

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F612080

JUSTIN GRIFFITH, EMPLOYEE	CLAIMANT
UNION DRILLING, EMPLOYER	RESPONDENT
AIG CLAIM SERVICES, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 21, 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 MELISSA WOOD, 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 September 27, 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 October 9, 2006, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a compensation rate of \$488.00 for

temporary total disability and \$366.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable low back injury while working for the respondent on October 9, 2006.
5. The respondent should pay for all reasonable and necessary medical treatment for this claimant's low back compensable injury.
6. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 13, 2007, to August 27, 2007.
7. 25% of any temporary total disability benefits paid to this claimant should be sent to the Benton County Child Support Enforcement Unit to apply to the claimant's arrearage.
8. The respondents have controverted this claim in its entirety.
9. The claimant's attorney is entitled to the maximum statutory attorney's fees 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 27, 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.

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OLAN W. REEVES, Chairman

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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 injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a chain hand on a drilling rig. The claimant contended that on October 9, 2006, he was tripping pipe when he tripped, fell and landed on his back. The claimant was helped up and his supervisor, Mr. William Wright, told him to go home. The claimant was scheduled to work the next day but did not show up. He testified it was due to the pain and lack of sleep. The time cards submitted into evidence from that date indicate that the claimant worked the entire shift and there was no

injury. The claimant contacted the respondent employer on October 10, 2006, stating that he was going to the emergency room but he did not indicate where.

The claimant sought treatment from the emergency room at Spark's Regional Medical Center on October 12, 2006. The claimant underwent x-rays of the chest, thoracic spine, pelvis, and lower lumber spine. All of these x-rays yielded normal findings except for degenerative disc disease. He was prescribed medication and discharged.

On October 13, 2006, Pam Cozort, the benefits manager for the respondent employer, sent a letter to the claimant indicating that the respondent employer had information that the claimant would be off work for an undetermined period of time. Ms. Cozort enclosed the respondent's leave of absence forms which needed to be completed by the claimant and his physician and returned within 15 days. The claimant never returned these forms and was terminated on November 6, 2006.

On November 2, 2006, the claimant was seen at the Cooper Clinic. The claimant was diagnosed with a lumbar sprain. He was given prescriptions for medication and physical therapy and given a 20 pound lifting restriction. The claimant failed to contact the

respondent employer to inquire if light duty work was available.

The claimant did not seek any more treatment until August 13, 2007, when he saw Dr. Tubb. Dr. Tubb restricted the claimant from working from August 13, 2007, through August 27, 2007. Dr. Tubb diagnosed the claimant with low back pain.

The claimant contended that he sustained a compensable injury on October 9, 2005. The respondents contended that the claimant did not suffer a compensable injury, and alternatively, if there is a finding of compensability, notice was not received until November 1, 2006. I find that the claimant cannot prove by a preponderance of the evidence that he sustained a compensable injury as there are no objective findings.

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, ie., 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).

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 signed documents pertaining to the procedures for the filing of workers' compensation claims when he went to work for the respondent employer. These documents demonstrate that the claimant was aware of the procedure for filing a claim. At the hearing the claimant was questioned about why the time cards from the date of the injury in questions indicates that there were no injuries:

Q. Mr. Griffith, I'm going to show you a couple of exhibits. This is Respondent's Exhibit 2. Starting at page 1. Have you seen that before?

A. I must have. I've signed it here.

Q. That's your signature?

A. Yes, ma'am.

Q. And on that document, it talks about reporting job-related injuries, doesn't it?

A. Yes, id does.

Q. On that, it indicates that you're supposed to report all accidents at the time of the accident and turn it in to the office; is that correct?

A. Yes, ma'am.

Q. Did you do that?

A. Yes, ma'am.

Q. You did that on October 9<sup>th</sup>?

A. I reported it to my tool -- or to my driller, and I -

Q. And he's not here to verify that, is he?

A. -- I called the next morning. No, ma'am.

Q. Okay. This third page, is that your signature on that page, as well?

A. Yes, ma'am.

Q. The next thing I'm going to show you, because you've indicated that there's a possibility it happened on the 8<sup>th</sup> or 9<sup>th</sup>. The next is page 4 of Respondent's Exhibit 2. It's drilling crew payroll data. On that, it shows you were the floor man on that date; is that correct?

A. Yes, ma'am.

Q. One of the questions, it says "Was there any injury on this tour?" And it says "No" by your name; is that correct?

A. I never filled them paperwork out.

Q. It says there's no injury; is that correct?

A. Yes, but I do -

Q. Do you know who fills that paperwork out?

A. It would have to be the driller.

Q. So that would be William Wright?

A. Uh-huh.

Q. Yes?

A. Yes, ma'am.

Q. Okay. The next one is the 9<sup>th</sup>. Same -- it says page 5. Same thing. It shows your name as the floor man; is that correct?

A. Yes, ma'am.

Q. And it shows no injury; is that correct?

A. That's what it shows.

Q. Also shows that you worked 12 hours that day; is that right?

A. Yes, ma'am.

Q. But you were telling us earlier that you left early; is that correct:

A. Yes, ma'am.

Mr. Wright is married to the claimant's niece but yet the claimant did not have Mr. Wright at the hearing to testify on his behalf that the claimant reported an injury to him. The only person to corroborate the claimant's testimony that he did report an injury was another relative, Chris Hatley who is married to another one of the claimant's nieces. In my opinion, their testimony is suspect at best. Uncorroborated testimony of an interested party is always considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Ins. Co., 81 Ark.

App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony. Id. Furthermore, a witness's close familial relationship to a party has been held to demonstrate a sufficient possibility of bias so as to treat the witness's testimony as disputed, see Sykes v. Carmack, 211 Ark. 828, 202 S.W.2d 761 (1947), and the testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. Knoles v. Salazar, 298 Ark. 281, 766 S.W.2d 613 (1989). When I consider the fact that there were two other non-related individuals, William Graper and Ronnie Meeks, that were witnesses that did not appear at the hearing, I find that the testimony of Mr. Hatley should be disregarded as biased.

The evidence demonstrates that the claimant sought medical treatment on his own from the Sparks emergency room. The following testimony of the claimant is very enlightening:

Q. Okay. You told me in your deposition that you did not call the office before you went to Sparks emergency room; is that correct?

A. I'm not sure.

Q. Do you know if you reported it to anybody before you went to the emergency room?

A. I **think** I called Pam or somebody and set up a - - they had give me - - yeah, I had to have, because that's the reason I went on to the emergency room, because it was going to be so far off before I went to the Cooper Clinic. (Emphasis added)

Q. You're saying Pam couldn't get you an appointment for a couple of weeks?

A. Yeah. Or I'm not saying that, but my understanding was that I wasn't going to be able to see the clinic - - or the doctor for a couple of weeks, so I went ahead and went to the emergency room on my own.

Q. When you called Pam, did you tell her anything about kidney problems you were having?

A. I don't recall that. You know, I - - you had asked that question in my deposition, and I - - that confused me, but the only thing I can think of is if I had said something like that, it would - - it had to be right there at the first, and I wasn't sure whether I had hurt my back or what I had done to myself. I knew I was in pain and it was in my lower back.

Q. Did you tell her you had kidney problems?

A. No, not that I know of.

Ms. Cozort testified at the hearing regarding the procedures the respondent employer utilized for filing a workers' compensation claim:

Q. What's the procedure at Union for filing a workers' comp claim?

A. Well, normally, the first point of contact is the toolpusher. The employee goes to the toolpusher and tells him that he's injured. If - - excuse me. They take him to the emergency room if it's an emergency or they bring him in to the company doctor. They fax the reports to me, and I file the claim. In the meantime, they also - - as soon as they know of the accident, they call our safety director, no matter what time, day or night, and inform him of it.

Q. Who's the safety director?

A. Tracy Closson.

Q. What's the difference between the toolpusher and the driller as far as supervisory status?

A. The toolpusher is a salaried personnel, and he is in complete charge of the rig. The driller is a position on the rig like a floor hand. They have a floor - - they have a floor hand, derrick man, driller. And now they have divided the floor hand into different categories such as - - I think they call some of them motor man, some them chain hand, different things.

Q. Of the toolpusher and the driller, who is in charge?

A. The toolpusher.

Q. Are the employees, the floor hands supposed to report to both of them or just one of them?

A. If there's an injury - -

Q. If there's an injury.

A. - - they are supposed to report it to the driller and the toolpusher.

Ms. Cozort went on to explain how and when she found out the claimant was not at work:

Q. Okay. When did you first have notice of any missed work or problems with Mr. Griffith?

A. Well, on October 10<sup>th</sup>, I received a phone call from James Lauterbach. He said he had an employee that was out. He wasn't sure what the problem was with him. And I was to call him to find out - - because I contact them to find out - - if they're going to miss three days, I sent them leave paperwork.

So I called Justin. And I think I woke him up, but I remember the conversation real well. He got up, and I said "Justin, your toolpusher has told me that you didn't come to work; and I need to know, you know, what the problem is, if you hurt yourself at work or if it's something else."

He said that his back was hurting and that he had a kidney problem, he was going to go to the doctor, and he would return to work on the 11<sup>th</sup>.

Q. What was the next contact you had with him?

A. The next contact I had with Justin wasn't until October 24<sup>th</sup>.

Actually, on October 13<sup>th</sup>, I called his supervisor to make sure he did return, because that would have been

his three days before he would need to apply for family medical leave. And they said he had not returned. So at that point, I got his paperwork together for family medical leave and put that in the mail to him.

Q. So that's what's sent to employees who miss three days?

A. Yes. Yes.

Q. Okay. Did you send that paperwork to him?

A. I did on October 13<sup>th</sup>.

I didn't hear - - I didn't hear back from Justin as far as the paperwork. I spoke to his toolpushers again to see if they had heard from him. They had not heard from him.

So on October 24<sup>th</sup>, I left a message for Justin to call me. He did return my call. He said - - at point, he said, "I'm having a problem with my back, and it could be work-related." And I said, "Well, Justin, I need to know, is it work-related or is it your kidneys, because you told me that you were having kidney problems." He could never tell me definitely it was.

And I told him again, I said, "We need to get your paperwork back in." Because our company gives them 15 days to return the paperwork. And if they don't and it's not a work-related injury, then they will - they will be terminated. And I had sent the letter on the 13<sup>th</sup>. His 15 days were up around the 24<sup>th</sup>, so I was getting worried that he wouldn't get his paperwork back in.

Q. And by paperwork, you mean the FMLA paperwork?

A. Yes.

Q. Okay. On the 24<sup>th</sup> when you talked to him, did he say for sure whether or not he had a work injury?

A. No, he did not. He said he couldn't say for sure.

Q. Did he tell you anything about falling on the rig?

A. No.

Q. What did you do next?

A. On October 31<sup>st</sup>, the accident reports that you have showed up in our office. Normally, the accident reports are faxed to my fax machine at my desk; but for some reason, these reports came mixed in with the daily sheets from the rig and the time sheets.

So the lady in the payroll department brought those to me, and she said, "Do you know of this?" I said: "No. This is the first I've seen of an accident report." I said, "I know he's off, but it was a - - my understanding, it was a personal illness." And - -

Q. Did you get those accident reports from the toolpusher?

A. No.

Q. Is that who you normally would have gotten them from?

A. No. The only - - The toolpusher had not signed the accident reports. The only name on them was William Wright, the driller.

Q. Okay. What did you do once you got those reports?

A. I called the toolpusher and asked him if he knew of the reports. He said, "No."

Q. Is that - -

MS. BROOKS: I object to the hearsay of what the toolpusher may or may not have said.

Q. (Ms. Wood continued.) Who was the toolpusher at that time?

A. James.

Q. Okay. Then what did you do next?

A. I - - we took them to our manager, our division manager, and I said, "These just came. This is October 31<sup>st</sup>. They're dated October 10<sup>th</sup>. We need to know - - I need to know where they were between the 10<sup>th</sup> and the 31<sup>st</sup>." No one ever knew where the reports were during that time period.

Ms. Cozort indicated that Mr. Wright was off of work from October 11<sup>th</sup> through the 21<sup>st</sup> due to a family emergency. Ms. Cozort testified further:

Q. Did you do anything as far as contacting Justin after that point?

A. I did. On October 31<sup>st</sup>, I called Justin. I told him I had the reports, I was going to file a work comp claim on it, and I needed him to go to Cooper Clinic that day." (sic) Because they're a walk-in clinic, they see the patients when I call them. As long as they get there

before 4:30, they take them the same day.

I told him I needed him to go that day. He said he could not go that day, but he could go the next day, which would have been October 1<sup>st</sup>.  
(sic)

Q. Did you hear him testify earlier about Cooper Clinic not being able to see him for two weeks?

A. Yes.

Q. Is that true?

A. No.

Ms. Cozort's testimony clearly shows that the claimant was not truthful when he said he could not get into the doctor for two weeks after he allegedly reported the injury. Further, the statements of the claimant's co-workers regarding the incident were missing for over two weeks when they suddenly appeared on Ms. Cozort's desk. No explanation was offered as to where those statements had been during the interim.

After considering all the evidence, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The medical reports contain absolutely no objective findings. The first medical treatment the claimant sought was at Sparks wherein x-rays were taken and they showed minimal degenerative joint disease. Dr. Clark

later diagnosed the claimant with a lumbar strain. A year later, Dr. Tubb diagnosed the claimant with lower back pain. There was no objective findings to support these diagnosis.

The only evidence of an injury before the commission is the claimant's testimony that an incident happened and it is supported by the testimony of clearly biased witnesses, i.e. the claimant's relatives. The claimant's testimony is replete with inconsistencies and these inconsistencies are demonstrated by the testimony of Ms. Cozort He is also a convicted felon, having served time for manslaughter. The claimant is not a credible witness.

Therefore, after considering all the evidence, I find that the claimant failed to prove by a preponderance of the evidence that he sustained a compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner