

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F904994

JAMES KELLEY, EMPLOYEE	CLAIMANT
COURTYARD MARRIOTT, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 8, 2011

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

Claimant represented by the HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JAMES ARNOLD II, Attorney at Law, Fort Smith, 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 that he sustained a compensable left knee injury in the form of an aggravation of a pre-existing condition and specifically finding that the recommendation for a total knee replacement was reasonable and necessary medical treatment. Based upon our de novo review, 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 employed by the respondent employer as a maintenance man. On April 12, 2009, the claimant stated that he had gone outside to get a gas can that someone had left in the parking lot. He was walking up the steps to go inside and hurt his knee. The claimant went to the emergency room following this incident. The X-rays showed that there was no joint effusion and that the impression indicated that there "may be some mild anterior soft tissue swelling".

The evidence demonstrates that the claimant had problems with his knee for many years. The claimant had a patellar fracture in 1984 as the result of a motorcycle accident. The claimant underwent two surgeries at that time. The medical records also indicated that in March of 2007, the claimant sought medical treatment from Dr. Bolyard for left knee difficulties. The records from that date indicated that the claimant had not had any recent trauma and that a two plus joint effusion of the knee was observed.

Dr. Theodore Hronas, a board certified radiologist, reviewed the claimant's films from March 8, 2007; April 12, 2009; May 8, 2009; as well as an MRI dated March 16, 2007 and concluded that there was no change

present in any of those radiographs. Dr. Hronas opined that each study demonstrated degenerative change of the patellofemoral compartment, a small joint effusion, and mild narrowing of the medial tibeofemoral compartment. He stated that the small joint effusion remained unchanged throughout each of the radiographs.

The claimant's treating physician, Dr. Rhomberg, has indicated that he wants the claimant to undergo a knee replacement and has opined that the claimant's current problems are the result of the incident on April 12, 2009. Dr. Rhomberg testified, via deposition, that the claimant had a degenerative condition and that there was nothing in his initial examination of the claimant to suggest that there had been a new exacerbation of the underlying condition. What Dr. Rhomberg found most pertinent was the fact that the claimant had a history of a patellar fracture, which predated the April 12, 2009 incident. Dr. Rhomberg testified that a conclusion that the claimant had a stable joint effusion caused by chronic degenerative condition which required the claimant to seek emergency treatment because of the pain was just as reasonable as the conclusion that such joint effusion pain and the need to seek emergency

treatment were caused by the claimant's April 12, 2009 incident. He indicated that the claimant's X-rays which showed small joint effusions on both April 12, 2009 and May 8, 2009, could have been due to the claimant's degenerative condition without the need for a precipitating traumatic event. 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.

In order to establish a compensable injury by medical evidence, the injury must be supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). Furthermore, the requirement 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). There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

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).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App.

533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Technologies, 343 Ark. 297, 35 S.W.3d 800 (2001).

Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. §11-9-102(16)(B), which requires that medical opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances, 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 Ann. §11-9-102(16)(B). The Arkansas Supreme Court held 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 the theoretical possibility of a causal connection did not meet the standard of proof. 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. Simply put, Dr. Rhomberg's opinion is not stated within a reasonable degree of medical certainty.

The claimant's attorney elicited deposition testimony from Dr. Rhomberg to the effect that the joint effusion fluid seen on April 12, 2009 could not be the same as that which was present in 2007 because Dr. Bolyard aspirated 25 cc's of the claimant's left knee in 2007. The Administrative Law Judge opined that the effusion or fluid shown in the joint of the claimant's left knee in 2007, was not the same fluid that was present on the X-rays in 2009. We note that because cells within the human body are not static in nature, it may be technically correct to state that the joint effusion or fluid in the claimant's left knee in 2007 was not the same as that which was present on the X-rays in 2009. However, the objective radiographic studies show absolutely no difference in the size of the small joint effusion. The joint effusion was recurrent in nature. While the exact cells comprising the joint effusion in 2007 may not have been the same as those comprising the joint effusion in 2009, there was no objective change in the

radiographic manifestations of the joint effusion between these two dates. Further, there are no radiographic manifestations to suggest any acute injury or interval change since the studies of 2007.

Additionally, in the absence of aspiration, the claimant's joint effusion remained the same size for nearly a month following his incident of April 12, 2009. Dr. Rhomberg testified that it was likely the claimant's condition was stable and chronic, and that this likelihood was supported by the fact that the size of the joint effusion did not decrease between April 12, 2009 and May 2009. Had the joint effusion been caused by a significant traumatic event on April 12, 2009, Dr. Rhomberg would have expected it to decrease in size by May 8, 2009, which did not occur. All the medical evidence and objective testing points to the conclusion that this small joint effusion and the underlying degenerative condition causing it have remained unchanged since March of 2007. A finding that the joint effusion was somehow "not the same" as it was in 2007 is nothing more than speculation and conjecture at the cellular level and is unsupported by any medical evidence. Conjecture and 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

It is clear that the medical records from March 2, 2007 indicated the complete absence of recent trauma. The only evidence that claimant's current joint effusion was caused by a work-related incident on April 12, 2009, is claimant's own self-serving testimony.

Our review of the evidence demonstrates that the medical services received by the claimant for his left knee injury as well as the recommended total knee replacement were not necessitated by the claimant's incident on April 12, 2009. The evidence indicates that the claimant suffers from chronic, unstable, degenerative condition to his left knee, which he was having problems with at least two years prior to this incident of April 9, 2009. The evidence demonstrates that the claimant's current knee problems are merely a continuation of his pre-existing degenerative left knee problems which are long standing and well documented, and objectively, indistinguishable from the injury for which

the claimant is seeking benefits. Therefore, based upon our review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. The claimant has objective findings of a knee injury. The majority's argument that the joint effusion present after the April 12, 2009 incident did not come from the April 12, 2009 incident and is merely "speculation and conjecture at the cellular level" simply makes no sense. The medical records and the testimony in this case indicate that the claimant sought no treatment for his knee between March of 2007 and April 12, 2009. His acting Chief, David Childress, testified that he regularly worked with the

claimant and never heard him complain about his knee prior to the April 12, 2009 incident. The claimant presented to the emergency room, on the same day the accident occurred, with such severe symptoms that he was placed in a knee immobilizer.

Since the onset of the claimant's symptoms has such a close temporal relationship to the occurrence of the job-related incident, it is only reasonable to conclude that the job-related incident caused the onset of the symptoms. There is simply no other reasonable explanation for why the claimant would have become symptomatic after having no knee complaints for more than two years prior to April 12, 2009, and having sought no medical treatment during that period of time, despite having performed physically-demanding work that required significant repetitive use of his knee.

Dr. Rhomberg testified that he does not recommend total knee replacements unless the claimant is experiencing severe symptoms. He further testified that the recent onset of symptoms would be the straw that broke the camel's back. He testified that the symptoms are what precipitated the claimant going to the emergency room and ultimately being referred to him.

In Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004), the Arkansas Court of Appeals addressed a claim for temporary total disability and medical expenses involving preexisting conditions. In Williams, the claimant suffered a compensable injury superimposed upon significant pre-existing degenerative conditions. While the respondent initially accepted the responsibility for medical treatment, additional treatment was denied based on the allegation that the additional medical treatment requested was for pre-existing conditions as opposed to the compensable injury. In Williams, the doctors agreed that the degenerative changes were not the "major reason" for the need for additional treatment and disability and that "most of the cause" preexisted the injury. However, the medical opinions established that the compensable injury was "a factor" in the claimant's need for surgery. The Court of Appeals reversed the Commission's decision and remanded the case for an award of benefits, stating:

Both doctors can be fairly said to have testified that appellant's fall at work was not the major cause, but that it was, at least, a factor in

her resulting inability to work and need for knee-replacement surgery...the Commission had found that appellant had failed to prove a causal connection between her compensable injury and her need for total-knee-replacement surgery. Moreover, the Commission concluded that '[t]here is no evidence that the degenerative disease was worsened by the work-related injury.' Even reviewing the evidence in the light most favorable to the Commission's findings, we conclude that they are not supported by substantial evidence. Appellees had to take appellant as they found her, and the compensable injury that she suffered was a factor in her need for the additional surgery. (emphasis added.)

Therefore, in claims for medical benefits, a causal connection is established when the compensable injury is found to be "a factor" in the resulting need for medical treatment, even though the compensable injury is not the major cause of the disability or need for treatment.

Williams v. L&W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004).

Here, the claimant has objective findings of a compensable injury occurring on April 12, 2009. While he had

pre-existing knee problems, the compensable injury is at the very least, a factor in his need for knee replacement surgery. As such, the knee replacement surgery is a liability of the respondents.

For the aforementioned reasons I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner