

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602589

ROBERTA GIBSON, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 20, 2008

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE DALE BROWN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 25, 2007.

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. On November 15, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her left thumb on November 15, 2005.
4. The claimant is entitled to a weekly compensation rate of \$363.00 for ttd.
5. The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury at the time of her fall on November 15, 2005, and that she has sustained a compensable right thumb injury due to overuse while working for the respondent.
6. The claimant is entitled to all necessary and reasonable medical care for the treatment of her back and right thumb.
7. The claimant is entitled to temporary total disability as a result of her compensable injuries from July 24, 2006, to December 25, 2006.
8. The respondents have controverted this claim in its entirety.
9. The claimant's attorney is entitled to maximum statutory attorney's fee based on the 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 September 25, 2007 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 she sustained a compensable injury to her back and a compensable injury to her right thumb. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer in the imaging department. Her job duties included removing staples, taping tears, and bar-coding papers to determine whether they were legal or medical. The claimant previously worked as a workers' compensation claims adjuster for the respondent employer and was intimately familiar with reporting requirements and the statements needed to be completed when there was

an incident. On November 15, 2005, the claimant was attempting to sit down at a meeting when she fell. The claimant and her co-workers were participating in a meeting that was initially dismissed. A manager announced that she had one more item to address. Believing that the meeting had concluded, a co-worker began to move the claimant's chair back to where it had been located before the meeting. When the chair was replaced underneath the claimant, she went forward onto the table in front of her but then landed on the floor. She stated that her lower right back and hip began to hurt, somewhat like a muscle spasm, and her left thumb hurt and her right thumb were tender. The respondents accepted the left thumb as compensable and paid benefits accordingly. At this time the claimant contended that she also sustained an injury to her back and an injury to right thumb as a result of overuse.

The incident happened on November 15, 2005, and on November 27, 2005, the claimant filled out a written statement indicating that she injured her right hip and left thumb. On December 7, 2005, the claimant was seen for the first time by Max Beasley, a nurse practitioner. She reported to Nurse Beasley that she was having pain in her right hip and her lower back and left thumb. The claimant was noted to have "questionable

generalized swelling of the left thumb", and x-rays of her left thumb, lumbar spine and right hip were negative. The claimant was instructed to avoid prolonged sitting and to be allowed to change positions as needed. The claimant again saw Nurse Beasley on December 15, 2005. She denied having any hip pain, but reported a burning sensation across her lumbar spine. The claimant complained of triggering present at the IP joint of her left thumb and she was referred to an orthopedic surgeon.

On December 21, 2005, the claimant presented to Dr. Tang, who diagnosed the claimant with left trigger thumb. He restricted the claimant to limited repetitive motion of her thumb and continued with this limitation through her left trigger thumb release on March 3, 2006. The claimant was also given a cortisone injection.

On January 16, 2006, the claimant returned to Dr. Tang with increased pain and triggering in her left thumb. Dr. Tang administered a second cortisone injection and noted that if the claimant did not see improvements surgical intervention would be necessary.

The claimant saw Dr. Tang again on February 9, 2006. Dr. Tang scheduled the claimant for a left trigger thumb release which was performed on March 3, 2006. He

took the claimant off of work until March 20, 2006. He released the claimant to return to work with right-handed duty only.

On March 14, 2006, the claimant sought treatment from Dr. Tang and he indicated in his notes that the claimant had began experiencing pain in her right thumb on approximately March 7, 2006. He noted the onset of clicking in the right thumb on March 13, 2006.

The evidence demonstrates that the claimant sought treatment for low back and hip pain before her fall on November 15, 2005. On December 30, 2004, the claimant sought treatment for low back pain and bilateral hip pain. On August 19, 2005, she reported back pain. On November 14, 2005, one day before the incident, the claimant treated with her family physician, Dr. Emerson. Dr. Emerson's reports indicated that the claimant "is having some new pains in her hands, calves, and hips for a couple of months. She stated the hip pain is a dull, achy pain."

On February 13, 2006, the claimant returned to Dr. Emerson. She related that she had new pain developing in her right arm with onset the week before. On May 12, 2006, the claimant treated with Dr. Emerson complaining of hip pain due to her incident at work. The claimant also related pain in her back. On August 3,

2006, the claimant had an MRI which indicated an L5 pedicle with uncertain etiology. The claimant was referred to Dr. Knox and underwent physical therapy. She was recommended to continue with chiropractic treatment. The claimant has not returned to work and has applied for Social Security disability benefits.

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,

medical 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, i.e., 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).

The claimant contended that she injured her right thumb on November 15, 2005, or in the alternative, after she was placed on right-handed duty following her left thumb surgery on March 3, 2007. The majority found that the claimant's right thumb injury was due to overuse associated with being placed on right-handed duty. The claimant admitted that the sole reason she injured her right thumb was because it was overtaxed performing right-handed duties following her left thumb

trigger release on March 3, 2006. The claimant must prove by a preponderance of the evidence that she sustained a "compensable consequence" pursuant to all of the statutory elements of compensability. Jones v. B.A.E. Sys., Full Commission Opinion filed May 6, 2004 (F001696); Atchison v. John P. Marinoni Const. Co., Full Commission Opinion filed September 19, 2001 (E616344). The burden of proof rests upon the claimant to prove the compensability of her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979).

In my opinion, a review of the medical evidence demonstrates that the claimant's right thumb became symptomatic well before she began any right-hand only duties and it is not a compensable consequence of her left thumb injury. The claimant's right thumb first began hurting in March 2006. In his notes of March 14 and March 29, 2006, Dr. Tang indicated that the claimant's right trigger thumb "started about three weeks ago." This is well before the claimant began right-hand only duty working for the respondent

employer. In fact, the claimant was completely off work until March 20, 2006. Dr. Tang's note of March 14, 2006, indicates:

Ms. Gibson is post left trigger thumb release on 3/3/06. She has been doing well since surgery. She denies any numbness. About a week ago she started having pain in her right thumb; initially it was just pain, but last night she noticed a little clicking.

The evidence demonstrates that the claimant's thumb did not hurt until after the first week of March when the claimant was not working at all. The claimant acknowledged that her right thumb began hurting when she was not working. The claimant was only given right-handed duty from March 20, 2006, until March 29, 2006, when she was released to normal duty at a slower pace. Therefore, the claimant only worked right-handed duty for one week. She was released to normal duties on April 20, 2006.

After considering the fact that the claimant's right thumb did not start bothering her until after she was not working for the respondent employer after her surgery, I cannot find that the evidence preponderates in favor of a finding that the claimant's right thumb problems were a compensable consequence of the

claimant's admittedly compensable left thumb injury. Accordingly, I find that the claimant has failed to meet her burden of proof by a preponderance of the evidence that she sustained a compensable right thumb injury. Therefore, I must dissent from the majority's finding of compensability.

The claimant also contended that she sustained a compensable back injury. The evidence demonstrates that the claimant did not report a back injury following her November 15, 2005, incident. She only reported a hip and left thumb injury. As a former workers' compensation adjuster for the respondent employer, the claimant knew how to completely and accurately report injuries. Therefore, the only explanation for the claimant's failure to report a back injury on the AR-N, which was filed on December 6, 2005, is that she did not hurt her back. The Form AR-N which she submitted stated that she injured her right hip and left thumb. This is also what the claimant reported in the written associates statement made on November 27, 2005. Yet, the claimant contended that right immediately after the incident her lower back and hip were throbbing and painful. When I read the associates statement along with the Form AR-N, there is consistency in that the claimant had hip pain

and left thumb pain and there is a complete failure to mention a back injury.

Furthermore, the claimant sought treatment for back pain one day before this incident on November 15, 2005. Moreover, the claimant also sought treatment from Dr. Emerson eleven months before the incident. Dr. Emerson noted that the claimant was experiencing "some low back pain and bilateral hip pain lately." The claimant was prescribed Darvocet and Flexiril.

The claimant testified that when her children were young that she broke her tailbone and that she had experienced pain in her tailbone since that time. The claimant's children are now 41 and 45 years old. There was no indication from the records of Dr. Emerson or any other medical provider that note that the claimant previously broke her tailbone. An MRI performed approximately one year after the fall identified an area on the L5 pedicle of uncertain etiology. Dr. McAlister, the radiologist, opined that "the etiology of this is uncertain. It could represent a stress fracture. Clinical follow is recommended." Dr. Emerson related this to her fall. However, the medical records fail to demonstrate that the claimant ever told any medical provider that she broke her tailbone many years ago.

It is curious that on November 14, 2005, the day before the claimant fell, she presented to Dr. Emerson complaining of "new pain in her hands, calves, and hips for a couple of months." She reported chronic pain and bilateral radicular pain in her lower extremities. It is also curious that the claimant did not seek any medical treatment for her injuries supposedly sustained in the fall until nearly one month following the fall. If the claimant had injured her back, as she alleges, then as a former workers' compensation claims adjuster she is intimately familiar with the procedures relating to medical treatment for work related injuries. She would have immediately requested medical treatment instead of waiting nearly one month after the fall before requesting to see a doctor. The medical records demonstrate that the day before the fall she was already symptomatic. Consequently, the evidence indicates that the claimant's back pain did not arise out of or in the course of her employment with the respondent employer despite the fact that she initially testified that she had never received medical treatment for back pain. In my opinion, this calls into question the claimant's credibility. I find that the claimant's testimony with regard to her prior back pain is completely without credibility. It is well

settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). Arkansas Code Annotated section 11-9-704(b) (6) (A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c) (2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility as being constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in

the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. In addition, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995)

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 275 (1994). Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from

accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000). However, the findings fo the Administrative Law Judge on issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d (1987). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

Therefore, for all the reasons set forth herein, I find that claimant failed to prove by a

preponderance of the evidence that she sustained a compensable injury to her back at the time she sustained her admittedly compensable left thumb injury on November 15, 2005. Accordingly, I must respectfully dissent from the majority opinion finding the claimant sustained a compensable injury to her back.

KAREN H. MCKINNEY, Commissioner