

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F411649

JAMES THRONE, EMPLOYEE

CLAIMANT

LEXICON, INC., EMPLOYER

RESPONDENT NO. 1

**LIBERTY MUTUAL FIRE INSURANCE CO.,
INSURANCE CARRIER**

RESPONDENT NO. 1

STAFFMARK, EMPLOYER

RESPONDENT NO. 2

**AMERICAN HOME ASSURANCE CO.
c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER**

RESPONDENT NO. 2

OPINION FILED APRIL 30, 2007

Hearing before Administrative Law Judge Barbara Webb on February 8, 2007, in Little Rock, Pulaski Count, Arkansas.

Claimant represented by Mr. Scott A. Scholl, Rice & Adams, Little Rock, Arkansas.

Respondents No. 1 represented by Mr. Joseph Purvis, Dover Dixon Horne, PLLC, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. Jarrod Parrish, Worley, Wood & Parrish, P.A., Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on February 8, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on April 28, 2006, and was introduced into the record of this proceeding as Commission Exhibit No. 1. An Order was filed on July 17, 2006, dismissing Anchor Packaging and Cannon Cochran Management Services as parties to this claim. A copy of the July 17, 2006 Order was made Commission Exhibit No. 2 to the hearing record. An Amended Pre-hearing Order was entered on October 18, 2006. The

Amended 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 Amended Pre-hearing Order was made Commission's Exhibit No. 3 to the hearing record. The following stipulations as submitted by the parties in the Amended Pre-hearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between claimant and respondent No. 1 commencing on March 1, 2004, until August 24, 2004.
3. The employee/employer/carrier relationship existed between claimant and respondent No. 2 commencing on September 3, 2004, until September 30, 2004.
4. The applicable compensation rate, if allowed, as to Lexicon is a temporary total disability rate of \$240.00 and a permanent partial disability rate of \$180.00.

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

1. Compensability of the claimant's alleged injury and associated benefits.
2. A determination as to who the claimant was working for at the time of his injury.
3. If found compensable, whether claimant suffered a reoccurrence or aggravation.

4. If found compensable, the applicable compensation rates as to Staffmark.
5. Controversion and attorney's fees.

The record consists of an one volume transcript of the February 8, 2007 hearing, the first volume consisting of the testimony of James Throne, Jr., James Throne, Sr., Steve M. Dineen, and Meggan Blevins and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Commission's Exhibit No. 2 (July 17, 2006 Order); Commission's Exhibit No. 3 (Amended Pre-hearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' No. 1 Exhibit No. 1 (medical records); and Respondents' No. 2 Exhibit No. 1 (Medical Exhibits) and No. 2 (non-medical exhibits). In addition, I have blue-backed and fully incorporated the following depositions into the hearing record: Respondents' No. 1 Exhibit No. 2 (Deposition of Roger Cagle, M.D.), Exhibit No. 3 (Deposition of Lance Monroe, M.D.) and Exhibit No. 4 (Deposition of Jeanine Andersson, M.D.).

FACTUAL BACKGROUND

James Alan Throne, Jr., is 23 years old (DOB: 4-23-84). He attended Paragould High School and received his GED in September of 2001. He subsequently attended Cotton Boll Technical College for training as a certified nursing assistant. He also attended Pulaski Technical College for blueprint reading and welding. He worked as a CNA and in the construction business remodeling houses. He began working for Lexicon in August of 2003 as an expediter. As an expediter, he explained that he read blueprints and moved steel buckets of parts to the beams for the welders and fitters. The buckets were moved by crane due to

their weight and parts were hand-lifted out of the buckets and set on the beams. He worked for Lexicon for approximately one year.

Throne testified that in March of 2004, he was returning to his designated work location after assisting another employee in repairing a beam line when he tripped and fell over some metal bars and other scrap which had been left in the floor. He reported the fall and his injured wrist to the weld shop supervisor and his immediate supervisor. He was directed to the safety office. He reported the injury to Jason Tucker in the safety office and recalled filling out a piece of paper. Tucker told him that he had sprained his wrist and that he should go back to work. He finished his shift. He reported to work the next morning. His wrist was still hurting so he went back to the safety office and reported that it was still bothering him. He was told that it would be sore and that it would eventually quit hurting. He did not seek medical care until September of 2004, after he left the employment of Lexicon. He explained that he repeatedly reported the pain but was told that it was just sprained and would be sore. After approximately a month, he told Jason Tucker that he needed to go to the doctor, but was not provided medical treatment.

He explained that he couldn't bend his wrist or hold stuff in his hand. Throne testified that due to problems with his wrist, he can no longer fish or hunt. He also testified that his wrist prevented him from working in construction jobs using a hammer or ladder.

He subsequently worked for Staffmark and the Daily Press. At Staffmark, he was assigned to Anchor Packaging where he ran a machine to put plastic wrap on

rolls. He explained that he left the employment of Staffmark when he could no longer perform the job. He explained:

I took a – the way the machine was designed, it had a bar that had three or four rolls, cardboard rolls that the Saran Wrap wrapped itself around. The job was, when the buzzer went off, you cut the plastic wrap, remove the one that was there and replaced it with an empty – empty pipe that had the rolls on it so it could begin wrapping it again. Well, during the process of removing one of them, I had picked it up – well, it had a slot – there's two like little half u's that this pipe sat in. When I raised up one end, I was getting in the middle of it and the pipe was like across my arms and I was walking down trying to get in the middle of it so I could balance it so I could pick it up. When I went to balance it, the piece slipped out of the u and fell on the machine. Well, it jarred my arms like that, obviously jarring my wrist.

He testified that the jarring made the old injury worse. He testified that he next worked for the Daily Press for 90 days but also had difficulties performing the job due to the limitations of his wrist. He testified that he had only been able to work part-time picking up trash at constructions sites.

On cross-examination, Throne denied telling Steven Dineen in August or September of 2003, that he had fallen and that his fall and injured wrist were not work related and that he did not need medical treatment. He admitted that he quit Lexicon in August of 2004, in part, to move back to Paragould, Arkansas. At the time he moved, he admitted he had never filled out an accident report nor sought medical treatment for his wrist. He agreed that the first time he sought treatment at the emergency room was September 9, 2004, after he began working for Staffmark on September 3, 2004. He could not explain the inconsistencies in the emergency room reports listing his chief complaint as he dropped a roller on his right wrist and that his wrist was caught between two rollers at work and denied that

either description was accurate. He also denied telling Dr. Monroe on September 10, 2004, that he fell down stairs and landed on his wrist. He admitted that on October 4, 2004, he returned to Little Rock and filled out an accident report with Lexicon for the first time based on the advice of his grandparents. He admitted that he also worked at two construction jobs after leaving Lexicon. He denied telling Staffmark employees that he had fallen down playing basketball. He agreed that he did not report a work-related injury to Staffmark or Anchor Packaging. He explained that his wrist problems began prior to his employment with Staffmark and there was not a time where his wrist was completely well. He admitted that he told Staffmark that his injury was not work-related and testified that he did not believe Staffmark or Anchor Packaging was responsible for his injury. He explained that he did not seek medical attention earlier since he couldn't afford it and he sought treatment when he could no longer handle the pain.

James Alan Throne, Sr., the claimant's father, testified for the claimant. He worked for Lexicon from November of 2003 until April of 2006. He worked the weekday shift while his son worked the weekend shift. His son told him that he hurt his wrist in March of 2004 while working at Lexicon. He testified that his son wanted to go to the doctor but that they did not have the money. He observed that his son did not fish anymore and required his assistance when he worked on his vehicle. He testified that he had conversations with Jason Tucker and Steven Dineen, both safety personnel at Lexicon, about his son's injury to his wrist and his need for medical treatment.

Steven Michael Dineen testified that he has been the safety director for Lexicon since August of 2003. He hired the claimant and performed his safety orientation. He gave him safety training. He explained that in the first six weeks after hiring the claimant, Throne was involved in two incidents with overhead cranes. In late August or early September of 2003, six months prior to the claimant's alleged fall, Dineen explained he responded to a safety call in the plant and observed Throne rubbing his wrist as he came down from standing on top of a table. Throne told him that he hurt his wrist in a fall. Throne denied that he hurt his wrist at work or that he needed first aid or a doctor. He was first advised that Throne believed he hurt himself on the job in October of 2004, approximately seven months after the alleged incident. He explained that any conversation he had with Throne, Sr. about his son's claim was after the claim was filed and during the time he was handling a work-related claim for Throne, Sr. He testified that he could not locate any written report filed by the claimant prior to October of 2004.

Meggan Blevins testified on behalf of Staffmark. She is employed as a staffing specialist at Staffmark and was shadowing the staffing manager, Penny Mulligan, at the time Throne was placed at Anchor Packaging and also when he quit. She testified that she was present during a conversation between Throne and Mulligan in which he told her he was unable to work at Anchor Packaging because he had a personal injury. She further explained "Of course, we asked, you know, what happened. He said, I fell down playing basketball." He told them that the injury was not work related. She further explained that he could not have caught his

hand in the rollers without having a greater injury. She explained that he never filled out any workers' comp forms or any claim with Staffmark. She further explained that there was never a report from the claimant that he injured or aggravated his wrist even though he was given the opportunity to report a work-related injury during his exit interview.

Medical records reflect that Throne sought medical treatment at the emergency room at Arkansas Methodist Medical Center on September 9, 2004, at approximately midnight. As reflected in the emergency room notes, Dr. Cagle testified by deposition that Throne complained of right wrist pain and told him that "he dropped a roller on his right wrist tonight, he has a history of a fall six months ago, it was hyperextension, right wrist." He further explained that his reading of the x-ray of the right wrist was negative as to fractures, revealed no acute injury, but noted changes consistent with an old injury and degenerative changes. During the musculoskeletal examination, he observed swelling over the right wrist. He diagnosed the claimant with contusion of the right wrist. As a result of the contusion, he put him in a splint, told him to keep it elevated, use ice for swelling, for twenty-four (24) hours, and prescribed him pain medication. Dr. Cagle referred Throne to his regular physician for follow-up treatment.

Throne was examined by Dr. Lance Monroe on September 10, 2004. Dr. Monroe testified that he had last seen Throne on May 3, 2001. In the history provided by Throne, Dr. Monroe was told that Throne was seeking follow-up treatment on his right wrist after falling down stairs and landing on his wrist. He

indicated that his employer would not let him work on the pain medication. Monroe prescribed Tramadol for pain and diagnosed Throne with a fractured wrist. He testified by deposition that the radiologist could not tell from the x-ray whether the fracture was recent or old. Dr. Monroe testified that the history provided to his staff did not mention any incident at work involving rollers or that his problem was work-related. He referred Throne to an orthopedist, Dr. Shecktor. He testified that if the x-ray revealed avascular necrosis, that would be consistent with an old injury. He explained that surgical treatment is the only form of treatment. He explained that the problems with the lunate observed on September 10, 2004, would be more consistent with a hyperextension type as opposed to a pulling injury. He testified that continued stress or aggravation to an orthopedic injury can result in pain and swelling for a long time after the injury. He testified that Throne could have sustained a similar injury if he fell playing basketball or a vast number of different scenarios.

Dr. Jeanine Andersson, an orthopedic surgeon testified that Throne was first treated on December 8, 2005. At that time, Throne complained that he hurt his right wrist in March of 2004. Following her examination, Throne was diagnosed with Kienbock's disease, a deficiency of blood flow to the lunate bone in the wrist that collapses as the disease progresses and arthritic changes develop. She testified that a patient can develop the condition from trauma, genetics, or as a result of unexplained reasons. Records reflect that at the time of his visit, Throne attributed his problems to a fall in March of 2004 while working at Prospect Steel. Dr.

Andersson testified that the injury could have been caused by a roller dropping directly onto the wrist. Andersson also agreed that the injury could have been sustained by a fall down the stairs or a fall while playing basketball. Throne did not mention an incident involving a roller or a fall down stairs to Andersson. The only information provided by Throne on the Health/Hand Information Sheet was "I fell on the job and tried to catch myself, resulting in a fractured wrist". She explained that her tests revealed that Throne had a genetic negative ulnar variance in his right wrist that predisposed him to Kienbock's disease. She explained that avascular necrosis is progressive until an operation is performed or there is no longer viable bone. She testified that she had recommended an MRI to determine the amount of blood flow in claimant's wrist, but it was never performed. She testified that a person with a lunate fracture could function but would not be able to perform heavy lifting, gripping and grasping, or other functions that require force without pain. She testified that there were surgical procedures that would improve his condition. She noted that she would perform a wrist arthroscopy to determine the type of surgery needed. She explained that Throne's type of injury was more consistent with hyperflexion than a striking injury and not consistent with a pulling type injury. She further opined that the blood supply was pinched off before the fracture happened. She testified that she could not say to any reasonable degree of medical certainty that any fall caused Kienbock's condition. She agreed that her examination revealed a congenital condition that the claimant's ulnar in both wrists is short. She explained that other predisposing factors like viscosity and smoking can contribute

to the development of the condition and that his records revealed that Throne had a significant smoking history.

Employment records reveal that claimant worked with Staffmark as a temporary employee for four weeks at the established rate of \$8.33 per hour. The number of hours worked varied but totaled 62.5 hours. There was no evidence of a contract for hire that required claimant to be available or that availability of work was the only factor which kept him from working more hours. Travelers Ins. Co. v. Perry, 262 Ark. 398, 557 S.W.2d 200 (1977); Metro Temporaries v. Boyd, 314 Ark. 479, 863 S.W.2d 316 (1993). Based on the evidence, I find that if claimant is entitled to receive benefits as to Staffmark, his compensation rate should be based upon averaging the hours worked and the amount of wages received.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between claimant and respondent No. 1 commencing on March 1, 2004, until August 24, 2004.
3. The employee/employer/carrier relationship existed between claimant and respondent No. 2 commencing on September 3, 2004, until September 30, 2004.

4. The applicable compensation rate, if allowed, as to Lexicon is a temporary total disability rate of \$240.00 and a permanent partial disability rate of \$180.00.
5. The applicable compensation rate, if allowed, as to Staffmark is based on an average weekly wage of \$130.16; resulting in a temporary total disability rate of \$87.00 and a permanent partial disability rate of \$87.00.
6. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury while employed by Lexicon in March of 2004.
7. The claimant has failed to prove by a preponderance of the evidence that he suffered a compensable work-related injury to his right wrist on September 9, 2004, while employed by Staffmark.
8. The claimant failed to notify Staffmark of the alleged injury until March of 2006 and therefore Staffmark is not responsible for any disability, medical treatment or any other benefits prior to notification of said injury.

DISCUSSION

The claimant contends that he fractured his wrist when he tripped and fell while performing duties within the scope of his employment with Lexicon; that he is entitled to all appropriate benefits; and attorney's fees.

Lexicon and its insurance carrier contend that the claimant did not sustain a compensable injury while working for Lexicon and therefore the problems with his right wrist are not their responsibility.

Staffmark and its insurance carrier contend that the claimant was not an employee of Staffmark on or about March 1, 2004; that Staffmark is not liable for benefits associated with any alleged injury; and that claimant was not injured while under the employ of Staffmark from 9/3/04 through 9/30/04. Respondents No. 2 further asserts that they were not given notice of the alleged injury until March of 2006, when they were joined in this proceeding.

I. COMPENSABILITY

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

- (i) (a) an 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 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 present case, I find that claimant failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. The claimant testified that he injured his right wrist in March of 2004 as a result of a fall at Lexicon, Inc. and the symptoms became more severe after a subsequent incident on September 9, 2004, when his wrist was jarred when a piece of equipment that he was attempting to lift fell against his arm and wrist while working for Staffmark. He testified that the initial incident was reported to his supervisor and the safety personnel on numerous occasions but medical treatment

was not provided and the second incident was reported to Staffmark as related to a prior injury.

To the contrary, Lexicon personnel testified that Throne did not report an incident in March of 2004 resulting in a right wrist injury to them. In fact, the safety director testified that he was told by Throne in September of 2003 that his wrist was hurting as a result of a fall. Throne clearly told him that his wrist problem did not occur at work. The evidence demonstrates that Throne was familiar with the procedures for reporting a work-related injury and that the safety office would have processed the necessary paperwork had Throne reported an incident.

Throne continued to work without seeking medical assistance for six months and returned after he left his employment with Lexicon to fill out the paperwork to report his injury. Moreover, Throne testified that he had a second incident at Anchor Packaging while working for Staffmark immediately prior to seeking medical assistance. While some of the medical records reflect a patient history provided by Throne consistent with a fall in March of 2004 and an incident on September 9, 2004, there is also other history provided by Throne as to a fall down some stairs and a conversation with a staffing specialist with Staffmark during his exit interview when he said he fell down playing basketball. In addition, the medical records reflect that Throne had a congenital problem such that his wrist condition could have been degenerative in nature and not the result of trauma to his wrist.

This is clearly a case of credibility. Based on my review of the credible evidence in this case, I find the testimony of Dineen and Blevins more credible than

the uncorroborated testimony of the claimant. While it is evident that Throne needed medical treatment for his wrist, the preponderance of the evidence does not show that claimant's wrist problems were the result of a work-related injury. I find that the testimony of claimant is even less credible when considered with the evidence of his delay in seeking medical treatment, his inconsistent statements as to the manner in which he had hurt his wrist, and the medical evidence of a congenital condition that, in and of itself, could have resulted in the development of his problem with his wrist.

I am further persuaded by the testimony of Meggan Blevins, who specifically recalled the statements of the claimant, as follows:

Q Explain to me what took place and what he said to you when he –

A He came in. I heard the conversation. He actually spoke to Penny. As I said, I was shadowing. He came in, he spoke to Penny Mulligan, and he was telling her that he was unable to work at Anchor Packaging because he had a personal injury. Of course, we asked, you know, what happened. He said, I fell down playing basketball. We gave him something called an exit interview. He filled that out. And we interviewed him — we went over, you know, the personal injury that he had, and that was it.

II. CAUSATION

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. The claimant did not seek immediate medical attention following the alleged incident in March of 2004. In October of 2004, the emergency room doctor which treated the claimant observed signs of swelling or abnormality. However, subsequent testing did not reveal whether the symptoms observed were the result of a remote or acute injury. Moreover, the medical evidence established that claimant's problems with his wrist could have been the result of degenerative changes due to congenital anatomy conditions in light of his diagnosis of Kienbock's disease, a deficiency of blood flow to the lunate bone in the wrist that collapses as the disease progresses and arthritic changes develop.

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 his right wrist as a result of a work-related incident in March of 2004.

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).

It appears from my review of the medical reports that the opinion of Dr. Cagle and Dr. Monroe are based on the subjective complaints of the claimant. 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.

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, Dr. Andersson, the treating orthopedic surgeon, testified by deposition:

Q. As we discussed earlier, you indicated that there are a number of potential causes of Kienbock’s disease and you also indicated that based on the information that you’ve seen today, I gather most of which, the outside information if for the first time, that there’s no way you can say to any reasonable degree of medical certainty that any fall of March 4th caused this condition, this Kienbock’s condition, am I correct in that?

A. Correct.

Such evidence is insufficient to satisfy Throne’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. 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 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). But, if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the Commission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962).

Finally, from a review of the credible evidence offered in this case, I am convinced that any objective medical findings and need for medical treatment are consistent with degenerative conditions of the claimant which may have been aggravated by an incident on claimant's own personal time rather than a specific work-related incident.

After considering the evidence submitted in the record and observing the demeanor of the witnesses during their testimony at the hearing conducted in this matter, I find that the greater weight of evidence fails to support a conclusion that claimant sustained an injury arising out of and in the course of his employment.

Finally, Staffmark contends that even if this claim were compensable, claimant failed to provide notice as required by the Arkansas Workers' Compensation laws. While it is not necessary for me to address this issue in light of the findings above, I would note that it is undisputed that claimant did not fill out any workers' compensation forms until October of 2004, almost six months after the alleged date of injury, and did not report a work-related injury to Staffmark until Staffmark was joined as a party to this proceeding in March of 2006. See, Ark. Code Ann. § 11-9-701. Although claimant asserts that he notified Lexicon and Staffmark, both called credible witnesses who specifically denied the incidents were timely reported.

ORDER

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

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge
