

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G002318

RUBEN MORALES,
EMPLOYEE

CLAIMANT

PINNACLE PRECAST COMPANY,
EMPLOYER

RESPONDENT

CINCINNATI INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 24, 2011

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

Claimant represented by the HONORABLE STEVEN R. MCNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C.
FRYE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed December 20, 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 over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his back.

4. Because of the above finding, the remaining issues will not be addressed.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that he sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the December 20, 2010 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I find that the claimant sustained a compensable injury to his back on or about November 12, 2009.

The claimant testified that he hurt his back around November 12, 2009, when he lifted a big, heavy rock to put on a pallet. He felt that "everything stretched" in his back. He reported the injury to his boss, Herman. The medical records showed that the claimant was seen on November 16, 2009 with back pain and radiating pain. He related that he developed low back pain after picking up heavy rocks the week before. His pain went into his left leg sometimes, especially when climbing ladders. He had pain when seated. The claimant had mild tenderness in his lumbar muscles. He was prescribed Flexeril and Mobic and given a steroid

injection. He was taken off work. A month later, he was seen with continued pain. His prescriptions were refilled. The claimant was seen with same complaints on February 20, 2010, at which time L4 and L3 spondylolisthesis was seen on x-ray. Physical therapy and Flexeril were prescribed. The reason for physical therapy was "back spasm and spondylolisthesis." X-rays also showed early hypertrophic change of the facet joints at L5-S1.

The majority, in affirming the Administrative Law Judge, found that the claimant did not have objective findings of injury and, therefore, did not have a compensable injury. I disagree.

Arkansas Code Annotated Sec. 11-9-102(4)(D) and (16)(A)(i) state that a compensable injury "must be established by medical evidence supported by objective findings" which are findings "which cannot come under the voluntary control of the patient." The act does not require "objective proof of injury" as required by the majority opinion. The net effect of the majority's opinion is to impose too high a burden upon the claimant: to require the claimant to prove causation via objective findings. This is not the law.

The current claim is similar to the claim in Keene v. Arkansas Dept. of Health, 2008 AWCC 88 (AWCC No. F502422) (Full Commission Opinion filed July 30, 2008) in which the Court of Appeals had reversed the Commission and remanded with instruction to consider objective findings and causation separately. The Commission found that an MRI showing spinal stenosis satisfied Ark. Code Ann. § 11-9-102 (16) (A) (i). The Commission went on to rely upon Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999) and Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002) to state that while "objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the work-related accident." The majority has repeated its mistake in Keene here, by muddling the issues of objective findings and causation.

The claimant has indeed proven an injury, established by medical evidence supported by objective findings. There is both subjective and objective medical evidence of injury. The claimant had pain and tenderness consistent with the mechanism of injury he reported. He was given a prescription for Flexeril at

every visit since he was first seen on November 16. X-rays showed spondylolisthesis at L3 and L4 and hypertrophic changes at the facets at L5-S1. Dr. Humbard stated that he was prescribing physical therapy due to muscle spasms and spondylolisthesis. Spondylolisthesis, essentially a slippage of the vertebrae, and hypertrophic changes (enlargement) are outside the control of the claimant. Therefore, both fit the definition of objective findings. See Estridge v. Waste Management, 343 Ark. 276, 282, 33 S.W.3d 167 (2000) ("The finding of a straightened lumbar-spine is an objective medical finding."); Cooper Standard Automotive, Inc. v. Kelley, 2009 Ark. App. 552 (objective medical evidence of minimal degenerative cervical changes shown by discogram); Keene v. Arkansas Dept. of Health, supra, (spinal stenosis satisfied objective evidence requirement). Both support the other medical evidence establishing an injury, including the claimant's history and the doctor's subjective observations.

Furthermore, Dr. Humbard identified muscle spasms as a reason for prescribing physical therapy. The medical records do not otherwise mention that spasms were observed; however, to conclude that spasms were not

observed is to reach a speculative and absurd conclusion. The claimant was prescribed Flexeril, a muscle relaxer used to address spasms, as well as a pain reliever medication. Arkansas case law requires more than just a prescription of a muscle relaxer for a finding that spasms were observed. Here, the record shows that Dr. Humbard identified muscle spasm as one of two reasons for prescribing physical therapy. To conclude that Dr. Humbard did not observe muscle spasms is to conclude that he was lying. The conclusion also necessitates requiring more of the claimant than the Act and the Courts require to uphold findings of muscle spasm in the case of a prescription of Flexeril.

Under Arkansas law, for purposes of the Workers' Compensation Act, muscle spasm is an "objective finding." Smith v. County Market/Southeast Foods, 73 Ark. App. 333, 338, 44 S.W.3d 737 (2001), citing Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999), and UAMS v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997). The Arkansas Supreme Court discussed this issue in Estridge v. Waste Management, 343 Ark. 276, 281, 33 S.W.3d 167 (2000), and stated that a prescription to be taken as needed for muscle spasm was sufficient to satisfy the requirement of objective

findings. The Court stated that the respondents' argument that the prescription was a direction and not a medical finding was "absurd", and went on to state that a "doctor would not prescribe medication directed to be taken 'as needed for muscle spasm' if he did not believe muscle spasms were existent." See, also, Parker v. Atlantic Research Corp., 87 Ark. App. 145, 153, 189 S.W.3d 449 (2004) (documentation of muscle spasm for which Valium was prescribed satisfied the requirement of objective findings).

In Fred's, Inc. v. Jefferson, 361 Ark. 258, 264-265, 206 S.W.3d 238 (2005), the Arkansas Supreme Court applied the logic of the Estridge, supra, case, to find that the objective findings requirement was satisfied where the claimant was prescribed a muscle relaxer and physical therapy, but did not state what the medication was for or why he prescribed therapy. The Court stated that "a reasonable inference from the chronology of events is that the medication and physical therapy were prescribed to aid Jefferson and to treat her injury. Any other construction of these events does not withstand scrutiny or pass the test of reasonableness."

The Arkansas Court of Appeals distinguished Fred's, supra, to find that the objective findings requirement was not met, where there was no evidence of why the general muscle relaxer, Robaxin, was prescribed, and no notation of muscle spasm in the emergency room records, but where there was a doctor's testimony that when Robaxin is prescribed in the absence of muscle spasms, it is a prophylactic measure. Rodriguez v. M. McDaniel Co., Inc., 98 Ark. App. 138, 144, 252 S.W.3d 146 (2007).

Here, the claimant has presented evidence of more than three months of prescriptions of Flexeril since the November 2009 incident, coupled with a February 2010 prescription of physical therapy due to the presence of spasms. The only reasonable conclusion is that Dr. Humbard observed muscle spasms, for which he prescribed both the Flexeril and the physical therapy.

The majority opinion defies the above case law. The claimant has presented objective evidence in the form of x-ray evidence of spondylolisthesis and facet hypertrophy, and of muscle spasm. This evidence supports the other medical evidence that the claimant had a back injury.

The second issue, which the majority has confused with objective findings, is causation. The claimant was able to perform his very heavy manual job without back pain until he felt pain on lifting a large rock at work on November 12, 2009. He had immediate pain, which he immediately reported, and he saw a physician within four days. The claimant was prescribed Flexeril - a muscle relaxer, Mobic - a pain reliever, and given a steroid injection. Within three months, after very limited conservative care, physical therapy was prescribed on top of the medications, because of muscle spasms and spondylolisthesis. Importantly, the prescription of Flexeril continued without stop from November 16, 2009 onward, as did the pain medications. There is no other evidence to suggest prior pain or limitation.

Lastly, the suggestion that the Administrative Law Judge cannot address whether the injury caused an asymptomatic degenerative condition to become symptomatic is nonsensical. Firstly, the claimant showed a back injury, without regard to the pre-existing condition of his back, in that, there were spasms. Secondly, the suggestion requires that the claimant prove a diagnosis, not an injury. This is not a

situation where the claimant failed to make a crucial contention. This is a situation where the claimant contended he sustained a compensable injury and where the evidence provides the objective findings. The fact that the claimant had spondylolisthesis and facet hypertrophy, which was asymptomatic before the incident, and symptomatic after the incident, shows that the incident caused an injury to his low back, an injury which satisfies all the requirements of compensability. Of course, this issue can be addressed, as it is the whole point of the claim.

The majority opinion fails to adequately apply the law or analyze the facts. The claimant has proven that he sustained a compensable injury for which he is entitled to benefits.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner