

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.F902129

CARL E. FELTUS, EMPLOYEE	CLAIMANT
MAVERICK TUBE, LLC., SELF-INSURED, EMPLOYER	RESPONDENT
CONSTITUTIONAL STATE SERVICE, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MAY 14, 2010

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

Claimant represented by HONORABLE BILL E. BRACEY, JR.,  
Attorney at Law, Blytheville, Arkansas.

Respondent represented by HONORABLE RICHARD REID, Attorney  
at Law, Blytheville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals the decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a yard shipper. The claimant's job duties

required him to build pallets while loading pipes onto flatbed trucks. The claimant worked for a temporary service before he was hired by the respondent employer in June of 2008. The claimant was terminated on August 25, 2008 for having too many points. The claimant filed a workers' compensation claim claiming that he had carpal tunnel syndrome as a result of hammering all day long building pallets on which pipes were put onto flatbed trucks.

The first time an injury was reported was by a form dated February 17, 2009 and mailed on March 2, 2009. The claimant listed October 15, 2008 as the date of his injury. When the respondents denied the claim, listing that the claimant had been terminated on August 25, 2008, the claimant changed the date of occurrence to August 15, 2008. After the claimant was terminated by the respondent employer, he filed for unemployment benefits. The claimant stated that the reason he did was because he was required to do so for food stamps and public assistance.

The medical evidence demonstrates that the claimant sought medical treatment on January 12, 2009 for high blood pressure and fatigue. The claimant's wrist was not mentioned until the medical records dated January 16,

2009 from the Pemiscot Memorial Hospital Emergency Room. The claimant was diagnosed with carpal tunnel syndrome at that time. After that, the claimant sought an attorney and filed a claim for workers' compensation benefits.

The evidence demonstrates that the claimant operated a club in Carruthersville, Missouri during his tenure with the respondent employer, and he continued the operation until February of 2009. The claimant contended that he did no work whatsoever at the club in the form of cleaning up, loading drinks into drink boxes or handling anything other than keeping order and collecting money.

The respondents offered the testimony of Mr. B.J. Mays, the claimant's lead man. Mr. Mays testified that the job the claimant had was one of the simplest and easiest jobs that could be done. He testified that the claimant had help and that the job the claimant did was not continuous. According to Mr. Mays, the claimant did not have to nail boards each time. This is in direct contrast to the claimant's testimony where he stated he nailed constantly each day, and most of the time, for 16 hours a day.

Satrina Aldredge also testified for the respondent employer. She confirmed that there was no report of any

problems by the claimant until February or March of 2009. She also confirmed that all employees are instructed to report any kind of problems. She stated that the claimant did not report any problems before he was terminated in August of 2008.

An examination of the medical records shows various dates are given as the onset of the claimant's pain. On January 20, 2009, it states that the claimant had right-hand pain one month. On January 24, 2009, the record shows a denial of trauma or swelling and no deformity was noted. Another report states that the claimant has X-rays of the right hand and forearm and there was a finding of no acute abnormality and refers to calcification adjacent to the tip of the radial styloid that was a residual from old trauma. In a record dated February 19, 2009, the claimant sought treatment from Dr. Edmund Landry. Dr. Landry's report states:

CC/PI: This is a 50-year-old male who returns for follow up. He has complaints of right hand pain. He could not afford to see the neurologist for nerve conduction testing. He says his problem is due to his job, and he has an attorney. He is right handed and currently unemployed. He denies problems with his right hand prior to October 2008. He was doing hammering of

4 x 4s all day and then lifting them. He had been doing this for five months sometimes working 16 hours per day. He quit three months ago without any improvement in his pain. He has pain throughout all of the right fingers that radiates up the arm. Also, there is pain that radiates down the back of the arm and forearm. He complains of numbness of the index finger on a constant basis that began since last seen on January 22nd. He complains of intermittent numbness in the right thumb and all of the fingernails.

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Examination of the right wrist reveals that he is wearing a soft support. This is removed for further examination. There is no tenderness or swelling. Tinel sign is negative over the median and ulnar nerves at the wrist and the ulnar nerve at the elbow. Sensation is actually increased or hyperesthetic at the thumb and index finger. It is decreased uniformly over the dorsum of the hand. He has full range of motion of the wrist and fingers. He has a normal pinch. There is no muscle atrophy. Phalen's test is negative bilaterally.

I have reviewed the patient's chart and note that he has a history of cervical degenerative disk disease at C4-5 and C5-6 with previous left upper extremity radiculitis and rotator cuff partial thickness tear.

Medical Decision Making: The patient has right shoulder pain and a sensory disturbance with his RUE. I explained the need for nerve conduction and EMG testing to determine if there is a surgical problem. I explained my concern

for constant symptoms at the index finger. He says he is going to talk to his lawyer about the testing. He will see me for follow up if he can get the testing done to determine what is going on in the right arm.

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 claim is compensable, ie., that his injury was the result of an accident that arose in the course of his 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 condition and his 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).

Act 796 recognizes certain specified exceptions to the general limitation of compensable injuries to those injuries which are caused by specific incident and which are identifiable by time and place of occurrence. These exceptions are set forth in Ark. Code Ann. § 11-9-

102(4) (A) (ii) through § 11-9-102(5) (A) (i) (v) (Repl. 2002). Claims for injuries caused by rapid repetitive motion, for back injuries, and for hearing loss are accepted in Ark. Code Ann. § 11-9-102(4) (A) (ii). Claims involving mental illness, heart, pulmonary, and cardiovascular conditions, and hernias are excepted from the definitiveness rule in Ark. Code Ann. § 11-9-102(4) (A) (iii) through § 11-9-102(4) (v), and the requirements necessary to establish the compensability of these conditions are set forth in other sections of the Arkansas Workers' Compensation law.

To satisfy the definitional requirements for injuries falling under Ark. Code Ann. § 11-9-102(4) (A) (ii), the employee still must satisfy all of the requirements discussed above, with the exception of the definitiveness requirement. Thus, the claimant still must prove by a preponderance of the evidence that he sustained internal or external damage to the body as the result of an injury that arose out of and in the course of employment, and the employee still must establish the compensability of the claim with medical evidence, supported by objective findings. However, in addition to these requirements, if the injury falls under one of the exceptions enumerated

under Ark. Code Ann. § 11-9-102(4) (A) (ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." Ark. Code Ann. § 11-9-102(4) (E) (ii) (Repl. 2002).

Since the claimant asserts that he sustained a work-related gradual onset of carpal tunnel syndrome, the claimant is not required under the provisions of Act 796 of 1993 to establish that his work duties required rapid repetitive motion in order to establish the compensability of his carpal tunnel syndrome injury. See, Kildow v. Baldwin Piano & Organ, 333 Ark. 335, 969 S.W.2d 190 (1998). However, the claimant must still prove that he sustained a carpal tunnel syndrome injury arising out of and in the course of employment, that a work-related injury is the major cause of his disability or need for medical treatment, and the compensable injury must be established by objective medical findings. See, Id.

A review of the evidence fails to demonstrate that the claimant sustained a compensable injury. The claimant did not seek medical treatment for over five months after he was terminated for cause from the respondent employer.

Although the claimant contended that he was having symptoms while working for the respondent employer, he failed to report any of these problems until after he went to see a physician in January of 2009. In fact, the first report of problems with the claimant's wrist state that the claimant has been having problems for one month. It is of note, that during that time period, the claimant continued to operate his club, even though he states that he did not have any obligations other than just being there. The claimant said that he had other guys to do the work for him. Moreover, the claimant applied for unemployment benefits. He tried to justify this by saying that it was because he had to do it to collect food stamps. Simply put, we cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury either in the form of carpal tunnel syndrome or a neck injury. When we consider the fact that the claimant was terminated by the respondent employer and did not report any problems until five months after the termination, even though he testified to the fact that he was having problems while working for the respondent employer, we cannot conclude his problems are work related. To conclude otherwise requires conjecture and speculation.

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). Accordingly, we would reverse the decision of the Administrative Law Judge.

Therefore we find that the decision of the Administrative Law Judge must be reversed. 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**

After my de novo review of the entire record, I must respectfully dissent from the majority opinion. I would affirm and adopt the well-reasoned opinion of the Administrative Law Judge. I would award the claimant medical

and indemnity benefits for his compensable injury, and an attorney's fee as well.

The claimant testified at the hearing that he had been a special education student and that he flunked out of school in the ninth grade. He was about 50 years old at the time of the hearing. The claimant testified that he developed pain in his hand and arm while he was employed with the respondent-employer, but that he did not realize there was something wrong. He also testified that he explained to his doctors that the pain increased over the course of his employment.

The claimant's ability to recall facts during the hearing was limited, and he is a poor historian. However, the consistencies in his testimony and medical records support the conclusion that he was a credible witness who was unable to assign an accurate timeline to his history. His testimony that he had symptoms which were initially easily dismissed as everyday pains, and which increased over time until he felt compelled to go to the emergency room, is consistent with his medical records and the nature of carpal tunnel syndrome, even if the medical records contain some inaccurate dates of the progression of his problems. I find

that the claimant was credible in his testimony that he developed the symptoms of carpal tunnel syndrome during his employment with the respondent-employer, and that the symptoms did not become severe enough to warrant medical attention until his first trip to the emergency room on January 16, 2009.

The claimant did not report his injury until after his termination. The respondents made much of the fact that the employer requires notice of all injuries and "near-misses." The fact that the claimant did not report gradually-developing hand and arm pain does not show either that he intentionally defied the reporting policy or that his pain did not exist. The claimant's symptoms did not fit within either category, injury or near-miss. He had gradual pain, which began on the job and did not resolve on its own. He should have reported the problems when he realized they were something more than everyday aches and pains, but there is nothing in the record to suggest that this is not exactly what he did. He certainly cannot be charged with the responsibility of interpreting company policy which is inherently vague on the issue of reporting a gradual onset injury.

I do not place any weight on the fact that the claimant erred in assigning a date of injury on his claim form, the AR-C. Carpal tunnel syndrome is a gradual onset injury, and there is no specific date of injury. It is impossible to assign a date, as required on the C Form. The claimant's confusion over dates is consistent with his difficulties providing a history, in terms of dates, but is in no way indicative of any sinister purpose on his part. He is an eighth grade graduate of a special education program, unable to complete the ninth grade, who demonstrated limited communication and recall skills at the hearing. I do not begrudge him his confusion between August and October.

Much attention was given to whether the claimant's job was rapid and repetitive in nature. The claimant does not have to prove that his work was rapid and repetitive in the case of carpal tunnel syndrome, but this evidence does support a causal connection between the claimant's employment with the respondent employer and his condition. The claimant's testimony that he used a hammer to build pipe racks every time a truck came in to be loaded and that he had to work quickly is credible. The respondent-employer's

witnesses, B.J. Mays and Satrina Aldridge, provided self-serving and less than credible testimony that the claimant had an easy job which provided a lot of time in which he was not working at all. However, there is no question that the claimant did engage in hammering in his job. This evidence that the claimant used his arms to hammer chocks to long boards to secure pipes often throughout the work day supports the causal connection between work and injury.

The claimant also owned a nightclub before, during and after his employment with the respondent-employer. This club was open for two-and-one-half hours on Friday and Saturday nights. The claimant had employees who stocked drinks, served, and cleaned. The claimant's role at the club was to keep control of the crowd and to take money. Two factors mitigate against any causal relationship between this activity and the claimant's injury. First, these activities were limited in frequency and duration to five hours over two days each weekend. Secondly, the claimant was able to perform these duties after his symptoms became severe, demonstrating that his activities at the club were not implicated in his problem.

I find that the claimant has proven by a

preponderance of the evidence that he sustained a compensable gradual onset injury in the form of carpal tunnel syndrome, and that he is entitled to medical and indemnity benefits.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

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PHILIP A. HOOD, Commissioner