

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E512363

REGINA PREACHER, EMPLOYEE

CLAIMANT

CAVE CITY NURSING HOME, INC.,
A SELF INSURED, EMPLOYER

RESPONDENT

OPINION FILED JANUARY 15, 2004

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

Claimant represented by HONORABLE RICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals and the respondent cross-appeals a decision of the Administrative Law Judge filed on April 30, 2003, finding that: (1) the additional medical treatment which the claimant received for her back condition was reasonable and necessary and related to the compensable injury; (2) the claimant remained in her healing period and was unable to earn wages from August 11, through November 3, 1995, and from December 30, 1998, through April 27, 1999; (3) the claimant failed to prove that she was permanently and totally disabled; (4) the claimant was entitled to a 10%

permanent impairment rating; (5) the claimant was entitled to a 20% wage-loss disability; and, (6) the claimant waived vocational rehabilitation by not presenting a vocational plan at the hearing. Based upon our de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. Accordingly, we reverse the decision of the Administrative Law Judge.

We would note from the outset that compensability was identified as a contended issue by both parties and was a threshold issue which needed to be decided before any benefits could be awarded. During the claimant attorney's direct examination of the claimant, he incorrectly stated that the respondents had "stipulated that you did have an injury on August the 9th." During his introductory remarks at the outset of the hearing, the claimant's attorney acknowledged that the respondents controverted all benefits, that have not been paid to date, and that only two stipulations were offered by the pre-hearing order: (1) that an employer-employee relationship existed on August 10, 1995, and (2) that the compensation rate was \$113.00. During the respondents' attorney's opening remarks to the

Administrative Law Judge, he clarified that the respondents did not agree that the claimant was injured on either August 9 or 10, 1995. The burden of proving compensability always falls upon the claimant. In light of the Administrative Law Judge's lack of a finding with respect to the compensability issue, she nonetheless made findings that the claimant is entitled to benefits. After conducting a de novo review of the record, the Commission makes a finding on this issue. Our review of the record indicates that the claimant cannot prove by a preponderance of the evidence that she sustained a compensable injury. However, even if we were to find that she sustained a compensable injury, a finding which we do not make, we also find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment, temporary total disability benefits, a 10% permanent impairment rating, and a 20% loss in wage earning.

The 42-year-old claimant was a homemaker for most of her married life, up until the 10-month period she spent working as a Certified Nursing Assistant (CNA) for the respondent-employer. She completed the ninth grade in school, and worked in fast food restaurants before she got

married. The claimant testified that she never had any problems with her back and was healthy prior to the alleged accident. She testified that she used to enjoy working around her yard, shopping, swimming, and going to church.

The claimant stated that on August 9, 1995, she sustained an injury when she was moving a patient from a wheelchair to a bed. She testified that she felt that she had pulled a muscle at the time, but the next morning she felt the worst pain she ever had and was only able to move herself from her bed to her couch. She was taken by ambulance to the emergency room and later sought treatment from Dr. Davidson, the respondent-employer's physician. She was later referred to Dr. Rutherford who released her to work with a 10-pound lifting restriction. The claimant testified that she returned to work, and that first morning after she had been there two or three hours, she attempted to lift a patient. She was unable to perform this task, and was taken by ambulance to the emergency room.

The claimant testified that, at the time of the hearing, she was currently on medication that included a duragesic patch. The patch caused her to shake and sweat, and she takes two or three muscle relaxants each day. She

testified that she spends 19 or 20 hours out of every 24 hours laying either on the couch or in bed. The claimant stated that the surgery performed by Dr. Peek in November 1999 did improve her condition, and that she has been able to do more since the surgery. She has not had to go to the hospital since that time for an extended period. The claimant testified that she tried to work for a security company at one point subsequent to her injury, and that she attempted to work 40 hours a week for approximately 6 months. She got the job through Arkansas Rehabilitation. The employer tried her in several positions, but she could not perform any of them. The claimant testified she has not had a pain-free day since August 9, 1995. She could sit in a chair approximately 20 minutes before she had to move, and she could not stand up very long without leaning against a wall. She also stated that she could walk approximately two blocks. She testified that the pain medication causes her to have problems listening to people, reading, and remembering things. At the time of the hearing, the claimant was still being treated by her family physician, Dr. Moody, and a pain specialist, Dr. Ismail.

On cross-examination, the claimant testified regarding the work that she did for the security company, and stated that she had gone on her own to Arkansas Rehabilitation to see if she could go back to work. She testified that she drove to the Arkansas Rehabilitation business herself, that they gave her tests to determine what type of work she was capable of doing, and that she participated in a group interview with Burns Security. The job she got was at the ConAgra plant in Batesville, which was 15 to 20 miles from her home, and she would drive herself to work. She testified that one position she tried involved making 4 or 5 "rounds" around the facility each shift, checking locks, and making sure gates were shut. Each round took her 20 minutes to an hour to complete. Her shift was from midnight to 8 a.m., but her boss would come in 2 hours early every day to relieve her. She also attempted to work in a position at the truck gate, and tried to work the scales as well, weighing the trucks that came in and out.

During cross-examination, the claimant clarified that she would spend 19 to 20 hours a day on the sofa or in

the bed on days that she did not wear her pain patch. The claimant testified as follows:

Q. What kind of vocational rehabilitation do you want if you don't get permanent and total disability?

A. I don't, I don't know.

Q. In other words, if you don't get permanent and total disability, you're not satisfied to stay at home and do nothing for the rest of your life; am I correct?

A. No, I'm not going to be satisfied to stay home for the rest of my life and do nothing. I mean, who would be.

Gina Preacher, the claimant's daughter, was 13 years old at the time of her mother's alleged injury, and was 20 years old at the time of the hearing. She testified that prior to the injury, her mother was outgoing and fun and would play actively with her, but that since the accident her mother "can't do nothing." Ms. Preacher stated that she has an eight-month-old baby, and the claimant cannot hold or play with the baby. Ms. Preacher testified that she does housework and yard work for her parents, and that her mother primarily spends her days laying on the couch. She indicated that the claimant cannot stand and wash

dishes, and does not ever go shopping or fix food. Prior to the accident, the claimant used to do all the cooking.

Gloria Shiveley, the claimant's mother-in-law, testified that she moved into the claimant's home right before the alleged accident occurred. At that time Ms. Shiveley was working 7 days a week, 12 hours a day, but retired 5 years ago, and began working 30 hours a week at Wal-Mart. She testified the claimant was a very active person and a good housekeeper prior to the alleged injury, but that since the accident, she does all of the shopping. She testified that she and the claimant's daughter and husband all pitch in and do the cooking and cleaning. They each work different shifts outside of the home so that there is always someone with the claimant.

The claimant's husband, David Preacher, testified that he and the claimant had been married 22 years. He testified that his wife was a great housekeeper and did 99% of the shopping, housework, laundry and cooking prior to her injury, but that she did 0% after she got hurt.

The emergency room report from August 11, 1995, states that the claimant presented early in the morning via ambulance with a complaint of severe pain in her mid and

upper low back following lifting a patient the day before at work. The physical examination revealed muscle spasms palpable from T4 down through L2 or L3. The claimant was diagnosed with acute thoracic strain with intractable pain, and was seen by Dr. Davidson for physical therapy that same day. Dr. Davidson assessed the claimant with mid to low back pain secondary to strain and associated spasm, and admitted her to the hospital for pain control and observation. X-ray's showed straightening of the lordotic curve. The claimant requested to be discharged from the hospital that evening.

On August 14, 1995, the claimant returned to Dr. Davidson for a follow-up, complaining of pain. The claimant was scheduled for an MRI which revealed the following:

1. Disc dessication at L11-12, La-2, L4-5 and L5-S1.
2. Marked narrowing of the L5-S1 disc space with minimal annular bulge protruding about 3mm into the spinal canal.
3. Subligamentous protrusion of disc material at L4-5 with caudal migration elevation of the posterior spinal ligament . . .

On August 30, 1995, the claimant was evaluated by Dr. Richard S. Kyle, a neurosurgeon, who opined that the claimant suffered from degenerative disc disease and a herniated disk at L4-5 without neural compromise. He recommended steroidal anti-inflammatories and narcotics on an as-needed basis. Dr. Kyle also referred the claimant to physical therapy with instructions to return in four weeks.

The claimant sought treatment at the emergency room on September 4, 1995, with pain in her low back which had increased following physical therapy. The claimant also complained of right-sided abdominal pain, fever, and generally not feeling well. She was admitted to the hospital and was discharged on September 6, 1995, with a final diagnosis of lower abdominal pain secondary to probable ruptured ovarian cyst and back pain secondary to previous lumbosacral strain.

The claimant returned to Dr. Davidson on October 3, 1995. He stated that following her release by Dr. Kyle, the claimant underwent an epidural steroid injection by Dr. Boysenberry. The claimant indicated that following this treatment, she began to have increased pain and discomfort and went to the emergency room. However,

Dr. Davidson's record stated, "[The claimant] states that she does not feel that she can go ahead and work. I have discussed with her that she needed to increase her activity in light of the fact that Dr. Kyle felt there was no danger of worsening injury to her back. I did discuss with her what she was doing at home and she did say she was doing some sweeping and mopping at home. I told her if she was able to do that, then she should be able to at least participate in light-duty at the nursing home." Dr. Davidson returned the claimant to work at light-duty the following day.

The report from a post-myelogram CT of the claimant's lower lumbar spine obtained on October 9, 1995, stated, "Degenerative disc disease at L5-S1. No HNP at any level identified."

A return-to-work certificate, signed by Dr. Kyle on October 17, 1995, stated that the claimant was scheduled for an additional week of therapy, and was to return to regular duty on October 23, 1995. Dr. Davidson's clinic note from October 20, 1995, states that he would not continue the claimant on narcotic pain medication and recommended an evaluation at The Pain Clinic by Dr. Reginald Rutherford.

Dr. Rutherford saw the claimant on October 27, 1995. He released the claimant to return to work on October 30, in a light-duty capacity, with a 10-pound lifting restriction. Dr. Rutherford's clinic note dated November 2, 1995, stated:

The report of [the claimant's] prior lumbar myelogram and post-myelographic CT has now been received, this proving devoid of substantive abnormality. This correlates with her electrodiagnostic study performed earlier today by Dr. Miles, which proved normal, there being no evidence of lumbar radiculopathy. [The claimant's] MRI study of the thoracic spine has likewise proved unremarkable other than demonstrating minimal degenerative change at two levels, which is considered without clinical consequence. . . . [The claimant] was given an unrestricted release to return to work, effective November 3, 1995.

On November 4, 1995, the claimant again sought treatment from the emergency room. The report stated as follows:

This is a 34 year old who was working today, had gradual onset of back pain which has become severe. She called an ambulance and insisted on pain medication, was given 5mg Nubain, before she was transported. She has been followed for chronic back pain and apparently has been released to return to normal function by her neurosurgeon,

who felt like there was no significant disease present.

The claimant sought treatment from Dr. Moody beginning November 30, 1995. She saw Dr. Moody seven times after that initial visit, through July 3, 1996, for back pain related complaints. During that period, she reported to the emergency room one time for back pain on January 23, 1996.

The claimant was referred to Dr. Scott Schlesinger, who evaluated her on June 17, 1996. Dr. Schlesinger's exam notes from that date include that the claimant had full range of motion in her lumbar spine, and that there was no tenderness to palpation in her lumbar spine. He reviewed her MRI scan and noted that it showed a central disc herniation without evidence of focal root compression. Dr. Schlesinger treated the claimant with a Medrol Dose Pak and set her up for an epidural steroid injection. On June 18, 1996, the day after the epidural steroid injection, the claimant reported to the emergency room and was admitted to the hospital. The note from the attending physician stated that a physical examination revealed markedly decreased lumbar spine range of motion

with tenderness of the paravertebral muscles. The claimant was discharged from the hospital on June 20, 1996.

The claimant underwent a second MRI at the direction of Dr. Schlesinger at the end of June 1996. Dr. Schlesinger wrote in a letter dated July 1, 1996, that the results showed some "abnormal edema in the L5 vertebral body extending to the right pedicle." He recommended a repeat lumbar MRI be performed in one month to assess any changes. Dr. Schlesinger sent the claimant for an additional epidural steroid injection on July 12, 1996, at a different clinic, to be performed by Dr. Jeffrey Ketcham. The claimant returned to Dr. Ketcham for another injection on July 22, 1996.

The claimant next saw Dr. Hudson at a neurological clinic in Memphis on August 20, 1997. Another MRI was obtained on August 25, 1997, that showed, "Multilevel degenerative changes most severe at 4-5 and 5-1 as described. No focal disc herniation is identified. No definitely identifiable significant canal or foraminal compromise is apparent either." A bone scan was performed on the same day which showed an area of increased uptake over

the L5 vertebral body, which represented degenerative disease, osteophyte formation or possibly a steoid osteoma.

The claimant was admitted to the hospital later in August 1997 following her presentation to the emergency room with pelvic pain. She gave a history of having a herniated disc. The final diagnosis from the discharge summary states:

1. Pelvic and low back pain with pelvic adhesions and chronic pelvic inflammatory disease - D&C report pending.
2. Apparently a known herniated nucleus pulposus causing back pain - being treated by Dr. [Moody].

An MRI was obtained on July 4, 1998. The impression from the MRI report stated:

1. Degenerative disc space changes at the T11-T12, L1-L2, L4-L5, and L5-S1 levels. Discogenic endplate changes are also demonstrated at the L4-L5 and L5-S1 levels.
2. Small central disc protrusion at the L4-L5 level. There is reduction in size of the protrusion when compared with the prior study.
3. Minimal annular disc bulge at the L1-L2 and L5-S1 levels.

Another MRI was obtained on October 26, 1998. The impression section stated:

Findings compatible with degenerative disc disease at three levels as previously described . . .

Degenerative changes at the vertebral body endplates of L4-5 and L5-S1 are noted. A rather prominent midline disc protrusion at L4-5 level is noted effacing the dural sac but not effacing the nerve roots. A smaller midline disc protrusion at L5-S1 is noted. It does not efface the dural sac or exiting nerve roots.

The claimant was evaluated by Dr. Richard Peek on November 23, 1998, and underwent a right L4-5 diskectomy and decompression of L5 root on December 30, 1998. The primary discharge diagnosis was herniated nucleus pulposus. The discharge summary from that date stated that the claimant noted an immediate relief of subjective pain in the leg and relief of the pressure. However, a note from Dr. Peek's clinic dated January 5, 1999, stated that the claimant began experiencing increased lower back pain following a trip in her truck that day.

The claimant went to the emergency room and was admitted to the hospital on January 11, 1999. She followed up with Dr. Peek on February 8, 1999, and his report from

that date stated that the claimant reported improved lower back pain, but was still having residual pain. A lumbar MRI obtained on March 9, 1999, showed scar formation at the site of the laminectomy. An epidural steroid injection was given on March 23, 1999. An April 20, 1999, report indicated that the injection provided no relief to the claimant.

An April 27, 1999, letter from Dr. Peek stated:

We did find a herniated disc at the time of surgery with a fragmented disc. This would be traumatic in nature based on the history she provided to me. She describes this injury happening as she is lifting a patient from her wheelchair to her bed. She describes receiving this injury that she does have as happening when she is lifting this very large person. She technically is still under treatment. However, partial permanent impairment for loss of motion segment integrity since she is having instability would be 20% according to the Fourth Edition AMA Guidelines.

A medical assessment of ability to do work-related activities signed by Dr. Moody in April or July 2001 (the date is not legible), indicates that the claimant was restricted to lifting or carrying 5 pounds, could stand or walk for 30 minutes during an 8-hour workday, could stand or walk without an eruption for 30 minutes, and could sit for a

total of 20 minutes during an 8-hour workday. He concluded the claimant was permanently and totally disabled.

In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that her claim is compensable, ie., that her injury was the result of an accident that arose in the course of his employment and that it grew out of, or resulted from the employment. Ringier American v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993); Carman v. Haworth, Inc., 74 Ark. App. 55, 455 S.W.3d 408 (2001). Further, the claimant must prove a causal connection between the work related accident and the later disabling injury. Bates v. Frost Logging Co., 38 Ark. App. 36, 827 S.W.2d 664 (1992). The claimant must show a causal relationship exists between her condition and her employment. Harris Cattle Co. V. Parker , 256 Ark. 166, 506 S.W.2d 118 (1974).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 2002). In determining whether a claimant has sustained her burden of

proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party.

Ark. Code Ann. § 11-9-704; Wade v. Mr. C. Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body . . . 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." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's

interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id. Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In our opinion, the claimant cannot prove by a preponderance of the evidence that she sustained a compensable injury. The claimant presented her own

testimony, as well as that of her husband, daughter and mother-in-law, to support her contention that she sustained a compensable injury. Their testimony merely described the claimant's behavior before and after the August 10, 1995 alleged injury. She presented no witnesses that actually witnessed the alleged accident.

Further, the medical evidence does not support the claimant's case. Dr. Peek, Dr. Kyle, Dr. Hudson, and Dr. Schlesinger all testified that the claimant had degenerative disc disease at the time of the alleged accident. No doctor has opined that the claimant's medical condition was related to an injury that arose out of the claimant's course of employment. Dr. Schlesinger offered his opinion on the claimant's injury in his deposition, to which he stated:

Q. Based on the objective evidence early on, the MRI's etcetera, would you be able to formulate an opinion as to whether or not her problems were related to an injury or it was related to a degenerative process -

A. There's no way to know based on just the objective findings, no.

Medical evidence is not ordinarily required to prove causation, Wal-Mart v. Van Wagner, 337 Ark. 443, 990 S.W.2d

522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the 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). However, 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). Therefore, after we consider all the evidence in the record, we cannot find that

the claimant proved by a preponderance of the evidence that she sustained a compensable injury.

If we were to find that the claimant sustained a compensable injury, a finding which we do not make, we find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002).

However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The claimant is requesting payment for back surgery that Dr. Richard Peek performed in November of 1999. Three different prominent physicians opined that the claimant was NOT a candidate for surgery. However, Dr. Peek performed surgery on the claimant. Dr. Kyle stated in his deposition:

Q. And what was that diagnosis?

A. That she had degenerative disc disease and a herniated disc at L4,5 without neurocompromise.

Q. Okay. Is there any significance to that fact when you say neurocompromise?

A. Well, from a neurosurgical standpoint, a herniated disc in itself is not an indication for surgery. It's the neurocompromise.

...

Q. Okay. The Administrative Law Judge, Doctor, who is going to decide this case is going to have to decide whether or not in his opinion Miss Preacher needed surgery as a result of anything that happened to her in 1995, and I want to make sure I understand your testimony that because there was no neurological compromise, she didn't need surgery from a neurosurgical standpoint. Am I correct?

A. At the time I saw her, that's correct.

...

Q. Okay. Have you seen anything during your treatment or after of Miss Preacher that would indicate from a neurological - - excuse me - - from a neurosurgeon's standpoint, particularly yours, that would indicate that she needed surgery?

A. No.

Dr. Joseph S. Hudson also opined that the claimant did not need surgery. In a report dated August 26, 1997, Dr. Hudson did not see anything that he felt would benefit the claimant. Dr. Hudson stated during his deposition as follows:

Q. Okay. And, Doctor, did you have recommendations for Ms. Preacher at that time as far as surgery is concerned?

A. I did not feel that there was anything there that surgery would be of benefit to her.

Q. And would you explain to the Administrative Law Judge who will read this deposition why you did not believe that surgery would be beneficial to her?

A. Well, I think just basically backs fall into two categories: Those that you can operate on and help and those that an operation won't help, and I look at the back as a machine with joints, ligaments, muscles. And there is lot of back pain and back pain problems that an operation just are not of any benefit to, and I felt like there was not any evidence there that an operation was going to be a benefit to her.

...

Q. Have you seen anything since you treated Ms. Preacher that would alter your opinion that you gave in 1997 that she did not need surgery?

A. No.

Dr. Schlesinger also stated that the claimant was not a surgical candidate: "I don't believe surgery was ever recommended to her by me. I see no recommendation for surgery in my review of her records." Further, Dr. Schlesinger opined:

Q. And during any of those treatments (sic) period or times that you saw her, did you ever formulate an opinion as to whether or not she was a surgical candidate or not?

A. I never felt she was a neurosurgical candidate.

Therefore, based upon our review of the evidence in the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reserve the decision of the Administrative Law Judge awarding additional medical treatment.

We also find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to

any permanent impairment. Injured workers bear the burden of proving by a preponderance of the evidence that they are entitled to an award for a permanent physical impairment. Moreover, it is the duty of this Commission to determine whether any permanent anatomical impairment resulted from the injury, and, if it is determined that such an impairment did occur, the Commission has a duty to determine the precise degree of anatomical loss of use. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994); Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). Physical impairments occur when an anatomical or physiological abnormality permanently limits the ability of the worker to effectively use part of the body or the body as a whole. Consequently, an injured worker must prove that the work-related injury resulted in a physical abnormality which limits the ability of the worker to effectively use part of the body or the body as a whole. Therefore, in considering such claims, the Commission must first determine whether the evidence shows the presence of an abnormality which could reasonably be expected to produce the permanent physical impairment alleged by the injured worker. Crow, supra.

Ark. Code Ann. § 11-9-704(c)(1) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Objective findings are defined as: "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. § 11-9-102(16) (Repl. 2002). The Commission cannot consider complaints of pain when determining physical or anatomical impairment. Id. Furthermore, "for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg raising tests or range-of-motion tests shall not be considered objective findings." With regard to the medical findings other than those which are specifically precluded from being considered objective, a medical finding may be considered objective only if it is not the product of a diagnostic procedure which does not come under the voluntary control of the patient. Dept. of Parks and Tourism v. Helms, 60 Ark. App. 110, 959 S.W.2d 749 (1998). The Commission has the authority and the duty to weigh medical evidence to determine its medical soundness, and we have the authority to accept or reject medical evidence. Mack v. Tyson Foods, Inc., 28 Ark. App. 299, 771 S.W.2d 794 (1989);

Wasson v. Losey, 11 Ark. App. 302, 669 S.W.2d 516 (1984);
Farmers Insurance Co. v. Buchheit, 21 Ark. App. 7, 727
S.W.2d 391 (1987). Likewise, the Commission is entitled to
examine the basis for a physician's opinion, like that of
any other expert, in deciding the weight to which that
opinion is entitled. However, as with any evidence, we can
not arbitrarily disregard the testimony of any witness. In
making determinations regarding the existence and extent of
anatomical loss of use, we are not limited solely to medical
evidence.

A review of Dr. Peek's report which assigns the
claimant the permanent physical impairment revealed that his
assessment was based entirely upon the claimant's subjective
statements. A medical opinion based solely upon claimant's
history and own subjective belief that a medical condition
is related to a compensable injury is not a substitute for
credible evidence. Brewer v. Paragould Housing Authority,
Full Commission Opinion filed Jan. 22, 1996 (E417617). The
Commission is not bound by a doctor's opinion which is based
largely on facts related to him by claimant where there is
no sufficient independent knowledge upon which to
corroborate claimant's claim. Roberts v. Leo-Levi Hospital,

8 Ark. App. 184, 649 S.W.2d 402 (1983). His report revealed in relevant part:

This would be traumatic in nature based on the history she provided to me. She describes this injury happening as she is lifting a patient from her wheelchair to her bed. She describes this injury that she does have as happening when she is lifting this very large person. (Emphasis mine.)

Further, the impairment rating was assigned to the claimant as a result of the surgery, not because of any alleged injury. The claimant has failed to prove that the surgery was reasonable and necessary medical treatment, therefore she is not entitled to any impairment rating assigned as a result of the surgery. Accordingly, the award of the 10% permanent impairment should be reversed.

The claimant is also requesting temporary total disability benefits and the Administrative Law Judge awarded benefits from August 11, 1995 through November 3, 1995, and from December 30, 1998, through April 27, 1999. The respondents contended that the claimant is not entitled to any temporary total disability benefits. We find that the claimant has failed to prove she is entitled to temporary total disability benefits for those periods.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying

condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. McWilliams, Parker, supra. In Pallazollo v. Nelms Chevrolet, 46 Ark. App. 130, 877 S.W.2d 938 (1994), the Court of Appeals stated that in order to be entitled to temporary total disability compensation for an unscheduled injury, a claimant must prove that he remained within his healing period and that he suffered a total incapacity to earn wages (citing Arkansas State Highway & Transp. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981)).

The medical evidence is simply lacking that any physician removed the claimant from work for any period of time prior to her surgery. Further, the claimant's surgery is not reasonable and necessary medical treatment. Therefore, she is not entitled to any temporary total disability benefits for the period she was recovering. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant is also requesting wage loss disability benefits. Because the claimant failed to prove she was entitled to any permanent impairment, she is not entitled to any wage loss disability benefits.

Therefore, after conducting a de novo review of the record, we reverse the decision of the Administrative Law Judge. This claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion, which reverses the decision of the Administrative Law Judge.

The majority concludes that the claimant failed to prove by a preponderance of the evidence that she experienced a compensable injury. Essentially, respondents' brief on appeal asserts that the claimant failed to prove that her objectively identified back problems are causally related to a work injury which occurred on August 10, 1995. However, my review of the evidence indicates otherwise.

Initially, the majority intimates that the claimant failed to prove that she even experienced a work-related accident on August 10, 1995. They state that the claimant called no witnesses who testified that they observed the alleged accident. It should first be noted that the respondents initially accepted this claim as compensable and paid benefits. Furthermore, I do not find the lack of any eyewitness testimony to call the claimant's claim into suspicion, since work accidents do occur without eyewitnesses present. Finally, it becomes even more unlikely

that the claimant fabricated the occurrence of the injury when it is observed that the claimant presented at the ER the next morning and related a history of injury virtually identical to that she related in her hearing testimony. *CX1, p. 2.*

Beyond intimating that the claimant failed to prove that a work-related accident even occurred on August 10, 1995, the majority concludes that the claimant in any event failed to prove that any of her objectively identified back problems were causally related to any August 10, 1995 work injury. My review of the evidence in the record leads me to disagree with this conclusion of the majority.

Dr. Richard Peek, who performed surgery on the claimant in 1998, testified that the MRI he observed showed an acute herniation which fit the history claimant related to him. *CX4, p. 16.* Dr. Scott Schlesinger, who first treated the claimant in June 1996, testified that there was no way to ascertain the etiology of the claimant's back problems by looking at the objective findings alone. *RX4, pp. 7-8.* However, Dr. Schlesinger also testified that, assuming the history the claimant related to him is complete and

accurate, it was his opinion that the claimant's back problems began with the August 10, 1995 work injury.

Id., pp. 13, 19.

For these reasons, I find that the claimant proved a compensable injury.

SHELBY W. TURNER, Commissioner