

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F704206

FERNETTE E. MILLER, EMPLOYEE	CLAIMANT
HOLIDAY INN HOLIDOME, SELF-INSURED EMPLOYER	RESPONDENT

OPINION FILED JUNE 3, 2008

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

Claimant represented by the HONORABLE NELSON V. SHAW, Attorney at Law, Texarkana, Texas.

Respondents represented by the HONORABLE GAIL O. MATTHEWS, 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 January 28, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The employee-employer relationship existed on April 9, 2007.
2. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

3. The claimant's average weekly wage was \$166.17; her compensation rate for temporary total disability is therefore \$111.00 per week.
4. The claimant proved by a preponderance of the evidence that she sustained a compensable back injury on April 9, 2007.
5. I find that the claimant's failure to give notice on whatever written forms and by whatever procedures the respondents may have in place for reporting a work-related injury is excused under the circumstances presented in this claim.
6. The claimant has established by a preponderance of the evidence that the emergency room treatment and the prescriptions documented in the record which the claimant received beginning on April 12, 2007, were reasonably necessary to treat her work-related low back injury.
7. The claimant has established by a preponderance of the evidence that the MRI and follow-up treatment originally proposed on April 18, 2007, are also reasonably necessary for treatment of her compensable low back injury.
8. The claimant has established by a preponderance of the evidence that she has been temporarily totally disabled from working from April 12, 2007, through the date of the hearing on November 1, 2007, and continuing to a date yet to be determined.

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 January 28, 2008, 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 on April 9, 2007, and a finding that the claimant's failure to give notice of a work-related injury was excused under the circumstances presented in the claim. After conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on April 9, 2007.

The claimant was employed by the respondent employer in the laundry. The claimant's job duties required her to wash and dry linens for the respondent

employer. The claimant testified that on April 9, 2007, she was pushing a laundry cart full of laundry when she fell and hurt her back. The claimant stated that something popped in her back and she fell to the floor. The claimant testified that she laid on the floor for a period of time before she got up and moved to a chair. The claimant asserted that this incident was witnessed by Tammy and Medallion in the laundry room. The claimant did not complete an incident report with her supervisor, Tammy. She did not report an incident to Ms. Bonnie Kirtly, the housekeeping supervisor. The claimant testified that she went straight to the office to report the incident with Ms. Davis, the owner. She testified that Ms. Davis was not in the office, which is contrary to her deposition testimony where she stated that she did report it to Ms. Davis, but she attempted to report the incident to someone else that was in the room. However, the unknown individual allegedly advised her that "they don't do anything about that." The claimant continued to work the next day and the day after and finally on April 12, 2007, due to her complaints of pain she sought treatment at the emergency room.

The claimant stated that she began writing down things after the incident because of the alleged unknown person's conversation who told her that they

would not pay for any kind of workers' compensation injury. The claimant contended that she authored this document on April 9, 2007. However, it contains events that occurred on April 10, 11, and 12 of 2007. It is curious that this document states "I Fernette returned back to work on 4/10/07 in pain also 4/11/07. I Fernette couldn't take the pain anymore so I went to the hospital on 4/12/07."

The respondents offered the testimony of Ms. Bonnie Kirtly the housekeeping supervisor. Ms. Kirtly testified that the claimant was not working on April 9, 2007, pursuant to the payroll journal. It is up to Ms. Kirtly to keep up with the hours that everyone in housekeeping works. She does not perform all of the paper work, but she does maintain the time cards for the housekeeping employees. There was no report of the claimant working on April 9, 2007. She also testified that there were numerous incidents where the claimant failed to report to work on her scheduled day prior to April 7, 2007. Ms Kirtly testified that the claimant would call in pretty often for various reasons of being sick and various other assorted sundry of excuses.

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, i.e., 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).

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury on April 9, 2007. First and foremost, the claimant's time cards indicate that she was not even at work that day. She failed to report an injury to anyone and only wrote down these alleged conversations that took place with unknown individuals. The claimant thought Tammy was her supervisor but yet Tammy did not fill out any kind of incident report for the claimant. The claimant alleged that Ms. Kirtly told her that her back injury would not be paid for. But Ms. Kirtly testified that if claimant had reported a back injury to her she would have written down or witnessed the claimant completing an injury report. It was Ms. Kirtly's job to see that the report was completed and somebody else's job to determine whether or not the

benefits were awarded. She adamantly stated that it was not her job duty to determine whether or not benefits were paid to the claimant and she would never have told her that she was not going to receive any benefits. The claimant's version of her attempts to report the alleged incident are simply not plausible. In my opinion, the claimant has absolutely no 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 of 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.

Even if the claimant did establish that there was an incident on April 9, 2007, the claimant cannot establish objective findings of an injury. The claimant asserted that the pain was so intense that she finally sought medical treatment on April 12, 2007. The claimant was diagnosed with a low back strain and was given prescriptions for Lortab, Flexeril and Naproxen. There are no objective findings in the medical records that establish a compensable injury. The medical records indicate subjective complaints of pain and the claimant's assertion that the pain is indicative of a muscle spasm is not even present. The Administrative Law Judge relied upon several cases to make the determination that just because the claimant was given a prescription for Flexeril, Lortab and Naproxen, that she must of had some objective findings. The claimant was prescribed these various medications and they can also be used to relieve pain. Pain is very clearly a subjective medical finding. The physician never

indicated that the prescriptions were being provided to assist with or to use when needed for muscle spasms. He did not order physical therapy. There was no indication that the claimant presented with anything other than subjective reports of pain. The evidence is simply insufficient to meet her burden of proof.

Therefore, after considering all of the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on April 9, 2007. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

---

KAREN H. MCKINNEY, Commissioner