

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308310

RONALD SHENKS,
EMPLOYEE

CLAIMANT

SCHNEIDER NATIONAL CARRIERS, INC.,
EMPLOYER

RESPONDENT

LIBERTY MUTUAL INSURANCE CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 26, 2005

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

Claimant represented by the HONORABLE MARC I. BARETZ,
Attorney at Law, West Memphis, Arkansas.

Respondents represented by the HONORABLE MICHAEL R.
MAYTON, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed November 19, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation
Commission has jurisdiction of this
claim.
2. On July 3, 2003, the relationship
of employee-employer-carrier existed
among the parties.
3. On July 3, 2003, the claimant earned
wages sufficient to entitle him to weekly

compensation benefits of \$440.00/\$330.00 for temporary total/permanent partial disability.

4. On July 3, 2003, the claimant sustained an injury arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled for the period beginning July 4, 2003, and continuing through the end of his healing period, a date yet to be determined.

6. Claimant first notified respondents of the July 3, 2003, work related injury on August 4, 2003.

7. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of July 3, 2003.

8. The respondents have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 19, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the

opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment, and that the he was temporary and totally disabled for the period beginning July 4, 2003, and continuing through the end of his healing period, a date yet to be determined.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury and that he is entitled to benefits as a result thereof. Therefore, I find that the decision of the Administrative Law Judge should be reversed.

The claimant was a truck driver for the respondent employer at the time of his alleged injury. On July 3, 2003, the claimant experienced a sudden onset of debilitating pain while trying to adjust the tandem on his truck. Because the claimant had experienced identical symptoms prior to this incident as a result of kidney stones, he attributed this episode to kidney

stones as well. Based upon this assumption, the claimant sought medical treatment from a urologist at the Memphis Neurological Center, namely Dr. Perry Larimer. When medical tests confirmed that the claimant had developed another large kidney stone, Dr. Larimer treated the claimant with a procedure to break up and remove the stone, and he eventually released the claimant to return to work.

The claimant contends that his low back pain did not resolve after he was treated for his kidney stone and released by Dr. Larimer. The claimant attributed his persisting pain to a possible injury from the incident of July 3rd, and he sought treatment accordingly. I find that the objective medical evidence presented in this claim, however, fails to support a finding that the claimant sustained a low back injury on July 3, 2003. Instead, the record reveals that the claimant has had recurrent problems with kidney stones over an extended period of time, and that he had pre-existing degenerative spinal problems. For example, pelvic x-rays taken on January 11, 2003, some seven months prior to the July 2003 incident, showed that the claimant had kidney stones at that time. In addition, these x-rays revealed degenerative changes in the

claimant's lumbar spine. The claimant was again treated for kidney stones in March of 2003, and on June 30, 2003, an x-ray of the claimant's lumbar spine revealed "diffuse osteophytes suggestive of a disc," with "mild narrowing of L5-S1." Under the "Clinical History" section of the radiology report, Dr. Donna Swain noted that the claimant "has had low back pain for several years" with "no known injury." A subsequent MRI revealed "osteoarthritis, facets, with probable compression left L5 nerve root secondary to stenosis."

In addition to objective medical tests, other evidence reveals that the claimant complained of low back pain long before his alleged injury of July 2003. For example, the claimant filled out and signed a Short Term Disability Income Claim Form on July 21, 2003. In that form, the claimant described the details of his medical condition as follows:

Kidney stones lodged in uretha (sic) tube
blocking Right Kidney - started June 25, 2003
- Driving Truck (Running Coast to Coast).
(Emphasis added)

As previously mentioned, on August 7, 2003, the claimant presented to the emergency department of the veteran's hospital in Memphis (VA) with complaints of radiating low back pain, where diagnostic tests confirmed "severe arthritis" at L4-L5, L5-S1, and spinal

stenosis at L5. The claimant continued to be treated conservatively at the VA, primarily for lower back pain. On September 19, 2003, the claimant was examined by Dr. Todd Robinson at Concentra Medical Centers for his complaints. Dr. Robinson diagnosed the claimant with cervical strain and restricted the claimant from driving. Subsequently, a VA clinic note dated November 11, 2003, reflects that the claimant had reportedly been experiencing back pain for one and a half years.

On December 31, 2003, claimant was examined by Dr. Michael Sorensen, who assessed him with, among other things, cervical myelopathy at C6-C7, secondary to spondylosis; lumbar degenerative disc disease; and severe facet hypertrophy causing narrowing the foramen. In addition, Dr. Sorensen noted the appearance of mild diabetic neuropathy. Based upon these findings, Dr. Sorensen recommended that the claimant be seen for surgical consultation in regards to his cervical myelopathy. Concerning the claimant's alleged work related injury, Dr. Sorensen stated:

Since the patient's MRI scan shows primarily degenerative changes of the facet joints and some disc bulging, which is likely degenerative, I am unable to see any changes which are clearly acute from work injury. Certainly, one could have degenerative changes and have the strain with back symptoms, but review of the scan cannot show this. One can

only rely on the patient's complaints of pain after the alleged work injury compared to history of no complaints prior to this. Perhaps Dr. Murrell can address it at some point, but the most pressing problem is the cervical problem which is not a worker's comp problem.

Dr. Samuel Murrell, III, conducted a surgical evaluation of the claimant on January 5, 2004. Dr. Murrell assessed the claimant with cervical myelopathy at C6-C7, for which he recommended that the claimant undergo surgical decompression and spinal fusion. In Dr. Murrell's report of that visit, he made the following comments:

I have discussed the findings with the patient. I told him that I do think he has cervical myelopathy and have recommended surgical decompression and fusion for this. Unfortunately, the patient and his wife are unable to discuss possible surgical treatment because they feel that his primary problem is that of low back pain. They do not appear to be able to understand the diagnosis that I have discussed with them and the possible goals of treatment of surgery.

The claimant returned for treatment to Dr. Sorensen, who described the claimant's condition as a "aggravation of a pre-existing asymptomatic degenerative process." Dr. Sorensen conceded that his medical opinion of the claimant's condition was based primarily upon history provided to him by the claimant.

For example, in his report of January 6, 2004, Dr.

Sorensen stated:

The patient was told that the MRI scan cannot prove whether or not he had an acute injury to his back as there are degenerative changes. However, from the history as stated, this would be consistent with a back injury which occurred during work. (Emphasis added)

Finally, in a letter dated August 20, 2004, Dr. Stephanie Einhaus of the neurosurgical department of the VA hospital, wrote:

I have thoroughly reviewed Mr. Shenks records at the VA. He was seen by neurosurgery on September 15, 2003 for the first time regarding back pain and some left leg weakness. He mentioned he hurt his back at work "pulling some tandems." He was unable to work because of the back pain. He had complained of back pain previous to this, but apparently it did not prevent him from working until he hurt himself at work. Apparently the work injury significantly aggravated his back problem, which had not been worked up yet.

A "compensable injury" is defined as an accidental injury causing internal or external physical harm to the body arising out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(Supp. 2003). The claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Moreover, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal

Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

Objective findings are defined at Ark. Code Ann. § 11-9-102(16) as those findings which cannot come under the voluntary control of the patient. Further, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the extent and existence of the injury, and a preponderance of other non-medical evidence establishes a causal relation to a work-related incident. Horticare Landscape Mgt. V. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). However, a claimant's belief, no matter how sincere, is not a substitute for credible evidence." Brewer v. Paragould Housing Authority, FC 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 claimant's claim. Roberts v. Leo Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Based upon the above and foregoing, I find that the claimant has failed to establish that he sustained a compensable injury on July 3, 2003, arising out of and in the course of his employment with the respondent employer. First, the claimant sought treatment for lower back pain a little over a month after the alleged work related incident of July 3rd. In addition, the claimant initially testified that he had not experienced lower back pain prior to this alleged incident, whereas the record contains numerous references to back pain which pre-dates the claimant's alleged injury. Further, the claimant testified that Dr. Larimer told him that his lower back pain was not associated with kidney stones. Rather, the claimant testified that Dr. Larimer told him "You've hurt your back." The claimant admits, however, that a CT scan taken contemporaneously with the July 3rd incident revealed a large kidney stone. Moreover, the record is devoid of medical evidence to corroborate the claimant's testimony concerning any comments that Dr. Larimer may have made to the claimant during his examination. Although the claimant has established that he experienced symptoms related to a large kidney stone on July 3, 2003, he has failed to prove by a preponderance

of the evidence that he sustained an injury to his back on that date. Moreover, the record is devoid of objective medical evidence that establishes that the claimant's back complaints are injury related. Rather, numerous objective medical tests indicate that the claimant's back related symptoms are the result of long-standing degenerative disease. Moreover, none of the claimant's treating physicians state within a reasonable degree of medical certainty that the claimant's back problems are the result of a work related injury.

Accordingly, I find that the evidence preponderates in favor of the claimant's back problems being related to pre-existing degeneration and recurrent kidney stones, rather than a work related injury. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that the back pain which he reported in August of 2003 was causally related to the work related incident which occurred one month earlier.

Therefore, for the reasons stated herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner