

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F710806

JENNIFER HURN, EMPLOYEE

CLAIMANT

MEDCATH, INC., EMPLOYER

RESPONDENT

**LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JUNE 25, 2008

Hearing before Administrative Law Judge Barbara Webb on April 2, 2008, in Little Rock, Pulaski County, Arkansas.

The claimant was represented by Mr. Steven McNeeley, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by Mr. Eric Newkirk, Attorney at Law, Rieves, Rubens & Mayton, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on April 2, 2008, before Administrative Law Judge Barbara W. Webb. A Pre-hearing Order was entered in this case on February 26, 2008. 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 February 26, 2008 Pre-hearing Order is made a part of the hearing record as Commission Exhibit No. 1. 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 or about September 25, 2007.
3. If found compensable, the claimant earned sufficient earnings to entitle the claimant to the maximum rate in effect , i.e. \$504.00 for a temporary total disability rate and permanent partial disability rate of \$378.00 per week.
4. Claimant did not work from October 1, 2007, until March 19, 2008.
5. The claimant drew short-term disability benefits beginning October 1, 2007, and continuing for eleven (11) weeks at the rate of \$478. 80.

ISSUES

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

1. Compensability of claimant's alleged September 25, 2007, injury.
2. If found compensable, claimant's entitlement to medical benefits and temporary total disability benefits.
3. Controversion and attorney's fees.
4. The claimant reserves all other issues at this time.

The record consists of a one volume transcript of the May 19, 2008 hearing, consisting of the testimony of Jennifer Hurn, Melissa French, and all documentary evidence consisting of Commission's Exhibit 1 (Pre-hearing Order); Claimant's Exhibit 1 (Medical Reports); and Respondents' Exhibit No. 1 (Medical Records).

FACTUAL BACKGROUND

The claimant is twenty-five years of age (b.d. 08-12-82). She is not married and does not have children. She was home-schooled and attended Central Baptist College for two years. She went to UAMS and graduated from the nursing school in 2005 with a Bachelor of Science in Nursing. Prior to attending nursing school, she worked at UAMS in several positions. After completion of her degree, she worked as a registered nurse ("RN") for two years in the intensive care unit. On July 9, 2007, she began working at the Heart Hospital as a staff RN in their critical care unit. She was making \$22.17 per hour and worked day shift from 6:30 a.m. until 7:00 p.m.

Hurn testified that prior to September 25, 2007, she had no prior back problems and had no problems working because of her back. She denied having any non-work-related activities that would have injured her back. Hurn recalled that she was performing her daily duties as a nurse on September 25, 2007. She explained that she had to squat to start an IV on a patient and that she had been doing quite a bit of physical activity, including moving some open heart patients out of bed. She could not recall a specific incident but remembered hurting after squatting down. She testified that her pain increased and she went home. She worked two more twelve hour shifts but had an increasing amount of pain. She went to the emergency room because she was to the point of blacking out from the pain and was not able to sit, stand or lay down. Her mother drove her to the hospital. She explained that her pain was located in the lowest part of her spine

“where her pelvis starts”. She testified that she had not injured her back and was not involved in a motor vehicle accident or any other incident prior to September 25, 2007. She had not had prior muscle spasms in her low back.

She testified that she was initially treated with muscle relaxers and hydrocodone that did not help the pain. She was seen by Dr. James Bryan, who continued her on pain medication. She was referred to a physical therapist, Rob Tillman. After therapy, she improved but remains in some amount of pain. She also received steroid injections from Dr. Rosenzweig which helped relieve her pain. She testified that she was not able to work from October 1, 2007, until March 20, 2008. Within two weeks of the incident, she reported her injury to Linda Prince when she realized it was more than just a small muscle strain. She was ultimately referred to Lisa Wallace, the workers' compensation representative, who submitted the claim.

She is currently working as an agency nurse where she has been able to work at various locations in a light duty environment without physical work. She is paid about the same amount of pay as before her injury. She cannot drive longer than twenty (20) minutes or sit or stand for certain periods of time without muscle spasms and the need for muscle relaxers. She cannot drive in heavy traffic due to braking, sit in a church pew, or lift anything over twenty (20) pounds. She testified that she was able to sit up normally in January and was able to start driving in February.

In addition to Dr. Bryan and Rosenzweig, she was treated by Dr. Gray, her family doctor. She took the "major cause" letters to her doctors who agreed to sign them.

On cross-examination, Hurn explained that she first began working in a physically demanding job in 2004 working as a Tech at UAMS in her senior year doing "grunt work". She explained that her job required lifting, a lot of bending and stooping, and transferring patients that were not able to assist since they were primarily bed ridden. She worked with people who were totally unresponsive, often intubated, and she was required to do a lot of lifting, bending, and stooping.

She explained that she was a typically active young woman prior to her injury. She did not recall prior medical treatment from Dr. Gray in March of 2002, for low back pain in the right lumbosacral area which he suspected sacroiliac joint dysfunction, the same as her current condition. She was also diagnosed with scoliosis as a child. She explained that her current pain starts in her low back and radiates down into her right hip and leg. She explained that her work at the Heart Hospital was different than UAMS because UAMS did not stand patients up or squat to start IV's. She agreed that both jobs were very physically demanding.

She testified that she left UAMS because they required her to work overtime and uncertain hours, often on the weekends. She was working 36 hours a week at the Heart Hospital compared with the fifty (50) to sixty (60) hours worked at UAMS. She admitted that Dr. Tillman was treating her for sacroiliac pathology. She explained that her group health initially paid for her therapy but denied further

therapy in December and had not paid for about \$4,000.00 worth of therapy visits. She began interviewing for a job in the early part of February.

She admitted that she had been to OrthoArkansas for treatment for her hip area in 2002, but could not recall any specifics concerning the treatment or reason for the treatment. She recalled that her doctor told her that she could not carry a backpack or wear heels in 2002. She did not recall any long term or follow-up treatment after the doctor's visit in 2002. She denied having any muscle spasms prior to September 25, 2007.

She testified that she had remarkable improvement after her second steroid injection in the irritated nerves in her low back which calmed the nerve pain in her leg. She continues to have the muscle spasms. She continued physical therapy until March 18, 2008, at the recommendation of the therapist. She continues to do exercises at home to build strength and plans to go to a gym when she can handle heavier weights. She explained that her doctors do not believe she is a candidate for surgery and that it was unlikely that a pelvis fusion would help.

She testified that she had told Dr. Rosenzweig and Dr. Gray about how the injury occurred, prior employment history and physical activity required of her even though there was nothing noted in Dr. Rosenzweig's report.

Melissa French testified for the respondents. She has worked for the Heart Hospital for eight years. She helped guide the claimant through her orientation, known as a "Preceptorship". She estimated that she was her Preceptor for approximately three-fourths of the time the claimant was employed there. She

testified that during the orientation, they were assigned to the same patients and worked in tandem and were available to help out with activities that were physically demanding. In the last three to four weeks, it was more difficult to get assistance. French testified that Hurn complained to her of low back and hip pain and took Ibuprofen. She explained that she knew she was hurting because she couldn't get her to smile. Hurn told her that she had taken some Tae Kwon Do when she was younger and had some previous hip difficulty. She recalled that the claimant began complaining of pain in the last few days that they worked together.

On cross-examination, French testified that she was not aware that Hurn had any problems. She described Hurn as a good hard worker. She agreed that Hurn had accurately described the physical activity required on the job. She was not aware of any outside activities that would have injured Hurn's back.

Medical records offered by respondents reflect that the claimant sought treatment from Dr. Gray with complaints of low back pain primarily in the right lumbosacral area on March 29, 2002. She did not recall a specific injury but noted that she had been carrying a backpack and had started running to get in better shape. He notes that she reported that the hip in that area has popped for years. He notes that x-rays showed not evidence of disc disease. He further observes that she may have some SI joint dysfunction and notes complaints of radicularopathy. He prescribed Vioxx and ordered her to undergo physical therapy.

On October 1, 2007, the claimant sought treatment at the emergency room at the Heart Hospital with complaints of lower back pain radiating down her right buttock and leg. She reported that the pain had started one week earlier.

On October 2, 2007, the claimant sought treatment with Dr. James Bryan, an orthopedic specialist, complaining of acute, right-sided low back pain. Dr. Bryan notes that the claimant had been seen at the emergency room on the previous day. His examination did not reveal any evidence of spasms. He diagnosed her with "Acute low back pain with right lumbar radiculitis suggesting an L5-S1 herniated disk. He order physical therapy and prescribed Tizandine and Vicoprofen. On October 2, 2007, Hurn was seen by a physical therapist, Robert Tillman. He noted

objective data indicating a posteriorly rotated right sacroiliac joint and laxity in the bilateral hips as well as laxity in the dorsal sacroiliac ligaments. She will need a treatment regimen including mobilization of the sacroiliac joint on the right to a more anterior position followed by stabilization exercises for the normalization of lumbopelvic functioning with specific function coordination of the gluteals and the sacral originating external rotators on the right side including the periformis . . . We will utilize a sacroiliac belt to help maintain a corrected posture in the pelvic girdle.

On October 4, 2007, physical therapy notes reflect that the claimant was able to tolerate a small range of motion and that the inflammation was beginning to calm down. On October 8, 2007, clinic notes reflect that the claimant was walking more symmetrical but did not tolerate hip extensions. On October 9, 2007, she returned for follow-up with Dr. Bryan. He noted she was wearing the SI belt, but was still in pain and discomfort. He further notes that her mother informed him that she had scoliosis as a child that was followed with radiographs but required no treatment.

X-rays revealed “a right concave scoliosis of a low degree of curvature. The sacroiliac joints appear intact.” She was diagnosed with an acute lumbar sprain and spasm, right lumbar radiculitis, and sacroiliac dysfunction. Dr. Bryan ordered an MRI and continued his prior orders for physical therapy and prescription medications.

On October 10, 2007, Hurn reported to the therapist that she was able to walk normal for a while and then got sore. He noted that she was able to raise higher and performed toe hip extensions well. On October 15, 2007, Hurn underwent an MRI of the lumbar spine without contrast. The MRI revealed:

Shallow levoconvex scoliosis with hyperdynamic curvature of the lumbosacral spine, but without high-grade disc protrusion, critical canal stenosis, neural effacement or markedly asymmetric rightward pathology to correlate with the patient’s current right lower extremity clinical syndrome.

On October 18, 2007, Hurn returned for a follow-up examination with Dr. Bryan after continued therapy. She reported that her symptoms are “approximately 50% better”. She can walk better but cannot sit or drive. He notes that Hurn advised him that her work injury claim was denied for lack of specific injury but that she recalled responding to a cardiac emergency and experiencing the acute onset of pain. He diagnosed her with lumbar pain and sacroiliac dysfunction. His treatment plan included a referral for steroid injections. He noted duty status limitations on a return-to-work form. On October 23, 2007, the physical therapist notes reflect that Hurn showed a small amount of rotation and ambulates much better.

On October 24, 2007, the claimant was seen by Dr. Kenneth Rosenzweig. She underwent a fluoroscopic assisted, right sacroiliac joint injection. On November 2, 2007, the claimant returned for a follow-up examination with Dr. Rosenzweig, who noted that she did not get a favorable response with the steroid injection. He diagnosed her with sacroiliac joint dysfunction on the right. He advised her to continue with physical therapy. On November 11, 2007, clinic notes reflect that Hurn reported to the therapist that she was in pain due to walking her 80 pound dog. On November 16, 2007, Hurn reported to the therapist that she was having pain down her right leg and does not know what caused the discomfort. On November 30, 2007, clinic notes reflect that Hurn reported to the therapist that she was feeling much better since she had her second steroid injection the past Wednesday.

On January 3, 2008, Dr. Gray writes that he has treated Hurn for several years. He states that she "has developed significant disability with sacral iliac dysfunction which has been rather chronic in nature." He notes that she had been undergoing physical therapy, but continues to have significant pain that is causing her marked limitation in her ability to perform the tasks of her job. "It is very likely that her job did in fact contribute to the pain that she is having." He further opines that "At this point, I consider her to be functionally disabled from her normal duties as a nurse."

On February 1, 2008, Dr. Gray issued a document entitled "Physician's Statement" stating:

Within a reasonable degree of medical certainty, the Major Cause (51% or more) of Jennifer Hurn's low back injury is her work-related accident.

Yes X

Within a reasonable degree of medical certainty, the 'objective and measurable findings' related to the above referenced injury is/are:
(Blank)

On February 5, 2008, Dr. Rosenzweig issued a document entitled "Physician's Statement" stating:

Within a reasonable degree of medical certainty, the Major Cause (51% or more) of Jennifer Hurn's low back injury is her work-related accident.

Yes X

Within a reasonable degree of medical certainty, the 'objective and measurable findings' related to the above referenced injury is/are:
(Blank)

On February 7, 2008, Dr. Bryan signed a return to work slip stating that the claimant was able to return to work with restrictions consistent with light duty work. She was restricted with a 20 pound limitation on lifting and advised to avoid stooping, bending, pushing, and pulling.

DISCUSSION

_____The claimant contends she sustained a compensable back injury on September 25, 2007. The claimant contends that respondents have controverted this claim in its entirety. The claimant contends she is entitled to medical care and treatment for her work related injury and payment of medical bills, mileage and out-of-pocket expenses. The claimant contends that she is entitled to temporary total disability benefits from the date of October 1, 2007 until March 19, 2008. The

claimant specifically reserves the issue of permanency at this time. The claimant contends that if she prevails on the medical issue, claimant's attorney is entitled to a fee on this denial, should any indemnity benefits follow.

The respondents contend that the claimant cannot prove a compensable back injury arising out of and in the course and scope of her employment on or about September 25, 2007. There was no specific incident and the claimant cannot prove major cause. Likewise, there are no objective medical findings of an injury traceable to the work environment. Furthermore, to the extent the claimant has any objective back problems, they are traceable to pre-existing abnormalities and not to the work environment. Moreover, the major cause of any back problems would not be the work environment or in any way connected to the claimant's job duties because she had only worked for respondent employer for approximately ten weeks. Alternatively, respondents contend that in the event the claimant is somehow able to establish a compensable injury, the respondents plead an offset for any group health payments made to or on behalf of the claimant pursuant to Ark. Code Ann. § 11-9-411.

I. Compensability

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

- (i) (a)n accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence;
- (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused

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.

Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. Ark. Code Ann. § 11-9-102(4)(D)(Repl. 2002); Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999) . 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.

In the instant case, the claimant is alleging that she experienced pain in her lower back after squatting to give a patient an IV on September 25, 2007. The credible evidence demonstrates that Hurn had prior medical problems with the sacroiliac joint, but that those problems occurred in 2002 and did not interfere with her ability to work until September 25, 2007.

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.* 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). 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 Hamblton 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.

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).

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).

Claimant was employed by the Heart Hospital for approximately ten weeks before the onset of her pain. She testified that her job duties at the Heart Hospital differed from those at UAMS in that she was required to squat and to stand patients up after open heart surgery. On October 1, 2007, claimant told ER personnel that her pain began one week prior but that she could not identify a specific activity which caused her symptoms. On October 2, 2007, she told Dr. Bryan that she recalls no specific mechanism of injury. However on October 2, she told the physical therapist that she had severe lower back and right sacroiliac pain "which started while trying to lift a patient". On October 18, 2007, Dr. Bryan notes that the claimant's work injury claim was denied for lack of specific injury, but she recalls responding to a cardiac emergency and experiencing the acute onset of pain at that time. At the hearing, the claimant testified that she didn't know a specific incident but recalled hurting after squatting down to start an IV on a patient and having to stand up some open heart patients and get them over and moving out of bed. She

tried working for a few days and sought medical treatment when she could no longer work due to the pain. The testimony offered by Hurn's co-worker that the claimant was a good, hard worker and first complained of pain and difficulty working a few days before she left work to seek medical treatment is consistent with the claimant's testimony. Based on the preponderance of the evidence, I find that the claimant is credible and corroborated by the testimony of her co-worker. I find that the claimant has proven by a preponderance of the evidence that her low back and sacroiliac injury was caused by a specific incident and is identifiable by time and place of occurrence. In light of this finding, I do not find it necessary to address whether the claimant met her burden of proof under a gradual onset analysis.

II. Causation and Objective Findings

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). In the present case, I find that the claimant does establish a compensable 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 an injury to her low back and sacroiliac region as a result of a work-related incident. The medical records in the case reveal that the physical therapist noted objective data showing a posteriorly rotated right sacroiliac joint. The claimant was prescribed muscle relaxers by her

treating physicians for muscle spasms and continues to take the prescription medication if she exceeds her limitations. The medical records further reflect that claimant's condition improved significantly after conservative treatment with prescription medications, epidural steroid injections, and physical therapy with strengthening exercises.

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. Respondents question whether claimant has established a causal connection between the work-related incident and the need for medical treatment. In a workers' compensation case, a claimant must prove a causal connection between the work-related accident and the disabling injury. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). The determination of whether a causal connection exists is a question of fact for the Commission to determine. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998).

In the instant case, Dr. Gray and Dr. Rosenzweig have opined that within a reasonable degree of medical certainty, the Major Cause (51% or more) of Jennifer Hurn's low back injury is her work-related accident. This is not a case where the

opinion of Dr. Gray and Rosenzweig are based solely on the subjective complaints of the claimant. Rather Dr. Gray and Rosenzweig rely on the physical examinations, x-rays and the MRI report which reveal objective findings.

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 the instant case, Dr. Gray and Rosenzweig render their professional opinions in separate statements in which each states, within a reasonable degree of medical certainty, that the claimant’s major cause for treatment for her back is work related. Moreover, Dr. Gray, the claimant’s family physician, notes that after several years of treatment of the claimant, that “It is very likely that her job did in fact contribute to the pain that she is having.”

In the instant case, the evidence demonstrates that although the claimant had prior back problems, she was able to perform her job duties without complaints or medical treatment until September of 2007. Based on the clear weight of the

medical evidence in this case from claimant's treating physicians, I find that the medical treatment and physical therapy provided by Dr. Gray, Bryan, and Rosenzweig, beginning October 1, 2007, through February of 2008, was reasonable and necessary and related to the compensable injury.

III. Temporary Total Disability and Temporary Partial Disability

Claimant is contending that she is entitled to temporary total disability benefits from the date of October 1, 2007 to March 19, 2007. Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

The claimant is entitled to temporary total benefits if he can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. Ark. State Hwy. 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). Temporary total disability compensation cannot be awarded after the claimant's healing period has ended. Trimble, supra; Milligan v. West Tree Serv., 57 Ark. App. 14, 946 S.W.2d 697 (1997).

In the instant case, I find that the medical evidence demonstrates that claimant reached the end of her healing period on February 7, 2008. On February 7, 2008, Dr. Bryan signed a return to work slip stating that the claimant was able to

return to work with restrictions consistent with light duty work. She was restricted with a 20 pound limitation on lifting and advised to avoid stooping, bending, pushing, and pulling. Based on the preponderance of the evidence, I find that the claimant is entitled to temporary total disability from October 1, 2007 to February 7, 2008. I further find that respondents are entitled to an offset pursuant to Ark. Code Ann. § 11-9-411 for all medical treatment paid by the claimant's group health insurance and any indemnity benefits owed for all periods of time that the claimant received short-term disability benefits.

IV. Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of compensability of an injury, medical treatment, and temporary total disability benefits. 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 September 25, 2007.

3. The claimant earned an average weekly wage which would be sufficient to entitle the claimant to the maximum rate in effect , i.e. \$504.00 for a temporary total disability rate and a permanent partial disability rate of \$378.00 per week.
4. Claimant has proven by a preponderance of the evidence that her low back injury is compensable and that her need for medical treatment from Dr. Gray, Dr. Bryan, and Dr. Rosenzweig, including the epidural injections and physical therapy, was reasonable and necessary and causally related to her compensable work-related injury.
5. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from October 1, 2007 until February 7, 2008. Pursuant to Ark. Code Ann. § 11-9-411, respondents are entitled to a credit against any temporary total disability benefits owed with respect to any week for which the claimant received short-term disability benefits.
6. Respondents have controverted the compensability of claimant's low back injury, claimant's entitlement to medical benefits, and temporary total disability benefits.
7. 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
