

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605510

SHEILA MILTON, EMPLOYEE	CLAIMANT
K-TOPS PLASTIC MANUFACTURING, EMPLOYER	RESPONDENT NO. 1
CHAMPION PROPERTY & CASUALTY INS. CO., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JULY 8, 2009

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

Claimant represented by the HONORABLE STEVEN McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE CHRISTY L. KING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted as modified.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed January 23, 2009. 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 this claim.

2. On May 5, 2006, the relationship of employee-employer-carrier existed among the claimant and respondents #1, when the claimant earned an average weekly wage of \$274.66, which corresponds to weekly compensation benefit rates of \$183.00/154.00, for temporary total/permanent partial disability.
3. On May 5, 2006, the (sic) sustained an injury arising out of and in the course of her employment which rendered her temporarily totally disabled for the period beginning May 6, 2006, and continuing through the end of her healing period on June 20, 2007.
4. Respondents #1 have failed to prove the necessary elements of the *Shippers* defense by a preponderance of the evidence, such that the same does not serve a (sic) bar to the present claim for workers' compensation benefits.
5. The claimant has sustained a permanent physical impairment in the amount of 20% to the body as a whole as a result of the (sic) her May 5, 2006, compensable injury in the employment of respondent #1.
6. Respondents #1 shall pay all reasonable hospital and medical expenses arising out of and in connection with the claimant's compensable injury of May 5, 2006.
7. Respondents #1 have controverted this claim in its entirety.

After reviewing the entire record *de novo*, the Full Commission opines that the administrative law judge's decision is supported by a preponderance of the evidence, correctly applies the law, and should be

affirmed, except for Finding of Fact No. 5. The Full Commission finds that the claimant proved she sustained an anatomical impairment rating in the amount of 11%, pursuant to Table 75, p. 3/113, of the Guides to the Evaluation of Permanent Impairment, 4th Ed. In accordance with Table 75 II (E) of the Guides, the claimant should receive 10% for her surgically treated lumbar disk lesion and an additional 2% for the second operation. The claimant proved that the compensable injury was the major cause of her 12% anatomical impairment, and that the anatomical impairment rating was supported by objective medical findings not within the claimant's voluntary control.

The Full Commission therefore affirms the January 23, 2009 decision of the administrative law judge, including all findings of fact and conclusions of law therein, except for Finding of Fact No. 5, and we adopt the administrative law judge's decision as the decision of the Full Commission on appeal. The Full Commission finds that the claimant proved she was entitled to an 12% anatomical impairment rating.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal, the

claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part with the majority's opinion. Specifically, I dissent from the finding the claimant proved by a preponderance of the evidence that she sustained a compensable injury on May 5, 2006. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. However, I concur in the majority's assessment that the 20% permanent anatomical impairment rating is wrong. I agree that the claimant's permanent anatomical impairment rating should be 12% based upon Table 75 II(E) of the Guides.

The claimant went to work for the respondent employer in February of 2006. She testified that on May 5, 2006, she was pulling a cage that contained the bases for baby walkers when she hurt her back. The claimant notified supervisory personnel. She was seen by Dr. James Jacobs and underwent an MRI. Dr. Jacobs referred the claimant to Dr. Engleberg who later referred the claimant to Dr. Dowling in June of 2006. After conservative treatment and numerous diagnostic test, the claimant ultimately came under the care of Dr. Sam Murrell who performed a diskectomy in September of 2006. The claimant continued to complain of pain and underwent a second surgical procedure on March 3, 2007. The claimant was released to return to work by Dr. Murrell in June of 2007. The claimant has not returned to work since she last worked for the respondent employer on May 5, 2006.

The evidence demonstrates that the claimant previously had back surgery in 2005. She alleged that her back was fine after this surgery but the medical records indicate that she was having some problems post surgery.

The respondents initially accepted this claim as compensable, paid all medical including 73 week of

temporary total disability benefits and 16 weeks towards the 20% permanent anatomical impairment rating assessed by Dr. Murrell. The respondent's then controverted this claim arguing that the claimant could not meet her burden of proof by failing to establish that she had objective findings of injury and there was no causal connection. The respondents contended and argue that the claimant continued to complain of pain and was taking hydrocodone and cyclobenzaprine from the time she had the surgery in January of 2005, until she had the injury on May 5, 2006.

Dr. Murrell did find significant scar tissue when he operated on the claimant. Although his operative report did note that he found disc material, this disc material was intraforaminal. He went on to agree that there was no way to know when or how long that disc material had been there.

The claimant was seen by Dr. Engleberg who did not think the claimant was a surgical candidate and that the claimant's significant scar tissue would not respond well to surgery. Dr. Engleberg reviewed the claimant's MRI from May 18, 2006, and did not see any disc abnormalities. He did not see any objective findings of injury.

There is also evidence that the claimant failed to keep appointments and called Dr. Murrell's office numerous times requesting pain medication. In fact, Dr. Murrell would no longer call in medication for the claimant and he referred her to pain management. Dr. Murrell refused to unequivocally state that the claimant was exhibiting drug seeking behavior but he did admit there were no objective findings to support the claimant's continued subjective complaints of pain. He also stated that the claimant would call in requesting medication before her prescriptions would run out. The claimant admitted that sometimes she took more medicine than she should. She explained that the reason the pharmacist called Dr. Murrell was that her grandchild's mother, who was a meth addict, told the pharmacist that the claimant was selling her medicine. She explained that the mother was getting revenge on the claimant because the claimant had gotten the child from a meth house after the mother left the child there.

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).

In my opinion, a review of the evidence fails to demonstrate that the claimant sustained a compensable injury. The claimant cannot prove objective findings of an injury. Dr. Murrell, even after performing surgery on the claimant and finding disc material, could not state how long that material had been there. It is conjecture and speculation to conclude that the material was the result of an incident at the respondent employer's. It is just as plausible that the material was there at the time the claimant had the first back surgery in 2005. 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). The claimant had a prior surgery and was still undergoing

active treatment and taking medications before this May 5, 2006, alleged incident. Therefore, when I consider all of the evidence in the record, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on May 5, 2006. Accordingly, I must dissent from the majority's finding that the claimant sustained a compensable injury.

However, since a majority of the Commission has found that the claimant sustained a compensable injury, I concur with the finding that the appropriate rating should be 12% based upon Table 75 of the Guides.

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Repl. 2002). The Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used in assessing anatomical impairment. See, Commission Rule 099.34; Ark. Code Ann. § 11-9-522(g) (Repl. 2002). Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. § 11-9-704(c)(1)(B) (Repl. 2002).

Dr. Murrell assessed the claimant with a 20% permanent anatomical impairment rating based on Table 74 of the Guides using the DRE Lumbosacral Category II. In my opinion, the more appropriate rating is based upon Table 75 II(E) of the Guides. The claimant should receive 10% for her surgically treated disk lesion with residual pain and rigidity and another 2% for the additional operation.

KAREN H. MCKINNEY, COMMISSIONER