

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508006

EMMA WILLIAMS, EMPLOYEE	CLAIMANT
SANYO MANUFACTURING INC., EMPLOYER	RESPONDENT
MITSUI SUMITOMO INS. GROUP, CARRIER	RESPONDENT

OPINION FILED NOVEMBER 27, 2007

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

Claimant is not represented but appears *pro se*.

Respondent represented by HONORABLE SUSAN M. FOWLER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision of the Administrative Law Judge filed on February 14, 2007, finding that the claimant sustained a compensable injury on February 16, 2005, for which she is entitled to reasonable medical expenses and temporary total disability benefits from April 18, 2005, and continuing through a date yet to be determined. Based upon our de novo review of the entire record and without giving the benefit of the doubt to either party, we find that the claimant has failed to meet her burden of proof. Therefore, we find that the decision of the

Administrative Law Judge should be and hereby is reversed and this claim for benefits is hereby denied and dismissed.

The claimant contends that she sustained an injury on February 16, 2005, when she lifted a wooden skid and set it on the floor; that she was able to return to work until April 19, 2005, when she suffered a relapse; and that she is entitled to benefits for this relapse. Conversely, respondents contend that the claimant did not sustain a compensable injury as that term is defined by the Workers' Compensation Act. Alternatively, respondents contend that if it is found that the claimant sustained a compensable injury on February 16, 2005, the claimant's current need for treatment is not causally related to that injury as the claimant suffered a new, non-work-related injury on April 19, 2005.

The claimant testified that she injured her back during her shift on February 16, 2005, when she picked up a skid near the end of her shift and set it on the floor. According to the claimant, she felt a burn in her back and made a comment to a co-worker that she told a co-worker that she had "burnt my back." As her back did not hurt, the

claimant testified that she did not think anything of it and did not report an injury at that time. Claimant further testified that she was fully aware of the company policy to report even minor injuries immediately to a supervisor. The claimant finished her shift and went home. Upon awakening that afternoon, the claimant testified that she could not get out of bed and had to work the stiffness out before she could move around and straighten up. Nevertheless, the claimant testified that she did not have intentions of reporting an injury when she went to work. It was not until after she tried to work, dropped a part, and the supervisor came over that she reported the injury. The claimant completed the appropriate paper work and was taken to the local hospital emergency room by the guard.

The claimant was examined by the emergency room physician, diagnosed with a strain, prescribed medication, and taken off work for a couple of days. Upon returning to work, the claimant was sent to the company physician, Dr. Banaji on February 22, 2005. Like the emergency room visit, Dr. Banaji examined the claimant, administered a drug test, diagnosed her with a lumbar sprain, prescribed

medication and then returned the claimant to work.

The claimant continued to work for respondents without requiring any additional medical treatment until April 19, 2005, when she allegedly reported on her own to the emergency room. Medical records from this alleged emergency room visit were not introduced into evidence. The next medical report in evidence was the May 6, 2005, chart of Dr. Dac Tat Pham when the claimant was seen for back pain. Hand written notes on this check-off chart of Dr. Pham's states, "less than before - walk in the office without assistance No expression of pain seen on face - Normal gait sit down + stand up without assistance." A second page of this chart note reveals a diagnosis of "back pain on medications and borderline hypertension." Dr. Pham continued the claimant on her medications, advised her to use a heating pad as needed, and released her to return to light duty work on May 9, 2005. Further notations dated May 9, 2005, and May 11, 2005, indicate that the claimant contacted Dr. Pham requesting, at first a release to return to work without restrictions, and then a release with restrictions. Dr. Pham's office advised the claimant at that

time to seek a second opinion. Another note written on this page reveals that the claimant contacted Dr. Pham's offices stating, "go groceries, load bag - hurt her back, so she wants to change her mind." Unfortunately, the date of this notation is obliterated by the clip used to hold the transcript together; nevertheless, the month and year are still legible, May, 2005. On May 9, 2005, Dr. Pham prepared a form entitled "Certification of Health Care Provider" stating that the claimant suffered from back pain which met the description of "serious health condition." Under the provision that requests the approximate date the condition commenced, Dr. Pham wrote, "4/19/05."

The record indicates that the claimant did not return to work nor did she seek any additional medical treatment until June 30, 2005 when she sought medical treatment from Dr. Michael Webber. Dr. Webber recorded a history of "pt hurt back April - 2005." Above the word April there appears to be a notation that states "18th." Dr. Webber also diagnosed the claimant with a low back strain, recommended physical therapy and requested an MRI. Dr. Webber completed a "Certification of Health Care

Provider" dated July 7, 2005, in which he indicated that the claimant hurt her back on April 18, 2005.

An MRI performed on June 30, 2005 revealed a "broad-based disc bulge...with right foraminal/extraforaminal disc protrusion....appears to displace the exiting nerve root posteriorly," at L4/5, as well as a very small central/left paracentral disc protrusion at L5/S1.

On July 22, 2005, the claimant presented to Dr. Carlos E. Rivera-Tavarez, an Orthopaedist with the Campbell Clinic in Memphis, Tennessee. She provided Dr. Rivera the following medical history:

Ms. Williams is a 43 year-old-female who comes today for initial evaluation with a chief complaint of pain in the back down to the right lower extremity with associated numbness and tingling. This has been going on since February 17th. She said that she was working at Sanyo. She was lifting something and she felt a pull on her back. She was able to continue but the next morning when she woke up she had severe pain. She needed some help to be able to just get out of bed and get dressed. She went to the Emergency Room. They sent her to a company doctor. They gave her some medications and sent her back to work. She was having on and off pain but then

on April 19th she had another injury, severe pain, unable to stand up straight for about a month. She needed help with daily activities. She has been out of work since then. She went to another doctor. Again, they just gave her medication. She decided to see Dr. Weber (sic). She has been seeing Dr. Weber (sic) now. He just started her on therapy this week and even though she feels pain she feels it is helping. Her pain is still mostly in the right lower extremity with tingling. The worst for her is sitting, lifting or bending.

Dr. Rivera did not have the claimant's MRI films for review. Based upon his examination of the claimant, however, Dr. Rivera diagnosed the claimant with "symptoms suggestive of right L5 radiculitis and possible disk hernation." Dr. Rivera advised the claimant that she should continue with physical therapy, but that if she did not improve, he would consider giving her an epidural steroid injection. Furthermore, Dr. Rivera advised the claimant that she could try to work with no lifting over 10 pounds and no repetitive twisting or bending.

In a letter dated September 26, 2005, counsel for respondent wrote to Dr. Mohamed Z. Knefati, the physician who examined the claimant in the emergency room on

February 17, 2005, to inquire whether he observed any objective medical findings or whether the medication he prescribed at that time was merely for "symptoms Claimant complained of by history." In a hand written response dated September 30, 2005, Dr. Knefati specifically wrote that he "did not observe any muscle spasm" during his examination of the claimant and he prescribed medication as "a treatment for patient complaint of the symptoms by history." Dr. Knefati further wrote that his above response was "within a reasonable degree of medical certainty."

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, medial 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).

Act 796 recognizes certain specified exceptions to the general limitation of compensable injuries to those injuries which are caused by specific incident and which are identifiable by time and place of occurrence. These exceptions are set forth in Ark. Code Ann. § 11-9-102(4)(A)(ii) through § 11-9-102(5)(A)(i)(v) (Repl. 2002). Claims for injuries caused by rapid repetitive motion, for back injuries, and for hearing loss are accepted in Ark. Code Ann. § 11-9-102(4)(A)(ii). Claims involving mental illness, heart, pulmonary, and cardiovascular conditions, and hernias are excepted from the definitiveness rule in Ark. Code Ann. § 11-9-102(4)(A)(iii) through § 11-9-102(4)(v), and the requirements necessary to establish the compensability of these conditions are set forth in other sections of the Arkansas Workers' Compensation law.

To satisfy the definitional requirements for injuries falling under Ark. Code Ann. § 11-9-102(4)(A)(ii), the employee still must satisfy all of the requirements discussed above, with the exception of the definitiveness requirement. Thus, the claimant still must prove by a preponderance of the evidence that she sustained internal or external damage to the body as the result of an injury that arose out of and in the course of employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(4)(A)(ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4)(E)(ii)(Repl. 2002).

The only evidence of a compensable injury on February 16, 2005, is the claimant's self-serving testimony. A claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d

842 (1985). Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). Claimant presented no witnesses to corroborate her testimony of an injury although she testified that she immediately told a co-worker about it. When questioned on cross-examination, the claimant was unable to positively state that this co-worker actually witnessed the alleged injury. Moreover, the claimant testified that she was aware of the company policy that all injuries, no matter how minor, must be immediately reported, yet she did not report an injury on February 16th. In fact, the claimant did not even intend to report an injury when she returned to work on February 17th, and more than likely would not have reported an injury if she had not been observed by a supervisor dropping an item while on the line.

The claimant has not presented any objective medical evidence of an injury that arose out of and in the course of her employment on February 16, 2005. When the claimant was examined by Dr. Knefati in the emergency room, he did not detect the presence of any objective medical findings. As indicated in his September 30, 2005, response to respondent's inquiry, Dr. Knefati did not observe any

muscle spasm during his examination of the claimant.

Claimant's history of complaint specifically reveals that the claimant did not have any radiating pain at that time. Notations under the physical exam portion of the emergency room medical record states; "Tenderness Lt Mid lumbar spine [illegible] on palpation SLR ⊕ lt side Nerve intact."

Dr. Knefati did not record the presence of any objective medical findings and diagnosed the claimant with back pain.

Although the claimant complained of tenderness during her examination, it has previously been determined that

tenderness is not an objective medical finding as it can come under the voluntary control of the claimant. See

Kimbrell v. Ark. Dept. of Health, 66 Ark. App. 245, 989

S.W.2d 579 (1999). While a prescription for muscle relaxer

as needed for muscle spasms, has been found to constitute

evidence of objective medical findings of muscle spasms, the

record in the present case clearly reveals that muscle

spasms were not observed during any of the claimant's

physical examinations, and that medication for such was only

prescribed based upon the claimant's complaints and medical

history. See, Fred's Inc. v. Jefferson, 361 Ark. 258, 206

S.W.3d 238 (2005); Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000).

Accordingly, based upon the medical records from claimant's initial treatment February 16, 2005, there are no objective medical findings supportive of a finding of compensability. Moreover, the claimant was able to return to work after the February 16th incident and continuing working until she supposedly sought medical treatment on or about April 19, 2005. Interestingly, the claimant testified that she sought medical treatment on April 19th, due to a flare up from her February 16th work-related incident; however, she did not introduce the emergency room records from the April 19th visit. Moreover, all medical records subsequent to April 19th, refer to April 18th or 19th as the date of onset, or the date of injury. It was not until after the claimant had retained counsel for her workers' compensation claim that the medical records indicate that the claimant had been having problems off and on since February 17th. However, even Dr. Rivera's initial medical record wherein he recorded a history of "off and on" pain since February 17th, also refers to a new injury in April of 2005. Although the

claimant provided self-serving testimony that she did not sustain a new injury after February 2005, the medical records present a different story. The claimant provided, not one, but three different physicians with a history of an injury on or about April 18th or 19th. As there is no evidence that these physicians received copies of each others medical records, the only plausible explanation for three separate physicians to record a history of an injury on or about April 18th or 19th is that the claimant provided them with a history of an injury on that date. While the respondents may have been able to prove the existence of a new injury had they obtained and introduced a copy of the claimant's April 19th emergency room record; it is the claimant who carries the burden of proof that her the objective medical findings detected three and a half months after her alleged injury and after she advised three separate physicians that she had a new injury are causally related to her alleged work related incident. Since the claimant carries the burden of proof, it is reasonable to assume that the missing medical records reveal a new injury, as the failure to produce evidence that is available to a

party raises the presumption or inference that the evidence would not be favorable. See Ark. Hwy Commission v. Phillips, 252 Ark. 206, 478 S.W.2d 27 (1972); See also Dissent in Mavity v. Pulaski Co. Special School Dist., Full Commission Opinion filed April 17, 1997 (E500231).

In addition, medical bills for the alleged April emergency room visit, as well as all treatment sought after that date were not submitted to her employer as workers' compensation related. Rather, the claimant turned all this medical treatment into her health insurance carrier for payment. Ms. Kim Crump, the Human Resources Coordinator for respondent-employer, testified that had she known that the claimant's medical treatment in April of 2005 and thereafter was related to the February 2005 workers' compensation claim, she would not have allowed the claimant to submit and receive FMLA leave, but would have processed it under workers' compensation leave. Ms. Crump also testified that she advised the claimant that if her medical treatment was related to her February injury, that she would need to return to Dr. Benaji, the company physician. The claimant testified that she did not want to return to Dr. Benaji,

because she did not feel that he was concerned about her. Nevertheless, after being advised that if her need for medical treatment was related to the February injury, the claimant did not return to Dr. Benaji nor did she seek a change of physician, as was her right.

Accordingly, after we consider all the evidence of record, we find that the claimant has failed to prove that her need for medical treatment after April 18th or 19th, 2005, was in any way causally related to her incident in February of 2005. Furthermore, we find that the claimant has failed to prove by a preponderance of the evidence that the objective medical findings as revealed in the MRI performed June 30, 2005, are causally related to the incident in February. Despite the claimant's self-serving testimony to the contrary, the overwhelming weight of medical evidence reveals that the claimant consistently conveyed to her medical care providers that she sustained a new injury on or about April 19, 2005. Therefore, we find that the decision of the Administrative Law Judge must be and hereby is reversed and the this claim for benefits is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision finding the claimant did not suffer a compensable injury on February 16, 2005 and denying her temporary total benefits related to that injury. Based upon a de novo review of the record in its entirety, I find the claimant suffered a compensable work-related injury, supported by objective medical findings. Furthermore, I find that the claimant is entitled to temporary total disability benefits. As such, I must respectfully dissent.

_____The Majority finds that the claimant did not satisfy the statutory requirement of Ark. Code Ann. § 11-9-102. In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of

occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

First, the claimant proved by a preponderance of the evidence that she sustained an injury arising in and out of the course of employment and was caused by a specific incident identifiable by time and place of occurrence. The claimant testified that she sustained an injury to her back and right leg on February 16, 2005, while performing job

duties in her employment with respondent-employer. The claimant's shift commenced at 6:00 p.m and ended at 6:00 a.m. The claimant testified that she sustained her work-related injury at approximately 5:30 or 5:40 a.m. on February 16, 2005, just prior to the end of her shift, which was at 6:00 a.m.

The claimant testified that she pulled a skid down and set it in the floor to put parts on. The claimant testified that almost immediately, she felt a burning sensation in her back. The claimant testified that the girl working behind her, asked her what was wrong, and she said that she had burned her back. The claimant testified that her back was not hurting at that time, so she did not report the injury. Instead, the claimant testified that she went home and went to bed.

The claimant testified that when she woke up she could not get up out of bed and had to roll out of the bed. However, after moving around a bit, she was able to straighten up, so she felt that she would be okay. The claimant testified that she went to work, but that the first part that she picked up, she dropped. At that point, the

claimant reported her injury. It is therefore evident that the claimant sustained an injury to her back while in the course and scope of employment and was caused by a specific incident identifiable by time and place of occurrence.

Second, the injury caused internal harm to the body which required medical services. The claimant reported her injury to the nighttime supervisor, Carl Gilmer, who called Ms. Crump, the Human Resource Manager. Ms. Crump then sent the claimant to the ER at Forrest City with the Sanyo guard. In the Emergency Room, the claimant was provided a prescription for Relafen, a muscle relaxer, and Demerol by the emergency room physician, Dr. Knefati.

The claimant was returned to work with restrictions and was able to continue working, until April 19th, when she had a flare-up of the original injury. The claimant testified that she did not want to go back to the respondent's doctor, so she went to a doctor of her own choosing. The claimant first sought treatment from Dr. Dac Tat Pham who continued her on medication for her back and released her to light duty.

On June 30, 2005, the claimant was seen by Dr.

Michael Webber, who diagnosed the claimant as having a lumbar strain. Dr. Webber recommended physical therapy and requested an MRI.

An MRI was performed on June 30, 2005 and revealed:

L4-L5: Minimal posterior broad-based disc bulge is identified with right foraminal/extraforaminal disc protrusion. This appears to displace the existing nerve root posteriorly. The right neural foramen is narrowed. Bilateral facet arthropathy is noted. The left neural foramen is narrowed. Bilateral facet arthropathy is noted. The left neural foramen is not significantly compromised.

L5-S1: Minimal posterior broad-based disc bulge is identified. A very small central/left paracentral disc protrusion is identified, which has a very minimal affect upon the ventral thecal sac. No significant foraminal compromise is noted.

On July 22, 2005, the patient saw Dr. Rivera-Tavarez, an Orthopaedist, who noted that the claimant's symptoms were suggestive of right L5 radiculitis and possible disc herniation. Dr. Rivera-Tavarez also noted that the claimant should continue with physical therapy and could

return to light duty.

It is therefore evident that the claimant continued to have pain in her back after her initial injury, and she continued to receive medical treatment for her injury. Therefore, the injury caused internal harm to the body which required medical services

Third, the claimant provided medical evidence supported by objective findings. In the Emergency Room, the claimant was provided a prescription for Relafen, a muscle relaxer, and Demerol by the emergency room physician, Dr. Knefati. In fact, the Majority completely fails to consider the holdings of Fred's Inc., and Estridge, where medical notes of muscle spasms and prescriptions of muscle relaxers are held to be objective medical findings. See Estridge v. Waste Management, 343 Ark. 276, 33 S. W. 3d 167 (2000), and Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S. W. 3d 238 (2005). It is hard to believe that Dr. Knefati would have actually prescribed a muscle relaxer without any evidence of actual muscle spasms.

_____Furthermore, an MRI was performed, which revealed that the claimant suffered from a broad-based disc bulge a

L4-L5 and a minimal posterior broad-based disc bulge at L5-S1. The findings of an MRI are objective medical findings. As such, the claimant proved by a preponderance of the evidence that her injury is compensable due to the objective medical findings.

In conclusion, the claimant has proven by a preponderance of the evidence that she sustained a compensable work-related injury, supported by objective medical findings. She is therefore entitled to receive medical and temporary total disability benefits pursuant to her compensable injury.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner