

**BEFORE THE ARKANSAS WORKERS' COMPENSATION  
COMMISSION**

**CLAIM NO. F308921**

**JANET L. ROGERS, EMPLOYEE**

**CLAIMANT**

**JONES CAFÉ INC.,  
UNINSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED DECEMBER 22, 2005**

Hearing before Administrative Law Judge Cynthia Estes Rogers on September 30, 2005, in Pine Bluff, Jefferson County, Arkansas.

Claimant appeared pro se.

Respondent represented by Mr. Maxie F. Kizer, Attorney at Law, Pine Bluff, Arkansas.

A hearing was held on September 20, 2005, to determine compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on June 22, 2003. It was further stipulated that if the tips claimant earned are to be included in the calculation of her average weekly wage, the claimant was earning an average weekly wage of \$147.45; if, however, tips are not to be included in the calculation, the claimant was earning an average weekly wage of \$55.02.

Claimant contends that on June 22, 2003, she sustained an injury to her right knee and foot when a stack of plates fell on her at work. She seeks the payment of medical expenses only.

Respondent contends that any accident the claimant was involved in did not occur while the claimant was at work and was, therefore, not work-related.

### **STATEMENT OF THE CASE**

Claimant testified that she had worked as a waitress for respondent-employer for about one and a half years at the time she was allegedly injured on June 22, 2003. She testified that on that date, as she was carrying two pies in her hands, she turned to take the pies to the freezer and, when she did, she hit her elbow on a stack of stoneware plates that are normally stacked elsewhere; and, when she struck them, some fell. One plate struck her on the foot and, as she raised her foot, another plate struck her on the edge of her right kneecap.

Claimant testified that Willie Coleman, a fellow employee who worked primarily in the kitchen-area, obviously heard the plates fall and came around to ask claimant if she was ok. She testified that she showed him her knee, which had an almost immediate knot on it. Mr. Coleman, who had worked for the Jones family for about thirty years, testified that he was standing about six or seven feet from the stack of plates, with nothing obstructing his view, and that he did see claimant “bump into” the plates with her elbow before they fell. He testified that he asked her what happened and, although he did not look at her knee that day, he did see it the next day, when she was complaining about it and limping. He said he did not notice a bump or knot on her knee, but he did see a “red spot.” He first testified that he only saw

“maybe one” plate fall and break but later testified that it was “four or five or something like that.” He testified that no other employees were around when the incident occurred and that he is the one who cleaned up the broken plates.

Claimant testified that W. R. Jones, the owner of the café, came out when the plates fell, as well, and that she and Mr. Jones had a “confrontation” about it. She testified that the accident occurred at approximately 1:30 p.m. and that she completed working her shift that day, which was until 2:00 p.m. It was a Sunday, so there was no split-shift that day, as they were not open on Sunday evenings.

Mr. Jones testified that the restaurant had been in his family since 1943 and that he was really the only person who supervised the employees in June of 2003. He testified that the restaurant is no longer open but was closed by the Department of Finance and Administration, and he is now “denied access” to it. He testified that he does vaguely remember the incident on June 22, 2003, wherein a “couple” of plates were broken and were on the floor and that claimant did complain to him later, although not that same day, of having injured herself.

Mr. Jones testified that he has no recollection of her ever having complained of any injuries *prior* to June 22, 2003. He testified that he does not recall whether he told her to see a doctor. He testified that although he had maintained workers’ compensation insurance in the past, he does believe he had it on the date of claimant’s alleged injury. He testified, “I cannot remember when the workman’s comp expired.”

He testified that claimant had been a good employee, showing up when she was supposed to and being a good waitress.

Claimant testified that Mr. Jones told her to see her family physician about her injury. Medical records indicate that claimant began seeing Dr. Nancy Williams on June 25, 2003. Although claimant maintains that she told the doctor how she injured her knee, the records of that date do not mention a work-related injury; however, the records do reflect that claimant had a hematoma, or a knot, on the right knee, and that it “swells when she walks on it.” Further, claimant testified that she had not had any kind of knot on her knee or problem with it prior to June 22, 2003.

Medical records reflect that claimant followed up with Dr. Williams on two more occasions for her knee, on July 2, 2003, and on July 9, 2003. The July 9<sup>th</sup> visit does mention that her knee was hit by “stoneware plate.” She was then referred to an orthopaedist, Dr. Charles Clark, at the South Arkansas Orthopaedic Center. The notes of her first visit with Dr. Clark state as follows: “While on the job a stack of stoneware plates fell onto her R knee and hit her on the lateral aspect of the R kneecap.”

Dr. Clark’s opinion was that she had developed “prepatellar bursitis secondary to contusion.” He gave her a steroid injection that day and gave her Darvocet for the pain. He recommended that she take seventy-two hours off to allow it to resolve and recommended an MRI if it did not resolve within a couple of weeks. Claimant

testified that once the doctors began ordering tests, she learned that respondent-employer did not have workers' compensation insurance and that her treatment was being denied.

Records reflect that Dr. Clark saw claimant again on October 6, 2003, and he felt at that time that she was still suffering from a patellar contusion, which he stated is "unpredictable and can take a while to heal." He recommended an MRI, which he noted had been denied by workers' compensation, as there was no workers' compensation coverage. He also recommended physical therapy. He gave claimant another injection on that date and ordered her back in three weeks for reassessment.

On November 24, 2003, Dr. Clark notes that claimant said the injections and rest seemed to help her, as did wearing a knee brace. He noted that the physical therapy seemed to help some but that the problem had not resolved. He stated:

When you examine the knee, indeed it is tender over the medial joint line. It is tender over the medial facet of the patella. . . . Findings are consistent with persistent patellar contusion and possible medial joint line pathology, ie (sic) medial meniscus either contusion or tear.

He recommended that she go ahead with the MRI, and he put her on Flexeril and reinjected her knee.

The last medical record introduced from Dr. Clark was from April 7, 2004, in which he noted that the MRI was "unremarkable" and opined that claimant's problem was most likely "patellofemoral syndrome," for which surgical intervention would not

be of much help. He gave claimant another injection that day and recommended that she return to physical therapy for three more weeks. He noted that wearing a brace seemed to be helpful to her, as well as patellar taping during rehab, and noted that he would see her in the future on an as-needed basis.

Claimant testified that she only missed one week of work following her injury, beginning the day after her injury, but could not then return to her full duty of “split shifts.” She testified that a “split shift” meant that she would work 11:00 a.m. to 5:00 p.m. and that between 2:00 p.m. and 5:00 p.m., she would be the only person waiting table in the restaurant. She testified that after this incident, she could only work one three-to-four hour shift. She testified that it was about one year before she got back to where she could work split shifts again. However, she only continued working for respondent-employer for about three months following her alleged injury and had to wear a knee brace the entire time there and at her next job, which was for Finley’s restaurant. She is only asking, in this case, that the medical expenses she has incurred for this injury be paid, which she testified total approximately \$4,000.00.

#### **FINDINGS OF FACT**

1. The stipulations herein agreed to by the parties are accepted as fact;
2. Claimant was earning an average weekly wage of \$147.45 on June 22, 2003;

3. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury, arising out of and during the course and scope of her employment, on June 22, 2003;
4. Claimant is entitled to all past and future medical expenses incurred as a result of her June 22, 2003, compensable right knee injury.

### **DISCUSSION**

With regard to the calculation of claimant's average weekly wage, the Full Commission has cited Professor Larson's treatise *Workmen's Compensation Law*, in holding that "anything of value received as consideration for the work, as, for example, tips, bonuses, commissions," be included in the computing of the average weekly wage. See *Eckhardt v. Willis Shaw Express, Inc.*, 1997 AWCC 369, Claim Nos. E603970 and E414831. As such, and as the parties stipulated above, claimant's average weekly wage, when including tips, would have, therefore, been \$147.45.

In this case, claimant alleges that she sustained a compensable injury to her right knee on June 22, 2003, arising out of or in the course of her employment, identifiable by time and place of occurrence, and supported by objective and measurable physical findings. It is this examiner's opinion that claimant has so proven by a preponderance of the credible evidence.

In order to prove compensability of a claim, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his

or her employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was caused by a specific incident, identifiable by time and place of occurrence; and (4) the injury must be established by medical evidence supported by objective findings. *See* Ark Code Ann. § 11-9-102(4)(A)(i); 11-9-102(4)(D); 11-9-102(4)(E)(i).

Objective findings are those that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A)(I). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra*; *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra*; *Arnold v.*

*Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra*; *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

Claimant testified that she had never before experienced right knee problems prior to this injury of June 22, 2003. Indeed, no medical records or evidence was offered to prove otherwise, and all of the medical records introduced support claimant's contentions regarding her injury. The Arkansas Court of Appeals has held that if a claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, there is no substantial evidence to sustain the Commission's refusal to make an award. *See Wentz v. Service Master*, 75 Ark. App. 296, 57 S.W.3d 753 (2001).

In addition, Mr. Coleman's testimony corroborates claimant's testimony regarding how and when her injury occurred. Even Mr. Jones' testimony that he "vaguely" remembered the incident and claimant complaining later about an injury works to bolster the credibility of her claim.

For all of these reasons, it is this examiner's opinion that claimant has proven by a preponderance of the credible evidence that she sustained a compensable right knee injury on June 22, 2003, as she claims, and that she is entitled to the payment of the medical expenses for same.

**AWARD**

Respondents are directed to pay the claimant all medical benefits to which she is entitled in accordance with the findings of fact above.

Respondent is further ordered to pay the costs of the court reporter fee in this case.

IT IS SO ORDERED.

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CYNTHIA ESTES ROGERS  
Administrative Law Judge