

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F702656

TOMMY HOWELL, EMPLOYEE	CLAIMANT
AUTOMATED CONVEYOR SYSTEMS, INC., EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 6, 2010

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

Claimant represented by HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable back injury on December 1, 2006. Based upon our de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury to his left shoulder and right wrist on December 1,

2006 when he fell 15 feet from a ladder. The respondents provided medical treatment and temporary total disability benefits as well as permanent anatomical impairment. The claimant now asserts he sustained an injury to his back when he fell.

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).

The medical records demonstrate that the claimant did not have any medical problems related to his back prior to his December 1, 2006 injury. However, the claimant did not complain of any problems with his back for over five months after the fall. The first mention of back pain was on May 10, 2007. At the time of that visit to physical therapist Lee Ann Howe, she noted that the claimant "...

says his back has been hurting a lot here lately." The back complaints continue until the claimant has an office visit with Dr. Manugian on May 21, 2007. At that time the claimant related his problems to the fall he suffered on December 1, 2006. Dr. Manugian recommended the claimant undergo a lumbar MRI which was completed and showed defects at multiple levels as well as an annular disc tear. The claimant subsequently underwent lumbar surgery with Dr. Waggoner.

In our opinion, the claimant has failed to prove by a preponderance of the evidence that his back injuries are causally connected to his fall on December 1, 2006. The claimant did not complain of problems with his back for over five months and during this period, he had many visits with his physicians as well as physical therapy, and there is not one reference to any difficulty with his back. Simply put, we cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his back when he fell on December 1, 2006. There is no evidence of a causal connection. The claimant waited over five months before he made his first complaints about his back and in order to find that the fall was the cause of his back problems would require us to resort to 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 hereby reverse the decision of the Administrative Law Judge.

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. As did the Administrative Law Judge, I found the claimant to be an extremely credible witness. The claimant's work-related incident is undisputed. The claimant fell 12 to 15 feet off a ladder, landing on the floor. The claimant sustained an acute and painful dislocation to his left shoulder. Subsequent diagnostic studies revealed a rotator cuff tear, which required surgical intervention. In addition, the claimant sustained a severe carpal tunnel injury to the right wrist. The claimant testified that, although he experienced some pain in his back immediately following the fall, his primary complaints involved the left shoulder and right wrist. The record reflects that the claimant was taking pain medication for his hand and shoulder which, the claimant asserted, masked the pain in his low back. After the symptoms involving the claimant's left shoulder and right hand improved, he began expressing increased complaints of back pain which he contended resulted from the December 1, 2006 fall. The credible evidence of record supports the claimant's contention.

A claimant is not required to establish the causal

connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962). However, if the disability does not manifest itself until months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and disability, the issue becomes a question of fact for the Commission's determination. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962). See also, Wentz v. Servicemaster, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

In the instant case, there is no evidence whatsoever that the claimant experienced any back problems before the December 1, 2006, work-related fall. The claimant sustained significant and acute traumatic injuries

to both his left shoulder and right hand as the result of a work-related injury. The claimant credibly testified that his primary complaints initially involved the right hand and left shoulder. The claimant took both prescription medications and over-the-counter medications. The medications relieved the pain in his wrist and shoulder while, at the same time, relieved the claimant's back pain. Once the claimant's shoulder and wrist injuries improved and the claimant began receiving physical therapy and limited his medications, the symptoms associated with his low back became magnified. The record reflects that the claimant, at all times, related his back problems to the December 1, 2006 fall, even before the exact nature and extent of the back injury were diagnosed. Based on the above, I find that the claimant has sustained his burden of proving that he sustained a back injury on December 1, 2006.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner