

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801359

NORA REED, EMPLOYEE	CLAIMANT
CVM d/b/a MARVIN'S IGA, EMPLOYER	RESPONDENT
BENCHMARK INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 26, 2009

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE WALTER MURRAY, 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 June 24, 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 pre-hearing conference conducted on April 3, 2008, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her

left upper thigh while working for respondent on September 18, 2007.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury; this includes her hospitalization.

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 June 24, 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 she sustained a compensable injury in the form of a spider bite on September 17, 2007. Based upon my de novo review of the

record, I find that the claimant has failed to meet her burden of proof.

The claimant worked for the respondent at two different stores. At one store the claimant worked as a cake decorator and on Tuesdays of each week the claimant worked at another store at its floral design desk while the department manager was off. The claimant's job duties in the floral department included waiting on customers, ordering flowers, designing floral arrangements, and unloading flowers and plants from cardboard boxes. The claimant testified that on September 18, 2007 she arrived at work at the store in the floral department between 8:15 and 8:30. After opening the department she began unloading boxes of flowers. The claimant testified that between 9:00 and 10:00 that morning as she was washing and cleaning buckets at a sink she felt a bite on her left upper thigh area. The claimant testified that she had on a skirt and did not look at the area at that time because the bite was high up on her thigh. The area progressively itched and became irritated and as a result the claimant went to the ladies room in order to look at the bite. She washed the bite and put a cool rag on it. The claimant did not report the injury that day because her supervisor was off and the only other

managers present were men. She testified that she could not show the bite to them because of its location. Because the bite continued to be inflamed and irritated she called her family physician, Dr. Adkins, and made an appointment for the next day, September 19. Before going to Dr. Adkins on September 19, the claimant went to the store where she worked as a cake decorator and showed the bite to two female managers and informed them of her doctor's appointment.

The claimant sought treatment from Dr. Adkins and was prescribed medication. After her appointment with Dr. Adkins claimant reported the results of her visit to the managers at the store where she primarily worked and also to the store where she worked one day each week in the floral department. The claimant eventually returned to Dr. Adkins when her condition did not improve and she was hospitalized and treated with antibiotics. Dr. Adkins opined that claimant was bitten by a brown recluse spider.

The claimant contended that she suffered a compensable injury to her left upper thigh on September 18, 2007 when she was bitten by a brown recluse spider. She seeks payment of medical benefits for that injury. The respondents contended that the claimant cannot prove

the injury arose out of and in the course and scope of her employment. I agree with the respondents.

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).

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, i.e., 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 demonstrates that the claimant cannot prove that her injury arose out of and in the course and scope of her employment. The only evidence that supports the claimant's contention that the spider bite occurred while the claimant was working for the respondent employer is the claimant's own self-serving testimony. The claimant's testimony simply is not sufficiently credible to support a finding that her injury arose out of and in the course of her employment. Arnold v. Dino's, Inc., Full Commission Opinion, August 1, 2002 (Claim No. F001514); Riley v. Craighead Nursing Center, Full Commission Opinion, January 13, 1998 (Claim Nos. E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion, December 12, 1998 (Claim No. E700104); Mooney v. Monday & Associates, Full Commission Opinion, August 15, 1996 (Claim No. E410794).

In my opinion, the evidence in the record demonstrates that the claimant did not get the spider bite while working for the respondent employer. First and foremost the claimant did not report her injury to the manager the day the alleged incident happened. She testified that it was because the only managers present were male and she did not want to show them the bite because of the location high up on her thigh. However, after going to the doctor the claimant made an injury report over the telephone to these same managers. It makes no sense that she was unable to report the injury in the first place because of the location of the bite yet she was able to notify these same managers via telephone.

Further, the claimant testified that she did not see a spider after the alleged incident. She testified that in the two years she had worked in the floral department she had only seen three spiders. She offered no witnesses that testified as to the presence of spiders in the store. Moreover, the claimant has a landscape design business and she testified that she has seen spiders in her home. The spider could have just as easily come from someplace other than the workplace. In my opinion, conjecture and speculation are required in order to find that the spider came from the workplace.

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). Simply put, there is no evidence that the spider came from the respondent employer.

The medical evidence also fails to establish the claimant was bitten at the respondent employer's business. Dr. Adkins medical records from September 24, 2007, indicate that the claimant reported a "4 day history of spider bite." His hospital discharge report from September 26, 2007, noted again that the claimant was bitten four days prior to being admitted to the hospital. The claimant was allegedly bitten on September 18, 2007, six days prior to her hospital admission.

In my opinion, this case is akin to the cases of Green v. City of Little Rock, Full Workers' Compensation Commission June 29, 2006 (Claim No. F503061) and Dobbs v. Craighead County Nursing Home, Full Workers' Compensation Commission April 26, 2005 (Claim Nos. F000826, F107988, F107989 & F212641). In both of those cases, the Full Commission found that the claimant could not prove by a preponderance of the

evidence that the spider bite was work related. In both cases, the claimant's never saw the spider which bit them, they did not report their injuries on the day it allegedly occurred, there were no corroborating witnesses to support the claimant's testimony concerning the injuries, and there was no evidence of a problem with spiders on the respondent employers premises.

Therefore, when I consider the fact that the claimant failed to report the injury on the day it happened, the fact the claimant did not see a spider at the time of the incident, the fact there was not a history of spiders at the respondent employers business, the fact that Dr. Adkins stated the claimant had a four day history of a spider bite on the sixth day after the incident, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner