

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403235

MARVIN RIPPE, EMPLOYEE	CLAIMANT
DELBERT HOOTEN LOGGING, EMPLOYER	RESPONDENT
AMERICAN INTERSTATE INS. CO., CARRIER	RESPONDENT

OPINION FILED AUGUST 31, 2006

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

Claimant represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed May 9, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee-employer relationship existed on March 15, 2004.

3. The claimant sustained admittedly compensable injuries to his head and elbow on 3-15-04.

4. The claimant's appropriate compensation rate for temporary total disability is \$199 per week.

5. The claimant has failed to establish by a preponderance of the evidence that he sustained a compensable brain injury, a compensable neck injury, a compensable back injury, or a compensable eye injury on March 15, 2004.

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

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.

Thus, we affirm and adopt the 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority decision. Specifically, I concur with the portion of the decision denying the claimant's motion to

recuse and rejecting his arguments regarding the constitutionality of the workers' compensation statutes. I also concur with the findings that the claimant did not sustain compensable eye, neck, or back injuries. However, I must respectfully dissent from the portion of the decision finding that the claimant did not sustain a compensable brain injury shown by objective findings.

The claimant's injury occurred on March 15, 2004, when a log fell on his head while he was at work. The claimant did not lose consciousness, but had difficulty keeping his balance and suffered from dizziness immediately after the incident. The claimant was taken to a doctor's office. The office was closed so he was then taken to the emergency room in Heber Springs, Arkansas.

At the emergency room the claimant presented with symptoms of being dizzy and feeling like he was intoxicated. He did not report vision problems, but indicated he had a headache. The claimant was noted to have a 6-centimeter laceration to the scalp and was diagnosed with a, "closed head injury." The claimant's wound was closed with 11

staples to the head. A CT scan of the claimant's head was performed but returned as having normal results. The claimant was given pain medication and was instructed to return to have the staples removed.

On March 20, 2004, the claimant was admitted to the White County Medical Center emergency room. He reported having symptoms of blurred vision, headache, nausea, left arm weakness, and slurred speech. The claimant was treated with oxygen, aspirin, and Decadron. The following day, the claimant was noted to have only occasional symptoms of dizziness. He was assessed with having, "Cerebral concussion syndrome, resolved." The report further indicated that the physician told the claimant there was an unlikely possibility that he might have further problems such as seizures in the future. The claimant was released from the hospital on March 23, 2004. His final diagnosis was "Cerebral concussion."

On March 30, 2004, the claimant was treated at Family Practice Associates, located in Searcy, Arkansas. He was noted to have ongoing headaches and dizziness while

walking. His staples were removed and he was noted to have a well healed laceration. He was diagnosed with a cerebral concussion and taken off work for the week. The claimant was treated again on April 6, 2004, and was noted to have headaches on occasion. He also presented with blurred vision. The claimant was treated on April 12, 2004, and reported having headaches, dizziness, and nausea. He also reported that light bothered him.

An unsigned doctor's report dated April 21, 2004, indicates that the claimant reported having vision problems, headaches, light sensitivity, and nausea. The report provides that the claimant's eye exam was normal. It further provides, "assurance given; symptoms should improve over the next year; no ocular injuries."

A neuropsychological evaluation was performed by Dr. Vann Arthur Smith on August 6, 2004. The report from that evaluation provides that the test was requested,

after the patient presented with a history of worsening neurocognitive and emotive symptoms including impaired recall memory, impaired attention to sequential detail, impaired

concentration, word finding difficulty, recurrent "deja vu" episodes, daily migraine like headache (sic) accompanied by nausea and scintillating scotoma, rapid affective shifts and impulsivity preceded and or accompanied by olfactory hallucination (sulfur)and dysexecutivism.

The claimant relayed the symptoms occurred after being struck in the head by a 35-foot log on March 15, 2004, and sustaining a concussion. Dr. Smith noted that the claimant had a high school diploma, had a history of receiving marital counseling in the past, and noted that the claimant had been involved in past motor vehicle accidents that required medical attention.

Dr. Smith opined that the claimant's, "clinical history, mental status examination and neuropsychodiagnostic test data reveal a number of abnormal findings consistent with the presence of impaired brain function." He further indicated that the right cerebral functions appeared to be more severely impacted than on the right. Dr. Smith further indicated that the claimant's profile and testing were similar to that associated with, "acceleration-deceleration

type traumatic brain insult". He opined that was consistent with the history of being hit in the head by a log.

Likewise, Dr. Smith indicated the claimant presented with findings consistent with the diagnosis of, "Organic Brain Syndrome, Secondary to TBI and sequelae thereof.

(e.g. impaired attention/concentration, impaired recall memory, impaired executive function, word finding difficulty, migraine)". The claimant was deemed to be disabled due to the aforementioned neurocognitive symptoms.

Finally, Dr. Smith gave the following diagnosis to the claimant,

I: Organic Brain Dysfunction, Secondary to TBI (310.2)

Cognitive Dysfunction, Non-Psychotic, Secondary to OBS (294.10)

Organic Brain Dysfunction Secondary to Axis III Condition(s) (310.8)

II.: None

III.: TBI with Grade III Concussion. Hepatitis B, by history. GERD. Hiatal Hernia. OA. Chronic Pain Syndrome. Migraine. Asthma.

IV.: Moderate, chronic.

Dr. Smith recommended the claimant be referred for additional neurological and physiatry treatment for additional evaluation. He also recommended that the claimant return for another neuropsychodiagnostic test battery in the next six months.

At the time of the hearing, the claimant testified that he had an educational background of having a high school diploma and graduating from a diesel mechanic vocational program. The claimant said that after being injured he has ongoing problems with his vision, has suffered from sensitivity to light, has had problems with memory loss and concentration, and has suffered from a loss of balance. He further indicated that he had tried to return to work since being injured, but that he no longer worked because he had been making mistakes while performing simple tasks such as taking a phone message or sweeping. The claimant further stated that his ability to remember or to focus has also greatly diminished since being injured.

Four witnesses testified on behalf of the claimant. Each one indicated that the claimant's cognitive

abilities had decreased since being injured. Robert Powell testified that he built custom Jeeps and vehicles and that he had worked with the claimant prior to his injury. He said that the claimant was able to help him do "complex stuff" such as aiding in designing or creating brackets based on written plans. Powell testified that the claimant attempted to work for him after being injured, but that he was no longer able to perform in the same capacity. He indicated that the claimant made mistakes, had problems with concentration and memory, and did not seem to be able to focus.

Richard Lane testified that he had previously observed the claimant's work and was aware that he had the ability to modify vehicles. He said that the claimant had previously helped him build a grill and that he had sought the claimant's assistance since the injury. Lane said he asked the claimant for help because he intended to open a business and because of the claimant's knowledge in building grills. He indicated that the claimant's personality and abilities had changed. Specifically, he indicated that the

claimant worked for him after the injury and that he was unable to remember or follow simple instructions. He also indicated that the claimant would repeat himself and suffered from loss of memory.

Jenna Verduco testified that the claimant had worked as a mechanic for her brother-in-law and that she was familiar with his abilities. She said that when her brother-in-law could not perform a task, he would turn to the claimant for assistance. She further indicated that since the injury she had observed the claimant trying to make minor repairs to his Jeep. She said that he was not able to make the repairs, whereas prior to being injured, he had built the Jeep. She also said the claimant appeared to be depressed and that he had memory loss.

Doug Rouse testified that he had previously worked with the claimant. He relayed that after the injury the claimant appeared to have memory problems and would repeat himself. He further testified that the claimant's personality had changed since the injury and that the

claimant was no longer sociable. He also said the claimant appeared to be depressed.

The claimant alleges that he sustained compensable injuries in the form of injury to the eyes, neck, back, and brain. The Administrative Law Judge denied each of these claims. The Majority now affirms and adopts that decision as their own. After reviewing the record, I find that the portion of the Administrative Law Judge's decision regarding the claimant's brain injury should be reversed. The remainder of the decision should be affirmed.

In order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between his employment and the injury. McMillan v. U.S. Motors 59 Ark. App. 85, 953 S.W.2d 907 (1997). Objective medical evidence is necessary to establish the existence and extent of an injury, but not essential to establish the causal relationship between the injury and a work-related accident. Horticare Landscape Mgmt. v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Objective findings are defined at Ark. Code Ann. § 11-9-102(16) as those findings

which cannot come under the voluntary control of the patient. When the Commission determines physical or anatomical impairment, complaints of pain, straight-leg raising tests, or active range of motion tests shall not be considered objective findings. Further, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the extent and existence of the injury, and a preponderance of other non-medical evidence establishes a causal relation to a work-related incident. See, McDonald, supra.

The Majority, by virtue of adopting the Administrative Law Judge's decision as their own, asserts that the claimant's back and neck injuries should be denied because there is no reference to them in the medical records. They further opine that there were no objective findings to show a compensable injury to the claimant's eyes. I agree with these assertions.

However, while I find that the claimant did not sustain back, neck, or eye injuries, I find that he did sustain a compensable brain injury. I further find that such injury is shown by objective findings and that the claimant's cognitive difficulties, headaches, dizziness, and blurred vision are caused by the claimant's compensable brain injury.

In denying the claimant's request for benefits associated with a brain injury the Majority notes that the claimant's CT scan was returned as normal. They further reason that pursuant to the holding of Watson v. Tayco, Inc., 79 Ark. App. 250, 86 S.W. 3d 18 (2002), the neuropsychological testing performed on the claimant was not enough to show objective findings of an injury. The decision provides,

I recognize that Vann Smith has diagnosed organic brain dysfunction based on his neuropsychological testing performed on August 4, 2004. However, I understand that neuropsychological testing, without more, is not adequate to establish organic brain injury by "objective findings" within the meaning of Ark. Code. Ann. §11-9-102(4)(D). See

Watson v. Tayco, Inc. (McDonald's), 79 Ark. App. 250, 86 S.W. 3d 18 (2002).

While the Majority relies on the holding of Tayco, I find that the case of Wentz v. Service Master, 75 Ark. App. 296; 57 S.W. 3d 753, (2001) is more similar to the present case. I further find that even if one does not consider Wentz, under the rationale of Tayco, the claimant has shown that he sustained a compensable injury shown by objective findings.

In Wentz, the claimant worked as a cleaner. She was injured when she fell and hit her head and the right side of her face on a concrete floor. She did not seek immediate medical attention but was later diagnosed with a concussion. A short time after being injured, the claimant presented to the hospital and reported having headaches and changes in her mental status. She was referred to a neuropsychologist. A neuropsychological evaluation was performed and the claimant was diagnosed with having an organic brain disorder that was secondary to a closed-head injury. The doctor responsible for testing the claimant

testified that the results of the neuropsychological evaluation were dependent on the claimant's voluntary responses. However, he also indicated that the claimant was not intelligent enough to manipulate the results of the test and indicated that it was virtually impossible to manipulate the results of such a test. Id.

In Wentz, the Administrative Law Judge found that the claimant sustained compensable injuries to the jaw and face but that she had not sustained a compensable brain injury. The Commission affirmed and adopted the decision as their own. On appeal, the Court of Appeals reversed and remanded the case, finding that the claimant had sustained a compensable brain injury. In making this finding, the Court noted that the claimant's physical symptoms of nausea, vomiting, and light sensitivity did not present until after she fell. They further noted that the claimant was noted to have cognitive defects after falling and that her intellectual capacity had decreased. They also called attention to the fact that the claimant had been diagnosed with a concussion. Id.

In the case of Tayco, the claimant was restocking cartons when she was hit on the back of the head by a metal plate that fell. The claimant presented at the emergency room with weakness, nausea, dizziness, blurred vision, and tingling in the upper extremities. The claimant was referred to have neuropsychological testing and was diagnosed with an organic brain injury. The respondents controverted the claim. At the time of the hearing the claimant testified that she suffered from cognitive problems and suffered loss of balance and headaches. She also said that prior to her injury she had not experienced such symptoms. Id.

In Tayco, the Administrative Law Judge found the claimant had not sustained a compensable brain injury. That decision was affirmed by both the Commission and the Court of Appeals. The Court specifically noted that the only objective evidence of a closed head injury was found in the form of the neuropsychological testing. The Court indicated that without other objective evidence to establish a closed-head injury, there was insufficient evidence to show that the claimant sustained a compensable injury. The Court went

on to distinguish the holding of Wentz by noting that in Wentz other evidence in the form of medical testimony showed objective evidence of a brain injury and that such was sufficient to show a compensable injury. Id.

After reviewing the holdings of Wentz and Tayco, I find that the Majority is correct in asserting that the claimant cannot show objective findings of an injury solely based on neuropsychological testing. However, in my opinion, they fail to consider the multitude of medical evidence showing that the claimant sustained a closed-head injury that is consistent with and is objective proof of a brain injury.

It is undisputed that the claimant had a large laceration to his head that required some 11 staples. It is also undisputed that early in treatment the claimant was diagnosed with having a concussion. It is also clear that the claimant began suffering from symptoms such as dizziness, headaches, sensitivity to light, nausea, and other symptoms that are commonly associated with brain injuries. When these factors are considered in conjunction

with the fact that a 35-foot log hit the claimant on the head, I find the evidence to be clear that the claimant did suffer from a brain injury and that the diagnosis was not only based on the results of the neuropsychological evaluation.

I also find that the present case is more analogous to Wentz than Tayco. Just as in Wentz, the claimant in the present case was noted to have a concussion and a closed-head injury. These findings, in conjunction with the findings of neuropsychological testing, ultimately led to the finding that the claimant sustained a compensable injury to the brain. I note that in Wentz, a doctor apparently testified as to the reasons for his conclusions. However, I find that in the present case the medical records themselves are sufficient in showing that the claimant had objective findings in the form of a concussion and closed head injury. These records, in conjunction with the neuropsychological evaluation show that the claimant sustained a compensable brain injury.

I also find that this case is distinguishable from Tayco, in that the claimant in Tayco had not sustained an admittedly compensable injury to the head and there was no objective medical evidence to show that the claimant had sustained an injury to the head. In contrast, in the present case, the claimant sustained an admittedly compensable injury to the head. In fact, the claimant described that his scalp was "flipped up" like he had been scalped and his injury was severe enough to warrant receiving 11 staples to close the wound to his head. Even at the time of the hearing, almost two years after the accident, the Administrative Law Judge was able to observe the claimant had a loss of hair where the laceration occurred.

I note that the claimant's CT scan returned as normal. However, I note that virtually every doctor's report recognizes that the claimant had ongoing symptoms that only occurred after being hit by the log. I also note that the report from the neuropsychological test itself specifically refers to the claimant's past medical attention, indicating that the results of the report were based on both the

results of that test, and the results of the various past medical attention the claimant received.

In conclusion, I find that while there is no objective evidence to show the claimant sustained injuries to his eyes, neck, or back, there is sufficient evidence to show he did sustain a compensable brain injury. The medical records document the objective existence of such an injury and the claimant's ongoing cognitive defects, including, but not limited to his loss of memory, headaches, and blurred vision, are attributable to being struck on the head. Accordingly, I must respectfully concur in part and dissent in part from the Majority decision.

SHELBY W. TURNER, Commissioner