

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412785

CAROLYN BOREN, EMPLOYEE

CLAIMANT

WATSON CHAPEL SCHOOL DISTRICT, EMPLOYER

RESPONDENT

**RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 21, 2006

Hearing before Administrative Law Judge Barbara Webb on August 23, 2006, in Little Rock, Pulaski County, Arkansas.

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

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 23, 2006, before Administrative Law Judge Barbara Webb. A Prehearing Order was entered in this case on March 20, 2006. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. The employer/employee relationship existed on December 2, 2004.
2. Compensation rate: \$453.00 – TTD, \$340.00 – PPD.
3. The claim was initially accepted as compensable and some medical and TTD benefits were paid. TTD benefits were paid from December 3, 2004 until April 29, 2005.

By agreement of the parties, the issues to be litigated are:

1. Compensability.

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2. Claimant's entitlement to additional benefits, if found to be compensable.

The record consists of a one volume transcript of the August 23, 2006, hearing, consisting of the testimony of Carolyn Boren, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (medical records); and Respondents' Exhibit No. 2 (non-medical records). In addition, I have blue-backed correspondence dated September 19, 2006, related to payment of short term disability benefits, which is incorporated and made a part of the record of this case.

CONTENTIONS

The claimant contends that she sustained a compensable back injury on December 2, 2004, when she lost her balance and fell to the floor when her kindergarten students ran up to her and hugged her. The claim was initially accepted as compensable. The claimant contends that the work accident resulted in injuries to her low back area, specifically, at the L5-S1 level and that she underwent conservative treatment by Dr. Edward Saer with no relief. A disc replacement surgery in conjunction with a discectomy was suggested by Dr. Saer. The claimant contends she was then seen by Dr. Earl Peeples on June 29, 2005, for the purpose of an independent medical evaluation. The claimant contends that it was Dr. Peeples' opinion that she was at maximum medical improvement. Following the report of Dr. Peeples, medical benefits were controverted. The claimant then proceeded with total disc replacement on August 15, 2005, with her own insurance under the direction of Dr. Edward Saer, resulting in near complete relief of her back pain. The claimant contends she received TTD benefits through April 21, 2005, at which time temporary total disability benefits were controverted. The claimant contends she was off work from the date of the injury through August

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8, 2005, at which time she returned to work until August 15, 2005, when she was again taken off work by Dr. Saer. She contends she did not return to work until October 3, 2005. She therefore claims she is entitled to TTD benefits from April 21, 2005 to August 8, 2005, and from August 15, 2005 to October 3, 2005. The claimant contends she should also be assigned a permanent partial impairment rating and is entitled to PPD benefits. Further, the claimant contends she is entitled to medical benefits in the form of surgery performed by Dr. Saer.

The respondents contend that although they initially accepted the claim as compensable, based on Dr. Peoples' independent medical evaluation of June 29, 2005, they have now controverted the claim in its entirety contending that claimant was not injured in the course and scope of her employment, that her condition and need for treatment preceded the injury date and that there are no new objective medical findings. As such, respondents contend that attorney's fees are not due since the claim is not compensable. Alternatively, Respondents contend that if the claim is found compensable, they are entitled to a credit for all short term disability benefits received by Boren.

FACTUAL SUMMARY

The claimant testified that she had suffered from back pain prior to the work-related incident but had resumed all of her normal activities in November of 2004. She testified that she fell when some of the children in her music class surrounded her causing her to lose her balance and fall to the ground. She was assisted up by other students. She began having problems immediately after the fall. She could not walk or bend. She treated with the doctor for the school and was referred to Dr. Saer, her previous doctor, for additional testing. She was treated conservatively and ultimately had disc replacement surgery on August 15, 2005. She testified that

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after the surgery, she was healed and had no pain in her leg or her back. She returned to work on October 3, 2005. She received temporary disability benefits and medical benefits from workers' compensation carrier for five months. She received short term disability benefits for 26 weeks at the rate of \$253.85 from December 15, 2004 through June 2, 2005. Her group health insurance paid her medical bills related to her surgery. She returned to work at a higher rate of pay. She returns for follow-up evaluation and x-rays with Saer every six months to verify that the disc has not moved.

The medical records in this reflect that the claimant reported a long history of back pain of approximately 26 years. Due to continuing complaints, Boren underwent an MRI of the lumbar spine based on a referral from her rheumatologist, Dr. Houk, on August 24, 2004. The MRI reflected a large rightward disc herniation at L5-S1 with biforaminal stenosis greater on the right due to loss of disc space height. On September 16, 2004, she was evaluated by Dr. Saer. At that time, Dr. Saer noted that Boren told him that her back bothers her more if she does a lot of work at school which involves bending and lifting. Dr. Saer reported that he reviewed x-rays which showed degenerative changes at L3-4 with some anterior spurring and some narrowing at L5-S1 and MRI films which revealed a right sided disk herniation at L5-S1 with some narrowing at that level. He noted that her "chronic symptoms are probably related to the degenerative changes although the acute pain that she had back over the summer could well be related to the disk herniation." She was treated conservatively with physical therapy and an epidural steroid injection and scheduled for follow-up in several weeks.

On November 4, 2004, she was seen at the Little Rock Diagnostic Clinic with complaints of continuous back pain with symptoms on both sides. She returned to

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Dr. Saer on December 14, 2004, in connection with a work-related injury which she related occurred on December 2, 2004. She was originally treated by Dr. Gerald Morris with a Toradol injection, prescription pain medication, and rest. She had also started back to physical therapy. Boren reported pain in the left leg to the foot as well as pain across the lower back. Saer recommended repeating the MRI done in August since her current symptoms were predominately on the left and continued physical therapy. The second MRI was performed on December 24, 2004. The MRI showed similar findings to first MRI. On December 30, 2004, Saer reviewed the results and recommended an ESI and continued physical therapy. On January 18, 2005, Boren returned to Saer with complaints of pain in her back, buttock, and her left leg. Clinic notes reflect that Saer was unable to explain the left side symptoms based on her test results and ordered an EMG/MCV of the left leg. On January 19, 2005, Boren underwent the testing. On January 20, 2005, Saer's notes reflect that the test results were normal. He ordered a lumbar myelogram and post myelogram CT. On February 15, 2005, Saer noted that the tests results confirmed the previous diagnosis and revealed that the left side looked normal. Due to her continued complaints of pain, he ordered a discogram. Based on these tests, Saer recommended that Boren undergo a diskectomy and fusion or disc replacement. On May 17, 2005, Saer opined that although Boren had right-sided disc herniation that preexisted her fall, her current pain "is likely related to the fall where she probably aggravated or exacerbated a problem at L5-S1".

On July 5, 2005, Boren underwent an independent medical evaluation by Dr. Peeples. Based on his examination and review, Dr. Peeples opined based on a reasonable degree of medical certainty that the cause of Boren's pain could not be explained on a physical basis and that the only physical findings were degenerative

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and preexisting and recommended psychological testing prior to any surgical intervention. On August 15, 2005, Boren underwent complete disc replacement surgery. Clinic notes from Saer on September 8, 2005, reflect that Boren was “doing fine” with some discomfort. On September 30, 2005, Boren reported that she was not having any back pain and was improving. She was released to return to work with some restrictions on lifting and standing and physical therapy. In February of 2006, Saer reports that he saw Boren on November 22, 2005, and that she had not reached MMI as of that date. On August 1, 2006, Saer opined that he did not feel that Boren would have needed any surgical intervention at L5-S1 except for the injury of December 14, 2004, and that her subsequent surgery has helped relieve her pain. Based on the AMA Guidelines, 4th Edition, he assigned Boren an impairment of 15% to the body as a whole for her disc problem stated within a reasonable degree of medical certainty.

In a deposition taken on April 27, 2006, Dr. Peeples testified that based on his evaluation and the tests results, there was no objective abnormality of instability or neurological compromise which required treatment and that her surgery was an elective treatment for pain. He further testified that there was no evidence that there was a significant change in her condition attributable to the incident at work.

DISCUSSION

I. COMPENSABILITY

Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”:

- (i) (a)n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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;
- (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused

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by a specific incident or is not identifiable by time and place of occurrence, if the injury is: (a) Caused by rapid repetitive motion . . .
(v) A hernia as set out in § 11-9-523.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D)(Repl. 2002). Claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). If claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Brotherton v. White River Area Agency, ___ Ark. App. ___, ___ S.W.3d ___ (Dec. 14, 2005); Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). The Commission may accept or reject medical opinions and determine their medical soundness and probative force. Id. It is important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985); Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

In the instant case, the claimant had a long history of back problems and was undergoing physical therapy for her preexisting condition at the time of her work-related accident. While it appears to be undisputed that claimant fell at work on December 2, 2004, the medical records do not support a finding that the claimant suffered a compensable injury.

II. CAUSATION AND OBJECTIVE FINDINGS

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the claimant does not establish a compensable injury by medical evidence supported by objective findings.

A review of the medical records offered in this case reflect there is no objective medical evidence that the claimant sustained a new injury to her lower back as a result of a work-related incident on December 2, 2004. The medical records in the case reveal that the claimant had a long history of complaints of chronic low back pain. All of the subsequent tests performed on the claimant, including the MRI’s and the nerve conduction study revealed no new findings other than degenerative findings.

In the instant case, it is undisputed that an incident involving the claimant occurred at work. It is equally clear from the medical evidence that objective medical evidence established the claimant’s need for disc replacement surgery. The primary dispute is whether claimant has established a causal connection between the work-related incident and the need for medical treatment. In a workers’ compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

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It appears from my review of the medical reports that the opinion of Dr. Saer is based on the subjective complaints of the claimant and is speculative at best. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970); Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B)(Repl. 1996). The Arkansas Court of Appeals has held:

the plethora of possible causes for work-related injuries includes many that can be established by a common-sense observation and deduction. To require medical proof of causation in every case appears out of line with the general policy of economy and efficiency contained within the workers' compensation law. To be sure, there will be circumstances where medical evidence will be necessary to establish that a particular injury resulted from a work-related incident - but not in every case. We find the Court of Appeal's reasoning in *Millican* and *Tilley* persuasive. We therefore adopt the holding in *Millican* that objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and the work-related incident (emphasis added).

Freeman v. Con-Agra Frozen Foods, 70 Ark. App. 306, 27 S.W.3d 762 (2000), quoting Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). See Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997) and Aeroquip, Inc. v. Tilley, 59 Ark. App. 163, 954 S.W.2d 305 (1997).

Based on this reasoning, Freeman, summed up the current state of the law as such:

Medical evidence is not ordinarily required to prove causation, i.e., a connection between the injury and the claimant's employment, but if an unnecessary medical opinion is offered on that issue, the opinion must be stated with a reasonable degree of medical certainty.

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Freeman, supra, citing Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

The law is clear that medical opinions based upon “could”, “may”, “possibly”, and “can” lack the definitiveness required by Ark. Code Ann. §11-9-102(16)(B)(Supp.1999) which requires that medical opinions be stated within a reasonable degree of medical certainty. Scott v. Middleton Drywall, 2005 AWCC 22 (Feb. 9, 1005) (“probably did” found insufficient to prove causation); Frances v. Gaylord Container Corporation, 341 Ark. 527, 20 S.W.3d 280 (2000) (overruling prior Court of Appeals decision and holding that “could” was insufficient to satisfy standard); Crudup v. Regal Ware, Inc. , 341 Ark. 804, 20 S.W.3d 760 (2001) (“theoretical possibility” did not meet standard of proof); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001) (to pass muster, opinion must be more than speculation and go beyond possibilities). In this case, in his report of May 17, 2005, Dr. Saer notes “Her current pain is likely related to the fall where she probably aggravated or exacerbated a problem at L5-S1”. Such evidence is insufficient to satisfy Boren’s burden of proof.

The Arkansas courts have frequently discussed the distinction between a recurrence and an aggravation of a preexisting injury. When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence is not a new injury but simply another period of incapacitation resulting from the previous injury. Pinkston v. General Tire & Rubber Co., 30 Ark.

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App. 46, 782 S.W.2d 375 (1990). The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998).

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004); Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). However, an aggravation is a new injury resulting from an independent incident. *Id.* An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.*

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998). The basic test is whether there is a causal connection between the two episodes. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). It is the Commission's duty to determine if a causal connection exists between the primary injury and any additional injuries. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). While medical evidence is not required to show a causal connection, claimant must show proof by a preponderance of the evidence. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that

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the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962). If the 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. Clark v. Ottenheimer, 229 Ark. 383, 314 S.W.2d 497 (1958); Johnson v. Little Rock School District, Full Commission Opinion filed April 4, 2002 (E700511 & F011921).

Boren contends she has met her burden by showing that the new symptoms of low back pain manifested immediately after the incident on December 2, 2004, and that the subsequent disc replacement surgery was successful. However, the medical records in the case reflect that these were not new complaints or symptoms. The claimant testified that she had sought treatment only two months prior to the fall for low back pain. Moreover, a comparison of the MRI's taken before and after the alleged injury in December of 2004 do not reflect any new adverse changes in the claimant's condition. Couch v. Harold Ives Trucking Co., 1999 AWCC 260 (E714521, August 16, 1999); James Liaromatis v. Baxter County Regional Hospital, et.al., _____ Ark. App. _____ (CA 05-1096, May 24, 2006). Moreover, none of the tests, including the EMG and nerve conduction study, performed after December of 2004 reflect any additional objective medical findings. While there is evidence that claimant's condition improved after the surgery, the medical records reflect that Saer was required to fix degenerative disc problems in order to replace the herniated disc, all of which preexisted her fall at school.

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After review and consideration of the testimony and medical records, I find that the preponderance of the evidence fails to show that claimant's need for medical treatment to her lower back, including the disk replacement surgery, was causally related to a work-related incident on December 2, 2004.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed at all relevant times, including December 2, 2004.
3. The claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her lower back and lower extremities on December 2, 2004.

In the instant case, I find that claimant has failed to prove by a preponderance of the evidence that she sustained compensable injury to her lower back and extremities as a result of the work-related accident on December 2, 2004, which is the basis for this claim. Therefore, it is not necessary for me to address whether claimant is entitled to additional medical or disability benefits.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge

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