

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403064

HAROLD HINDS, EMPLOYEE	CLAIMANT
BPB GYPSUM, INC., EMPLOYER	RESPONDENT
SENTRY INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 2, 2006

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 GARY ROGERS, 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 April 25, 2006. 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 additional medical treatment, including pain management and hardware removal surgery, remains reasonably

necessary in connection with his compensable injury.

4. The claimant has proven by a preponderance of the evidence that he has been within his healing period and totally incapacitated from earning wages from August 18, 2005, through a date yet to be determined.

5. The claimant has therefore proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from August 18, 2005, through a date yet to be determined.

6. The claimant has proven by a preponderance of the evidence that he earned wages sufficient to entitle him to the maximum compensation rates.

7. 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 April 25, 2006, 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical benefits, including pain medication and hardware removal surgery, as well as temporary total disability benefits. A carefully conducted de novo review of this claim in its entirety reveals that the claimant suffers from a preexisting condition, which has necessitated the need for his impending hardware removal surgery, and that his temporary incapacitation from earning meaningful wages is a result of his preexisting condition. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to additional medical and temporary total disability benefits.

The record reveals that the claimant was involved in an automobile accident in 1992, that resulted in his undergoing a fusion at L4-5, performed by Dr. James Arthur. The claimant returned to regular employment after his healing period for this injury ended; sometime near the end of that same year. In 1996, the claimant suffered a sudden reoccurrence of symptoms at the site of his previous back surgery. Diagnostic studies conducted at that time revealed that the

claimant had a fractured pedicle screw. The claimant was treated conservatively and returned to work on August 26, 1996. On December 31, 2003, the claimant re-injured his back in the course of his employment with the respondent employer when the claimant, a "bundler operator", was driving a forklift that struck a concrete encased pole. The claimant testified that the impact "snatched [him] around in [his] seatbelt", to the right.

The claimant realized no immediate symptoms as a result of the December 31, 2003, incident, and he finished his shift. However, by January 2, 2004, the claimant sought emergency treatment at Howard Memorial Hospital for increasing pain and stiffness. Afterwards, the claimant was seen by his family physician, Dr. H. Patel, who referred him back to Dr. Arthur. In the meantime, x-rays taken on January 7, 2004, showed chronic changes involving L4-5, and a fractured pedicle screw. The respondent carrier switched the claimant's referral to Dr. Raza Shahim, who saw the claimant for the first time on March 8, 2004.

Dr. Shahim examined the claimant and reviewed his previous studies. Preferring to manage the claimant conservatively, Dr. Shahim put him on a course of physical therapy and placed him on light duty. An MRI taken on March 11, 2004, confirmed the fractured pedicel

screw, of which Dr. Shahim was under the mistaken belief was recent. A myelogram and CT scan of the claimant's lower back were conducted on April 8, 2004. These studies showed postoperative degenerative changes at L4-5, with no identifiable nerve root cutoff and only slight bulging at that level. On April 12, 2004, Dr. Shahim, now aware that the claimant's pedicel fracture was old, stated in his clinical report:

It is possible that Mr. Hinds is now symptomatic from the fractured screw and it's possible that the injury has caused some jarring and movement of the instrumentation, and it is causing some of his hip and leg symptoms.

Dr. Shahim recommended that the claimant undergo epidural injections by Dr. Sundeep Lal. Dr. Shahim further recommended that, should these injections fail to alleviate the claimant's symptoms, removal of his hardware should be considered, with the understanding that this procedure may not resolve all of his symptoms.

On May 19, 2004, the claimant was evaluated by Dr. Lal, who assessed him with right SI joint dysfunction, lumbar axial pain status post fusion, and radiological evidence of pre-existing metal implant fracture. Dr. Lal added that the claimant's physical

examination was limited by "extreme anxiety and limited cooperation and give-way weakness in the right lower extremity." Dr. Lal recommended an arthroscopic sacroiliac diagnostic block and an electrodiagnostic study of the claimant's right lower extremity. In addition, Dr. Lal continued the claimant off work pending these studies.

The claimant reported "traumatic worsening" of his symptoms following his SI joint injection. Therefore, Dr. Lal opined that the claimant would not be an appropriate candidate for future injections, and he recommended conservative treatment only. The results of the claimant's electrodiagnostic study were normal, and revealed no evidence of radiculopathy in L2 through S1. Dr. Lal planned to enroll the claimant in graduated back extension exercises through physical therapy, and gradually return him to regular work activities. Dr. Lal stated that the claimant's re-entry into his regular employment was "crucial to him being fully rehabilitated back to his present job which I expect him to make should he fully participate in his therapies."

On June 28, 2004, the claimant reported to Dr. Lal that he was unable to resume his former work activities because the respondent employer had no light duty available. The claimant also told Dr. Lal that the

SI injection had helped him, but that he had fallen on June 26, 2003, bruising his right hip, and causing him to "hurt everywhere".

A functional capacity evaluation conducted on July 6, 2004, noted a reliable effort by the claimant, and found him capable of light duty work with restrictions.

Thereafter, the claimant sought from the respondent carrier a change of physician to Dr. Kenneth Rosenzweig. As a result of his initial examination of the claimant on August 16, 2004. Dr. Rosenzweig diagnosed him with failed back syndrome. Dr. Rosenzweig opined that the claimant's recurring pain was from a "work-related event in what appears to be an exacerbation/aggravation of an underlying fractured hardware that predates this injury but may represent a pseudoarthritis disrupted by this work event". Dr. Rosenzweig referred the claimant to Dr. Ackerman for injections, which ultimately confirmed that the claimant's source of pain originated from his fractured hardware. In his clinic note of October 8, 2004, Dr. Rosenzweig concurred with Dr. Ackerman's stated opinion that hardware removal might be appropriate in the claimant's case.

Subsequently, the claimant sought from the Commission, and was granted a change of physician to Dr. Arthur, who had performed the claimant's 1992 fusion. On March 16, 2005, Dr. Arthur recommended temporary pain management, including a facet rhizotomy, pending removal of the 1992 hardware.

On June 16, 2005, the claimant was seen in an independent medical evaluation by Dr. Earl Peeples. Dr. Peeples found no correlation between the claimant's 1992 hardware and his present symptoms, and he recommended that a bone scan and psychological evaluation be conducted. The results of the bone scan were negative, and the claimant was diagnosed with conversion disorder by Dr. Winston Wilson as a result of his psych evaluation. Ultimately, Dr. Peeples did not recommend surgery.

It is the claimant's burden to prove by a preponderance of the evidence that, among other things, an injury arose out of and in the course of his employment. See, Ark. Code Ann. §11-9-102(4)(A)(ii). Further, in order to establish that an injury "arose out of and in the course of employment" the claimant must establish a causal relationship between his condition and his employment activities. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985).

Objective medical evidence, while necessary to establish the existence and extent of an injury, is not essential to establish a causal relationship between the injury and the work related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999).

However, except in the most obvious cases where causation is established through common sense observation and deduction, the existence of a causal relationship may require the assistance of expert medical evidence. John Cotton v. Ball & Prier, Full Commission Opinion, September 23, 1997 (E512437); Billy Wayne Jetter v. B & R McGinty Mechanical Co., Full Commission Opinion, March 6, 1997 (E208256), Affirmed May 6, 1998; Ortho O. Wells v. Armstrong Rubber Co., Full Commission Opinion, April 14, 1997 (D100998); and Carolyn Jackson v. Bosley Construction, Full Commission Opinion, March 6, 1997 (E009401).

The claimant testified that he sustained his back injury of 1992 as the result of a head-on collision. He stated that it took him approximately one year to recover from that injury. The claimant further testified that he was uncertain as to what had caused his symptoms to reoccur in 1996, but that he remained asymptomatic for seven years thereafter. The claimant testified that during those seven years between 1996 and

2003, he was strenuously employed with other employers, and he admitted that he suffered from occasional back pain. Although there is no medical evidence to refute the claimant's testimony, there is none to corroborate it either. The uncorroborated testimony of an interested party is never considered uncontradicted. Continental Express v. Harris, 61 Ark. App. 198, 965 S.W.2d 811 (1998); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Moreover, testimony of interested parties is taken as disputed as a matter of law. Gilbert v. Diversified Graphics, 286 Ark. 261, 691 S.W.2d 162 (1995); Waterfield v. Quimby, 277 Ark. 472, 644 S.W.2d 241 (1982). Based on the record as a whole, reasonable minds could logically conclude, especially given the severity of the claimant's initial injury and the aggravation of 1996 that required medical treatment, that the claimant was not entirely symptom free for the entire seven years preceding the incident of December 31, 2003. Moreover, diagnostic studies conducted throughout the course of the claimant's treatment following that incident show no acute changes in the claimant's spine from previous studies. Dr. Shahim speculated that the December 31<sup>st</sup> incident caused jarring and movement of the claimant's fractured pedicel screw, which resulted in his current symptoms. Likewise,

Dr. Rosenzweig entertained the possibility that the claimant's 1992 arthrodesis "did not take but that the scarring was extensive enough that he became asymptomatic". This type of conjecture intimates some doubt on Dr. Rosenzweig's part that the claimant had remained asymptomatic for such an extended period of time. Therefore, as the respondents correctly assert, the claimant's testimony alone is insufficient to establish the necessary causal connection between his work related accident of December 31, 2003, and his current need for back surgery.

Moreover, and more importantly, the medical records conclusively establish that the claimant's pedicel screw was fractured at the time he suffered a temporary aggravation of his condition in 1996. Furthermore, there was a general consensus among the claimant's treating physicians that the preexisting damaged hardware is the source of the claimant's contemporary back problems, and that removal of this hardware may eventually become necessary. However, none of these physicians state with medical certainty that the claimant's current problems are causally connected to his injury of December 2003. For example, in his report of April 12, 2003, Dr. Shahim speculated that it is "possible" that the December 31<sup>st</sup> incident caused

jarring and movement of the claimant's fractured pedicel screw. Similarly, on August 16, 2004, Dr. Rosenzweig stated that it "may be" that the claimant has pseudoarthrosis at L4-5, and he added, "One might speculate that the arthrodesis did not take but that the scarring was extensive enough that he became asymptomatic." Absent a concise medical opinion linking the incident of December 31, 2003, to the claimant's current need for surgery, we are reduced to speculation in finding a causal connection exists between the two. 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 (1979); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Lastly, at least one physician, Dr. Peeples, find no link between the claimant's December injury and his hardware failure, which has necessitated the claimant's alleged need for surgery. In addition, Dr. Wilson found that the claimant suffers from conversion disorder. Although the Administrative Law Judge expressed doubt regarding the validity of Dr. Peeples' opinion, due largely on Dr. Peeples' professional relationship with Dr. Lal, Dr. Wilson does not have that

professional tie. Further, for the Administrative Law Judge to minimize Dr. Wilson's (who is a trained mental health professional) warning that "compliance may be an issue in this case", in favor of Dr. Ackerman's opinion that the claimant "is not exaggerating his pain syndrome", completely disregards Dr. Lal's report that the claimant's May 19, 2004, examination was limited due his "extreme anxiety and limited cooperation". This statement supports Dr. Wilson's diagnosis of a tendency, on the claimant's part, to exaggerate his symptoms.

Based on the above and foregoing, the medical record fails to support a finding that the claimant's proposed hardware removal surgery is causally connected to his injury of December 31, 2003. Assuming, for the sake of argument, that the jarring from that incident caused the claimant to become symptomatic, it is well established that the claimant's pedicel screw had been broken for several years prior to that incident. In addition to there being no concrete medical opinion linking the claimant's current proposed surgery to the December incident, diagnostic studies performed after the incident of December 31, 2003, have failed to show any appreciable change in the claimant's back condition from previous studies. Based on the above and foregoing, the claimant has failed to prove by a preponderance of

the evidence that a causal connection exists between the incident of December 31, 2003, and his current back problems, which have allegedly necessitated removal surgery. Rather, it is more likely than not that, as in 1996, the incident of December 31, 2003, caused only a temporary aggravation of the claimant's preexisting condition. This temporary aggravation having since resolved, the claimant has been restored to same condition that he was in prior to the incident of December 31, 2003. Likewise, because the claimant has failed to show a causal connection, he has failed to prove that he is entitled to additional temporary total disability benefits in association with his current complaints.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner