

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308993

PATRICIA OWENS, EMPLOYEE

CLAIMANT

CIRCLE N, EMPLOYER

RESPONDENT

CINCINNATI CASUALTY COMPANY, CARRIER

RESPONDENT

OPINION FILED FEBRUARY 25, 2004

Hearing before Administrative Law Judge J. Mark White on January 28, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Emily Paul, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. William Frye, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 28, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on December 8, 2003, and a Prehearing Conference Order was entered on December 19, 2003. A copy of the December 19, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including January 31, 2003; and that the respondents have controverted this claim in its entirety.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury on January 31, 2003; whether she is entitled to associated medical and indemnity benefits; and attorney's fees. At the hearing, the parties agreed to also add the issue of computation of the claimant's average weekly wage and corresponding compensation rate.

The claimant contends that she sustained a specific-incident compensable injury to the head/nose/face on January 31, 2003; that her injury required medical treatment; that she is entitled to past and future reasonably necessary medical treatment; and that she is entitled to temporary total disability benefits.

Respondents contend that the claimant did not sustain a compensable injury on January 31, 2003; that the claimant did not report an injury until August 16, 2003, after the claimant terminated her employment with respondent-employer; and that there are no objective findings of injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents

and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that the existence and extent of her injury is established by medical evidence supported by objective findings.
4. The claimant has therefore failed to prove by a preponderance of the evidence that she sustained a compensable injury on January 31, 2003.
5. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

In January, 2003, the claimant went to work as a cashier for the respondent-employer, a convenience store. She testified that on January 31 she was outside a

storage shed adjacent to the store obtaining replacement supplies. She testified that she took a box of napkins and placed it on a dolly, accidentally causing the dolly to fall forward and hit her on the nose and face. She reported the injury to her supervisor, Mary Turk, and at the end of her shift she sought medical treatment from Dr. Timothee Wilkin.

Dr. Wilkin noted no abnormal observations or findings on his treatment note, other than the history related by the claimant. He assessed a contusion and prescribed an ice pack. I note that the index attached to Respondent's Exhibit No. 2 identifies the doctor as Dr. Robert Floss, but the claimant's testimony and other documents submitted by the respondents establish that the doctor seen by the claimant that day was in fact Dr. Wilkin.

The claimant continued working for the respondent-employer and did not seek medical treatment again until April 7, when she saw her personal physician, Dr. Don Howard, for a nosebleed. She saw Dr. Howard again on August 11 for headaches, at which point Dr. Howard ordered a CT scan. The CT scan was performed September 8 and revealed nothing abnormal. The claimant testified that from the time of her injury until the hearing, she has experienced headaches, nosebleeds, and pain and tingling in her nose and face. She acknowledged on cross-examination that she had sought medical treatment for similar symptoms prior to

the alleged injury of January 31, 2003.

Mary Turk, the respondent-employer's store manager on January 31, testified that when she returned from the bank that day, the claimant reported an injury to her. Turk testified that she completed the appropriate paperwork and faxed it to the respondent-employer's main office in Pine Bluff, and that she later spoke with the respondent-employer's controller, Wednesday Smith, about the injury. Turk acknowledged that she quit her employment with the respondent-employer in February after she was demoted. Smith testified that she received no report of injury for the claimant in January, and she denied that Turk had discussed this injury with her. Smith testified that her first knowledge of this injury came when the claimant reported it to her on August 13.

II. Adjudication

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported

by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

The question in dispute is whether the claimant has established the existence and extent of her injury by medical evidence supported by objective findings. Objective findings are those which cannot come under the voluntary control of the patient. ARK. CODE ANN. § 11-9-102(16). The claimant relies on Dr. Wilkin's diagnosis of a "contusion" as an objective finding establishing her injury. *Dorland's Illustrated Medical Dictionary*, 26th Edition, defines a contusion as, "a bruise; an injury of a part without a break in the skin." *Dorland's* likewise defines a bruise as, "a superficial injury produced by impact without laceration; a contusion." Given these definitions, it is apparent that a contusion or bruise is not necessarily a visible injury, and a diagnosis of such may in fact be based solely on a patient's subjective complaints. Therefore, I must conclude that a diagnosis of contusion, standing alone without corroboration by an observation of swelling or other objective finding, is

insufficient to meet the claimant's burden of proving her injury by medical evidence supported by objective findings.

I anticipate two objections to this conclusion by the claimant. First, the claimant noted at the hearing that Dr. Wilkin prescribed an ice pack, implying that he visibly observed a contusion or bruise. I cannot say whether Dr. Wilkin provided an ice pack because of the claimant's subjective complaints of pain or because of a visible contusion or bruise, without resorting to conjecture and speculation; such can never substitute for credible evidence. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1980).

Second, the claimant would almost certainly note the precedent of *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001); and *Meister v. Safety Kleen*, 339 Ark. 91, 3 S.W.3d 320 (1999). Objective findings were not at issue in *Bryant, supra*, thus any reference to a contusion as objective is mere *dicta*. *Dicta* consists of statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand, and they lack the force of an adjudication. *Hutchens v. Bella Vista Village*, 82 Ark. App. 28, 110 S.W.3d 325 (2003). Where an issue under consideration in the instant claim was not considered by the court in the case relied upon, what was said in *dicta* in the quoted case has no bearing on the instant claim. *Id.*

As for *Meister, supra*, the Supreme Court did not hold that *any* finding or diagnosis of contusion is an objective finding. Rather, the Court held that the requirement of objective findings is satisfied where a diagnosis of contusion is corroborated by the observation of swelling on an x-ray. To put it another way, the objective finding identified by the Court in *Meister* was not the diagnosis of contusion, it was rather the swelling observed by a physician on an x-ray of the claimant's hip. The Court reversed the Commission because the Commission had overlooked these x-ray findings. *Meister* cannot save the instant claim, for the diagnosis of contusion by Dr. Wilkin is unsupported by any objective findings of injury.

The only other evidence in the record which might conceivably constitute an objective finding is the testimony of Turk that she encouraged the claimant to go to the doctor "because she had this -- she was very red; her eyes, I knew, were going to turn black." Turk never explained why she thought the claimant's eyes would turn black, or the location or nature of the redness. Considering how vague this statement is, I cannot reasonably conclude that it constitutes an objective finding sufficient to meet the claimant's burden of proof.

Because the record contains no objective findings of injury, I find that the claimant has failed to prove by a preponderance of the evidence that the existence

and extent of her injury is established by medical evidence supported by objective findings. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on January 31, 2003. Because I so find, the remaining issues identified by the parties are moot and need not be addressed.

AWARD

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on January 31, 2003. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge