

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103351

PEGGY A. BAIN, EMPLOYEE	CLAIMANT
HUGHES SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 16, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on October 1, 2004, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Ms. Carol Lockard Worley, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 1, 2004, to determine whether the claimant sustained a compensable injury or injuries which arose out of and during the course of her employment with the Hughes School District.

A prehearing conference was conducted in this case on August 25, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to additional clarification set out below. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed between the

parties at all relevant times, including March 16, 2001; that the claimant earned sufficient wages to entitle her to the maximum compensation rates of \$410.00 per week for temporary total disability and \$308.00 per week for permanent partial disability in the event that compensability was overcome; that an incident occurred on March 16, 2001, involving an altercation at the school; that respondents paid some medical and related expenses prior to controverting the claim in its entirety.

By agreement of the parties, the issues to be presented for determination included:

- 1) Whether the claimant sustained a compensable injury to her right knee on March 16, 2001.
- 2) Whether the claimant sustained a compensable back injury on March 16, 2001.
- 3) If compensability was overcome, claimant's entitlement to associated benefits.

Claimant contended, in summary, that she sustained injuries to both her right knee, as well as her low back while trying to break up a fight at school, maintaining that the admitted incident aggravated pre-existing conditions and are thus compensable; that respondents should be held responsible for all medical and related treatment, including, but not limited to a total knee replacement on April 17, 2001, as well as for a spinal surgery performed on May 9, 2002; that she was entitled to temporary total disability from the date

of the injury and continuing through the date that her healing period ended which would be identified at the hearing; and that a controverted attorney's fee should attach to any benefits awarded. Claimant specifically reserved the issue of permanent disability, if applicable. At the hearing, the claimant requested temporary total disability beginning March 16, 2001, through September 9, 2002.

The respondents contended that although it initially accepted the claim as compensable and paid medical through on or about October 12, 2001, at which point it controverted the claim based upon lack of objective findings to support injuries to claimant's low back and right knee. Respondents maintain that the medical evidence, including the deposition of Dr. Ennis, indicates that the claimant's problems were pre-existing without any evidence that the incident caused any trauma or aggravation of the pre-existing conditions to either the right knee or low back. Further, respondents contended that any treatment of the claimant's right knee was related to a January 19, 1987, injury and that the Statute of Limitations had run on the prior claim and/or that the previous carrier, the Public Employee Claim Division may have liability. In the alternative, respondents contended that the claimant was not performing employment services and that any alleged injury did not arise out of and in the course of her employment. At the hearing, respondents pointed out that it was not seeking reimbursement for any benefits paid through October 12, 2001.

The claimant was the only witness to testify. The record in this claim is composed solely of the transcript of the October 1, 2004, hearing containing two (2) volumes of medical exhibits, specifically, ninety-six (96) pages introduced by the claimant and thirty-four (34) pages introduced by the respondents which were received as "Claimant's Exhibit A" and "Respondent's Exhibit A," respectively, despite various duplications, in order to avoid a delay in the hearing. In addition, the evidentiary deposition of Dr. Richard Ennis was introduced as "Respondent's Exhibit B" and retained in the Commission file in bound form.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a compensable injury to her right knee on March 16, 2001.

4. The claimant has proven, by a preponderance of the credible evidence, that she sustained a compensable back injury which arose out of and during the course of her employment and which was caused by a specific incident identifiable by time and place of occurrence on March 16, 2001, and which required medical services and resulted in disability as established by medical evidence, supported by objective findings.
5. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability for the period beginning March 17, 2001, and continuing through at least September 9, 2002, which was the latest medical evidence submitted by either party regarding the claim(s).
6. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's back injury, including, but not limited to spinal surgery performed on May 9, 2002, and respondents remain responsible for continued, reasonably necessary medical treatment. Respondents are not responsible for any medical and associated benefits related to the claimant's total knee replacement on April 17, 2001, or any follow-up medical treatment related to the claimant's right knee.
7. A medical lien has been filed by Arkansas Blue Cross/Blue Shield which paid medicals for both the unrelated total right knee replacement of April

17, 2001, as well as the spinal surgery on May 9, 2002. Respondents are entitled to a credit or offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received in medical services pursuant to Ark. Code Ann. §11-9-411. Reimbursements to medical providers are to be paid in accordance with Commission Rule 30.

8. The end of claimant's healing period, as well as entitlement to additional temporary total disability after September 9, 2002, for the claimant's back injury requires further development of the medical evidence and is by necessity reserved.
9. The issue of permanent disability has been specifically reserved.

#### DISCUSSION

The claimant, Peggy A. Bain, was the only lay witness to testify. Most of her testimony is undisputed. However, a claimant's testimony is never considered uncontroverted. Indeed, the testimony of an interested party is always considered to be controverted. *Lambert vs. Gerber Products Co.*, 14 Ark. App. 88, 684 S.W.2d 842 (1985); *Nix vs. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994); *Continental Express vs. Harris*, 61 Ark. App. 198, 965 S.W.2d 84 (1998).

The claimant is fifty-three (53) years old. At the time of her alleged injuries, the claimant was a high school teacher at the Hughes School District in Hughes, Arkansas. It was stipulated that an incident occurred on March 16,

2001, involving an altercation at school for which respondents paid medical and related expenses prior to its controverting compensability of the injuries claimed. On March 16, 2001, the claimant was teaching when a student from an adjoining classroom summoned her to help another teacher whose students had become extremely unruly. The claimant's description of the incident is set out below:

Q Would you tell the Judge in your own words how that happened and what happened to your body?

A Okay. It was the day we get out for spring break. It was approximately 8:20 in the morning. The kids were wild. I'm the chairperson of the science department. Mr. Richard Sparrow, who is next door to my classroom, had some unruly kids that morning. About, as I said, about 8:20 desks and everything started flying in the room next door, confusion, yelling, screaming from all the kids in his room. My kids looked up at me and said, "Ms. Bain, aren't you going to do anything?"

MS. WORLEY: Your Honor, I'm going to object to hearsay.

JUDGE GREENBAUM: Actually, the incident has been admitted, but why don't you just tell us exactly what the incident was that you feel caused your injury.

THE CLAIMANT: Okay. I sat at my desk and I didn't do anything. I had a – a few minutes later I had a child from Mr. Sparrow's room next door come and yell –

MS. WORLEY: Your Honor, I'm going to object again to hearsay.

BY MR. WREN:

Q Ms. Bain, just tell us –

A I was petitioned by a student to come and help Mr. Sparrow next door. I got up, walked out of my classroom, walked into the room next door. I am

an official, volleyball official. I had a very loud volleyball official whistle. I blew it. I yelled, "That's enough," and they stopped. I said, "Ladies, that's enough," and the fight ceased.

Q So what happened to you?

A I walked into the room. Mr. Sparrow was between me and the student. The student, one of the students came toward me, and I told her to go to the – she started to explain what happened. I told her to go to the office. She left the classroom. The other student was further in the – it was a chemistry lab with lab tables, chemistry lab tables in the back and regular classroom seats in the front of the room. As soon as I came up to Mr. Sparrow, he was very upset. I asked if he was all right, because I had been called to his room. The child that hit me, Mr. Sparrow was between me and the student.

JUDGE GREENBAUM: Okay. So that's really the essence of what we need to get, how the injury occurred. I assume that –

THE CLAIMANT: Okay. The student came by, lowered her shoulder, Mr. Sparrow stepped out of the way and she hit me, and she knocked me into a chemistry table, my back into a chemistry table. I fell back into a chemistry table, forward into another chemistry table, hitting my head and body, and then fell on the floor.

BY MR. WREN:

Q Ms. Bain, did you feel as though you were injured at that time?

A Absolutely.

Q What part of your body did you feel was injured?

A My back. My knee had collapsed. My left ankle, my neck, everything. I mean, I don't know if I was knocked out or what, but when I opened or when I finally came to, I had students over me looking at me. (Tr.15-18)

The claimant was initially taken to the school's doctor in West Memphis, Arkansas. She stated that the company doctor was not available and that a nurse took some x-rays, gave her pain medication, and released her to follow-up

with her regular doctor. As will be set out further below, the claimant has a long history of physical problems involving her right knee, as well as her spine, and has undergone surgeries to both the right knee, as well as the low back. The claimant was next examined and evaluated by Dr. Richard Ennis, an orthopedic surgeon in Memphis, Tennessee, practicing primarily at the St. Francis Hospital with a group called Specialty Orthopedics. Dr. Ennis has been the claimant's orthopedic specialist since April 8, 1978. Following the incident at school, the claimant was first examined and evaluated by Dr. Ennis on March 19, 2001. Dr. Ennis described the claimant's history and complaints as follows:

**CHIEF COMPLAINT:**

Injured right knee.  
Injured back and neck.

**PRESENT ILLNESS:**

A 50-year-old white female who has been treated by me in the past primarily for right knee problems was injured in the classroom at Hughes High School on March 16, 2001 while trying to break up a fight between some students. She was pushed against a table and fell twisting and injuring her knee. She also injured her neck, her shoulders, and her low back. She complains of some tingling sensation in the leg ever since the fall. She has had limited and painful movement of the neck and of the shoulders. Also noticed what she describes as a knot over the left shoulder. (Cl. Ex. A, p.54)

Of particular interest, Dr. Ennis observed swelling of the left knee without objective evidence of any additional injury to the right knee which, indeed, appears to be consistent with the claimant's testimony that although her right

knee collapsed, she twisted her left extremity. Based upon x-rays and the physical examine, Dr. Ennis diagnosed acute cervical strain, contusion of the left shoulder with sprain, lumbar spondylolisthesis, aggravated by trauma, lumbar strain, as well as severe ostarthritis of the right knee, aggravated by trauma. (Cl. Ex. A, pp.54-55) (Resp. Ex. A, p.21)(Tr. 18, 31)

As previously pointed out, respondents paid some initial medical and related expenses prior to controverting the claim in its entirety. Respondents do not seek reimbursement for any benefits voluntarily paid. After respondents controverted the claim, claimant's medical treatment was paid by Arkansas Blue Cross/Blue Shield which filed a medical lien to protect its subrogation interests if respondents are ultimately held liable for the claimant's medical treatment. Both parties agree to protect the interests of said provider. (Tr.9)

The record reflects that the claimant underwent a total right knee replacement on April 17, 2001. Following a lengthy recovery, the claimant subsequently underwent spinal surgery on May 9, 2002. By agreement of the parties, the primary issue presented for determination is whether the claimant sustained a compensable injury to either her right knee or a compensable back injury as the result of the admitted incident on March 16, 2001. If overcome, claimant's entitlement to associated benefits must be determined.

It is undisputed that the claimant has sustained prior injuries and undergone multiple surgeries involving her right knee, as well as a prior lumbar

surgery. A summary of the claimant's pre-existing conditions, her prior course of conduct, and course of medical treatment is necessary to address the immediate claim(s).

The claimant excelled in sports during high school and college. The claimant first sustained an injury to her right knee in the early 1970s while in high school. The claimant underwent three (3) surgeries involving the right knee during high school, the last of the three involving a reconstruction of the right knee. Following the reconstruction surgery, the claimant continued to excel in sports while in college, and, in fact, was second in the nation in racketball in 1975. The claimant graduated college in 1976. She maintained that she did not have any additional problems involving her right knee following the reconstruction surgery until she sustained another injury on or about 1987. The claimant testified that she was working for the employer herein when she sustained the injury. She stated that the building flooded and while going to the science building from the cafeteria, she fell and tore her right ACL. The medical record reflects that the claimant was initially examined and treated by Dr. Richard Ennis on January 19, 1988. Dr. Ennis had previously evaluated the claimant in April, 1978. There is no evidence of medical treatment between 1978 and January, 1988. Dr. Ennis has remained the claimant's primary treating physician involving her right knee since January 19, 1988. Dr. Ennis performed a fourth surgery involving the claimant's right knee on March 8,

1988. Rather than conduct an exhaustive analysis of the medical evidence, suffice it to say that Dr. Ennis has considered a total right knee replacement at least as early as 1988, which was repeatedly put off because of the claimant's young age. (Cl. Ex. A, pp.1-12)

The record reflects that the claimant continued to experience problems involving her right knee at all times following the 1987 or 1988 injury. She acknowledged that her right knee frequently collapsed. In fact, at the time of the March 16, 2001, admitted incident, the claimant was required to use crutches in order to ambulate. Further, the medical record clearly indicates that the claimant desired and required a total right knee replacement at least as early as 1999; however, the surgical procedure was not carried out until following the March 16, 2001, incident.

The medical record further reflects that the claimant began experiencing low back problems at least as early as 1996. Although the claimant related her back problems to a 1996 incident at work, the 1996, alleged injury was never pursued as a workers' compensation claim. The claimant underwent various diagnostic studies, including a MRI on April 4, 1996, which revealed a Grade II spondylolisthesis with probable spondylolisthesis also at the L5 level and minimal degenerative arthritis. In addition, the MRI demonstrated a large herniated fragment at the L5-S1 level. The claimant underwent a decompression laminectomy at L5 and S1 and the disc removed on April 12,

1996, as well as a fusion during the laminectomy decompression. Although the claimant underwent extensive treatment for her low back after April, 1996, no medical evidence was introduced reflecting any treatment related to the claimant's low back between 1998 and the work-related incident on March 16, 2001. The medical evidence reflects that although the claimant complained about significant problems with her back and both lower extremities following the admitted March 16, 2001, incident, including, but not limited to pain down both legs into her feet, muscle spasms, and right leg numbness, she proceeded with the total knee replacement prior to undergoing spinal surgery. On May 9, 2002, the claimant underwent a second surgical procedure on her low back. The surgical procedure was an anterior/posterior lumbar fusion with instrumentation, including rods, screws, and cages. Although the record clearly reflects that the claimant required and desired to undergo a total right knee replacement before March 16, 2001, there is no credible evidence that she required another back surgery prior to March 16, 2001. The claimant emphatically stated that she would never have considered back surgery prior to the admitted incident. The claimant has not returned to gainful employment since March 16, 2001. (Tr.21)

#### ADJUDICATION

The claimant must prove that her injury was "the result of an accidental injury that arose in the course of employment, and that it grew out of, or

resulted from, the employment.” *Cook vs. Aluminum Co. of America*, 35 Ark. App. 16, 21, 811 S.W.2d 329, 332 (1991); *See also*, Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2002). Objective findings are those findings which cannot come under the voluntary control of the patient/claimant. Ark. Code Ann. §11-9-102(16)(A)(i)(Repl. 2002). Complaints of pain, *per se*, may not be considered by the physician, the administrative law judge, the Commission, or the Courts. Ark. Code Ann. §11-9-102(16)(A)(ii)(Repl. 2002).

Under our workers’ compensation law , an employer takes the employee as he finds her, and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple vs. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. *Oliver vs. Guardsmark*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup vs. Regalware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. vs. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996); *Ford vs. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Under our law, since an employer takes an employee as he finds them, a pre-existing disease or infirmity does not disqualify a claim if the employment circumstances aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Jim Walter Homes vs. Beard*, 82 Ark. App. 607 120 S.W.3d 160 (2003). Furthermore, if the claimant can prove that an injury occurred, major cause is not necessary to establish compensability. *Williams vs. L & W Janitorial, Inc.*, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (February 4, 2004).

The claimant maintained that the March 16, 2001, incident aggravated her pre-existing conditions and are thus compensable. Conversely, respondents' primary defense is based upon a lack of objective medical findings to support alleged injuries to the right knee and low back. A review of the medical evidence fails to establish any new objective medical findings related to the right knee that did not exist prior to the March 16, 2001, incident. However, the claimant has proven, by a preponderance of the evidence, that the incident aggravated a pre-existing back condition which has been established by medical evidence supported by objective findings, which were not present prior to March 16, 2001, thus entitling her to benefits for the back claim.

As previously pointed out, the claimant had undergone at least four (4) surgeries involving her right knee prior to the March 16, 2001, incident. In 1972, the claimant underwent a medial meniscectomy on the right. In 1973,

a lateral meniscectomy on the right was performed. In 1974, the claimant underwent a reconstructive surgery on the right knee through a medial parapatellar incision which was performed in California. The claimant resumed normal activities including participation in sports. The claimant was first examined and treated by her primary orthopedic surgeon, Dr. Richard Ennis, on April 8, 1978, following an incident when she was walking up a hill and had an acute onset of severe pain in the right knee. X-rays of the right knee showed at least two (2) loose bodies in the medial compartment, as well as early degenerative changes. Dr. Ennis initially felt that an arthroscopy would be necessary to remove the loose bodies and that, if unsuccessful, surgical incision might be required. The claimant returned to Dr. Ennis on April 14, 1978, at which time he, again, discussed arthroscopy and possible arthrotomy if unsuccessful. The claimant indicated that she did not want to have a repeat arthrotomy at that time and the claimant was treated with medications and an exercise program and advised to return in three (3) weeks to determine whether or not arthroscopy should be performed. Apparently, the claimant made a full recovery without surgery because she did not seek additional medical treatment for the right knee until January 19, 1988, at which time she returned to Dr. Ennis with new complaints related to slipping on a wet floor. The medical evidence reflects that the claimant has continued to experience significant problems with her right knee since 1988. She underwent another arthroscopic

surgery on March 8, 1988, performed by both Dr. Ennis and his associate, Dr. Bobo, at which time she was found to have an osteocartilaginous loose body about 8mm in diameter, as well as degenerative changes on the lateral compartment, Grade II and mild degenerative changes in the medial lateral compartment. In addition, there was complete tearing of the anterior cruciate which was removed. Because of the extent of the claimant's problems, a total knee replacement was contemplated as early as September, 1988. In fact, Dr. Ennis referred the claimant to Dr. Tooms at the Campbell Clinic for consideration of knee replacement surgery as reflected by Dr. Tooms' February 17, 1989, report. Both a total knee replacement, as well as a fusion of the knee were considered, but neither performed. The claimant returned to Dr. Ennis on January 2, 1990, at which time he opined that nothing short of a knee replacement would benefit the claimant while suggesting that they try to put that off as long as possible. On December 14, 1990, Dr. Ennis' notes reflect that replacement surgery would be scheduled after the first of the year; however, the surgery was never performed. (Cl. Ex. A, pp.10-11)

The record reflects that the claimant's knee replacement, while warranted, was postponed for more than ten (10) years because of the claimant's young age in an attempt to avoid multiple knee replacements. Because of increasing pain and advanced arthritic changes, the claimant returned to Dr. Ennis on November 1, 1999, anxious to go ahead with the knee

replacement. The claimant's knee was so painful that she was unable to work and hardly able to walk. Again, the knee replacement surgery was scheduled, but later cancelled, apparently because the workers' compensation carrier refused to accept responsibility as being related to the 1987 or 1988, prior claim. (Tr.23)(Cl. Ex. A, p.52)

The claimant underwent a total right knee replacement on April 17, 2001. The surgery was paid for under the claimant's health insurance policy rather than under workers' compensation. Although the claimant has, at all times maintained that the March 16, 2001, incident aggravated the pre-existing knee injury, requiring a total knee replacement, her statements are mere conclusions which are inconsistent with, and overshadowed by the overwhelming weight of medical opinion. In fact, as reflected by Dr. Ennis' March 19, 2001, report, the claimant was once again prepared to have a total knee replacement scheduled just a few months before the immediate claim which was again cancelled because it was not being covered under workers' compensation. A portion of Dr. Ennis' March 19, 2001, report states:

**DISPOSITION:**

She was treated with Darvocet and Parafon, cervical collar, referred for a cervical MRI and will return in a week. Ms. Bain needs to have a knee replacement done on the right to relieve her pain. She says that in the past there has been some confusion as to whether this is a Workman's Compensation problem and says that when she was preparing to have a knee replacement done a few months ago Workman's Comp. turned her down. She says that her knee problems originated from an injury at work and our records

also indicate that. The recent trauma at work breaking up the fight resulted in aggravation of the pre-existing condition. According to the patient, both the original injury which created the arthritis and the reinjury are results of on-the-job incidences. (Cl. Ex. A, p.55)

In his deposition, taken October 7, 2003, Dr. Ennis concedes that there were no new objective findings after the March 16, 2001, incident which did not exist prior to March 16, 2001. Accordingly, the claimant's claim for a total right knee replacement must be denied because the incident did not aggravate, accelerate or combine with the pre-existing condition to produce the disability for which compensation is sought. Dr. Ennis was specifically questioned as to whether or not the March 16, 2001, incident aggravated the claimant's pre-existing condition. His opinion follows:

Q. As far as the incident that she says happened in March of 2001, you indicated that was an aggravation of a pre-existing condition; is that right?

A. That's right.

Q. Can you state, within a reasonable degree of medical certainty, that Ms. Bain's need for the total knee replacement pre-existed any incident that might have happened in March of 2001?

A. Yes, I can.

Q. And as far as her need for additional treatment for her back, did those problems pre-exist any incident that would have happened in March of 2001?

A. Back problems existed prior to March of 2001, but need for additional treatment for her back, you know, that's a different question. I saw her in November '99 and I didn't see her – as far as I know, she didn't have back treatment, maybe she did. I don't have any records that indicate that she had any back treatment between November of '99 and March of 2001.

So I would say, possibly, she needed back treatment. And I think we maybe got an MRI of her neck related to that on-the-job injury of 2001. But she never had surgery. She never had hospitalization. She may have had some medication.

And I'm not sure if she ever had the MRI. It looks like that sort of dropped into the sunset when we went ahead and did the knee replacement in April of 2001.

Q. What do you see as far as further treatment that Ms. Bain will need?

A. I haven't seen Ms. Bain in a couple of years now, a little over two years.

Q. What was the last date you saw her?

A. September 26<sup>th</sup>, 2001. At that time, she still had some back pain, she still had some knee pain. The exam was normal, x-rays were normal. She was going to call me when she got some tomograms, some extra x-rays and other tests. I don't believe I've heard from her since.

So I don't know if she's sought medical attention somewhere else or if she's doing okay in her present state. I haven't seen her in over two years. (Resp. Ex. B, pp.26-28)

Respondents contend that the claimant's back surgery on May 9, 2002, was related solely to the pre-existing condition and that there was no medical evidence supported by objective findings that the pre-existing condition was aggravated by the trauma on March 16, 2001. Respondents' assertion is simply inconsistent with the record as a whole.

As previously noted, although the claimant underwent prior back surgery, including a fusion, she did not require medical attention related to her back between 1998 and March 16, 2001. Although the claimant candidly acknowledged continuing to experience muscle spasms following the initial

back surgery, her credible testimony reflects that following the March 16, 2001, incident, she experienced additional problems, including pain down both legs into her feet, increased muscle spasms and numbness in her right leg.

Additional diagnostic studies were performed by Dr. Keith Bridwell whose comparative report dated February 11, 2002, states:

**ADDENDUM**

Hunting through the studies some more, we were able to find a 3/96 film that was preop. She has a very very narrow disc at L5-S1 back in March of '96. Comparing March of '96 which was I think immediate preop to 2/11/02 which is today, the disc has settled some more, the translation has increased somewhat, and it does look like her foramen is smaller at L5-S1. She was somebody who started out with a rather small disc at L5-S1 but it actually has collapsed and gotten somewhat worse. I'll star the appropriate films here and hope that we can keep track of them and hold onto them. So there is not drastically dramatic progression of her spondylolisthesis since March of '96 but there is some progression of the translation and some progression of the disc collapse and some progression of the foraminal stenosis as well at 5-1. (Resp. Ex. A, p.30)

The claimant underwent spinal surgery on May 9, 2002, performed by Dr. Brian Rubin at the Barnes-Jewish Hospital in Memphis, Tennessee. Clearly, there was no evidence that such a surgery was necessary prior to the admitted incident. (Cl. Ex. A, pp. 75-78)

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the

evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. Arkansas Code Annotated §11-9-704(c)(4); *Wade vs. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove that she sustained a compensable right knee injury on March 16, 2001. Accordingly, any claim for benefits related to the right knee, including, but not limited to the total knee replacement, is denied and dismissed.

I do find that the claimant has proven, by a preponderance of the credible evidence, that she sustained a compensable spinal injury which aggravated her pre-existing condition on March 16, 2001, entitling her to appropriate benefits related to the back injury. For some unexplained reason, the last medical record related to the claimant's spinal injury is dated September 9, 2002. The claimant requested temporary total disability through that date. Clearly, the claimant remained within her healing period and was totally disabled four (4)

months post-surgery. By necessity, the nature and extent of claimant's back injury, as well as her entitlement to additional temporary total disability, as well as permanent partial disability must be reserved.

I feel compelled to point out that because of the claimant's pre-existing disabilities and impairments, it is apparent that Special Funds must be joined before a final determination on the nature and extent of the claimant's disability. It is the fervent hope of this administrative law judge that the parties will complete that joinder in a timely manner, further develop the medical evidence, and attempt to amicably resolve any remaining disputes, if at all possible.

I feel compelled to further point out that, in the alternative, respondents contended that the claimant was not performing employment services on March 16, 2001, and that any alleged injury did not arise out of and during the course of her employment. There is no evidence whatsoever to support this allegation.

In view of the foregoing, I hereby make the following:

#### AWARD

Respondent, Risk Management Resources, is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$410.00 per week beginning March 17, 2001, and continuing through September 9, 2002. All benefits having accrued, respondent is to pay same in

lump sum and without discount.

Respondents are further directed and ordered to pay all hospital, medical, and related expenses as the result of claimant's back injury, including, but not limited to back surgery performed on May 9, 2002, and respondents remain responsible for continued, reasonably necessary medical treatment.

Additionally, claimant's attorney, Mr. M. Keith Wren, is hereby awarded the maximum statutory attorney's fee on this entire Award, to be paid pursuant to Ark. Code Ann. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge