

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F902543

GLEND A D. MCKINNEY, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., SELF-INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 5, 2010

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

Claimant appeared *pro se*.

Respondent represented by HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, 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 she sustained a compensable injury to her left foot on January 30, 2009.

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 a stocker in the meat department. The claimant testified that on January 30, 2009, she was helping a lady retrieve a bottle of cranberry juice from a shelf that the woman could not reach. The claimant stated that she took a lock-down stool off of the pole, made sure it was locked down, and climbed up on the stool. As she was reaching back to the back of the shelf, she stated that she arched her foot and that she "felt the burning sensation" like "it popped". The claimant claimed that it blew a vein out on the bottom of her foot. The claimant continued to work the rest of the day of the incident and also worked her full shift the following Saturday. The claimant did not report the incident until the following Monday when she went to the personnel office and reported it to Dana Ferguson and Larry Rich the store manager. The claimant contended that because Mr. Rich knew she had previously seen a doctor concerning foot problems, he instructed her to have the doctor check out her foot and then they would fill out the paperwork.

The medical evidence demonstrates that the claimant had previously sought medical treatment from Dr. Caldwell, a podiatrist, on January 13, 2009 for a heel spur and plantar faciitis. Her medical records from this visit

state that the claimant complained of left heel pain that had been present on and off for the last several months, but it had been constant the past few weeks. Following examination, Dr. Caldwell assessed the claimant with left plantar faciitis and left calcaneal spur. Dr. Caldwell injected the claimant's plantar faciitis and she was scheduled to return on January 27, 2009. The claimant was not able to keep the January 27<sup>th</sup> office visit as the office was closed because of an ice storm.

On February 9, 2009, the claimant again sought treatment from Dr. Caldwell. The medical records from that visit state that the claimant told Dr. Caldwell that she has had "complete relief of her heel pain since her last visit". She denied any other complaints at that time. The claimant testified that she told Dr. Caldwell that she had problems but that Dr. Caldwell "messed up the records."

The claimant sought treatment from Dr. Caldwell on March 10, 2009. On this date, the claimant called Dr. Caldwell's office complaining that she was still having throbbing pain on the bottom of her foot and he instructed her to come into the office. During this visit, the medical records state that the claimant denied any injury, treatment

or other complaints. Again, at the hearing, the claimant testified that the doctor got this wrong as well.

The evidence demonstrates that the claimant did not request medical treatment from the respondent employer through Workers' Compensation until March 11, 2009. The respondent made an appointment for the claimant to see Dr. Lack, the company doctor. Dr. Lack noted in the claimant's medical records that the claimant had shown this injury to Dr. Caldwell, and she was told she had a ruptured plantar fascia. He also noted that if there was a ruptured plantar fascia, it was probably related to the steroid injection the claimant was given on January 13, 2009.

The claimant testified that she was advised by Dr. Caldwell to go see Dr. Lack. However, on March 26, 2009, the claimant called Dr. Caldwell's office requesting her progress notes stating that the respondent was sending her to see their physician, Dr. Lack, for evaluation of her foot pain. The medical records kept by Dr. Caldwell were needed in order for the claimant to obtain precertification for an MRI. On cross-examination, when told that there was nothing in Dr. Caldwell's March 10, 2009 records stating that he wanted her to go see Dr. Lack, the claimant simply

responded, "it was on something."

On March 19, 2009, the claimant saw Dr. Lack. His notes indicate that the claimant needed to continue physical therapy and medication and he requested an MRI of the claimant's left foot.

On April 2, 2009, the claimant's claim for workers' compensation benefits was denied by the respondent. The claimant, on this date, contacted Dr. Caldwell's office to let him know that the respondent had denied her claim as a pre-existing injury to her heel, and that there were wrong dates on her medical records. It was at this time that Dr. Caldwell put an addendum to the claimant's records to reflect the dates of her appointments from 2005 to 2009.

On April 9, 2009, the claimant saw Dr. Caldwell again. The claimant complained of burning and throbbing in her foot after standing or walking. Her medical records state that she has been unable to obtain any decisional studies or physical therapy due to a miscommunication in her medical records. Because of this "miscommunication" an addendum was again made by Dr. Caldwell to the claimant's medical records to include the incident which allegedly occurred on January 30, 2009. Before April 9, 2009, the

claimant's medical records are completely devoid of any mention of the alleged incident at the respondent employer's.

The claimant filed a claim for benefits associated with her left foot. She has not missed any work and is only asking for medical benefits. In an opinion dated August 28, 2009, the Administrative Law Judge found that the claimant sustained a compensable injury and awarded reasonable and necessary medical expenses as well as medical related travel expenses and reimbursement for out-of-pocket expenses the claimant incurred in obtaining medical treatment for her injury. The respondents filed this appeal.

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 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).

A review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. The claimant was treated on January 13, 2009 for problems with her left foot and she was assessed with plantar faciitis and a heel spur. The claimant complained that the left heel pain was present on and off for several months and had been constant for the past few weeks. In fact, Dr. Caldwell, who treated the claimant, gave her a steroid injection and she was to follow up January 27<sup>th</sup>, but there was an ice storm and she was forced to cancel her appointment.

The claimant did not report an injury to the respondent employer until March 11, 2009. She had two follow-up appointments with Dr. Caldwell prior to filing this claim that made absolutely no mention of her alleged injury. It was not until after the claimant's claim was denied that an addendum was added to her medical records to include the injury. It is of note, that Dr. Caldwell's

records from February 9<sup>th</sup> states that the claimant had a "complete relief of her heel pain since her last visit. Denies any other complaints at this time." The claimant sought treatment from Dr. Caldwell again on March 10<sup>th</sup> of 2009 and, at that time, there was no mention of a injury. When the claimant was asked by counsel if she told Dr. Caldwell that there had been no other injury, she testified that the doctor got this wrong. She also had previously stated that the doctor got it wrong on her prior visit in February. It appears that every time the claimant's medical records do not bear out what the claimant thinks, her response was to blame the doctor. The claimant's testimony that Dr. Caldwell "messed up the records" should be given little weight. There is nothing in the medical records until April 9, 2009 when the addendum was written stating that the claimant suffered an injury. Similarly, Dr. Lack attributed the claimant's problems to a ruptured plantar fascia caused by the steroid injection she received as treatment prior to the alleged injury date.

When we consider the fact that the claimant had a pre-existing injury to her left foot for which she obtained treatment for only weeks before this alleged incident, the

fact that Dr. Lack attributed the claimant's ruptured facia to the steroid injection she received as treatment for this injury before reporting her injury to the appropriate personnel, the fact the claimant did not file for benefits until March 11, 2009, and the fact that the medical records made by Dr. Caldwell contemporaneous with the claimant's visits right after the January 30, 2009 alleged incident showed no evidence whatsoever of any injury, we cannot find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury on January 30, 2009. Accordingly, we hereby reverse the decision of the administration of the Administration Law Judge. This claim is 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, must

respectfully dissent from the majority opinion. I find that the claimant proved the compensability of her foot injury and is entitled to medical benefits for the same.

I find that the record bears out the claimant's testimony that the records of her physician, Dr. Caldwell, contained errors as to her complaints and the circumstances of her injury. Dr. Caldwell's records contain more than one error of significance. The first error was in the dates of certain clinic visits, originally showing as 2005 visits, when in fact they were 2009 visits. The claimant became aware of this error after Dr. Caldwell's records were sent to the respondents, and upon the claimant's request, Dr. Caldwell corrected the records and resubmitted. There is another error in the medical records, in which the record reflects an injury to her right foot, which Dr. Caldwell corrected by hand to show that the visit was in fact about her left foot. Likewise, the claimant became aware of the errors in the records as to her report of injury to the doctor and the history of injury after records were submitted to respondents, and at that point she was able to identify the error to the doctor. Dr. Caldwell prepared an addendum to her medical record reflecting the correct

information regarding her foot injury of January 30, 2009. From Dr. Caldwell's willingness to prepare such an addendum, from the absence of any notation that this was anything other than an error and from the presence of significant errors in other records, I find that the claimant did report that she injured her foot on January 30, 2009, when she used a stool to assist a customer and felt a pop and pain in her foot. The inconsistencies and corrections in the medical records are reflective of housekeeping errors, by Dr. Caldwell or his transcriptionist, and not of deceit on the part of the claimant. I also note that the medical records show a delay in Dr. Caldwell's provision of records to Dr. Lack, which is attributed to Dr. Caldwell needing to finish his dictation. The fact that Dr. Caldwell was not doing the dictation from the claimant's visits close in time to her visits supports this position.

I also note that the claimant testified that she reported her injury the following Monday and that the respondents chose not to present testimony from the individuals to whom she reported her injury.

I find that the claimant proved that she suffered a compensable injury on January 30, 2009, that she reported

this injury to her employer, that she also reported this injury to her physician, that she followed the instruction of her employer to first see her own physician before completing forms or seeing the company doctor, that she suffered pain different from the pain she experienced due to her pre-existing heel spur, and that the MRI (one recommended by the company doctor as well as Dr. Caldwell) showed stress fractures. Based upon my de novo review of the entire file, I would award medical benefits to the claimant for the compensable injuries to her foot.

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

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PHILIP A. HOOD, Commissioner