

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F905831

TIMOTHY G. MARTIN, EMPLOYEE	CLAIMANT
ALGONQUIN INDUSTRIES, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED JUNE 7, 2010

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

Claimant represented by the HONORABLE PHILLIP WELLS, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, 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 January 28, 2010. 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 June 23, 2009, the employment relationship existed at which time the claimant earned wages sufficient to entitle him to weekly compensation benefits at the rate of \$550.00/\$413.00, for temporary total/permanent partial disability.

3. On June 23, 2009, the claimant sustained an injury to his back arising out of and in the course of his employment, which rendered him temporarily totally incapacitated from engaging in gainful employment commencing June 24, 2009, and continuing through October 5, 2009.
4. The respondents shall pay all reasonably necessary medical and hospital expenses arising out of the injury of June 23, 2009.
5. The claimant was paid short term disability benefits in the weekly amount of \$383.50, for the period July 5, 2009, through October 5, 2009, through a group disability policy provided by respondent-employer, and pursuant to Ark. Code Ann. §11-9-411, respondents are entitled to an off-set for same.
6. The respondents have controverted this claim in its entirety.

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 January 28, 2010, 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's findings that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. 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 he was performing employment services at the time he sustained a back injury. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant testified that he had worked for his employer for over nine years and that over the past year or so his job assignment was as a rolling mill operator. Before the alleged injury, he had been working on a different machine. The claimant stated that he had never had any back injury prior to the one he suffered at work nor had he received any medical treatment for a back injury before the date of alleged injury. He began working on a larger machine around June 15, one that required the frequent manual removal of a "facing" which weighted approximately 100 pounds. The removal process necessitated removing the facing and placing it on the floor. This was required about every 30 minutes and was a job that he did by himself.

The claimant testified that on June 23, 2009, his back was burning and tight and he felt pressure that made him think he needed to go to the restroom. The claimant went to the restroom and when he bent up from washing his hands, he felt pain in his back. He described the pain he experienced upon straightening up from washing his hands as "...more sensation in my back". He washed his hands in a round trough about four feet off the ground, and the water was activated to begin running by using a foot pedal. When he washed his hands, he was not bending completely over, but was leaning over and did not slip or fall or do anything unusual. When the claimant straightened up, he felt more pain in his back. The claimant testified that he did report the incident to a man named Al Townsend, who in turn reported it to Mr. Belaggi, the safety coordinator. After reporting the claimant's complaint to Mr. Belaggi, Mr. Townsend told the claimant to continue working and that Mr. Bellagi would speak with in "in a little bit". The claimant stated that he continued running the machine for an hour and one-half at which time his supervisor, Keith Day, came by. Mr. Day sent the claimant to the break room. While in the break room, Mr. Belaggi came by and filled out an incident report and authorized the claimant to see a doctor.

The claimant testified that when he saw Mr. Day, it was about an hour and one-half after he experienced the back pain and that he told Mr. Day that his back was hurting and that he needed to go to the doctor. When the claimant was asked if he described the circumstances of what led to his back pain to Mr. Day, he responded "I can't remember." When the claimant was asked if he said something specifically about being in the bathroom and bending down, and raising up to Mr. Day, he responded, "I probably did."

The claimant was asked if, when he spoke with his supervisor that day, he gave an account to Mr. Day of his back bothering him prior to going to the bathroom. He said that he did not, probably because he was hurting too badly, but he really did not know why he did not mention having back pain prior to going into the bathroom. When the claimant subsequently saw his family physician, Dr. Cullom, he said he told him that he got hurt running his machine and that his back was burning when he went to the bathroom, but when he raised up from washing his hands in the bathroom, his back started hurting more. The claimant testified that he did not think he told his supervisor the same story on the day of alleged injury.

The claimant was sent for medical treatment and was treated by Dr. Lin, who diagnosed him with a pulled muscle and released him to return to work. The claimant returned to work the same day. The claimant then sought treatment from Dr. Cullom, his family physician, who referred him to Dr. Rodney Field, a surgeon.

Dr. Field ordered an MRI which showed that the claimant had a ruptured disc. The claimant testified that when he saw Dr. Field, he gave a history and told him "basically the same thing I told Dr. Cullom". He said that he believed he would have told Dr. Field that he was already experiencing pain in his back when he went to the bathroom and bent over to wash his hands.

Keith Day testified that he has worked for respondent-employer for almost 31 years, and that he was the claimant's supervisor. Mr. Day said that the claimant gave an accurate description of his job duties. He stated that on June 23, 2009, the claimant reported to him that his back was hurting. Mr. Day testified that he told the claimant that they needed to go to the break room and get Mr. Belaggi. Mr. Day filled out an accident report. When Mr. Day was asked if the claimant told him that his back was burning or bothering him prior to going into the bathroom, he responded "not that I can

remember, no". Mr. Day did state that the claimant told him that he went into the bathroom, bent over, rose up, and experienced pain in his back.

Mr. Day corroborated the claimant's account of the operation of the machine on which he was working the day of the back incident and the weight of the faceplate and removal process. Mr. Day said that he did not know specifically what the claimant told Mr. Townsend or Mr. Belaggi. Mr. Day indicated that the claimant had been a good employee and that he (Day) was not aware of any prior back problems the claimant had before June 23.

The only evidence in the record of the claimant injuring his back before going to the restroom is the claimant's own self-serving testimony. The claimant actually said, when asked why he did not tell Mr. Day about his back pain before his visit to the bathroom, was "I don't know. Maybe I was hurting too bad, I don't know." Mr. Townsend testified that the claimant did not go into any detail to him about his back condition prior to the bathroom visit.

Further, the first medical record from Dr. Reggie Cullom indicates that the claimant's history was that he "hurt back at work on 6/23/09". The claimant testified that he told Dr. Cullom the entire scenario of him hurting his back while working and then going into

the bathroom, but it is difficult to discern from Dr. Cullom's medical records what actually transpired in that first visit. Although, Dr. Cullom did state in a letter from the claimant's attorney that the claimant injured his back before going to the bathroom.

The medical record of Dr. Rodney Field, the physician who performed the back surgery on the claimant on January 28, 2009, is especially enlightening. On August 26, 2009, it was his opinion that the major cause of the claimant's disc injury was lifting up after washing his hands on June 23, 2009. Dr. Fields in his patient history was very elaborate, and in his report dated July 28, 2009, under present illness, Dr. Fields stated:

The patient runs a machine. He went to the bathroom and bent over on 6/23/2009. He developed severe pain in his back. This he reported. He continued to work. His supervisor was aware of his complaint. Supervisor took information obtained in the bathroom that occurred while he was washing his hands.

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 of 1993 redefined the term "compensable injury" to exclude an injury that was inflicted upon the employee at a time when employment services were not being performed. Olsten Kimberly Quality Care v. Petty, 328 Ark. 381, 944 S.W.2d 524 (1997); Ark. Code Ann. § 11-9-102(4)(B)(iii)(Supp. 2005). The same test is used to determine whether an employee was acting within the course of employment at the time of the injury as is used when determining whether an employee was performing employment services. Privett v. Excel Specialty Prods., 76 Ark. App. 527, 69 S.W.3d 445 (2002). The test is whether the injury occurred within the time and space boundaries of the employment while the employee was carrying out the employer's purpose or advancing the employer's interests directly or indirectly. Id.

Employment services are performed when the employee does something that is generally required by his or her employer. Collins v. Excel Specialty Products, 347 Ark. 811, 69 S.W.3d 14 (2002); Pifer v. Single Source Transport, 347 Ark. 851, 69 S.W.3d 1 (2002); White v. Georgia-Pacific Corp., 339 Ark 474, 6

S.W.3d 98 (1999). We use the same test to determine whether an employee was performing "employment services" as we do when determining whether an employee was acting within "the course of employment." Smith v. City of Ft. Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004); Collins, supra; Pifer, supra; White, supra; Olsten Kimberly Quality Care v. Pettey, 328 Ark. 381, 944 S.W.2d 524 (1997). The test is whether the injury occurred "within the time and space boundaries of the employment, when the employee [was] carrying out the employer's purpose or advancing the employer's interest directly or indirectly." Collins, supra; Pifer, supra; White, supra; Olsten, supra. The critical issue is whether the interests of the employer were being carried out by the employee at the time of the injury. Collins, supra. In Collins and Pifer, the Arkansas Supreme Court specifically overruled "all prior decisions by the Arkansas Court of Appeals" to the extent that they were inconsistent with the holdings in those two cases. Wal-Mart Stores, Inc. v. King, 93 Ark. App. 101, 216 S.W.3d 648 (2005).

Whether a worker was performing employment services within the course of employment depends on the particular facts and circumstances of each case. The controlling test is whether the employee is engaged in

the primary activity that he was hired to perform, or in incidental activities that are inherently necessary for the performance of the primary activity. Matlock v. Arkansas Blue Cross and Blue Shield, 74 Ark. App. 322, 49 S.W.3d 126 (2001).

In addition, the Arkansas Supreme Court in Pifer, supra, refused to narrow or broaden the requirements of Act 796 by automatically accepting or rejecting a personal-comfort activity as either providing or not providing employment services. In this regard, the Court stated:

Instead of following either extreme position, the critical issue is whether the employer's interests are being advanced, either directly or indirectly by the claimant at the time of the injury. In addressing this issue, we decline to adopt the factors identified by the Court of Appeals in Matlock v. Blue Cross Blue Shield, supra.

The claimant's alleged back injury is very clearly not a compensable injury. The injury occurred while the claimant was on a break using the bathroom and he was not performing employment services. The claimant was not returning from break. He was attending to his personal needs. Going to the restroom was not inherently necessary for the claimant's job. The evidence demonstrates that the claimant failed to tell Mr.

Townsend and Mr. Day that he hurt his back prior to going to the restroom. His initial visit with Dr. Cullom indicates that he injured himself tending to his personal needs. In addition, his personal history given to Dr. Field indicates he was tending to his personal needs. When the history recorded by Dr. Field, along with the history recorded by Dr. Cullom is considered along with the testimony of Mr. Townsend, and testimony from the claimant about what he told Mr. Day, it is clear that the claimant injured his back while lifting up after washing his hands in the restroom. Accordingly, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury.

Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

---

KAREN H. MCKINNEY, Commissioner