

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110661

KEITH L. JORDAN, EMPLOYEE	CLAIMANT
PARKER FURNITURE CO., INC., EMPLOYER	RESPONDENT NO. 1
TRAVELERS, INSURANCE CARRIER	RESPONDENT NO. 1
COLUMBIA NATIONAL INSURANCE CO., INSURANCE CARRIER	RESPONDENT NO. 2

OPINION FILED FEBRUARY 27, 2004

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

Claimant represented by HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondents No 1 represented by HONORABLE ROBERT H.
MONTGOMERY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE ROBERT J. DONOVAN,
Attorney at Law, Marianna, Arkansas.

Decision of the Administrative Law Judge: Affirmed as
modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's
order and opinion filed July 10, 2003. The administrative
law judge found that the claimant proved he sustained a
compensable back injury. The administrative law judge found
that the claimant "remained in his healing period and was
unable to earn wages from September 21, 2002 to at least
March 21, 2002(sic)." The administrative law judge found,

"Respondent No. 1 and Respondent No. 2 are both held liable for benefits with their liability apportioned. Respondent No. 1 is apportioned 75% of the expenses and benefits while Respondent No. 2 is apportioned 25% of the expenses and benefits." After reviewing the entire record *de novo*, the Full Commission finds that the claimant proved he sustained a compensable injury. The Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from June 19, 2001 through July 3, 2001, and from September 5, 2001 through March 21, 2002. We find that the administrative law judge properly apportioned liability between the respondents. The Full Commission therefore affirms, as modified, the opinion of the administrative law judge.

I. HISTORY

Keith L. Jordan, age 46, testified that he began working for Parker Furniture Company in about 1981. Mr. Parker described his duties as "Delivering furniture, unloading, loading, and put it in the warehouse, and stock the floor, and so on." The parties stipulated that Respondent No. 1, Travelers, was "on the risk" beginning May 1, 1997. The parties stipulated that Respondent No. 2,

Columbia National Insurance Company, was "on the risk" beginning May 1, 2001.

The claimant informed Dr. Apurva R. Dalal on May 15, 2001 that his back was hurting. The claimant testified that his last day of work was about May 19, 2001. The claimant testified that he quit working because "I have problems with my knee, and I kept going back and forth to the doctor. I told my boss. He said go to the doctor and see what, you know, straighten out and, you know, make sure everything is all right."

Dr. Dalal reported on June 19, 2001:

States that his back is still bothering him. It hurts him a lot. States that every time that he tires (sic) to lift up weight it causes him to have pain....

Dr. Dalal's impression was "LBP, poss herniated disk on the RT side." Dr. Dalal requested additional diagnostic testing and told the claimant "that he should not be lifting any heavy weight until further notice."

An MRI of the lumbar spine without contrast was taken on June 26, 2001, with the following impression:

Broad based disc bulge at L3-4. L4-5 and L5-S1. No focal herniation or spinal stenosis is identified.

The claimant returned to Dr. Dalal on July 3, 2001:

PT states that he is feeling much better. He has not been having much pain lately. He has been ambulating W/O any difficulty. However, states that suddenly sometimes at night both legs cramp up....

MRI: He has a broad based disc bulge at L3, L4 L4 (sic) L5 and S1, however, there is no focal herniation or spinal stenosis identified.

Dr. Dalal's impression was "low back pain." Dr. Dalal recommended physical therapy and told the claimant "that since he does not have any herniated disc at present he may be OK to go back and start lifting some weight and go back to work. However, in the meantime I would like him to have an arterial Doppler of both the legs done. PT is a heavy smoker and we want to R/O the problem W/his claudication."

The claimant followed up with Dr. Dalal on August 1, 2001, complaining of continued right leg problems. The claimant told Dr. Dalal on September 5, 2001 "that his RT knee is killing him....PT states that he can no longer work at his former place of employment. He cannot lift any heavy weights. PT has applied for disability from the state of Arkansas." Dr. Dalal's impression was "RT knee internal derangement W/degenerative arthritis." Dr. Dalal recommended a diagnostic knee arthroscopy and wrote, "We have received a phone call from Dr. Iskander stating that he has investigated him thoroughly and even though his pain

sounds like claudication he does not think that there is any vascular abnor."

The claimant underwent right-knee surgery on September 13, 2001. The claimant informed Dr. Dalal on September 20, 2001, "He states that he is feeling much better. He does not have pain anymore."

Through Dr. Dalal's referral, the claimant visited Dr. Michael J. Sorensen on March 21, 2002:

The patient is a 44 year-old gentleman who has had back problems for about one year. He states he was injured in his job delivering furniture. He has had back pain from to time (sic) with this type work. He states that there was not any one specific injury, however, and his claim was denied from work comp although hearings are apparently pending....He has a numbness sensation in the legs bilaterally but the primary symptoms are on the right leg in the lateral of the upper and lower leg into the calf....

Maximal tenderness is in the low lumbar segments, greater on the right with spasm of the lower paraspinal musculature....

MRI scan of the lumbar spine was performed on 6/26/01, in Forrest City revealing a broad-based disc bulge at L3-4, L4-5 and L5-S1 without focal herniated discs. The patient states that he has had more leg pain since the MRI was done.

Dr. Sorensen assessed "Right leg sciatica/radicular pain with multilevel degenerative disc disease." Dr. Sorensen recommended conservative treatment, which included an epidural injection, and additional diagnostic testing.

Mr. Jordan claimed entitlement to worker's compensation. The claimant contended that he sustained "a gradual onset right knee and back injury that culminated May 8, 2001." The claimant contended that he was entitled to reasonably necessary medical treatment, and temporary total disability compensation from May 19, 2001 to a date to be determined.

Respondent No. 1 contended that the claimant could not prove he sustained a compensable injury. Respondent No. 1 contended that if the claim was found to be compensable, then Respondent No. 2 was liable for benefits. Respondent No. 2 contended that the claimant could not prove he sustained a compensable injury. Respondent No. 2 contended that if the claimant did sustain a compensable injury, then the compensable injury occurred before Respondent No. 2's coverage.

Dr. Dalal wrote to the claimant's attorney on February 17, 2003:

This is in response to your letter dated 02-10-03, requesting a letter stating if Keith Jordan's medical condition is work related. He worked at Parker Furniture in Forrest City where he delivered furniture. The patient stated he worked there for many years and lifted heavy weights.

I have reviewed his records and my notes taken last year and the year before that, and I have

examined him on many occasions. I have also reviewed his MRI results and notes returned by Spine Memphis. I can say medically with a reasonable degree of certainty that his back problems, especially the multiple levels of degenerative arthritis with the central disc herniation and right sciatica, could have resulted from him lifting heavy weights for many years.

I am certain that the back injury is caused from repeated lifting of heavy weights, which results into degenerative changes in the intervertebral discs. This disease can progress and cause narrowing of the neuroforamina and cause permanent damage to the lumbar spine....

The parties deposed Dr. Dalal on May 22, 2003. Dr. Dalal confirmed that the June 2001 MRI had shown disc bulging at L3-4, L4-5, and L5-S1, with no focal herniation identified. Respondent No. 2's attorney examined Dr. Dalal:

Q. What does that mean, no focal herniation?

A. Focal herniation is a term used when ligament in the posterior aspect of the spine, they break, and a disc extrudes out of that herniation. That is focal herniation. A bulge is a pressure. So if this is the membrane and it pushes that and bulges out, that's a bulge. However, if this separates out and this comes out of it, that's a herniation.

Q. Okay. At this point in time, do you have an opinion as to whether or not this bulge had existed back to the first visit that he had in your office?

A. Well, my opinion would be that the bulge could have existed even at the time of the first visit, whether detected or not, or whether symptomatic or not, but it was seen and detected on 7/3/2001 with

the MRI done, but could he have had a bulge? He could have.

Q. Could he have had one, say, back as early as the year 2000?

A. It's hard to say how far the bulge could have been. It could have been in 2001, could have been in 2000. It would be difficult for me to say one way or the other. It's hard for me to predict that far. Just because of the timing, it's possible it could have been two or three months ago, but I couldn't be absolutely sure if I told you that it could have been there in 2000 or 1996, I don't know.

Q. What symptoms, if any, would a bulge at the level and nature described in this report give?

A. One thing we have to note is bulge in many patients could be asymptomatic, also. Lumbar disc bulge does not always cause symptoms. The second thing is, if the bulges start to cause problem (sic), he would have transient low back pain, spasms in the back, pain radiating down the leg, things like that. But it could be very well asymptomatic....

Q. And you can't tell us the extent that these problems pre-existed his first visit with you?

A. It would be difficult for me to say whether his problems were at the same level when he complained of the back problem versus the first time he came. He may have had a problem and may not have been symptomatic, or maybe the knee was more problematic than his back.

Q. And there's not any way to tell how much of this problem is a result of the natural aging process, as opposed to work?

A. It is very difficult. It's impossible to say.

Q. Impossible. Okay. And, in fact, you can't even say with certainty which is the major cause, can you?

A. What the ...

Q. The major cause of the problem with his back, whether it's part of the aging process or work over the years.

A. It's difficult to say whether his back problem, could it be an aging process? Yes, it could be an aging process. However, relying on the fact that he is forty-four-year old gentleman and not eighty-four-year-old gentleman, and considering that a forty-four-year-old gentleman has a history of lifting heavy weights, one may assume that lifting heavy weights may have contributed to the degenerative arthritis. However, I cannot say exactly what portion of it could have, to differentiate that from his normal aging process.

The claimant's attorney questioned Dr. Dalal:

Q. And just referring to the February 17, 2003, letter that you wrote to me, Doctor, did you have any information at that time regarding what kind of job duties Mr. Jordan had for Parker Furniture? I've got a copy here if you need to review that.

A. It is my understanding that I was aware that he lifted weights and delivered furniture.

Q. And if you will assume for me, for the purpose of this question, that the term "major cause" means more than 50 percent, do you have an opinion as to whether Mr. Jordan's work at Parker Furniture was the major cause of his back condition that you saw him for?

A. I would think yes.

After a hearing before the Commission, the administrative law judge found that the claimant failed to prove he sustained a compensable knee injury; the claimant does not appeal this finding. The administrative law judge found, "The claimant has proven by a preponderance of the evidence that he sustained a gradual onset back injury arising out of and in the course of his employment." The administrative law judge implicitly awarded temporary total disability "from September 21, 2001 to at least March 21, 2002 (date of the last medical report in evidence)." The administrative law judge found, "Respondent No. 1 and Respondent No. 2 are both held liable for benefits with their liability apportioned. Respondent No. 1 is apportioned 75% of the expenses and benefits while Respondent No. 2 is apportioned 25% of the expenses and benefits."

Both respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by

a specific incident or is not identifiable by time and place of occurrence, if the injury is: (b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. See, Ark. Code Ann. § 11-9-102(4)(D); Ark. Code Ann. §11-9-102(16). The claimant's burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable "only if the alleged compensable injury is the major cause of the disability or need for treatment." See, Ark. Code Ann. § 11-9-102(4)(E)(ii).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that he sustained a compensable gradual onset back injury arising out of and in the course of his employment." The Full Commission affirms the administrative law judge's finding of compensability. We agree with the administrative law judge that the claimant was a credible witness. The claimant began heavy manual labor for the respondent-employer in 1981. The claimant's first recorded complaints of back pain occurred in May 2001, after respondent-carrier No. 2 was on the risk. A June 2001 MRI showed broad-based lumbar disc bulging, with no herniation. In March 2002, Dr.

Sorensen described "spasm" in the claimant's "lower paraspinal musculature." In February 2003, Dr. Dalal stated, "I am certain that the back injury is caused from repeated lifting of heavy weights, which results into degenerative changes in the intervertebral discs. This disease can progress and cause narrowing of the neuroforamina and cause permanent damage to the lumbar spine." We note Dr. Dalal's credible expert testimony that disc bulges could cause problems, including back spasms. Dr. Dalal agreed with the claimant's attorney that the claimant's "work" was "the major cause" of his condition. It is true that the Commission must find that the "compensable injury," not "the work," was the major cause of the claimant's disability and need for treatment. Nevertheless, Dr. Dalal's opinion that that the claimant's "work" was the "major cause" of the claimant's condition is additional evidence satisfying the statutory requirement that the claimant proved his injury arose out of and in the course of employment.

The Full Commission recognizes that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B). Expert opinions based on "could," "may," or

"possibly" lack the definiteness required to prove causal connection. Frances v. Gaylord Container Corp., 341 Ark. 527, 20 S.W.3d 280 (2000). However, 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 800 (2001). Dr. Dalal expressly opined in the present matter, "I am certain that the back injury is caused from repeated lifting of heavy weights, which results into degenerative changes in the intervertebral discs." Dr. Dalal's opinion was stated with clarity and definiteness. It is true that Dr. Dalal also stated under questioning by the respondents that it was "impossible" to say "how much of this problem is a result of the natural aging process, as opposed to work." Yet, we attach greater weight to Dr. Dalal's "certainty" in February 2003 that the claimant's back injury was caused by repeated lifting of heavy weight at work. In addition, a finding of causation in a worker's compensation case does not need to be expressed in terms of a reasonable medical certainty when there is supplemental evidence supporting the causal

connection. Heptinstall v. Asplundh Tree Expert Company, CA03-11, December 10, 2003 (E913717).

The Full Commission affirms the administrative law judge's finding of compensability. The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a back injury which was not caused by a specific incident and not identifiable by time and place of occurrence. We find that the claimant's injury caused physical harm to the body and arose out of and in the course of employment, and that the claimant established the compensable injury by medical evidence supported by objective findings. We find that the claimant's compensable injury was the major cause of the claimant's disability and need for treatment.

B. Temporary 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). In the present matter, the Full Commission finds that the claimant proved he was entitled to temporary total disability compensation from June 19, 2001, when Dr. Dalal took the

claimant off work, until July 3, 2001, when Dr. Dalal stated that the claimant could return to work. We find that the claimant proved he was entitled to an additional period of temporary total disability beginning September 5, 2001, when Dr. Dalal informed the claimant that he could not lift any heavy weights. There are no medical reports of record following Dr. Sorensen's visit with the claimant on March 21, 2002. Dr. Sorensen recommended additional conservative treatment and diagnostic testing, but he did not indicate that the claimant was unable to work. We find that the claimant failed to prove he was both within his healing period and incapacitated to earn wages after March 21, 2002.

C. Apportionment

As the administrative law judge stated, apportionment is appropriate when disability results from the combined effects of successive injuries or accumulative trauma while separate entities are providing coverage. See, Collins v. From The Heart, Inc., Workers' Compensation Commission F703473 (Feb. 2, 1999). The administrative law judge found, "Respondent No. 1 and Respondent No. 2 are both held liable for benefits with their liability apportioned. Respondent No. 1 is apportioned 75% of the expenses and benefits while

Respondent No. 2 is apportioned 25% of the expenses and benefits."

It is true that the claimant began working for the respondent-employer in 1981, and Respondent No. 2 did not come "on the risk" until May 1, 2001. Nevertheless, the claimant's back problems did not become manifest until May 15, 2001 and following. The Full Commission finds that the administrative law judge's finding on apportionment was equitable and based on a preponderance of the evidence, and we see no reason to disturb this finding on appeal.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable back injury. We find that the claimant proved he was entitled to temporary total disability compensation from June 19, 2001 through July 3, 2001, and from September 5, 2001 through March 21, 2002. We affirm the administrative law judge's finding that the respondents are entitled to a credit for any unemployment benefits received by the claimant during this period, pursuant to Ark. Code Ann. §11-9-506. The Full Commission therefore affirms, as modified, the opinion of the administrative law judge. The claimant's attorney is entitled to a fee pursuant to Ark.

Code Ann. §11-9-715(a) (Repl. 1996). For prevailing on the respondents' appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion.

Dr. Dalal provided opposing and contradictory opinions with regard to the cause of claimant's back problems for which he provided treatment. First, Dr. Dalal offered a written opinion in which he stated that the claimant's "...multiple levels of degenerative arthritis with the central disc herniation (sic) and right sciatica, **could have** resulted from him lifting heavy weights..." (Emphasis added). As noted by Dr. Dalal in his deposition, this statement indicates that it is possible that the claimant's back condition resulted from his work, and it is

possible that it did not. It is clear from the Supreme Courts holding in Frances v. Gaylord Container Corp., supra. and line of cases addressing A.C.A. § 11-9-102(16) (B) that Dr. Dalal's causation opinion lacks the definiteness required to satisfy this statutory requirement. Second, Dr. Dalal offers vacillating opinions as to whether claimant's work or the aging process is the major cause of claimant's back condition. Dr. Dalal states that it is "impossible" to tell how much of claimant's condition is the result of the natural aging process as opposed to his work. Yet Dr. Dalal later agrees with claimant's attorney that more than 50% of the cause of claimant's back condition was his work for respondent-employer.

Unlike the majority, I cannot find that any of Dr. Dalal's testimony and opinions regarding causation are entitled to great weight. In my opinion, the vacillating opinions of Dr. Dalal only serve to discredit his opinions altogether. Accordingly, I find that the medical evidence is insufficient to satisfy A.C.A. § 11-9-102(16) (B) which requires that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Dr. Dalal's opinions simply do not "pass muster"

as his opinions are not only contradictory but they are also merely speculation, and do not go beyond possibilities.

Since I do not find that the claimant offered sufficient medical evidence with regard to causation, I further find that the claimant has failed to meet his burden of proving that he sustained a gradual onset back injury. Claimant sought medical treatment for right knee pain and swelling in April of 2001. The following month he complained to his doctor of low back pain. Claimant described his back pain as developing over a period of time and could not relate any specific incident to the onset of his pain. While I acknowledge that a specific incident is not required to prove compensability of a back injury, the remaining evidence does not rise to a preponderance of the evidence to satisfy the causal connection and major cause requirements for a gradual onset injury. Claimant clearly suffers from degenerative disc disease. Claimant continued to work for respondent-employer until he received a letter from Dr. Dalal restricting claimant from lifting. Dr. Dalal later rescinded this restriction, yet the claimant did not return to work. Unquestionably, the claimant was capable of working until he received this letter. Accordingly, I find it difficult to find that the claimant's work, while it may

have contributed to his back condition, was the major cause of claimant's injury. In my opinion, given the level of degenerative disc disease, the evidence simply does not preponderate in favor of finding that the major cause of claimant's injury was his work. As noted by Dr. Dalal, in at least one of his opinions, such a finding is impossible.

Therefore, for those reasons set forth herein, I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable gradual onset back injury for which he is entitled to benefits.

KAREN H. MCKINNEY, Commissioner