

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707295

GERALD HAWTHORNE, EMPLOYEE	CLAIMANT
O'REILLY AUTOMOTIVE, INC., EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 11, 2009

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, 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 stipulations agreed to by the parties at the prehearing conference conducted on November 8, 2007, and contained in a pre-hearing order filed

November 8, 2007, are hereby accepted as fact.

2. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
3. On April 16, 2007, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$276 for total disability and \$207 for permanent partial disability.
4. On April 16, 2007, the claimant sustained a compensable injury to his left chest and lung. Specifically he has established by medical evidence, which is supported by objective findings, the actual existence of these physical injuries. He has further proven that these injuries arose out of and occurred in the course of his employment, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to his body, required medical services, and resulted in disability (at least temporarily).
5. The claimant is entitled to reasonably necessary medical services provided (sic) Dr. Goodman, Dr. Nelson, Dr. Giffith, Dr. Kannout, Dr. Vernon, Dr. Stites, and Dr. Foreman.
6. The claimant has proven that he was rendered temporarily totally disabled as a result of the effects of the compensable lower lumbar injury for the period of July 3, 2007, through February 5, 2007, less credit to the respondents for any day during this time period that the respondents paid the claimant for employment services.
7. The respondents have denied the occurrence of compensable injuries to the claimant's injuries (sic). The respondents have controverted any and

all benefits attributable to such injuries.

8. The appropriate fee for the claimant's attorney is the maximum statutory attorney's fee on all applicable benefits herein and herein awarded to the claimant.

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 an injury to his left chest and lung. After conducting a de novo

review of the evidence, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent employer as a delivery person. The claimant had only been working for the respondent employer for five or six weeks. He testified that on April 16, 2007, he was carrying two 50 pound boxes of brake rotors when the boxes shoved into his side. The claimant stated that while he was going through the back door of the respondent employer, he used a corner of the boxes to open the door, started out and somehow the boxes got trapped between the door and the claimant's side. The claimant completed his delivery and reported an incident to the store manager, Dale Gilstrep.

The following day the claimant sought treatment at the emergency room. The notes from that visit state that the claimant was injured at work and felt a pull in the rib area. X-rays were taken which reflected subtle deformities which might be chronic but no displaced fracture.

The claimant again sought treatment from the emergency room on May 29, 2007. The claimant again gave a history of injuring himself at work while lifting a heavy item.

On June 4, 2007, the claimant sought treatment from Cooper Clinic. The claimant gave a history of injuring himself at work when twisting his back and ribs. The claimant was ultimately diagnosed with a left rib separation, rib fractures and hernia. On August 15, 2007, Dr. Rowland Vernon, a thoracic surgeon, performed a repair of the claimant's hernia. The claimant had complications to his heart due to the surgery and required the care of a cardiologist as well.

The deposition of Dr. Vernon was introduced into the record. Dr. Vernon testified that when he first saw the claimant on July 11, 2007, the claimant had a mass near the junction of the abdominal chest wall which he thought was a hernia. Dr. Vernon opined that the cause of the claimant's problem was the claimant holding a box and the wind blew a door shut which resulted in blunt trauma that evolved into weakening of the musculature which resulted in the need for surgery. On cross-examination Dr. Vernon testified that in the absence of a malignant disease one would expect a trauma to cause the type of injury seen in the claimant. Dr. Vernon admitted that a history of just picking up an item without trauma would not result in a rib fracture. Dr. Vernon stated that in the case of direct trauma, a mass would appear in about six to ten weeks and bruising

would appear in ten to fourteen days. Dr. Vernon admitted that he was relying the claimant's history to determine causation.

Dale Gilstrep, the respondent employer store manager, testified regarding the door closer on the rear door at the respondent employer's place of business. Mr. Gilstrep testified that the purpose of the door closer was to keep the door from shutting real fast. In fact, Mr. Gilstrep has attempted to open the door fast and slam it shut but has been unable to accomplish this due to the hydraulic tension on the closer. Mr. Gilstrep checks the door every day as part of his job and the door has not been changed or altered in any way since the alleged incident with the claimant.

Mr. Gistrep testified that he heard about the incident with the claimant and the door through one of his assistants. He asked the claimant about it and the claimant replied that it was no big deal. He also asked the claimant if he needed medical care and the claimant stated he did not.

The respondent offered into the record pictures of the rear door and picture of a gentlemen carrying boxes the approximate size and weight as the ones the claimant was carrying on the date of the alleged incident. The claimant reviewed these

photographs and testified that he was carrying the boxes in the same manner as this gentleman in the photographs. The claimant testified that he got approximately one foot out of the door when the door jammed into him. He stated that he felt like the wind had come back against the door but he had no idea what had actually caused it. He estimated that the door got all the way open and felt like the wind caused it to "flop all the way back." The claimant went on to testify that at all times either his arm, foot or the boxes were touching the door.

The claimant completed an AR-C on September 4, 2007, stating "Claimant was carrying boxes and wind blew truck door into boxes, injuring ribs and possible internal organs." The AR-C was then amended to state, "Claimant was carrying boxes and wind blew a door into boxes."

The claimant had a prior workers' compensation claim which was properly reported and he received benefits. The claimant stated that he had asked Mr. Gilstrep for medical care but it is of note he sought treatment from the emergency room on his own.

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).

After conducting a de novo review of the record, I find that the claimant has failed to meet his burden of proof. First of all, the claimant has given inconsistent statements about the nature of the alleged incident. When he reported the incident to the emergency room on April 17, 2007, he gave a history of pulling something when he picked up something at work. Again, on May 29, 2007, he gave a history of injuring himself picking up a heavy item at work. In his deposition, the claimant told the story of the wind blowing the door shut. The claimant was confronted with the National Weather Service report from April 16, 2007, noting there was little wind or rain or storms on that date. The claimant then stated that the door somehow closed shut on him. In my opinion, the claimant is not a credible witness.

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. Id. Once the claimant needed surgery, his story changed on how the injury occurred. In my opinion, the claimant is unable to show a causal connection between his injury and his work. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner