

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F902389 & F905503

STACY STRICKLAND,
EMPLOYEE

CLAIMANT

COOPER TIRE & RUBBER COMPANY,
EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 22, 2010

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

Claimant represented by the HONORABLE GREG R. GILES,
Attorney at Law, Texarkana, Arkansas.

Respondents represented by the HONORABLE WILLIAM C.
BULLOCK, Attorney at Law, Texarkana, Arkansas.

Decision of Administrative Law Judge: Affirmed and
adopted as modified.

OPINION AND ORDER

The respondents appeal an administrative law
judge's opinion filed July 27, 2010. 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 agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the evidence, that she sustained a compensable gradual onset back injury while in the respondents' employ.

4. The claimant has proven, by a preponderance of the evidence, that all the medical treatment contained in the record herein related to the claimant's back was reasonable, necessary, and related to the claimant's gradual onset back injury.
5. Additionally, the claimant has proven, by a preponderance of the evidence, that the additional treatment now recommended by Dr. Shahim is reasonable, necessary, and related to the claimant's compensable back injury. All said treatment related to the claimant's back is the respondents' responsibility pursuant to Commission Rule 099.30.
6. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability benefits for the following periods:

May 30, 2008, through May 9, 2008; May 12, 2008, to May 30, 2008; June 3, 2008, through July 7, 2008; July 28, 2008, through July 29, 2008; August 5, 2008, to October 17, 2008; November 5, 2008, to November 10, 2008; December 1, 2008; December 11th through December 22, 2008; January 2, 2009, through January 8, 2009; March 22, 2009, through June 14, 2009; June 17th through June 19, 2009; August 22, 2009; and from November 18, 2009, date of termination, to a date yet to be determined.
7. Maximum attorney's fees are herein awarded to the claimant pursuant to A. C. A. §11-9-715.

Based on our *de novo* review of the entire record, 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, except for Finding Of Fact No. 6. The Full Commission modifies Finding Of Fact No. 6 as follows:

6. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability benefits for the following periods:

May 1, 2008, through May 9, 2008; May 12, 2008, to May 30, 2008; June 3, 2008, through July 7, 2008; July 28, 2008, through July 29, 2008; August 5, 2008, to October 17, 2008; November 5, 2008, to November 10, 2008; December 1, 2008; December 11th through December 22, 2008; January 2, 2009, through January 8, 2009; March 22, 2009, through June 14, 2009; June 17th through June 19, 2009; August 22, 2009; and from November 18, 2009, date of termination, to a date yet to be determined.

We find from a preponderance of the evidence findings made by the administrative law judge, as modified, are correct and are adopted by the Full Commission.

We therefore affirm the July 27, 2010 decision of the administrative law judge, including all findings of fact as modified and conclusions of law therein, and we adopt the opinion as the decision of the Full Commission on appeal.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an

additional fee of five hundred dollars (\$500), pursuant to 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 respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

In my opinion, a review of the evidence fails to prove that the claimant's back problems were related to her employment. It was not until August 29, 2008, the claimant asked for and filled out an accident report. In this document, the claimant alleged for the first time that over four months previously, on April 25, 2008, she had sustained an on-the-job back strain. She claimed specifically that as she was, on that particular day in

April, changing the settings on her tire-building machine in order to run a smaller tire, she started hurting in her lower back.

When the respondents investigated this claim, it found that the claimant not only did not report any incident or problem with her back to management on April 25, 2008, the claimant never left or ceased work that day nor sought any medical attention. April 25, 2008, was a Friday and she did not seek any medical attention at all until Thursday, May 1, 2008, almost a week after the alleged incident. She reported that she had pain that started a week ago with the onset of her menstrual cycle. The claimant found on examination to have a normal curvature of spine; moderate tenderness to palpation of paraspinous muscles with no midline tenderness, and a negative straight leg-raising test. She acknowledged at that time that she had "history of back pain". The claimant continued working regular duty.

On May 13, 2008, the claimant went to see Dr. David Williams at Collum & Carney Clinic. This appointment was sought by the claimant and paid for under the claimant's group health plan. She reported to Dr. Williams that her back had hurt "since April 25, 2008, the day her menstrual cycle started". The claimant

denied any injury on the job and acknowledged she had "prior back problems". Dr. Williams ordered lumbar X-rays and an MRI, and took her off work. On May 27, 2008, the claimant returned to Dr. Williams advising that she was "feeling much better", and that her pain was "no longer radiating" into her hip, and that she wanted to try going back to work. Dr. Williams canceled the MRI.

On June 3, 2008, the claimant returned to Dr. Williams stating that after doing light duty, her pain returned. Dr. Williams took her off work again until June 17, 2008. The claimant, again, did not report a work-related injury and filed it under her group health insurance.

On June 9, 2008, Dr. Williams ordered a lumbar MRI. This was approved under the claimant's group health insurance. The MRI indicated that the claimant had only mild degenerative disc disease at L4-5 and L5-S1, with mild disc space narrowing and dessication , but no disc protrusion, spinal canal stenosis, or recess stenosis. Levels of the spine other than L4-5 and L5-S1, were found to be "unremarkable".

The claimant returned to Dr. Williams on July 3, 2008, receiving medical treatment again under her group health plan. The claimant reported that her back

pain was improved and that she wanted to try light duty again. She was given a return to work slip for light duty beginning July 8, 2008.

On July 8, 2008, the claimant went to see another medical provider, Family Medical Group of Texarkana, and saw a physician's assistant named Teresa Fontenot. The claimant reported to Ms. Fontenot that she was having two problems: 1. a vaginal discharge which started the past weekend, and 2. back pain into her right leg. In regard to the latter complaint, Ms. Fontenot referred the claimant to neurologist Michael Clevenger. This was filed under the claimant's group health plan.

On July 17, 2008, the claimant returned to Dr. David Williams and reported that with light duty at work, her pain was "slightly better". The claimant apparently made no mention to Dr. Williams of the referral by Ms. Fontenot had given her to Dr. Clevenger. Dr. Williams referred the claimant to a physiatrist, Dr. Sharp, and told her to continue on light duty and return in one month.

On August 5, 2008, the claimant returned to Dr. Williams for a post-dated work excuse covering July 27, 2008 and August 2, 2008, which she apparently missed

without a medical release. She also requested FMLA paperwork to "cover her when she feels unable to work". The FMLA documentation Dr. Williams provided referenced an onset date of symptom of May 1, 2008.

Meanwhile, the claimant saw Dr. Michael Clevenger, a neurologist. Her report of symptoms to Dr. Clevenger was that her current problems with lower back pain radiating into the right leg started on May 28, 2008, and that underlying back pain "before in early April". She acknowledged that she had "experienced low back pain on and off for several years." She knew of no particular on-the-job incident which led to her discomfort, but stated that she "feels her job likely does contribute to her symptoms". The claimant acknowledged that she has been on light duty at work, however, that "sitting seems to intensify the symptoms most." Dr. Clevenger felt weight loss "would benefit her significantly to reduce the weight-bearing load of her lumbar spine."

Dr. Clevenger ordered a lumbar myelogram and CT Scan which were performed on August 22, 2008. This was filed by and processed under the claimant's group health plan. These tests suggested a problem at two levels. First, at L1-2 there appeared to be a large

right lateral disc protrusion, unaccompanied by spinal stenosis or lateral recess stenosis, and second, at L4-5 there appeared to be a small right lateral disc protrusion, with perhaps some bilateral recess stenosis, but no spinal stenosis. Based upon these results, Dr. Clevenger referred the claimant to Dr. Freddie Contreras, a neurosurgeon, for consultation.

The claimant saw Dr. Contreras on August 28, 2008. She then told Dr. Contreras that "she hurt herself back in May while at work". She acknowledged that this was not a Workers' Compensation case, but stated that she had talked to David Boone, the president of the claimant's union, and "they are going to make this Workman's Comp [sic]". Dr. Contreras told the claimant he did not do Workman's Comp for the respondent due to a falling-out several years ago.

The next day, August 29, 2008, the claimant filled out and turned in the AR-N and employee accident report. The respondents denied the compensability of the claim.

The claimant returned to see Dr. Williams on September 8, 2008, requesting an off work slip and a referral to Little Rock for treatment of a herniated

disc. She advised Dr. Williams this was now being pursued as a workers' compensation claim.

On October 2, 2008, at the request of Dr. Contreras, the claimant saw Dr. Edward Saer. She told Dr. Saer that her symptoms "started gradually and got progressively worse over a period of about a week." Dr. Saer reviewed her medical records and her complaints and opined that it is "hard to know if this is the cause of her symptoms". He opined further that the claimant's HNP at L1-2 "may be causing some compression on the L2 nerve root, but that does not correlate all that well [sic] with her pain". Dr. Saer felt ESIs should be tried before considering surgery.

On October 27, 2008, the claimant was seen by Ms. Fontenot for a gynecological checkup and to request HIV testing.

On November 5, 2008, the claimant saw Dr. Stephens. She continued on light duty. She had been able to stop all pain meds and muscle relaxers. She reported that the radiuclopathy down her leg had resolved since receiving an ESI.

On November 6, 2008, the claimant was seen at Health Care Express, not for any back-related problem, but for a headache, cough and elevated blood sugar.

On December 3-5, 2008, the claimant underwent a sleep study due to excessive daytime sleepiness and fatigue.

On January 9, 2009, the claimant returned to Dr. Stephens for a follow-up on her back. She recently reported undergoing lap band surgery, and was still on a liquid diet for that. She was continued on light duty.

On February 9, 2009, the claimant returned to Dr. Stephens, and reported no back pain. She was returned to light duty in her normal job as a tire builder.

On Wednesday, March 4, 2009, the claimant went to Health Care Express reporting that "Tuesday morning, she experienced right-sided back pain again at work after lifting, carrying, and tossing a wooden roll into a barrel. She was sent back to work on light duty.

The claimant was evaluated by Dr. Reza Shahim on March 12, 2009. The claimant told Dr. Shahim her problem started April 25, 2008, when she "hurt back pulling and pushing on a heavy tire". Dr. Shahim opined that a discectomy at L4-5 was reasonable and he ordered a new MRI. The claimant testified at the hearing that Dr. Shahim recommended a decompression at L4-5, but that she wanted L1-2 operated on as well. The MRI revealed a

small, right paracentral broad-based disc protrusion at L1-2 which did not compromise the L1 nerve root. At the L4-5, the study showed a small central and right paracentral broad-based inferior disc protrusion which abuts the right L5 nerve root in the lateral recess, but did not compromise the nerve root.

Dr. Shahim performed surgery on the claimant's spine at both L1-2 and L4-5 levels on March 24, 2009. The surgery did not stop the burning sensation the claimant reported going down her right leg. On May 13, 2009, Dr. Shahim wrote the claimant a return to work slip indicating she could return to work on light duty on June 14, 2009, with no bending, stooping, twisting, climbing, and with limited standing and lifting over 10 pounds.

While, the claimant was off work recovering from her back surgery, she filed a claim for unemployment compensation. She sought benefits from March 21, 2009, through May 15, 2009. The Arkansas Department of Workforce services found that the claimant had "deliberately made a false statement in order to receive benefits to which you were not entitled".

On August 13, 2009, the claimant returned to Dr. Shahim and was found to be symptomatic from

degenerative disc disease, and on account thereof was given a work release subject to severe restrictions. He ordered a follow-up MRI.

On August 31, 2009, the claimant returned to Dr. Shahim. A review of the MRI showed evidence of inflammatory changes at L4-5. He suggested repeating ESIs.

On October 29, 2009, Dr. Shahim noted significant improvement after an ESI but that recurrent right leg pain, weakness and numbness persisted. He noted the MRI did not show nerve root compression.

The claimant went to see Dr. Jack Menges on January 16, 2010, seeking pain mediation. She stated her menstrual period started January 15, 2010.

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).

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/she 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).

The claimant's testimony and the medical records are replete with inconsistencies. The evidence demonstrates that on May 13, 2008, the claimant had her first visit with Dr. Williams, and she denied any injury on the job. She reported to Dr. Williams that her back had hurt since April 25, 2008, the day her menstrual cycle started. She thought her back pain might be related to her menstrual cycle. The claim was filed through the claimant's group health plan. Then, on July 8, 2008, the claimant saw another medical provider, the physician assistant, Ms. Fontenot. The claimant reported

to Ms. Fontenot that she was having two problems, "colon, a vaginal discharge and back pain into her right leg". Again, the claimant said nothing about a job-related injury. She indicated that the back pain had been persistent for three months. Again, the claim was filed on the claimant's health insurance.

On August 5, 2008, the claimant saw Dr. Williams and requested that FMLA paperwork be completed to "cover her when she feels unable to work". The FMLA paperwork Dr. Williams provided the claimant indicated an onset of symptoms on May 1, 2008. This visit was, once again, through the claimant's individual health insurance.

The claimant saw Dr. Michael Clevenger, and she reported to him yet a different date. The claimant told Dr. Clevenger that her current problems with her lower back, pain radiating into the right leg, started on May 28, 2008. Dr. Clevenger felt the claimant needed to lose weight and that would significantly benefit her to reduce the weight bearing load on her lumbar spine.

Dr. Clevenger referred the claimant to Dr. Freddie Contreras, a neurosurgeon. The claimant saw Dr. Contreras on August 28, 2008. She told Dr. Contreras that she hurt herself in May while at work. She stated

that she talked to David Boone, the President of the claimant's union and "they are going to make this Workman's Comp claim". Dr. Contreras told the claimant that he did not do Workers' Compensation claims. At the request of Dr. Contreras, the claimant was referred to Dr. Edward Saer. The claimant told Dr. Saer that her symptoms started gradually and progressively worsened over a period of about a week. In between seeing Dr. Contreras and Dr. Saer, the claimant filled out and filed an incident report on August 29, 2008 with the respondents employer indicating that she sustained an on-the-job back strain on April 25, 2008.

The claimant was referred to Dr. Shahim who first evaluated the claimant on March 12, 2009. The claimant told Dr. Shahim that her problems started on April 25, 2008, when she hurt her back pulling and pushing a heavy tire. In her Form AR-N, the claimant alleged she felt pain after changing the settings on her machine, not pushing on a heavy tire.

The claimant tells yet another story at the hearing where she testified that after finishing building out the specifications that she was building on April 25, 2008, she did a changeover and sat down on a

five-gallon bucket. When she tried to get up, she testified that she was hurting.

The evidence demonstrates that the claimant has had long standing back problems. In October of 2004, the claimant had an MRI which showed a small central disc protrusion at L4-5, which effaced the ventral aspect of the thecal sac. There was also a small central disc protrusion at L5-S1 which effaced the ventral aspect of the thecal sac. The claimant's L1-2 disc showed minimal bulging. In June 2005, the claimant reported having a third or fourth back sprain. She was also noted to have mild scoliosis. Two weeks later, on June 14, 2005, the claimant reported more problems in the form of severe pain in the low back after pushing some clothes in a closet.

The evidence also demonstrates that the claimant has had a long-standing weight problem with her weight fluctuating from as much as 274 to 246 pounds. The claimant also has been abused and beaten by men with whom she has been in relationships.

Therefore, when I consider all of the inconsistent information that the claimant gave to a plethora of medical providers, the fact that the claimant has had long-standing back problems, and the

fact that the claimant has attributed most of her problems to her menstrual cycle, it would require conjecture and speculation to conclude that the claimant's job as a tire builder for the respondent employer was the cause of the claimant's back problems. 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). Therefore, I must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER