BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708055

BERTHA OSBORNE, EMPLOYEE	CLAIMANT
BOONEVILLE HUMAN DEVELOPMENT CENTER, EMPLOYER	RESPONDENT NO. 1
PUBLIC EMPLOYEE CLAIMS DIVISION, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JUNE 12, 2009

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

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

Respondent No. 1 represented by HONORABLE RICHARD S. SMITH, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was excused from the hearing.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on August 6, 2007. Based upon our de novo review of the record, we find that the claimant has failed

to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as an aide. On August 6, 2007, the claimant was helping with a resident when she fell striking her left elbow. The claimant testified that at the time of the fall she heard her back pop. The claimant immediately reported the incident to her supervisor. The respondent employer sent the claimant for treatment at the Emergency Room at Booneville Community Hospital where she was seen by Dr. William Daniel. The claimant complained of pain from the waist to the knee on the right side and in the left elbow. X-rays were taken which were essentially normal except for mild degenerative changes in the claimant’s hip. The claimant was diagnosed with a strain to the lower abdomen and right thigh. The claimant has not returned to work for the respondent employer nor has she worked anywhere else. The claimant contends that she sustained a compensable injury at the time of the incident. In our opinion, the claimant has failed to meet her burden of proof.

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 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 Cavenaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

The medical evidence demonstrates that the claimant has a long history of injury and degenerative disk disease in her low back. In fact, the claimant began receiving treatment for problems for her back as early as

April of 2004. The claimant ultimately underwent back surgery in January of 2007. She was released to return to full duty work and did in fact return to work. The claimant last sought medical treatment on August 3, 2007, three days before this incident and Dr. Daniels diagnosed the claimant with groin strain at that time.

The evidence demonstrates that after the claimant sought treatment at the Emergency Room, she sought treatment from Dr. Tonya Phillips on August 22, 2007. Dr. Phillips stated under the assessment portion of her records as follows:

> A patient with a history of L4 radiculopathy now with recurrent back pain without any clear evidence of radiculaopathy. She has some symmetric reflex loss symptoms could be related to diabetic neuropathy. I think this is hard to ferret out. With her underlying problems I think it would be difficult to clearly relate if there are some new findings going on.

Dr. Phillips ordered a lumbar MRI performed on August 31, 2007. It showed mild disk bulges at L2 and L4-5 and degenerative facet changes from L2-S1, incidental hemangiomas in the L2-S1 vertebra and degenerative end plate

changes at L2-3, L4-5 and L5-S1. It also demonstrated post surgical changes from a laminectomy that was performed in January of 2007.

When we review the evidence in the record, we cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. The claimant had pre-existing degenerative problems as well as was a diabetic. Dr. Phillips was not able to clearly relate if the claimant had new findings or not. She stated that some of the symptoms the claimant had could be related to diabetic neuropathy which was completely unrelated to the claimant’s incident of August 6, 2007. Further, the record demonstrates that the claimant sought treatment for essentially the same symptoms three days prior to this incident. Simply put, we cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Accordingly, we reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.

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 opinion. After a de novo review of the record, I find, as did the Administrative Law Judge, that the claimant proved by a preponderance of the evidence that she sustained a compensable specific incident back injury in an employment related fall on August 6, 2007, and therefore, I must respectfully dissent.

HISTORY

There is no doubt that the claimant has a history of difficulties involving her lumbosacral spine. The medical evidence presented shows that on April 23, 2004, the claimant was treated for low back pain, particularly in the area above the sacroiliac junction and right sacroiliac

joint. This episode of difficulties does not appear to be connected with any particular activity or event. However, this episode of difficulties appears to have resolved after this one office visit, and the claimant missed little, if any, work.

On September 16, 2005, the claimant experienced another episode of low back difficulties. However, these difficulties only involved her back or lumbosacral spine adjacent to the left sacroiliac junction. Again, there was no history of any specific precipitating activity or event. This episode of difficulties was diagnosed as a lumbosacral strain. Again, this particular episode of difficulties appears to have resolved after only one office visit and the claimant missed little, if any, work.

On January 19, 2006, the claimant experienced another episode of difficulties with her low back or lumbar spine. Again, there was no evidence of any radicular symptoms. This episode of difficulties began with a lifting incident, at home. X-rays of the lumbar spine, taken at that time, showed only mild degenerative changes of the facets of the lumbar vertebra, particularly the L5 and S1

vertebra. Disc space height was noted to be well maintained and there was normal alignment of the vertebra. It appears that this episode of low back difficulties also rapidly resolved.

On August 29, 2006, the claimant was experiencing difficulties with pain over the left greater trochanter muscle and tenderness over the sciatic notch. Again, there is no history of any particular activity or event preceding this episode of events. Again, these complaints seem to have resolved or diminished after one visit.

On October 11, 2006, the claimant sought medical treatment for difficulties with her lower back or lumbar spine, and also radicular difficulties into her left buttock and leg. In the initial nurse's report, a history was noted of progressive back pain since a fall a year prior. However, in his history and physical, Dr. William Daniel noted that the claimant had performed no strenuous work immediately prior to the onset of her difficulties and that her pain in her lower back began when she was getting out of the shower that morning and progressively worsened. On his physical examination, he also noted positive straight leg

raising, bilaterally. A CT Scan, which was performed at the request of Dr. Daniel, was interpreted as showing a moderate broad-based disc bulge with a small right paracentral disc protrusion of the L3-4 disc and a right posterior lateral bulge with mild broad-based disc bulge of the L4-5 disc. Arthritic changes were noted involving the vertebral bodies at both levels. A vacuum phenomenon was noted involving the L5-S1 disc, as well as degenerative arthritic changes of the vertebral facets at this level and a broad-based bulge of the disc. An MRI, which was also performed at the request of Dr. Daniel on October 16, 2006, was interpreted as showing a left paracentral disc herniation of the L4-5 disc. At this point, Dr. Daniel requested a neurosurgical evaluation, and the claimant was seen by Dr. Larry Armstrong, a neurosurgeon. Dr. Armstrong concurred with a diagnosis of a left-sided disc herniation at L4-5 with neurological impingement. He performed a corrective lumbar microdiscectomy on January 12, 2007. Following this surgery, the claimant's difficulties with her lower back and radicular difficulties into her left leg appears to have significantly improved, if not resolved. The only

difficulties noted, in Dr. Armstrong’s last report of February 26, 2007, were pain radiating around the groin into the buttocks. Dr. Armstrong diagnosed these difficulties as “classic sacroiliac joint dysfunction”. He recommended treatment for these new complaints by Dr. John Swicegood, a chronic pain management specialist.

It would appear that the claimant never returned to Dr. Armstrong after February 26, 2007. There is also no indication that the claimant ever obtained the recommended treatment by Dr. Swicegood. Although the claimant was seen on two occasions in March of 2007 by Dr. Daniel, her only complaints were with upper respiratory difficulties. There is no mention, in either of these office records, of any symptoms or difficulties involving the claimant’s lower back or either of her lower extremities. However, there is an indication that the claimant obtained a refill of Lorcet, a pain medication, from Dr. Daniel on April 2, 2007. Although there is no evidence of the exact condition for which this medication was prescribed, it was clearly not for her upper respiratory difficulties. The most reasonable explanation is that it was prescribed for continuing difficulties with

her right sacroiliitis and possible even some continuing pain in her lumbar spine.

The evidence shows that the claimant neither sought nor obtained any further medical services for any type of complaints until August 3, 2007. On that date, the claimant consulted Dr. Daniel with right lower quadrant pain for two days, proceeded by diarrhea and nausea. She indicated that this pain was exacerbated by moving her legs. She also reported that this pain radiated into the leg to the knee. However, she gave no history of an injury or precipitating activity or event preceding this episode of complaints. Dr. Daniel made a diagnosis of a right groin strain.

The claimant testified that, on August 6, 2007, she was performing her regularly assigned employment duties. While attempting to restrain an unruly resident along with other co-employees, she fell, striking her left elbow. She testified that, at the time of the fall, she "heard" her back "pop". The claimant testified that she immediately reported the incident and injury to her supervisor. This portion of the claimant's testimony is confirmed by a

supervisor’s report of injury, bearing the date of August 6, 2007.

