

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608887

STEVEN BISBEE, EMPLOYEE	CLAIMANT
MEMPHIS SCALE WORKS, INC., EMPLOYER	RESPONDENT
HARLEYSVILLE MUTUAL INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 23, 2008

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

Claimant represented by the HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHEAL ALEXANDER, Attorney at Law, Little Rock, 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 4, 2008. 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. The employer-employee relationship existed at all relevant times.
3. The claimant's average weekly wage was \$628.88.

4. The claimant sustained a compensable neck injury on July 25, 2006.
5. All of the medical treatment documented in the October 9, 2007, hearing transcript beginning on August 1, 2006, was reasonably necessary for treatment of the claimant's compensable injury.
6. The claimant has established by a preponderance of the evidence that he is entitled to temporary total disability compensation from August 2, 2006, until October 16, 2006.
7. The respondents have controverted the claimant's compensable injury in its entirety; the claimant's attorney is therefore entitled to a controverted attorney's fee on the indemnity 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 4, 2008, 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 neck injury on July 25, 2006. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a service technician. His job duties required him to service and repair scales as well as test scales. His duties required him to travel from different locations throughout the State of Arkansas. Technicians were not generally assigned a particular vehicle, but up until the date of the alleged incident, the claimant had been driving a 1984 Volvo service truck more than any of the others. On July 25, 2006, the claimant and a co-worker, Gary Fason, traveled to Newark to inspect and service the scales at Townsend Foods. The claimant testified that on that particular morning the truck road extremely rough and that he began feeling pain in his collar bone, left shoulder and neck. The claimant continued to work and completed his job duties for the day. This included unloading weights from the

truck and maneuvering the weights on chains to hang the weights. The claimant continued to perform all of his job duties for the next three days as well. The claimant testified that he told his supervisor, Jessie Goforth, about his injury the next day and that he told Mr. Goforth that he would not drive the Volvo until repairs were made. However, he never told Mr. Goforth that he needed any time off or that he needed to see a doctor. As stated previously, the claimant continued to work the next three days. He loaded tool boxes weighing between 25 and 30 pounds, as well as, maneuvering 1000 pound of weight off of his truck.

The claimant testified that he had discomfort in his neck on Friday and Saturday nights. On Sunday he called Karen Coleman, the Human Resource Officer in Memphis, to report his injury to her.

The evidence demonstrates that the claimant had previously had a workers' compensation injury to his elbow while working for the respondent employer. When that incident happened, the claimant completed an accident report the next business day. However, after this alleged incident the claimant did not complete an accident report until six days after the alleged incident.

On the day of the alleged accident, the claimant conceded that he did not hit any potholes or anything and he did not have any kind of accident. He claimed he did not press the issue of filing an accident report because he was "pretty well afraid for my job." However, the claimant acknowledged that he returned to work after his elbow injury and had no problem telling his supervisor that he refused to drive the 1984 Volvo until it was repaired.

Mr. Fason testified that the claimant did complain of the truck bothering his neck on July 25, 2006. He also testified that the claimant complained about the ride in the 1984 Volvo bothering his neck "most of the time." He stated that claimant complained of pain in his shoulders and neck about 30 minutes into the trip and that he probably complained throughout the day but he could not remember.

Mr. Goforth testified that he had the claimant complete an accident report the next business day after Ms. Coleman informed him that the claimant was alleging an injury to his neck. He testified that he did not have the claimant complete an accident report on July 26, 2006, because the claimant failed to mention any injury. Mr. Goforth also testified that the claimant never

reported the 1984 Volvo's rough-riding seat on any of his pre-trip check lists.

The medical records demonstrate that the claimant went to see Dr. Stan Burns on August 1, 2006. Dr. Burns's medical reports indicate that the claimant had an injury to his neck and shoulder on July 25, 2006, as a result of the claimant hitting a bump. The claimant ultimately underwent surgery under the care of Dr. Greenberg. Dr. Greenberg opined that the claimant's anatomical findings were longstanding and degenerative. He also testified that there was nothing in his chart to indicate whether or not a traumatic event or some work incident caused the claimant's injury.

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 his/her claim is compensable, i.e., that his/her injury was the result of an accident that

arose in the course of his/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 his/her condition and his/her employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury. The evidence demonstrates that the claimant described pain in his neck over the course of at least one or two weeks prior to July 25, 2006, the date of the alleged injury. The claimant, although he felt pain in his neck on the morning of July 25, 2006, worked three full days as well as the remainder of the work day before the pain allegedly worsened on Friday and Saturday nights. The claimant acknowledged that he did not experience any accident or hit a pothole that caused his injury. Further, the claimant's own treating surgeon had no initial record of the claimant being injured as a result of any traumatic or work related incident. Although Dr. Burns's clinical note from August 1, 2006, indicates the claimant "suffered an injury to

his neck and left shoulder while driving a truck when he hit a bump," the claimant's own testimony directly contradicts that scenario. The claimant stated that he did not hit a bump or pothole or anything. Further, the claimant's own description of the cause of the accident stated "driving 84 Volvo truck."

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable neck injury on July 25, 2006. When I consider the fact that the claimant continuously complained about the rough ride in the 1984 Volvo, he failed to mention an injury to his supervisor the next day when he said he would not drive the Volvo until the seat was fixed, the fact that he did not complain about an injury to Dr. Greenberg in addition to Dr. Greenberg's observation that if the claimant's nerve root compression had existed prior to the alleged incident date the claimant would have had symptoms and would have known about it, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 25, 2006. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner