

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F601782

ALECIA CLARK, EMPLOYEE	CLAIMANT
SAN ANTONIO SHOES, INC., EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INSURANCE, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 15, 2008

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

Claimant is not represented by counsel, but appears *pro se*.

Respondent represented by HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 25, 2007, and amend decision filed July 2, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on February 13, 2006 and at all other relevant times.

3. Respondent's objection to claimant's non-medical evidence forwarded to the Commission on July 22, 2006, accompanying her medical evidence marked as Exhibit 1 is sustained.

4. Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable injury while performing employment services.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 of fact

made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury while performing employment services. After a de novo review of the record, I find that the

claimant has proved by a preponderance of the evidence that she sustained a compensable gradual onset back injury and is entitled to reasonably necessary medical treatment for her compensable injury. Therefore, I must respectfully dissent.

Arkansas Code Ann. §11-9-102 (4) (A) states that an injury must be "accidental" i.e., caused by a specific incident and is identifiable by time and place of occurrence to be compensable. However, Arkansas Code Ann. §11-9-102(4) (A) (ii) (b) states that back injuries not caused by a specific incident and not identifiable by time and place of occurrence, are specifically included in the definition of a compensable injury. Arkansas Code Ann. §11-9-102(4) (E) (ii) states that the burden of proof for a "gradual onset" back injury is by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment.

The majority, by affirming and adopting the Administrative Law Judge, failed to make any findings regarding the claimant's burden of proving a gradual onset

back injury, instead citing only the standard for a specific incident injury despite noting that the claimant "admits that there was no specific incident or incident of trauma." Indeed, the only specific finding made by the majority, again, by affirming and adopting the Administrative Law Judge, is that the claimant is not a credible witness. However, I find that for the majority to determine that the claimant is not credible because she could not identify a specific incident while acknowledging that the claimant admits that she did not sustain a specific incident injury, makes absolutely no sense. The correct analysis is not whether or not the claimant can prove the occurrence of a specific incident, but whether the claimant can prove by a preponderance of the evidence that her back injury (1) is an injury arising in and out of the course of employment; (2) the injury caused internal or external physical harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) the back injury is the major cause of the disability or

need for treatment. Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W. 3d 540 (2001).

I find that the claimant has clearly proved by a preponderance of the evidence that she sustained compensable gradual onset lumbar strain and sacroiliac strain injuries at work. The evidence of record clearly corroborates the claimant's testimony as to the job duties which caused her injuries. 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). While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal relationship between the injury and the job. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W. 2d 422 (1999). "Major cause" means more than fifty (50%) of the cause. Ark. Code Ann. §11-9-102(14) (A). The claimant testified that she has worked for the respondent for thirteen years. The claimant testified as to the rapid and

repetitive twisting nature of her job duties. The respondent video and the testimony of the respondent witnesses corroborates the claimant's testimony. While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro-transportation, ___ Ark. App. ___, ___ S.W.2d ___, (2007).

As for "major cause" when faced with the testimony as to the claimant's job duties, it would be sheer conjecture and speculation to find that anything else was the cause of her injuries, particularly as the respondent has introduced no credible evidence controverting the claimant's testimony. 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 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Furthermore, the medical record clearly shows objective findings of an injury requiring medical treatment. In order for an injury to be compensable under Arkansas Workers' Compensation law, the claimant must show an injury causing internal or external physical harm to the body which required medical services or resulted in disability or death Ark. Code Ann. §11-9-102(4) (A) (i). The claimant must show medical evidence of an injury, supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). Here, on February 13, 2006, Dr. Meador diagnosed the claimant as having a lumbar sprain and prescribed two weeks of physical therapy. On February 24, 2006, Dr. Hilman prescribed Flexeril for muscle spasm. Furthermore, as noted by the Administrative Law Judge, the claimant's physical therapist, Debbie Davis, testified that she observed muscle spasm. The claimant treated with Dr. Hartman until April 14, 2006, at which time he noted, "Back pain resolved." However, the

claimant returned to Dr. Hilman on April 19, 2006, after returning to work full duty, with a recurrence of the back pain. The claimant saw Dr. William Blankenship on May 22, 2006, who referred the claimant for an MRI, the results of which is not in the evidence of record and apparently was never performed.

However, on June 20, 2006, Dr. Tad Ghormley wrote:

HISTORY OF PRESENT ILLNESS: The patient is a 32-year-old white female who has been having pain in her back since February of this year. She thinks it may be caused by her job at SAS shoes where she is constantly bending to the right-hand side. She has changed jobs recently and it has made it feel better. She states that she has mostly right lower back pain that does radiate into her posterior thigh. It is aching in nature. Most of her pain is in the back. She has had some buttocks pain and numbness in the great toe at times. She denies history of trauma...She has had physical therapy...

IMPRESSION: Her main source of pain is her right facet syndrome from her activity at work. Secondary causes of pain are her right hip bursitis and right sacroilitis.

Dr. Ghormley treated the claimant with exercises, and recommended that the claimant take Relafen, glucosamine

and chondroitin sulfate. Dr. Ghormley also recommended that the claimant change her job. On July 3, 2006, the claimant informed Dr. Hilman that her back is better and that the respondent has offered her a different job and that she is returning back to work.

I would also note that the claimant has merely requested the payment of the reasonably necessary medical treatment she has received for her compensable lumbar/sacroiliac sprain/strain injury. Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). The claimant does not have to

provide objective medical evidence of her continued need for treatment. Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W. 3d 211 (2000), citing Chamber Door Indus. Inc. v. Graham, 59 Ark. App. 224, 956 S.W. 2d 196 (1997). Here, the claimant has clearly proved not only the compensability of her injury, but also that the treatments she has received from and at the direction of Drs. Meador, Hiland, and Ghormley up until July 3, 2006, the last medical record in evidence, have been reasonable and necessary.

In conclusion, I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable gradual onset back injury in the form of a lumbar/sacroiliac sprain/strain as diagnosed by Drs. Meador, Hiland and Ghormley and is entitled to reasonably necessary medical treatment for her compensable injury.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner