

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F809361

RICKY COOLEY, EMPLOYEE	CLAIMANT
AMTECK, LLC, EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 3, 2010

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

Claimant represented by the HONORABLE WILLIAM CHRISTOPHER PAUL, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, 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 June 28, 2010. 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 September 10, 2008, the relationship of employee-employer-carrier existed among the parties when the claimant sustained a compensable injury to his low back, during which time the claimant

earned wages sufficient to entitle him to workers' compensation benefits at the weekly rate of \$375.00/\$281.00, for temporary total/permanent partial disability.

3. The claimant obtained a change of physician through the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission designating Dr. Gregory Ricca, a Jonesboro neurosurgeon, as his treating physician in connection with the September 10, 2008, compensable injury.
4. In addition to prior period of temporary total disability, the claimant has remained temporarily totally disabled as a result of the September 10, 2008, compensable injury, for the period beginning March 26, 2009, and continuing through the end of his healing period, a date to be determined.
5. The evidence preponderates that the medical treatment recommended by Dr. Gregory Ricca is reasonably necessary in connection with the treatment of the claimant's September 10, 2008, compensable injury.
6. The respondents shall pay all reasonable hospital and medical expenses arising out of the claimant's compensable injury of September 10, 2008.
7. The respondents have controverted the claimant's entitlement to temporary total disability benefits subsequent to March 26, 2009, and entitlement to reasonable necessary medical treatment subsequent to March 26, 2009, to include the medical treatment as recommended by Dr. Gregory Ricca, a Jonesboro neurosurgeon.

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 June 28, 2010, 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.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional medical treatment and additional temporary total disability benefits. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was working as a electrician helper on September 10, 2008, when he sustained an admittedly compensable injury to his back. The

respondents provided medical treatment and the claimant ultimately came under the care of Dr. Kevin Rutz in St. Louis. Dr. Rutz did injections on the claimant's back, but those injections failed and the claimant ultimately underwent surgery on January 14, 2009. Dr. Rutz opined that the claimant had fairly impressive degenerative changes and a degree of scoliosis with rotation of one bone on another in an abnormal way including arthritic changes in the joints in the back of the spine and degeneration of the disc. The claimant also had rotary subluxation of L3 on 4 and L4 on 5. The claimant also had severe disc degeneration on the right side disc at L4-5.

Dr. Rutz, while performing the claimant's surgery on January 14, 2009, identified the herniated fragment and removed it. In a follow-up visit on February 3, 2009, the claimant noted significant improvement in his back and leg and that he was taking four pain pills a day. Dr. Rutz gave the claimant a 20-pound lifting restriction and encouraged him to return to work.

The claimant was next seen by Dr. Rutz on March 3, 2009. He had no leg pain and was noted to be doing well. The claimant stated that he had been off his pain pills until ten days prior to the visit when he

indicated he was lifting a bag of aluminum cans and his back began to hurt. He stated that he had a burning back pain in his pain when he stood up that was more persistent. Dr. Rutz recommended another MRI. The radiologist nor Dr. Rutz read the MRI as indicating a recurrent disc herniation. Dr. Rutz noted that he did see something small on the MRI, but there was no corresponding symptoms. The claimant did not have any clinical evidence of a recurrent disc herniation.

The claimant was again seen by Dr. Rutz on March 26, 2009. The claimant was placed in physical therapy and Dr. Rutz felt there were no other treatment options because he was dealing with the intrinsic degenerative changes. He released the claimant to return to work with no restrictions and provided a 5% permanent anatomical impairment rating. Dr. Rutz indicated that the claimant could have undergone a functional capacity evaluation but the claimant refused.

The claimant received a change of physician from the Commission and went to see Dr. Gregory Ricca in Jonesboro. Dr. Ricca recommended that the claimant have a PLIF surgery or a fusion to address the entire L4-5 level.

Employers must promptly provide medical services which are reasonably necessary for treatment of

compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

In my opinion, a review of the evidence demonstrates that the claimant is not entitled to additional medical treatment. Dr. Rutz, who is the claimant's treating physician, opined that the claimant's current problems are not related to his original compensable injury but are, indeed, related to the claimant's pre-existing degenerative problems. When Dr. Rutz was questioned about whether or not the claimant had a recurrent disc herniation, Dr. Rutz

stated that the claimant did not have corresponding symptoms of it. Dr. Rutz stated:

Q Okay. Now, let me ask you this, Doctor, with Mr. Cooley -- based on what you know in your visits, would he have had even this possible small recurrent disc herniation had he not had the bag-lifting -- or the can-lifting event?

A He could have.

Q Okay.

A Recurring disc herniations, I've seen it happen when people are, quote, getting out of bed of when people are doing different activities. It's hard to predict. Overall, I don't -- how can I put it? His problem is not a recurrent disc herniation.

Q Okay. And that's based on what, Doctor?

A He didn't have symptoms of it.

Q Okay.

A So if I thought he did, I would have treated it.

Q By treating it, you would have recommended additional surgery or additional injections or something of that nature?

A That's correct.

Q Because that's what you do; is that a fair statement?

A That's fair.

- Q Would it have been to your benefit to have continued to treat him, Doctor, from a financial standpoint?
- A Yes.
- Q Now, it ended up, the MRI -- and I believe you've noted this briefly, Dr. WU doesn't note any problem at the L4-5 level in his impression, does he?
- A He does not note any recurrent disc at L4-5, just some scar which would be expected after surgery.
- Q So with your knowledge of him and of this particular imaging radiology group, would you feel comfortable with his -- either determination or review of the film in generating this report?
- A Yes.
- Q Now, in fact, there is a mention of a broad base disc protrusion at L3-4 and L5-S1. Now, would those be related to the degeneration in those particular areas?
- A Yes.
- Q That wouldn't have anything to do with the herniation that you treated?
- A That is correct.
- Q Okay. And really, is it fair to say, Doctor, that your consideration of a recurrent disc herniation is essentially, I guess, a suspicion at the time that you see it as opposed to an actual finding?

A It's an aggressive MRI reading that -- meaning, that I see something very small around there. It doesn't correlate with his clinical symptoms. It doesn't count unless people actually have symptoms from it.

For example, we just read that MRI report that talked about some left-sided findings as pre-emptive MRI, it demonstrates some left-sided protrusions, but he did not have left leg pain. So just because you see something on the MRI -- MRI is an accumulation of all sorts of wear and tear changes over your lifetime.

And unless one actually has clinical symptoms from it, it doesn't count -- It's an MRI finding, it's not a diagnosis. It's something you can -- you can't fix -- make something better that is not symptomatic.

Q Based on the MRI, you -- I guess, suspected the possibility of a recurrent disc herniation at L4-5, but you couldn't correlate that with any of his examination findings?

A Based on the MRI, he had a very small recurrent disc herniation and he was not symptomatic from it.

.....

Q If he had needed additional treatment, would you have hesitated at all in recommending additional surgery

or injections or any other treatment at that point?

A As far as his Workers' Compensation injury?

Q Yes, sir.

A There was no indicative treatment. As far as treatment for his rotatory subluxation and disc degenerations and arthritis, there are things that can be done for that if someone's pain becomes severe. But that would have to be under his private insurance.

Q Because that was related to an unrelated degenerative condition?

A That is right.

Q Okay. Doctor, without this can-lifting event that was reported to you by Mr. Cooley, do you believe his symptoms would have increased or changed at all -- based on his reports up to that point?

A It's hard to predict. I mean he had such significant degenerative changes that he was at, you know, higher risk of having problems with his back that someone that had, basically, a healthy back. So I think he is at risk of having problems with his back because of his degenerative changes. He -- I can't predict if he had or hadn't lifted those cans if he would have had that same problem.

It is evident from Dr. Rutz's deposition that the can lifting incident had a significant impact on the claimant. However, it was an independent intervening cause and flared up the claimant's pre-existing degenerative disc problems. Simply put, the claimant's complaints were caused by an unrelated degenerative condition. The claimant has a very worn out back.

Further the credibility of the claimant is suspect at best. The claimant testified that he does not remember telling Dr. Rutz that he had "significant improvement". He also does not remember telling Dr. Rutz about the can lifting incident. I find it hard to believe that Dr. Rutz would make this stuff up as the claimant has inferred. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964).

The constitutionality of the Commission's authority and duty to conduct a de novo review of the

record, including issues of credibility, has been established by the court. See, Stiger v. State Line Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000).

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. Stiger, supra; see also, White, supra.

Ark. Code Ann. §11-9-704(b) (6) (A), vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." By allowing the Commission this latitude, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Stiger, supra. The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c) (2). However, neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. Moreover, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into

findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995).

When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Stiger, supra. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. More specifically, in Stiger, supra, the Court of Appeals stated:

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right to due process.

Uncorroborated testimony of an interested party is always considered to be controverted. However, the rule also applies to a non-party witness whose

testimony might be biased. Burnett v. Philadelphia Life Insurance Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. Id. Furthermore, a witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of bias so as to treat the witness's testimony as disputed. See, Sykes v. Carmack, 211 Ark. 828, 202 S.W.2d 761 (1947). Moreover, the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989).

Finally, there is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger, supra. The findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). Accordingly, I find the claimant's testimony regarding his recovery and his reporting to Dr. Rutz as not credible.

The deposition of Dr. Ricca was also introduced. Dr. Ricca saw the claimant on two separate occasions in September of 2009. Dr. Ricca acknowledged that he had not reviewed any of the claimant's prior treatment records and that he relied solely upon the claimant's information and subjective complaints provided at the time of his visit with the claimant. Dr. Ricca indicated that the claimant may have a recurrent disc herniation due to a fragment or piece of disc which was not removed at the time of the earlier surgery. However, Dr. Ricca was not privy to the deposition of Dr. Rutz, nor had he reviewed the medical records. Dr. Ricca testified that it was not clear to him and that he could not definitely state within a reasonable degree of medical certainty whether the lifting incident was the subsequent, intervening cause resulting in the recurring disc herniation he suspected. In his deposition, Dr. Ricca was questioned and the following testimony is enlightening:

Q If Dr. Rutz's surgery, at the time of his surgery on January 14, 2009, corrected the original herniation and he was able to retrieve any and all fragments at the L4-5 level, and the -- Mr. Cooley's pain complaints and condition improved, then there was an event and subsequently he then begins having the leg pain.

Does that point to that subsequent event as the cause for recurrent herniation?

A Yes, sir.

Q And is the fact that he did not complain of leg pain following his surgery and an improvement of his condition significant in reaching that conclusion, Doctor?

A I'm sorry, please restate the question.

Q Sure. And I apologize. Is the fact that he, Mr. Cooley, noted improvement and was not complaining of any leg pain and then subsequently developed leg pain, assist in reaching the conclusion that you provided us a minute ago regarding the subsequent event?

A Yes, sir.

Q Doctor, has -- have your responses to my questions been based upon a reasonable degree of medical certainty and probability?

A Yes, sir.

Simply put, when I consider the fact that the claimant was improving significantly after his surgery in January of 2009 as is noted in Dr. Rutz's medical records, the fact that the claimant told Dr. Rutz that he had significant pain after lifting cans, the fact that Dr. Rutz was unable to find anything significant

that correlates with the claimant's symptoms with the MRI, the fact that Dr. Ricca was unable to stay within a reasonable degree of medical certainty that the claimant's problems were related to his original injury, and the fact that Dr. Ricca had not reviewed the claimant's prior medical records, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment. Accordingly, I would reverse the decision of the Administrative Law Judge. Because I find that the claimant is not entitled to additional medical treatment, I find that the claimant is not entitled to any additional temporary total disability benefits. The evidence demonstrates that Dr. Rutz released the claimant to full duty with a 5% permanent anatomical impairment rating on March 26, 2009.

Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner