

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602986

HENRY UTECHT, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED JULY 10, 2007

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

Claimant represented by HONORABLE TIMOTHY MYERS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

This claim comes before the Commission on the respondents' appeal of the January 25, 2007, decision finding that the claimant sustained a compensable injury to his thumb and awarding him related medical benefits. On appeal, the respondents contend that the claimant's injury was not shown by objective findings related to an accident that occurred in the course and scope of employment. After a de novo review of the record, we reject these assertions and find that the claimant has met his burden of proof in showing that he sustained a

compensable injury for which he is entitled to related medical treatment.

The claimant worked as a door greeter for the respondent-employer. The claimant testified that he was cleaning out a shopping cart when a "cart boy" did not see him and rammed 13 carts into his cart. The claimant said that his thumb was caught between the carts. A co-worker named Beth helped the claimant by pulling the carts apart so the claimant could get his thumb out. The claimant said that Beth instructed him to contact the Assistant Manager, Rocky. The claimant followed her advice and was sent to Personnel. The claimant described that his thumb was swelling and ice was used for over an hour. The claimant also completed paperwork regarding his injury and was eventually sent home for the day. The claimant asked for medical treatment before going home, but was told that doctors were not available over the weekend. He was also instructed that because his condition was not life threatening, he would have to wait for medical attention.

The claimant went home and his thumb swelling and pain became worse. He testified that his thumb also became red. The claimant's roommate called another

assistant manager with the respondent-employer. The claimant returned to the work site and he went to Personnel to see "Tom P". The claimant was again instructed that his condition was not life threatening and, therefore, he could not see a physician. The claimant then went to the emergency room for treatment.

The medical records from the emergency room indicate that the claimant reported injuring his right thumb after it being jammed between carts at Wal-Mart. The claimant was not noted to have bruising or swelling. His x-rays also returned as normal. However, he was noted to have limited range of motion. The physician prescribed a splint and arm sling and instructed the claimant to use ice on his hand and wrist every thirty minutes. He was also given an anti-inflammatory and instructed to elevate his right wrist. He was diagnosed with, "Injury to ulnar collateral ligament R thumb". Finally, the claimant was told to return to the ER "For continued or increased pain, swelling or redness of R wrist or Fever." The claimant said he was given a big glove that would fit over his entire hand with ice in it. The claimant was further instructed to seek a specialist's opinion on Monday.

On March 13, 2006, the claimant was treated by the employer's physician, Dr. Konstantin Berestnev. Dr. Berestnev noted that the claimant's pain was so extreme that he was crying. He further indicated, "He is refusing to let go of his right hand with his left hand in order for me to perform the exam. This limited examination reveals no evidence of bruising, swelling, discoloration or anatomical deformities of the right hand compared to the left." The claimant was noted to have decreasing range of motion in the ulnar radial plane. Dr. Berestnev diagnosed the claimant with a right thumb contusion and right wrist strain. The claimant was given an injection of Nubain and Vistaril. He was also given a prescription of Napreelan and placed in a right thumb spica splint. The claimant was instructed to return in a week and instructed to avoid use of his right hand. The claimant testified that at the time of this visit his hand was red and that he was experiencing numbness from the tip of his thumb going towards his elbow.

The claimant returned to Dr. Berestnev on March 20, 2006, for treatment. The claimant was noted not to have swelling or bruising. Dr. Berestnev noted

the claimant had attempted to discontinue use of his sling, but that when he did, he developed significant pain in his thumb. Dr. Berestnev continued the claimant on anti-inflammatories and recommended physical therapy. The claimant was placed on continued restriction from using his right hand. The claimant testified that he asked to see a physical therapist closer to his home and that when he requested such, the respondents denied any further treatment. The claimant continued to work for the respondent-employer but complained of his injury. He also requested additional treatment, but the respondents never provided further treatment.

On April 4, 2006, the claimant called the VA clinic and reported he injured his thumb and wanted Dr. Pilcher's opinion. The claimant continued working, but sought treatment from the VA clinic. On April 24, 2006, the claimant reported an injury to his right thumb due to having his thumb caught between carts. The claimant was noted to have some swelling at the base of his thumb and to have minimal flexion at the DIP joint. He was also noted to be unable to substantially flex his thumb. The claimant's x-rays were returned as being negative

for a fracture but revealed mild soft tissue swelling at the medial aspect of the IP joint of the right thumb.

The claimant returned for treatment on April 26, 2006, and was not noted to have swelling or discoloration of the thumb. The claimant was diagnosed with a strain and exercises were discussed. The claimant was also told to elevate and use ice on his injury. The claimant's physician opined, "This type of injury, soft tissue/sprain, typically takes time to slowly resolve. If this level of pain continues, may need to be treated for RSD, but again would need more time to see if this does not resolve on its own." The claimant received ongoing conservative treatment, including injections to his thumb.

The claimant testified that he continued to work after the respondents cut off his treatment, despite his continued pain. He said that he continued to complain of pain and his need for treatment, to no avail. On May 20, 2006, the claimant requested a bathroom break on four separate occasions. No one came and the claimant "wet his pants" because he could not wait any longer for a worker to allow him to go to the bathroom. Frustrated that the employer would not

provide him with light duty or provide him with a break, the claimant quit.

On June 29, 2006, the claimant reported having a loss of sensation in his thumb. He was also noted to have difficulty with his pincer grip. The physician recommended an EMG and diagnosed the claimant with tenosynovitis. He was given a steroid shot and a splint to be worn during the day. The claimant's EMG returned as normal. The claimant was assessed with,

1. interdigital neuropathy right thumb
2. sprain IP joint right thumb
3. prominent ligamentous sprain metacarpal phalangeal joint right thumb
4. dequervan's tenosynovitis
5. absence of carpal tunnel syndrome, ulnar or radial neuropathy and no evidence of complex regional pain syndrome (RSD)

The note further provides, "The fact that his numbness had onset a week after his injury with intact but mildly slowed conduction suggests local edema/contusion as the etiology of his paresthesias." It was recommended that the claimant continue to receive conservative treatment.

At the time of the hearing, the claimant testified he had never suffered any prior injuries to his right hand or thumb. He further indicated that he

remains symptomatic. The claimant also testified that he has a hobby of woodworking, but that since the injury, he has been unable to participate in the activity.

The claimant contends that he sustained a compensable injury to his right thumb after it was smashed between carts. The claimant contends that his compensable injury is shown by swelling and redness and by the x-rays showing soft tissue swelling. The respondents, however, contend that the claimant's injury is not shown by objective findings or causally related to the cart incident. After a de novo review of the record, we find that the claimant has shown he sustained a compensable injury by a preponderance of the evidence.

The claimant has the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(I)(Repl. 2002). A "compensable injury" is one "arising out of and in the course of employment." Ark. Code Ann. § 11-9-102(4)(A)(i)(Repl. 2002). Ark. Code Ann. § 11-9-102(4)(D) provides, "[a] compensable injury must be established by medical evidence supported by "objective findings" as defined in subdivision (16) of this

section." "Objective findings" are "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16); Carman v. Haworth, Inc. 74 Ark. App. 55, 45 S.W.2d 408 (2001). In order to prove a compensable injury, the claimant must prove, among other things, a causal relationship between his employment and the injury. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). However, medical evidence is not required to prove that the cause of an injury was work-related. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). The requirement that a compensable injury be established by medical evidence supported by objective medical findings applies only to the existence and extent of the injury. Cross v. Magnolia Hosp. Reciprocal Group, 82 Ark. App. 406, 109 S.W.3d 1435 (2003); Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

After reviewing the evidence, we find that the claimant has met his burden of proof in showing a compensable injury. The parties have stipulated that the claimant was involved in an incident on March 11, 2006, where his thumb was caught in a shopping cart,

causing him to fall almost backwards with his thumb and hand still in the cart. There is no dispute that the claimant reported the injury. Likewise, there is no dispute that the claimant's hand was iced immediately thereafter or that he received and continued to request medical attention from that day forward. When considering the mechanics of the claimant's injury in conjunction with his complaints and the diagnosis of a strain as later shown by the objective findings of swelling of the soft tissue of the thumb, we find that the claimant's injury is consistent with the mechanics of the claimant's cart accident. Likewise, when the claimant returned for treatment in April, he was noted to have swelling and edema as shown by the x-ray.

The respondents assert that because the medical records do not show objective findings until April, none existed and the claimant cannot meet his burden of proof in showing an injury that is causally related to his accident. However, we find this argument to be unconvincing. The claimant credibly testified that no accident had occurred prior to going to the VA and no evidence was given to refute that testimony. The claimant also credibly testified that his thumb became

red and swollen after the accident. He further provided unrefuted testimony that his hand was iced for over an hour on one occasion before going to the emergency room. Certainly there would be no need to put ice on the claimant's hand unless it was swollen. While no swelling, bruising, or discoloration was noted at the emergency room, the claimant was admittedly diagnosed with a thumb injury and prescribed medication for inflammation, a splint, and told to use ice. In our opinion, these recommendations would not have been given unless the claimant had an objective injury. We also note the claimant was explicitly noted to have a lack of range of motion and told to go to a specialist. Accordingly, it is apparent that the emergency room believed the claimant had sustained a legitimate injury.

We are further unconvinced by the respondents' argument that Dr. Berestnev did not document objective signs of an injury. By the time the claimant went to Dr. Berestnev, he was already taking medication for inflammation and taking steps that would reduce the outward signs of injury. Additionally, on the first visit, Dr. Berestnev indicated that he was unable to conduct a thorough investigation of the claimant's

injury due to the severity of his pain. Notably, Dr. Berestnev did not indicate the claimant's behavior was inappropriate. Instead, it is apparent that he believed the claimant had an injury, as evidenced by his diagnosis of a strain, his prescription of medication for inflammation and for a splint, and his directions for the claimant to use ice on his hand. As with the emergency room, we are simply unconvinced that Dr. Berestnev would have prescribed such treatment unless the claimant had an injury. Likewise, Dr. Berestnev prescribed physical therapy for the claimant, which gives further corroboration to the legitimacy of the claimant's injury.

However, even if objective findings were not noted or present in the aforementioned visits, it is evident that the doctor's notes from the VA show the claimant sustained a compensable injury. The claimant contacted the VA shortly after being cut off from treatment from the respondents and reported that he had been in a work injury and needed a second opinion. The claimant was treated at the VA shortly thereafter and reported that he had suffered an injury while working for the respondent. At that time, he was noted to have

swelling, both by observation of medical staff and by x-rays. These findings were entirely consistent with all the past diagnoses. Furthermore, since the claimant sought treatment from the VA almost immediately after being cut off by the respondents, it is apparent that his need for treatment was directly related to the work-related accident. Finally, we believe that it is also noteworthy that when he was treated at the VA, the claimant continually reported the reason for his injury was due to the cart incident. As the medical reports from the VA are consistent with those completed at the emergency room and Dr. Berestnev, and mirror the claimant's testimony, we find that the claimant's credibility regarding the reason for his injury is greatly bolstered.

In our opinion, the record simply shows that there is no other explanation for the claimant's injury other than his thumb being smashed in the cart. The respondents attempt to assert that the claimant's injury was somehow related to his habit of woodworking. There is no convincing evidence to support this finding. In fact, the medical evidence shows that the claimant has had little use of his right hand since the time of his

injury. The claimant testified that he had not engaged in woodworking after his injury. There is no evidence to the contrary nor is there any indication that the claimant somehow lacks credibility. Rather, the evidence shows that the claimant was in an accident at work and that, since that time, he has continually sought medical treatment which is attributable to his work accident. Furthermore, to assert that the claimant somehow injured himself in those activities is simply impermissible 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 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Rather, the evidence shows that the claimant's thumb was smashed in a cart and that he injured his thumb. From the time of the accident forward, the claimant provided an accurate, consistent accounting of his symptoms. When seeing the doctor at the VA, the claimant's x-ray revealed soft tissue swelling, which was consistent with the symptoms the claimant originally

presented with and was consistent with the diagnosis made at the emergency room and the diagnosis made by the respondents' own physician. Therefore, the claimant has met his burden of proof in showing that he sustained a compensable injury.

We also find that the claimant has met his burden of proof in showing he is entitled to related medical benefits. Therefore, we affirm the Administrative Law Judge's decision to award medical benefits.

Arkansas Workers' Compensation law provides an employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant bears the burden of proving that she is entitled to medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In this instance, it appears that the respondents do not dispute that if the claimant's injury

is found to be compensable, he is entitled to related medical benefits. Furthermore, the record shows that all the treatment the claimant received was directly related to his compensable injury. It is also apparent that the treatment received by the claimant was both reasonable and necessary in treating the claimant's compensable injury.

Accordingly, we affirm the decision of the Administrative Law Judge.

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. §11-8-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (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.

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OLAN W. REEVES, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury to his right hand and thumb on March 11, 2006. Based upon my de novo review of the entire record, I find that the claimant has failed to establish that he sustained a compensable injury that is supported with objective medical findings. Therefore, I find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed.

It is undisputed that the claimant was involved in an incident at work on March 11, 2006, when his right hand became entangled in a shopping cart as he

was trying to remove debris from inside a cart when a co-worker pushed additional carts into the one the claimant was working with. The claimant immediately reported this incident and completed the necessary paperwork for a work related injury. According to the claimant, he remained in the back office and kept ice on his hand until he was allowed to go home early. As the incident occurred over the weekend, the respondents medical care provider was not open for business. The claimant was advised that since his "injury" was not life threatening he would be unable to see a physician until Monday.

The claimant testified that after he got home, he felt that his pain was too great so he sought medical treatment at the emergency room of Northwest Medical Center of Benton County. Medical records from this emergency room visit fail to reveal the presence of any objective medical evidence of an injury. The claimant presented with complaints of pain in his right thumb from having the thumb "jammed between two carts." A secondary assessment made by the nurse attending the claimant notes "Pt ĉ pain to ® thumb limited ROM 2° pain

o deformity noted ...” Likewise the physical examination notes from this emergency room visit clearly reveal that the claimant underwent a thorough examination of the right hand during which no objective findings were made. Specifically, no swelling or ecchymosis, no deformity and no nail injury were detected. Although the claimant complained of pain, no bruising, swelling, tingling, numbness, or nerve damage was noted. Moreover, x-rays of the claimant’s right hand did not reveal any “evidence of fracture, dislocation or other evidence of an acute traumatic injury.” Likewise, x-rays of the claimant’s right wrist found “no evidence of fracture, dislocation or other evidence of an acute traumatic injury. Incidental note is made of a small cyst in the trapezium.” The claimant was provided with pain medication, a splint for his thumb, an arm sling, and was released from the emergency room with instructions to ice his hand and wrist and to return to the emergency room should he experience any increase in pain or have swelling redness or fever.

When the claimant returned to work on Monday, March 13, 2006, he reported immediately to the assistant

manager Tom P. and was instructed to take a drug test and seek medical treatment from the company physician. Upon reporting to the Occupational Health Clinic, respondent's medical care provider, the claimant complained of pain in his right thumb from an injury sustained on March 11, 2006. Dr. Konstantin Berestnev reported:

The patient appears to be in a lot of pain during the physical examination today. The patient is holding his right hand with the left hand. The patient is crying due to the pain. The patient states that he can't take this pain any longer. He states that the Oxycodone does not help his pain. He is refusing to let go of his right hand with his left hand in order for me to perform the exam. This limited examination reveals no evidence of bruising, swelling, discoloration, or anatomical deformities of the right hand compared to the left hand. The patient has pain on even light touch of his right hand. The patient also has pain in the right radial aspect of the wrist. The patient has no evidence of compartment syndrome. Good distal capillary refill and peripheral pulsation. The patient has full range of motion on extension and complete flexion in the wrist. The patient has decreased range of motion in the ulnar/radial plane, and most of the pain is along the right extensor pollicis tendon.

The x-ray of the right wrist with navicular view and x-ray of the right thumb reveal no fractures of(sic) dislocations.

Dr. Berestnev diagnosed the claimant with right thumb contusion and right wrist strain, injected Nubain and Vistaril into the thumb, prescribed Naprelen and restricted the claimant from using his right hand. The claimant returned to the Occupational Health Clinic for a follow-up examination by Dr. Berestnev on March 20, 2006. The claimant continued to complain of pain in his right thumb. On physical examination, Dr. Berestnev again noted the absence of any evidence of bruising, swelling, discoloration or anatomical deformities of the right thumb. Aside from pain, the claimant's examination was negative. Dr. Berestnev again prescribed anti-inflammatory and pain medications and advised the claimant to try to discontinue use of the arm sling and attempt to restore range of motion in the right hand through physical therapy

The claimant did not seek any additional medical treatment until April 24, 2006, when he was seen at the Veterans Administration. In the history provided

of his present illness, the claimant advised that he injured his thumb when 13 carts hit him so that his thumb was hung in the cart, and he has had pain and swelling at the base of his thumb ever since. Upon examination it was noted:

His thumb right now is nonfunctional because of pain. He can minimally flex at the DIP joint. He has pain and discomfort over the extensor. Sensation is normal. He has good radial pulse. Good sensation in his hand. Wrist is fine. Elbow and shoulder are normal. Supination and pronation are normal. There is minimal swelling at the base of his thumb now.

Likewise, an x-ray performed on April 24, 2006, revealed "mild soft tissue swelling of the IP joint of the right thumb."

In order for the claimant to establish the compensability of his claim he must establish the existence of his injury with objective medical findings. The claimant was involved in an incident at work on March 11, 2006, wherein his right hand and thumb were caught in a shopping cart as it was being pushed or hit by a co-worker pushing a long line of shopping carts.

After this incident the claimant sought medical treatment from the Northwest Medical Center of Benton county. The claimant underwent a thorough examination and x-rays were taken of the claimants right hand and wrist. No objective medical findings were observed at that time. Likewise when the claimant was examined at the Arkansas Occupational Health Clinic on March 13, 2006, and March 20, 2006, Dr. Berestnev specifically noted that the claimant had no findings of bruising, swelling, discoloration, or anatomical deformities. Moreover, x-rays performed at the Occupational Health Clinic did not reveal any objective findings of injury. It was not until April 24, 2006, that the first sign of any objective medical findings were ever noted in the claimant's medical records. Anyone who has ever sustained a strain or a sprain is well aware that swelling and bruising are much more likely to occur within the first few hours and days after an injury than they are six weeks post injury. The claimant did not present with any objective medical findings to support an injury on or about March 11, 2006. Admittedly, the claimant was involved in an incident at work that

resulted in pain to his right hand, but this incident did not produce any objective medical evidence of an injury at that time. Nor did this incident result in any objective medical findings when the claimant was seen by Dr. Berestnev on March 13, and March 20. No such findings were ever noted until more than six weeks after the incident occurred. Given the claimant's admitted hobby of woodworking in which he spends over 40 hours a week, I cannot find that the claimant has proven by a preponderance of the evidence that the objective medical finding of minimal swelling detected six weeks after his work related incident is, in fact, related to the work related incident. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. As such, I would reverse the decision of the Administrative Law Judge.

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

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KAREN H. MCKINNEY, Commissioner