

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F109999

BEVERLY YOUNG, EMPLOYEE	CLAIMANT
SMURFIT-STONE CONTAINER, A SELF-INSURED EMPLOYER	RESPONDENT
CRAWFORD & COMPANY, TPA, CARRIER	RESPONDENT

OPINION FILED JANUARY 5, 2004

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

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

Respondent represented by HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals the decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on July 20, 2001. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent-employer as a bag puller. The claimant contended that on July 19, 2001, she was tying up scrap bundles and putting

them on a pallet when she injured her back. The claimant did not report the alleged injury to the respondent for approximately one week and did not seek medical attention for several days after the incident. The claimant contended that she sustained a gradual onset injury.

The claimant testified that on the 19th she felt like her back was hurting. She stated that she reported to Linda Griffin, one of her co-workers, and Sandra Loyd, another co-worker on July 20, 2001, that her back was hurting. Neither Ms. Griffin nor Ms. Loyd was the claimant's supervisor.

The claimant left work on July 20th at 8:30 because she was subpoenaed to be a witness for a court appearance for her son. The claimant called the respondent-employer and reported that she would not be returning to work as she had planned because the proceedings were taking longer than she had expected. The claimant did not relay during either telephone conversation to the respondent-employer on July 20, 2001, that she had injured her back the previous day. The claimant testified that she stayed in bed the entire weekend because her back was hurting. However, there was evidence introduced into the record that the

claimant had spent the weekend moving. The claimant had told several co-workers that she was moving that weekend.

The claimant returned to work on Monday, July 23, 2001, and reported to her supervisor, Mr. Richard Davis, that she had hurt her back the previous Thursday. Mr. Davis told the claimant that she would not be able to file a claim because it was too late. The claimant had previously been informed that any time there was an injury that was work-related, it was to be reported immediately to her supervisor. It is of note that the claimant had a prior claim for carpal tunnel syndrome and was well aware of all of the procedures for filing a workers' compensation claim.

The claimant offered the testimony of Ms. Griffin, who testified that the claimant told her about the injury sometime in the late afternoon, not in the early morning. Ms. Griffin acknowledged that all injuries are supposed to be reported. Ms. Griffin explained that she told the claimant that she needed to report the injury to Mr. Dennis Davis. However, Ms. Griffin was not aware of whether or not the claimant reported the injury to him.

Ms. Bernadette Tankersly, who is also a bag puller for the respondent-employer, testified at the hearing. She

testified that the bags only weighed between 15 and 20 pounds. She also indicated that the claimant was talking about moving the weekend before she reported the injury on Monday.

The respondents offered the testimony of Dennis Davis, the safety coordinator for the respondent-employer. Mr. Davis testified that the bundles that the claimant was working with on that particular day weighed from 15 to 20 lbs. and not the 40 lbs. that the claimant said they were. Mr. Davis indicated that he was not aware of the claimant's injury until the following Thursday.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). See, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). The claimant does not contend that the injury is identifiable by time and place of occurrence, but that the injury is a gradual onset injury. In order to prevail, the claimant must prove by a preponderance of the evidence that he/she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical

services or resulted in disability or death; that the injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by "objective findings". However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(5)(A)(ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4)(E)(ii)(Repl. 2002). If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, he fails to establish the compensability of the claim and the claim must be denied. Reed v. ConAgra, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. § 11-9-704(C)(3). Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between her injury and her employment by medical evidence

supported by objective findings and she must establish that her injury is the major cause of her disability or need for treatment. We find that the claimant in the present case has simply failed to meet her burden of proof on the major cause requirement.

Dr. Richard Jordan, the claimant's treating physician, stated that: "I am sorry that I cannot say (with medical certainty) that repetitive lifting of 40 pound bundles caused more than 50 percent of Ms. Young's problem with disc herniation. We have no mechanism to quantitate such things." Further, Dr. Jordan's notes of August 28, 2001, indicate that the claimant's reported back problems started in "July of 2001 without any incident or accident."

The claimant offered the testimony of Dr. Waterhouse who opined that the claimant's injury was the major cause. However, Dr. Waterhouse's opinion is based upon a history given to him by the claimant. The opinion of Dr. Jordan should be given more weight than the opinion of Dr. Waterhouse. Dr. Jordan and Dr. Waterhouse have the same subjective history from the claimant. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App.

115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses' testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In short, we can not find that the claimant has proven by a preponderance of the evidence that she sustained

a compensable injury on July 19, 2001. The only evidence to support the claimant's claim is the claimant's own self-serving testimony and the testimony of her friend. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. No report of an injury was ever made on the day of the alleged injury or the day following the alleged injury even though the claimant knew that she was to immediately report any injuries. The claimant had ample opportunity to report an injury. The claimant spoke to at least two co-employees about this alleged back injury and in fact she called the office of the respondent-employer twice to let them know that she would not be in to work on Friday, July 20th. There was also evidence presented that the claimant was moving the

weekend before she reported the injury to the respondent-employer. Further, the medical opinion of Dr. Jordan stating that he could not make the determination that the claimant's repetitive lifting was more than 50% of the claimant's problems with the disc herniation is telling. Accordingly, after weighing all the evidence of record, we find that the claimant failed to prove by a preponderance of the credible evidence that she sustained a compensable injury on July 20, 2001.

Therefore, after we consider all the evidence, we find that the decision of the Administrative Law Judge must be and hereby is reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.