

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F903005

RENE CIENFUEGOS-MENDOZA, EMPLOYEE

CLAIMANT

DOBBS COATING SYSTEM, UNINSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 27, 2010

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

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

Respondent represented by HONORABLE NEAL HART, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed and dismissed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence he sustained a compensable low back injury and awarding both medical and temporary total disability benefits. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was working for the respondent

employer loading saw horses onto a trailer. The claimant evidently fell off the trailer onto his back and buttocks onto the ground. The claimant stated that he fell four to five feet, felt pavement and stayed there unconscious for an unknown period of time.

The claimant's supervisor, Mr. David Renfro, was there on the scene and saw the accident happen. He testified that the claimant and other employees were loading metal saw horses onto a low-boy trailer when the incident happened. Mr. Renfro testified that the bed of the low boy was 2 ½ feet off the ground. He stated that the claimant's feet went out from under him and he came down on his bottom on a dirt road covered in sand. As soon as the claimant hit the ground, he laid there for a second. Mr. Renfro was there and he went to get a tissue because he developed a nose bleed. While Mr. Renfro was running back to the claimant seconds later, the claimant was trying to sit up. The claimant then blacked out and scratched his face on the ground. Mr. Renfro testified that the claimant blacked out for approximately 30 to 45 seconds and the other men rolled the claimant over. The claimant then sat up and got up. Mr. Renfro instructed the claimant not to do anything. Mr. Renfro testified that

at no time was the claimant unconscious for 8 to 12 minutes and at no time did either he or his men refuse to take care of the claimant. Mr. Renfro testified that the claimant did not appear to be in any pain but conceded that his "butt may have been sore".

On January 21, 2009, it was reported that the claimant had ecchymosis in the lumbar spine and pain with motion of the left shoulder. His X-rays demonstrated no acute changes in the lumbar spine. He was treated conservatively by a physician assistant, Carolyn Nutter.

In an evaluation dated February 2, 2009, the claimant was diagnosed with a right lumbar strain. On February 16, 2009, the claimant reported that his condition was worsening. He had tingling in both lower extremities and pain in the thoracic spine. The assessment was that he had a right lumbar strain with paresthesias and sciatica.

On March 2, 2009, the claimant reported paresthesias in his left leg. The report previously was that it was present bilaterally. A note dated March 16, 2009, by physician assistant, Daniel Briley, indicated that the claimant fell off a trailer that was 2 to 3 feet tall. He had slight swelling in the left lumbar area at approximately

L4-S1. A form AR-3 dated March 16, 2009, indicated that the claimant suffered no permanent impairment due to work related injury. This was signed by Rebecca Lewis, D.O.

A CT scan of the claimant's lumbar spine was performed on March 17, 2009. It demonstrated no canal stenosis in the lower thoracic/upper lumbar spine, and degenerative changes were noted at L3-L4. There was a rightward disk protrusion noted at L4-L5 with degenerative changes noted as well at that level. Degenerative changes were noted at L5-S1 with biforaminal stenosis noted greater on the right side.

At this time, the claimant contends that he sustained a compensable injury to his head, thoracic spine and lumbar spine on January 20, 2009. The respondents contend that the claimant did not sustain a compensable injury and that any problems the claimant may have are due to his pre-existing problems. After conducting a de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we find that the decision of the Administrative Law Judge must be reversed.

Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2005) defines "compensable injury" as "[a]n accidental injury

causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). 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. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be

established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary 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). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally, medial opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16) (i) (B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). 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 Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the employment. Carman v. Haworth, 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). Further, the claimant must show a causal relationship exists between his condition and his employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

It is well established that 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) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or 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; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The evidence demonstrates that the claimant had a prior injury to his back. On December 11, 2005, while working as an employee at the Tyson Foods cafeteria in Springdale, Arkansas. At that time, his medical records report that on December 14, 2005, less than three days after the injury, he had good rotation to the right and left. He had flexion to about 6 inches from the floor but all motions were described in "as jerky and dramatic." There was no increase in pain with dorsiflexion of the foot on leg extension. The claimant was treated conservatively at that

time; however, he did not admit to any significant improvement in his symptoms. His examining physician reported that the patient was a "little dramatic" in his presentation during the examination.

According to medical records, on December 21, 2005, the claimant reported that he was terminated from his job and still had severe pain but wanted to continue working. He described his pain as feeling like the "bones are opening up." X-rays done on that date indicate joint space narrowing at L5-S1 and with the impression being that the claimant had degenerative disk disease at this level.

On January 11, 2006, the claimant reported that both legs "tingle at times." Although the claimant is reported to jerk and jump any time the physician touched his back, he was able to get on and off the examining table without any assistance. The claimant also demonstrated that he could stand up straight and do extensions until he gets to the endpoint. With forward flexion, the claimant could go to his shin, his straight leg raising was negative to 90 degrees and sensory function was intact.

An MRI was performed January 17, 2006, and demonstrated degenerative changes at the L5-S1 disk space

with a midline disk protrusion and possibly a lateral disk protrusion that could be impinging on the L5 nerve root. The claimant had spinal stenosis at L2-L3 as a result of broad-based disk protrusion, but there was no narrowing of the neuroforamina. A steroid injection, physical therapy and medication were not successful in alleviating the claimant's pain. A physical therapy note dated December 22, 2005, indicated that the claimant jumped with pain, even with superficial palpation. The therapist added that his reaction was such that it could by itself cause back pain.

The claimant saw a neurosurgeon on January 31, 2006, who again reported "exquisite tenderness to skin rolling in the lumbar region." There was no motor or sensory deficit noted on examination, although the claimant had reported generalized weakness and significant pain. Dr. Danks felt he had "a functional examination," and he noted "incongruencies." The claimant underwent a functional capacity evaluation which revealed submaximal effort. The functional capacity test indicated that the claimant was ambulating with bilateral canes. He was unable to lift an 8-pound box from any level and was unable to walk at a slow pace on treadmill. Dr. Danks again reported on March 10,

2006, that the claimant's examination was "functional." Due to Dr. Danks's reservations about the validity of the claimant's reports on examination and the functional capacity test result, he felt that the claimant was not a surgical candidate and reported on March 14, 2006, that the claimant had reached maximal medical improvement.

The claimant's deposition was taken on June 24, 2009. The claimant testified regarding his problems that existed in June of 2009 were practically the same since the 2009 accident. He stated he was able to stand upright and he felt like his spinal column was giving way. He had bilateral leg pain and numbness that radiated into his feet. He was also walking with two canes. The claimant testified that he felt like the bones in his back were "opening up". It is of significant note that when the claimant sustained an injury in 2005, he was unable to stand upright, he had bilateral leg pain and numbness, and he was walking with two canes as well. And he further told the doctors during the treatment for the 2005 injury that he felt like the bones in his back were "opening up". In fact, the claimant told Dr. Cooper twice that he had a triangular shaped area in his low back where he felt like the bones were "opening up".

The respondents had Dr. Bruce Safman review the claimant's medical records. Dr. Safman issued a report which found that the claimant's back problems were all degenerative and/or chronic in nature and that back surgery would not be helpful and that the claimant had no objective pathology demonstrating an acute work injury except bruising and swelling that were mentioned in earlier medical notes. Dr. Safman opined that the claimant's complaints were primarily subjective in nature and that any objective findings were all degenerative and chronic. He noted that the claimant had reached maximum medical improvement. Dr. Safman specifically stated:

I do believe he has reached maximal medical improvement from his injury of January 2009. There are no objective findings on examination. His MRI demonstrates fairly significant degenerative changes, which takes a prolonged period of time to evolve, and this would be chronic in nature.

Regarding the patient's complaints, these are completely subjective in nature. To what degree they are related to his injury is difficult to discern in view of his of unusual responses on examination, lack of validity

of functional capacity test, and disparities, such as the denial of paresthesias in the lower extremities after the first injury, which has been documented in his medical record after the 2005 injury, but denied in his deposition. I do not feel, in the absences of objective pathology, that any additional therapy would likely be beneficial. This patient's complaints are purely subjective in nature. He has had a reasonable course of treatment and enough time has evolved for a strain/sprain to have naturally demonstrated some improvement. His ambulation with bilateral canes is highly unusual. I have been in practice for almost 38 years and have treated patients with back pain throughout this period of time. I have never seen anyone with a lumbar strain who fell two to three feet require bilateral canes for ambulation; thus, I would state that his complaints are purely subjective. There is no objective documentation of any acute injury. I believe he is at maximum medical improvement and would not place any physical limitations on him in the absence of objective pathology to support his complaints of severe pain that is unchanged without any evidence of acute pathology on his MRI that was performed.

In our opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury supported by objective findings. The medical records indicate that the claimant suffered a low back injury while working in 2005, and he complained of severe pain just like he is now. He had numbness in both legs; he complained of pain down both legs; he walked slouched over; his complaints were both unusual and inconsistent; and nothing the doctors prescribed worked. This is precisely the exact same scenario that the claimant has with his present claim. In 2005, as the claim progressed, the claimant started walking with bilateral canes for no reason whatsoever. Moreover, not even one cane was ever prescribed. We cannot find that the claimant proved by a preponderance of the evidence that his problems are anything more than degenerative and chronic in nature. We give the opinion of Dr. Safman more weight. Dr. Safman has been practicing for a very long time and he compared all the medical records from 2005 to the records from 2009, and he noted that there was no objective documentation of any acute injury. 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.

Therefore, when we consider the fact that the claimant's symptoms from 2005 and 2009 are exactly the same; the fact that the claimant is once again still walking using bilateral canes, the fact he is still complaining about his back opening up, the fact that the MRIs show no objective

findings of an acute injury, plus the opinion of Dr. Safman, we cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

Therefore we find that the decision of the Administrative Law Judge must be reversed and this claim for benefits 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, as did the Administrative Law Judge, that the claimant sustained a compensable lumbar injury when he fell at work on January 20, 2009.

For the claimant to establish a compensable injury

as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

There is no doubt, from the medical evidence presented, that the claimant had significant pre-existing defects involving his lumbar spine. However, this fact does not prevent a subsequent employment-related injury to this portion of the claimant's body. In fact, this pre-existing damage could make the claimant more susceptible to subsequent injury to this damaged and weakened portion of

his anatomy.

The actual mechanics of the January 20, 2009 employment-related fall would unquestionably produce stress and trauma on the claimant's lumbar spine, regardless of whether he initially landed on the "lower part of his back" or his "butt". In fact, landing on his butt would be the more stressful on his lumbar discs.

The claimant's testimony that he had not experienced any difficulties with his lower back for a substantial period of time prior to the January 20, 2009 fall, but experienced substantial difficulties within a short period of time following this fall, is clearly supported by the other evidence presented. The record reveals that the claimant had been employed for a period of time at George's and Cargill's, prior to his employment with this respondent. Both of these positions required the claimant to be on his feet for extended periods, and perform some strenuous lifting activities. The claimant had also been employed by the respondent for almost a year prior to his fall, and had been performing employment activities that required prolonged standing or walking, bending and twisting, climbing, and frequent heavy lifting. Yet, there

is no indication that the claimant experienced any difficulties performing these activities, made any complaints with his low back, or sought any medical treatment for low back difficulties. The record reveals that the claimant timely reported the onset of difficulties with his low back to the respondent, and requested medical treatment. The claimant's testimony concerning the onset of this new episode of difficulties with his lower back is supported by objective evidence of a recent or acute injury to this portion of his body, specifically, the ecchymosis or bruising observed by Ms. Nutter on January 21, 2009.

In conclusion, based on the claimant's credible testimony, supported by the medical record, I find, as did the Administrative Law Judge, that the claimant sustained a compensable lumbar injury when he fell at work on January 20, 2009.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner