

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312928

JERALD WILSON, EMPLOYEE	CLAIMANT
CORNERSTONE MASONRY, EMPLOYER	RESPONDENT
FIRSTCOMP INS. CO., CARRIER	RESPONDENT

OPINION FILED MAY 11, 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 WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal by the respondents from a decision filed by an Administrative Law Judge on July 7, 2004, wherein the Administrative Law Judge found that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury, namely a herniated cervical disc, on July 23, 2003, as a result of a motor vehicle accident. In addition, the Administrative Law Judge awarded the claimant temporary total disability benefits from December 11, 2003 to a date yet to be determined.

A carefully conducted de novo review of the record in its entirety reveals that the claimant has failed to prove that he sustained a compensable injury on July 23, 2003. Therefore, the decision of the Administrative Law Judge should be reversed and all related benefits should be denied.

On Wednesday, July 23, 2003, the claimant, a mason for the respondent employer, was driving a company owned pick-up truck to a jobsite when he was rear-ended by a tractor trailer rig. The claimant was immobilized and transported by ambulance to a nearby hospital, where he was examined and found to have sustained a contusion to his occipital scalp and an abrasion of his right forearm, with possible embedded glass. Although the claimant complained to emergency room personnel of back pain and a headache, x-rays taken of the claimant's c-spine were normal. The following day, the claimant testified that he awoke with severe abdominal pain. The claimant attempted to work that morning, but stated that he was unable to work due to pain in his left hand. The claimant returned to the ER where further diagnostic testing, including x-rays and an MRI, revealed normal results. The claimant was assessed with cervical

strain, with a possible osteophyte fracture, for which he was prescribed pain medications and an anti-inflammatory. The claimant was told not to return to work for 72 hours. In addition, the claimant was instructed to follow up with his personal physician and return to the ER should his condition worsen. The claimant did neither.

The claimant returned to work the following Monday, July 28, 2003. The claimant testified that he worked an average of 8 to 9 hours per day following his accident. His work duties involved heavy lifting, bending, stooping, climbing, and stacking. The claimant continued to work until November 4th, 2003, at which time he sought medical treatment with Dr. Robert Thompson. An MRI taken on November 7, 2003, revealed a broad posterior disc protrusion at C6-7, which produced mild central canal stenosis and which impressed slightly upon the cervical cord. In his report dated November 11, 2003, Dr. Thompson stated that the claimant "surely had degenerative arthritis with no symptoms." Based upon the history provided to him by the claimant, Dr. Thompson opined that the claimant's protruding disc was "directly causally related" to his MVA. Dr. Thompson referred the claimant for a neurosurgical

evaluation. Dr. Gregory F. Ricca examined the claimant on December 11, 2003. Based upon this examination and his review of the most recent MRI, Dr. Ricca recommended an ACDF at C6-7 with anterior instrumentation and structural allograft. In his report of this visit, Dr. Ricca stated that he believed decompression of the spinal cord was important for the claimant. Dr. Ricca recommended that the claimant be off of work pending his surgery because "heavy labor [would] increase his risk of further injury to the spinal cord."

Under Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), for an injury to be compensable, the claimant must show that he sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987); See also, Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). Additionally, 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). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

The phrase "arising out of the employment" refers to the origin or cause of the accident. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Therefore, the employee is required to show that a causal connection exists between the injury and his employment. Id. Moreover, an injury occurs "in the course of employment" when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly. Id.

It is undisputed that the claimant was involved in a motor vehicle accident on July 23, 2003, while in the course and scope of his employment. The claimant testified that immediately afterwards, he began suffering from severe,

recurrent headaches, soreness and tightening in his neck and shoulders, and pain in his left hand. The claimant testified that beginning in September of 2003, he began suffering from a recurrent burning sensation in the back of his neck. The claimant admitted that he continued to work in spite of his ongoing symptoms, but that by November of 2003, the sensations in the back of his neck had become more frequent and intense. Therefore, the claimant sought treatment with Dr. Thompson, who ultimately diagnosed the claimant with a herniated cervical disc. The claimant further testified that he did not seek additional medical treatment until November of 2003 because he believed that he was just sore from his accident and that his symptoms would eventually resolve on their own. Upon seeing Dr. Thompson, the claimant thoroughly explained to him the nature of his work. In spite of knowing what the claimant's work activities entailed, Dr. Thompson did not take the claimant off of work. Rather, Dr. Thompson recommended that the claimant limit his activities, and he referred the claimant for a neurosurgical evaluation.

In his deposition taken May 21, 2004, Dr. Ricca stated that he believes within a reasonable degree of medical certainty that the claimant's MVA of July 23, 2003,

is the major cause of the claimant's ruptured disc and need for surgery. Dr. Ricca admitted, however, that the complaints made by the claimant in the emergency room immediately following his MVA were not the same as those made to him some four months later. Furthermore, Dr. Ricca admitted that other activities could have caused the claimant to rupture his disc, and that he could not say "100 percent with clarity" when the claimant's rupture occurred. Dr. Ricca stated that in addition to his review of the MRI studies taken of the claimant's spine, he (like Dr. Thompson), relied heavily on the history provided to him by the claimant in forming his medical opinion concerning the cause of the claimant's condition. Dr. Ricca admitted, however, that had he been given a different history, his medical opinion might be different.

Yes, Sir. If I had a different history that presented another event, then I would not be able to come to that conclusion. A lot of what I am rendering is based on the history. Without the history that I have, I would not be able to give you an opinion as to causation.

It is well established that 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). Furthermore, 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). Because both Dr. Ricca and Dr. Thompson based their medical opinions largely on facts related to them by the claimant, their respective opinions cannot be considered dispositive of the cause of the claimant's herniated disc.

In rendering her opinion, the Administrative Law Judge apparently relied heavily upon the claimant's testimony. In rendering their medical opinions, specifically that the claimant's herniated disc is causally related to the claimant's MVA, Dr. Ricca and Dr. Thompson admittedly rely heavily upon history provided by the claimant. Dr. Ricca confirmed during his deposition, however, that his office would not continue to treat the claimant due to the claimant having requested that they make misrepresentations concerning his injury in order for state insurance to cover

his pending surgery. "Because of that," stated Dr. Ricca, "this patient will not be coming back into our clinic." The claimant's willingness to make false representations to a state agency, and his attempt to persuade his doctor's office to participate in said fraud, weighs heavily against the claimant's overall credibility. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). Furthermore, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id. Although the claimant tries to minimize the incident involving potential fraud, the respondent correctly points out that in view of the fact that Dr. Ricca's office will no longer treat the claimant, "it is obvious that even Dr. Ricca feels as though the claimant's veracity is doubtful." Therefore, based upon the claimant's alleged willingness to commit fraud upon a government agency, his testimony should be given little weight.

The weight of the objective medical evidence presented in this claim fails to establish that the claimant's herniated disc occurred as a result of his MVA of July 23, 2003. Objective medical testing performed at the time of the claimant's accident, including x-rays and an MRI, showed normal results. It was not until nearly four months later that an MRI of the claimant's neck revealed a herniated disc. Furthermore, it is very unlikely that the claimant could have continued to engage in the type of strenuous activities that he did for months after his accident had he sustained a herniated disc at the time of his accident. Finally, the claimant did not seek medical attention during the three and a half months following his MVA, in spite of his "severe" and worsening symptoms.

In support of its argument to the Full Commission, the respondent cites Towery v. Hi-Speed Electrical Co., 75 Ark. App. 167, 56 S.W.3d 391 (2001). In the Towery case, the Court upheld the Commission's finding that the claimant failed to prove that his neck injury was causally related to his work, and therefore denied the compensability of his claim. Like the claimant in the present case, Mr. Towery testified that his neck injury did not become symptomatic

until some four or five months after his injury. Also, like this claimant, Mr. Towery testified that he had suffered no other accidents that could have caused his neck injury. In contradiction to the facts in this claim, however, Mr. Towery had pre-existing conditions that clearly contributed to his present problem. In rendering its decision in Towery, the Court stated that because Mr. Towery continued to work subsequent to his accident and failed to seek medical treatment for some months thereafter, "fair-minded persons could have come to the Commission's conclusion that Mr. Towery failed to establish a compensable injury." Id. Likewise, based upon the facts presented in this claim, "fair-minded persons" could easily conclude that the claimant has failed to prove a causal connection between his MVA and his herniated disc.

In conclusion, the claimant is not a credible witness and Dr. Ricca's medical opinion should be given little weight. Moreover, and more importantly, the weight of the objective medical evidence in this claim clearly fails to support a finding that the claimant's herniated disc occurred at the time of his MVA in July of 2003. Based upon the above and foregoing, we find that the claimant has

failed to prove by a preponderance of the evidence that he sustained an injury to his neck, specifically a herniated disc, as a result of his MVA of July 23, 2003. Therefore, and for all of the reasons stated above, the decision of the Administrative Law Judge is hereby reversed and the compensability of this claim 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's decision finding that the claimant did not sustain a compensable injury and denying the claimant temporary total disability benefits. The Majority found the claimant was not credible and that the medical opinions were largely based on history given by the claimant and therefore should be given little weight. The Majority also opined that the claimant's

ability to return to work after his accident was indicative that the claimant's neck injury was not causally related. I find that the claimant provided credible testimony regarding his injuries and symptoms. I further find that it is more probable than not the accident caused the claimant's condition and that the Majority did not give the medical opinions regarding the claimant's condition the appropriate amount of weight. For these reasons, I respectfully dissent.

It is undisputed that on July 23, 2003 the claimant was performing employment services and was rear-ended by a tractor trailer rig. The claimant was subsequently taken to the hospital. The Emergency Clinical Record dated July 23, 2003 indicates the claimant was involved in a motor vehicle accident and that he was not restrained. It also indicates the claimant complained of mid-back pain and of "burning in the back of head." X-rays were taken and returned as normal. The Emergency Room Report contains typed notes regarding the visit. However, the report indicates the claimant's only complaint was of "pain in the posterior occipital head."

The claimant returned to the emergency room the next day. The Emergency Clinical Record indicates the

claimant complained of "abd pain @ belt line." There is also a notation indicating, "Unrestrained driver MVA yesterday." It indicates he was diagnosed with "Abdominal pain S/P MVA," and "Cervical strain." A Work School Statement was also completed and indicates the claimant was given instructions regarding a neck injury and abdominal pain. The Emergency Room Report with typed notes regarding the visit indicates the claimant, "still has some discomfort along the area where the seat belt was." It also indicates that the claimant complained of difficulty swallowing and that he had a history of gastroesophageal reflux disease. The report further indicates the claimant had, "repeat x-rays of his cervical spine and that there may be a small osteophyte, which has been fractured off. This may be new versus old. It is about the C5 level." The claimant was given a 72-hour work restriction.

At the end of the restriction, the claimant returned to work but continued to suffer from soreness in his neck and shoulders. He also had recurring headaches. The claimant did not seek immediate medical attention because he believed the symptoms would subside. In mid-September the

claimant began to suffer from a burning sensation in his neck and numbness in his right shoulder and arm.

On November 4, 2003 the claimant was treated by Dr. Robert Thompson. The Progress Sheet from that visit indicates the claimant complained of, "burning in his neck radiating down into between the shoulder blades."

Dr. Thompson referred the claimant for an MRI. The MRI revealed the claimant had bulging discs at levels C3-4, C5-6, C4-5 and that there was a disc protrusion at level C6-7. The Progress Sheet also indicates Dr. Thompson felt the disc bulging was, "sufficiently large to clearly cause the burning in his neck and left side." The Progress Sheet also says, "I think it very, very clearly is directly causally related to the accident."

The claimant was referred to Dr. Gregory Ricca. Dr. Ricca concluded the claimant suffered from a cervical disc rupture that was directly associated with the accident. On December 11, 2003 Dr. Ricca restricted the claimant from returning to work. Dr. Ricca recommended the claimant undergo surgery. The respondents had already controverted the claim. The claimant contacted Dr. Ricca's office and attempted to get the surgery paid for by Medicaid.

Dr. Ricca's personnel felt the claimant was requesting his office submit an untrue statement that the surgery was not work-related. As such, Dr. Ricca refused to see the claimant again.

The Majority finds that the claimant is not credible and that because Dr. Thompson and Dr. Ricca relied on history provided by the claimant in diagnosing him, their medical opinions should be given little weight. In supporting this finding, the Majority found that Dr. Ricca's office refused to continue treating him due to his request to categorize the injury as non work-related in order to have Medicaid pay for his surgery. The evidence is unclear as to exactly what the claimant said or requested regarding the payment of his surgery. It is important to note that Dr. Ricca did not actually converse with the claimant regarding this request and that at times, he appeared to be hesitant to comment on the reason the claimant was not allowed to return for treatment. Dr. Ricca said,

"I think what I--and you might want to talk to Dr. Sauthier. She can give you the exact or more accurate information about her conversations. But what I had the impression from my conversations with Dr. Sauthier was that the patient was requesting us to misrepresent some

of the information to help him get insurance coverage. I may be incorrect--"

Given Ricca's earlier testimony that his office did not bill for Medicaid, it is likely the claimant was in pain and simply trying to find a way to have his medical bills paid. Requesting an office to submit a request for payment in order to get treatment is in no way dishonest. Furthermore, the issue of whether an injury is due to work-related activity is often a complex legal question and to determine someone is not credible for trying to categorize the reason for an injury in order to receive medical attention would be unjust. Furthermore, while Dr. Ricca went on to say that his impression was that the claimant asked his office to submit his claim as though it were not work-related, he also testified that his practice did not bill Medicaid in instances where the injury was work-related and said if the claimant got authorization to have surgery paid for, he would provide treatment.

Regardless of whether the claimant did ask Dr. Ricca's office to report his injury was not work-related, the evidence does not support a finding that he lied regarding whether he sustained an injury or when his

symptoms appeared. As such, even if one believes the claimant did attempt to defraud the state to receive treatment, that does not establish that he lied regarding his injury and symptoms.

The Majority also opines that the medical records do not support a finding that the claimant's injury was caused by the July 2003 accident. These findings ignore that Dr. Thompson and Dr. Ricca both reviewed the claimant's medical records, were aware that he returned to work, and yet still ultimately concluded that his condition was caused by the accident.

The Commission has the discretion to decide what weight to give to the testimony presented by the physician. Questions of credibility and the weight and sufficiency to be given the evidence are matters within the province of the Commission. Swift-Eckrich, Inc. V. Brock, 63 Ark. App.118, 975 S.W.2d 857(1998). Medical opinions must be stated within a reasonable degree of certainty. Crudup v. Regal Ware Inc., 341 Ark. 804, 20 S.W. 3d 791(2001); Ark. Code Ann. §11-9-102(16)(B). Expert opinions based on "could", "may," or "possibly" lack the definiteness required to prove causal connection. Frances v. Gaylord Container Corp. 341 Ark, 527,

20 S.W. 3d 280(2000). Additionally, 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. Preacher v. Cave City Nursing Home INC., 2004 AWCC 14 Claim No. E512363, citing Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). However, 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 800 (2001).

The Majority reasons that the claimant's x-rays and the MRI report from immediately after the accident did not show bulging discs or neck problems and therefore, his neck and back condition were not due to the accident. This ignores evidence that the claimant complained of problems with his neck and back after the accident and also ignores Dr. Ricca's testimony that he reviewed the claimant's records from that date and still concluded the reason for the claimant's injury was due to the accident.

The medical records reflect that the day of the accident the claimant complained of mid-back pain and of, "burning in the back of head." The claimant's wife testified that she felt a knot on the back of his head after the accident and corroborated his testimony regarding his symptoms after the accident. Though the x-ray performed on the day of the accident returned as normal, the next day the claimant's x-ray revealed that he had a possible osteophyte fracture near level C5. This shows that immediately after the accident, the claimant began to suffer from both back and neck problems and that the problems were shown by objective medical findings. Though the x-ray does not indicate the claimant had bulging discs in his back, Dr. Ricca testified he reviewed the x-ray reports. After reviewing the reports, Dr. Ricca testified it was still his opinion that the claimant's condition was caused by the accident. This shows that the claimant's x-rays were not disregarded and implies that the x-rays were not the only thing that would reflect an accurate conclusion regarding the claimant's diagnosis. It also shows that contrary to the Majority's findings, Dr. Ricca's testimony was not solely based on the history reported by the claimant.

With regards to the MRI performed shortly after the accident, the medical reports reference that an MRI was performed on the claimant's abdomen rather than on his neck or spine. As such, the fact that the MRI performed after the injury did not show any injury to the abdomen has no evidentiary value with regards to the claimant's back or neck condition.

With regards to the opinions of Dr. Ricca and Dr. Thompson, it is clear that they had access to the claimant's medical records, were told of the claimant's return to work, but yet still decided the claimant's accident was the cause of his injuries. Dr. Ricca testified that he relied on the claimant's history in diagnosing him and said that if he were given a different history of events, that could change his diagnosis. However, Dr. Ricca also indicated that he had reviewed the claimant's x-ray reports from 7-24-03 and that he was aware the claimant laid bricks after the injury. This testimony illustrates that the claimant gave an accurate history to Dr. Ricca and that Dr. Ricca considered the claimant's return to work and his medical reports but still concluded that the injury was caused by the accident.

The Majority relied on Towery v. Hi-Speed Electrical Co., in finding that the claimant's failure to seek medical attention between July 24 and November 4 showed that his injury was not caused by the accident. While the facts in Towery are similar to the current case in that there was a lapse of time between the time of injury and seeking medical attention, the current case is distinguishable. In Towery, the claimant failed to seek medical attention for a period of 10 months, whereas in the present case, the claimant waited a much shorter time period of just over three months to seek treatment. Additionally, the claimant in Towery gave contradictory testimony regarding whether he had ever suffered from prior back pain or whether he had sought treatment for back pain prior to the time of the alleged compensable injury. In this instance, there is no evidence that the claimant had a history of having back or neck problems prior to the day of the accident. Additionally, there is no evidence the claimant engaged in any non-work related activity that would cause his condition. In fact, the only explanation the Majority proposes for causing the claimant's injury is that the claimant returned to work. As the claimant was complying

with doctor's orders regarding his restriction, he would have no reason to think the employer would escape liability if he suffered another injury at work. Therefore, it is unlikely he would fail to report any subsequent work-related injury to his back or neck.

While the Court in Towery did recognize the claimant's ability to return to work was a factor in finding the claimant's injury was not compensable, in this instance, Dr. Ricca provided testimony that it would not be unusual for the claimant to be able to return to work, only to later suffer from symptoms associated with his initial injury. Dr. Ricca testified, "One can rupture a disk and get pressure on the spinal cord and have no symptoms for some time period." Dr. Ricca also testified that the claimant's symptoms from the time of the accident to November were not inconsistent with one another. He further said, "Only if I had an MRI every day, I could then pinpoint it down to the date." This testimony illustrates that while Dr. Ricca relied on the claimant's history, he was presented with alternative reasons for his injury and ultimately concluded that he could state within a reasonable degree of medical certainty that the July 2003 wreck caused the claimant's

injury. His testimony also shows that it would be impractical and virtually impossible to diagnose a patient without relying on their history to some extent.

Ultimately, the evidence indicates this claimant was injured in the admittedly work-related car wreck in July 2003 and that he only later realized the true extent of his injuries. The extent of the injuries were evidenced by the medical reports taken immediately after the accident and during his subsequent doctor's visits. While the Majority finds the claimant is not credible, all doctors dealing with the claimant concluded that his condition was caused by the accident. Additionally, the record is devoid of any indication the claimant engaged in non-work related activities that aggravated his condition. Therefore, I conclude that the claimant's injury was due to the wreck and that it amounted to a compensable injury. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner