

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410694

CHARLES TODD,
EMPLOYEE

CLAIMANT

GENERAL DYNAMICS,
EMPLOYER

RESPONDENT

AMERICAN INTERNATIONAL,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 16, 2005

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

Claimant represented by the HONORABLE GREG GILES,
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE FRANK NEWELL,
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 June 17, 2005. 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. The stipulations agreed to by the
parties are reasonable and are hereby
accepted as fact.
3. The claimant has proven by a preponderance
of the evidence that he sustained back and
neck injuries causing internal physical harm

to the body requiring medical services, that the existence and extent of his injuries are established by medical evidence supported by objective findings, and that his injuries were caused by a specific incident identifiable by time and place of occurrence.

4. The claimant has proven by a preponderance of the evidence that he sustained injuries to his back and neck arising out of and in the course of his employment.

5. The claimant has therefore proven by a preponderance of the evidence that he sustained compensable injuries to his back and neck.

6. The claimant has proven by a preponderance of the evidence that he has been totally incapacitated to earn wages from September 8, 2004, to a date yet to be determined.

7. The claimant has proven by a preponderance of the evidence that he has remained in his healing period from September 8, 2004, to a date yet to be determined.

8. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from September 8, 2004, to a date yet to be determined.

9. The claimant has proven by a preponderance of the evidence that the medical treatment he has received to date for his back and neck, along with future medical treatment, has been and remains reasonably necessary in connection with the compensable injury.

10. 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 June 17, 2005 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.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part from the majority opinion finding that the claimant sustained compensable back and neck injuries on or about August 9, 2004. My carefully conducted de novo review of this claim reveals that the claimant most likely sustained a lumbar injury on the date in question, but that this injury was a temporary aggravation of a preexisting condition. The preponderance of the evidence, however, fails to support a finding that the claimant sustained a cervical injury on the date in question. Furthermore, the preponderance of the evidence demonstrates that the claimant was released to return to work after October 4, 2004. Therefore, the claimant would not be entitled to

temporary total disability benefits after October 4, 2004. The claimant would, however, be entitled to reasonable and necessary medical benefits associated with his lumbar strain injury up until the time that he was released to return to work. I would disagree that the claimant is entitled to additional medical benefits for his lumbar spine after October 4, 2004, or to medical benefits for his cervical spine, since he has failed to prove the compensability of his neck problems.

In rendering his decision, the ALJ gave greater weight to the claimant's testimony than recorded impressions made by Dr. Crump contemporaneously with the claimant's alleged injury. For example, the claimant testified that on the afternoon following the alleged incident at work, which supposedly resulted in a ruptured disc, he presented to his family physician, Dr. Mark Crump, at the Ouachita Valley Family Clinic. Dr. Crump's clinic note, which is actually dated August 10, 2004, reveals that both of the claimant's hips and thighs were swollen, and that he complained of lumbar pain "X 2 weeks". This clinic note gives no indication that the claimant reported to Dr. Crump or to his nurse, that he had been injured in a work related incident earlier that day. And, although the claimant's memory of

certain details of that particular examination was quite intact, he could not recall whether he had told Dr. Crump or his nurse about the alleged incident at work that had just hours before. Moreover, Dr. Crump's report of August 10, 2004, does not mention the claimant's alleged neck injury.

The claimant testified that he reported the alleged incident of August 9, 2004, to his supervisor, Mr. Jimmy Dale Williams, shortly after it happened. Although Mr. Williams testified that the claimant told him his back "was hurting" on the day in question, he denied that the claimant reported any injury to his back or neck as a result of a lifting incident. Mr. Williams further testified that, had the claimant told him on the day in question that he had been injured, he would have filled out an accident report and moved him to a different position. Furthermore, Mr. Williams stated that the claimant did not mention any symptoms associated with his neck on the day in question. In fact, Mr. Williams testified that the first time he learned of the claimant's alleged neck injury was during the hearing of April 28, 2005. Mr. Williams testified that he was aware that the claimant had seen a doctor on the afternoon of the alleged incident, but that he

became confused when the claimant returned to work a few days later in an arm splint. Mr. Williams' testimony concerning this matter is as follows:

Q. [After the afternoon of the alleged incident] ... when is the next time that you saw him?

A. Well, it was - - He went - - He came back, I think it was like the next day, or day or two later, and he had a wrist brace on his arm; his right hand, I believe. And I said, "What did the doctor say, Man?" And he says, "you know that doctor told me - - " this is his words" - - that doctor told me I had carpal tunnel." And I said, "Man, go from a back to your arm to carpal tunnel?"

Mr. Williams next explained that he told his supervisor about the claimant's arm splint, and that his supervisor moved the claimant to another position outside of Mr. Williams' building. On cross-examination, Mr. Williams reiterated his confusion concerning the nature of the claimant's physical problems as follows:

Q. Did he tell you what was going on with his arm and his hand, what kind of complaints he was having about that?

A. No, he did not.

Q. But you understood he had some because that's why he had this thing on his hand?

A. Yeah. I understood, but, you know, I was kind of confused because he left with a back problem and he come back with carpal tunnel. And it's kind of confusing.

The medical records reveal that on August 26, 2004, the claimant presented to Dr. Crump with neck and upper back pain, and with numbness in his right first and second fingers, and numbness in his left first finger. Suspecting that the claimant's pain was originating from degenerative disc and joint disease, Dr. Crump referred him for an MRI to be conducted on September 3, 2004. The claimant's cervical MRI confirmed multi-level degenerative disc disease from C3-C4 through C6-C7, with mild to moderate central canal stenosis from

C3-C4 through C5-C6. In addition, a moderate sized left paracentral hard disc protrusion with cord impingement was located at C5-C6. The claimant's lumbar MRI showed a superiorly migrating left paracentral disc extrusion with associated moderate left neural foraminal narrowing and mild central stenosis at L2-L3. In addition, congenital central spinal stenosis was seen at L3-L4 and L4-L5 with severe bilateral neural foraminal narrowing at these levels, severe bilateral foraminal narrowing at L5-S1 secondary to diffuse disc bulge, and degenerative disc disease at T11-T12 with severe foraminal narrowing secondary to asymmetric disc osteophyte complex. In his letter dated September 8, 2004, Dr. Crump explains these findings to the claimant as follows:

You have significant arthritis in your neck. There was also a disc protrusion in your neck as well. This is really bulging and not fully herniated or ruptured. You do, however, have a herniated or ruptured disc in your lower back.

Dr. Crump continued the claimant on conservative care until he could be seen by a specialist.

An OSHA form 301, Injury and Illness Incident Report, completed by James Bullock on September 20, 2004, reflects that the claimant called in to the respondent employer on September 7, 2004, reporting his alleged injury of August 2004. Handwritten in the section of this report concerning the activity which allegedly caused the claimant's injury is the following statement: "moving a pallet without pallet jack in August". Under item No. 15., What Happened, is written, "Employee did not report the injury and does not remember the exact circumstances or date". Finally, the claimant's injury was reported to be a strained back. The Workers Compensation First Report of Injury claim form dated September 21, 2004, also reflects that the claimant's reported injury was a lumbar back strain which occurred on August 7, 2004.

After the first report of injury was made, the claimant was referred by the respondent to Dr. Judson Hout. In a letter to the respondent employer dated September 21, 2004, Dr. Hout wrote:

Charles Todd came in today referred by your Worker's Comp manager stating that on August 10, 2004, he was lifting some pallets when he

felt something burn in his back, and since then he has had pain. He came in on August 10 and saw Dr. Crump on his own without referral from you stating at that time that he had low back pain for the past two weeks and gave no history of any injury.

...

This just does not add up. He obviously has degenerative disc disease, multiple levels, both cervical and lumbar spine, that has taken years to develop, and one disc at L2-L3 which could be surgically amenable. There is an inconsistency in that he says he hurt his back on August 10, 2004, but when he saw Dr. Crump on that date, he gave him a two week history of back pain and did not give any history of any injury.

I will therefore leave it up to your company and insurance carrier whether or not to accept this as a work related injury. I cannot definitely say it is.

Based upon the above letter, the respondent controverted the claimant's claim from that point on. Thus, the claimant was denied a referral to see a specialist. Eventually, the claimant sought a consultation with Dr. Schlesinger on his own. On March 18, 2005, Dr. Schlesinger conducted a comprehensive neurosurgical examination of the claimant, from which he concluded the following:

Differential Diagnosis

Neck and back pain could be caused by a number of things including degenerative arthritis, rheumatologic disease, disc disease,, joint disease, facet joint arthritis, musculoskeletal problems, etc.

Impression/Plan/Discussion

Certainly, he has a complex set of symptoms. I believe that his problem is a work related aggravation of his underlying lumbar and cervical disease coupled with some fresh problems. I think the new problem is the herniated disc at L2-3 level and this is undoubtedly where the symptoms down the legs

are coming from. The back pain is more complicated.

In regards to his cervical complaints. I think this is an aggravation and the symptoms may be coming from the C4-5 and C6-7 levels.

Dr. Schlesinger recommended that the claimant try lumbar steroid injections before considering any surgical options.

Finally, the medical records reflect that the claimant on September 24, 2004, requested that Dr. Hout continue him off of work until October 5, 2004, because he wanted to be seen by a neurologist before returning to work. Dr. Hout granted the claimant's request, and extended the claimant's leave of absence from work through October 4, 2004.

In deciding that it is "plausible" that the claimant may have either inadvertently or unintentionally omitted any mention of a work related accident to Dr. Crump, or that Dr. Crump or his staff may have made an omission in reporting that the claimant's problems were allegedly work related, the ALJ stated that the records of every other medical provider

reflect a history consistent with the claimant's testimony. Therefore, finding the claimant's testimony to be credible, the ALJ afforded more weight to the claimant's testimony concerning his alleged accident than to Dr. Crump's "isolated" medical record in which this alleged accident is not mentioned. However, according to the claimant's own testimony, Dr. Crump saw him on the afternoon of the alleged accident; thus, at a time when events would presumably still be fresh on the claimant's mind. Yet, during the hearing, the claimant, who otherwise displayed a somewhat remarkable memory of details concerning this particular office visit, could not remember whether he had mentioned his alleged work related incident to Dr. Crump or his staff. One thing is clear from the record, on August 10, 2004, Dr. Crump was under the distinct impression that the claimant's lumbar pain had been ongoing for approximately two weeks. Furthermore, the allegation of the claimant's work related injury did not appear in the medical records until after the claimant made his first report of injury on or about September 7, 2004. In fact, the first medical report to reflect the claimant's alleged work related injury was that of Dr. Hout on September 21, 2004. As previously mentioned, it was in this report

that Dr. Hout expressed confusion concerning the etiology of the claimant's symptoms stating, "This does not add up." Further, Dr. Hout noted the inconsistencies between the claimant's allegations of a work place injury, and statements he had given to Dr. Crump on August 10, 2004, concerning a two week history of back pain. That Dr. Hout left the final determination of whether the claimant's injury was work related to the respondents, is a clear indication that he was truly uncertain in his medical opinion concerning causation. It is well established that 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). 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). Further, Dr. Schlesinger opined in March of 2005, that the claimant's problem was a "work related aggravation of his underlying lumbar and cervical disease" coupled with a "fresh problem" - specifically, a herniated lumbar disc. However, Dr. Schlesinger did not offer this opinion within a reasonable degree of medical certainty, and he did not state whether he believed the claimant's herniated disc was causally related to the claimant's employment. Therefore, the medical evidence fails to objectively and conclusively establish that the claimant's lumbar herniation is work related, and it clearly establishes that the claimant's degenerative back and neck disease is not causally related to his employment.

The ALJ opined that the testimony of corroborating witnesses, although potentially biased, supports the claimant's allegations concerning the circumstances of his alleged accident. This testimony included that of the claimant's current wife, Rosemary Todd; his former wife and co-worker, Mary Carolyn Richardson; his friend and co-worker, Mr. Jonathan Ford; and, to some extent, the testimony of Mr. Williams, in that his testimony corroborates the claimant's complaints of back pain on the date in question. The

claimant's wife, Mrs. Todd, testified that the claimant called her on the date in question and told her that he had hurt his back and needed a doctor's appointment. Her testimony about this conversation and her subsequent observations of the claimant's physical condition reflects that the claimant advised her that he had injured his back only. The claimant apparently made no statements to his wife about his neck having been injured as result of the alleged work related incident of August 2004. Likewise, the testimony of the claimant's former wife and co-worker, Ms. Richardson, reflects that the claimant initially complained to her of a back injury only. Further, Ms. Richardson could not remember the time or date on which she had conversed with the claimant about his alleged injury. Therefore, she was uncertain as to when the alleged incident had actually occurred.

The ALJ did not take the testimony of the claimant's friend and co-worker, Mr. Ford, into consideration, finding him to be an unreliable witness. However, Mr. Ford's testimony is relevant to this review in that recorded statements he had made during the investigation of the claimant's alleged injury were inconsistent with statements Mr. Ford made during the

hearing. For example, at the hearing, Mr. Ford testified under direct examination that he had witnessed the claimant lifting a pallet at work, and then later grabbing his back. Although Mr. Ford could not recall the exact date of this alleged incident, he further testified that the claimant came to work the next day "kind of humped over". The record reveals, however, that the claimant did not return to work on the day following this alleged incident. Mr. Ford stated that when he asked the claimant what had happened, the claimant told him that he had hurt his back while lifting a pallet. Further, Mr. Ford testified during cross examination that statements he had made to an investigator, Ms. Rita Reeder, in a telephone conversation in 2004, were true. However, when the respondent's counsel reminded this witness that he had informed Ms. Reeder that the claimant never told him that he had injured himself at work, Mr. Ford recanted, stating that the testimony he gave under direct examination was, in fact, the truth. When asked to explain the discrepancies in his statements to Ms. Reeder and his testimony, Mr. Ford stated:

Q. Why would you tell her [Ms. Reeder] that if it's not true?

A. They caught me off guard. I don't know.

Q. She caught you off guard?

A. Yeah. I didn't know what was going on at the time.

Furthermore, Mr. Ford could not remember the day, date, or even the month, when the claimant allegedly injured himself at work. The inconsistencies in Mr. Ford's statements discredit his testimony generally, in that, quite frankly, it shows that Mr. Ford may have been willing to lie for his friend's benefit concerning the events surrounding his alleged injury. However, the *consistencies* between Mr. Ford's testimony and other testimony concerning the exact date of the claimant's alleged injury, combined with Dr. Crump's notes indicating that the claimant had been experiencing lumbar pain for two weeks prior, strongly suggests that the claimant may have been experiencing back pain well before his alleged work related accident.

Certainly, the medical records and testimony presented in the record are consistent in one regard - the claimant neither reported nor complained to anyone involved in this claim of an injury to his neck on the date in question. Furthermore, the medical records clearly demonstrate that the claimant's neck problems are degenerative in nature and have taken years to develop. Therefore, the preponderance of the evidence fails to support a finding that the claimant injured his neck on or about August 9, 2004. Moreover, although the record indicates that the claimant may have temporarily aggravated his pre-existing lumbar degenerative disease on or about the date in question, the preponderance of the evidence fails to support a finding that the claimant sustained a new injury to his back on or about August 9, 2004. More specifically, neither Dr. Hout nor Dr. Schlesinger stated with medical certainty that the claimant's herniated lumbar disc was caused by his activity at work. Moreover, the record is devoid of substantial evidence which corroborates that the claimant sustained a specific injury to his back on or about August 9, 2004. Therefore, the claimant has failed to establish that an alleged work related incident of on or about August 9, 2004, caused a compensable injury to

his back or neck. At best, the incident which may have precipitated the claimant seeking medical treatment on August 10, 2004, caused a temporary aggravation of the claimant's underlying degenerative arthritis, which has been slowly developing for several years. Therefore, the claimant has failed to prove by a preponderance of the evidence that a work related incident of on or about August 9, 2004, resulted in a compensable injury to his lumbar spine, other than a temporary aggravation. In addition, the claimant has failed to prove by a preponderance of the evidence that he has sustained a compensable injury to his cervical spine. Thus, the claimant's medical benefits should consist only of that treatment that the claimant received prior to this claim being controverted. Further, the compensability of the claimant's neck injury, along with all associated benefits, should be denied. Finally, the claimant's healing period for his lumbar aggravation should have long ended, and the claimant has failed to prove that he was totally incapacitated to return to work after October 4, 2004. Therefore, the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits after

October 4, 2004, and these benefits should be denied after that date.

Therefore, I MUST respectfully concur, in part, and dissent, in part from the majority opinion.

KAREN H. McKINNEY, Commissioner