The claimant testified that the respondents initially sent her for medical treatment to the emergency room of the Booneville Community Hospital. She was seen there by Dr. William Daniel. Although Dr. William Daniel, along with Dr. Andrew Daniel, was one of her family physicians, he was coincidently the physician on call at the emergency room on that particular date.

The initial reports of Dr. William Daniel record essentially the same description of the incident as that given by the claimant in her testimony, including a twisting of her lumbar spine. The claimant is noted as having pain from her right waist to below her right knee, as well as her left elbow. At that time, Dr. Daniel diagnosed a muscle tear/strain of the lower anterior abdomen and thigh. This was essentially the same diagnosis as the one made on August 3, 2007. The claimant was scheduled for a return visit in one week.

The claimant was seen in follow-up on August 14, 2007. However, at this time, she was seen by Dr. Andrew

Daniel. He also recorded essentially the same description of the accident as that given by the claimant in her testimony. On this visit, the claimant was complaining of symptoms involving her lumbar spine. Although her complaints now affected her right lower extremity, she indicated that they were similar to those she had experienced from her prior herniated discs. Dr. Andrew Daniel noted that the claimant continues to experience pain in the right lumbar area that extended into the right thigh, calf, and heel. She also reported tingling and sensory changes in this same area. Upon review of the x-rays, which were taken at that time, Dr. Daniel opined that they revealed some increased narrowing of the L4-5 junction, when compared to post-op x-rays that were made shortly after the surgery by Dr. Armstrong in January of 2006. Dr. Daniel recommended a neurosurgical evaluation and another lumbar MRI.

The claimant was next seen at the respondent's direction, by Dr. Tonya Phillips. Dr. Phillips is a neurologist, rather than a neurosurgeon. Again, Dr. Phillips recorded essentially the same description of the

incident as that noted by the other physicians. She also recorded an evaluation of the claimant's symptoms, which match those noted in the reports and records of the two Dr. Daniels. At the time of the visit with Dr. Phillips, the claimant's complaints involved pain in the right side of her back, with occasional numbness down the right leg into the toes. She was also experiencing occasional symptoms of feeling like her right leg was going to "give out". On her physical examination, Dr. Phillips noted decreased sensation in a "stocking-glove distribution" bilaterally, two plus reflexes at the knee, bilaterally, and absent ankle reflexes and flexor plantar response, bilaterally. Muscle tone was normal and strength was 5/5 in both the lower extremities, with no abnormal tone, fasciculations, or atrophy. The claimant exhibited positive straight leg raising and positive Patrick's maneuver. Dr. Phillips recommended a repeat lumbar MRI and EMG/NCV study of the lower extremities. She stated that, depending on the results of these tests, a neurosurgical referral might be appropriate.

The lumbar MRI, which was requested by Dr. Phillips, was performed on August 31, 2007. This study was

interpreted by the radiologist (Dr. Laura G. Moore-Farrell) as showing the following:

> 1. At L4-5 there is a mild disc bulge. The patient has had a laminectomy on the left at L4-5 and there is enhancing scar/granulation tissue around the thecal sac. The disc bulge combines with facet hypertrophy to cause bilateral foraminal stenosis worse on the left than the right.
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> 2. At L2-3, there is a mild disc bulge without spinal or foraminal stenosis.
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> 3. There are degenerative facet changes from L2-S1.
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> 4. There are incidental hemangiomas in the L1 and L2 vertebral bodies.
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> 5. There are degenerative end plate changes at L2-3, L4-5, and L5-S1.

Both the reports of Dr. Andrew Daniel and Dr. Phillips clearly indicate that the claimant was to return to them for a follow-up visit after the recommended testing. However, no reports or records of such follow-up visits are contained in the medical evidence. Instead, there is simply

a handwritten note from Dr. Andrew Daniel, dated September 13, 2007. This note released the claimant to return to work without restrictions, and also stated that she was released from further treatment or evaluation by Dr. Phillips. There is no explanation, whatsoever, for this action. The next medical record is another handwritten note by Dr. Andrew Daniel, bearing the date October 1, 2007. This note simply stated that the claimant was to be off work until further notice. Again, there is no explanation for this change in his prior opinion. There is a final handwritten note by Dr. Andrew Daniel, dated November 13, 2007. This note stated that the claimant was to be off work until released by neurosurgery and that the claimant had a neurosurgery appointment in January of 2008.

The claimant, on her own, consulted Dr. Anthony Capocelli, a neurosurgeon, on November 9, 2007. Dr. Capocelli diagnosed the claimant’s difficulties as lumbago, sciatica, a right-sided radiculopathy, degenerative disc disease, epidural fibrosis, and post-discectomy/laminectomy. He recommended a trial of conservative treatment that included physical therapy and oral medications. He also

scheduled the claimant to return to re-evaluation in two months and noted that, if conservative treatment modalities had failed to produce significant improvement, a lumbar myelogram might be necessary.

The claimant testified that she was terminated by the respondent in December of 2007. She further stated that she had been unable to obtain the treatment modalities recommended by Dr. Capocelli or to return for follow-up by Dr. Capocelli, due to a lack of funds and insurance.

On July 22, 2008, Dr. Capocelli authored a report to the claimant's attorney. In this report, he expressed his expert medical opinion on the existence of a causal relationship between the claimant's lower back and right lower extremity difficulties and the employment-related incident of August 6, 2007.

> It is my belief that this (the claimant's current difficulties) most likely is an exacerbation of the underlying degenerative disease and probably to some degree an exacerbation of some of the prior surgical areas where there is some epidural fibrosis. Her examination at

> that time demonstrates significant rigidity and straight leg raising on examination consistent with neuropathic origin and further evidence of lateralized right-sided symptomatology including antalgic gait. There is a reasonably objective finding on examination to be consistent with a true injury suffered at the time of her injury in August. At this time, I again believe that the injuries are related.

DISCUSSION

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). An aggravation is a new injury with an independent cause and, therefore, must meet the requirements

for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). 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)(Repl. 2002), 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 (4)(D), 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). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102 (16)(A)(i) (Supp.

2007). First, I find that the claimant has presented "objective findings" of an injury causing physical harm to the body. The medical reports and records of Dr. Andrew Daniel, Dr. Tonya Phillips, and Dr. Anthony Capocelli, all diagnose a physical injury involving the claimant's lower back or lumbar spine with possible radicular symptoms into her right lower extremity. These diagnoses are supported by purely "objective findings", that are in the form of abnormalities noted on plain x-rays and a lumbar MRI study, which was performed on August 31, 2007. The plain x-rays were interpreted by Dr. Andrew Daniel as showing an increase in the disc space narrowing between the L4 and L5 vertebra over previous studies. The MRI, which was taken on August 31, 2007, demonstrated physical defects involving the L2-3 intervertebral disc and the L4-5 intervertebral disc, together with arthritic changes involving the facets or end plates of the L2 vertebra, the L3 vertebra, the L4 vertebra, the L5 vertebra, and the S1 vertebra.

Next, I find that the claimant has proved by a preponderance of the evidence that her injury was caused by a specific incident and arose out of and in the course of

her employment. The record unquestionably establishes that the claimant was involved in a specific employment-related incident or accident (i.e., a fall) while performing her assigned employment duties on August 6, 2007. Not only was this accidental fall proven by the claimant’s credible testimony, but is independently corroborated by other evidence. The claimant’s accidental fall appears to have been witnessed by various co-employees, none of which were called to refute the claimant’s description of this event. The supervisor’s report of injury specifically noted that the work-relatedness of the reported accident was not questionable.

It is difficult to accept that the close temporal relationship between the fall and the appearance of the claimant’s symptoms is a mere coincidence. I find that this close temporal relationship, when coupled with the fact that the claimant was having no apparent difficulties with her lumbar spine for a significant period prior to the fall of August 6, 2007, is sufficient to prove that the most likely or probably cause or precipitating event of her current

lumbar difficulties was the employment-related fall of August 6, 2007.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner