

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F701977

BOBBIE A. BROWN, EMPLOYEE

CLAIMANT

UNIVERSITY OF ARKANSAS, EMPLOYER

RESPONDENT

**PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED FEBRUARY 4, 2008

Hearing before Administrative Law Judge Barbara Webb on November 8, 2007, in Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Mr. Kenneth A. Olsen, Attorney at Law, Bryant, Arkansas.

The respondents were represented by Mr. Richard S. Smith, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on November 8, 2007, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on September 12, 2007. 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 September 12, 2007 Pre-hearing Order is made a part of the hearing record.

By agreement of the parties, the stipulations as submitted by the parties in the Pre-hearing Order as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed on January 29, 2007.
3. The claimant's earnings were sufficient to entitle her to a compensation rate of \$201.00 for temporary total disability.
4. The respondents have controverted this claim in its entirety.

By agreement of the parties, the issues presented at the hearing were as follows:

1. Compensability of claimant's alleged injury on January 29, 2007.
2. If found compensable, claimant's entitlement to temporary total disability benefits from February 7, 2007, until a date yet to be determined, and medical expenses.
3. Controversion and attorney's fees.
4. All other issues are reserved.

CONTENTIONS

The claimant contends she sustained a compensable injury to her right foot and ankle on January 29, 2007, and is entitled to medical benefits, temporary total disability benefits from February 7, 2007, the date she last worked, until a date yet to be determined, and attorney's fees. Claimant reserves all other issues, including permanency.

The respondents contend that there are no objective clinical findings to support a compensable injury and that any objective findings in the record appear

to be related to a pre-existing condition. Respondents contend that the evidence does not establish the specific date and time of the injury.

The record consists of a one volume transcript of the November 8, 2007 hearing, consisting of the testimony of James Ray Vaughn, Bobbie A. Brown, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Reports of Dr. Thrash); and Respondents' Exhibit No. 1 (Medical Records).

FACTUAL BACKGROUND

James Vaughn testified for the claimant. He has worked at University of Arkansas at Pine Bluff ("UAPB") as a maintenance/custodial worker for fifteen years. His job entails cleaning buildings, bathrooms, etc. He has known the claimant for over five years. On January 29, 2007, he was working with the claimant on the same crew on the shift from 6:00 a.m. until 3:00 p.m. He testified that at approximately 10:30 that morning, he and the claimant had just finished doing some work and were in the janitor's closet when the claimant filled a five gallon bucket with water. He explained that the claimant picked up the bucket, the bucket slipped from her hand, and fell on the claimant's feet. He testified that the claimant screamed out "Darn, that hurt" or similar words, became red in the face, and began limping. He was not aware that the claimant had pre-existing problems with her right foot and had not observed her having difficulty in the past. The claimant continued to limp and complain that her foot was hurting. He explained that the claimant was having difficulty finishing their work and reported the incident to the

supervisor within 35 to 40 minutes. He testified that the claimant worked the next day and he observed that her foot and ankle were swollen about seven to eight inches. He had not noticed swelling before. The claimant was still limping so he encouraged her to see a doctor.

On cross-examination, he explained that the bucket was an oblong mop bucket with a roller and a funnel. He explained that he considered the claimant a friend. He testified that they had eaten lunch together and visited socially outside of the workplace.

The claimant is forty-eight years of age (b.d. 07-16-60). She completed a two-year associate degree in early childhood education. She worked as a custodial worker for UAPB from August 25, 2002, until August 21, 2007. Her job duties entailed cleaning classrooms, bathrooms, the office, mopping floors, vacuuming, and doing the windows. On January 29, 2007, she was working with James Vaughn. She explained that she rinsed out her mop, after cleaning some classrooms, in the closet. She emptied the bucket and refilled the bucket with water. As she was lifting the bucket, the handle fell off and the bucket fell back on her foot and she screamed. She caught the wall to keep from falling. She recalled filling the bucket with three gallons of water using a one gallon bleach bottle. She had seen Dr. Thrash concerning her foot before the incident, but denied getting active medical treatment. Her foot was not swollen on January 29, 2007, before the incident. She had previously had swelling from the bottom of her foot due to wearing a pad in her shoe too long. After dropping the bucket on her foot, she

explained that the swelling was different due to the fact it came from the top and her ankle was swollen and she could not bend her foot. She denied having foot spasms before the incident with the bucket. She explained that about two to three days after the bucket incident, she began having spasms in her foot. She testified that she tried to finish her day of work but her foot was hurting bad enough to cry. She reported the incident to Cynthia Anderson, the personnel manager at UAPB. Anderson sent her to Healthcare Plus that day. She explained that she tried to go to Healthcare Plus twice but they were too full. She also reported the incident to her supervisor, Annie Glover. She continued to work until February 7, 2007, but was sent back to Healthcare Plus because her foot still hurt. On February 7, 2007, she was treated by Dr. Morris. She explained that when she could not get into Healthcare Plus on the 29th, she called and made an appointment to see Dr. Thrash. She told Thrash about the incident and he took x-rays of her foot, heel, and the side of her ankle. He released her back to work. She is diabetic but does not have any diabetic neuropathies, sores, or other problems. When she saw Dr. Morris, she was taken off work and put into a splint. She continued to have swelling and spasms. She continued to treat with Dr. Thrash until June of 2007, but has not returned because she did not have insurance. She has not been able to work. She currently wears a boot due to the spasms and swelling from the injury. She did not have to wear the boot prior to dropping the bucket on her foot.

On cross-examination, she testified that she had used up all of her leave time. She was terminated. She had never had a previous workers' compensation

claim. She was previously diagnosed with a bone deformity in her foot. She explained that the doctor had ordered some custom orthotics for her shoes due to a flat instep. She was treated by Dr. Thrash on January 22, 2007, seven days prior to the work incident, for a swollen right foot and ankle and was given an injection. On January 18, 2007, she was treated by Dr. Reyes due to complaints of left shoulder pain and right ankle pain. She had been given a release from work for two days due to the shoulder problem which was caused while claimant was lifting garbage bags at work.

Medical records reflect that she was seen by Dr. Thrash on January 22, 2007. Notes reflect that her right foot and ankle were swollen due to orthotics being too high on her arch and she was treated with an injection. On January 30, 2007, the clinic notes reflect that she returned with her right foot swollen and after review of her history, surgery was discussed. On February 27, 2007, clinic notes reflect:

R foot persistently painful. Condition is aggravated by injury 1-29-07 @ work where bucket was dropped on top of foot. Previous condition to lateral sinus tars is painful but new area of pain indicated at anterior ankle and dorsal midfoot.

In addition, the office note dated February 27, 2007, by Dr. Thrash notes that his examination revealed new symptoms in the area affected by the work incident and that the claimant was “guarded and slightly spasmed due to symptoms.”

On June 1, 2007, Dr. Thrash recommended that the claimant continue to use the boot brace previously prescribed in April of 2007 and that surgery be considered for treatment of her prior condition of equinus and the related deformity.

On July 20, 2007, Dr. Thrash responded that he found objective findings of injury to the claimant's foot caused by the injury of dropping the bucket on her foot. He further opined that the injury at work did not contribute to her need for surgery. He noted that her period of temporary disability related to her injury began on January 29, 2007, and continued until June 1, 2007, and possibly beyond since he had not seen the claimant since that date.

On February 7, 2007, the claimant was evaluated by Dr. Morris as a result of her work-related accident. She was diagnosed with a contusion to her right foot and ankle. He treated her with an Aircast and prescription medication of Celebrex and Darvocet. He recommended that she stay off her foot and gave her a release from work until the next visit on February 13, 2007. She returned on February 13, 2007, and was given a release from work until February 20, 2007.

DISCUSSION

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, she 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).

The preponderance of the evidence demonstrates that claimant had a work-related accident on January 29, 2007, when she dropped the bucket of water on her foot and ankle. The incident was witnessed by her co-worker and was immediately reported to the claimant's supervisor and personnel manager. She filled out the necessary paperwork. The medical records from both Dr. Thrash and Dr. Morris confirm that the claimant sought medical treatment for the injury to her foot. Although respondents point to the notes from Dr. Thrash that the claimant did not report the injury to him on her initial visit, the claimant testified that she reported the

incident to his nurse when scheduling the appointment. Moreover, Dr. Thrash notes the work-related incident on subsequent visits, observes objective findings on new injury by way of spasms and swelling, and opines that the disability and treatment from January 29, 2007, until as least June 1, 2007, was related to the accident at work. On the other hand, he notes that the need for surgery is related to her pre-existing condition and not the injury at work.

Ark. Code Ann. § 11-9-508 states that employers must provide all medical treatment that is reasonably necessary for the treatment of a compensable injury. What constitutes reasonable and necessary treatment under the statute is a question of fact for the Commission. Ganksy v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996); Geo Specialty Chem., Inc. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Respondents are responsible only for medical services which are causally related to the compensable injury.

Objective Findings

Respondent contends that there are no “objective findings” as required in order to support compensability of the alleged 2007 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 his 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).

In the present case, I find that the claimant does establish a compensable right foot and ankle injury by medical evidence supported by objective findings.

A review of the medical records offered in this case reflect there is objective medical evidence that the claimant sustained a new injury to her ankle and foot as a result of the work-related incident on January 29, 2007. Dr. Thrash observed that the work-related incident was an aggravation of her pre-existing condition and noted new findings of spasms and swelling which he treated with the boot brace and prescription pain and anti-inflammatory medications.

Causation

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).

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).

This is not a case where the opinion of Dr. Thrash is based solely on the subjective complaints of the claimant. Dr. Thrash, claimant’s treating physician, does more than speculate or render theoretical possibilities. He examined the claimant the day after the work-related incident and made objective findings of new symptoms consistent in the location and nature of the accident described which were not present in his examination of the claimant only seven days prior to the work incident. Due to the fact that he had treated the claimant for a number of years, it is reasonable to conclude that he was in the best position to evaluate the claimant and determine whether the need for medical treatment was due to the pre-existing condition or the new injuries caused when the claimant dropped the bucket on her foot.

The Arkansas courts have frequently discussed the distinction between a recurrence and an aggravation of a pre-existing 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 pre-existing 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). An aggravation of a preexisting non-compensable condition by a compensable injury is, itself, compensable. *Id.*

In Davis v. Helena Chemical Co., claimant suffered from a pre-existing lumbar degenerative condition before sustaining a compensable injury. Full Commission Opinion, filed August 3, 1999 (D406121). The Full Commission

affirmed an administrative law judge's finding that claimant was entitled to additional medical treatment, stating:

The respondents' and the dissent's central argument in this case is that the treatment the claimant is presently receiving is because of an ongoing degenerative condition which would be occurring whether or not the claimant suffered an injury in 1984. However, this argument overlooks the fact that the claimant's previously asymptomatic degenerative process physically progressed and became symptomatic because of his 1984 compensable injury . . . the compensable injury, not some speculative event, is what resulted in the claimant's present condition.

Id.

The Full Commission later upheld a finding of compensability where symptoms of claimant's pre-existing condition were asymptomatic for five years prior to the compensable event. Jerry Hambelton v. Guy King & Sons, Inc. & Bituminous Casualty Corp., Full Commission Opinion, filed February 22, 2001 (E904812). The Commission held that a preponderance of the evidence showed that claimant's symptoms were the result of his compensable injury, despite the fact that claimant had a pre-existing ongoing degenerative process. Id. at 19.

In the instant case, as demonstrated above, there is medical evidence to confirm that claimant aggravated her pre-existing condition. The evidence further demonstrates that her need for treatment from Dr. Thrash and Dr. Morris was related to the claimant's work-related injury. Based on Dr. Thrash's opinion and records, it is equally clear that the claimant's need for surgery is not related to the work-related injury but rather her pre-existing condition. This medical evidence is further substantiated by the testimony of the claimant and her co-worker. The claimant and her co-worker testified that she had no prior swelling in the top of her

right foot and ankle prior to the incident in January 29, 2007. Although there is evidence that the claimant sought treatment for swelling in her foot and ankle prior to the accident at work, the records reflect that the swelling was in a different area of her foot due to orthotics which did not fit properly. Moreover, she had been able to perform her job duties without complaint or noticeable symptoms of swelling or limping as observed by her co-worker immediately after and following the work-related accident.

Based on the clear weight of the medical evidence in this case from claimant's treating physicians, I find that the medical treatment provided by Dr. Thrash and Morris, beginning January 30, 2007, until June 1, 2007, is reasonable and necessary and related to the compensable injury.

Temporary Total Disability

Claimant is contending that she is entitled to temporary total disability benefits from February 7, 2007, to a date yet to be determined. The claimant is entitled to temporary total benefits if she can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). Based on Dr. Thrash's recommendations, the claimant remained in her healing period and was not able to return to work until at least June 1, 2007, the date he last treated

the claimant. Since the claimant was unable to seek further treatment due to the lack of insurance and funds, the evidence is not clear if her healing period has ended. Based on the preponderance of the evidence, I find that the claimant is entitled to temporary total disability for the time period from February 7, 2007, through a date yet to be determined.

Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that respondents have fully controverted compensability of the claimant's right foot and ankle injury, medical treatment, and temporary total disability benefits from February 7, 2007, to a date yet to be determined. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on January 29, 2007.
3. The claimant's earnings were sufficient to entitle her to a compensation rate of \$201.00 for temporary total disability.

4. The respondents have controverted this claim in its entirety.
5. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury at a specific date and time, i.e. January 29, 2007, to her right foot and ankle and that her need for medical treatment from Dr. Thrash and Dr. Morris from January 30, 2007 until June 1, 2007, was reasonable and necessary and causally related to her compensable work-related injury.
6. The preponderance of the evidence further demonstrates that claimant's need for surgery to her right foot and ankle is not related to her work injury but rather is related to her pre-existing condition.
7. The preponderance of the evidence demonstrates new objective clinical findings to support a compensable injury
8. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from February 7, 2007, until a date yet to be determined.
9. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.

AWARD

The respondents are hereby directed and ordered to pay benefits and attorney's fees in accordance with the findings of fact and conclusions of law set forth herein. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge