

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D917561

STEVEN TREAT,  
EMPLOYEE

CLAIMANT

MADISON COUNTY,  
EMPLOYER

RESPONDENT

AAC RISK MANAGEMENT SERVICES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 29, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE MARK MARTIN, Attorney at  
Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE J. MATTHEW MAULDIN,  
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and  
Adopted.

OPINION AND ORDER

This case comes on for review by the Full  
Commission on appeal by respondents from an opinion filed  
herein by an Administrative Law Judge on November 15, 2002.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

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

2. On April 19, 1989, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his back on April 19, 1989.
4. The claimant is entitled to a weekly compensation rate of \$203.85 for temporary total disability and \$154.00 for permanent partial disability.
5. The respondents accepted and paid a 10 percent permanent partial impairment rating.
6. The back surgery of May 10, 2002, has been accepted by the respondents and they have accepted the follow up therefore (sic).
7. The claimant has proven by a preponderance of the evidence that his bowel surgery and subsequent complications thereto are a compensable consequence to his compensable injury.
8. The claimant has failed to prove his entitlement to temporary partial disability.
9. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from May 10, 2002, to a date to be determined. The claimant reentered his healing period at the time of his back surgery on May 10, 2002, and has not been released by Dr. Knox or his other physicians as a result of his many surgeries subsequent to

that date. Dr. Knox has also indicated that his period of disability would be rather elongated.

10. The respondents have controverted this claimant's entitlement to benefits for his colon surgery as well as temporary total disability subsequent to May 10, 2002.
11. The claimant's attorney is entitled to the maximum statutory attorney's fee.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the decision of the Administrative Law Judge is correct and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 15, 2002 opinion of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002). For prevailing on

this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner Yates dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant has proven by a preponderance of the evidence that his bowel surgery and subsequent complications thereto were a compensable consequence of his compensable injury and awarding him temporary total disability benefits from May 10, 2002, to a date yet to be determined. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant was employed by the respondent-employer in law enforcement. The claimant began working for the Carroll County Sheriff's Office in 1972, and was there

for 3 years before moving to the Madison County Sheriff's office, where he worked for 22 years. The claimant left Madison County and worked for Washington County for approximately 1½ years. It was while working for the Carroll County Sheriff's Department that the claimant sustained an admittedly compensable injury to his back on April 19, 1989. The claimant has had a diskectomy at L3-L4 and the surgery was not successful. The claimant still experienced pain in his low back and groin area, had muscle spasms, and walked crooked. The claimant has continued to need medical treatment, although he was assessed with a permanent impairment rating in January of 1990. His medical treatment from 1990 to 1997 dealt mostly with pain control. The claimant received steroid injections, had nerves burned in two, nerves frozen, facet injections, oral medication, physical therapy, a TENS unit, and also did home exercises. The claimant testified that the oral medications, specifically the narcotics, caused constipation, and he was also prescribed stool softeners and laxatives.

When the claimant began working for the Washington County Sheriff's Department as a bailiff in January, 1999, he was still experiencing severe pain. The condition got to the point where he could not function a full eight hours

without having to rest. The claimant explained that he pretty much had a sit-down job, but he would have to lie down during part of his shift. After the claimant became vested in his retirement after 28 years, he worked another 2 months and then took retirement.

After his retirement, the claimant and his wife began a check recovery business in February of 2001. The business entailed going around twice a week to pick up checks from different merchants if these checks were not paid. These checks would then be taken to the prosecuting attorney for processing. The claimant testified that his wife did all of the bookkeeping, letter writing, kept up with the affidavits, and did a notary business for the merchants, as well. The claimant stated that he worked on an average of four to five hours per week in this business.

On the morning of January 15, 2002, the claimant woke up and was unable to get out of bed. The claimant testified that his pain was excruciating in his back and groin area, and he had numbness in his foot. The claimant stated that his symptoms were so severe that he was pretty much housebound. Ultimately, on May 10, 2002, Dr. Knox performed surgery. On May 14, 2002, the claimant began to experience pain in his lower left side and had fever. The

claimant had to undergo emergency surgery on May 15, 2002, to repair a perforated sigmoid colon with diverticulitis. Following this abdominal surgery, the claimant had a surgical sponge left inside him which required another surgery on June 17, 2002, to remove the sponge. Following this procedure, four abscesses were discovered in the claimant's abdomen and were drained by Dr. Dorn Ben-Avi. The claimant had a colostomy following the perforated sigmoid colon with diverticulitis repair, and this colostomy was closed on August 5, 2002.

The claimant contended that the colon surgery was a compensable consequence of his back injury. The respondents contend that the surgery is not a compensable consequence of the claimant's fusion surgery performed on May 10, 2002. Based upon my de novo review of the record, I agree with the respondents.

When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary total disability benefits. Ark. Code Ann. § 11-9-102(5)(F)(i)(Repl. 2002). Benefits are not payable for a condition which results from a non-work-related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment Ark.

Code Ann. § 11-9-102(5)(F)(iii)(Repl. 2002). "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). Whether there is a causal connection between an injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. Oak Grove Lumber Co. V. Highfill, 62 Ark. App. 42 968 S.W.2d 637 (1998). Where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. Crudup v. Regal Ware, Inc., 341, Ark. 804, 20 S.W.3d 900 (2000); KII Construction Company v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). Except in the most obvious cases, the existence of a causal relationship must be established by expert medical evidence. Cotton v. Ball & Prier, Full Workers' Compensation Commission, September 23, 1997 (E512437).

In my opinion, a review of the evidence indicates that there is absolutely no causal connection between the claimant's surgery for his compensable back injury and his

colon problems which resulted in surgery on May 15, 2002. In support of his contention, the claimant relies upon a letter from Dr. C. R. Magness dated May 30, 2002, wherein Dr. Magness stated that the claimant's bowel condition "occurred five days following his laminectomy and was exacerbated by the conditions of the ileus, perioperative pain relief, and instability within the hospital required by [the claimant's] operative procedure on the 10<sup>th</sup> of May. There is no question that this is time sequence related." In my opinion, this is insufficient evidence to establish a causal connection. Dr. Magness appears to rely heavily on the fact that the bowel condition occurred just five days after the claimant's back surgery. However, this is merely a coincidence and cannot be equated with causation. Medical evidence is not ordinarily required to prove causation, i.e., a connection between an injury and the claimant's employment WalMart v. Van Wagner, 337 Ark. 443, 990 S.W.2d 522 (1999), but if an unnecessary medical opinion is offered on that issue, the opinion must be stated within a reasonable degree of medical certainty. Medical opinions must do more than state that causal relationships between work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never

required that a doctor be absolute in an opinion or that the magic words "within a reasonable degree of medical certainty" even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. See, Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001).

The record contains a letter from Dr. Dorn Ben-Avi, the physician who drained the claimant's abscesses. Dr. Ben-Avi performed a CT of the claimant's abdomen and pelvis on May 15, 2002. Dr. Ben-Avi interpreted the CT scan as follows:

This patient recently had lumbar spine fusion; but this was reportedly a week ago. I do not appreciate any evidence that the surgery extended to the vicinity of the peritoneal cavity or left lower quadrant. There is abundant normal appearing retroperitoneal fat separating the surgical site from the pericolic inflammatory changes. There is no harvesting site for fusion bone apparent.

Dr. Ben-Avi opined that he, "doubt[ed] relationship to the recent lumbar surgery."

In addition, in a report following his consultation on May 16, 2002, Dr. Stephen Hennigan, after discussing the claimant's medical history, stated that it was, "difficult to put this all together in a causative fashion."

In my opinion, Dr. Ben-Avi's opinion as to causation should be given more weight than the opinion of Dr. Magness, who apparently left a sponge in the claimant at the time of his surgery. The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Accordingly, I find that the claimant's colon problems are not a compensable consequence of his May 10, 2002, lumbar surgery.

The claimant is also requesting temporary total disability benefits for the period May 10, 2002, to a date yet to be determined. The Administrative Law Judge ordered the respondents to pay benefits during this time period. In order to be eligible for temporary total disability benefits, the claimant must show that he is both within a healing period and totally disabled from any and all gainful employment. In my opinion, the claimant has failed to satisfy his burden.

The claimant, in my opinion, is not totally disabled from any and all gainful employment. The claimant and his wife opened a check-recovery business in February of 2001. The claimant testified that he only worked five hours a week. However, paperwork that the claimant filed with the Social Security Administration in September of 2001, indicated that he worked up to 15 hours per week. The claimant conceded such at the hearing. The evidence indicates that the claimant continues to operate the business with his wife. The only evidence that we have to the contrary is the claimant's own self-serving testimony that he has not been able to assist his wife in managing the business since his back surgery on May 10, 2002. In workers' compensation cases, the burden rests upon the

claimant to establish his claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47 Ark. App. 181, 888 S.W.2d 314 (1994).

Therefore, when I consider all the evidence, I cannot find that the claimant proved by a preponderance of the evidence that there was a causal connection between the claimant's admittedly compensable injury and resultant back surgery in May of 2002, to the surgery on May 15, 2002, wherein the claimant had to have surgery performed on his bowel and the subsequent complications thereto. Accordingly, I would reverse the decision of the Administrative Law Judge. Therefore, I must respectfully dissent from the majority opinion.

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JOE E. YATES, Commissioner