

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F613992

GLEND A FLYNN,
EMPLOYEE

CLAIMANT

SOUTHWEST CATERING COMPANY,
EMPLOYER

RESPONDENT

PHOENIX INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 15, 2008

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

Claimant represented by the HONORABLE SHANNON MUSE CARROLL,
Attorney at Law, Hot Springs, Arkansas.

Respondent represented by the HONORABLE PHILLIP CUFFMAN,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed January 14, 2008. The administrative law judge found that the claimant proved she sustained a neck and arm injury. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant did

not prove she sustained a compensable injury to her neck or arm.

I. HISTORY

The parties stipulated that Glenda Gail Flynn sustained a compensable foot sprain injury on December 16, 2006. Ms. Flynn testified:

Q. So tell me, on December 16th, 2006, what happened?

A. I was going through the kitchen, and they have rugs, or mats....There was one sort of diagonal like....my foot got right on the corner of it, and it just threw me off to the side. In falling, there was that formica counter there....I was trying to grab a hold of the counter to keep my head from hitting on it. That's all I can remember until I was just standing there....

Q. So let me be clear: Did you catch yourself on the counter?

A. Yes. I didn't hit my head or nothing or go on down, because I caught myself on that counter there.

Q. And the next thing you recall, what part of you was hurt?

A. Well, right then my foot was so bad....

Q. Did your neck and arms hurt at the same time, or when did you start discovering that that was causing you some pain?

A. That day they took me in, the foot was so bad that I didn't notice the arms all that bad. I mean I was just really bad on my foot....

The claimant testified that she did not return to work after December 16, 2006.

Dallas Pomeroy, PA-C, saw the claimant on December 18, 2006:

She presents to the Business Health Clinic Today for complaints of pain per her right ankle and foot after a work relate (sic) injury this past weekend. The patient states that on 12/16/2006 at approximately 10:25 p.m. the patient was walking in the kitchen and slipped on a mat and twisted her foot sideways. She had immediate pain and swelling per the foot and ankle....Today she is having a slight improvement but is still unable to walk completely due to the pain. The patient denies any pain per her knee or hip. She has noticed no bruising but has had some swelling....

Examination of the right foot, the patient has tenderness to palpation over the lateral portion of the foot, but no tenderness over the medial or lateral malleolus....There is no obvious ecchymosis....The rest of her exam is unremarkable.

Ms. Pomeroy's impression was "Right foot sprain....She will be able to return to work if they have seated work only." The claimant continued follow-up visits with Dallas Pomeroy at the health clinic and physical therapy was arranged. Dr. Michael K. Atta saw the claimant on January 17, 2007: "The patient returns for further evaluation and states that her right foot is slightly better....Examination of the patient's her foot (sic) reveals some ecchymosis

along the lateral aspect of the mid foot region." Dr. Atta assessed "Right foot sprain....The patient will be continued on another three sessions of physical therapy. In the meantime, she will be continued on her current work restrictions." Dr. Atta's assessment on January 25, 2007 was "Right foot sprain with obvious right foot drop....The patient will be continued on physical therapy for another week. However, I feel that a nerve conduction velocity test will be in order to further evaluate her current condition."

A physical therapist's note on January 29, 2007 appeared to indicate that the claimant was complaining of pain in her left arm and was unable to sleep on her left side.

Dr. R. Paul Tucker administered nerve conduction studies on February 6, 2007 and noted, "Overall these findings are consistent with a right peroneal nerve palsy with a delayed conduction there." Dr. Atta's impression on February 12, 2007 was "Right foot sprain with right perennial (sic) nerve palsy....In view of the patient's nerve conduction velocity findings I feel that neurological consult is necessary to further evaluate the probable cause

of the perennial nerve palsy to ascertain whether it is due or linked to her foot sprain in any way or not."

The claimant visited Dr. Tucker on April 2, 2007:

She has worked as a waitress in the past. She was walking where there were mats. Her feet became tangled and she tripped over the mats. She caught herself on her arms and did not fall to the ground. She seemed to injure her arms, and now she feels as if this burns in her arms between her shoulder and her elbow, more on the left side. This really hurts her. She has an area that is tender in the left arm, three fours (sic) of the way between her elbow and shoulder. When she fell, she had to scoot to the bathroom....

I had seen her for EMG and nerve conductions on 02/06/2007....The findings were consistent with a right peroneal nerve palsy, with a delayed conduction there....

More recently, she has noticed a small knot in the left arm....

Her extremities showed good pulses and no edema....

I checked her for range of motion of her neck and she had good full range of motion of her neck. In examining the arms for the area of the knot, I could feel an area of induration and tenderness, which I would say is a horizontal area and is in the location previously noted. This was about one to one and a half centimeters wide and with the long dimension horizontally, about three centimeters. I cannot feel this on the right side. It was somewhat tender. There was no redness of heat, etc....

IMPRESSION: The patient does have some findings....We do not know what the small lump in her arm is. There seems to be something there

when she caught herself, when she started to fall. She twisted her ankle. Twisting of the ankle usually does not cause ankle dorsiflexion weakness, as with a peroneal nerve palsy.

We need to obtain approval for the MRI of the cervical spine. I would like to extend this now to the lumbar spine as well. She has the small lump on her left arm. She also needs approval for the Zanaflex.

The claimant returned to Dr. Atta on May 24, 2007:

She states that her right ankle is feeling much better. She has developed strength in the ankle and is no longer walking with a stepish (sic) gait. She does not have any numbness or tingling in her right lower extremity.

However, the patient states that she is experiencing severe pain in the lateral aspects of her arms. On further discussion, the patient states that she has been experiencing pain in both arms every (sic) since a week after the injury and attributes this to possibly falling onto her elbows when she had the initial injury. She denies any current bruising, redness or swelling in her upper extremities. She does not have any numbness or tingling in her upper extremities....

Examination of both upper extremities does not show any redness, swelling or ecchymosis. Palpation reveals tenderness over the lateral aspects of both arms, but no swelling....Neurovascular examination of both upper extremities is normal.

Dr. Atta assessed "1. Resolving right foot sprain. 2. Bilateral arm pain" and recommended an MRI of the cervical spine.

Dr. Steven A. Kulik provided an Independent Medical Examination on May 30, 2007:

Ms. Flynn is a 63-year-old female who works for Southwest Catering Company and injured herself on December 16, 2006. She apparently was walking and slipped on a rug and twisted her right ankle and foot and heard a snap. She could not walk on it that evening or the next day....

Patient is improving and currently she has very little pain in her right foot. She does have a history significant for being referred to Dr. Tucker in Hot Springs where EMGs were done of her lower extremity. This showed a peroneal nerve weakness....

Her right foot and ankle were evaluated. Her ankle was stable on anterior stress and lateral tilt. There is absolutely no tenderness in her ankle. There is no significant tenderness of her foot except possibly the dorsolateral midfoot area. No swelling and no particular warmth. There is full motion....X-rays of her foot show no fractures.

Dr. Kulik assessed "1. Right foot sprain. 2. No evidence of fracture or chronic ligamentous instability. 3. Weakness in her peroneal nerve as evidenced by dorsiflexion. Weakness of about 4/5. According to patient this is improving." Dr. Kulik recommended continued physical therapy and stated that the claimant "could go back to work from the standpoint of her foot. Dr. Kulik noted, "3. Ms. Flynn also complains of pain in her upper extremities. I did not fully evaluate or examine it. I did very cursory

evaluation of her records. She does appear to have pain mostly in her shoulders and some pain in the back of her neck. Just from the review of Dr. Atta's records, I do agree that an MRI of her neck would probably be needed."

The respondents paid temporary total disability benefits through June 16, 2007.

The impression following an MRI of the claimant's cervical spine on August 7, 2007 was "1. Mild bilateral neural foraminal narrowing at C4-C5. 2. Moderate bilateral neural foraminal narrowing at C5-C6, greater on the right than the left."

The claimant returned to Dr. Atta on August 9, 2007:

The MRI revealed mild bilateral neural foraminal narrowing at C4/C5 as well as moderate bilateral neural foraminal narrowing at C5/C6, which is greater on the right than the left. No regions of spinal stenosis were demonstrated. No definite pressure on any nerve or spinal cord tissue was noted....

I had an extensive discussion with the patient where I explained that the objective findings do not clearly correlate with any traumatic injury from falling onto her upper extremities. Based on this MRI report I am therefore not able to show any objective findings to further justify linking her current symptoms to the injury which occurred on December 16th 2006.

However, I have expressed to the patient that the MRI was initially requested by Dr. Paul Tucker, the neurologist, to further evaluate her symptoms

after she had had an initial office visit with him on April 2nd 2007. I feel that it would therefore be best that Dr. Tucker also be allowed to evaluate the MRI as well. I am therefore requesting that the patient also be sent to see Dr. Tucker for further evaluation. However, I have explained to the patient that at this time I do not feel that there is any further intervention that is required from an occupational health point of view.

Dr. Atta assessed "Degenerative joint disease of the cervical spine."

Dr. Tucker examined the claimant on September 5, 2007 and noted, "The problem she is having now is still with her arms, where she caught herself....We reviewed the MRI more carefully. Although they mention narrowing at C5-6, it was in the report itself that said the narrowing was at C6-7, greater on the right than the left, with the most prominent changes there. This is a difficult problem. Clearly she has a definite abnormality. I think the least expensive and most precise way to improve her status would be to obtain a myelogram with a post meylgraphic (sic) CT rather than doing further EMG and nerve conduction studies, and then going on to do this study....I had seen her initially on 02/06/2007. She was referred to me for EMG and nerve conductions of her legs, and we raised the question of the change in her legs. Those symptoms seemed to have now cleared completely. She

had fallen on December 16th, 2006. She had sustained a significant injury, particularly at C6-7 on the right side."

A pre-hearing order was filed on October 16, 2007. The claimant's contentions were listed as follows: "1. Compensability of a neck injury as well as the foot sprain injury on December 16, 2006. 2. Entitlement to additional medical, both for the neck and the arm. 3. Entitlement to TTD benefits from June 16, 2007, to a date to be determined. 4. Entitlement to attorney's fees." The respondents' contentions were, "1. Respondents accepted the claimant's foot injury and have paid all appropriate benefits. 2. Respondents have controverted the neck injury and contend this is not a compensable injury arising out of the course and scope of claimant's employment."

Issues to be litigated were, "1. Compensability of a neck injury and arm injury. 2. Medical benefits. 3. TTD benefits. 4. Attorney's fees."

A hearing was held on December 7, 2007. The claimant testified, "My foot is a lot better. I won't complain on it. Once in a while I'll have a real sharp - like a bolt goes through it. But it don't last but a second, and that's

very rare....If they would just get my arms to where I could get back to work."

The administrative law judge found that the claimant proved "she sustained not only a right foot injury on December 16, 2006, when she tripped over a mat at work, but she also has proven that she sustained a neck and arm injury at the same time." The administrative law judge awarded medical treatment and temporary total disability compensation. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings

which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge found that the claimant proved she sustained a neck and arm injury. The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable foot sprain injury on December 16, 2006. The claimant testified that she tripped over a mat, caught herself with her arms to keep from falling, and felt acute pain in her foot. The initial medical records show that the claimant complained of right foot pain and did not sustain any trauma to her neck or arms. The claimant was assessed as having a right foot sprain. The respondents promptly provided reasonably necessary medical treatment in connection with the claimant's compensable right foot sprain.

The claimant informed Dr. Tucker on April 2, 2007 that she had recently noticed a small knot on her left arm. Dr.

Tucker reported that he felt an "induration," or small lump in the claimant's left arm. The evidence does not show that this lump was caused by the claimant's December 16, 2006 right foot sprain, or that the lump was caused by the claimant "catching herself" to keep from falling on December 16, 2006. An MRI on August 7, 2007 showed foraminal narrowing at C4-C5 and foraminal narrowing at C5-C6. Dr. Tucker opined in September 2007 that the claimant had sustained "a significant injury" to her cervical spine. It is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, we must attach minimal weight to Dr. Tucker's opinion that the claimant injured her cervical spine. The evidence does not show that the claimant injured her neck or cervical spine when she sprained her right foot on December 16, 2006. We attach significant weight to Dr. Atta's opinion in August 2007, "the objective findings do not clearly correlate with any traumatic injury from falling onto her upper extremities."

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove she

sustained a compensable injury to her neck or arms. The claimant did not prove that she sustained an accidental injury causing internal or external physical harm to her neck or either arm. The claimant did not establish by medical evidence supported by objective findings a compensable injury to her neck or arms. There is no probative evidence before the Commission demonstrating that the knot, induration, or lump described by Dr. Tucker on April 2, 2007 was in any way caused by the claimant's foot sprain or by the claimant catching herself on December 16, 2006. Nor is there any probative evidence before the Commission demonstrating that the findings seen on the cervical MRI were in any way caused by the claimant's foot sprain or by catching herself on December 16, 2006. The Full Commission therefore reverses the opinion of the administrative law judge, and this claim 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 opinion. The majority, reversing the Administrative Law Judge, finds that the claimant did not prove she sustained a compensable injury to her neck or arms. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant proved by a preponderance of the evidence that in addition to her compensable right foot injury, sustained during a fall at work on December 16, 2006, the claimant also sustained compensable neck and upper extremity injuries. Therefore, I must respectfully dissent.

For the claimant to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing

the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997). I find that the claimant has proved by a preponderance of the evidence all of the elements for compensable specific incident neck and upper extremity injuries, supported by "objective findings."

First, the claimant has proved by a preponderance of the evidence that her neck and upper extremity injuries were caused by a specific incident at work and "arose out of and in the course of her employment." 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). Here, there is no dispute that there was an incident on December 16, 2006, when the claimant almost fell after tripping over a mat. The claimant caught herself, using both hands, on a counter near the coffee

machines. The respondent accepted a right foot injury and paid medical and temporary total disability benefits associated with that injury. The claimant credibly testified that she began experiencing problems with her arms and neck immediately after the fall. The claimant testified that she notified Dallas Pomeroy, nurse practitioner, on her second visit, about her neck, shoulders, and arm hurting. On May 24, 2007, Dr. Michael Atta ordered a cervical MRI, and then referred the claimant to Dr. Paul Tucker to evaluate the MRI findings and her symptoms. On April 2, 2007, Dr. Tucker's report notes and measures the knot in the claimant's left arm. Dr. Tucker further mentions the "small lump in her arm" later in his report and states, "There seems to be something there when she caught herself, when she started to fall." On September 5, 2007, Dr. Tucker reviewed the claimant's MRI and addressed the results, as follows:

This is a difficult problem. Clearly she has a definite abnormality. I think the least expensive and most precise way to improve her status would be to obtain a myelogram

with a post myelographic CT rather than doing further EMG and nerve conduction studies, and then going on to do this study. I think this would be economical and reasonable. We could repeat the MRI with a higher resolution machine, but will go to the definitive test to see if she needs something specifically at C6-7 done.

Dr. Tucker ended his September 5, 2007, progress report stating that the claimant's problems with her legs seem to have cleared up completely but that the claimant had also sustained a significant injury at C6-7 on the right side when she fell on December 16, 2006.

Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962). Here, based on the above medical evidence and the claimant's credible

and uncontradicted testimony regarding the mechanics of the December 16, 2006 fall, I find that the claimant has clearly proved a causal connection between the December 16, 2006 fall at work and her neck and upper extremity injuries.

Second, I find that the claimant's injury caused internal or external physical harm and the claimant has presented objective findings establishing the existence and extent of her injury. Regarding this element, the majority states:

The claimant did not establish by medical evidence supported by objective findings a compensable injury to her neck or arms. There is no probative evidence before the Commission demonstrating that the knot, induration or lump described by Dr. Tucker on April 2, 2007 was in any way caused by the claimant's foot sprain or by the claimant catching herself on December 16, 2006. Nor is there any probative evidence before the Commission demonstrating that the findings seen on the cervical MRI were in any way caused by the claimant's foot sprain or by catching herself on December 16, 2006.

As outlined above, the majority has confused the elements of objective findings and causation, and erroneously required the claimant to prove the causation

element with objective findings. The workers' compensation statutes provide that "[a] compensable injury must be established by medical evidence supported by objective findings...." Ark. Code Ann. 11-9-102(4) (D) (Supp. 2007). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102 (16) (A) (i) (Supp. 2007). A claimant must prove a causal connection between his employment and the injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). 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 work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002). Here, as noted by, but apparently disregarded by the majority, the MRI report contains objective medical findings of a cervical injury. As for the claimant's upper extremity injury, as noted, but again apparently disregarded by the majority, Dr. Tucker palpated a lump in the claimant's arm, which

is clearly an objective finding outside of the claimant's voluntary control.

I would also note an additional point of error seen in the majority's finding. The claimant did not assert that her foot "sprain" caused her arm injuries. She also did not assert that her foot "sprain" caused her neck injury. The majority's statements that the claimant failed to prove that her neck or arm injuries were caused by her foot "sprain" are ridiculous, particularly due to the fact that the claimant's contention that her injuries were incurred during the fall, not as a compensable consequence of the compensable foot injury, is clearly set out in the Pre Hearing questionnaire.

In conclusion, I find that the claimant has proved all of the elements of compensable neck and upper extremity injuries sustained, in addition to her compensable right foot injury, during a fall at work on December 16, 2006.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner