

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503078

GERMAN RODRIGUEZ,
EMPLOYEE

CLAIMANT

SIMMONS FOODS,
EMPLOYER

RESPONDENT

S. B. HOWARD & COMPANY,
INSURANCE CARRIER/TP

RESPONDENT

OPINION FILED OCTOBER 24, 2006

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

Claimant represented by the HONORABLE EVELYN BROOKS,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE TOD BASSETT,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed October 21, 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. On all relevant dates in January of 2005,
the relationship of employee-self insured
employer-third party administrator existed
between the parties.
3. On all relevant dates in January of 2005,
the claimant earned wages sufficient to

entitle him to weekly compensation benefits of \$227.00 for total disability and \$170.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that the existence of a causal relationship between his employment with this respondent in January of 2005, and the difficulties he subsequently experienced with his right foot, as the result of an extensive infection. Therefore, the claimant has failed to prove that his difficulties with his right foot represent either a "compensable injury" or a "occupational disease", as those terms are defined by the Act.

5. The respondents have denied that the claimant's right foot difficulties are "compensable" and 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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq.

The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the October 21, 2005 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's October 21, 2005 opinion denying a causal relationship between Claimant's employment with the respondent employer in January of 2005, and Claimant's right foot difficulties.

Based upon my de novo review of this claim in its entirety, it is my opinion that Claimant proved by the greater weight of the credible evidence a causal relationship between his right foot difficulties and his employment with the respondent employer in January of 2005.

Claimant is a 39 year old man who began working for the respondent employer in late December of 2004. Claimant was hired to perform cleanup, which included taking out the trash and washing the floors with a hose. Claimant usually worked from 5:30 pm until 2:30 or 3:30 am, Monday through Saturday, with his regular scheduled day off on Sundays.

Near midnight on Thursday, January 27, 2005, Claimant went to throw away some boxes from the line that had what he described as "red water" in them. The water spilled soaking his tennis shoes and feet. Claimant worked the rest of his shift that night.

On Friday, January 28, 2005, Claimant noticed a spot on his right foot where it looked like there was some skin off. Claimant testified that he tried to locate the chief of personnel on Friday, but was unsuccessful. Claimant also testified that he went by

the infirmary on Friday but no one was available.

Claimant finished out his shift on Friday.

Claimant was excused to leave at approximately eight o'clock on Saturday, January 29, 2005, by his supervisor, because his foot was hurting and Claimant felt like he was running a fever. Sunday, January 30, 2005, was Claimant regularly scheduled day off.

Claimant returned to work on Monday, January 31, 2005. Claimant informed the chief of personnel of his foot difficulties and was seen in the infirmary where an appointment was made for the following afternoon.

Claimant was seen at the Gentry Medical Center on Tuesday, February 1, 2005, where he was advised to go to the emergency room for possible gangrene of the fourth right toe. During Claimant's emergency room visit, he was found to have diabetes.

Claimant's fourth right toe was amputated on February 4, 2005, by Dr. John Kendrick. Claimant received intravenous antibiotic treatments following his surgery.

In my opinion, this is not an occupational disease case. Claimant spilled water on his feet that led to an infection. His feet got wet at work and an

infection followed. The fact that Claimant was found to be diabetic is not relevant. The diabetes may have made the infection progress faster, but it did not cause the infection. In Pekin Wood Products Co. v. Graham, 207 Ark. 564, 181 S.W.2d 811(1944), the Court of Appeals held that irritation to a claimant's eyes made him more susceptible to an infection. In the present claim, having wet feet made the Claimant more susceptible to an infection.

The record reflects that Claimant was unaware that he had diabetes prior to the incident, and had not had any difficulties due to diabetes. According to Dr. Kendrick it is not unusual for a first diagnosis of diabetes to be made when a patient is in the hospital.

Dr. Kendrick was deposed on August 19, 2005. During that deposition, Dr. Kendrick opined that an infection of the type that Claimant had could have become gangrenous in as short as four days or it could possibly fester for months. In my opinion, the record supports Dr. Kendrick's opinion that the infection spread rapidly and was a result of the claimant having wet feet from work. In support of this contention, I note that Claimant had a physical prior to being hired

by the respondent employer that did not take notice of any foot difficulties.

A case decided by the Court of Appeals supports Dr. Kendrick's opinion with its fact situation and medical testimony. In Heptintall v. Asplundh Tree Expert Company, 84 Ark. App. 215, 137 S.W.3d 421, Dr. Vowell testified concerning an infection of staph A into appellant's body:

He described the time frame and process through which the staph A would have entered the wound. He discussed the fact that staph A is an organism that's around us on everything that we might come in contact with, but that it has to have some entrance into the body through some opening. He identified the entry time of the staph A into appellant's body as anywhere from three to six days prior to the Monday that appellant entered the hospital. His opinion was based upon his application of the organism's normal progression in the skin, it starts growing within a day or two. It first starts growing into the soft tissues and after it is established, the patient begins to experience pain. The pain increases substantially within forty-eight hours of the its [sic] onset resulting in severe pain for the patient.

These facts are remarkably similar to the ones in the present claim, and Dr. Vowell's testimony supports that of Dr. Kendrick. In the present claim the injury is the infection. The infection happened at one instant and then it progressed. The water caused the infection, and the fact that Claimant had diabetes and may have

been more susceptible to the infection occurring is irrelevant. But for the water, Claimant would have been without the infection.

The commission is required to weigh the evidence impartially without giving the benefit of the doubt to any party. Keller v. L.A. Darling Fixtures, 40 Ark. App. 94, 845 S.W.2d 15 (1992). The Commission also has the duty of weighing the medical evidence as it does any other evidence. Roberson v. Waste Mgmt., 58 Ark. App. 11, 944 S.W.2d 858 (1997). However, "[I]f the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the commission's refusal to make an award." Hall v. Pittman Constr, Co., 235 Ark. 104, 357 S.W.2d 263 (1962). Furthermore, an employee is not required to prove the source of an infection with absolute certainty because that is a manifest impossibility. See Dega Poultry Co. v. Tanner, 259 Ark. 396, 533 S.W.2d 207 (1976). In addition, the Commission cannot arbitrarily disregard any witness's testimony. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). The claimant need only to establish a

causal link between the original injury and the subsequent complications for the injury to be compensable. See Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

In my opinion, Claimant has met his burden of proving a compensable injury. All of Claimant's reports are consistent. Claimant's treating physician, and surgeon, found with a reasonable degree of medical certainty that Claimant's infection was caused by the water at work. Claimant had a clear pre-employment exam only weeks earlier. The accidental injury is the water soaking Claimant's feet whereby an infection entered. It took several days to realize the severity of the injury, but when Claimant realized it, he attempted to report it, and persisted until he did report it. In my opinion, the great weight of the substantial evidence supports the compensability of this injury and the period of incapacity associated with it.

For the foregoing reasons, I respectfully dissent from the Majority's decision affirming and adopting the Administrative Law Judge's October 21, 2005 opinion.

SHELBY W. TURNER, Commissioner