

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F212233; F307562

ROBERT SCOTT, EMPLOYEE	CLAIMANT
MIDDLETON DRYWALL, EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INC., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 9, 2005

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE R. SCOTT MORGAN, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission on appeal by the respondent from an Opinion filed herein by the Administrative Law Judge on January 27, 2004, wherein it was found that the claimant sustained a compensable injury to his right shoulder September 25, 2002, for which he is entitled additional medical benefits.

A carefully conducted de novo review of the record in its entirety reveals that the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury to his right shoulder on

September 25, 2002. All associated medical benefits should, therefore, be denied in this claim.

_____The claimant sustained an admittedly compensable injury to his left hip and cervical spine when he fell on September 25, 2002. The claimant was constructing the third of three sections of scaffolding when the first two sections collapsed beneath him. The claimant fell approximately fifteen to seventeen feet onto a set of wide concrete steps below him. The claimant recounted landing primarily on his left hip, and he remembered being hit in the upper back and right shoulder by falling debris. The claimant testified that this falling debris shoved him about fifty feet out into an entryway. The claimant reported experiencing immediate numbness in his left hip, and pain over his entire body. The claimant was transported by ambulance to Siloam Springs Memorial Hospital, where Dr. Mark Allard diagnosed him with a left hip contusion. The claimant stayed in the hospital overnight and was discharged with crutches and pain medications and taken off of work.

The claimant was seen in follow-up by Dr. Allard on October 7, 2002. Based upon his physical examination of the claimant and X-rays of the claimant's pelvic region,

Dr. Allard assessed the claimant with a "significant hip contusion" with possible nondisplaced ligamentous injury to his pelvis. No fractures were found in the claimant's hip area. Doctor Allard planned to continue to treat the claimant symptomatically, and he opined that the claimant's symptoms would resolve.

By the time of his appointment with Dr. Allard on October 28, 2002, the claimant reported improvement with his hip, but that he was experiencing pain in his left shoulder. Doctor Allard assessed the claimant with left trapezius strain, for which he prescribed physical therapy with ultrasound, hot packs, and deep message therapy. The doctor released the claimant to restricted work duty beginning the following day.

The claimant returned to Dr. Allard on January 15, 2003, at which time he reported burning and weakness in his right arm, but significant improvement with his hip. In his clinic note of that visit, Dr. Allard noted a dictation error in his report of the claimant's October 28, 2002, visit. Specifically, the doctor clarified that the claimant's symptoms were in his right arm, and never his left as he had reported earlier. Suspecting a brachial

plexus injury, or cervical radiculopathy, Dr. Allard referred the claimant for a full neurological assessment. During this visit the claimant reported to Dr. Allard that he had returned to his former job with light duty restrictions, but that he had quit after a disagreement with his supervisor over his having to carry 70 pound buckets across the job site.

On February 19, 2003, the claimant underwent X-rays of his cervical spine and right shoulder, and an MRI was taken of his cervical spine. Doctor Luke Knox of Northwest Arkansas Neurosurgery Clinic reviewed the results of these tests, and in a letter dated April 4, 2003, to AIG, Dr. Knox stated that the claimant's MRI showed a "rather significant" disc herniation at 5-6 and 6-7, with stenosis at the 3-4 level which "appeared to be worse on the left." Doctor Knox instructed the claimant to remain off of work for the next month, and he recommended an "extensive physical therapy regime."

A subsequent myelogram revealed a pronounced neuroforaminal encroachment at C5-6 with marked adjacent spondylosis. From these findings, Dr. Knox recommended an anterior cervical fusion which was performed on June 2,

2003. Dr. Knox reported that x-rays showed stable alignment of the surgery site, and that he was "pleased" with the claimant's progress. The claimant was released to restricted work duty on July 21, 2003.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Moreover, the respondent is only responsible for medical services which are causally related to the compensable injury. Medical Center, 74 Ark. App. 250, 48 S.W.3d 544 (2001). Even if a pre-existing condition is also a causal

factor of the claimant's need for medical treatment, the claimant has met her burden of proof if she nevertheless shows that the compensable injury bears some causal relation to the need for treatment. General Electric Railcar Servs. v. Hardin, 62 Ark. App. 120, 969 S.W.2d 667 (1998).

The parties have stipulated and the claimant agreed that he sustained compensable left hip and cervical spine injuries from a work-related fall on September 25, 2002. Moreover, the respondent has provided the claimant with all medical services reasonably necessary for the treatment of those injuries. The claimant now contends that he is entitled to medical treatment and services for an injury sustained to his right shoulder from his fall of September 25, 2002. The medical records fail to provide any objective evidence, however, that the claimant in fact sustained a right shoulder injury from his work-related accident. For example, the record reveals that the claimant did not complain to his treating physician, Dr. Allard, of right shoulder symptoms until approximately a month after his accident. However, the claimant and his wife testified that the claimant informed Dr. Allard about his right shoulder on the morning of September 26, 2002. The claimant

also testified that he was aware of his right shoulder injury while at the emergency room, stating, "Well, the main places I was hurting was my left hip and my right shoulder. I mean, that was my chief complaints." However, the hospital records, including emergency room records and nursing progress notes recorded throughout the claimant's hospital stay, are void of any documentation regarding a possible injury to the claimant's right shoulder, or of reports by the claimant of a right shoulder injury. Furthermore, the claimant admitted that he received treatment only for his left hip both at the hospital and then in follow-up with Dr. Allard. In spite of the lack of evidentiary documentation to support the claimant's testimony, the claimant maintained that from the time of his injury until he first mentioned his right shoulder to Dr. Allard on October 28, 2002, his right shoulder was more problematic for him than his left hip.

By the time of his examination by Dr. Allard on October 28, 2002, the claimant's left hip contusion showed marked improvement. The claimant presented to Dr. Allard at that time, however, with complaints of right shoulder pain, which he claimed he had experienced from the time of his

fall. An examination of the claimant's right shoulder by Dr. Allard revealed tenderness in his trapezius, with full range of motion in the claimant's right shoulder and neck. Doctor Allard stated that he did not feel a great deal of spasm in the claimant's trapezius. Almost one year later, Dr. Allard wrote in a letter to Dr. Robert Scott the following relevant statements:

It is my opinion that [the claimant] likely did injure his right shoulder when he fell [off] of the scaffold. He had a significant pelvis injury which was quite painful and we were concentrating mainly on that injury at that time. He certainly did not do anything strenuous enough to cause a significant right shoulder injury between the time of his injury and the date that I examined his shoulder in late October. He has some arthritic changes at the acromioclavicular joint by MRI and by x-ray and has spoken with another surgeon about the possibility of doing a distal clavicle resection I cannot verify any of this but this is what [the claimant] has told me today. I have also not examined him since last January so it is difficult for me to make any assessment on whether or not he needs surgery.

To summarize, he probably did injure his right shoulder at the time of the fall from the scaffold but I do not have any specific recollection of having that conversation on 9/26/02.

Dr. Allard does not mention the claimant's past medical problems, which include a lumbar fusion at L5-S1 in 1986; a left hip and leg and contusion from a slip and fall accident in 1993; left arm and neck pain requiring emergency medical treatment in 1995; and, chronic complaints of bilateral shoulder pain in 2001, for which the claimant received cortisone injections. Therefore, one can only speculate as to whether knowledge of the claimant's other medical problems might have caused Dr. Allard to have a different opinion about the cause of the claimant's shoulder pain. 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).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B). 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 300 (2001). Moreover, medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. § 11-9-102(16) (B) (Supp. 1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000).

In Frances v. Gaylord, supra, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. § 11-9-102(16) (B). In Frances v. Gaylord, the Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra 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.

Dr. Allard has opined that the claimant "probably did" injure his right shoulder when he fell from the scaffold on September 25, 2002. And, although the claimant's fall was substantial, and the claimant did sustain a "quite painful" left hip contusion from his fall, Dr. Allard's opinion lacks the certainty to establish causation. Moreover, there is no medical proof which establishes that the claimant's shoulder problems are contemporaneous with his accident of July 25, 2002. Utilizing Dr. Allard's causation opinion as a basis to find compensability is simply not sufficient, as his opinion does not "pass muster." The claimant did not complain of shoulder problems when he reported to the emergency room for treatment following his injury. The claimant's physician and medical care providers did not note any complaints of shoulder pain until October 28, 2002, a month after the claimant's compensable cervical and hip injury. The claimant has worked in the construction industry his entire life. The claimant had problems with his shoulders prior to his compensable injury on July 25, 2002. And, Dr. Allard appeared to be

basing his opinion that the claimant's right shoulder problem was caused by his fall primarily on information provided to him by the claimant, with little or no consideration of the claimant's prior shoulder problems. The Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Consequently, to conclude that the September 25 2002, incident is the cause of the claimant's right shoulder problems is nothing more than sheer speculation. And again, conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, supra.

Based upon the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder at the time of his work related accident on September 25, 2002. The decision of the Administrative Law Judge is hereby reversed and medical benefits for the treatment of the claimant's right shoulder problems denied.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion, which reverses the decision of the Administrative Law Judge that Claimant proved entitlement to additional medical and temporary total disability benefits for his compensable injury.

The Claimant sustained a dangerous fall while working for Respondent. On September 25, 2002, he fell approximately 15 to 17 feet when the scaffolding he was on collapsed and he landed on some concrete stairs. Claimant testified that when he landed his left hip went numb and then the scaffolding parts, braces and scaffold boards fell on him in the upper part of his back and his right shoulder and shoved him another 50 feet down the stairs and out into the entry way. He testified that at that point he was

hurting all over and did not know exactly what he had injured. Claimant was taken to the hospital by ambulance and at that time his left hip was numb, his right shoulder was hurting and he was nauseated. Initially, Claimant was treated only for his left hip although he testified that he informed Dr. Allard, the ER doctor, that his shoulder was hurting. Claimant saw Dr. Allard in the hospital the morning after his fall. He testified that Dr. Allard focused his attention on Claimant's left hip even though his right shoulder was hurting and he did not have any feeling in his fingers. He was diagnosed with a "significant hip contusion with possible non-displaced ligamentous injury to his pelvis." Respondents have controverted any necessary medical treatment to Claimant's shoulder.

On October 28, 2002, a little more than a month after his injury, Dr. Allard did discuss Claimant's shoulder problem with him because the pain and muscle spasms had not subsided. Dr. Allard diagnosed Claimant with "left trapezius strain" and prescribed physical therapy with ultrasound, hot packs and deep massage therapy. The doctor released Claimant to restricted work duty beginning the next day.

Claimant saw Dr. Allard again on January 15, 2003 and complained of burning and weakness in his right arm with significant improvement with his hip. Dr. Allard referred Claimant for a full neurological assessment.

The neurological testing of Claimant's cervical spine and right shoulder revealed degenerative changes of the right acromioclavicular joint and it was noted that there was "a little neuroforaminal encroachment at C5-6. Degenerative changes were also noted from C5 through C7." Claimant's MRI revealed a "narrowing on the left at C3-4 secondary to spur formation, bilateral uncovertebral hypertrophy, right greater than left, at C4-5 narrowing the neural exit foramina right greater than left and bilateral neural exit foraminal narrowing at C5-6 noting that there is also an underlying disc bulge on the right compromising the exiting nerve root and that at C6-7 level there is uncovertebral hypertrophy, left greater than right and that there is an underlying disc bulge to the left compromising the exiting nerve root."

Dr. Knox wrote on April 4, 2003, that he had seen the Claimant for severe and incapacitating neck and right arm pain resulting from his fall from 2002. Dr. Knox noted

that Claimant had persistent radiculopathy with severe and incapacitating burning extending to the right arm described as a C6-7 radiculopathy. He also stated that the Claimant's neurological exam was remarkable in that he did have an absent tricep reflex on the right and diminished brachioradiatis on right with diminished sensation over the C6-C7 dermatome. At that time, physical therapy was recommended and a Depo-Medrol was administered. He recommended that Claimant remain off work for one month.

On May 9, 2003, Dr. Knox noted that the Claimant had undergone a myelogram which revealed a pronounced encroachment at C5-6 with marked adjacent spondylosis. Dr. Knox recommended surgery at that time. On June 2, 2003, Claimant underwent an anterior cervical fusion. After the fusion, Claimant still complained of having various aches and pains with electric type shock extending into his right arm and pain extending into his right shoulder. He was instructed to obtain physical therapy and was told to return to work with the following restrictions: no lifting more than fifteen pounds, no looking up and to avoid stooping and bending.

Post-surgery, Claimant testified that he has very limited use of his shoulder and when he does activities involving his right shoulder, he experiences pain which will not go away. He testified that he is in need of additional medical treatment for his right shoulder, since his cervical fusion did not fix his problems.

The Majority concluded that the Claimant failed to establish that his shoulder pain was causally related to his compensable injury. My review of the medical evidence indicates that the conclusion of the Majority is unfounded. First, it must be noted that the claimant had no documented prior history of significant back problems prior to his compensable injury, except for minor shoulder problems for which he received injections in 2001. However, these symptoms did not preclude Claimant from performing the duties of his current position. Second, the Claimant consistently testified that he reported the same symptoms to his treating physicians from the time of his compensable injury to the date of the hearing. This fact standing alone militates strongly against a finding that the Claimant's problems subsequent to the compensable injury were somehow not causally connected to his compensable injury.

Dr. Mark Allard wrote a letter as to whether Claimant initially complained of right shoulder pain. Dr. Allard stated that he "does not recall, but has no reason to doubt that the Claimant reported his shoulder problem." He also explained, "the right shoulder problem is not in my dictation because he (Claimant) had a significant pelvis injury and I was concentrating on that at the time." Dr. Allard's notes do reveal that Claimant reported a shoulder injury on October 28, 2002, only a month after his fall. Dr. Allard also set forth that, in his opinion, the Claimant likely did injure his right shoulder when he fell off of the scaffolding. Dr. Allard further wrote that the Claimant did not do anything strenuous enough to cause a significant right shoulder injury between the time of his injury and the date he examined Claimant's shoulder in late October.

Simply because Claimant's shoulder was not treated until one month after the compensable injury is no indication that Claimant's shoulder problem did not bear any causal relation to his compensable injury. The fact that the Claimant consistently reported the same pain in his shoulder from the time of his compensable injury to the date of the

hearing indicates that whatever the precise etiology of his pain was, it bore some causal relation to his compensable injury.

The "statutory definition of compensable injury does not require a timely reporting of an injury, or the receipt of medical treatment within a specified period of time." Services Chevrolet v. Atwood, 61 Ark. App. 190, 194. See also, Reed v. Arkansas Methodist Hospital, Full Commission Opinion filed November 4, 1999 (E809731) ("Moreover, the compensability of a specific incident injury is not contingent upon timely reporting.")

Based on the foregoing, I find by a preponderance of the evidence that the Claimant sustained a compensable injury to his cervical spine, left hip and right shoulder on September 25, 2002. Therefore, I find that the Administrative Law Judge's finding was correct and that Respondents are liable for all the reasonable and necessary medical care for the Claimant's right shoulder which resulted in the need for further medical treatment.

SHELBY W. TURNER, Commissioner