

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408077

PAULA L. KEFFER, EMPLOYEE	CLAIMANT
EMERGENCY AMBULANCE SERVICE, EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE CORP., CARRIER	RESPONDENT

**OPINION FILED MAY 7, 2007**

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

Claimant represented by HONORABLE STEVEN R. McNEELY,  
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her lumbar spine on July 25, 2004.

Based upon our de novo review of the record, we would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as an Emergency Medical Technician. On July 25, 2004, she was in an ambulance when the ambulance hydroplaned

and rolled over three times before coming to a stop. The claimant was transported to Jefferson Regional Medical Center in Pine Bluff. She spent the night in the hospital for observation and received conservative treatment. The medical records demonstrate that the claimant complained of right shoulder and hip pain and headaches. The medical records state that the claimant had multiple bruises but no bruises were actually observed on her back or neck. The claimant was treated by Dr. Eckert who ordered x-rays and a CT scan. Both were negative for any acute injury. The claimant was referred to Dr. Bruce Safman who stated that the MRI he requested was normal. He suspected that the claimant had fibromyalgia. At the hearing, the claimant stated that she did not think that she had fibromyalgia. Specifically, she stated:

Q. So your - - it's your belief, then, that you don't have fibromyalgia?

A. Again, I'm not a doctor, but from what he discussed with me about fibromyalgia, no, I don't believe that that's what I have.

Q. Now there was discussion, I think, in one of the reports about your - -

somebody in your family has a history of fibromyalgia or maybe a sister and a mother, or something like that?

A. I'm sorry if I sound rude. My sister is a hypochondriac. If she sees a word, she has it. So according to her, she has it. I can get you medical proof that she's a nut. I'm sorry.

Dr. Safman did not give the claimant a permanent anatomical impairment rating because there was no objective evidence of injury. She was given a full release to return to work.

The claimant then sought treatment from Dr. Stan Burleson who diagnosed her with myofascial pain and related the pain to the claimant's work related accident.

Dr. Burleson went on to say that the claimant had some objective findings of muscle spasm in the thoracic spine.

The claimant's injuries to her hip and shoulder were all accepted as compensable. At this time the claimant contends that she sustained a compensable injury to her low back. The respondents have controverted same. Ark. Code Ann. §11-9-102(4)(A)(i)(Supp. 2005) 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 is required to show that a causal connection exists 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).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be

established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally, medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-

102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). 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 Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that her claim is compensable, ie., that her injury was the result of an accident that arose in the course of her employment and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Further, the claimant must show a causal relationship exists between her condition and her

employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

It is well established that the party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Our review of the evidence demonstrates that the claimant has no objective medical findings of a low back injury. The evidence demonstrates that the claimant had x-rays of the lumbar spine that were normal. She also had a

CT scan of the lumbar spine that was unremarkable and contained no evidence of acute findings. Furthermore, she had an MRI of the lumbar spine that was unremarkable except for a haemangioma which was completely unrelated to the accident. The medical records contain no notations that the claimant had a contusion or bruise that was specifically observed in the lumbar area. Although the independent medical evaluator stated that the claimant needed medication for chronic pain, pain is not an objective finding. Moreover, the claimant has been released to return to full duty work with no permanent anatomical impairment. When all of these things are considered, the evidence simply does not preponderate in favor of a finding that the claimant sustained an injury to her lumbar spine on July 25, 2004. Accordingly, the decision of the Administrative Law Judge is hereby reversed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion finding that the claimant did not sustain a compensable lumbar injury. The Majority essentially denies benefits on the basis that the claimant did not sustain an injury shown by objective findings. In my opinion, the Majority has erroneously ignored the multitude of medical records specifically indicating that the claimant suffered from multiple contusions and that she sustained a lumbar injury. Furthermore, as noted by the Administrative Law Judge, the claimant continued to have spasms in the thoracic region and pain in her shoulder, and as she sustained admittedly compensable injuries to those parts of her body, she would arguably be entitled to additional pain medication for treatment of those conditions regardless of whether she sustained a compensable low back injury. Accordingly, I simply cannot agree with the Majority opinion.

The facts in the present case are relatively undisputed. The claimant sustained admittedly compensable

injuries when she was involved in an accident in which the ambulance she was riding in rolled over three times. Specifically, the respondents admit that the claimant sustained injuries to the right hip, shoulder, and thoracic spine. However, they deny the claimant sustained a compensable lumbar injury.

The claimant was taken to the emergency room and complained of neck, back, right hip, and shoulder pain. X-rays returned as normal but the claimant was noted to have multiple contusions or multiple bruises. While the reports generally do not indicate the locations of the bruises, she was specifically noted to have bruising on her right hip.

On August 2, 2004, Dr. Michelle Eckert treated the claimant and noted that she had sustained multiple bruises and contusions. Dr. Eckert opined the claimant's bruises were healing and restricted the claimant to light duty work for two weeks. She also noted the claimant was complaining of low back pain.

The claimant was treated again on August 23, 2004, and was noted to have significant contusions. The report provides, "She has significant contusions. She is doing

better but still does not feel up to par. She has pain in the L1/L2 region. There is no step off or crepitation and it is in the distribution of a prior bruise. I think it is just muscle strain." Dr. Eckert referred the claimant for a CT scan and indicated the claimant could return to light duty work. She also scheduled a return visit.

The CT scan returned as normal and on November 29, 2004. The radiologist recommended a bone scan, but instead, the claimant was subjected to an IME. Dr. Safman indicated that the claimant suffered from lower lumbar pain, right sacroiliac pain, coccygeal pain, and pain in the periarticular structures of the right hip. Dr. Safman also diagnosed the claimant with a coccydynia and recommended the claimant have an MRI, trigger point injections, and Lidoderm patches. He further indicated the claimant would benefit from a cut-out cushion to sit on. Finally, he recommended the claimant undergo an MRI before returning to work.

An MRI was performed on the claimant's hip and lumbar spine on December 8, 2004, and returned as normal with the exception of an atypical hemangioma in the S1 body. Likewise, on December 20, 2004, Dr. Safman indicate that the

claimant was improving after trigger point injections but that she was still having some lower lumbar discomfort with lifting. Dr. Safman noted the claimant had no guarding or muscle spasm in the lower spine and indicated that he would continue the claimant on Lidoderm patches and Ultracet. He also indicated that he was to reassess her in two weeks, that she was close to MMI, and that "after the holidays" he would have the claimant start learning lumbar stabilization exercises. He also placed her on a 30 pound lifting restriction.

On January 20, 2005, Dr. Safman indicated the claimant still suffered from lumbar pain but that it was improved. He indicated that the claimant suffered from a chronic lumbar strain. He further indicated that he believed she might have fibromyalgia but gave the claimant a full release to work and a 0% impairment rating. He further opined, "I tried to the (sic) case manager who works for the insurance company to discern why her medications have not been approved. We have not gotten a call back from our appeal to try the Zonegran, which would have been the last medication, that I would have tried her on. Zonegran is used

for chronic pain just as Neurontin, Gabitril and similar medications. Although these are antiseizure medications, they are all used as adjunctive medications for pain."

On June 15, 2006, Dr. Burleson indicated that the claimant continued to suffer from low back pain and myofacial type pain. He opined the claimant's condition was as a direct result of the ambulance accident and indicated that the claimant would benefit from additional diagnostic studies to alleviate her pain and symptoms. Finally, in response to a letter which asked for an explanation of the claimant's objective injuries, Dr. Burleson indicated the claimant suffered from muscle spasms in the thoracic spine.

The Majority denies the claimant benefits on the sole basis that the claimant failed to show objective signs of an injury to her low back. In making this conclusion, they assert the medical records fail to indicate specifically that the claimant's bruises were on her low back. Given the evidence in this case, it is simply incomprehensible that the Majority could conclude the claimant sustained no objective injury to her lower back. In

fact, to make such a finding, in my opinion, ignores the available medical evidence.

Virtually every doctor's report in the record indicates that the claimant suffered from multiple bruises and contusions. It is undisputed that the claimant was observed to have multiple contusions, and when reviewing the medical records, it is apparent bruising existed on the claimant's lumbar spine. The claimant was specifically noted to have bruising on her hip, which would be in the area of her lumbar spine. Likewise, the claimant complained of low back pain immediately after the accident, which would be consistent with the existence of bruising.

In fact, I note that on August 23, 2004, the claimant was noted to have pain in the distribution pattern of a prior bruise and was diagnosed with a strain. Dr. Eckert indicated, "She has significant contusions. She is doing better but still does not feel up to par. She has pain in the L1/L2 region. There is no step off or crepitation and it is in the distribution of a prior bruise. I think it is just a muscle strain." Significantly, Dr. Eckert was also the physician that treated the claimant on the day of the

accident, so she would be familiar with the areas in which the claimant had suffered bruising. As such, I find that when reviewing the aforementioned language the only logical conclusion is that Dr. Eckert observed bruising on the claimant's lumbar region and that she was complaining of pain in the distribution of that prior bruise.

Furthermore, Dr. Safman diagnosed the claimant with coccydynia, which is pain in the tailbone and in the vicinity of the lumbar spine. Dr. Safman further referred the claimant for an MRI, indicating that he believed her complaints to be legitimate. Significantly, he also diagnosed the claimant with a chronic lumbar strain, which, again, would be consistent with the claimant's accident and would be consistent with the findings of Dr. Eckert.

While the Majority asserts that Dr. Safman diagnosed the claimant with fibromyalgia, it is evident that he also believed the claimant suffered from a lumbar strain. Additionally, there is no indication that Dr. Safman did not believe a diagnosis of fibromyalgia would be consistent with the claimant's accident. In fact, it is apparent that Dr. Safman was at a loss as to why the carrier would not pay

for the claimant's treatment as noted by his January 20, 2005, medical report.

I also note the reports given by Dr. Burleson. In those reports, Dr. Burleson indicated he had been familiar with the claimant's condition and that she had back pain consistent with her accident. He further indicated she had no significant bony abnormalities and that she needed further diagnostic testing. Finally, he indicated she had muscle spasms of the thoracic musculature. The Majority uses this report to denounce the existence of objective findings to the lumbar spine. I cannot agree with this assessment. It is unclear when Dr. Burleson first began treating the claimant in connection with the accident. As such, it is impossible to know whether he could have reasonably observed bruising to her lumbar spine. Likewise, I note that Dr. Burleson fails to indicate the claimant had objective findings to her hip or shoulder. As these were accepted as the respondents and the claimant was noted to have bruising on her hip, it is evident that Dr. Burleson was either not fully involved in the claimant's treatment from the onset of her accident, or that he was not thorough in completing his

report. Finally, I note that while Dr. Burleson failed to indicate the claimant had objective findings to her lumbar spine, what is evident, is his belief the claimant had legitimate complaints that were directly caused by her work-related accident.

Finally, I address the Majority's argument that the claimant's objective tests all returned as normal. While the claimant's tests returned as normal, the radiologist recommended the claimant undergo a bone scan. Clearly the nature of this test was to determine the nature and extent of the claimant's injuries. Pursuant to Arkansas Workers' Compensation Law, injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods,

Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d.

In this instance, it is clear that the bone scan was designed to assess the nature of the claimant's injury. Yet, despite this recommendation, the respondents refused to allow the claimant access to such treatment and instead decided to send her to an IME in fear of finding a more significant problem than bruising or a strain. Interestingly, even Dr. Safman found the claimant's complaints to be legitimate as seen by the fact that he diagnosed her with a strain and was at a loss to understand why the carrier would not authorize payment for ongoing pain medication.

Ultimately, I find that the Majority errs in denying this claim. This is not an instance where the claimant was involved in a minor trauma. She was in a severe accident which required her to be transported to the hospital by ambulance. There is no evidence that the claimant's physicians believed her to be exaggerating her symptoms. Even the respondents acknowledge that the claimant sustained injuries to various parts of her body including

her shoulder, thoracic spine, and her hip. Given the widespread nature of these injuries, it is simply not logical to conclude that the claimant did not injure her low back in the ambulance accident. She had no complaints of lower back pain prior to this incident and yet afterward, she was diagnosed with multiple contusions, bruises, coccydynia, and a strain, all of which would be consistent with the mechanics of her accident and her complaints. Though the medical reports do not specifically indicate the claimant had bruises to her low back, the observance of such can be inferred from the August 23, 2004, report from Dr. Eckert. Furthermore, she was diagnosed with coccydynia and a bruise to the right hip, which are in the general vicinity of the claimant's lumbar spine. As such, I find that she has met her burden of proof in showing objective evidence of a lumbar injury.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner