

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608022

LYNN BURKETT, EMPLOYEE	CLAIMANT
TIGER MART, INC., EMPLOYER	RESPONDENT
AMERICAN HOME ASSURANCE CO., CARRIER	RESPONDENT

OPINION FILED MAY 4, 2009

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

Claimant represented by HONORABLE J. RANDOLPH SHOCK,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This claim is presently before the Commission on remand from the Court of Appeals. In a decision delivered February 18, 2009, the Court of Appeals held that the Commission correctly found that the Full Commission did not err in finding that the Administrative Law Judge exceeded his authority when he ordered an IME and reserved the issue of reasonable and necessary medical treatment. In reaching these findings, the Court held that "...it was the statutory obligation of the Commission to make findings of fact and to

decide the issues of compensability and additional benefits by determining whether Burkett met her burden of proof."

However, the court found that the Commission did not satisfy its duty to make findings of fact before it summarily denied her claim. Therefore, the court remanded this claim to the Full Commission for a determination, based upon factual findings, of the issues that were litigated by the parties.

At the hearing held on February 20, 2007, the parties stipulated to the employee-employer-carrier relationship on July 15, 2006; the appropriate compensation rate of \$139.00 for both total disability and permanent partial disability; and the compensability of an injury to the claimant's right hand. The issues for determination at the hearing were framed by the Administrative Law Judge as (1) Whether the claimant's difficulties with her right upper extremity, which has been diagnosed as RSD, represent a compensable consequence or complication of the compensable injury of July 15, 2006, and (2) the claimant's entitlement to additional medical services, additional temporary total

disability from August 22, 2006 through a date yet to be determined, and attorney's fees.

The mechanics of claimant's right hand injury are not in dispute as the injury was accepted as compensable and certain benefits were paid through August 21, 2006. As the claimant was in the process of changing the plastic numbers for the price of gasoline, one of the numbers fell, striking the claimant's right hand. The claimant sought medical treatment at the local hospital and was diagnosed as having a relatively minor contusion to her right hand. No fracture or other significant damage was shown on x-rays. The initial emergency room records from Johnson Regional Medical Center were introduced into evidence. The only objective medical finding reflected in these records was of mild swelling in the claimant's right hand. The emergency room records contain several forms which were completed by the hospital staff. Of particular interest is the fact that only "contusion" was circled under the "Injury description (quality)" portion of the form. Not circled were

"laceration/puncture/stab/abrasion." Despite the lack of comment regarding a laceration or reference to a procedure to suture or super glue a wound, the claimant testified that she had an actual break in the skin that was super glued or stitched in the emergency room.

The claimant was examined by Dr. Robert May on July 19, 2006. Dr. May noted no objective findings of damage to the claimant's right hand, particularly no swelling, redness, temperature differential, skin changes, or hair pattern changes. Moreover, Dr. May noted that the claimant's hand was "really not swollen." Nevertheless, due to the claimant's subjective complaints of severe pain, Dr. May opined that the claimant was developing RSD. Upon her return visit to Dr. May on July 26, 2006, the claimant continued to complain of worsening symptoms. Upon examination, Dr. May did not detect a visible sign of an injury or any physical changes to the claimant's hand. However, he continued to diagnose the claimant with RSD based solely upon her extensive subjective complaints of pain.

When the claimant's complaints had not improved after her third visit with Dr. May, the respondents had the claimant examined by Dr. David Rhodes, a hand specialist with Martin, Bowen, Hefley, in Little Rock. Dr. Rhodes examined the claimant on August 10, 2006 and noted that the claimant's "hand was held with the fingers and wrist in flexion. She is complaining of pain with range of motion, active or passive. Radial pulse of 3+. Capillary refill less than 2 seconds." Dr. Rhodes ordered x-rays which he interpreted as unremarkable. In order to rule out RSD, Dr. Rhodes ordered a triple-phase bone scan, the Gold standard test for RSD. This test conducted on August 16, 2006, did not reveal any evidence of RSD, but was interpreted by Dr. Robert Laakman as revealing "focal areas of increased activity involving the scaphoid and lunate suggesting posttraumatic change. Study is otherwise unremarkable." After reviewing the triple-phase bone scan, Dr. Rhodes noted in his August 21, 2006 report that the scan did not show any signs of RSD. After again examining the

claimant, Dr. Rhodes stated "There is no ecchymosis over the dorsal aspect of the wrist. There is a well healed scar on the ulnar aspect of the wrist. Sensation intact to light touch in radial, ulnar and median nerve distribution." Dr. Rhodes assessed the claimant as having "status post blunt trauma to right hand" and released her to return to work as there were not any changes in her physical objective findings that would substantiate the patient's subjective complaints."

The claimant was next seen by Dr. Michael Westbrook of the Westbrook Medical Clinic on August 31, 2006. The nurse recorded a history of a "hammer dropped on Pt hand July 15th. Pt hand starting to swell continues to pain." After examination, which revealed swelling of the dorsum of the right hand, Dr. Westbrook assessed the claimant with "tendonitis and ? carpal tunnel syndrome." Aside from the swelling, Dr. Westbrook did not detect the presence of any symptoms consistent with RSD.

The claimant returned to the Johnson Regional Medical Center Emergency Room on September 2, 2006. Upon examination the claimant was found to have moderate swelling in her right hand, but no heat or redness. The Emergency Room physician assessed the claimant with tendonitis and advised her to follow up with her primary care physician. However, two days later, the claimant returned to the Johnson Regional Medical Center Emergency Room with complaints of severe pain, swelling and redness in her right hand. On physical examination, it was noted that she exhibited redness and swelling of the palm of her right hand. Dr. Joseph Kradel, the emergency room physician noted the following:

She is having trouble with her right hand. She injured it the 15 of August and has been seen a couple of times since then. She saw a specialist and was told that it was okay and then she had more pain and had repeat x-ray which just showed some old injuries, nothing acute. She is having much more pain today, which is Monday. The hand is swollen. She does have swelling and there is some erythema, which actually

looks more like bruising across the knuckles and down the right lateral aspect, the ulnar aspect of the hand over the fifth metacarpal. It is markedly swollen to touch. There is one area that looks like there may have been a bit/sting, but nothing to drain. She is not running a fever.

Dr. Kradel diagnosed the claimant with possible cellulitis at that time and prescribed antibiotics. Per instructions, the claimant returned for a follow-up the next day with Dr. Westbrook, who noted that the claimant's hand was warm to the touch and was swollen. Dr. Westbrook, diagnosed cellulitis and ordered blood tests. Dr. Westbrook referred the claimant to Dr. James E. Kelly at that time.

Dr. Kelly, a Plastic and Reconstructive specialist, examined the claimant on September 6, 2006.

Dr. Kelly reports the following history:

...this is a 48 year old patient who back in July was struck in the dorsum of her right hand by some sign letters that were being changed at a Quick-Pick that she works at. At the time she had some bruising in the dorsum of the fingers and they had to glue a couple of the

lacerations on the dorsum of her knuckles closed in the emergency room. She started developing pain in the hand and she was seen by an orthopaedist in Little Rock who stated there was nothing wrong with her hand and discharged her. Today she presents with a swollen, red hand, very painful. She has hyperhydrosis of the palm as well as excessive hair growth and shiny skin.

Based upon his observations of the claimant and the claimant's self-reported history, Dr. Kelly opined:

She has classic RSD findings and at this point I think that it warrants fairly aggressive treatment. I am going to start her on stellate ganglion blocks as well as stress loading therapy. We will keep her on light duty restrictions and I will be following her throughout her care.

At the hearing the Administrative Law Judge noted:

...the claimant's right hand did appear to be somewhat swollen. However, her left hand appeared to be equally swollen. There was also no noticeable skin changes, bluish discoloration of the skin, abnormal hair growth patterns, or muscle atrophy.

The issues we are asked to determine are whether the claimant has proven by a preponderance of the evidence that she has developed RSD as a result or compensable consequence of her compensable right hand injury and if so, whether additional medical treatment is reasonable and necessary in connection with the compensable injury. The claimant must prove by a preponderance of the evidence that she sustained a "compensable consequence" pursuant to all of the statutory elements of compensability. Jones v. B.A.E. Sys., Full Commission Opinion filed May 6, 2004 (F001696); Atchison v. John P. Marinoni Const. Co., Full Commission Opinion filed September 19, 2001 (E616344). The burden of proof rests upon the claimant to prove the compensability of her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224

(1979). The burden of proof rests upon the claimant to prove the compensability of her claim. Carman v. Hayworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. §11-9-704(c)(2). In determining whether a claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. §11-9-704(c)(4); Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987). However, no matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof. Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (Claim Nos. E408248 & E408249).

The Commission has a duty to translate the evidence on all the issues before it into findings of fact.

Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v.

Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). 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 it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. 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, January 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). Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant's hand injury has been evaluated by Dr. Robert May, Dr. David Rhodes, Dr. Michael Westbrook,

Dr. Joseph Kradel, and Dr. James E. Kelly. In addition, she has seen other physicians at Johnson Regional Medical Center for her hand injury as well. Of particular interest, however, is the medical report from Dr. Roxanne Marshall dated August 29, 2006, approximately a month and a half after the claimant's minor hand injury. Although the claimant had already obtained treatment for her hand complaints from the hospital, Dr. May, and Dr. Rhodes, the claimant did not make any complaints regarding her right hand when she was examined by Dr. Marshall. Moreover, it is interesting to note that on August 21, 2006, the claimant had been advised by Dr. Rhodes that she did not have RSD and that she was able to return to full time work. Claimant's primary complaint when examined by Dr. Marshall was her uncontrolled diabetes. Dr. Marshall not only checked the claimant's blood sugar, discussed a diabetic diet, and prescribed additional medications for this condition, but she also recorded several other condition from which the claimant suffers including, osteoarthritis of both knees,

hyperlipidemia, degenerative joint disease of the lumbar spine, dyslexia, and colonic polyps. Notably absent from this list, or from the claimant's complaints was any mention of pain, swelling or other problems with the claimant's right hand. When the claimant was first seen by Dr. Westbrook the day after her examination by Dr. Marshall, the claimant provided a much more radical description of her injury, stating that a hammer (not a light weight plastic sign) fell on her hand. The history claimant provided to Dr. Kelly and at the hearing of having lacerations on her hand which required super glue stitching is not consistent with the emergency room records from the day of claimant's injury, nor is it consistent with the medical records of Dr. May who examined the claimant four days after the injury and did not note the presence of a laceration, only a contusion or bruise.

After reviewing all the evidence of record, we place greater weight upon the medical findings and opinion of Dr. David Rhodes, the only hand specialist to examine and

treat the claimant. Dr. Rhodes examined the claimant's hand, and despite the claimant's testimony to the contrary, his medical records reveal that he physically examined the claimant's hands; otherwise he would not have been able to determine the claimant's radial pulse and capillary refill time, or determine that she was sensitive to light touch in the radial, ulnar, and median nerve distributions.

Dr. Rhodes did not detect any bruising or ecchymosis or other discoloration of the hand. Dr. Rhodes ordered and reviewed the triple phase bone scan which examines the blood flow throughout the body. This objective study demonstrated symmetric flow, which is not consistent with RSD. The only positive findings on the triple phase bone scan confirmed the presence of the claimant's old carpal tunnel syndrome and right elbow injuries. After examining the claimant and reviewing her triple phase bone scan, Dr. Rhodes was able to unequivocally state that the claimant did not have RSD.

Dr. May, on the other hand, while he is an orthopaedic specialist, he is not a hand specialist. Moreover, Dr. May

jumped to the conclusion that the claimant had RSD based solely upon her complaints of pain as she did not display any of the other symptoms typically associated with this condition when he examined the claimant, nor did he order a bone scan to confirm his diagnosis. As for the opinion of Dr. Westbrook and Dr. Kradel, both physicians are general practitioners and do not specialize in either orthopaedics or more particularly the hand. Not only was Dr. Westbrook not provided an accurate history of the claimant's injury he was still focused on the claimant's old carpal tunnel injury. Furthermore, after the claimant was seen in the emergency room by Dr. Kradel and diagnosed with cellulitis, Dr. Westbrook, likewise assessed the claimant with cellulitis. It was not until the claimant's third visit that Dr. Westbrook noted that the claimant's hand was warm and he made a questionable diagnosis of RSD. This questionable diagnosis was not made until after a possible bite or sting was noted by Dr. Kradel. The only physician to note the presence of multiple signs or symptoms of RSD was Dr. Kelly.

Dr. Kelly is a plastic surgeon, not an orthopaedist or hand specialist. By the time the claimant was seen by Dr. Kelly, she had the opportunity to learn more about RSD from literature which she testified was provided to her by her physicians. Although the claimant was examined by multiple physicians prior to being seen by Dr. Kelly on September 6, 2006, no other physician ever noted the presence of hyperhydrosis, excessive hair growth or shiny skin. This is despite the fact that she was examined by Dr. Westbrook on the same day, just hours before the claimant was seen by Dr. Kelly. Accordingly, given the discrepancies in examination findings, we cannot find, based upon the evidence before this Commission, that Dr. Kelly actually observed the presence of sweaty palms, excessive hair growth and shiny skin, or whether these were mere symptoms reported to him by the claimant. Clearly, Dr. Kelly observed the redness and swelling he stated that the claimant presented with, but it is not clear from his report whether he actually observed these other symptoms. The absence of these

symptoms in all the other medical reports, most particularly the medical report of Dr. Westbrook just hours before the claimant was examined by Dr. Kelly, calls into question whether these symptoms were observed or merely reported by the claimant to Dr. Kelly. Nor did Dr. Kelly order a triple phase bone scan to confirm his diagnosis. In addition, the Administrative Law Judge personally observed the claimant's right hand and noted no appreciable swelling as compared to the left hand, no noticeable skin change, bluish discoloration, abnormal hair growth patterns or muscle atrophy.

Accordingly, when we weigh all the credible evidence of record, we cannot find that the claimant has proven by a preponderance of the evidence that she sustained RSD as a compensable consequence of her minor compensable right hand injury. The findings supportive of a diagnosis by Dr. Kelly were not noted by any of the claimant's other treating physicians. A triple phase bone scan conclusively ruled out RSD. Dr. Rhodes, the only orthopaedic hand

specialist to exam the claimant, unequivocally stated that the claimant did not have RSD. Based upon this record, we find that the claimant has failed to prove by a preponderance of the credible evidence that she developed RSD as a compensable consequence of her compensable right hand injury. Therefore, she has failed to prove by a preponderance of the evidence that additional medical treatment for RSD is reasonable and necessary for her compensable injury. Accordingly, this claim for additional benefits must be denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable RSD injury, and therefore, I must respectfully dissent.

On July 15, 2006, the claimant, who worked as a cashier at the respondent's convenience store, was changing prices on a gasoline sign when a plastic number measuring one foot by one and a half feet (1' x 1 ½') fell from twenty (20) to twenty-five (25) feet striking the middle and top of the claimant's right hand. The claimant testified that the blow resulted in bleeding, contusion and swelling. The claimant immediately reported the injury to the assistant manager, basic first aid was applied and medical treatment was sought at the Johnson Regional Medical Center Emergency Room. At the emergency room the claimant was treated and released with instructions to remain off work until July 26.

On July 19, the claimant sought treatment from Dr. Robert May, who had previously treated her for a

fractured right elbow. Dr. May's clinical examination and follow-ups on July 19, July 26, and July 28 all indicate a growing suspicion of Reflex Sympathetic Dystrophy at the injury site. The respondent sent the claimant to Dr. David Rhodes for a "second opinion." Although Dr. Rhodes noted that a triple phase bone scan showed findings indicative of post-traumatic change involving the claimant's scaphoid and lunate in her right wrist, he opined that the claimant did not have findings supporting a diagnosis of Reflex Sympathetic Dystrophy. Dr. Rhodes released the claimant from his care on August 21, 2006.

Subsequently, the claimant sought treatment from Dr. Westbrook at the Westbrook Clinic. Dr. Westbrook's examination notes dated August 31, September 5, and September 6 all document objective medical evidence consistent with a diagnosis of Reflex Sympathetic Dystrophy.

On September 6, 2006, Dr. James Kelly, an orthopedic surgeon asked to consult by Dr. Westbrook stated:

Today she presents with a swollen, red hand, very painful. She has hyperhydrosis of the palm as well as excessive hair growth and shiny skin....She has classic RSD findings and at this point I think that it warrants fairly aggressive treatment.

I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable RSD injury. Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962). Here, three of the claimant's treating physicians, Dr. Mays, Dr. Kelly and Dr. Westbrook, have all diagnosed the claimant with RSD, relative to her on-the-job injury. The only doctor to opine otherwise is Dr. Rhodes,

who saw the claimant solely for the purpose of a "second opinion" at the request of the respondent. I place greater weight on the opinions of Dr. Mays, Dr. Kelly and Dr. Westbrook than on that of Dr. Rhodes. Accordingly, I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable RSD injury.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner