

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405481

DARLENE HAM,
EMPLOYEE CLAIMANT

RENT-WAY, INC.,
EMPLOYER RESPONDENT

TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER RESPONDENT

OPINION FILED JUNE 2, 2005

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

Claimant represented by the HONORABLE STEPHEN SHARUM,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE ROBERT
MONTGOMERY, 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 December 9, 2004. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on September 15, 2004, and contained in a pre-hearing order filed September 16, 2004, are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her

back while employed by respondent on March 8, 2004.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's low back injury.
4. Claimant is entitled to temporary total disability benefits beginning June 4, 2004, and continuing through the date she was released to return to work by Dr. Foster in October 2004.
5. Respondent has controverted claimant's entitlement to temporary total disability benefits.

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 December 9, 2004 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a

preponderance of the evidence that she sustained a compensable injury on March 8, 2004. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a sales person. She began working for the respondent employer on January 26, 2004. The claimant's primary job duties involved office work but she was also required to perform delivery work if the respondent employer was short handed. On March 8, 2004, she and Jeremy Lyons, the respondent employer's assistant manager, went to pick up some items that had been repossessed. These items included furniture and appliances. The claimant testified that while she and Mr. Lyons were putting a mattress in the truck she stepped into the back of the truck and was forced to bend over backwards over the washing machine. The claimant testified that she felt immediate pain in her back.

The claimant stated that as soon as she returned to the respondent's place of business she reported the injury to the store manager, Frances Hicks. The claimant testified that Mr. Hicks did not complete an accident report and told her to continue working even though she informed him that she needed medical

treatment. The claimant continued working until May 15, 2005, when she stated she rolled over in bed, her back popped and she had severe pain. The claimant sought medical treatment from at the Emergency Room at St. Mary's Hospital. The claimant was prescribed bed rest and was told to seek medical attention from Dr. Foster, an orthopedic surgeon. The claimant underwent an MRI as ordered by Dr. Foster, which revealed the following:

Mild degenerative disc disease at L4-5 and L5-S1. There is a small midline disc bulge at L4-5 that does not compromise neural structures.

Dr. Foster ordered physical therapy for the claimant. The claimant continued on light duty until she was terminated on June 4, 2004.

The claimant contended that she sustained a compensable injury on March 8, 2004. The respondents contended that the claimant did not sustain a compensable injury on March 8, 2004. I agree with the respondents.

Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is

caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he/she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal

Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury. The claimant contended that she injured herself on March 8, 2004, but she missed no time from work until May 15, 2004, after she rolled over in bed and felt a pop in her back. The claimant did not seek medical attention until the date of the back popping incident. The claimant testified that she was in a great deal of pain following the alleged injury on March 8, 2004, but she failed to seek medical attention until May 15, 2004.

The medical evidence also fails to demonstrate that the claimant sustained a compensable injury. The medical report from the doctor's visit stated that the claimant "woke up and turned over and felt popping with pain in low back area." The medical reports also indicate that the claimant had been experiencing similar

symptoms of low back pain for approximately one week. Further, the documents from Dr. Foster's clinic notes all indicate that the claimant's injury date was "5/15/2004", rather than the date of March 8, 2004.

In short, I simply cannot find that the claimant prove by a preponderance of the evidence that she sustained a compensable injury on March 8, 2004. In order for me to find that the claimant sustained a compensable injury would require me to resort to conjecture and speculation. 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 Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner