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ARKANSAS COURT OF APPEALS

DIVISIONS I, II & III
No. CA12-28

HYDE'S TERMITE & PEST CONTROL and GALLAGHER BASSETT SERVICES APPELLANTS	**Opinion Delivered** June 27, 2012
V.	APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [NO. F708235]
JIMMY D. ROGERS APPELLEE	AFFIRMED

JOSEPHINE LINKER HART, Judge

The Arkansas Workers' Compensation Commission found that appellee, Jimmy D. Rogers, proved by a preponderance of the evidence that he was entitled to additional medical treatment in the form of surgery to his spine at L3-4, along with associated temporary total-disability and permanent partial-disability benefits. Appellants argue that substantial evidence does not support the Commission's decision that Rogers proved, as required by statute, that this medical treatment was reasonably necessary in connection with his compensable back injury. Ark. Code Ann. § 11-9-508(a) (Supp. 2011). We affirm.

On July 9, 2007, Rogers sustained a compensable injury to his back. In 2008, Dr. Robert Abraham performed surgery on Rogers's spine at L4-5. An MRI was performed on October 20, 2009, and Dr. Abraham observed a herniation at L3-4. On December 1, 2009, he performed surgery at this level. It was this latter surgery that served as the point of contention, and the issue before the administrative law judge (ALJ) was whether the surgery

involving the herniation at L3-4 was reasonably necessary in connection with Rogers's 2007 compensable back injury. In a document signed by Dr. Abraham and dated November 8, 2009, he opined as follows:

> It is my opinion to a reasonable degree of medical certainty, or at least 51% probability, based upon the information presented to me, including a history given by the patient, that the major cause of Jimmy D. Rogers' lower back injury at the L3-4 level, as well as his need for surgical treatment was his accident on July 9, 2007 while he was working for Hyde's Termite and Pest Control.

The ALJ, in an opinion adopted by the Commission, wrote as follows:

> Dr. Abraham has identified two herniations, one at L4-5 and another later at L3-4 and has opined these are related to the claimant's July 2007 event. He has continued to treat the claimant since his injury and has more first hand information from the claimant and then comparing the diagnostic tests with the claimant's symptoms and complaints. I find the claimant has proven by a preponderance of the evidence that the additional medical he has pursued is reasonable and necessary and related to the July 2007 injury.

Appellants note on appeal that Dr. Abraham, in a deposition taken after the doctor opined as above, testified that while he saw a problem at L3-4 in the 2009 MRI, he did not notice the problem in earlier diagnostic tests. The doctor further observed that the diagnostic tests were performed in a recumbent position, so a patient could have an injury that would not be seen. He further testified that he was not aware of any incident other than the 2007 accident that could have caused the injury, so it could be a factor. He agreed that he felt comfortable with his 2009 opinion. Dr. Abraham was asked by appellants' counsel if he were "guessing," and Dr. Abraham responded in sum that he was guessing as to cause because he did not follow Rogers around, seeing what he may or may not have done.

Appellants assert that, based on Dr. Abraham's deposition testimony, there was evidence that earlier diagnostic tests did not show an injury at L3-4 and that Dr. Abraham's opinion was only a "guess" that the 2007 accident "could" have caused the injury. Appellants contend that there was not substantial evidence to establish that Rogers's surgery at L3-4 was reasonably necessary in connection with his 2007 compensable back injury.

Our standard of review is well established. We view the evidence and reasonable inferences deducible therefrom in a light most favorable to the Commission's decision and affirm if the decision is supported by substantial evidence. *Ouachita Cnty. Med. Ctr. v. Murphy*, 2012 Ark. App. 135. Further, we defer to the Commission's findings on what testimony it deems to be credible and the weight it is to be given; it is within the Commission's province to reconcile conflicting evidence and to determine the true facts; and the Commission is not required to believe the testimony of any particular witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Id.*

Dr. Abraham stated his opinion within a reasonable degree of medical certainty in his 2009 opinion, he reaffirmed that opinion during his deposition, the Commission relied on his opinion, and the Commission found that Rogers proved his case by a preponderance of the evidence. The evidence noted by appellants did not undercut Dr. Abraham's opinion; rather it underscored the obvious fact that he did not continuously observe Rogers over a period of years and that he relied on Rogers's history.[1] Further, Dr. Abraham explained why diagnostic

[1]And we note that Rogers provided credible testimony on the issue of causation.

tests could result in inconsistent findings. Moreover, even if there were conflicts in Dr. Abraham's testimony, those were matters for the Commission, and we view the evidence in the light most favorable to the Commission's decision. Given our standard of review and the evidence presented, we affirm the Commission's decision.

Affirmed.

VAUGHT, C.J., and PITTMAN, ROBBINS, GLOVER, ABRAMSON, and MARTIN, JJ., agree.

WYNNE and BROWN, JJ., dissent.

WYNNE, J., dissenting. I respectfully dissent from the majority opinion. Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B) (Supp. 2011). Opinions based on "could," "may," or "possibly" lack the definiteness required to meet a claimant's burden to prove causation. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000). Dr. Abraham did check a box on a letter provided by Rogers's attorney that stated that the work-related incident was at least fifty-one percent of the cause of Rogers's injury. However, appellants later deposed Dr. Abraham, who clarified his position regarding the causation of the herniation. Dr. Abraham testified at his deposition as follows:

APPELLANTS' COUNSEL: You've mentioned may and it could be, really you're just guessing aren't you?

DR. ABRAHAM: Well it's like I said, it may be or it maybe or it may not

be.

APPELLANTS' COUNSEL: Sure.

DR. ABRAHAM: I really don't know.

Dr. Abraham does go on to state, as the majority relates, that he did not follow Rogers around every day to know what he may or may not have done. This does not change the fact that Dr. Abraham classified his causation opinion as a guess and actually said that the work-related incident may be the cause of the herniation or it may not be. This is expressly the kind of language that our supreme court has said does not constitute a reasonable degree of medical certainty.

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. *Ouachita Cnty. Med. Ctr. v. Murphy*, 2012 Ark. App. 135. I fail to see how the Commission as fact-finder was not guessing as to the cause of the herniation at L3-4 when the only physician who rendered an opinion regarding the causation of the injury stated that *he* was guessing as to the cause of the injury. Dr. Abraham's causation opinion falls below the minimum standard for what constitutes a reasonable degree of medical certainty according to precedent from our supreme court. For this reason, I respectfully dissent from the majority opinion.

I am authorized to state that Judge Brown joins in this dissent.

Friday, Edlredge & Clark, LLP, by: *Guy Alton Wade* and *Travis J. Fowler*, for appellant.

Orr Willhite, PLC, by: *M. Scott Willhite*, for appellee.