

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103814

ERIC PRATT, EMPLOYEE	CLAIMANT
B & B DIRECTIONAL BORING, EMPLOYER	RESPONDENT
AMERICAN STATES INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED OCTOBER 31, 2005

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

Claimant represented by HONORABLE KEN OSBORNE, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge finding that the claimant's difficulties with his lower back are a compensable consequence of his compensable right knee injury. Based upon our de novo review of the entire record, we find that the claimant has failed to establish by a preponderance of the evidence that he sustained a compensable consequence injury to the lower back. Therefore, we find that the decision of the Administrative Law Judge must be reversed.

The claimant sustained an admittedly compensable right knee injury on January 4, 2001, for which he has undergone two surgical procedures to remove loose bodies. During the first surgery, claimant's treating orthopedic surgeon, Dr. Mark Powell, discovered that the claimant has pigmented villonodular synovitis (hereinafter PVNS), a very rare condition. This finding was confirmed through a pathology report. Dr. Powell described his findings during surgery as follows:

...It looks like fingers, and it looks like - - it looks like carpet kind of just sticking out. Little villus is what we call 'em, and they're - - the hemosiderin is inflamed. It's just something we find usually accidentally. Usually on an MRI, if you look at it long enough, the radiologist will probably say, "Oh, yeah, that's PVNS," but it wasn't - - you know, it wasn't that obvious."

In describing the claimant's PVNS, Dr. Powell testified in his deposition that the claimant's condition only presented with finger-like tissues and not in a more serious nodular or ball-like form. Dr. Powell explained that PVNS is a localized condition that will not metastasize or

spread outside of the knee joint, but that it can destroy the joint. According to Dr. Powell, the claimant will expect to have more surgeries in the future to address the villus growth that will continue to reoccur.

In October of 2002, approximately a year and a half after the first surgery, the claimant underwent a second surgery to remove additional loose bodies within the claimant's knee. The parties do not contest the compensability of this second surgery.

Dr. Powell was specifically asked during his deposition if anything about the April 2001 surgery or the October 2002 surgery would cause a leg length discrepancy or would cause the right leg to be shorter than the left, to which he unequivocally responded in the negative.

In order to address the claimant's PVNS, Dr. Powell referred the claimant to Dr. Hershey Garner, a radiation oncologist. Dr. Garner administered 15 rounds of radiation to the claimant's right knee. Pursuant to Dr. Garner's May 29, 2003 report: "There is data from Europe indicating that a moderate radiation dose in the mid 30 Gy range over a three week period stands a high likelihood of

controlling his synovitis with minimal acute and long-term side effects." The claimant underwent radiation therapy in the summer of 2003. After completing the radiation therapy, the claimant returned to Dr. Powell.

The first report of back pain recorded by Dr. Powell during his multiple examinations of the claimant occurred on September 17, 2003, almost one year after the second surgery. In that report, Dr. Powell, recorded a history of "His pain has moved up, and his lower back hurts." Dr. Powell referred the claimant to a back specialist at that time as he specializes in knees and shoulders. The respondents controverted the referral for back treatment, thus the claimant never saw that specialist. During his next visit with Dr. Powell on November 6, 2003, the claimant reported that he had begun a new job at Granite By Design which required heavy lifting, and a lot of walking and standing. With regard to his knee, the claimant reported that his swelling had decreased and that his knee was feeling better. Dr. Powell recorded a history at that time that the claimant was continuing to have low back pain which the claimant believed was related to his right knee

compensation. However, Dr. Powell testified in his deposition, that he could not state that the back pain was in any way related to the claimant's right knee injury. In this regard, Dr. Powell testified that he does not have enough information to make a determination as to the cause of the claimant's back pain.

The parties argue that the first time the claimant complained of back pain that is recorded in Dr. Powell's records appears on September 16, 2003. However, our review of the nurse's notes reveals that the claimant called on October 17, 2002, a couple of weeks after his second surgery, advising that he was having back spasms and stiffness in the mornings due to trouble rolling over during the night as a result of knee pain. The medical records reveal that the claimant was seen by Dr. Powell on October 15, 2002, for a two week post-surgical follow-up, and that the claimant did not mention any complaints of back pain at that time. Aside from this one nurse's note, the parties are correct in that the claimant did not complain to Dr. Powell of any type of back pain until September of 2003.

The claimant began treating with Mark Sewell, a chiropractor, in January of 2004. Although the claimant completed a new patient questionnaire at that time advising that he has had low back pain since his compensable injury in January of 2001, and that he has undergone surgery on his knee, Chiropractor Sewell, did not request or obtain a copy of the claimant's medical records from Dr. Powell. Chiropractor Sewell, obtained x-rays of the claimant's lower back, as well as of the claimant's knees. On the Radiographic Report which is either dated January 14, 2004, or January 19, 2004, Chiropractor Sewell, checked off positive findings of subluxation at L4 and illium on the right. In addition, a handwritten notation states: "Pt has 6 mm short leg on the ®." Sewell, sent the x-rays of the knees out to Midwest Radiology Consultants to be read by Dr. Doran Nicholson. Dr. Nicholson's report dated January 22, 2004, states:

Bilateral AP and lateral views of the knees have been submitted for examination. The history indicates the patient has a prior diagnosis of pigmented villonodular synovitis (PVNS). This diagnosis is best made by advanced imaging such as MRI. Plain film findings

would include pressure erosions within and adjacent to the joint capsule. Erosions in the knee are unusual since this is a "loose" joint. The views provided do not show evidence of erosive activity. The patellae are intact and are of good alignment. There is mild narrowing of the lateral compartment joint spaces bilaterally. The articular surfaces visualized are smooth and well defined. There appears to be mild soft tissue swelling superior to the patellae bilaterally, being more prominent on the left.

Chiropractor Sewell opined that the claimant's lower back pain is causally related to the claimant's compensable right knee injury because it is "secondary in nature to the Leg Length Inequality (LLI) problem." In a letter dated August 18, 2004, Sewell stated:

Mr. Pratt presented to my office on 01-14-04 complaining of low back pain. After complete neurological and orthopedic examination, and X-ray examination, it was determined that Mr. Pratt indeed suffered from a right LLI. This LLI is causing pelvic unleveling, ilium rotation, and a subluxation at L5 that is putting pressure on the disc. It is very common for LLI to cause secondary responses due to the biomechanical stresses along the kinetic chain from the feet upward. Statistics show that 90% or more of patients that present with LLI also have

pelvic unleveling. The pelvis acts as the foundation for the rest of the spine. When pelvic unleveling occurs, other back problems will continue to increase due to the posture strains on the spine.

In his deposition Chiropractor Sewell intimated that he was not convinced that the claimant suffers from PVNS although he has never reviewed the claimant's medical records. However, he did agree that PVNS causes joint deterioration which could result in a leg length discrepancy. Sewell was asked multiple times during his deposition whether he could determine one way or the other as to whether the degeneration noted in the claimant's right knee is related to the PVNS, or the loose bodies removed from the claimant's knee during surgery. Sewell specifically responded:

There's no way for me to make an accurate statement. All I know is from what the patient told me concerning his surgeries and when he had those and when the back pain started appearing.

* * *

There's no way to make that diagnosis or the differentiation.

Moreover, when asked whether the claimant's back pain that he treated the claimant for beginning in January of 2004 is related to the claimant's PVNS degeneration of the right knee or to the trauma that occurred as a result of his compensable injury in January of 2001, Sewell testified:

Without seeing prior films of his knee before the trauma there is no way to make an accurate diagnosis on which has caused that.

Chiropractor Sewell opined that the claimant's current need for low back treatment is directly related to the claimant's antalgic gait which he attributes to the claimant's compensable knee injury. Sewell testified that he bases this opinion on the fact that "if" PVNS is an accurate diagnosis, the claimant should have displayed some type of pain or discomfort from degeneration from this condition prior to the compensable injury and since the claimant denied any previous knee problems any and all degeneration had to be from the compensable injury. In explaining his causation opinion, Sewell testified as follows:

As any joint degenerates - - and off the plain film X-rays we had taken it shows on the lateral compartment that there is

a decreased space between the two bones, femur and the tibia. and as that happens, the patient or a person will have a difference in gait. They might have a toe-out problem or they might be rolling their foot, causing undo stress at the sacroiliac joint, which is a joint that moves. With every step you take, that joint is moving back and forth, and if you have a leg-length inequality, it's going to put stress and pressure on the points and the ligaments - - or on the ligaments and the musculature at that sacroiliac joint.

Chiropractor Sewell further testified that the claimant's antalgic gait is directly related to the claimant's leg length discrepancy because this discrepancy causes the claimant to "load" to the right.

On re-cross examination, the following colloquy transpired:

Q. ...Let me just follow your argument here just for a second. You believe he has a leg-length inequality?

A. Yes.

Q. You refer to it as LLI?

A. Yes, sir.

Q. That leg-length inequality is caused by degeneration?

A. That is one cause of it.

Q. Okay. That leg-length degeneration causes a gait change?

A. No, not necessarily.

Q. It doesn't have anything to do with it?

A. It can, but post-traumatic surgery -- or post-trauma and surgery can also cause it.

Q. That's my whole point, Doctor. You're unable to tell us whether it's the PVNS or the post-traumatic surgery that has caused the change in gait or the leg-length inequality; correct?

A. I just know what the patient had told, me, that he had never had back pain in that area prior to the date of - -

In finding that the claimant's lower back pain is a compensable consequence of the claimant's right knee injury, the Administrative Law Judge found that the back pain is related to the claimant's antalgic gait, not the leg length inequality. However, the cause for the claimant's antalgic gait was, according to Chiropractor Sewell, the right leg length inequality. We find that the reasoning

employed by the Administrative Law Judge to reach his decision is flawed.

The burden of proof rests upon the claimant to prove the compensability of his claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained his burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. Green Bay Packing v.

Bartlett, 67 Ark. App. 332, 999 S.W.2d 692 (1999). The Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of workers' compensation law. Tyson Foods, Inc. v. Watkins, 31 Ark. App. 230, 792 S.W.2d 348 (1990). As our Supreme Court has stated:

The Commission has never been limited to medical evidence only in arriving at its decision as to the amount or extent of a claimant's injury. Rather, we wrote that the Commission should consider all competent evidence, including medical, as well as lay testimony and the testimony of the claimant himself. Further...while medical opinions are admissible and frequently helpful in workers' compensation cases, they are not conclusive.

A.G. Weldon v. Pierce Brothers Construction, 54 Ark. App. 344, 925 S.W.2d 179 (1996). 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, FC Opinion filed Jan. 22, 1996 (E417617). Finally, no matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such

belief is not sufficient to meet the claimant's burden of proof. Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249).

A.C.A. § 11-9-102(16)(B) provides that medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. In Freeman v. Congra 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.

Chiropractor Sewell has opined that the claimant's lower back pain is causally related to the claimant's compensable right knee injury. This opinion is based upon the leg length inequality which he measured off the claimant's x-rays. The claimant's treating orthopedic surgeon, Dr. Powell, testified that the surgical procedures he performed did not create a leg length discrepancy. Moreover, Dr. Powell never appreciated any such discrepancy in the claimant's right leg. Chiropractor Sewell explained that he made his measurements off the Gonsted Technique for measuring x-rays when he measured for leg length inequality.

However, the medical records introduced into evidence do not set forth the basis for Sewell's finding of a 6 mm leg length inequality. In addition, it is noted that Sewell relied upon the x-rays taken in his office to support this finding of a 6 mm leg length inequality in that he specifically relied upon the language in the radiology report from Midwest Radiology Consultants that describes "mild narrowing of the lateral compartment" when he described the claimant's joint degeneration. This radiological report which was a report on x-rays of the claimant's knees, not solely of the claimant's right knee, clearly states that "there is mild narrowing of the lateral compartment joint spaces bilaterally." (emphasis added) Thus, the only conclusion that can be drawn from this report is that the claimant suffers from joint degeneration in both his right and left knee. There is no evidence in the record that Sewell acknowledged this bilateral knee degeneration, or that he measured the claimant's left knee for any leg length inequality.

Chiropractor Sewell testified multiple times throughout his deposition that he could not state whether

the degeneration he relied upon to find the leg length inequality was caused by the claimant's pre-existing PVNS which is known to cause joint deterioration or the claimant's compensable injury. Nevertheless, Sewell has opined that the claimant's leg length inequality is related to the claimant's compensable injury. In reaching this opinion, Sewell relies almost solely upon the history the claimant provided him of developing back pain in February of 2002, shortly after his compensable injury and first knee surgery. Chiropractor Sewell's reluctance to accept the diagnosis of PVNS also plays a factor in his causation opinion. For instance, Sewell testified that the claimant provided a history of conflicting diagnoses regarding PVNS. However, it is undisputed that the claimant suffers from PVNS, which while undetected prior to the first surgery, the claimant has since obtained treatment, including but not limited to radiation therapy.

Chiropractor Sewell acknowledged in his deposition that his causation opinion is based upon the claimant's history of lower back pain which began shortly after his injury and first knee surgery. This history, however, is not

supported in the medical records. The first mention of any back pain is in a nurse's note two weeks after the claimant's second surgery in October of 2002. At that time the claimant only complained of morning stiffness and spasms which he attributed his knee being immobilized from pain and not being able to roll over at night. The claimant did not mention this pain to Dr. Powell in any of his follow-up examinations. It was not until almost a year after the second surgery that the claimant first complained of back pain to Dr. Powell, at which time the claimant attributed the pain to the way he walked, not his immobilization. Given the fact that the claimant had undergone radiation treatment for his PVNS, and the claimant's complaints of additional knee pain following the radiation treatment just prior to the claimant complaints of lower back pain, it is just as likely that the PVNS, rather than the claimant's compensable injury caused the condition which lead to the claimant's back pain. Based on the record before us, a determination as to the cause of the claimant's back pain cannot be made without resorting to 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).

Moreover, we find that Chiropractor Sewell's opinion as to causation is not supported by the evidence of record, therefore, we find that his opinion is not entitled to any weight. Sewell relates the claimant's back pain to the claimant's knee, based upon the claimant's unsupported history of long-standing back pain. Using this history, Sewell's opinion relies upon an unsupported finding of leg length discrepancy resulting from the claimant's first knee surgery. However, Dr. Powell unequivocally testified that nothing about the claimant's surgery resulted in a leg length discrepancy.

A fair reading of the medical records reveals minor morning back pain after the second surgery when the claimant was still immobilized and was unable to roll over. The claimant did not complain of any consistent back pain until over a year after his second surgery, but only months after aggressive radiation treatment for his PVNS. It is

undisputed that the AVNS is not related to the claimant's compensable knee injury. It is further undisputed that the respondents are not liable for any treatment related to the AVNS. Sewell relates the claimant's joint deterioration to the knee injury based solely upon the claimant's history of this relationship. However, when he was asked whether the joint deterioration was caused by the claimant's AVNS or the surgery to remove the loose bodies which resulted from the claimant's compensable injury, Sewell testified that did not know. Thus, despite Sewell's apparent uncompromising opinion relating the claimant's back pain to the claimant's knee injury, Sewell's inability to recognize the actual cause for any deterioration undermines his opinion. Accordingly, we find that Chiropractor Sewell's opinion regarding causation is insufficient to meet the claimant's burden of proof. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

Having found that Sewell's causation opinion is not entitled to any weight, we find that the claimant cannot establish by a preponderance of the evidence that his back pain is a compensable consequence of his right knee injury.

Therefore, we find that the decision of the Administrative Law Judge must be reversed and this claim for benefits denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion, which reverses the decision of the Administrative Law Judge (ALJ), finding that Claimant's lower back difficulties are a compensable consequence of his compensable right knee injury. Based upon my de novo review of the record, I would affirm the decision of the ALJ.

_____The Majority has opined that Claimant's pigmented villondular synovitis (PVNS), a systemic condition, is the

cause of Claimant's antalgic gait and back pain and not his admittedly compensable work injury of January 4, 2001. After a thorough review of Dr. Powell's deposition testimony, I find that Claimant has proven by a preponderance of the evidence that his back problems are not related to his PVNS and are directly related to his compensable knee injuries and subsequent two knee surgeries.

The Claimant contended that due to his ongoing knee problems, he now has back problems due to an irregular gait. He has sought, but has been refused medical treatment for his back pain. The Claimant argued that, but for the loosed bodies that have been determined to be work related, he would not currently have back problems. Both Dr. Powell and Dr. Sewell, Claimant's chiropractor, agreed that Claimant suffers from an antalgic gait, which may cause back pain.

Dr. Powell was deposed by Respondents regarding whether he believed that the loose bodies in Claimant's knee were due to the PVNS or to his compensable traumatic knee injury. Dr. Powell stated:

When you're trying to get rid of PVNS, you're trying to get rid of these little villus that I'm talking about with the shaver - - like shaver system, like what we used on him, to try to get rid of those things. But there was also, you know, loose bodies within his joint too. And usually with PVNS, you'll have stuff attached to the capsule. Loose bodies are usually from a trauma or an injury.

Likewise, when asked about the severity of Claimant's PVNS, Dr. Powell stated:

Well, the - you know, usually a loose body won't occur with - - I mean, you can have some fragments of cartilage with PVNS if it's aggressive. His was pretty benign when I was in his knee, and so I didn't appreciate that PVNS was his main problem. I think he's had that for a long time.

The Respondent's attorney also asked whether the potential for additional surgery would be due to loose bodies and if so, whether they would be related to trauma or the result of some other condition. Dr. Powell stated:

I think within a reasonable medical - - you know, it's a difficult problem to answer, but I think within a reasonable medical certainty, I feel that he's probably - - once you've had loose bodies, it's a process - - once you've had a condyle injury or damage to the

gristle on the end of the bone, once you've smacked it once, or hit it, or whatever you've done, that continues to flake off. . .

He also has the PVNS. Now, you know if it's mechanical problems that he comes to somebody's office and says, "I am hurting" and it's mechanical - - mechanical, i.e. it hurts, it catches, it locks up, then I would associate that with his work-related injury. If it is, "My knee is swollen all the time" and you know, he saw another orthopedist and he saw him for the first time but didn't know all this information and he just came in with swelling, I'd say that was PVNS.

When Dr. Powell was asked whether he had the opportunity to observe the Claimant walk, Dr. Powell answered, "Yeah. I've seen him. He walks with an antalgic gait." On cross-examination, Claimant's attorney questioned Dr. Powell regarding Claimant's gait. Dr. Powell testified that an antalgic gait is "ambulating with a limp, favoring one leg over the other." He also testified that he did not notice Claimant having an antalgic gait until after his surgery. Claimant's attorney specifically asked Dr. Powell

if his condition was in any way symptomatic prior to his work-related injury. Dr. Powell's response was:

No Sir. I have no records that he had any problems with his knee prior to this.

I find, from a review of the testimony of Dr. Powell and Dr. Sewell and the corresponding medical records, that Claimant has shown that his lower back difficulties are the natural and probable consequence of his compensable right knee injury of January 4, 2001. I would affirm the ALJ and award Claimant the reasonably necessary medical services for his compensable lower back problems.

For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner