NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F609829

EDDIE WARFORD, EMPLOYEE	CLAIMANT
ALMATIS HOLDINGS, EMPLOYER	RESPONDENT
COMMERCE & INDUSTRY INS. CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 12, 2010

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

Claimant represented by the HONORABLE TERENCE C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE JOHN P. TALBOT, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 4, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. There was a June 16, 2006, compensable shoulder injury.

2. The compensation rates are $488/366.

3. Respondents accepted a 12% permanent impairment rating to the shoulder.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable neck injury along with his compensable shoulder injury in June 2006.

5. Respondents are responsible for all reasonable and necessary medical treatment the claimant has pursued for his neck injury.

6. The claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from May 8, 2008 through July 3, 2008.

7. The claimant has proven by a preponderance of the evidence that he sustained an 11% permanent impairment rating to his neck as assigned by Dr. Zachary Mason.

8. The claimant has proven by a preponderance of the evidence that he sustained a 35% diminished earning capacity in addition to his permanent impairment ratings.

9. Respondents are entitled to an offset for any group benefits paid pursuant to Ark. Code Ann. §11-9-411.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §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 September 4, 2009, 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 he sustained a compensable injury to his neck when he sustained his admittedly compensable shoulder injury in June of 2006 and also awarding a 35% loss in wage earning capacity in addition to the claimant's permanent anatomical impairment ratings. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

On June 16, 2006, the claimant was performing his duties as a burner operator for the respondent employer when he slipped and fell injuring his left

shoulder. The respondents accepted the shoulder injury as compensable and paid benefits. The claimant underwent rotator surgery on August 14, 2006. He was released in December of 2006 with a permanent anatomical impairment rating of 12% to the body as a whole and a five-pound lifting restriction for the upper left extremity. The respondent employer was unable to accommodate his restrictions and, therefore, the claimant did not return to work for the respondent employer. At this time, the claimant contends he sustained an injury to his neck when he fell.

The claimant underwent a Functional Capacity Evaluation (FCE) which provided a five-pound lifting restriction. At the time of the FCE, the claimant stated that he did not have any neck problems. The claimant complained of mild pain and discomfort in his left shoulder which he attributes to a work-related injury that required surgical intervention. The FCE determined that the claimant gave reliable effort with 51 of 52 consistency measures within an expected limits. The FCE found that the claimant had the ability to perform work in the heavy classification, but he exhibited the ability to lift only five pounds overhead. The written report contains a pain drawing chart and

there is absolutely no suggestion of pain in the claimant's neck.

It is of note that the claimant made absolutely no mention of neck pain at any point during his course of treatment with Dr. Wilson who performed the claimant's shoulder surgery. In June of 2007, when the claimant saw his family physician, Clay Brashears, he again made no mention of neck pain. Dr. Brashears noted that the claimant "has been feeling fine" and "does not usually have pain." His physical exam included evaluation of the claimant's neck and his clinic note states the neck evaluation examination was unremarkable. When confronted with this, the claimant indicated that he had pain in his neck "from the get-go" and he was only seeing Dr. Brashears for treatment of high blood pressure and high cholesterol. Therefore, he would not complain about his neck. However, the medical evidence demonstrates that the claimant complained to Dr. Brashears of neck pain on other occasions.

Due to problems associated with his neck, the claimant ultimately underwent a cervical fusion on May 8, 2008 performed by Dr. Zachary Mason.

Dr. Mason's deposition was introduced into evidence and he testified that the claimant has spurs in his neck that were causing compression of the cervical

spine. He stated that this was pre-existing and was probably aggravated or made worse when the claimant fell at work. When questioned about this conclusion, the following testimony appears:

> A You know, if he's been treated by other physicians for neck problems and he's been doing fine, and then he has a fall or an accident and then he has a lot of neck pain and arm pain, yeah. I would say that the accident aggravated the previously existing condition.
>
> Q But to conclude that you're assuming that he's had a lot of neck and arm pain since the accident?
>
> A Yeah.
>
> Q On a pretty consistent basis?
>
> A Yeah.
>
> Q Starting around the time of the accident and continuing up until when he saw you?
>
> A Yeah. That's what you would expect, you know, from that kind of injury. You wouldn't expect that he wouldn't have a lot of pain pretty much continuously during that spell.

Dr. Mason was also asked about the claimant's functional capacity evaluation, in which no neck pain was indicated. He testified as follows:

> A He doesn't seem to have much neck pain in this test. He

does say that he has some arm pain that is increased with activity.

Q But you told us that if the accident is in fact what aggravated his neck condition, you would expect him to have the kind of pain he had -

A Usually, it -

Q - when he came to see you?

A That's correct.

Q Pretty much consistently?

A You would think that it should be pretty much consistent all during that time.

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 Cavenaugh'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 medical records demonstrate that the claimant had one year following his fall at work where there is virtually no mention of neck pain. In fact, there are affirmative statements from the claimant showing he did not have neck pain. This is

evidenced by the FCE where the claimant stated that he was only having mild pain and discomfort in his left shoulder. Although the claimant complained of neck pain on the very first visit with Dr. Cathcart on June 22, 2006, Dr. Cathcart assessed the claimant with a right shoulder sprain. There is absolutely no mention of any neck injury.

Furthermore, there is no mention of a neck injury in Dr. Brashears' medical records six months after the claimant was released from Dr. Wilson for his shoulder injury. In fact, the FCE included a pain drawing in the report. When the claimant was questioned about this, the following exchange is enlightening:

> Q Well, lets look at that last sentence of that first paragraph: "Mr. Warford reports that he does not feel that he can perform these duties a the current time."
>
> A I didn't say that.
>
> Q Do you think he just made that up?
>
> A Well, evidently somebody did.
>
> Q And then let's look down below there. It's got a pain drawing chart. Do you see that?
>
> A Yes, sir.

Q You see the sketch of that person. It says, "Mr. Warford's description of his symptoms" -- and then it's got some little dots there on your left shoulder. Isn't that right?

A Yes, sir.

Q And I don't see any of those going up into your neck, do you?

A No, sir.

Therefore, when I consider Dr. Mason's testimony, the absence of any complaints from the claimant regarding his neck after the initial intake with Dr. Cathcart right after he fell, and the fact that the claimant was able to perform the FCE without any problems and did not complain of neck pain at that time, I cannot find that the claimant has proven by a preponderance of the evidence that he sustained a compensable neck injury at the time he fell on June 16, 2006. Accordingly, I would reverse the decision of the Administrative Law Judge.

The Administrative Law Judge also awarded wage loss disability benefits in the amount of 35% in addition to the claimant's permanent anatomical impairment rating. In my opinion, the claimant cannot prove by a preponderance of the evidence that he is entitled to any wage loss disability benefits.

The Arkansas Workers' Compensation Law provides that when an injured worker's disability condition becomes stable and no further treatment will improve that condition, the disability is deemed permanent. In order to be entitled to any wage loss disability in excess of permanent physical impairment, the claimant must first prove by a preponderance of the evidence that he sustained permanent physical impairment as a result of the compensable injury. Wal-Mart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d 727 (2000); Needham v. Harvest Foods, 64 Ark. App. 141, 987 S.W.2d 278, (1998). If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability. See, Minor v. Poinsett Lbr. & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962). Objective and measurable physical or mental findings, which are necessary to support a determination of "physical impairment" or anatomical disability, are not necessary to support a determination of wage loss disability. Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

A worker who sustains an injury to the body as a whole may be entitled to wage-loss disability in addition to his anatomical loss. Glass v. Edens 233 Ark. 786, 346 S.W.2d 685 (1961). The wage-loss factor is the

extent to which a compensable injury has affected the claimant’s ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); Cross v. Crawford County Memorial Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant’s age, education, and work experience. Emerson Electric, supra; Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W.2d 316 (1998); Bradley v. Alumax, 50 Ark. App. 13, 899 S.W.2d 850 (1995). Such other matters may also include motivation, post-injury income, credibility, demeanor, and a multitude of other factors. Curry v. Franklin Electric, 32 Ark. App. 168, 798 S.W.2d 130 (1990); City of Fayetteville v. Guess, 10 Ark. App. 313, 663 S.W.2d 946 (1984); Glass, supra. A claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage loss. Logan County v. McDonald, 90 Ark. App. 409, 206 S.W.3d 258 (2005); Emerson Electric, supra. In addition, a worker’s failure to participate in rehabilitation does not bar his claim, but the failure may impede a full assessment of his loss of earning capacity by the Commission. Nicholas v.

Hempstead Co. Mem. Hospital, 9 Ark. App. 261, 658 S.W.2d 408 (1983). The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. Oller v. Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

In my opinion, the claimant lacks motivation to return to work. After the respondent employer declined to return the claimant to work in December 2006 because of his lifting restrictions, the claimant made absolutely no attempt to work any place else. Although the claimant was being treated for neck problems in 2007 and 2008, this surgery did not create any new restrictions. The claimant has not seen any doctor about his neck since he last saw Dr. Mason and he is not on any medication. He has also not been back to the doctor for his shoulder and does not take any medication for it. The claimant testified that he has not put any thought into what kind of jobs he might be able to do.

The respondents hired Edie Nichols, a Certified Rehabilitation Counselor, to assist the claimant in returning to work. Ms. Nichols met with the claimant and provided skills training to prepare the claimant for employment interviews. Ms. Nichols wrote the claimant letters once a week identifying jobs within

restrictions that he should be able to perform. She testified that the claimant did not follow up on the job leads she sent him and that he admitted it to her. Her impression was the claimant was not motivated to go back to work. The claimant would tell potential employers that "he couldn't do anything" and that he could not lift at all. On job search logs, the claimant would represent that a job was no longer available and Ms. Nichols would later confirm that the job was still available. The claimant told Ms. Nichols that he was pursuing all job leads she sent to him, but she found he was not doing so. Ms. Nichols testified that the claimant could earn close to what he made before if he worked as an over-the-road truck driver and that he could handle a truck driving route where he might have some commission from sales. In fact, the claimant's own expert, Mr. Robert White, testified that the claimant was perfectly capable of returning to work.

Therefore, when I consider the claimant's age, his education and his lack of motivation in returning to work, I cannot find that the claimant has proven by a preponderance of the evidence that he is entitled to any wage loss disability benefits in addition to his permanent anatomical impairment.

Therefore, for those reasons set forth above, I respectfully dissent from the majority’s award of benefits.

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KAREN H. McKINNEY, Commissioner