

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F511157 & F611155

MICHAEL CLEM, EMPLOYEE	CLAIMANT
CLOYES GEAR, EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, CARRIER	RESPONDENT

OPINION FILED JULY 31, 2008

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

Claimant represented by HONORABLE MIKE HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondent represented by HONORABLE BETTY J. HARDY, 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 4, 2007.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on February 14, 2007, and contained in a pre-hearing order filed February 16, 2007, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$424.00 which would entitle him to compensation at the rate of \$283.00 for total disability benefits and \$212.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his left wrist while employed by the respondent.

4. Claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment with respect to his compensable right wrist injury.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his right wrist injury.

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

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

In affirming and adopting the findings of fact and conclusions of law entered by the Administrative Law Judge, we note that the opinion did not cite any authority for his statement, "Although Dr. Wolfe has stated that various findings constitute objective findings, those findings are not recognized by the Commission and the courts of this state as objective findings for the purpose of workers' compensation." While this statement is now black letter law and may bear no citation, we note that the Court of Appeals was faced with the issue of the objectivity and reliability of the same set of tests conducted on the claimant in the present claim when it first addressed these specific tests in Duke v. Regis Hairstylists, 55 Ark. App. 327, 935 S.W.2d 600 (1996). In that case, extensive testimony was offered describing the tests conducted. Specifically, the court noted:

Dr. Earl Peeples, an orthopedic surgeon specializing in hand surgery, testified concerning the manner in which he

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arrived at his diagnosis. As abstracted, he stated:

I conducted a physical examination on April 4 and the conclusions are recorded in the third paragraph of my letter: "On examination the patient is in no acute distress. The examination of the hands reveal strongly positive left and mildly positive right Tinel's sign. She has a positive compression test on the left. Hyperextension and hyperflexion tests also tend to cause discomfort and numbness of the median nerve distribution. This patient has classic findings of carpal tunnel syndrome."

The first test conducted was a Tinel's test... . The Tinel's test is an indicator of irritated or damaged nerve fibers. When you tap on the area, the patient generally describes a tingling or electrical sensation out to where the nerve goes... . You tap along the nerve path and wait for the patient to respond. I also tap in some areas that are not in the nerve pathway so that if the patient is not being totally straightforward with me, I give them an opportunity to report areas that would be misleading. So I don't tell the patient what to expect. I tap in a variety of areas and ask them if they feel any particular sensation. If that correlates with the path of the median nerve, then that's considered a positive Tinel's test.

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I also did a positive compression test. The compression test is done by placing two fingers over the median nerve just above or at the edge of the ligament and holding additional pressure. In normal nerve, no numbness will be caused. In a nerve that is under pressure and has carpal tunnel syndrome, usually within twenty seconds it will become positive and there will be tingling in the median nerve distribution. In her case the test was positive. I also did hyperextension and hyperflexion tests. These tests are done for specific sensations and usually describing the light tingling.

I did not need to perform EMG or nerve conduction studies on Ms. Duke to confirm the diagnosis of carpal tunnel syndrome. I was able to make the diagnosis based on her physical exam. I did not feel the tests were needed.

After analyzing this testimony, and reviewing Dr. Peeples's deposition testimony in which he explained the reliability of these types of tests, the Court of Appeals held:

The foregoing testimony is typical of the extensive evidence adduced at the hearing to show that the tests performed by Dr. Peeples were reliable and accurate. Nevertheless, we are constrained to reject appellant's argument. In passing Act 796 of 1993,

which made far-reaching changes in Arkansas's workers' compensation law, the legislature made it plain that the provisions of that law were to be strictly and literally construed by the Commission and the courts. See Ark. Code Ann. § 11-9-704(c)(3) (Repl. 1996). The General Assembly further declared:

When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so. It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General

Assembly and should not be done by administrative law judges, the Workers' Compensation Commission, or the courts.

Ark. Code Ann. § 11-9-1001 (Repl. 1996).

Construing the Act strictly, as we must, it is apparent that the tests performed by Dr. Peeples did not produce objective findings within the meaning of § 11-9-102(16)(A)(i). That subsection excludes from the definition of "objective" all findings save those that "cannot come under the voluntary control of the patient." (Emphasis added). Despite the evidence tending to show the accuracy and reliability of the tests performed on appellant, it is nevertheless clear that they depended on voluntary responses and that the findings obtained from them could be controlled by a knowledgeable patient. We are consequently obliged to hold that they did not constitute objective findings as defined in Ark. Code Ann. § 11-9-102(16).

Since the Court of Appeals holding in Duke v. Regis Hairstylists, supra., the Commission and the courts of this state have consistently held that "Test results that are based upon the patient's description of the sensations

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produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition, do not constitute objective findings."

Liaromatis v. Baxter County Regional Hospital, 95 Ark. App. 296, 236 S.W.3d 524 (2006); See also, McKee v. American Greeting Corporation, Full Commission Opinion filed September 23, 1997, CLAIM NO. E606128; Jackson v. Department of Human Services, September 5, 1997, CLAIM NO. E515842; Fiedorowicz v. First Financial Bank, March 24, 1997, 1997, CLAIM NO. E518256; Cambron v. Aid Temporary Services, Inc., Full Commission Opinion filed February 13, 1998, CLAIM NO. E611161; Coffman v. Jones Timber Company, Full Commission Opinion filed May 13, 1999, CLAIM NO. E511952; Buckley v. Pactiv Corporation, Full Commission Opinion filed August 18, 2003, CLAIM NO. F106766; Walters v. US Timber, Full Commission Opinion filed September 16, 2004, CLAIM NO. F304712; Jones v. R C Landscaping, Full Commission Opinion filed May 14, 2007, CLAIM NO. F508814; Jordan v. Home Depot, Full Commission Opinion filed June 27, 2007, CLAIM NO.

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F504518; Keefer v. Emergency Ambulance Serv., Full
Commission Opinion filed May 7, 2007, CLAIM NO. F408077.

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

While I must regrettably agree with the majority's
finding that under the holding in Duke, the claimant has not
met his burden of providing objective findings, I must
dissent from the majority's opinion as I find that under
strict construction, which is required by Act 796 of 1993,

and regardless of the holding in Duke, the claimant has produced objective findings of carpal tunnel syndrome and DeQuervain's tendinitis.

The holding in Duke, which has been repeatedly cited by both the Full Commission and the Arkansas Court of Appeals, is stated by the majority, as:

[T]est 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, supra.

I find that the majority in the instant claim, constrained to follow the precedent set in Duke, has impermissibly expanded the definition of objective findings contained in Ark. Code Ann. § 11-9-102(16)(A)(i). The doctrine of strict construction directs us to use the plain meaning of the statutory language. Wallace v. West Fraser South, Inc. 365 Ark. 68, 225 S.W.3d 361 (2006). Strict construction means narrow construction and requires that nothing be taken as intended that is not clearly expressed.

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Elam v. Hartford Fire Ins. Co., 344 Ark. 555, 568, 42 S.W.3d 443, 451 (2001).

Ark. Code Ann. § 11-9-102(4) (D) states: A compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section. Ark. Code Ann. § 11-9-102(16) (A) (i) states: Objective findings are those findings which cannot come within the voluntary control of the patient.

First, as noted by the concurring opinion in Wentz v. Service Master, 75 Ark. App. 296, 57 S.W.3d 753 (2001), the holding in Duke contains a fundamental mistake. Ark. Code Ann. § 11-9-102(16) (A) (i) contains no reference to "test results". "Test results" are not findings. The statutory requirement is that the "findings" are not within the voluntary control of the patient, not that the "test results" are not within the voluntary control of the patient. "Finding" is defined in Webster's Third New International Dictionary, Unabridged (2002) as "the result

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or conclusion of any inquiry or investigation-usually used in plural."

As pertaining to the claimant in Wentz, supra, the concurring opinion stated:

Appellant's responses to neuropsychological testing are not findings, collectively or specifically. Instead, they are nothing other than indices from which the findings were made.

I find, as did the concurring opinion in Wentz, that "test results" are simply not, by definition, "findings" as required by Ark. Code Ann. § 11-9-102(16)(A)(i).

Second, again following Duke, the majority has misconstrued the meaning of "voluntary" and the meaning of "control". "Voluntary" is defined in Webster's Third New International Dictionary, Unabridged (2002) as "done by design or intention; not accidental." "Control" is defined in Webster's Third New International Dictionary, Unabridged (2002) as "to exercise restraining or directing influence" or "to have power over."

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As pertaining to the claimant in Wentz, the concurring opinion stated:

The findings rendered by the physicians who examined appellant were no more within her voluntary control than a factual finding by a trier of fact is within the voluntary control of a witness who reports his or her recollections.

I find, as did the concurring opinion in Wentz, that while a claimant may have voluntary control over test results, which, as discussed above is not the relevant inquiry under Ark. Code Ann. § 11-9-102(16)(A)(i), a claimant, cannot, by definition, have "voluntary control" over "findings."

Third, the majority, again following Duke, has misconstrued the definition of "patient." "Patient" is defined in Webster's Third New International Dictionary, Unabridged (2002) as "a sick individual esp. when awaiting or under the care of a physician or surgeon." However, as the Supreme Court of Arkansas has held that an objective finding is not synonymous with and need not be based on a

medical opinion. Continental Express v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). Therefore, it cannot be assumed, as was apparently done by the Court in Duke and the majority in the instant claim, that for the purposes of Ark. Code Ann. § 11-9-102(16)(A)(i) the claimant is a "patient" of a physician or surgeon. As such, I find that the Webster's Third New International Dictionary, Unabridged (2002) definition of "patient" as "one that is subjected to action or external force," as it does not refer to a doctor/patient relationship, is the most appropriate definition for the purposes of Ark. Code Ann. §11-9-102(16)(A)(i). I would note, however, that by either definition, a "patient" does not have "voluntary control" of "findings", which, I would also note, are not limited by Ark. Code Ann. §11-9-102(16)(A)(i) to "findings" made by a doctor. See, Continental Express v. Freeman, supra.

Fourth, regardless of whether or not "patient" is defined as "a sick individual esp. when awaiting or under the care of a physician or surgeon" or as "one that is subjected to action or external force" it is apparent from a

plain reading of Duke that the Court improperly added to Ark. Code Ann. § 11-9-102(16)(A)(i) a presumption that the claimant is "knowledgeable."

Dr. Peeple's testified in Duke that the Tinel's test, compression test, hyperextension text, and hyperflexion tests are objective tests because they have built in safeguards to disclose dishonest responses from the patient. Dr. Peeples illustrated his point by describing the Tinel's test, in which the doctor taps along the nerve root:

If the patient describes a tingling or electric sensation it is a positive indicator of irritated or damaged nerve fibers. Dr. Peeples said that, without telling the patient what response he expects, he also taps in some areas that are outside the nerve pathway to give the patient the opportunity to report sensations that would be misleading. Duke, (Mayfield, dissenting), supra.

Noting Dr. Peeples' testimony, the majority in Duke stated:

Despite the evidence tending to show the accuracy and reliability of the tests performed on appellant, it is nevertheless clear that they depended on

voluntary responses and that the findings obtained from them could be controlled by a **knowledgeable** patient. (Emphasis added). Duke, supra.

Addressing the majority's conclusion, the dissent in Duke stated: "To the contrary, I think it would take a highly trained, medically sophisticated patient to know the exact nerve path associated with carpal tunnel syndrome." Duke, (Mayfield, dissenting), supra. I find that Ark. Code Ann. § 11-9-102(16)(A)(i) does not contain any presumption of a "knowledgeable" patient. The "knowledgeable" patient presumption is solely a creation of Duke, and is in violation of the doctrine of strict construction. Particularly egregious is the fact that the "knowledgeable" patient presumption added to Ark. Code Ann. § 11-9-102(16)(A)(i) by the Court in Duke is apparently incapable of being rebutted. No evidence was presented in Duke, nor in the case at bar indicating that the claimant was capable of influencing the test results, nor any evidence introduced indicating that the claimant had indeed attempted to do so.

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Here, the claimant suffers from carpal tunnel syndrome and DeQuervain's tendinitis. The claimant's treating physician, Dr. Wolfe, wrote a letter, dated April 24, 2007, which outlines the issue before this Commission: whether or not the tests run by Dr. Wolfe, Tinel's and Finkelstein's can produce objective findings. Dr. Wolfe stated:

I received your recent letter relating to Michael Clem. You stated that you had a progress report from 10-31-2006 with nothing to address the issue of objective physical findings. My note at the bottom of the physical examination states that he has intact motor and sensory function with good pulses, full range of motion with good stability, good strength and good alignment. He had marked tenderness over the first extensor compartment with a positive Finkelstein's. These are tests that clearly indicate DeQuervain's tendinitis and a questionably positive Tinel's. This brings out the fact that the median nerve may show signs of compression consistent with carpal tunnel syndrome. This was all relating to the left wrist, and this is the side we were treating on that day. Subsequent note dated 04-03-2007 again shows the physical findings consistent with good stability, strength, alignment and range of motion of both wrists,

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again demonstrating positive Tinel's at both wrists. This would be consistent with carpal tunnel syndrome. He had tenderness over the first extensor compartment on the left with slightly less tenderness on the right, again having a positive Finkelstein's on the left. This again is indicative, by objective findings, of DeQuervain's tendinitis bilaterally, as well as bilateral carpal tunnel syndrome.

I find, based on Dr. Wolfe's medical records, that the claimant has produced objective findings of bilateral carpal tunnel syndrome as well and bilateral De Quervain's tendinitis. While the test results involved in the Tinel's and Finkelstein tests may be based on the claimant's subjective responses, Ark. Code Ann. § 11-9-102(16)(A)(i) does not address "test results", it addresses "findings" which, by the definition of "findings", "voluntary", "control" and "patient" are within the doctor's, not the claimant's control. I also find that Ark. Code Ann. § 11-9-102(16)(A)(i) does not contain a presumption that the claimant is a "knowledgeable" patient, a presumption which the majority, relying on Duke, has clearly applied. In the

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absence of any statutory presumption of a "knowledgeable" patient, and without any evidence of record indicating that the claimant was capable of influencing the test results, or, any evidence indicating that the claimant attempted to influence the test results, or, any evidence that the doctor's findings were based on improperly influenced test results, the majority's determination that the claimant did not produce "objective findings" of bilateral carpal tunnel syndrome and bilateral De Quervain's tendinitis is contrary not only to the preponderance of the evidence of record, but also contrary to strict construction of Ark. Code Ann. § 11-9-102(4)(D) and Ark. Code Ann. § 11-9-102(16)(A)(i).

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner