

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600866

RAY PIATT, EMPLOYEE	CLAIMANT
WAL-MART, EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 16, 2007

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

Claimant represented by the HONORABLE ADRIENNE MURPHY, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 9, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 29, 2005, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a compensation rate of \$256.00 for temporary total disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent in December 2005. See discussion above.

5. The respondent should pay for all reasonable and necessary medical treatment for this claimant's compensation injury from January 16, 2006. The claimant did not definitively report a workers' compensation injury until January 16, 2006, to the respondent.

6. The respondents should pay temporary total disability to this claimant from January 16, 2006, to July 10, 2006. See discussion above.

7. The respondents have controverted this claim in its entirety.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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 January 9, 2006 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on December 29, 2005. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant is 78 years old and was employed as part-time custodian for the respondent employer. The claimant was employed as a temporary worker for approximately four months prior to this alleged incident. He worked the evening shift beginning at 6:00 p.m. and ending at 2:30 a.m. Prior to going to work for the respondent employer, the claimant worked for ten years for the Rogers School District. The claimant was forced to retire for medical reasons after a bone scan revealed he had significant degenerative disc disease. The claimant failed to reveal that his reasons for leaving the Rogers School District were related to his medical conditions when applying for employment with the respondent employer. The

claimant was also diagnosed and treated for prostate cancer.

The claimant testified that in the early morning hours of December 29, 2005, he was moving chairs from a table to the floor. A stack of chairs fell, hitting him on the back as he bent over. The claimant was ultimately diagnosed with a compression fracture at his L2 vertebra. The claimant alleges that the injury is related to the alleged incident on December 29, 2005. The claimant did not tell anybody about the incident and continued to work the remainder of his shift. The claimant testified that the following shift, which began at 6:00 p.m. on December 29th and ended at 2:30 a.m. on December 30th, he told head custodian, Judy Maloney and co-employee, Bill Hingle, that he had pulled a muscle in his back. Both Ms. Maloney and Mr. Hingle testified at the hearing and neither recalled that conversation. The claimant also worked his entire shift that night and the next shift he left at mid-night. The claimant testified that he left because of back pain but Ms. Maloney testified that all of the employees were allowed to leave at mid-night on holiday mornings.

On January 3, 2006, the claimant sought treatment from his primary care physician. The claimant

was complaining of lower back pain but failed to mention a work-related incident to his medical provider. The medical records do demonstrate that the claimant complained of an onset of pain on December 31, 2005. The claimant was given a steroid shot and ordered to return if he still had problems. The claimant worked his entire shift on January 4, 2006, and then told his co-worker Bill Hingle about the alleged incident. Mr. Hingle reported the matter to Ms. Maloney a few days later who then initiated a workers' compensation claim.

On January 6, 2006, the claimant returned to his primary care physician for a recheck of his back. X-rays revealed degeneration and arthritis at every level and a slight compression fracture at the L2 vertebra. The medical notes indicate that the medical providers were unable to determine the age of the fracture. It also noted that the claimant stated that he fell off the wing of a B-29 in the 1950's and the claimant thought he might have hurt his back at that time. The claimant stated that he did not recall hurting his back, but there had been no other falls. The claimant was prescribed a back brace and scheduled for a bone scan. On January 13, 2006, the claimant returned to Dr. Bicak and indicated to him that he believed that he hurt his

back while lifting a chair. Dr. Bicak's examination revealed swelling and tenderness at the mid-line level. The claimant was given Vicodin and told that if he wanted surgery that he could get a referral.

Three days later the claimant filed a workers' compensation claim. He reported that he had no previous back injuries.

The claimant went to see Dr. Berstnev, the respondent employer's medical provider. Dr. Berstnev noted:

The patient had an x-ray done here at the clinic which shows significant degenerative changes over his lumbar spine including the osteophytes at L1 through L4 area with osteophytes being large and being present around the compressed L2 vertebra which makes me think that it is an old compression fracture with some osteophyte formation around the compressed area.

The claimant returned to Dr. Berstnev on January 23, 2006, after he strained his back doing at-home exercises. The claimant was prescribed physical therapy and told to return in two weeks. The claimant returned to Dr. Bicak on January 27, 2006, who then referred the claimant to Dr. Raben. On March 3, 2006,

Dr. Raben performed a Kyphoplasty surgical procedure on the claimant.

On March 16, 2006, the respondents sought an independent medical review from Radiologist Shane McAllister. Dr. McAllister reviewed the imaging studies and concluded:

The deformity of the body with its superior end plate being compressed is suggestive of a compressive injury from axial loading. This would not be compatible with a direct blow to the back. The degree of tracer accumulation on the bone scan is only minimal suggesting either very early injury (within the past two to three days) or a more chronic injury of months to years of age.

The claimant contends that he sustained a compensable compression fracture on December 29, 2005. The respondents contend that the damage to the claimant's back is the result of a chronic vertebra fracture that occurred years ago and is partially degenerative in nature and is not compensable. After conducting a de novo review of the record, I agree with the respondents.

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 his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his 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 his condition and his 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 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).

In my opinion, the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury on December 29, 2005. The evidence demonstrates that the claimant has a long history of arthritis and back pain. The claimant sustained lumbar fractures back in the 1950's when he fell from the wing of B-29 Bomber. The claimant was taking Aleve for chronic back pain and underwent a bone scan on January 20, 2005. This bone scan revealed osteoporosis of the spine so severe that Dr. Bicak told the claimant to retire from the Rogers School District janitor job because his job was "doing more harm than good." The medical reports from then reveal "I note the Z-score at L2 considerably less than levels below. This may reflect significant degenerative disease at L2-L4

but a locally destructive lesion could not be excluded." This was nearly one year before the claimant's alleged injury.

Three months after his forced retirement the claimant found himself in dire financial straits. He was diagnosed with prostate cancer; his wife's workers' compensation benefits had run out; and the claimant found himself unable to support his family on what little they received from social security and retirement. He stated, "I needed the money. I need money now, too. I've got to go back to work doing something." When the claimant applied for his job with the respondent employer he did not reveal his medical problems to them on the employment application. Under "reason for leaving", the claimant simply wrote "retired." The claimant alleged that he believed the job with the respondent employer would involve different duties than the custodian job he had left, he wrote that the job he was seeking was "custodian" - - the exact position he had left.

It is clear that the claimant's problem pre-existed his employment with the respondent employer. He obviously knew he was hurt when his doctor recommended that he retire. Despite his physician's warnings, the

claimant returned to the work force for financial reasons. Simply put, there is absolutely no proof to support the claimant's contention.

The alleged incident took place on December 29, 2005. It is of note that the claimant had properly reported a previous injury only two months prior, and he knew the procedure. However, he failed to report this alleged incident. He saw his co-worker, Bill Hingle, only an hour after the alleged incident at the time clock at the end of their shift, but failed to mention the incident to Mr. Hingle. The claimant testified that he told his co-worker and his supervisor the following day. However, neither Mr. Hingle nor Ms. Maloney remember the conversation. When he finally completed the workers' compensation form two weeks later, the claimant reported that he had not had any previous back injuries despite the fact that he had fractured the same vertebrae previously in a fall from a B-29 airplane.

Although the claimant stated he felt immediate pain, he did not go to the doctor until January 3, 2006. At that appointment he failed to mention the alleged incident at work and reported the onset of pain as being four days prior, on December 31st. That is two days after the alleged incident. When questioned about the

discrepancy in time, the claimant replied, "It wasn't hurting that bad. I mean it hurt, but it wasn't what you would call it - I don't know how to explain it. It hurt, but it wasn't real bad." It was not until the following day, January 4th, that the claimant first mentioned the alleged chair incident to Mr. Hingle. It was Mr. Hingle who subsequently advised the claimant's supervisor of the alleged work incident and not the claimant himself.

Two days later, the claimant was seen by Dr. Garrett who performed an x-ray which revealed degeneration and arthritis at every level and a slight compression fracture of the L2 vertebrae. The medical notes from that date stated, "I cannot tell the age of [the fracture]; however, he did say that 1950's (sic) during the end of the war he fell from the wing of a B29. He thinks he might have hurt his back then, though he does not recall hurting his back, but there have been no other falls." It is of note that eight days after the alleged incident, the claimant was still not contending that he hurt his back lifting a chair. Rather, he related it to the fall from the plane years prior.

A bone scan was conducted on January 10, 2006, and although the interpreting physician opined that the fracture was a recent injury, he was under the false

impression that the claimant had recently fallen. As noted in Dr. Garrett's report, the claimant stated that he had not recently fallen. I give little weight to this opinion as it is based on inaccurate information.

On January 13, 2006, the claimant returned to Dr. Bicak. For the first time since the incident two weeks prior he related that he injured his back while lifting a chair. Dr. Bicak noted:

A 77-year-old male is here today for evaluation. He recently had a problem where he hurt his back, he believes, while lifting a chair.
(emphasis added)

An examination of the claimant revealed swelling and tenderness at the midline level. At the previous appointments, the claimant made no mention of the incident. There was no swelling noted, and no tenderness noted. Suddenly, two weeks after the alleged incident at work, the claimant presented with swelling and tenderness. In my opinion, this clearly indicates a new injury. It seems highly unlikely, if not impossible, for an injury from December 29th to all of a sudden become swollen and tender two weeks later.

After he discovered that he had a fracture of his L2 vertebrae that could only be alleviated with surgery, the claimant completed workers' compensation

forms and was seen by Dr. Berestnev. In spite of the fact that he had been discussing his fall from the airplane with Dr. Garrett just ten days prior, he noted on the form that he had not injured his back previously.

Medical notes from Dr. Berstnev indicate that the swelling and tenderness that had been present three days prior was gone. Dr. Berestnev performed an x-ray and noted that there were large bone formations around the fractured vertebrae. He noted:

The patient had an x-ray done here at the clinic which shows significant degenerative changes over his lumbar spine including the osteophytes at L1 through L4 area with osteophytes being large and being present around the compressed L2 vertebrae which makes me think that this is an old compression with some osteophyte formation around the compressed area.

It is obvious to me that the fracture had been there for years. Osteophytes take years to form and cannot develop in two weeks. As Dr. Berestnev noted, at the time of the alleged injury, the osteophytes encompassed the compressed vertebrae. On January 23, 2006, the claimant returned after further straining his back while doing at-home exercises. On March 3, 2006, Dr. Raben performed a Kyphoplasty surgical procedure on the claimant. Dr. Raben made no findings as to the cause of the fracture

except to note "the bony structures are extremely osteopenic."

Of all the physicians who saw the claimant, none made a correlation between the fracture and the alleged incident at work. Those that related the injury to a traumatic event suggested that it would have to be a fall on the head and shoulders or base of the spine. Not one of them stated that a blow to the back could cause the type of injury to the claimant. This corresponds to Dr. McAllister's opinion, wherein he stated:

The deformity of the body with its superior end plate being compressed is suggestive of a compressive injury from axial loading. This would not be compatible with a direct blow to the back. The degree of tracer accumulation on the bone scan is only minimal suggesting either very early injury (within the past 2-3 days) or a more chronic injury of months to years of age.

According to Dr. McAllister, the fracture would have had to occur three days before the bone scan on January 7th-9, or months to years earlier. It most certainly could not have occurred on December 29, 2005, the date of the alleged incident.

While medical evidence of causation is not necessary, even the claimant failed to associate the

injury to the incident. He failed to mention it to his co-worker, Mr. Hingle, in a timely fashion or report the alleged injury to his supervisor. He also failed to tell Dr. Garrett about it. In fact, when he finally did report the incident to Dr. Bicak, he had fresh swelling and tenderness, suggesting that the injury was fresh and, therefore, happened at home rather than at work.

The only evidence to support the claimant's contention that the fracture occurred on December 29th is his own testimony. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Arkansas Code Annotated section 11-9-704(b)(6)(A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the

burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c)(2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility as being constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335

(2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. In addition, the Commission is not required to believe the testimony of the claimant or

other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995)

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 275 (1994). Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). However, the findings of the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d (1987). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a

claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id. The claimant's testimony is insufficient and is not supported by medical evidence. Furthermore, it is contradicted by his own statements to his treating physicians.

Accordingly, I find that the claimant failed to prove that he sustained a compensable injury to his back on December 29, 2005. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner