

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500502

BEVERLY A. HORTON, EMPLOYEE	CLAIMANT
MEAT SHOP, INC., EMPLOYER	RESPONDENT
TRAVELERS INSURANCE CO., CARRIER	RESPONDENT

**OPINION FILED MAY 29, 2009**

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

Claimant represented by HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed September 29, 2008.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Because I cannot interpret the contents of Respondents' Proffered Exhibit 1, a micro cassette tape,

without engaging in speculation and conjecture, it is not admitted into evidence.

4. Because Respondents failed to provide their Proffered Exhibit 2 to Claimant until the day before the hearing, in contravention of the prehearing order and Ark. Code Ann. § 11-9-705(c)(2)(A) (Repl.2002), it is not admitted into evidence.

5. Because consideration of Claimant's testimony on cross-examination concerning her visits to Dr. Joseph McCoy will help to "best ascertain the rights of the parties" under Ark. Code Ann. § 11-9-705(a)(1) (Repl.2002), the testimony is admitted into evidence.

6. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to back, neck, and shoulders on or around December 3, 2004.

7. Because of the above finding concerning compensability, the issue concerning Claimant's entitlement to reasonable and necessary medical treatment is moot and will not be addressed.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the

elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein, including the December 3, 2004, report of Dr. McCoy, 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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant could not prove by a preponderance of the evidence that she sustained a compensable injury to her back, neck, and shoulders on or about December 3, 2004. After a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence that she sustained specific incident back, neck, and shoulder injuries and, therefore, I must respectfully dissent.

History

\_\_\_\_\_ The claimant worked for Meat Shop, Inc., where her responsibilities included stocking shelves with supplies and lifting large containers, or "luggers," of meat on a regular basis. The claimant testified that she was carrying a heavy "lugger" of hamburger and deer meat on December 3, 2004. The claimant testified that when she attempted to lift the lugger, which was heavier than she originally thought, she immediately felt pain in her shoulders and back. The claimant estimated the lugger weighed between 40 and 55 pounds. The claimant testified that the pain was on the

right side of her body. The claimant described her condition as a severe, continuous pain around her shoulders and up into her neck and back. The claimant testified that Mr. McGinnis, the owner, was out of the store at the time of the accident, but that she informed him of the injury when he returned. The claimant testified that the pain continued into that afternoon and that she obtained an appointment to see Dr. Joseph McCoy, a chiropractor, on December 3, 2004.

The claimant testified that at her visit on December 3, 2004, Dr. McCoy adjusted her back and took x-rays. Dr. McCoy noted that the claimant had significant edema and swelling at the right scapula and diagnosed the claimant with cervical spondylosis with myelopathy, thoracic sprain/strain, thoracic or lumbosacral neuritis or radiculitis, cervicalgia, pain in thoracic spine, and spasm of muscle.

The medical records show that the claimant treated with Dr. McCoy for approximately six weeks, at which time the claimant was referred to Dr. Timothy Paden. The claimant testified that at her January 17, 2005 appointment, she informed Dr. Paden that the injury was work-related. Dr. Paden prescribed Flexeril and physical therapy for the

claimant. The claimant underwent the physical therapy at the McBride Group for approximately four months.

The claimant testified that in January 2005 she informed the respondent that she was given a 10 pound lifting restriction and that when he was informed of this, the respondent told her he did not need her anymore. At the hearing, the claimant testified that her neck and shoulders still bother her and that her right arm sometimes goes numb after excessive lifting.

#### Discussion

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i), must be established:

(1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16)(A)(i), establishing the injury; and (4) proof by a preponderance of

the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

I find that the claimant has shown, by a preponderance of the evidence, that she sustained specific incident back, neck, and shoulder injuries. First, the claimant presented proof by a preponderance of the evidence that her injuries arose out of and in the course of employment caused by a specific incident identifiable by time and place of occurrence. 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). Here, the claimant credibly testified that she was injured on December 3, 2004 after she attempted to lift a plastic container weighing 40-55 pounds. The claimant further testified that she presented to Dr. McCoy the afternoon of the day the injuries occurred. The medical records from Dr. McCoy's clinic corroborate the claimant's description of the events on December 3, 2004. I find that

the claimant's credible testimony and the medical records show that her injuries arose out of and in the course of employment and that her injuries were caused by a specific incident, identifiable by time and place of occurrence.

Next, the claimant has presented proof by a preponderance of the evidence establishing injuries that caused internal or external physical harm to the body which required medical services, supported by objective findings. In order for an injury to be compensable under Arkansas Workers' Compensation law, the claimant must show an injury causing internal or external physical harm to the body which required medical services or resulted in disability or death. Ark. Code Ann. §11-9-102(4)(A)(i). Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). In the claimant's initial visit to the doctor on the afternoon of the specific incident, Dr. McCoy noted swelling in the right side of the mid back, as well as significant edema and swelling in the thoracic rib cage area and right scapula, which satisfies the objective findings requirement of Ark. Code Ann. §11-9-102(16)(A)(i). Dr. McCoy diagnosed the

claimant with "cervical spondylosis with myelopathy, thoracic sprain/strain, thoracic or lumbosacral neuritis or radiculitis, cervicgia, pain in thoracic spine, and spasm of muscle." After the initial doctor visit, the claimant underwent approximately six weeks of treatment with Dr. McCoy. The claimant was then referred to Dr. Paden on January 17, 2005. On March 22, 2005, Dr. Paden prescribed medications, including Flexeril. The Supreme Court of Arkansas has held that a claimant may rely on a prescription for medication for muscle spasm as part of the claimant's evidence establishing objective medical findings. Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005). I find that the claimant has shown proof by a preponderance of the evidence establishing a neck, back, and shoulder injuries that caused internal or external physical harm to the body which required medical services, established by objective medical findings.

The majority, by affirming and adopting the Administrative Law Judge, determined that the claimant is not credible. 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; 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. Wal-Mart Stores, Inc. v. Sands, 80 Ark. App. 51, 91 S.W.3d 93 (2002). The majority notes that the claimant could not recall whether she had been to Dr. McCoy prior to December 3, 2004. The Administrative Law Judge cites the claimant's reply in the initial opinion: "All I can tell you is maybe I was starting to have problems lifting all this stuff before I had this accident... 'cause I was working for him starting in June." While the majority finds that this testimony demonstrates the claimant is not credible, I disagree. The claimant is simply being truthful about aches and pains she received from working for the respondent. Furthermore, the claimant consistently reported to her doctors that her injuries occurred at work on December 3, 2004. The claimant testified that she sought treatment from Dr. McCoy on the day of the work incident. Dr. McCoy's medical records support the claimant's testimony about his prior treatment for minor back pain. Mr. McGinnis testified

that the claimant was an honest person. I find that the claimant is credible.

The majority, by affirming and adopting the Administrative Law Judge's opinion, places great importance on the fact that on the December 3, 2004 medical record Dr. McCoy circled "exacerbation." However, in the long form in the medical report which Dr. McCoy used to further explain his diagnosis and treatment plan, he writes: "I have determined that Ms. Horton's history has not contributed to her present condition." The majority has not properly weighed this fact in coming to its conclusion.

In conclusion, I find that the claimant has proved by a preponderance of the evidence that she suffered a compensable specific incident injuries to her back, neck, and shoulders on or about December 3, 2004, and, therefore, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner