

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508257

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| HAZEL FOREMAN, EMPLOYEE | CLAIMANT |
| BAILEY TRUCK BROKERAGE, EMPLOYER | RESPONDENT |
| AMERICAN INTERSTATE INS. CO, CARRIER | RESPONDENT |

OPINION FILED JUNE 24, 2009

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

Claimant appears pro se.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and reversed in part.

OPINION AND ORDER

The claimant appeals and the respondent cross appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury, that the claimant's average weekly wage was \$497.59, that the claimant was under paid weekly temporary total disability by \$126.00 per week, and that the claimant was entitled to temporary total disability benefits for the period beginning June 22, 2005,

through August 25, 2005. Based upon our de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed in part and reversed in part. Specifically, we affirm the finding that the claimant sustained a compensable injury and the finding that she was entitled to temporary total disability benefits for the period June 22, 2005, through August 25, 2005. However, we reverse the finding that the claimant's average weekly wage was \$497.59. Our review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that her average weekly wage was \$497.59 thereby resulting in a compensation rate of \$332.00. We find that the claimant's average weekly wage results in a weekly compensation rate of \$206.00.

The claimant was employed by the respondent employer as a truck driver. On June 21, 2005, the claimant was involved in an accident in Memphis wherein the driver of another vehicle was killed. The claimant was able to get out of her truck and was ambulatory after the accident. She was taken to the hospital by ambulance where she spent one

night. At the hearing, the claimant gave an incredible account that she was sprayed in the face by the emergency medical worker. The claimant claimed the spray came from a lavender bottle and it made her feel like a rag doll. She was then placed in the ambulance and taken to the Regional Medical Center of Memphis.

At the hospital, the claimant underwent X-rays, CT scan of the cervical spine, and an MRI of the cervical spine. These tests revealed degenerative changes only. She was told to wear a cervical collar and was diagnosed with a cervical sprain and low back pain. She was told to follow up at the Orthopedic Clinic in two weeks. The claimant did not follow up with the clinic but sought treatment for her unrelated diabetes on July 6, 2005. At that visit she did not mention the motor vehicle accident she was involved in on June 21, 2005. The claimant sought treatment from the Joseph Clinic in Searcy on August 10, 2005. The claimant complained of neck and low back pain. She was referred for an MRI. On August 11, 2005, the claims adjuster, Steven Perry, sent a fax to the Joseph Clinic informing them that

the claimant had undergone a battery of tests on the day of the accident. After reviewing this letter, the claimant's physician did not order any additional testing. On August 24, 2005, the claimant was released to regular duties effective August 25, 2005. At that visit, the claimant requested that the nurse practitioner "be a good girl" and extend the claimant's period of disability. She refused to do so.

There is no additional medical in the record until May 20, 2008. The claimant was seen on that date at the emergency room at Harris Hospital in Newport following an incident. The claimant was noted to have sustained a "fall" and the diagnosis was "fall". The claimant contended that she was hit in the head by a gentlemen but she did not fall. A CT scan was performed on the claimant's lumbar spine which disclosed degenerative disc disease, facet arthropathy and spinal canal stenosis of L4-L5 and L3-L4, spondylolysis with grade I spondylolisthesis of L5-S1 and bulging annulus L4-L5 and L3-L4.

At this time, the claimant states that she is still having problems with her back and is requesting additional medical treatment, temporary total disability benefits and that her compensation rate was miscalculated. The respondent's contend the claimant did not sustain a compensable injury and that they have paid the claimant, if there is a finding of compensability, all the benefits to which she is entitled. Moreover, her compensation rate has been correctly calculated.

There is no dispute that the claimant was involved in a motor vehicle accident on June 21, 2005, in Memphis. There is also no dispute that the respondents provided the claimant with medical care at the Memphis Regional Medical Center and are responsible for payment of those services. There was some indication that the claimant's hospital bills from that visit remain unpaid. The Administrative Law Judge ordered those bills to be paid. The respondents have not disputed that they owe for these services and have not appealed that finding by the Administrative Law Judge.

However, what they do dispute is whether or not the claimant sustained a compensable injury.

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 her claim is compensable, ie., that her injury was the result of an accident that arose in the course of 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 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).

After reviewing the record, we find that the claimant sustained a compensable injury. Immediately following the accident, the claimant was diagnosed with a cervical strain at the emergency room and given a cervical collar and told to wear it. She did have muscle spasms observed at her August 10, 2005, visit to the Joseph Clinic. After reviewing the evidence of record, we find that the claimant sustained a compensable injury on June 21, 2005.

The claimant is also entitled to temporary total disability benefits for the period June 22, 2005 through August 25, 2005. We note that the respondents paid temporary total disability benefits for the period June 22, 2005, through August 25, 2005. Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613

S.W.2d 392 (1981). Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. See, Ark. Code Ann. §11-9-102(4) (D) (Supp. 2005). Although objective medical findings are not directly necessary for the Commission to award temporary total disability benefits, such findings are required for the underlying injury to be compensable. Williams v. Prostaff Temporaries, 64 Ark. App. 128, 979 S.W.2d 911 (1998), aff'd, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). When an injured employee is totally incapacitated from earning wages and remains in her healing period, he is entitled to temporary total disability. Id.

The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of

treatment will improve that condition, the healing period has ended. Crabtree, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. McWilliams, supra; Mad Butcher, supra. Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

The evidence demonstrates that the claimant was released to return to regular duty on August 24, 2005, effective August 25, 2005. At that visit, the claimant requested that the nurse practitioner "be a good girl" and extend the claimant's period of disability. The nurse

practitioner refused to give the claimant off duty status. Therefore, the award of the Administrative Law Judge is affirmed.

The claimant contends that she is entitled to additional medical treatment and temporary total disability after August 25, 2005. The medical records indicate that the claimant did not seek medical treatment until May 20, 2008, almost three years after the accident. At that time, she underwent tests revealing degenerative disc disease. She was diagnosed with a "fall". Clearly, any problems the claimant was now having were related to this unrelated "fall" and her pre-existing degenerative disc disease. In fact, the claimant testified that she had been diagnosed prior to the June 21, 2005 motor vehicle accident with degenerative disc disease. The claimant has failed to establish a causal connection between her compensable injury and her present need for medical treatment. We find that the claimant's claim for temporary total disability and medical benefits subsequent to August 21, 2005, is hereby

denied. Accordingly, we affirm the decision of the Administrative Law Judge.

The issue that remains is the calculation of the claimant's average weekly wage. A.C.A. § 11-9-518 (Repl. 2002) provides:

- (a) (1) Compensation shall be computed on the average weekly wage earned by the employee under the contract for hire in force at the time of accident and in no case shall be computed on less than a full-time workweek in the employment.
- (2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying the hourly wage by the number of hours in a full-time workweek in the employment.
- (b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.
- (c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and

justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

The respondents calculated the claimant's average weekly wage to yield a temporary total disability compensation rate of \$206.00 per week. The Administrative Law Judge found that the claimant's compensation rate was \$332.00, thereby resulting in an underpayment of \$126.00 per week. We cannot agree with the Administrative Law Judge. His calculations were based upon unsubstantiated evidence the claimant provided in the form of handwritten figures purported to be her actual gross pay for the twenty-two weeks she worked for the respondent employer. The claimant alleged she received a \$40.00 per day per diem but there was no evidence of that in the record except for her testimony which is suspect at best. The claimant offered no other evidence in the form of a payments for any per diem amount paid to her.

There was some evidence in the record that the respondent employer paid the claimant a certain amount in advance of trip and then would deduct that advance from the

claimant's gross wages to arrive at the net wages. It appears that those net wages are reflected on the Form W. However, there is absolutely no explanation about what the advances were for and there is no accounting of whether the claimant spent the money that was advanced to her or not. To conclude whether those advances were income requires conjecture and speculation. 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). Therefore, we reverse the decision of the Administrative Law Judge and find that the claimant's average weekly wage yielded a temporary total disability rate of \$206.00 per week. Accordingly, there was no underpayment by the respondents. For those reasons set forth herein, the decision of the Administrative Law Judge is hereby affirmed in part and reversed in part.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur in the majority's determinations regarding compensability and temporary total disability benefits. However, I must respectfully dissent from the majority's determination that the claimant's average weekly wage yielded a compensation rate of only \$206, significantly less than the \$332 compensation rate calculated by the Administrative Law Judge which produced an underpayment of \$126 per week. The claimant credibly testified and produced sufficient evidence establishing that her gross earnings for the respondent employer during the time period in question totaled \$9,951.85. This yields an average weekly wage of

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\$497.59 and a compensation rate of \$332. Simply put, the Administrative Law Judge was correct.

PHILIP A. HOOD, Commissioner