

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F412812 & F612506

LAVADA PARKER, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 27, 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 ANDREW IVEY, 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 October 3, 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 all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant would be entitled to a weekly compensation rate of \$322.00 for temporary total disability and \$242.00 for permanent partial disability as of November 30, 2004.
4. The claimant would be entitled to a weekly compensation rate of \$365.00 for temporary total disability and \$274.00 for permanent partial disability as of November 7, 2006.
5. The claimant has proven by a preponderance of the evidence that she sustained a right thumb right wrist injury while working for the respondent on November 30, 2004.
6. The claimant has proven by a preponderance of the evidence that she sustained a compensable low back injury while working for the respondent on November 7, 2006.
7. The respondents should pay for all reasonable and necessary medical treatment for this claimant's right hand and wrist compensable injuries as well as her compensable low back injury.

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 October 3, 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 compensable injuries to her right upper extremity, right thumb, left hip and low back. Based upon my de novo review of the record, I find that the claimant had failed to meet her burden of proof.

The claimant was employed by the respondent employer as a department manager. The claimant had worked for the respondent employer for approximately 18 years. The claimant contended that she sustained an injury to her right upper extremity on November 30, 2004, while moving large game tables. She also contended that she sustained a compensable injury to her low back on November 7, 2006, while moving antifreeze. The

respondents contended that the claimant cannot prove she sustained a compensable injury to her upper right extremity in the course and scope of her employment and that the claimant cannot prove a lower back injury because of lack of objective findings. I agree with the respondents.

The claimant testified that on November 30, 2004, the respondent employer had gone through their blitz day the day after Thanksgiving and had sold a lot of their merchandise. Large game tables such as pool tables, foosball tables, and ice hockey tables needed to be moved. The claimant was not able to pick up one of these tables by herself so she had another associate come help. As they were picking it up, the claimant stated that she felt a pain in her wrist that went up into her right arm. The claimant testified that she told the associate to hold on just a minute and they sat the table down. The claimant testified that she tried to shake the pain off, but when they picked the table up, she had the same pain, and it was constant. The claimant went to the personnel office to report to Tammy Fisk what had happened. The respondent employer sent her to a doctor in Huntsville. The claimant testified that the doctor opened the door, looked at her and told her that

she had tendinitis and sent her back to work. The claimant did not immediately go to another doctor but, since the pain did not subside, she did eventually see another doctor. The claimant requested to be seen by another doctor but, at that time, there were no other doctors in the Huntsville area; therefore, there was no one else to send her to.

The claimant testified that after the November 30 incident, she continued to have pain in her hand, arm, and thumb, and she had problems picking up things and holding onto things, noting that she would drop items at times. She stated that the pain would shoot up her arm and down into her thumb. The claimant testified that she had never had any problems with carpal tunnel before but she had had a problem with her right thumb five years earlier. The claimant testified that for her right thumb problems she was prescribed a splint which she wore for a period of time until her symptoms went away and that she had not had any problems with her right thumb for the next four years.

The claimant came under the care of Dr. James Moore, who had her tested for carpal tunnel. Dr. Moore performed surgery on her wrist. The claimant testified

that she was off work for four to six weeks following her carpal tunnel surgery.

In November of 2006, the claimant was lifting a case of antifreeze and had turned to set it down and felt a really sharp pain in her back. Another associate persuaded the claimant to report the incident to the office. The claimant testified that the case of antifreeze which she was lifting weighed approximately forty-eight to fifty pounds and it was not unusual for her to be lifting something of that weight.

The respondent employer sent the claimant to the Lowell Clinic where she was seen by Dr. Vandergriff. The claimant testified that her pain persisted, but she was told by the respondent that they would not authorize any further medical treatment. The claimant went on her own to see Dr. Powell, who prescribed physical therapy. The claimant attended physical therapy sessions for four to six weeks. The claimant stated that these sessions were helpful. The claimant testified that the left hip pain became much better but her discomfort moved into her low back. The claimant returned to work and did work for a little while, but she was sent home because she did not have a release from her doctor.

Dr. Powell referred the claimant to Dr. Tony Raben, who gave her two injections. She stated that the second shot eased some of her discomfort, but her pain is the same as it was before the last procedure and she experienced pain most everyday. The claimant had been working up until just shortly before the hearing. The claimant testified that she slipped in some water in front of the milk cooler in the stockroom at the respondent employer and fell. The claimant testified that she hurt the same spot on her back that was hurt before. The claimant testified that her symptoms have increased and are worse than they were before her fall.

On cross examination, the claimant agreed that in her deposition she testified that prior to November 2006 she had not had any low back problems. The claimant was reminded that she had sought treatment for low back pain prior to November 7, 2006, some four months before her incident. The claimant testified that the low back problems she was having before was just from getting up and down and was not anything major like the pain she currently was experiencing. The claimant agreed that when she was seen by Dr. Raben, she did not advise him of previous pain in her lower back.

The medical records indicate that the claimant was seen at the Ozark Orthopedic and Sports Medicine Clinic on March 22, 2004, for a bone density study. Dr. Carl Kendrick wrote that as compared to the previous studies, there had been a gain of 5.8 percent in the density in the claimant's hip and a gain of zero in her lumbar spine.

Dr. Kevin Richter wrote on November 30, 2004, that he had seen the claimant for complaints of an injury she sustained that day while working for the respondent employer moving heavy game tables. Dr. Richter indicated that the claimant had no previous injury to her arm and after examination, Dr. Richter assessed the claimant with having forearm strain/tendinitis for which he prescribed Lodine, ice, and to use a wrist splint while working. The doctor also recommended that she limit her lifting to ten pounds with her right upper extremity for the next week.

Dr. James Moore wrote on January 17, 2005, that he had seen the claimant who reported that she was moving heavy tables on November 30, 2004, and had sharp pain in the base of her right thumb. Dr. Moore noted that the claimant reported that she had a thumb spica splint at one time for osteoarthritis in her CMC joint.

The claimant reported that she did well with that until this event, and now she had tingling in her right MF and RF, noting that she had a handheld computer for the past sixteen years at her work and that she was right-handed. On physical examination, Dr. Moore noted that the claimant had pain and crepitus in her CMC joint right thumb and the claimant's x-ray of her right thumb shows arthritic CMC joint. Dr. Moore diagnosed the claimant with having osteoarthritis in her CMC joint right thumb and right carpal tunnel syndrome. Dr. Moore recommended that the claimant undergo a nerve conduction study.

Dr. Michael Morse performed the nerve conduction study and wrote to Dr. Moore on January 18, 2005, that the claimant had prolongation of the motor distal latency but not of the sensory action potential in the median nerve. Dr. Morse noted that this can occasionally occur in carpal tunnel syndrome. The claimant also had 10 m/sec delay across the elbow which implied some compression of the ulnar nerve across the elbow.

Dr. Moore operated on the claimant's right thumb and wrist on February 25, 2005. Dr. Moore recommended that the claimant return to work March 28, 2005, but for the first month she should do light duty

with her right hand with no heavy lifting. On June 3, 2005, Dr. Moore notes that the claimant's right thumb looks good, she had a smooth range of motion in her CMC joint and her sensation is good as well as she had a full range of motion. Dr. Moore recommended that the claimant return to see him as needed.

The claimant was seen by Cathleen Vandergriff on November 7, 2006. The claimant reported that she was picking up a case of antifreeze and felt a painful stretch in her left hip. Dr. Vandergriff noted that the claimant complained of left hip and left lower back pain which happened that day. After examination, Dr. Vandergriff assessed the claimant with having left hip strain and prescribed medication, range of motion exercises, use ice and heat to the area of pain, and she could return to work with limited duties of a maximum lifting limit of ten pounds, to alternate sitting and standing, no squatting, bending, or stooping. X-rays of the claimant's left hip revealed no fractures or dislocations. Dr. Vandergriff stated:

Her back is straight and normal to inspection and palpation without bruises, masses, swelling or tenderness. She has full range of motion of her C-spine and T-spine. She notes that he has discomfort with twisting at the hips and she is unable to heel walk due to her pain.

She stands slowly from a sitting position but bends to touch the floor without difficulty. She states it is the raising up that causes more pain. She is able to raise up on her toes easily and had a normal gait. Bilateral upper and lower extremities are neurovascularly intact with equal pulses and reflexes as well as full range of motion.

On November 14, 2006, the claimant reported to Dr. Vandergriff that she was no better and noted that climbing stairs and squatting caused increased pain and she was unable to tolerate the prescribed medication. Again the claimant was assessed with having left hip strain, was sent to physical therapy for evaluation and treatment and returned to work with the same restrictions.

Dr. James Moore wrote on January 5, 2007, that he had seen the claimant in regard to a rating but, overall, she is doing fine, noting some pain in the base thumb area after using it a lot. Dr. Moore assessed no anatomical permanent impairment for the claimant's thumb or carpal tunnel in a letter sent to the respondent's attorney dated May 22, 2007.

On April 11, 2007, the claimant underwent an MRI of her lumbar spine, which revealed a disc protrusion in the left para central region that slightly

narrows the neuroforamina. Dr. David Brown noted that he saw no definite impingement of the nerve root and that correlation was needed. Dr. Brown wrote that the claimant had very mild bulging of the L5-S1 disc.

The claimant was seen by Dr. Raben on April 11, 2007, for her low back pain. After examination, Dr. Raben recommended the claimant undergo an MRI and prescribed medications. The claimant was seen by Dr. Raben after her MRI on April 23, 2007, where it was noted that the MRI showed a left sided herniation at L4-5. Dr. Raben noted that the claimant's leg pain was on the right and was associated with numbness on the dorsum of her right foot. Dr. Raben reported that the claimant's back pain was worse. After examination, Dr. Raben assessed the claimant with having lumbar spine degenerative disc disease as well as lumbar spine disc herniation. Dr. Raben referred the claimant to Dr. Johnson for an EMG nerve conduction study.

The claimant underwent an EMG on April 24, 2007, which yielded a normal study of her right lower extremity and corresponding lumbosacral para spinal musculature. Dr. Johnson indicated that there was no electro diagnostic testing to suggest radiculopathy,

plexopathy, generalized peripheral neuropathy, or peripheral nerve entrapment syndrome or injury.

The claimant was seen by Dr. Raben on May 8, 2007. After review of the claimant's EMG nerve conduction study and examination, Dr. Raben recommended epidural steroid injections, to continue her medications, undergo physical therapy, and to return to work with restrictions of no prolonged standing or prolonged sitting, no working in a bent over position, frequent breaks, frequent change of position, and no repetitive bending with a lifting limitation of five to ten pounds.

The claimant was seen by Dr. Mark Powell on March 8, 2007, due to her complaints of left hip pain. After examination and review of the claimant's x-rays which were normal, Dr. Powell recommended that the claimant undergo an MRI of her pelvis. On March 29, 2007, Dr. Powell wrote that the claimant's MRI of her pelvis revealed no evidence as to the source of the claimant's left hip pain and no evidence of a vascular necrosis or fracture. Dr. Powell recommended physical therapy, to include aquatic therapy, and referred her to Dr. Raben. Dr. Powell also recommended that the claimant remain off work until seen by Dr. Raben. Dr. Powell

wrote on May 10, 2007, that the claimant had been seen by Dr. Raben and diagnosed with a herniated disc of the lumbar region and that she had completed her physical therapy. Dr. Powell noted that the claimant was requesting a release to return to work and Dr. Powell, in fact, did release the claimant to regular duty on May 14, 2007.

The medical evidence demonstrates that the claimant was seen and treated by Dr. Peter Heinzelmann on May 9, 2001, for complaints of right thumb swelling and pain. X-rays taken of the claimant's right thumb showed a slight dorsal subluxation of the first metacarpal. After examination, Dr. Heinzelmann diagnosed the claimant with early osteoarthritis of the CMC joint right thumb and recommended that she use a thumb spica splint and prescribed anti-inflammatory medications. Dr. Heinzelmann added an addendum to his office note stating that the claimant operated a handheld computer at work and also did a lot of unpacking and handling of store goods. Dr. Heinzelmann noted that the claimant reported that her thumb was definitely more painful during and after her work activities as apposed to when she was away from work for a day or two.

Dr. Raben's deposition was taken on August 27, 2007. Dr. Raben testified that following the claimant's EMG nerve study, which was normal, he assessed the claimant with what he believed to be radiculitis associated with an annular tear. Dr. Raben agreed that this diagnosis was in association with his diagnosis of the claimant having a herniated disc as well as disc degeneration. Dr. Raben testified that he was not surprised that Dr. Vandergriff did not find any findings consistent with an acute injury when she first saw the claimant. Dr. Raben explained that the natural history of an internal disc disruption was a progressive accelerated change with time. Dr. Raben stated several times that based on the claimant's history, a specific injury on November 7, 2006, while lifting a heavy case she felt sudden back pain, as well as the findings on her MRI of degenerative disc disease and a herniated disc, would lead him to conclude that the November 7 event was the cause of her herniation and or exacerbation of her degenerative disc disease. However, Dr. Raben stated that the only thing he had to go on was the claimant's history. Dr. Raben stated that according to the claimant's history, this was the acute and proximal cause of her need for medical treatment within

a reasonable degree of medical certainty. Dr. Raben was also asked to review Dr. Vandergriff's November 14, 2006, report which indicated that the claimant said that climbing stairs, squatting on her left caused increased pain, would that be consistent with an annular tear and Dr. Raben responded, "Yes."

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 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 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 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 did not sustain a compensable injury to her right upper extremity and to her low back.

The medical evidence demonstrates that the claimant sought treatment for problems associated with her right thumb as early as May 9, 2001. Dr. Heinzelmann

noted that the claimant noticed "slight swelling and pain at the base of her right thumb for about a year" and that her symptoms began spontaneously. He opined that the claimant had early osteoarthritis of the CMS joint.

The claimant sought treatment from Dr. Kevin Richter, the company physician, after the gaming table incident. Dr. Richter noted findings of tenderness "along the extensor muscles of the forearm on the right." He also noted full range of motion of the elbow, wrist and hand joints. He found no crepitus or other deformity, no erythema and no joint effusion. Dr. Richter opined that the claimant had a right forearm strain and/or tendinitis. Dr. Richter failed to note that the claimant had no previous injury to her right arm or thumb. He obviously was not told by the claimant that she had previously been diagnosed with osteoarthritis in her right thumb.

The claimant next sought treatment from Dr. Moore. Dr. Moore noted that the claimant had obvious osteoarthritis in her carpometacarpal joint. He did not indicate that the claimant's condition was caused by her employment nor did he relate the claimant's carpal tunnel to her employment. In a letter dated May 22,

2007, Dr. Moore noted that the arthritis in the joint was the primary cause of her overall arthritis and was not related to injury, but was "more than 50% related to general wear and tear osteoarthritis associated with her overall health condition."

With respect to the carpal tunnel syndrome condition and the claimant's lateral tennis elbow, Dr. Moore noted that "these could be related to any number of etiologies," noting that repetitive use is only one possible factor for this condition. He went on to note that the claimant's previous diagnosis of tennis elbow was based entirely on palpation and examination, with no objective findings to support that diagnosis. Further, although the claimant had positive objective findings of mild carpal tunnel syndrome as found on nerve conduction studies, but for the claimant's osteoarthritis of the right thumb, he would not have operated on the carpal tunnel. Moreover, Dr. Moore was unable to state with specificity that holding a hand held computer had any bearing on the claimant's condition. Dr. Moore's opinions are simply not enough to support a conclusion that the claimant's right upper extremity problems are related to a lifting incident on November 30, 2006. The Commission has a duty to translate the evidence on all

the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). However, it is well established that the determination of the credibility and weight to be given a witness's testimony is within the sole province of the Workers' Compensation Commission. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of

fact only those portions of the testimony it deems worthy of belief. McClain, supra.

The Commission is never limited to medical evidence in arriving at its decision. Moreover, it is well within the Commission's province to weigh all the medical evidence and determine what is most credible. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Id. In addition, the Commission has the authority to accept or reject a medical opinion and determine its medical soundness and probative force. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. McClain, supra.

The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion, January 22, 1996 (Claim No. E417617). The Commission is

not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Moreover, the Commission need not base a decision on how the medical profession may characterize a given condition, but rather primarily on factors germane to the purposes of the Workers' Compensation Law. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16) (B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. Huffy Service First v. Ledbetter, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing Howell v. Scroll Technologies, 343 Ark. 297, 35 S.W.3d 800 (2001).

Medical opinions based upon "could", "may", "possibly", and "can" lack the definiteness required to satisfy Ark. Code Ann. §11-9-102(16) (B), which requires

that medical opinions be stated within a reasonable degree of medical certainty. Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000). In Frances, the Arkansas Supreme Court expressly overruled a prior Court of Appeals decision to the extent that the Court of Appeals had held that such indefinite terms were sufficient to meet the requirements of Ark. Code Ann. §11-9-102(16)(B). The Arkansas Supreme Court held that a doctor's opinion that an accident "could" produce a lumbar disc injury was insufficient to satisfy the standard of within a reasonable degree of medical certainty. Moreover, in Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000), the Arkansas Supreme Court held that a medical opinion based upon the theoretical possibility of a causal connection did not meet the standard of proof. In Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001), the Arkansas Supreme Court held that in order for a medical opinion regarding causation to "pass muster" such opinion must be more than speculation, and go beyond possibilities. In my opinion, it would require speculation and conjecture to find that the claimant's problems with her right thumb and carpal tunnel were causally related to her employment.

Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her right thumb and compensable carpal tunnel syndrome.

The claimant also alleges that she sustained a compensable injury to her left hip and lower back while picking up a case of antifreeze on November 7, 2006. The claimant reported the incident to the respondent employer and was sent for treatment at the Lowell Occupational Health Clinic where she was seen by Dr. Vandergriff. The claimant made no mention of right leg pain or numbness. The claimant had x-rays which showed no fractures or dislocations. Dr. Vandergriff assessed the claimant with left hip pain.

The claimant sought treatment from Dr. Raben who had the claimant undergo an MRI six months after the antifreeze lifting incident. Dr. Raben opined that the claimant had a herniated disc at L5-S1 and related it to the November 7, 2006, lifting incident. However, Dr.

Raben was not aware that the claimant had a history of prior lower back pain. In fact, she denied that she had a history when questioned by Dr. Raben.

The medical evidence demonstrates that the claimant sought treatment from Dr. Harris on June 28, 1999, with a history of three months of burning pain and numbness in both lower extremities, particularly on the right. On October 1, 2003, Dr. Tom Patrick Coker noted "one year's long history of lateral proximal leg pain. Right worse than left." Dr. Coker also noted that the claimant had "some neurological complaints on the right." On April 27, 2006, Dr. Hanby noted that the claimant had back pain in the past and that "sometimes her pain does go down the lateral aspect of her leg and she will have a sense of numbness." The claimant was referred to Dr. Carl Kendrick who noted that the claimant had knee pain which he opined was coming from her back. Based on x-rays, Dr. Kendrick send the claimant for physical therapy.

After considering Dr. Raben's opinion in light of the claimant's prior history of back problems, I cannot give Dr. Raben's opinion any weight. His opinion is based upon the history given to him by the claimant. He attempted to explain his opinions when given the

facts that the claimant had prior problems. However, he indicated that the claimant's internal disc disruption was an ongoing progressive process that admittedly began well before the November 7, 2006 lifting incident. He opined that the lifting incident may have "markedly exacerbated" the claimant's pre-existing condition but that lack of objective medical evidence when the claimant was evaluated by Dr. Vandergriff on November 7 and November 14 seems to thwart that theory. In my opinion, the lack of objective findings at the time of the incident fails to establish that the claimant sustained a compensable lower back injury on November 7, 2006. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner