

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F705363

MICHAEL CALVA, EMPLOYEE	CLAIMANT
PITONYAK MACHINERY CORPORATION, EMPLOYER	RESPONDENT
SENTRY SELECT, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 26, 2009

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

Claimant represented by the HONORABLE J. MARK WHITE, Attorney at Law, Bryant, Arkansas.

Respondents represented by the HONORABLE JOSEPH PURVIS, 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 July 17, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on March 26, 2007 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$347.00.

2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondent is directed to reimburse the claimant's mother for all medical expenses paid to Dr. Anderson and to Dr. Moore along with mileage to the medical providers.
4. The respondents are directed to pay temporary total disability benefits from May 7, 2007 to September 3, 2007 as the claimant remained in his healing period and had not yet returned to work.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this

hearing within thirty days pursuant to Commission Rule 20.

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 July 17, 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.

A. WATSON BELL, 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 he sustained a compensable specific incident injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a welder. His job duties required him to use welding equipment, a cutting torch and an electric

grinder. The claimant testified that sometime in March of 2007 he felt a pop in his right hand and developed pain and swelling.

The claimant sought treatment from Dr. Edattukaren, the company physician, the same day he felt the pop in his hand. Dr. Edattukaren saw the claimant again on March 27, 2007, for right hand pain. Dr. Edattukaren noted a pain in the claimant's right hand for "three days in duration." No specific trauma is noted nor is there any reference to a specific activity causing pain. The claimant was prescribed medication for tendonitis.

On May 7, 2007, the claimant sought treatment from Dr. L. F. Anderson. Dr. Anderson reported that the claimant indicated that he hurt his hand at work two months prior. Dr. Anderson diagnosed swelling over the dorsum of the claimant's hand and prescribed medication and a splint for tendonitis. In follow up reports dated May 14, 2007, and May 15, 2007, Dr. Anderson excused the claimant from work. He also referred the claimant to Dr. Michael Moore, a hand specialist.

On May 14, 2007, the claimant completed a written statement which stated:

I, Michael Calva, don't know what happened exactly. I think from

gripping my stinger to (sic) tightly
might be the cause.

On June 8, 2007, the claimant completed a AR-N
form and stated:

I'm not really sure what happened. I
think it was from gripping my
welder.

The claimant listed the date of the accident as March
26, 2007, at 1:30 p.m. It is of note that the claimant
testified at the hearing that "there was no
accident...date of accident, you couldn't put your
name...or a date on a day it occurred."

The claimant saw Dr. Moore on June 14, 2007.

Dr. Moore noted:

Mr. Calva is a pleasant 33-year-old
right hand dominate welder who has
noted a six week history of a
popping sensation over the dorsal
and ulnar aspect of the right wrist.
The popping occurs when he performs
gripping. He denies a specific
trauma. He reports his job requires
him to perform forceful and frequent
gripping using his right hand and
arm...

Dr. Moore did confirm "a popping sensation
over the dorsal and ulnar aspect of the small finger."
Dr. Moore diagnosed the claimant with "right small
finger EDQ tenosynovitis or compartment rupture." He
prescribed injections and extended the claimant's light

duty release for four weeks. Dr. Moore ultimately performed surgery on July 23, 2007, for a right wrist distal extensor digiti quinti compartment release.

Dr. Moore testified via deposition explaining that EDQ tenosynovitis is a rare condition involving the tendon on the top of that hand that helps to extend the little finger. With inflammation of the tendon or instability in the tunnel, or compartment the tendon travels under, the patient develops a clicking, popping or snapping sensation with pain and swelling of the hand. The inflammation can be caused by infection, irritation, overuse, or a mechanical or anatomical problem (malfunction tendon). There are two mechanisms of injury. If the tendon is damaged, the resulting inflammation prevents the tendon from smoothly gliding through the tunnel, gradually leading to the snapping sensation. Or if the hand is used in an awkward movement, the tendon would pop and tear the compartment, causing inflammation to gradually develop. Dr. Moore stated that since the claimant did not describe any incident of trauma, then the more reasonable explanation was likely that the claimant's condition had been building up over a period time prior to the time he felt the pop. Dr. Moore stated that the pop was not related to any trauma. Dr. Moore opined that the claimant's

condition was a mechanical problem and he could not say what caused the claimant's problems.

The respondent employer's plant manager, Gary Coco, authored two statements dated May 15, and May 16, 2007, with regard to the claimant and light duty. He indicated that the claimant became angry when he was informed there was no light duty available without a full release from Dr. Anderson. The claimant ripped off his bandage and said he could return to work. The next day the respondent employer offered the claimant a job driving a fork lift for three days but he declined. The claimant testified that he had been told by the adjustor for the respondent carrier that his claim was being denied around this same time.

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).

In my opinion, the evidence fails to demonstrate that the claimant sustained a compensable injury. The evidence shows that at various times the claimant stated that he suffered an injury in early March, or March 26, or March 27, or early May but then admitted that there was no accident. There is no evidence, other than the claimant's own self-serving testimony, establishing a causal connection between the claimant job duties and his hand problems. Uncorroborated testimony of an interested party is always considered to be controverted. This rule also applies to a non-party witness whose testimony might be biased. Burnett v. Philadelphia Life Ins. Co., 81 Ark. App. 300, 101 S.W.3d 843 (2003). It is not arbitrary to choose not to credit such testimony.

Dr. Edattukaren's report makes absolutely no mention of any cause of the claimant complaints. Dr. Anderson simply recounted that the claimant told him he hurt his hand at work. Dr. Moore could not could not relate any cause for the claimant's unusual hand condition, only stating that there was no report of trauma. Simply put, I cannot find any causal connection between the claimant's hand problems and his work. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that he

sustained a compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner