

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F904433

TAMMY SMITH, EMPLOYEE	CLAIMANT
PAFFORD MEDICAL BILLING SERVICES, EMPLOYER	RESPONDENT
FIRSTCOMP INSURANCE, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 2, 2010

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

Claimant represented by the HONORABLE STEVEN R. McNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE RANDY P.  
MURPHY, 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 March 15, 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 over this  
claim.
2. The stipulations outlined herein are  
reasonable and are hereby accepted as  
fact.

3. The claimant's average weekly wage is \$340.00 per week.
4. The claimant has proven by a preponderance of the evidence that she sustained a compensable left elbow injury arising out of her employment in March of 2009.
5. The claimant has proven by a preponderance of the evidence that all the medical treatment related to her left elbow contained in the record herein was reasonable, necessary, and related to her compensable left elbow injury. Therefore, respondents are responsible for all of the medical treatment for the claimant's left elbow contained in the record herein pursuant to Rule 30.
6. The claimant's auto accident where she struck a deer did not constitute an independent intervening cause.
7. The claimant has proven by a preponderance of the evidence that she remained in her healing period and did not return to work from March 17, 2009, through a date yet to be determined. Respondents are responsible for temporary total disability benefits for that period.
8. Claimant's attorney, the Honorable Steven McNeely, is entitled to the maximum statutory attorney's fees on benefits awarded herein, one-half of which is to be paid by the claimant and one-half to be paid by respondents in accordance with A.C.A. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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 March 15, 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.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury in March of 2009. Based upon my de novo of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a billing assistant. The claimant testified that in March of 2009, she was moving some boxes containing bags for the Shred-It Company. Shred It was coming to shred papers and they come every two weeks. The claimant testified that she had a left elbow injury caused while moving these bags. The claimant described the injury as follows:

Shred-It comes when we have these boxes that contain bags that you put your papers in to take them for shredding, and I opened the box and got the bag out, and we have these carts that we put them on, and when Shred It comes to get them or we can just pull them out to the edge of the hall and they sit there and then we get the cart and pick them up, but you have to pull it out of the box in order to pull the strings and move it out, and all I did was move the bag out of the deal and pull it out of the way, and I just felt something in my elbow. I just thought I had strained it. I didn't think it was any big deal.

The claimant continued to work that day and did not report the incident to anyone. The claimant testified that she told Sharon Chandler, but Ms. Chandler testified at the hearing that she does not remember the incident nor did she remember the claimant ever telling her about the incident. Her first knowledge of an injury to the claimant's elbow was when the claimant came to work with a brace on her arm. The claimant did not report the incident to her supervisor or to Jennifer Revels, who was in charge of workers' compensation claims for the respondent employer. The claimant's supervisor, Jamie Oswald, did not know about the incident until April 7, 2009.

The claimant sought medical treatment from Dr. Ronald Rush on March 18, 2009. Dr. Rush documented complaints of tenderness or pain expressed by the claimant over her left elbow. He diagnosed the claimant

with lateral epicondylitis and told her to return to work with no restrictions on March 23, 2009.

On March 31, 2009, the claimant sought medical treatment from the emergency room at Christus St. Michael Hospital in Texarkana, Texas. An X-ray was taken which showed no acute pathology. The claimant was given an injection in her left elbow and instructed to return to work without restrictions on April 2, 2009.

On April 7, 2009, the claimant sought treatment from Dr. Doug Thompson. Dr. Thompson's examination revealed a full range of motion and "exquisite tenderness over the left lateral epicondyle." His review of the claimant's X-rays were normal as well.

On April 7<sup>th</sup>, the claimant was questioned when she came to work with a brace on her arm. This is when she reported the alleged injury.

On April 28, 2009, the claimant returned to Dr. Thompson who noted that the claimant's elbow was better but not completely well. He noted tenderness in the claimant's left lateral elbow. At that time, Dr. Thompson referred the claimant to Dr. G. Thomas Frazier. The claimant had problems with her left ring finger that Dr. Thompson wanted Dr. Frazier to look at. The ring finger was unrelated to the claimant's alleged elbow

injury. Dr. Thompson released the claimant to return to regular duties on May 4, 2009.

Dr. Frazier saw the claimant on May 11, 2009, and his examination revealed no swelling or deformity. He noted that there was no instability of the claimant's elbow and that her "active range of motion of the elbow is 0 to 130° flexion, without crepitus." X-rays were also normal. Dr. Frazier recommended an injection in the claimant's left elbow.

The claimant was seen by Dr. Frazier's partner, Dr. Robert Matthias on May 19, 2009. Dr. Matthias noted that the claimant had full range of motion of her elbow without pain. She also had no evidence of swelling.

The claimant returned to Dr. Thompson on May 26, 2009. Dr. Thompson's physical examination of the claimant revealed, "exquisite tenderness" and Dr. Thompson scheduled the claimant for a left lateral epicondylectomy, debridement, and reattachment surgery. Dr. Thompson performed this surgery on June 22, 2009.

The claimant continued to follow up with Dr. Thompson, and in September of 2009, Dr. Thompson was concerned that the claimant's surgical repair was coming apart. It was at that time that the claimant reported to Dr. Thompson that she had been involved in an accident

where she had struck a deer. Dr. Thompson determined that the claimant's initial surgery had failed on October 23, 2009, and he performed a second surgery on October 26, 2009.

In my opinion, the claimant cannot prove by a preponderance of the evidence that she sustained a compensable injury.

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).

In my opinion, a review of the evidence fails to demonstrate that the claimant sustained a compensable injury. When this alleged incident occurred, the claimant did not report the injury nor did she quit working. The claimant continued to work through at least April 7th of 2009. The claimant did not report the incident to her supervisor until April 7<sup>th</sup> of 2009. The claimant had been performing normal work for weeks

without complaint. The claimant had ample opportunity to report this incident, yet she failed to do so.

Further, objective testing performed on the claimant, including passive range of motion testing and X-ray scans, were all within normal limits. It appears that the physician's diagnosis was based upon the claimant's subjective complaints of pain. Objective findings of injury are necessary to support a claim. In this case, there were no objective findings of injury.

Simply put, based upon my de novo review of the record, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner