ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
WENDELL L. GRIFFEN, JUDGE

DIVISION III

CACR06-1431

June 20, 2007

CORBIN CAULDWELL APPELLANT	AN APPEAL FROM WASHINGTON COUNTY CIRCUIT COURT [CR2006-817-1]
V.	HON. WILLIAM A. STOREY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

On August 30, 2006, a Washington County jury found Corbin Cauldwell guilty of driving while intoxicated, and the court sentenced him to ninety days of community service and a $1000 fine. He appeals from the conviction, arguing that the conviction was not supported by substantial evidence. Specifically, he contends that the jury should not have considered the results of a breathalyzer test in light of evidence that the arresting officer did not observe him for twenty minutes before administering the test, as required by the Department of Health. We hold that the police officer's testimony was substantial evidence that he complied with the twenty-minute observation period. Accordingly, we affirm.

The only testimony at trial was from Sergeant Brian Comstock of the Washington

County Sheriff's Office. In the early morning hours of July 4, 2005, Comstock saw appellant run a stop sign at the corner of Gregg and Prospect Streets in Fayetteville. Comstock followed appellant and initiated a traffic stop. During the stop, Comstock smelled an odor of intoxicants inside the vehicle. Comstock wanted to know whether appellant or his female passenger was drinking; therefore, he asked appellant to step out of the car. Appellant told Comstock that he had two drinks. Because of the odor and appellant's admission, Comstock administered field sobriety tests.

Comstock first performed the horizontal gaze nystagmus (HGN) test. Appellant failed the test, as he showed six of the six clues showing intoxication. Comstock testified that seventy-seven percent of people who fail the HGN test are intoxicated.

Next, Comstock administered the walk-and-turn test. Appellant showed three of the eight clues, which constituted failure of the exam. Comstock stated that eighty percent of the people who fail both the HGN and walk-and-turn tests are intoxicated.

Finally, Comstock administered the one-leg-stand test. Appellant only showed one clue during the test, which is a successful exam; however, Comstock testified that it was not unusual for someone to pass one test and fail the others. Comstock arrested appellant after administering the field sobriety tests.

The records show that Comstock made the arrest at 2:11 a.m. Comstock testified that the Department of Health requires that a subject be observed for at least twenty minutes before administering a breathalyzer test. Comstock administered the exam at 2:38 a.m., and the test showed that appellant's blood-alcohol level was 0.12, above the legal limit.

On cross-examination, Comstock explained that the twenty-minute observation period was in place to allow any residual alcohol in the subject's mouth to evaporate. During this period, he watches for the subject to burp or vomit. He stated that he watched appellant part of the time by looking at him through the rear view mirror of his patrol car; however, he acknowledged that he did not have constant observation. Comstock also counted as part of his observation period the time that appellant sat in the intake area. He acknowledged that, while he was in the adjacent room looking for a form, appellant could have burped or regurgitated; however, he stated that he would have known if appellant had burped or regurgitated, either by a mess on the floor or by the odor. Comstock testified that appellant did not burp during the observation time.

At the conclusion of the State's case, appellant moved for directed verdict. Appellant argued that the trial court should not have allowed the jury to consider the results of the breathalyzer test because of the ambiguity of the evidence regarding the twenty-minute observation period. He further argued that once the test was excluded, the remaining evidence was insufficient to support a conviction. The court denied appellant's motion, and appellant closed without presenting a case.

Over the State's objection, the jury was instructed that it had to find beyond a reasonable doubt that Comstock substantially complied with the twenty-minute observation period prior to administering the breathalyzer test and that absent substantial compliance, it was not to consider the evidence that the test yielded. After deliberations, the jury found appellant guilty of driving while intoxicated, and the court sentenced him to ninety days of

community service and a $1000 fine.

For his sole point on appeal, appellant challenges the sufficiency of the evidence to support his conviction for driving while intoxicated. He argues that the jury's verdict was not supported by substantial evidence because Comstock did not substantially comply with the twenty-minute observation period and that, without the results of the breathalyzer test, there was not substantial evidence to support the conviction. We reject appellant's argument and affirm his conviction.

We treat a motion for directed verdict as a challenge to the sufficiency of the evidence. *Gorman v. State*, 366 Ark. 82, — S.W.3d — (2006). In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm if substantial evidence exists to support the conviction. *Id.* Substantial evidence is that which is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other, without resorting to speculation or conjecture. *Id.*

The evidence shows that Comstock exercised a twenty-seven minute observation period before administering the breathalyzer test. While appellant argues, without any corroborating proof, that he could have burped without Comstock noticing, Comstock testified unequivocally that appellant did not burp during the observation period. An officer is not required to stare fixedly at the arrested person for the entire time in order to comply with the twenty-minute regulation. *Goode v. State*, 303 Ark. 609, 798 S.W.3d 430 (1990); *Williford v. State*, 284 Ark. 449, 683 S.W.2d 228 (1985). It was within the province of the

jury to determine the weight and credibility of Comstock's testimony. *See State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Here, it is apparent that the jury chose to believe Comstock's testimony that he observed the twenty-minute observation period and that appellant did nothing during that period to affect the results of the breathalyzer test. Comstock's testimony is substantial evidence that he observed the twenty-minute observation period prior to administering the breathalyzer test, and the trial court did not err in denying appellant's motion for directed verdict. Accordingly, we affirm.

Affirmed.

HART and GLOVER, JJ., agree.

DIVISION III

CA06-1223

June 20, 2007

LINDA PARSON

APPELLANT

V.

ARKANSAS METHODIST HOSPITAL

and ARKANSAS PROPERTY &

CASUALTY GUARANTY FUND

APPELLEES

APPEAL FROM THE ARKANSAS WORKERS' COMPENSATION COMMISSION [F501700]

REVERSED AND REMANDED

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

Appellant, Linda Parson, an LPN who worked for appellee Arkansas Methodist Hospital (Methodist), fell and hit her head at work on October 29, 2001, suffering bruising and black eyes. Appellees accepted the injury as compensable and provided medical treatment for Parson's injuries. Parson requested permanent disability benefits, which appellees controverted. The administrative law judge (ALJ) found that Parson had suffered a compensable *physical* injury to her brain in addition to her other physical injuries and that she was entitled to permanent-partial disability benefits of thirty-five percent as well as fifteen percent wage loss, for a total of fifty percent permanent-partial impairment to the body as a whole. The Commission reversed the grant of benefits, finding that Arkansas Code Annotated section 11-9-113, the statute regarding *mental* injury and illness, was applicable and that Parson failed to meet her burden of proof. Parson now appeals, arguing that the Commission erred (1) in determining the type of proof necessary to establish the compensability of a closed-head injury in light of *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001); (2) in finding that her claim was barred by the language of Arkansas Code Annotated section 11-9-113; and (3) in finding that she had failed to present sufficient evidence to support her claim for benefits for a closed-head injury. We reverse and remand to the Commission for further findings of fact.

Standard of Review

In workers' compensation cases, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms the decision if it is supported by substantial evidence. *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000). The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Geo Specialty, supra.* It is the Commission's province to determine witness credibility and the weight to be given to each witness's testimony. *Johnson v. Riceland Foods*, 47 Ark. App. 71, 884 S.W.2d 626 (1994).

In a workers' compensation case, it is the claimant's burden to prove by a preponderance of the evidence both that his or her claim is compensable and that there is a causal connection between the work-related accident and the later disabling injury. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Id.*

Hearing Testimony

At the hearing before the ALJ, Parson testified that she was fifty-five years old, had completed the ninth grade, and had obtained her GED in 1968. She became a certified nursing assistant in 1987, and she worked as a CNA while putting herself through nursing school to obtain her LPN. She had been continuously employed in the field of nursing since 1988, and had worked for Methodist since 2000.

Parson testified that on the night of her injury, to the best of her recollection, she was walking back to the desk with a chart in her hand when both of her feet stuck to the floor, causing her to fall forward and strike her head on the edge of the desk. She then fell onto the floor on her hands and knees. She said that she felt "woozy and funny," that her head hurt, and that she was seen in the emergency room, but she did not remember how she got there. She also did not remember if she continued to work after being seen in the ER or if she went home. She said that her memory from the night of the accident forward was affected; that she had memory loss; and that she also had attention-span problems. Parson said that she had taken photographs of herself showing the injuries to her face and eyes; those pictures were admitted into evidence.

Parson testified that prior to her October 29, 2001 injury, she had suffered other medical problems, including two heart attacks, shoulder problems, herniated discs in her lower back, and knee problems, but that she was able to perform her job in spite of those problems. She said that after the incident, she was treated by Dr. Spanos and Dr. Johnson,

and that appellee paid those medical bills through 2004. She was also seen by Dr. Shedd, her original workers' compensation doctor. She testified that Dr. Johnson administered two eight-hour neuropsychological tests. She said that she was having headaches and near-syncope episodes but that she was told that there was nothing wrong with her. Parson stated that she was eventually authorized to see her family physician, Dr. Sanders McKee, who assumed that Parson had suffered a concussion and referred her to Dr. Spanos.

Parson testified that in early November 2001, she was having what Dr. Shedd called "near-syncope" episodes where she felt that she was going to fall or like there was an aura. She said that she still had those episodes, that she had never had anything like that prior to October 29, 2001, and that those episodes were now less frequent.

Parson said that she had several MRIs performed on her brain and neck. She also said that she has headaches everyday, which she did not have prior to October 29, 2001, and that they keep her from sleeping at times. She attributed her bad memory and lack of attention span to the accident.

Parson stated that she continued to work for Methodist after the accident, but that she had to begin making notes to herself to remember what she was doing. She did not remember when she returned to work, but she worked until she suffered a non-work related injury in April 2002, after which Methodist terminated her employment. Parson

testified that she was currently totally disabled and receiving benefits from the Social Security Administration.

The deposition of Dr. Demetrius Spanos was also entered into evidence. In that deposition, Dr. Spanos, a neurologist, stated that he had completed a report from Parson's attorney and in it noted "AMA Guidelines 25 to 50 percent for moderately severe cognitive decline." Dr. Spanos said that the cognitive decline was measured by two neuropsychological examinations performed by Dr. Dan Johnson in 2002 and 2004. Dr. Spanos stated that he did not understand exactly how the tests were done because he did not perform them, but he further stated that there was a validity portion built into the test to make sure that the patient was not malingering or trying to fake symptoms.

Dr. Spanos said that Dr. Johnson found mild to moderate cognitive decline in some respects, pointing out that some of Parson's factors improved slightly from 2002 to 2004, but that others got worse. Dr. Spanos testified that he did not have any neuropsychological testing results for Parson prior to the October 2001 incident, but that the test was also designed to gauge a patient's ability before an injury occurred, although he was not aware of how that was determined. Dr. Spanos said that he would assume that the current level of function was more easily testable than the pre-injury state, but noted that there were ways to determine the pre-injury state on the test.

Dr. Spanos stated that the twenty-five to fifty percent came straight out of the AMA Guidelines, Fourth Edition. He said that, in his opinion, Parson was at approximately thirty-five percent because some factors had improved and others had worsened with time according to Dr. Johnson, so he erred on the lighter side of the percentage and placed her at thirty-five percent. He testified that for head injuries and any neurologic disease, the majority of improvement was made in the first year, and the further out from the injury, the less likely improvement became. Dr. Spanos said that he did not put in the headache issue because they had no number in the guidelines; however, he gave Parson thirty-five percent for cognitive decline and thirty-five percent for headaches, which he said was erring on the lower side of the scale. He also said that Parson had chronic headache pain, and that he determined how severe the headaches were by asking her, which he admitted was subjective.

On cross-examination, Dr. Spanos testified that he felt comfortable stating within a reasonable degree of medical certainty the opinions he had outlined in the report. He attributed his seventy-percent rating to the October 2001 work injury based upon the history Parson gave and the fact that the headaches became worse following the head injury. Dr. Spanos stated that Dr. O'Sullivan[1] agreed that this was a post-traumatic headache, and that it may be post-concussive.

[1] The record contains no medical evidence from Dr. O'Sullivan.

Dr. Spanos testified that the November 12, 2001 MRI did not appear to show an objective sign of traumatic injury, and that an EEG taken one and one-half years after the accident also did not show any abnormalities. However, he stated that just because there was no abnormal result on the MRI did not mean that there was not injury to the brain or nervous system because closed-head injuries often showed normal results on MRIs and EEGs. He said that he regarded the neuropsychological tests performed by Dr. Johnson as objective even though he acknowledged that it was a question and answer session. He also said that he did not see evidence of trauma to Parson's head, but that he did not see her until February 2002. He stated that he believed that the story he was given by Parson was accurate. He testified that for the better part of the first year Parson responded well to medication for headaches, but that for many patients, medication may not work over time.

Medical Evidence

The November 12, 2001 MRI was essentially normal, showing only "a focal area of small vessel ischemia in the occipital lobe on the left, deep white matter tract probably secondary to hypertension." There was no finding of brain trauma in the MRI report.

In the June 2002 neuropsychological exam, Dr. Dan Johnson noted that Parson's past medical history included high blood pressure, elevated cholesterol, occasional headaches, and prior depression. Parson told him that she had near-syncope episodes anywhere from two to three times per day to two to three times per month, and she also

said that she had been both near and far sighted since she had fallen. Dr. Johnson found that Parson's affect was primarily depressed. He found that Parson's overall cognitive functioning was generally commensurate with premorbid levels, and that her composite memory measures ranged from average to superior. He found that Parson was experiencing deficits in some areas of neurocognitive and neurobehavioral functioning while being well within expectations in others, and that her overall cognitive functioning was generally commensurate with premorbid levels. He stated that the most noticeable areas of cognitive deficiency were in attentional abilities, and that those abilities were lower than expected and most likely represented somewhat of a decline compared to premorbid functioning. He also stated that Parson demonstrated significant emotional/behavioral distress, highlighted by significant depressive symptomatology and considerable anxiousness and worrying. He said that Parson most likely experienced a clinically significant level of depressive/dysthymic that appeared to have been exacerbated significantly by her current general medical condition and loss of work, which was complicating/slowing her recovery toward baseline cognitively. Dr. Johnson stated that it appeared from a neurological standpoint that Parson could benefit from an anti-depressant.

The second neuropsychological evaluation was performed on June 14, 2004. Dr. Johnson stated that Parson's current overall cognitive functioning was generally commensurate with premorbid levels. He said that although her overall ability to navigate

verbally mediated tasks worsened from 2002, performance on non-verbally mediated tasks improved significantly. Parson's performance on composite-memory measures fell consistently within the average range, although her current performances were less proficient in every measure than they were two years before. Her short-term memory declined from 2002; however, Dr. Johnson stated that that type of failure to return to baseline after mild concussion with psychologic overlay, while not being the norm, was not completely atypical, and was often times grouped into the diagnostic category of post-concussive syndrome with poor adjustment. He again noted that Parson likely experienced a clinically significant level of depressive/dysthymic and to a lesser extent anxious symptoms prior to her fall, but those symptoms appeared to be exacerbated by her current medical condition as well as psychosocial stressors which were likely complicating recovery. Dr. Johnson found that given Parson's job responsibilities as an LPN, her attentional difficulties and current emotional/behavioral status might potentially pose significant difficulties in the workplace, and those difficulties had shown little to no remission over the past two years, which was indicative of future prognosis.

Commission Opinion

The ALJ found that Parson had suffered a compensable *physical* injury to her brain in addition to her physical injuries to her forehead and both knees; that she reached the end of her healing period on June 14, 2004; that she suffered permanent physical

impairment in the amount of thirty-five percent to the body as a whole as a result of her compensable October 2001 brain injury; and that in addition, she had suffered a loss of earning capacity in the amount of fifteen percent over and above her anatomical impairment. In reaching these conclusions, the ALJ relied upon *Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

The Commission reversed the ALJ's decision, finding that Parson had failed to meet her burden of proof. The Commission found that Parson had received all the medical treatment for which she was entitled. It further found, without stating any reason, that the requirements of Arkansas Code Annotated section 11-9-113 were applicable to this case, and that the ALJ had failed to apply the requirements of this statute. The Commission also found that the doctor had failed to use the proper criteria to establish Parson's *mental* injury, using the AMA Guidelines instead of the required Diagnostic and Statistical Manual of Mental Disorders. The Commission noted that Dr. Spanos had addressed that there could be objective signs of a closed-head injury but only identified the EEG as a way to determine that and there were no abnormalities to be seen on Parson's EEG. The Commission noted that Dr. Spanos admitted that the tests on which he based his conclusions were convoluted, but that he accepted them as objective, and that in order to reach his conclusions, he had to take Parson at face value with her subjective assessments of her condition. The Commission noted that Parson's subjective complaints

were under her voluntary control, and it rejected Dr. Spanos's assessment of anatomical impairment because it was not based upon objective findings. The Commission also noted that Dr. Johnson attributed Parson's more severe symptoms and slower recovery to a clinically significant level of depressive/dysthymic and, to a lesser extent, symptoms of anxiety that she experienced prior to her fall. The Commission further noted Dr. Johnson's assessment that while such symptoms were exacerbated significantly, they were not exacerbated by the *physical* injury, but rather her general medical condition, loss of work, and other factors that had occurred since the fall. The Commission stated that Dr. Spanos's testimony appeared to be inconsistent with his October 2003 opinion, which stated that Parson had done very well, had no further headaches, and that her headaches appeared to be resolved.

Compensability

The ALJ, relying on *Wentz, supra*, found that Parson had suffered a *physical* brain injury and awarded permanent-partial disability benefits as well as wage-loss benefits. The Commission, in reversing that decision, and without stating any reason, found that Arkansas Code Annotated section 11-9-113 was applicable in this case, and did not address

the *physical* brain-injury analysis presented in *Wentz*. Section 11-9-113, entitled "Mental Injury or Illness," provides:

> (a)(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.
>
> (2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnoses of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

It is true, as the Commission points out, that Dr. Johnson, a clinical neuropsychologist, did not use the DSM to diagnose Parson's condition. However, in Parson's pre-hearing questionnaire, she claims that she suffered an injury to her head as a result of a specific incident. Parson is not claiming that she has a *mental* injury or illness; rather, as the ALJ found, she is claiming that she suffered a compensable *physical* injury to her brain as the result of the specific incident of October 29, 2001. As such, she is required to meet the definition of a compensable injury as found in Arkansas Code Annotated section 11-9-102(4)(A)(i), which provides, "An 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." A compensable injury must be established by medical evidence

supported by objective findings, which are findings that cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102 (4)(D) and (16). Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(4)(F)(ii)(a).

The Commission has failed to address Parson's contention that she suffered a specific-incident closed-head injury. Instead, it has changed Parson's argument to one of *mental* injury or illness. Parson has contended that she suffered a specific-incident closed-head injury. Therefore, this case needs to be analyzed under *Wentz, supra*, and *Watson v. Tayco, Inc.*, 79 Ark. App. 250, 86 S.W.3d 18 (2002).

Reversed and remanded.

GRIFFEN, J., agrees.

HART, J., concurs.