

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400506

SMITH W. TOMPKINS, EMPLOYEE	CLAIMANT
COMQUEST, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., CARRIER	RESPONDENT

OPINION FILED JANUARY 30, 2006

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

Claimant represented by HONORABLE ROBIN J. CARROLL, Attorney at Law, El Dorado, Arkansas.

Respondent represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and reversed in part.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on April 5, 2005. After a de novo review of the record, we find that the decision should be affirmed in part and reversed in part. The claimant suffered a compensable injury on December 3, 2003, from a fall at work. At the time of the injury, the claimant was employed by the respondent as an installer and maintenance provider at their cell phone towers. When the claimant fell, he injured his ankle and alleged that he also suffered

Tompkins - F400506

injuries to his neck, back, and shoulder. The respondent controverted the claim, stating that whatever problems the claimant suffered were the result of a preexisting condition.

After a hearing, an Administrative Law Judge issued an Opinion dated April 5, 2005, finding that the claimant had sustained a compensable injury and that, in the fall, he had suffered injuries to his right ankle and a "temporary aggravation" to his right shoulder. The Judge further found that the claimant's lower back and neck condition preexisted his compensable injury and any problem the claimant was having in regard to those parts of his body were merely recurrences of his preexisting conditions. However, the Judge further found that the claimant did not establish that he was entitled to any medical treatment for his shoulder injury after September 17, 2004, including the surgery performed on September 30, 2004 and the follow-up care. Likewise, the Judge also denied the claimant any temporary total disability benefits based upon his shoulder injury.

Following the entry of that Order, the claimant's attorney wrote to the Commission and requested a review of

Tompkins - F400506

the Judge's decision. While the letter did not specify any issues to be considered, the subsequent brief filed on behalf of the claimant only discussed issues relating to the compensability of the claimant's shoulder and his entitlement to medical and disability benefits on and after September 17, 2004. The respondent did not appeal any portion of that decision. After our de novo review of the testimony, evidentiary depositions, and medical records, we find that the claimant did establish that the treatment he received after September 17, 2004, specifically including his shoulder surgery, was for treatment of injuries sustained in his compensable accident and the respondent is, therefore, obligated to provide the claimant all appropriate medical and disability benefits based upon that injury. Therefore, we find that the Administrative Law Judge's decision should be reversed as to the claimant's shoulder injury and associated benefits, but affirmed on her other findings.

The claimant testified that when he fell, he was carrying an expensive piece of equipment in his left hand. In an attempt to avoid damage to the equipment, he twisted and tried to catch himself with his right arm. His

Tompkins - F400506

immediate attention was on his ankle, which he had sprained and which soon began to swell noticeably. At the time of the accident, the claimant was working on a cell tower in or near Mobile, Alabama. The following day, the claimant drove back to his home in Magnolia, where he sought medical treatment from the emergency room at the Magnolia Hospital. In that emergency room visit, the claimant received medication, was told to use ice, and was also issued crutches. The claimant later saw Dr. Patrick Antoon, a Magnolia general practitioner, for follow-up medical treatment. The claimant testified that he was somewhat sore and stiff after the fall, even though his ankle injury resolved.

On January 28, 2004, the claimant again saw Dr. Antoon, complaining of pain in his left flank and right shoulder. Dr. Antoon continued to treat the claimant for those problems and for symptoms in other parts of his body. In a clinic note dated April 5, 2004, Dr. Antoon noted the presence of shoulder spasms and directed the claimant to undergo a lumbar and cervical MRI. Later, he had the claimant receive an MRI for his right shoulder. The MRI of the claimant's shoulder was not performed until September

Tompkins - F400506

17, 2004 (this is the date chosen by the Administrative Law Judge to find that the claimant was not entitled to further medical treatment for his shoulder).

Our review of the MRI report, as well as the operative report of Dr. Kenneth Gati, an El Dorado orthopedist who operated on the claimant's shoulder, convinces us that the claimant significantly injured his shoulder in the fall. While some of the findings of the MRI noted the presence of degenerative changes, it also documented the presence of abnormalities which could have been caused by a traumatic injury. Further, it should also be remembered that this MRI was performed over ten months following the claimant's accident. While the claimant may have had some degenerative changes in his shoulder at the time of his compensable accident, damage to his shoulder from that incident certainly could have accelerated his degenerative condition.

Dr. Gati operated on the claimant's shoulder on September 30, 2004. In that operative note, Dr. Gati stated the claimant had signs of impingement and that he was proceeding with a subacromial decompression and debridement. While Dr. Gati found evidence of bone-on-bone arthritis

Tompkins - F400506

within the claimant's shoulder, he also found a loose body which he removed and other degenerative changes to the labrum. Lastly, he discovered the presence of synovitis (an inflammation of connective tissue) and bursitis in the subacromial space.

In our opinion, the presence of a loose body in the claimant's shoulder, as well as irritated connective tissues in the form of synovitis and bursitis are evidence of a traumatic injury. Further, those conditions are certainly in accord with a traumatic injury which had occurred approximately ten months prior to the surgical procedure.

We find that the Administrative Law Judge was correct in her decision that the claimant suffered a compensable aggravation of his shoulder in his job-related accident of December 5, 2003. However, in our opinion, her decision to find that medical treatment for this compensable aggravation ended on September 17, 2004, is illogical and inconsistent. The MRI and the operative notes of Dr. Gati, clearly demonstrate the presence of damage which could be the result of a traumatic injury.

In fact, Dr. Antoon opined that such was the case

Tompkins - F400506

in his deposition. When asked whether the claimant's right shoulder problems which lead to the surgery was related to his fall on December 5, Dr. Antoon replied, "I would think that it is very much so related." The reason that Dr. Antoon gave for that response was that he could not recall any complaints the claimant had with his shoulder for five years preceding his shoulder injury. While that is not entirely correct, the medical records do indicate that the claimant had only very infrequent shoulder problems. Specifically, the claimant saw Dr. Antoon in September 2002 and in June 2003 where he complained of shoulder pain. However, these complaints resulted only in the prescription of some medication and did not result in the claimant needing any other treatment. Further, considering the findings of degenerative joint disease in the claimant's September 2004 MRI and referred to in Dr. Gati's operative notes, it is not surprising that the claimant had some degree of pain in his shoulder. However, that does not change the fact that Dr. Gati specifically noted loose bodies and synovitis and bursitis in the claimant's shoulder.

In evaluating the claimant's entitlement to the

Tompkins - F400506

requested surgery, it is also helpful to note past decisions in dealing with this issue. Specifically, the surgical treatment requested by the claimant was denied, apparently because of the degree of his preexisting degenerative joint disease. This was essentially the same rationale used by this Commission in the relatively recent decision of Thomas v. Energy Arkansas, Inc., (Full Commission Opinion filed May 10, 2005, Claim No. F308759). In that case, this Commission held that a claimant was not entitled to knee replacement surgery because the surgery was the result of a degenerative joint disease and not a compensable injury. The dissenting opinion noted the record included medical opinions to the effect that the compensable injury had accelerated a degenerative condition and that this was sufficient to establish the claimant's entitlement to the requested medical treatment. Recently, the Court of Appeals reversed the Thomas decision on that very ground. While that decision was unpublished (see Thomas v. Energy Arkansas, Inc. Court of Appeals, (December 14, 2005)), the reversal was based upon the prior Court of Appeals decision of Williams v. L & W Janitorial, Inc., 85, Ark. App. 1, 145 S. W.3d 383 (2004). In that case, the Court of Appeals

Tompkins - F400506

considered a Commission decision denying a knee surgery because of a preexisting degenerative joint disease. The Court of Appeals reversed and remanded for an award of benefits because of their holding that a compensable injury that accelerates or aggravates a preexisting condition is sufficient to establish a claimant's entitlement to corrective surgery. While the present case involves the shoulder and not the knee, we believe the same principle is controlling.

In our opinion, the medical record demonstrates that prior to his compensable accident, the claimant had some degenerative problems in his shoulder. However, we believe the record also demonstrates that, as a result of his fall in December 2003, he sustained a traumatic injury to his shoulder, which constitutes a compensable aggravation of that condition. This aggravation is in the form of damage to the claimant's connective tissue and cartilage which resulted in a loose body being found during the surgical procedure, as well as evidence of further connective tissue damage.

We also believe the Administrative Law Judge erred in terminating the claimant's temporary disability benefits

Tompkins - F400506

on December 19, 2003. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The Administrative Law Judge did not state any explanation as to why she found that the claimant was not entitled to temporary disability benefits after that date. In fact, there is no medical evidence indicating that he ever left his healing period following his injury. As noted by the Administrative Law Judge, the claimant first complained of shoulder pain to Dr. Antoon in January 2004. Further, there is no medical documentation or other evidence suggesting that the claimant was ever released to return to work following his compensable injury. Further, Dr. Antoon opined that the claimant was not able to return to work at the time of his deposition in January 2005. In fact, the last report from Dr. Gati, dated October 12, 2004, indicates

Tompkins - F400506

that the claimant no longer has an impingement and that the claimant should begin strengthening his shoulder. Dr. Gati then directs the claimant to return in two weeks.

Obviously, the claimant was still in his healing period at that time.

Quite simply, there is no medical evidence indicating that the claimant had reached the end of his healing period at any time prior to the hearing in this case. Since the claimant has been disabled since the time of his injury, and there is no medical evidence showing that he had either been released to return to work or had reached the end of his healing period, we find that the claimant is entitled to receive temporary total disability benefits from December 5, 2003, the date of his compensable injury, to a date yet to be determined.

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

Tompkins - F400506

provisions of Ark. Code Ann. § 11-9-715 (Repl. 2002). Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (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).

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney, concurs, in part and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, with and dissent, in part, from the majority opinion. Specifically, I concur with the findings that the claimant failed to prove by a preponderance of the evidence that he sustained a

Tompkins - F400506

compensable injury to his neck or back, as well as the finding that the claimant sustained a temporary aggravation of his shoulder injury. However, I must dissent from the finding that the claimant's medical treatment after September 17, 2004, is reasonable and necessary medical treatment in connection with his compensable injury, and the finding that the claimant is entitled to temporary total disability benefits after December 19, 2003. Based upon my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to the benefits now awarded by the majority.

The claimant has a long history of shoulder problems. Dr. Antoon, upon whose opinion the majority relies to find that the claimant's need for shoulder surgery is related to his compensable fall, admitted in his deposition that the claimant experienced all of the same symptoms which eventually lead to surgery prior to his compensable fall. Moreover, in testifying that the claimant's shoulder problems which lead to surgery were related to the claimant's compensable fall, Dr. Antoon mistakably testified that the claimant suffered from a torn rotator cuff which

Tompkins - F400506

was surgically repaired by Dr. Kenneth Gati. However, a review of Dr. Gati's operative report clearly reveals that the claimant's rotator cuff was intact. Dr. Gati's preoperative diagnosis was "right shoulder impingement" and "right shoulder osteoarthritis." Moreover, the operative report revealed that the need for shoulder surgery was the claimant's pre-existing degenerative condition, as evidenced by the bone-on-bone arthritis discovered during surgery. This operative report further revealed evidence of inflammation known as bursitis and synovitis, however, there is no evidence in the record as to the cause of this inflammation. It is just as likely that this inflammation was caused by the claimant's fall as it is that it was caused from the irritation resulting from the claimant's severe arthritis and bone-on-bone condition. Obviously, Dr. Antoon was not aware of the true nature of the claimant's shoulder condition, as the operative report described the claimant's rotator cuff as normal. It is widely known that Dr. Antoon has been convicted of health care fraud, altering and falsifying health-care records, and a whole litany of other crimes involving a health care scheme. Accordingly, when this knowledge is considered

Tompkins - F400506

together with Dr. Antoon's patent lack of knowledge concerning the true nature of the claimant's shoulder surgery, I find that Dr. Antoon's opinion should not be afforded any weight.

The majority opines that the accident "could have" accelerated the claimant's degenerative condition, and that the loose body in the claimant's shoulder, as well as, the irritated connective tissues in the form of synovitis and bursitis, are evidence of a traumatic injury. These findings are not supported by any of the medical evidence of record. Ark. Code Ann. § 11-9-102(16) (B) (Supp. 1999) specifically mandates that all medical opinions as to causation must be stated within a reasonable degree of medical certainty. The Arkansas Supreme Court has interpreted this statute and has held that medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. § 11-9-102(16) (B) (Supp. 1999). In Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code

Tompkins - F400506

Ann. § 11-9-102(16)(B). The Arkansas Supreme Court held in Frances that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon theoretical possibility of a causal connection did not meet the standard of proof. Finally, in Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities.

In the present case, the majority has interpreted the medical evidence and rendered a finding as to causation based on nothing more than a theoretical possibility. If such an opinion will not past muster when rendered by a licensed physician, I do not believe that we as a Commission can base a finding of compensability on such tenuous evidence. Whether the claimant's injury accelerated the need for surgery is unmistakably speculative and was not answered by the claimant's treating physicians. Conjecture and

Tompkins - F400506

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 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Accordingly, when I weigh the credible evidence of record, I cannot find that the claimant has proven by a preponderance of the evidence that his shoulder surgery was reasonable and necessary medical treatment in connection with his compensable injury. At best, the claimant sustained a temporary aggravation of his pre-existing shoulder condition when he fell at work in December of 2003. Since I find that the claimant has failed to prove that his need for surgery is compensable, I further find that the claimant has failed to establish by a preponderance of the evidence that he remains temporarily totally disabled as a result of his compensable injury. Therefore, I must respectfully dissent from these findings of the majority.

KAREN H. MCKINNEY, Commissioner