessary or justifiable. These facts combined with the fact that the claimant suffered from a long history of chronic degenerative disc disease preponderates against the assumption that the claimant's healing period for an injury that he *may* have sustained on January 20, 2002, ended some eighteen months after the incident. Prior cases have shown us that the normal healing period for a soft tissue type injury should occur sometime within a three to six month period of time. Elliot v. Maverick Transportation, Inc., Full Commission Opinion filed September 10, 2003 (F101031). If the claimant continues to experience chronic pain after approximately six months, then it is likely that his symptoms stem from some other etiology, i.e., degenerative disc disease. In the present case, the claimant's underlying condition has been shown to be preexisting spinal stenosis and spinal spondylosis with non-verifiable radicular

complaints. Aside from the two days that the claimant was taken off work immediately following the incident of January 20, 2002, no conclusive evidence was presented in this claim to indicate when the claimant's healing period ended, assuming that it ever actually began. Nor was evidence presented in this claim to prove that the claimant was incapacitated from working due to a work related injury between August 15, 2002, and July 23, 2003. Therefore, his award of temporary total disability for that period of time should be denied.

Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-

related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

Ark. Code Ann. § 11-9-704(c) (1) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined as: "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Id. Furthermore, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings." With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks and Tourism

v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998). The Commission has the authority and the duty to weigh medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794 (1989); Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984); Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7, 727 S.W.2d 391 (1987). Likewise, the Commission is entitled to examine the basis for a physician's opinion, like that of any other expert, in deciding the weight to which that opinion is entitled.

Although it is evident that if the claimant in this case is not physically impaired to some extent at this time, he will most likely become so during his lifetime due to his overall health and medical condition. The claimant has failed to meet his burden of proof, however, in establishing that any permanent disability that he might currently experience is attributable to the incident which occurred on January 20, 2002. In his final analysis of the claimant's condition, Dr. Sklar opined with uncertainty that the claimant's impairment rating is 5% to the person as a whole. He based this rating not on a decisive medical determination that the claimant's accident resulted in permanent disability, but stated, rather, that the

"claimant's history and medical findings are consistent with a diagnosis of chronic degenerative disease in the lumbar spine with myofascial pain and tightness in the lumbar paraspinals and gluteals," with "non-verifiable radicular complaints... ," which "most likely" placed the claimant at a 5% impairment rating. Consequently, this claimant has failed to prove that a work-related injury resulted in a physical abnormality which limits his ability to effectively use part of his body as a whole. Therefore, any permanent disability awarded to this claimant should be denied.

Based upon the above and foregoing, we find that the decision of the Administrative Law Judge must be and hereby is reversed and the compensability of this claim along with any medical benefits associated therewith is denied. Accordingly, the award of any and all temporary total disability and/or permanent partial disability benefits associated with this claim is also denied.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.