

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G008662

CECIL SELLERS, EMPLOYEE	CLAIMANT
GEORGIA-PACIFIC, LLC, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 16, 2011

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

Claimant represented by the HONORABLE MICHAEL D. RAY, Attorney at Law, Crossett, Arkansas.

Respondents represented by the HONORABLE BETTY J. HARDY, 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 2, 2011. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employee-employer-carrier relationship existed on April 16, 1971, at which time the claimant sustained a compensable respiratory injury at a compensation rate of \$49.00 per week. Medical expenses (including treatment for a heart condition) were paid until July

15, 2009, when the claim was controverted.

2. The respondents remain liable for treatment of the compensable respiratory injury pursuant to Section 11 of the Act including treatment of the trach, bronchitis, pneumonia and sinusitis.
3. The respondents accepted and paid for treatment of the claimant's heart disease, including open-heart surgery, from 1971 to 2009 and are now estopped from denying this claim. This would include medication for high blood pressure, cholesterol, and diabetes and sinusitis.
4. The claimant has not established by a preponderance of the evidence of record that he was exposed to asbestos on the job, or suffers from lung disease. Likewise, over-the-counter medications and treatment for gastritis and low back pain are unrelated to the compensable injury.
5. This claim has been controverted and respondents are directed to pay the maximum attorney's fee on this award pursuant to Section 32 of the Act or 30% on the first thousand dollars, 20% on sums in excess of one thousand dollars and 10% on sums over two thousand dollars. This award shall earn interest at the legal rate pursuant to Section 19(g).
6. If they have not already done so, the respondents are directed to pay the court reporter, Linda Parker's, fees and expenses within thirty days of receipt of the bill.

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 2, 2011, 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 prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of 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 \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the respondents remain liable for treatment of the claimant's heart problems and are estopped from denying this claim. Based upon my de novo review of the record, I find that the respondents are not responsible for the claimant's heart disease. In my opinion, the finding that the respondents are estopped from converting this claim should be reversed.

The claimant sustained an admittedly compensable injury on April 16, 1971, when the claimant was exposed to some toxic fumes that caused damage to the claimant's respiratory system. The claimant was ultimately rendered permanently and totally disabled.

The respondents have paid for the claimant's treatment of his heart condition in the past, but it has become clear throughout the years that the claimant's continued treatment for various heart conditions that developed as he got older were not due to his work-related injury. The respondents notified the claimant on July 15, 2009, that they would not pay for any future medical benefits related to the claimant's heart. The respondents are not seeking reimbursement of past payments. The Administrative Law Judge found that the respondents were estopped from controverting any future medical related to the claimant's heart and, therefore, were responsible for it.

Estoppel is an equitable doctrine which is invoked in appropriate circumstances to prevent a party from prevailing on purely technical grounds after having acted in a manner indicating that the opposing party's strict compliance with the technicality would not be required. Snow v. Alcoa, 15 Ark. App. 205, 691 S.W.2d 194 (1985). There are four elements to prove estoppel:

- (1) the party to be estopped must know the facts;
- (2) he must intend this conduct shall be acted on or must so act that the party asserting the estoppel had a right to believe it is so intended;

- (3) the latter must be ignorant of the true facts; and
- (4) he must rely on the former's conduct to his injury.

The facts in this case unquestionably do not meet the necessary elements for a finding that the respondents are estopped from denying the claimant's entitlement to benefits for medication and treatment for his heart condition after July 15, 2009. The facts in the Snow case are distinguishable. In that case, the respondents were relying upon the statute of limitations defense to deny the claimant's claim for additional benefits. The claimant had not requested the additional benefits until much later because of statements made to him by one of respondents' managers. That certainly is not the case here. The claimant was notified that additional benefits for his heart condition would be controverted after receipt of updated medical information. The respondents were only denying future benefits, not seeking reimbursement for past benefits paid.

First, the respondents did not know the facts regarding the causal connection of the claimant's heart condition and need for future treatment until the report was received from Dr. Fonticiella in February 2009, and later reports from other physicians were obtained.

Second, the provisions of the second element are not applicable in this case because the denial of benefits for the claimants heart condition was for the future, not for treatment and medication the claimant previously received in which were paid by respondents. Likewise, the third element is not applicable as to whether the claimant was ignorant of the true facts, because the respondents are not requesting reimbursement, but are applying the information it received from the claimant's physicians and other physicians to future benefits. Finally, the fourth element does not apply because there is no injury to the claimant for relying upon the respondent's previous acceptance and payment of medical expenses for his heart condition. Again, the notice to the claimant in July 2009 was regarding any future medical treatment and medication he might need for his heart condition. There was no showing of injury to the claimant as the respondents are not denying any of his medical benefits for his heart condition prior to July 15, 2009, and are not seeking a reimbursement for those payments. Additionally, the claimant is receiving all of his other benefits for the work related injury, including weekly permanent total disability benefits.

The Administrative Law Judge erred in finding the respondents are estopped from denying benefits to

the claimant for his heart condition. The four elements do not apply. The evidence demonstrates that new information was obtained from at least three doctors regarding the claimant's heart condition in 2009 and its lack of connection to the 1971 work related injury.

Further, with regard to the doctrine of estoppel, the case of Southern Hospitalities v. Britain, 54 Ark. App. 318, 925 S.W.2d 81 (1996) is instructive. In the Britain case, the Court found that the employer was estopped from denying responsibility for the cost of treatment rendered by a physician, although the claimant's back injury was ultimately deemed to be non-compensable. The respondent had directed the claimant's treatment up until the time in which it was controverted. The Court found that the respondent was responsible for those expenses associated with the treatment they directed. In this case, the respondents are only controverting future medical benefits related to the claimant's heart problems. The respondents paid for all treatment prior to July 15, 2009, and notified the claimant that they were not paying for any future medical related to the claimant's heart. Estoppel would apply if the respondent employer were denying payment for past medical benefits but, in this case, they are not doing that. Therefore, I find that the four

elements of estoppel do not apply to this case, and the respondents are not responsible for the claimant's future medicals related to his heart condition from July 15, 2009, to a date yet to be determined.

With regard to the claimant's heart problems, the evidence does not support a finding that it is causally related to the claimant's compensable injury. The record indicates that the respondents accepted the claimant's heart related condition in November of 1991. Dr. Sexton Lewis wrote in September 1991 that:

Mr. Sellers heart condition is probably not related to his tracheostomy and the pulmonary complications as a result of inhaling toxic fumes.

After the claim was denied, Dr. Lewis wrote in a report in November 1991, relating the heart condition to the work-related injury and even went so far as to say "his total health" is related to the injury. As time went on, the claimant presented with additional heart problems through the years. In a visit with Dr. Fonticiella on August 8, 2008, the claimant was diagnosed with abnormal EKG, atherosclerotic heart disease, coronary heart disease, hyper/dys lipidemia and hypertension. By February 2009, Dr. Fonticiella recommended a diagnostic cardiac catheterization. This was performed on February 13, 2009. It was after this

procedure that Dr. Fonticiella indicated in response to an April 20, 2009, letter that the claimant's congestive heart failure, hyperlipidemia and hyperextension were due to genetic ASHP/CAD, and Iatrogenic factors. He also stated that the work injury was not the major cause of the claimant's recent heart catheterization. On August 26, 2009, after the claimant is notified on July 15, 2009, that the respondents will not be paying for his future treatment and medication related to his heart condition, Dr. Fonticiella wrote a letter changing his opinion finding a causal connection between the claimant's heart condition and work-related respiratory injury. However, he also stated that "it would be difficult for anyone to determine exact correlation."

The respondents obtained the opinions of two other physicians regarding the correlation of the claimant's heart condition with his respiratory injury. The first report is dated December 2, 2010, from Dr. David Randolph. Dr. Randolph did an extensive review of the medical records and addressed a number of questions regarding the claimant's heart condition. He reviewed the literature since the mid-1960s trying to find any link between tracheobronchitis with coronary artery disease or arteriosclerotic cardiovascular disease, but found no correlation. Dr. Randolph agreed that the

claimant clearly has cardiovascular disease attributable to arteriosclerotic cardiovascular issues, and that these conditions are associated with the claimant's risk factors, which include diabetes, obesity, hypertension, family history of hyperlipidemia.

Dr. Randolph's opinion is very instructive.

He states:

I would again note that Mr. Sellers has a number of unrelated risk factors for the development of cardiovascular disease, although risk factors of his family members were not presented in these records, the fact that his other family members did, in fact, have significant cardiovascular disease (and these records appear to reflect the number of direct relations suffering from cardiac-related death) puts Mr. Sellers at risk for the development of same.

Mr. Sellers is significantly morbidly obese based upon these records. This alone puts him at increased risk for cardiovascular disease.

Mr. Sellers has diabetes of uncertain control with some records indicating he is requiring insulin and some indicating that this is controlled through oral medications. This alone puts him at risk for the development of heart disease.

Mr. Sellers has significant hyperlipidemia for which he is taking medications. This alone puts them at risk for the development of arteriosclerotic cardiovascular disease.

Mr. Sellers has hypertension. The quality of his control is not clear with some of the records indicating some increase in his hypertension despite his numerous medications. This alone puts them at risk for the development of arteriosclerotic cardiovascular disease

Mr. Sellers has a significant family history of cardiovascular disease. This alone puts him at risk for the development of arteriosclerotic heart disease and coronary artery disease.

Mr. Sellers sustained an injury in 1971 resulting in a burn wound to his trachea. This, by now, has healed and although he may have some chronic difficulties with this, they would have no impact on his heart and there's nothing in the available clinical record to indicate that his heart was affected in any way by the instant event.

There is no published science to indicate that cardiovascular disease would develop as a consequence of the incident in question.

According to these records, the claimant began developing cardiac problems in his mid-40s. This is a standard time for individuals with the claimant's significant risk factors to begin developing cardiovascular problems. His combined risk factors make the development of cardiovascular disease a predictable occurrence. The fact that he had a significant family history would indicate the strong likelihood that he

would be at risk for the development of cardiovascular problems due to arteriosclerosis.

Further proof that the respondents were justified in controverted the claimants request for additional medical treatment and medication for his heart condition comes from of report dated February 3, 2011, from Dr. Peter Marvin. In that report, Dr. Marvin states:

There is no causal relationship between Mr. Sellers inhalational injury in 1971 and his coronary arterial occlusive disease in subsequent years. There is no basis in the scientific literature upon even which to postulate such a connection. Further, the patient has widely accepted risk factors for his coronary disease which amply explain its causation, including positive family history, hypertension, diabetes, hyperlipidemia, and morbid obesity. Thus, his symptoms of chest pain, rhythm disturbances, his coronary revascularization procedures, and his multiple visits to care givers for evaluation and treatment of these symptoms of coronary disease are unrelated to the 1971 incident, or to his tracheostomy or other consequences of that injury.

The claimant seems to assert that he did not have heart problems before the accident in 1971, and developed it sometime after, therefore, it must be related. However, the records indicated that the claimant was in his 30s when the work-related accident

occurred in 1971. As he got older, he developed high blood pressure and high cholesterol. The claimant's medical records and testimony also support his strong family history of heart problems and that the doctors have talked to him through the years about his diet and his arteries having blockages. In fact, the claimant's father died at age 66 from a heart attack. The claimant further testified at the hearing that he had recently had more blockage and had stints placed about a week before the hearing. He confirmed that his diet consists of hamburgers and other red meats, creamed potatoes and those kinds of things.

In my opinion, the record fails to show any evidence that his 1971 respiratory injury caused or aggravated the claimant's present condition. The opinion of Dr. Randolph is clear that the claimant is taking heart related medications to address his underlying cardiovascular problems that are not related to the claimant's condition of chronic trachibronchitis.

Therefore, after I consider the evidence of record, I cannot find that the respondents continue to be responsible for any future medical benefits related to the claimant's heart conditions. The evidence demonstrates that the claimant's underlying heart

condition is completely unrelated to the claimant's compensable injury in 1971. As such, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner