

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F202296

RICKY HOOPER, EMPLOYEE	CLAIMANT
MAVERICK TUBE, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 15, 2005

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

Claimant represented by HONORABLE STEVEN R. McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part, Reversed in part.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed December 17, 2003. The claimant sustained an admittedly compensable injury to his right lower extremity on January 18, 2001, when he was run over by a fork lift during the course of his employment. The claimant received medical benefits, but did not receive temporary total disability benefits. Claimant filed an AR-C claim for temporary total disability benefits related to his right lower extremity injury as well as a claim for benefits

alleging an injury to his left hand, wrist and forearm which was signed by the claimant on March 8, 2002. Respondents controverted the claimant's claim to additional benefits arising out of the January 18, 2001, injury, contending that the claimant did not provide any evidence or documentation warranting additional benefits. On October 5, 2002, the respondents petitioned the Commission to dismiss the claim for lack of prosecution. Correspondence between claimant's attorney, respondent's adjuster and the clerk of the Commission reveal that the parties agreed to leave the claim on the active docket while the claimant's attorney pursued additional medical documentation. After several months passed without any activity on the file, the respondents again petitioned the commission to dismiss this claim on January 9, 2003.

On February 13, 2003, Judge Greenbaum entered an Order of Dismissal without prejudice pursuant to A.C.A. § 11-9-702(a)(4). Claimant subsequently sent a request for a hearing to the Commission which was received on February 25, 2003. Claimant filed a second AR-C with the Commission on September 9, 2003.

At the hearing held on November 14, 2003, the claimant contended that in addition to the injury to his right lower extremity, he also sustained an injury to his left upper extremity for which he contended entitlement to temporary total disability and medical benefits. Conversely, the respondents contended that the claimant cannot prove that he sustained a injury to his left wrist and that the claimant's claim for additional benefits is barred by the Statute of Limitations. In his opinion filed December 17, 2003, the Administrative Law Judge found that the claimant's claim was not barred by the statute of limitations, that the claimant sustained a compensable injury to his left wrist, but that the claimant failed to prove entitlement to temporary total disability benefits. Respondents appeal the Administrative Law Judge's decision finding that the claim is not barred by the statute of limitations and finding that the claimant sustained a compensable left wrist injury. The claimant appeals the Law Judge's decision finding that the claimant failed to establish entitlement to temporary total disability benefits. Based upon our de novo review of the entire record, we find that the claimant's claim for benefits is not barred by the statute of limitations.

However, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his wrist. We further find that the claimant has failed to prove entitlement to any additional temporary total disability benefits. Therefore, we find that the decision of the Administrative Law Judge must be affirmed in part and reversed in part.

In the present claim, claimant's injury occurred on January 18, 2001. The claimant last received benefits for his lower extremity injury on January 26, 2001. Accordingly, the claimant had until January 18, 2003, to file a claim for benefits related to his left wrist injury, and January 26, 2003, to file a claim for additional benefits related to his right lower extremity injury. The record clearly reflects that the claimant filed an initial claim for benefits on March 8, 2002. An Order of Dismissal was filed on February 13, 2003. The claimant did not refile his present claim for benefits until September 9, 2003.

The Administrative Law Judge stated that the Order of Dismissal should not have been entered. This issue was not raised by the parties before the Administrative Law Judge.

The Administrative Law Judge found that the Order of Dismissal was defective on its face because no hearing was conducted on respondents' motion to dismiss.

In Dillard v. Benton County Sheriff's Office, ___ Ark. App. ___, ___ S.W.3d (Sept. 22, 2004), the Arkansas Court of Appeals held that on a claim for initial benefits a dismissal without a hearing would be invalid and the original claim would therefore remain active. The Court further held in Dillard that the claim for additional benefits was timely filed and therefore tolled the statute of limitations. Applying the Court's holding in Dillard to the present claim, we find that the claim was not properly dismissed and that the statute of limitations does not bar this claim. Accordingly, we affirm this finding.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which

required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In our opinion the evidence does not preponderate in favor of finding that the claimant injured his wrist when he was run over by a forklift. First, the medical records fail to corroborate the claimant's testimony that he injured his wrist in the forklift accident. Claimant sought immediate medical treatment for his injury. The claimant testified that he advised the emergency room personnel that he injured his wrist at the time of the accident, but the emergency room records do not corroborate this testimony. Moreover, the claimant was examined by Dr. John Williams on January 19, 2001, and on January 26, 2001. Dr. Williams did

not record any history of an injury to the wrist during either of these office visits. Furthermore, when the claimant sought medical treatment from a the Pemiscot Memorial Hospital in Missouri, x-rays were taken of the claimant's right hand, not his left. Claimant testified that the physician must have written the wrong hand down because the emergency room was extremely busy. We are not persuaded by this testimony. The medical records do not reveal treatment for the left wrist until July 18, 2001, when the claimant was examined by Dr. Edmund Landry. Dr. Landry has diagnosed the claimant with a ganglion cyst. In his December 3, 2001, office note, Dr. Landry stated that the claimant's cyst is the result of his injury, however, he does not set for the basis for this causation opinion. A review of Dr. Landry's medical records reveals that the claimant did not provide a true and accurate history of his injury and treatment to Dr. Landry. Accordingly, we cannot find that Dr. Landry's opinions are entitled to any weight.

The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value Poulan Weed Eater v. Marshall, 79 Ark. App. 129, 74 S.W.3d 878 (2002). The Commission may accept only

those portions of testimony that it determines are worthy of belief. Tucker v. Roberts-McNutt, 342 Ark. 511, 29 S.W.3d 706 (2000). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. Smith Blair, Inc. v. Jones, 77 Ark. App. 273, 280, 72 S.W.3d 560 (2002), The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's 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). Moreover, 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). Finally, 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).

The only evidence as to causation is the claimant's and his girlfriend's testimony. This testimony is not substantiated by the medical records. There is no evidence that the claimant reported an injury to his wrist when he completed the AR-N. Moreover, the claimant did not provide any independent corroborating evidence to support the self-serving testimony of the claimant and his girlfriend. Accordingly, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to left wrist on January 18, 2001.

In reaching this finding, we acknowledge the comment made by the Administrative Law Judge that the respondents should have produced Matt McCormick as a witness, and that the respondents failure to do so allows the Commission to infer that his testimony would have been

unfavorable pursuant to Brower Mfg. Co. v. Willis, et al, 252 Ark. 755, 480 S.W.2d 950 (1972). We find this statement to be a misapplication of the present law. Brower was decided at a time when the workers' compensation laws required the commission to draw every possible legitimate inference in favor of the claimant, when the claimant was always given the benefits of the doubt, and when the evidence was given the most liberal construction possible in favor of the claimant. In 1987, the General Assembly removed these requirements from the workers' compensation laws. In 1993, the General Assembly added language to the workers' compensation law requiring that the workers' compensation law be strictly, not liberally construed. The claimant carries the burden of proof. If Mr. McCormick could have substantiated the claimant's testimony, it was incumbent upon the claimant to produce Mr. McCormick as a witness. The claimant cannot rely upon the respondents to produce his witnesses, nor can a claimant any longer benefit from the respondents decision not to call certain witnesses. It would have been just as easy for the claimant to subpoena Mr. McCormick to the hearing as it would have been for the respondents since Mr. McCormick no longer worked for the

respondents. Accordingly, we place no weight or emphasis on the fact that the respondents did not call Mr. McCormick to testify.

With regard to the claimant's cross-appeal, we find that the Administrative Law Judge correctly found that the evidence fails to reveal that the claimant was ever totally disabled within the meaning of the Arkansas Workers' Compensation Laws. The claimant was released to return to work by his doctor on January 19, 2001, and contrary to the claimant's testimony, he was provided work by the respondents.

Accordingly, for those reasons set forth herein, we find that the claimant's claim for benefits is not barred by the statute of limitations; that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury to his left wrist on January 18, 2001; and, that the claimant failed to prove entitlement to temporary total disability benefits. Therefore, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part, and that this claim for benefits must be dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part from the Majority opinion. Specifically, I concur with respect to the Majority's holding that, pursuant to Dillard, the statute of limitations does not bar claimant's claim for benefits. I dissent, however, from the Majority's holding that claimant's wrist injury is not compensable.

I find that claimant's left wrist injury is compensable. The claimant testified that when the forklift ran over him, his left wrist was pinned underneath him and injured. The claimant further testified that he advised the emergency room doctor that he had injured his left wrist, but that he was primarily treated for what appeared to be a more serious injury to his foot and ankle. The claimant

testified that he continued to have pain and related problems in his wrist following the accident, which was corroborated by the testimony of Hershanna St. Arbor, the claimant's girlfriend. Ms. St. Arbor stated that the claimant complained of pain in his wrist immediately following the injury and continued to do so until the time of the hearing. The claimant also stated that he had obtained some treatment for his wrist from his personal family physician in Missouri. I find that claimant and Ms. St. Arbor's testimonies are credible and persuasive.

Dr. Edmond Landry, an orthopedic surgeon in Kennett, Missouri, treated claimant and noted on July 18, 2002, that there was crepitation in the claimant's wrist and that his Finkelstein's test was positive. Later, Dr. Landry would determine that the claimant was suffering from a ganglion cyst in his wrist. Both the presence of the cyst and the crepitation are objective findings.

The accident which was suffered by the claimant clearly could have caused the type of injury he has described. Further, the claimant and his corroborating witness credibly testified about the symptoms and problems the wrist injury were causing him. Lastly, Dr. Landry's

progress note documented objective findings to support the existence of an injury. That the claimant was suffering from some problems with his wrist is also supported by an emergency room visit to the Pemiscot Memorial Hospital in Hayu, Missouri, where he sought treatment for pain in his hand.

Accordingly, I find that the claimant has satisfied all of the elements necessary to establish a compensable injury of his left wrist as the result of being run over by a forklift on January 18, 2001.

I also find that claimant is entitled to temporary total disability benefits. The claimant alleged that, as a result of his injury, he missed work between January 19, 2001, through February 5, 2001, and again beginning on October 5, 2001, and continuing through April, 2002. I find that Dr. Landry's report dated September 19, 2001, indicates the claimant was not at the end of his healing period but, was instead, undergoing treatment at the direction at the direction of Dr. Landry. A further review of the medical record indicates that on December 3, 2001, the claimant saw Dr. Landry again. I find that the statements in that report reflect that the claimant had reached the end of his healing

period on December 3, 2001. I, therefore, find that the claimant is entitled to receive temporary total disability benefits from the date of his injury through December 3, 2001, except for any days in which the claimant actually was working.

In sum, I find that Claimant's claim is not barred by the statute of limitations, that he incurred a compensable injury to his left wrist and that he is entitled to TTD benefits as discussed above. Accordingly, I concur in part and dissent in part from the Majority opinion.

SHELBY W. TURNER, Commissioner