

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705087

HORTENCIA SANCHEZ, EMPLOYEE	CLAIMANT
PINNACLE FOODS, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 22, 2008

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

Claimant represented by the HONORABLE RONALD M. McCANN, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON, 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 November 9, 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 the within claim.

2. The employee-employer-carrier relationship existed among the parties on January 5, 2006.
3. The parties' stipulation that claimant earned an average weekly wage of \$530.00 which would entitle her to compensation at the rate of \$353.00 for total disability benefits and \$265.00 for permanent partial disability benefits is hereby accepted as fact.
4. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on January 5, 2006.
5. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes, but is not limited to, surgery performed by Dr. Routsong.
6. Claimant is entitled to temporary total disability benefits beginning November 8, 2006, and continuing through a date yet to be determined.
7. Pursuant to A.C.A. §11-9-411, respondent is entitled to a credit for medical and disability benefits paid by a group health carrier.
8. Respondent has controverted claimant's entitlement to all temporary total disability benefits.

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 November 9, 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 sustained a compensable injury to her lower back on January 5, 2006, for which she is entitled to reasonable and necessary medical treatment, including surgery performed by Dr. Routsong as well as temporary total disability benefits from November 8, 2006 and continuing through a date yet to be determined. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant sustained an idiopathic injury for which respondents are not liable. Therefore, I find that the decision of the Administrative Law Judge must be reversed.

The claimant reported an alleged injury to her employer on January 6, 2007, the day after it allegedly

occurred. Pursuant to the Incident Report the claimant signed on January 6, 2007, she experienced pain in her back in the right buttocks area when she was placing meat and stood up. No mention was made of the claimant slipping while in the process of standing. Likewise, when the claimant reported her history to her medical care providers, the claimant did not mention that she slipped as she was standing. Rather, the medical history, the claimant provided to Dr. Karl Haws on January 24, 2006, which was written by the claimant's daughter on a form provided by Dr. Haws's office stated:

she was getting up from her chair &
she felt some pain on her lower
right side

After reviewing this report, and examining the claimant, Dr. Haws recorded a history with a little more detail. Specifically, he wrote:

The patient presents as an employee of Pinnacle Foods in Fayetteville for the past 9 years, and complains of an accident which occurred approximately 3 weeks ago. She states she was rising from her chair and felt a pinch in her right lower back and buttocks area which has persisted....

When the claimant returned to Dr. Haws on February 10, 2006, he had a thorough discussion with the

claimant and her interpreter regarding the nature of her injury. In this regard, Dr. Haws noted:

I explained through her interpreter that based on the x-ray I took here, and I reviewed those results with her, she has moderately severe DDD at the lumbosacral spine, primarily at L5-S1. I explained that this level of degenerative change did not occur overnight and due to her injury, she has obviously has had severe degenerative changes present which have possibly been a contributing factor to her condition. She was not performing a specific movement attributed to any specific duty at work, but rather was arising from her chair when she felt a pinch in her right lower back and buttocks area. This could of course have happened any time she arose from a chair, whether at home or at work....

There is no indication that Dr. Haws misunderstood the nature of the claimant's injury, or that the claimant tried to correct him with regard to just how her injury occurred.

Dr. Haws had the same conversation with the claimant and her husband again on March 14, 2006, when he explained that arising from a chair is not a specific duty related to work. Again, no attempt was made by the claimant to correct Dr. Haws and inform him of a slip even after he repeated the claimant's description of her injury on more than one occasion and advised her that it would not be work related.

In finding that the claimant has met her burden of proof, the Administrative Law Judge did not find significant the lack of a reported slip and fall in the claimant's medical records "given the language barrier in this case." In my opinion, however, I place great weight upon the absence of any reported slip and fall in these medical reports. First, when the claimant reported an incident at work, she was provided with an interpreter who reported the mechanics of the injury just as the claimant described. Second, a different interpreter went with the claimant to Dr. Haws yet the exact same description of the injury was provided. Presumably, the claimant's daughter who would be intimately familiar with the claimant and her manner of speaking, only wrote, "she was getting up from her chair & she felt some pain on her lower right side," when she had to describe the claimant's injury for Dr. Haws. Finally, Dr. Haws, not once but twice, discussed the history and mechanics of the injury with the claimant, and she never attempted to correct Dr. Haws or explain that there was more to her injury than just arising from a chair.

The Administrative Law Judge also found that the testimony of Delina Espinal, the claimant's co-worker, corroborated the claimant's testimony that she

slipped as she was arising from her chair resulting in her lower back injury. However, I do not read Espinal's testimony as favorable to the claimant. The claimant did not identify Espinal as a witness to her injury when she first reported an injury. Moreover, unless Espinal was actually looking at the claimant's legs and feet, it would have been impossible for her to know that the claimant's foot slipped. Espinal testified that she was standing next to the claimant on the date on the incident and that the claimant stood up from her bench "she kind of slipped, and she was going to fall, and she grabbed onto the line." Espinal observed this movement out of her peripheral vision. If the claimant had stood "and felt like a needle went through" her back as she described in the Incident Report, Espinal would have seen the claimant stand, react to the shot of pain, bend over, and grab the line. The mechanics of such an incident may appear out of one's peripheral vision like a person slipped, especially if one were latter told that the person had slipped. Accordingly, without a better foundation laid for Espinal's line of sight, I cannot find that her testimony bolsters the claimant's account of slipping and falling at work.

In my opinion, the overwhelming evidence presented contemporaneously with the injury does not

support a finding that the claimant slipped and fell as she was arising from her chair. Accordingly, I find that the claimant sustained an idiopathic fall on January 5, 2006. An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998); Kuhn v. Majestic Hotel, 324 Ark. 21, 918 S.W.2d 158 (1996); Little Rock Convention & Visitors Bur. v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997); Moore v. Darling Store Fixtures 22 Ark. App. 21, 732 S.W.2d 496 (1987). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. ERC, supra. Where a claimant suffers an unexplained injury at work, it is generally compensable. Little Rock Convention & Visitors Bur., supra. Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk by placing the employee in a position, which increases the dangerous effect to the fall. Id. Employment conditions can contribute to the risk or aggravate the injury by, for example, placing the employee in a position which increases the dangerous effect of a fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Id.

In Moore, supra, the Court of Appeals offered the following analysis with regard to whether an on-the-job fall will give rise to compensation:

When one suffers an injury at work, the cause is, obviously, either known or unknown. Larson's treatise on workers' compensation law states that the most common example of a situation in which the cause of the harm is unknown is the unexplained fall in the course of employment and that most courts confronted with that situation have seen fit to award compensation. 1 Larson, *The Law of Workmen's compensation*, § 10.31, at 3-87 (1985). However, injuries from idiopathic falls do not arise out of the employment unless the employment contributes to the risk or aggravates the injury by, for example, placing the employee in a position which increases the dangerous effect of the fall, such as on a height, near machinery or sharp corners, or in a moving vehicle. Larson § 12.11.

The word "idiopathic" is defined in *Webster's Third New International Dictionary, Unabridged* (1976), as (1) peculiar to the individual, (2) arising spontaneously or from an obscure or unknown cause. Although the two concepts are frequently confused, Larson says "unexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin." Larson § 12.11, at 3-314.

Our Arkansas cases have followed the above rules. In Fairview Kennels v. Bailey, 271 Ark. 712, 610 S.W.2d 270 (Ark. App. 1981), we relied upon a statement from Larson § 10.31 that "It is significant to note that most courts confronted with the unexplained fall problem have seen fit to award compensation," and we held that the claimant's explanation that, while engaged in her work-related duties she "fell and couldn't get up," was sufficient for the Commission to find that the claimant fell in the course of her employment. 271 Ark. at 715.

Moore, 22 Ark. App. at 25, 732 S.W.2d at 498.

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).

There is no indication that the claimant was performing an act specific to her employment at the time of her injury. As the claimant first reported to her employer on January 6, 2006, and again to Dr. Haws on January 24, 2006, the claimant was merely arising from

her chair when she felt a stab of pain shoot through her lower back. This claim is substantially similar to Whitten v. Edward Trucking/Corporate Solutions, 87 Ark. App. 112, 189 S.W.3d 82 (2004), wherein we found that a claimant who felt pain as he was reaching for a door knob and fell to the ground sustained an idiopathic injury for which the employer was not liable. Likewise, in the present claim, the claimant was merely arising from a chair when she experienced a shooting pain in her back which Dr. Haws has attributed to the claimant's longstanding degenerative disc disease.

Based upon the evidence of record, I cannot find that the claimant's complaints of back pain "arose out of her employment" or is causally connected to her employment. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury for which she is entitled to benefits. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner