

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609140

DENVER L. GULLEY, EMPLOYEE	CLAIMANT
CITY OF MOUNTAIN HOME, EMPLOYER	RESPONDENT
ARKANSAS MUNICIPAL LEAGUE WORKERS' COMPENSATION TRUST, CARRIER	RESPONDENT

**OPINION FILED MAY 21, 2008**

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE J. CHRIS BRADLEY, Attorney at Law, North 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 May 11, 2007.

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

1. The employee-employer-carrier relationship existed on August 10, 2006.
2. The claimant is entitled to a compensation rate of \$403.00 in the event the claim is found to be compensable.

3. The claimant failed to prove by objective medical findings that he suffered a heat stroke/heat exhaustion injury on August 10, 2006, while working for the respondent.

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

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

After conducting a de novo review of the record, I would reverse the opinion of the Administrative Law Judge and find that the claimant proved by a preponderance of the evidence that he suffered a compensable injury on August 10, 2006, and that he should be awarded temporary total disability benefits from that date until a date yet to be determined, as well as medical expenses associated with the treatment of his injury and attorney's fees. Therefore, I

must respectfully dissent from the majority opinion denying the claimant these benefits.

#### **FACTS**

While there are a number of disputed facts in the record, it is unnecessary to resolve the discrepancies in order to reach the correct decision in this case. The undisputed facts of this case are as follows. On August 10, 2006, the claimant was performing heavy work for the City of Mountain Home's Water Treatment Facility, working on the Vac-Con truck, unstopping sewer lines. All witnesses agreed that it was an extremely hot day with temperatures at least as high as 100 degrees. It is also undisputed that the claimant became ill on the job and was taken to the emergency room by his supervisor. All witnesses indicated that it was their belief that it was the heat which caused the claimant's difficulties.

With regard to medical treatment, the claimant was initially seen in the emergency room by Dr. Phillip Sadler for "possible heat exhaustion" on the day of his injury. He was treated and released with instructions to take frequent

breaks during hot days and drink plenty of fluids. Next, the claimant was seen by Dr. Ronald F. Bruton, on August 11, 2006, with symptoms of tingling on the left side of the face and left arm and a jittery, shaking feeling. Dr. Bruton diagnosed "heat exhaustion" and recommended that the claimant stay out of the sun and take fluid replacements. He instructed the claimant to stay off work until August 15, 2006. On August 14, 2006, the claimant was seen again in the emergency room of Baxter Medical Center by Dr. Sadler and Dr. Bruton. On August 17, 2006, Dr. Bruton noted "cerebellar dysfunction". Dr. Bruton said, "I am going to send him to a neurologist to help me figure this out". Again, Dr. Bruton held the claimant off work. On September 5, 2006, the claimant was seen by Dr. Demetrius Spanos, neurologist, on referral from Dr. Bruton. Dr. Spanos had an EEG performed which was normal. He then sent the claimant for a neuropsychological evaluation with Dr. Dan Johnson, clinical neuropsychologist. The neuropsychological evaluation showed "some left frontal dysfunction", as follows:

**NOTE:**

Given the nature of the situation, a response bias test sensitive to effort and/or malingering was administered. The patient readily passes all three sub-tests, suggesting that he gave good effort during cognitive testing and that the current results are an accurate reflection of current cognitive status.

**Summary of Emotional/Behavioral Status:**

In addition to the above noted cognitive measures, the patient was administered a comprehensive 567-item neurobehavioral measure with build-in validity and reliability indices designed to objectively assess emotional/behavioral status. The validity scores demonstrated that the patient did not over-endorse negative symptomology, present himself in an overly favorable light, or respond in a defensive manner. His answers were consistent, reliable, and valid suggesting that this is an accurate reflection of his current status. He was significantly elevated on 1/0 clinical scales, sensitive to physical/health concerns. These findings are in keeping with his medical history and within expectations. Understandably, he does likely experience a high mild - low moderate level of depressed mood secondary to his medical situation.

**Impressions:**

Current neurocognitive testing found three areas of concern and was able to address to some extent two potential rule outs. The patient demonstrated a

consistent pattern of notably less proficient performance on verbally mediated cognitive tasks - typically associated with more left hemisphere vs. visually mediated non-verbal cognitive tasks - typically associated with more right hemisphere functioning. While he may have always had some aptitude towards visual, hand-on type tasks, the discrepancy currently seen appears to represent a significant change from estimated pre-morbid levels. In addition, the patients (sic) attention/concentration was variable and inconsistent, with significantly slowed processing speed; both of which also appear to represent a departure from pre-morbid estimates. The patient readily passed objective measures of malingering/effort. In addition, he readily passed emotional/behavioral indices which would of (sic) picked up negative response bias, positive response bias, defensiveness, etc. White (sic) he does have high mild - low moderate depression, he does not present as a somatoform or conversion disordered individual. From a neuropsych perspective there appears to be some left frontal dysfunction present. (Emphasis added.)

Dr. Spanos reviewed the neuropsychological evaluation and drew the following conclusions:

The patient next proceeded to a neuropsychological evaluation. This

appeared to be a valid study without evidence of malingering. Also of note is that there was no evidence of somatoform or conversion disorder. The study showed that the patient demonstrated abnormality of processing information and its relation to his memory dysfunction. I believe that this is due to excessive heat exposure as described in the initial consultation. A follow-up study has been scheduled in December, two months after the initial one, and this will help tell us if a good prognosis can be expected. Possible treatment options would include Cymbalta, Effexor, and memory exercises. (Emphasis added.)

On December 27, 2006, Dr. Spanos held the claimant off work from January 3, 2007, through April 16, 2007. At that time, he indicated that the claimant continued under his care and that he would not be released to return to work until such time as additional testing had been accomplished.

#### **ANALYSIS**

The opinion of the Administrative Law Judge, adopted by the majority, correctly pointed out that the claimant must establish a compensable injury by medical evidence supported by "objective findings" (Ark. Code Ann.

§11-9-102(4)(D)); that "objective findings are those findings which cannot come under the voluntary control of the patient" (Ark. Code Ann. §11-9-102(16)(A)(i)); and that the claimant's "burden of proof shall be a preponderance of the evidence" (Ark. Code Ann. §11-9-102(4)(E)(i)).

The opinion of the Administrative Law Judge, adopted by the majority, incorrectly concluded that this claim was governed by Ark. Code Ann. §11-9-114, which applies to "cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accidents" and which requires a showing that the exertion associated with this accident was extraordinary and unusual compared to the employee's usual work or some usual and unpredicted incident occurred that was the major cause of the physical harm. The claimant had none of the conditions listed in Ark. Code Ann. §11-9-114(a). The closest thing to his condition was a "cerebral vascular accident" which is also known as a stroke. This condition requires the occlusion of a blood vessel in the brain from a blood clot or thrombosis. Lybrand v. Ark. Oak Flooring, 266 Ark. 946, 588 S.W.2d 449 (1979).

Because the claimant did not suffer a "cerebral vascular accident" or any other condition specified in Ark. Code Ann. §11-9-114, that statute does not apply to this case.

Further, the statute must be strictly construed and if the claimant's injury is not specified in the statute, then it cannot be expanded by this Commission or the courts to include his condition. Ark. Code Ann. §11-9-704(c)(3); Amlease, Inc. v. Kuligowski, 59 Ark. App. 261, 957 S.W.2d 715 (1997); Cedar Chemical Company v. Knight, \_\_\_\_ Ark. App. \_\_\_\_, S.W.3d \_\_\_\_ (2008).

The opinion of the Administrative Law Judge, adopted by the majority, correctly identified the case which controls the result herein, Wentz v. Service Master, 75 Ark. App. 296, 57 S.W.3d 753 (2001). However, the facts of this case were not correctly applied to the holding in Wentz. In the Wentz case, the Arkansas Court of Appeals considered another brain injury which had been diagnosed by neuro-psychological testing. The Commission denied the claim concluding that neuro-psychological testing did not produce "objective findings" within the meaning of Ark. Code Ann.

§11-9-102(16)(A)(i). The court reversed the Commission's decision and held that neuropsychological testing can generate objective findings when the evidence shows that the claimant did not manipulate the test results and the validity of the tests can be established. The court in Wentz explained the objectivity of neuropsychological testing, as follows:

In his testimony, Dr. Morse stated that "[a] neuropsychological evaluation is objective testing for brain function." He explained that "neurological examination will show you if there is any big problem like paralysis or numbers or vision problems or coordination problems, and then the neuropsychological evaluation looks at the mental function of the brain; the ability to do calculations, memory, organize thought, learn, carry out activities."

Dr. Brown admitted that with neuropsychological testing, the patient controls her response. He explained that the "ultimate diagnosis is based upon [the] results of [the patient's] responses which are compared with results of thousands and thousands of others who have done the exact same tests for many years before. He also explained that when assessing the test results "[he] specifically check[s] to

see whether there [are] any indicators that would cause [him] to conclude that [the patient] was attempting to manipulate the test results."

The court quoted from Dr. Brown, the other neuropsychologist, as follows:

Also, given the broad spectrum of testing that we administer to people such as Ms. Wentz for neuropsychological evaluations, its virtually impossible to manipulate them to come out the way you want them to, because you don't know what each and every piece of the testing means.

The concurring opinion explained further how the "results" of neuropsychological testing can be objective findings even though the "data" upon which those results are based are within the voluntary control of the patient, as follows:

In his deposition testimony, Dr. Brown, a neuropsychologist, testified that he performed a neuropsychological evaluation on appellant...Dr. Brown testified that he was aware that appellant underwent diagnostic examinations, including a CT scan and an EEG. However, Dr. Brown opined that the fact that the diagnostic examinations were normal, did not indicate there was nothing wrong with appellant's brain.

Dr. Brown testified that EEGs were used to determine whether a person had a seizure disorder, and that CT scans may or may not show damage to the brain in terms of structural changes. *He testified that changes that have to do with the function of the brain were only measurable by neuropsychological evaluations.* Dr. Brown opined that although the responses given by appellant were within her control, the results were not, because the tests were safeguarded to prevent patient manipulation. He testified that he based his diagnosis of appellant on the *results* of a series of tests that he administered and *not the responses of appellant.* These tests involved oral responses, written responses, and the performance of various directed physical activities. Dr. Brown testified that the results of the tests were assessed based on patterns established when considering the totality of appellant's responses. He opined that appellant did not have the intellectual level or memory capacity to manipulate the tests, and that unless appellant had extensive knowledge and expertise in the area of neuropsychology, she would not be able to voluntarily control or influence the patterns yielded by her multiple responses.

A finding is a determination, not the data upon which that determination is based. "Finding" in the medical sense means a determination by a physician based upon certain data about a

condition, disease, or injury. Section 11-9-102(16)(A)(i) provides that objective findings are *findings* that cannot come under the voluntary control of the patient. The relevant inquiry, therefore, is not whether the *clinical data*, or certain datum, are within the patient's control. 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. 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.

Applying the facts of this case to Wentz v. Service Master, supra., the results of the claimant's neuropsychological testing will be considered objective findings if the claimant did not manipulate the results. Regarding the possibility of manipulation, the claimant's test results in this case showed an extremely high degree of reliability. When Dr. Spanos referred the claimant to the neuropsychologist for testing, he raised serious questions with regard to the claimant's credibility. These concerns

were expressed to the neuropsychologist before the evaluation. In response to these concerns, Dr. Johnson took extra care to test for the possibility of manipulation by the claimant. He said that "given the nature of the situation, a response bias test sensitive to effort and/or malingering was administered" and in addition "the patient was administered a comprehensive 567-item neurobehavioral measure with built-in validity and reliability indices designed to objectively assess emotional/behavioral status". Dr. Johnson reported that "the patient readily passed all three sub-tests, suggesting that he gave good effort during cognitive testing and that the current results are an accurate reflection of current cognitive status". He went on to say that "his answers were consistent, reliable, and valid". Thereafter, the neuropsychological testing was reviewed by the neurologist, Dr. Spanos. He concluded that the test results represented a "valid study". In light of the uncontradicted medical evidence of record verifying the validity and reliability of the neuropsychological testing, the claimant met the standards outlined in Wentz. Therefore,

the neuropsychological testing is an "objective finding" within the meaning of Ark. Code Ann. §11-9-102(16)(A)(i).

While the opinion of the Administrative Law Judge, adopted by the majority, correctly identified Wentz as the controlling precedent, the holding in that case was misinterpreted. It was not the holding in Wentz that neuropsychological testing had to be independently verified by other objective findings. Quite to the contrary, a reading of Wentz reveals that it was the holding of the Court of Appeals that the results obtained through neuropsychological testing were to be considered objective, if it is shown that the test results were not manipulated by the claimant. Stated another way, the test results are to be considered objective if the validity and reliability of the results can be verified. Therefore, the relevant inquiry is whether the test results in this case were in anyway manipulated by the claimant so as to call into question the validity and reliability of the findings. And as discussed in detail earlier, the evidence of record strongly suggests that the claimant did not manipulate the test results and

that the findings were reliable and valid. Therefore, the claimant in this case has satisfied the standards set out in Wentz.

In addition to proving the existence of objective findings, the claimant must establish a causal connection between those findings and the work related incident. On this issue, the court in Wentz stated the applicable rules of law, as follows:

[8-10] Objective findings are also defined as medical opinions stated with a reasonable degree of medical certainty. *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.2s 760 (2001); see also Ark. Code Ann. §11-9-102(16)(B) (Supp. 1999). Our supreme court has held that medical evidence supported by objective findings is not essential in every case, but if medical opinions are offered, they must do more than state that the causal relationship between work and the injury is merely a possibility. *Id.* Our supreme court has gone on to say that, if a doctor renders an opinion that goes beyond possibilities and establishes that a work-related accident was the reasonable cause of the injury, this will establish a reasonable degree of medical certainty. *Id.*

In order to determine causation, it is important to examine the opinions of each physician in this case, in an effort to determine whether it was their opinion that the claimant's brain injury was related to heat exposure on the job and, if so, were those opinions stated with a reasonable degree of medical certainty. The facts yield affirmative answers to both questions for all four physicians.

Drs. Sadler and Bruton who saw the claimant in the hospital, diagnosed the claimant's condition as heat exhaustion. After extensive testing, Dr. Johnson unequivocally concluded that the claimant suffered from a brain injury from heat exhaustion. Likewise, Dr. Spanos unequivocally agreed with Dr. Johnson that the claimant suffered a brain injury which was related to excessive heat exposure. Therefore, the uncontradicted medical evidence supports the requisite causal connection and those opinions are stated with a reasonable degree of medical certainty.

The existence of a close temporal relationship between an employment related incident and the development of the malady complained of, is important to the

determination of compensability. As the court pointed out in

Wentz:

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the Commission's refusal to make an award. *Min-Ark Pallet Co. v. Lindsey*, 58 Ark. App. 309, 950 S.W.2d 468 (1997) (quoting *Hall v. Pitman Constr. Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962)).

In this case, the claimant's disability arose immediately following his exposure to high temperatures during strenuous exertion. He was taken directly to the hospital from the job site and diagnosed with heat exhaustion. Under these circumstances, there existed a close temporal relationship between the claimant's development of the symptoms of heat exhaustion and his exposure to heat under physical exertion in the employment.

Wentz also emphasizes the importance of considering other independent findings which support the diagnosis reached through neuropsychological testing. The

claimant in Wentz suffered from delirium, headaches, changes in mental status, nausea, vomiting, cognitive agitation, memory problems anxiety, and emotional changes which the court considered important in finding the claim to be compensable. In this case, the reports from Baxter Regional Medical Center defined heat exhaustion, as follows:

**HEAT EXHAUSTION**

This is a form of heat-related illness caused by water and electrolyte loss from the body. It causes excess sweating, extreme fatigue, weakness, dizziness, nausea, vomiting, headache and sometimes muscle cramping. Temperature may be elevated up to 103 (f).

Factors which may increase the risk for this illness include strenuous exertion in high temperatures, poor physical conditioning, prior loss of salt or water (reduced intake or use of diuretics-water pills), preexisting illness with fever, alcohol use or clothing too warm for the climate. (emphasis added.)

A review of the medical and lay testimony reveals that the claimant experienced almost all of the symptoms of heat exhaustion. He had excess sweating, extreme fatigue,

weakness, dizziness, nausea, vomiting, and headaches. In addition, the number one risk factor for development of the condition was strenuous exertion in high temperatures. There is no dispute that this is exactly what sent the claimant to the hospital on August 10, 2006. Under these circumstances, the claimant herein, like the claimant in Wentz, has provided other evidence of injury which is supportive of the findings generated from the neuropsychological testing.

A troubling conflict in the holdings of the Arkansas Court of Appeals is evidenced by the decision in Watson v. Tayco, Inc., 79 Ark. App. 250, 86 S.W.3d 18 (2002). Here, the Arkansas Court of Appeals decided another brain injury case involving neuropsychological testing. As in Wentz, the issue was whether the findings produced by neuropsychological testing were to be considered objective findings within the meaning of Ark. Code Ann. §11-9-102(16) (A) (i). The claimant in Watson had positive findings from neuropsychological testing as well as problems with balance, headaches, memory, depth perception, speech, mental function, and emotional distress. The court in Watson

acknowledged that the principles announced in Wentz were controlling but distinguished Wentz and denied the compensability of the brain injury, as follows:

In Wentz, the appellant sustained a brain injury as a result of a work-related accident. We found that, in addition to the neuropsychological testing, there was other objective evidence of a brain injury. See Wentz, supra. This evidence included medical testimony besides that of the neuropsychologist that attributed the appellant's injury to her work-related accident.

Here, the only evidence suggesting that appellant sustained a compensable closed-head injury was found in the results of the neuropsychological testing; there was no other objective evidence establishing a closed-head injury. The results of the neuropsychological testing standing alone is not enough to establish a compensable injury...

There appears to be no real distinction between Wentz and Watson except for the fact that the claimant in Wentz produced medical testimony that the brain injury was causally related to the industrial incident and that testimony was stated with a reasonable degree of medical

certainty. If that is the test for objective findings, then the claimant has passed the test and his injury should be found to be compensable under Wentz or Watson.

In summary, the opinion of the Administrative Law Judge, affirmed and adopted by the majority, contains two major errors of law: (1) the inclusion of the claimant's heat exhaustion injury into the provisions of Ark. Code Ann. §11-9-114; and (2) the conclusion that the claimant has not produced evidence of objective findings in accordance with Wentz and Watson. Following Wentz, the results generated from neuropsychological testing, alone, would be considered objective evidence of injury, as long as the results can be validated. And even if results from neuropsychological testing are not to be considered objective unless supported by other findings, as was indicated by Watson, the claimant produced other findings which would satisfy the mandates of Watson in the form of opinions from physicians establishing the causal relationship between incident and injury with a reasonable degree of medical certainty.

Based on the above, I find that the claimant has produced evidence of objective findings within the meaning of the Workers' Compensation Law; that he has proved by a preponderance of the evidence that he suffered a compensable injury in the form of heat exhaustion causally related to his employment on August 10, 2006; that his injury is not controlled by Ark. Code Ann. §11-9-114; and that he is entitled to temporary total disability benefits from August 11, 2006 until a date yet to be determined, as well as medical expenses associated with the treatment of his injury and attorney's fees.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner