

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NOS. F407514 & F510037**

<b>AMBER LYKINS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SONIC DRIVE-IN, EMPLOYER</b>	<b>RESPONDENT NO. 1</b>
<b>FARMERS INSURANCE EXCHANGE, INSURANCE CARRIER</b>	<b>RESPONDENT NO. 1</b>
<b>WAL-MART ASSOCIATES, INC. SELF-INSURED</b>	<b>RESPONDENT NO. 2</b>
<b>CLAIMS MANAGEMENT, INC. (TPA), INSURANCE CARRIER</b>	<b>RESPONDENT NO. 2</b>

**OPINION FILED NOVEMBER 3, 2006**

Hearing before Administrative Law Judge Barbara Webb on August 2, 2006, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Emily S. Paul, Attorney at Law, Little Rock, Arkansas.

Respondents No. 1 represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

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**STATEMENT OF THE CASE**

A hearing was held on the above-styled claim on August 2, 2006, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on June 5, 2006. The Pre-hearing 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 Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following

stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

1. That the Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. That the employer/employee relationship existed on June 21, 2004 and June 27, 2004, with Sonic Drive-In.
3. That the claimant's average weekly wage on June 21, 2004 and June 27, 2004, with Sonic Drive-In, was \$124.33, which entitles her to a compensation rate of \$83.00 for TTD and PPD.
4. That the employer/employee relationship existed on August 19, 2005, with Wal-Mart Associates.
5. That the claimant's wages on August 19, 2005, with Wal-Mart Associates, were sufficient to entitle her to a compensation rate of \$133.00 for TTD and PPD.
6. That Wal-Mart has fully controverted this claim.

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

1. Claimant's entitlement to additional medical benefits associated with her right knee injury with Sonic Drive-In on June 27, 2004, as either a recurrence of that injury as to Sonic or as a new injury or compensable aggravation on August 19, 2005, with Wal-Mart.
2. Claimant's entitlement to medical benefits as to Wal-Mart.
3. Controversion and attorney's fees.

The record consists of a one volume transcript of the August 2, 2006, hearing, consisting of the testimony of Amber Lykins and Mike Houchen, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Respondent No. 1's Exhibit No. 1 (medical records); and Respondent No. 2's Exhibit No. 1 (medical records).

### **CONTENTIONS**

The claimant contends that on or about June 27, 2004, she sustained a compensable injury to her right knee while working for Sonic Drive-In. Respondent No. 1 paid benefits for claimant's injury, including arthroscopic surgery. Claimant was assigned a 0% permanent impairment rating on August 3, 2004. Claimant then discontinued her employment with Sonic and began working at Wal-Mart. Claimant contends that she was still treating for her knee during that time period. On August 19, 2005, claimant contends she slipped and fell after being pushed by a co-worker, injuring her right knee. Claimant contends she was performing employment services on August 19, 2005, with Wal-Mart, sustained a compensable injury, and is entitled to all workers' compensation benefits. In the alternative, if it is found that claimant's medical records do not indicate a new right knee injury or an aggravation, but do indicate a recurrence of her "old" Sonic injury, claimant contends she is entitled to additional reasonable and necessary medical treatment. Claimant claims entitlement to a controverted attorney's fee as to both respondents.

Respondents No. 1, Sonic Drive-In and Farmers Insurance Exchange, contend that claimant received benefits for her injury, including arthroscopic surgery paid for by respondent carrier No. 1, through November 30, 2004. Claimant was assigned a 0%

permanent partial impairment rating on August 3, 2004. Claimant discontinued her employment with Sonic and subsequently began working at Wal-Mart. Respondents No. 1 contend that claimant suffered a new injury or independent intervening injury prior to August 12, 2005, and has new objective findings to support that injury; alternatively, that claimant has suffered an independent intervening injury on August 19, 2005, which acted as an independent intervening cause that created new objective findings that would relieve Respondents No. 1 of any further liability and that Respondents No. 2 are liable for that injury.

Respondents No. 2, Wal-Mart Associates and Claims Management, Inc., contend that although an incident occurred at Wal-Mart on August 19, 2005, the claimant did not sustain an injury supported by objective medical findings arising out of and in the course of her employment as defined by the Arkansas Workers' Compensation Act. Respondents No. 2 contend, in the alternative, that this injury did not arise while the claimant was performing "employment services," or was a result of non-employment related hostility, or was caused by horseplay.

### **FACTUAL BACKGROUND**

The claimant is 20 years old (DOB: 9-3-86). She was working for Sonic on a Friday or Saturday night in June of 2004 when she slipped on water in the floor and injured her knee. She continued her shift and reported the injury the next morning to her supervisor. She was sent home and sought medical treatment. She explained that she had a couple of doctor's visits, arthroscopic surgery, and physical therapy. She testified that after the surgery, she continued to have swelling, popping, and knots in her knee. She continued to

work for Sonic until December of 2004. She went to work at Mazzio's on December 24, 2004, and continued to experience pain with her knee. She worked until Valentine's Day, worked for two days at a small grocery store, and began working for Wal-Mart on April 19, 2005.

At Wal-Mart, she was employed as a cashier and worked in lay-away. She testified that she continued to have swelling and popping problems with her knee, although the pain had eased up. She explained that she couldn't lift some things because of her bad knee and had to have cart pushers help her or figure out tricks to get products into the buggy when she checked out. She testified that on August 19, 2005, the first day of school, she went to work and was kicked in the back of her right knee during a conversation with a co-worker. She explained that she believed the co-worker was mad because they had both been called into the manager's office and counseled about talking about higher authority based on statements made by the claimant implicating her co-worker. She explained that the incident happened about thirty minutes before the end of her shift. She finished her shift, went home, and iced her knee down because it was swollen. She called in the next morning and reported the incident. She returned for treatment with Dr. Kilgore. She received a little bit of physical therapy, x-rays, MRIs, and some medication. She explained that her symptoms were worse than normal and the knee had returned to the same condition as existed immediately following the prior surgery. She testified that she has good days and bad days but still has swelling in her knee at times. She can stand up, but her knee pops when she bends and there are still lumps in her knee. She continued to work for Wal-Mart until December of 2005.

On cross-examination, she testified that she was hired at Sonic on June 21, 2004, and had arthroscopic surgery on July 12, 2004. Following the surgery, she was released and returned to work without impairment on August 3, 2004. She did not miss any work and was able to resume her normal activities until she quit after an argument with the store manager, Mr. Houchen. She continued medical treatment for sinus and allergy problems, migraines, asthma, and a back injury. She underwent a sports physical on August 11, 2005, and had a broken finger. She received clearance at that time to try out for the Dance Team but did not try out. After leaving Sonic, she worked a part-time job at Mazzio's waiting tables, answering phones, making pizza, and performing light janitorial services. She moved and went to work for a small gas station and grocery store for two days, but had to leave the job to take care of her sick mother. She subsequently went to work for Wal-Mart where she was required to stand for five to six hours working as a cashier. She testified that her knee was not swollen before her co-worker kicked her. She explained that her co-worker knew she had problems with her knee, but kicked her hard enough to knock her to the ground. She explained that her knee was red and began swelling. She explained that the next morning her knee had swollen to the size of a baseball. She remained on crutches until November of 2005. On February 27, 2006, she sought medical treatment for her knee when she hit a door facing. She explained that she was chasing her dog when she slipped. She also suffered a broken nose after wrestling with her fiancé. She testified that in April of 2002, she was hit in the nose and had a right eye injury during an attack at school. She hurt her thumb in October of 2002 when someone twisted her arm behind her back. In March of 2004, she was hit in the face by someone who threw a beer bottle. In January of

2004, in another fight at school she was slammed into the Coke machine. She had her ribs broken in another altercation within the last year.

She testified that she was fired from her job at Wal-Mart. She did not complete the physical therapy because her voucher for therapy expired and she didn't have the money. She testified that she did not recover fully after the Sonic incident and continued to have swelling and knots in her knee prior to the Wal-Mart incident. She had an MRI on her knee on August 12, 2005, prior to the Wal-Mart incident. She explained she sought medical treatment with Dr. Stamp at the time because her knee kept getting worse and she went to have it checked out. She said her knee stayed swollen for six or seven months after the surgery. She explained that she had the same symptoms after the incident at Wal-Mart. She explained that after the Wal-Mart incident, the pain was more intense but that it was not enough to be a "drastic change". She acknowledged that prior to the incident her knee had given out on at least two different occasions. She informed Wal-Mart that she had a bad knee when she started at Wal-Mart. She did not have problems with her knee prior to working for Sonic.

Mike Houchen testified that he was the part-owner of the Sonic drive-in and supervised the claimant at the time of her injury in June of 2004. He testified that she brought him a doctor's note on June 24, 2004, and informed him for the first time that she had hurt her knee on the job. She told him that she bumped her knee when she walked around the counter and slipped on water in the presence of other employees. Upon investigation, none of the other girls witnessed what had happened. After she returned to work following her surgery, she did not appear to have any problems with her knee and returned to regular duties without limitations. She never mentioned any swelling or popping.

He described the events leading up to the termination of the claimant. He explained that there were problems with the claimant's mother and she "got a little out of character, so to speak" and was told to leave the property and to never come back. When he informed the claimant that her mother was barred, she went ballistic and started hollering, screaming, and cursing. When he asked her to leave, the claimant threw her shirt and hat at him. It hit him in the chest and he threatened to call the police to get her to leave the building. He explained that prior to her termination, the claimant had not complained to him about any continued problems with her knee and had performed her job duties as a car-hop without any problem.

The medical records in this case reflect that claimant sought medical treatment from 1999 until 2004 for a number of injuries to her right arm, broken ribs, suspected head trauma, back strain. In January of 2004, she sought treatment for contusions to her face and back as a result of a fight at school. On June 24, 2004, she sought treatment with Dr. Stamp at the Cabot Medical Clinic complaining that she "fell and twisted (R) knee Tues. - fell because of water in floor". The clinic notes observe swelling in the right knee. On July 12, 2004, Dr. Kilgore notes that an MRI of the right knee was read as having horizontal tear of the anterior horn of the lateral meniscus. He recommended an exam under anesthesia and arthroscopy but advised the claimant and her mother that she could continue conservative treatment to see if there was improvement. At the urging of the claimant and her mother, the surgery was performed on July 14, 2004. In a progress note dated July 21, 2004, the doctor notes that the arthroscopy revealed minimal changes in the anterior horns of both menisci, but no detachment or tearing. The ACL appeared to be intact and she had no pivot shifting. At that time, he noted she had a hyperextension sprain. On August 3,

2004, the claimant returned to Dr. Kilgore for a routine follow-up examination. He noted that she was recovering without difficulty and recommended that she continue her exercise program and could resume normal activities. On August 13, 2004, she went to the Cabot Medical Clinic for her sports physical. On October 7, 2004, and November 8 and 19, 2004, she returned to Dr. Stamp at the clinic for treatment for sinus congestion and asthma. At that time, no complaints concerning her right knee were noted. On November 30, 2004, she returned to Dr. Kilgore reporting continued pain in her knee. The doctor corrected the form of her strengthening exercises, released her to regular activities, and assured the claimant and her mother that there was no significant structural damage within the knee and no further surgery would be necessary. On January 27, 2005, she returned to Dr. Stamp with a sore throat and a cough. She returned on February 1 and 7, 2005, and March 7, 2005, with complaints of an acute back pain and legs hurting. On March 28, 2005, she was seen at the emergency room at Baptist Health Medical Center after an asthma attack. On June 2, 2005, she returned to Dr. Stamp complaining of asthma and pain in her left shoulder. She was assessed with bronchitis, pleurisy, and asthma, and treated with prescription medications.

On July 20, 2005, she returned to the clinic with complaints of swelling and soreness in her right knee and was referred for evaluation by Dr. Kilgore. On August 11, 2005, Dr. Kilgore reports in a progress note that the claimant was doing pretty well for a while but is now having right knee pain that occurred fairly recently. He noted that it is possible that she has had a new meniscal injury and referred her for an MRI. The August 12, 2005 MRI resulted in findings of a "Horizontal tear in the posterior horn of the medial meniscus".

Medical records from the Rebsamen Medical Center reflect that the claimant was admitted on August 21, 2005, complaining of right knee pain after being hit at work on August 19, 2005, at Wal-Mart. She was prescribed Darvocet for pain and crutches. Nursing notes reflect that the claimant's mother was rude, abrupt, and requested treatment which was not deemed necessary. Clinic records reflect that the claimant was seen the next day on August 22, 2005, with complaints that while at work on Friday, someone hit behind her knee causing her to fall and hurt her right knee. She was examined and prescribed crutches, Darvocet and instructed to remain off work and school until her evaluation with Dr. Kilgore on August 24, 2005.

On August 24, 2005, Dr. Kilgore's notes indicate that he reviewed the MRI and determined that he was "not totally convinced that she has a meniscal tear". He recommended that she treat conservatively. She returned to Dr. Stamp at the clinic on August 30, 2005, for a follow-up. She was assessed with knee pain and instructed to follow-up with physical therapy as ordered by Dr. Kilgore. On September 16, 2005, she returned to the clinic complaining of pain and swelling in her right knee. Notes reflect that she was unable to tolerate current work restrictions due to pain. She was instructed to continue physical therapy twice a week, prescribed pain medication and scheduled to return to Dr. Kilgore on September 24 for a follow-up. On September 20, 2005, Dr. Kilgore's notes reflect that the claimant presented for treatment and continues to have a lot of problems. He notes that his examination revealed that her condition had not really changed and that she seems to have a low pain tolerance. He also notes that she is quite emotional and her mother is angry. He recommended conservative treatment and scheduled her to return in a couple of weeks.

On September 23, 2005, the claimant underwent another MRI. The MRI revealed normal and unremarkable findings with an impression of “internal derangement of the right knee”. On October 10, 2005, Dr. Rooney, the radiologist, did a comparison between the September 2005 MRI and the earlier August 2005 MRI. As a result, he attached an addendum to the August 12, 2005 MRI, as follows: “The increased signal intensity in the medial meniscus most likely represents persistent vascularity, rather than a meniscal tear. The MRI of the knee performed on 09/23/2005 showed no evidence of a medial meniscal tear.”

The claimant presented again to the Cabot Medical Clinic on December 19, 2005. At that time, she complained of “(1) migraines, (2) hands breaking out, and (3) left side under ribs hurts when breaths in”. On January 3 and 17, 2006, she returned to the clinic with complaints of sore throat, sinus, headaches, and other complaints unrelated to her knee. On February 1, 2006, she returned with complaints of feeling tired, nauseated, and vomiting after eating. Notes reflect that she “moved away from home - under a lot of stress”. She was referred to a gynecologist for further examination and treatment. On February 17, 2006, she returned to the clinic with complaints of back pain. On February 27, 2006, she returned to the clinic with an injured right knee and a possible broken nose. The records reflect that she hit the patilla of her right knee on the facing of a door. The right knee was x-rayed and she was diagnosed with a contused knee and contused nose.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. That the Arkansas Workers’ Compensation Commission has jurisdiction of this claim.

2. That the employer/employee relationship existed on June 21, 2004 and June 27, 2004, with Sonic Drive-In.
3. That the claimant's average weekly wage on June 21, 2004 and June 27, 2004, with Sonic Drive-In, was \$124.33, which entitles her to a compensation rate of \$83.00 for TTD and PPD.
4. That the employer/employee relationship existed on August 19, 2005, with Wal-Mart Associates.
5. That the claimant's wages on August 19, 2005, with Wal-Mart Associates, were sufficient to entitle her to a compensation rate of \$133.00 for TTD and PPD.
7. That Wal-Mart has fully controverted this claim.
8. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical benefits associated with her right knee injury with Sonic Drive-In on June 27, 2004, as either a recurrence of that injury as to Sonic or as a new injury or compensable aggravation on August 19, 2005, with Wal-Mart.
9. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional reasonable and necessary medical benefits as a recurrence of her June 27, 2005, compensable injury from respondents No. 1.
10. Claimant has failed to establish by a preponderance of the evidence that she had a compensable injury on August 19, 2005, while employed by respondent No. 2, Wal-Mart.

11. Claimant has failed to prove by a preponderance of the evidence that she is entitled to medical benefits as to respondent No. 2, Wal-Mart.

### **DISCUSSION**

In the instant case, it is undisputed that claimant suffered a compensable on-the-job injury in June of 2005 while employed by Sonic. Respondents No. 1 contend that they have provided claimant with all reasonable and necessary workers' compensation benefits for which they are responsible. Additionally, respondents No. 1 further contend that any need for benefits which claimant may presently have is the result of an independent intervening injury which she suffered after leaving her employment with Sonic.

Respondent No. 2 contends that claimant suffers from an aggravation of a preexisting condition that occurred prior to the incident at Wal-Mart and that there are no objective medical findings to support a new injury to her knee as a result of the incident of August 19, 2005, at Wal-Mart. Alternatively, respondent No. 2 contends that the claimant was not performing employment services at the time of the August 19, 2005 incident and was engaged in horseplay or other non-work related activities at the time.

### **COMPENSABILITY**

Ark. Code Ann. § 11-9-102(4)(A) defines "compensable injury": (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. A compensable injury must be established by medical evidence

supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). 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. Morelock v. Kearney Company, 48 Ark. App. 227, 894 S.W.2d 603 (1995). 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).

### **AGGRAVATION/RECURRENCE**

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine 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. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

Claimant testified that following the arthroscopic procedure in July of 2004, she continued to have swelling, popping, and pain in her right knee. She testified that the pain in the knee improved but was re-injured when she was kicked in the back of the knee by a co-worker at Wal-Mart in August of 2005. The medical records reveal that the claimant was released to resume her normal activities by Dr. Kilgore on August 3, 2004. Although she returned to the doctor for various problems, she did not complain about right knee pain until she returned to Dr. Kilgore on November 30, 2004. At that time, the doctor fully

released her from his care and released her to normal activities. Again, she sought medical treatment for other problems, but did not complain of swelling and soreness in her right knee until July 20, 2005. An MRI taken on August 12, 2005, reflected the possibility of a new meniscal tear which was later ruled out by the radiologist after a subsequent MRI taken on September 23, 2005. On August 19, the claimant complained of right knee pain and swelling after she was kicked in the back of the knee by a co-worker during an argument at work at Wal-Mart. She testified that the knee returned to the same condition as immediately following the surgery. An MRI taken on September 23, 2005, resulted in normal and unremarkable findings.

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000). I find that the preponderance of the evidence clearly establishes that claimant recovered from her June, 2004, injury and that there is no medical evidence which links claimant's subsequent medical problems to her compensable injury of June, 2004.

#### **REASONABLY NECESSARY TREATMENT**

Pursuant to Ark. Code Ann. § 11-9-508(a), an employer must promptly provide all reasonably necessary medical services which are needed to treat an employee's compensable injury. However, it was not the intent of the Arkansas Workers' Compensation Law to provide general accident insurance. Duke v. Perkin Wood Products Co., 223 Ark. 182, 264 S.W.2d 834 (1954). Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and

necessary. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, Opinion filed February 17, 1989 (D612291); B. R. Hollingshead v. Colson Caster, Full Workers' Compensation Commission, Opinion filed August 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, both the proposed procedure and the condition it is sought to remedy must be analyzed. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, Opinion filed December 13, 1989 (D512553). What constitutes reasonably necessary medical treatment is a fact question for the Commission. Wright Contracting co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Also, whether the medical treatment actually provided is reasonable and necessary is a question of fact for the Commission. DeBoard v. Colson Co., supra. While the results obtained may be a consideration in some cases, the primary considerations are the nature of the service in relation to the injury sustained. Tonnie Crisp v. Weyerhauser Corp., Full Workers' Compensation Commission, Opinion filed July 27, 1993 (D812922).

Since respondent No. 1 was the owner of (and carrier for) claimant's employer at the time of her June, 2004 compensable injury, they acknowledge that they would be responsible for any reasonable and necessary workers' compensation benefits which stemmed from said injury. As the record reflects, following said injury respondents provided claimant with medical treatment from June 24, 2004 to November 30, 2004.

Based on the evidence, I find that claimant's additional medical treatment was not reasonable and necessary treatment for the June, 2004, compensable injury.

### **OBJECTIVE FINDINGS**

Respondent No. 2 does not dispute that the claimant was assaulted by a co-worker at work on August 19, 2005, but contends that there are no "objective medical findings" as required to support compensability of an injury. The claimant bears the burden of proving a compensable injury by a preponderance of the evidence. Smith v. City of Fort Smith, 84 Ark. App. 430, 143 S.W.3d 593 (2004). In addition to proving her injury by a preponderance of the evidence, the claimant must establish the existence of the injury by medical evidence and supported by "objective findings." See Ark. Code Ann. § 11-9-102(4)(D). Objective findings are those that cannot come under the voluntary control of the patient. See Ark. Code Ann. § 11-9-102(16)(A)(i). The claimant must also prove that there is a causal connection between the work-related accident and the injury. Stevenson v. Tyson Foods, Inc., 70 Ark. app. 265, 19 S.W.3d 36 (2000). With respect to this proof, the claimant must show that the "major cause" of the injury is the workplace. When making this determination, the claimant does not receive the benefit of the doubt. Ark. Code Ann. § 11-9-704(c)(4)(Supp. 1995); Glencorp Polymer Products v. Landers, 36 Ark. App. 190, 820 S.W.2d 475 (1991).

A claim for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. Arkansas Department of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

In the present case, the claimant has not presented any objective medical findings supporting the existence of a compensable injury as a result of the assault at Wal-Mart on August 19, 2005. The fact that claimant was complaining of swelling and pain in her right knee in July, 2005, a month prior to the attack further negates the possibility of a relationship between her continued knee problems and the attack. Although claimant initially noted swelling and increased pain, the MRI performed after the attack did not reveal new findings when compared with the MRI performed only days before the attack. Without such proof, claimant's claim against respondent No. 2 must fail.

Alternatively, respondent No. 2 contends that claimant was engaged in horseplay or other non-work related activity on August 19, 2005, when she was kicked in the back of the knee by her co-worker. Although it is not necessary for me to address this issue in light of the lack of objective medical findings to support a compensable injury, I would note that the evidence suggests that the claimant was the victim of an unprovoked physical assault by a co-worker during an argument over work-related issues. Although the evidence did show that there were previous problems between the workers, the greater weight of the evidence indicates that the dispute was over the co-worker's displeasure over the claimant's statements at work which led to disciplinary action of both workers and that the co-worker was clearly the aggressor. Under these circumstances, there would be substantial evidence to support the altercation was about work and occurred at work. See, Welch's Laundry and Cleaners v. Clark, 38 Ark. App. 223, 822 S.W.2d 283 (1992).

**ORDER**

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied as to Respondents No. 1 and Respondent No. 2.

**IT IS SO ORDERED.**

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**HONORABLE BARBARA WEBB**  
**Administrative Law Judge**