

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103351

PEGGY BAIN,
EMPLOYEE

CLAIMANT

HUGHES SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED SEPTEMBER 1, 2005

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and adopted.

OPINION AND ORDER

The respondents appeal from a decision of the Administrative Law Judge filed November 16, 2004. The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations of the parties are hereby accepted as fact.
3. The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a compensable injury to her right

knee on March 16, 2001.

4. The claimant has proven, by a preponderance of the credible evidence that she sustained a compensable back injury which arose out of and during the course of her employment and which was caused by a specific incident identifiable by time and place of occurrence on March 16, 2001, and which required medical services and resulted in disability as established by medical evidence, supported by objective findings.
5. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability for the period beginning March 17, 2001, and continuing through at least September 9, 2002, which was the latest medical submitted by either party regarding the claim(s).
6. Respondents are responsible for all hospital, medical, and related expenses as the result of claimant's back injury, including, but not limited to spinal surgery performed on May 9, 2002, and respondents remain responsible for continued, reasonably necessary medical treatment. Respondents are not responsible for any medical and associated benefits related to the claimant's total knee replacement on April 17, 2001, or any follow-up medical treatment related to the claimant's right knee.
7. A medical lien has been filed by Arkansas Blue Cross/Blue Shield which paid medicals for both the unrelated total right knee replacement of April 17, 2001, as well as the spinal surgery on May 9, 2002. Respondent are entitled to a credit or offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received in medical services pursuant to Ark. Code Ann. § 11-9-411. Reimbursements to medical providers are to paid in accordance with Commission Rule 30.
8. The end of claimant's healing period, as well as entitlement to additional temporary total disability after September 9, 2002, for the claimant's back injury requires further

development of the medical evidence and is by necessity reserved.

9. The issue of permanent disability has been specifically reserved.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, 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.

However, we note that although the claimant properly raised the issue of the compensability of her alleged right knee injury during the pre-hearing conference and developed this issue at the hearing, she did not file an appeal or cross-appeal with the Full Commission pursuant to the guidelines of Ark. Code Ann. §11-9-711, upon finding by the Administrative Law Judge that "The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a compensable injury to her right knee on March 16, 2001." As a result, we find that the claimant's disagreement with the Administrative Law Judge's finding concerning this matter and her argument regarding the compensability of her alleged right knee injury as set forth in Claimant's Response Brief cannot be considered by the Full Commission pursuant to

Ark. Code Ann. § 11-9-711.

With this in mind, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal. 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).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (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(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur in part, but respectfully dissent in part, from the Majority's Opinion affirming and adopting the

decision of the Administrative Law Judge. In his decision, the ALJ found that the claimant had sustained a compensable injury to her back as a result of her March 16, 2001 accident. However, the Judge found that the claimant could not establish a compensable injury to her right knee in the same incident. While I concur in the Majority's affirmance of the compensability of the claimant's back injury, I respectfully dissent from their affirmance of their denial of the knee injury.

At the outset, I note that the respondent in their brief have asserted that the Judge's decision in regard to the claimant's knee injury cannot be considered on appeal. They base that decision because the claimant did not file a specific appeal of the adverse portion of the Judge's opinion. However, I note that the respondent filed a Notice of Appeal which states as follows:

"The respondents hereby appeal the Administrative Law Judge's Opinion, filed November 18, 2004, in that they believe the Opinion is contrary to the law and facts."

This general appeal has placed all findings of the Administrative Law Judge before us. This includes the finding that the claimant's knee injury was not compensable. Of particular relevance in this matter is the Court of Appeals decision of *Rogers v. Darling Store Fixtures*, 45 Ark. App. 68, 870 S. W. 2nd 776 (1994). In that case, the Court of Appeals

held that the Commission had to consider the claimant's contentions in regard to certain medical treatment not awarded him in that decision. The Court of Appeals reached this result because the respondent had appealed an award of other medical benefits. The Court reasoned that since the respondent had generally appealed this issue, the respondent could argue for the additional medical benefits on appeal. I believe that the general nature of the respondent's appeal placed all of the Judge's opinions into question and we, therefore, are required by the holdings of the Arkansas Court of Appeals to consider all arguments raised in regard to the Opinion.

Admittedly, the claimant has a long standing history of problems with both her knees but most notably her right knee. In the early 1970's, the claimant underwent multiple knee operations that resulted from sport injuries and she underwent knee reconstructive surgery in 1978. She continued to seek medical treatment for ongoing degenerative joint disease in her right knee as well as additional injuries to it throughout the 1980's and 1990's. In 1999, the claimant's treating physician, Dr. Richard Ennis, a Memphis orthopedist, scheduled the claimant for knee replacement surgery but, because of refusal to pay either by her employer's workers' compensation carrier or her health insurance carrier, the surgery was not performed.

The present issue is whether the claimant suffered an aggravation to her preexisting knee problems on March 16, 2001 in a job related accident. This accident occurred when the claimant, who is a Biology teacher at Hughes High School, attempted to assist in breaking up a fight between two students. In the resulting altercation, the claimant was knocked down, injuring various parts of her body, including her right knee.

The claimant's treating physician has opined on this matter on more than one occasion. Dr. Ennis first saw the claimant following her 2001 injury on March 19, 2001. In his treatment note of that date, he briefly reviewed the claimant's past knee problems and then states as follows:

"The recent trauma at work breaking up the fight resulted in aggravation of the pre-existing condition. According to the patient, both the original injury which created the arthritis and the re-injury are the results of the on-the-job incidences."

Dr. Ennis considered this problem again in a letter dated March 20, 2001. In that letter, Dr. Ennis stated as follows:

"Peggy Bain has advanced osteoarthritis in her right knee and is a candidate for a knee replacement. According to our records and the patient's information, her knee problems resulted from on-the-job injury. She has recently had another injury which has *significantly aggravated the problem*. (Emphasis added).

In his deposition, Dr. Ennis once again affirmed his underlying belief that the claimant's 2001 injury brought about the need for surgery. In discussing this issue, he stated, "but I think this brought her to an increased need for the operation at a time when she had funding for the operation." In a follow-up question he was asked whether the March 16, 2001 accident was the cause for the need of the surgery? In reply, Dr. Ennis stated, "I think that it was one of the causes, right."

The claimant clearly had extensive problems with her right knee prior to her injury of March 16, 2001. I find that in this accident, the claimant's preexisting knee condition was aggravated causing her to need additional benefits, specifically including the knee replacement surgery performed by Dr. Ennis and related disability benefits. In reaching that conclusion, I am relying primarily on Dr. Ennis' stated medical opinion that the claimant's knee injury was aggravated by her 2001 accident. As stated above, Dr. Ennis clearly stated his opinion on more than one occasion and he clearly opined in his deposition that the accident of March 16, 2001 caused a greater need for the surgery than existed prior to the accident. I believe his opinion is more than sufficient to establish that the claimant suffered a compensable aggravation to her right knee and that she is therefore entitled to medical benefits necessitated by their

aggravation.

The Administrative Law Judge did not accept Dr. Ennis' opinions in this regard. However, I note in a recent Court of Appeals decision of *Hamilton v. Gregory Trucking and Houston General Insurance Company*, ___ Ark. App. ___, ___ S. W. 3rd ___ (March 16, 2005), the Commission was reversed when they did not follow the opinions of the claimant's treating physician in regard to additional medical treatment the claimant was seeking. In the *Hamilton* case, all of the claimant's physicians had opined that the additional treatment was necessary for treatment of his condition. While the Court noted that the Commission had the duty to evaluate and decide disputed issues of medical fact, it held that "fair minded" persons could not reach the conclusion that the medical treatment was not reasonable and necessary in light of the overwhelming medical evidence. In my opinion, the same situation is presented here. Dr. Ennis, an experienced orthopedic surgeon, who has been treating the claimant for her knee problems since the late 1970's was of the opinion that the March 16, 2001 injury aggravated her preexisting condition. I do not believe that this Commission can simply ignore his opinion.

Based upon the medical record, I find that the claimant suffered a compensable aggravation of her preexisting knee condition on March 16, 2001. I would therefore award her

all appropriate medical and disability benefits arising from that aggravation. For that reason, I dissent from the portion of the Majority's opinion denying her these benefits.

SHELBY W. TURNER, COMMISSIONER

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the decision affirming and adopting the decision of the Administrative Law Judge. Based on my de novo review of the entire record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her right knee on March 16, 2001. Therefore, I concur in this finding. However, I further find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable back injury which arose out of and in the course of her employment for which she is entitled to benefits. Therefore, I must dissent from these findings.

As with the claimant's pre-existing right knee injury, the medical records reflect that the claimant has suffered from pre-existing problems with her lower back for

many years. An MRI performed on April 4, 1996, revealed evidence of "Grade II spondylolisthesis with probable spondylolysis also at the L5 level and minimal degenerative arthritis." This MRI also revealed the presence of a large herniated disc at L5-S1 for which the claimant underwent a decompressive laminectomy and lateral fusion from L5 to the sacrum on April 12, 1996. Throughout the remainder of 1996, the claimant continued to seek medical attention for her back pain despite the surgery in April of that year. A post-surgical CT scan performed on July 19, 1996 revealed findings of "severe degenerative disc disease with anterior spondylolisthesis at the L5-S1 level." In August of 1996, the claimant was diagnosed with fibromyalgia by Dr. Kit Mays, a pain specialist and good friend of the claimant. By September 23, 1996, the claimant's spinal surgeon, Dr. Richard L. Ennis, noted in his progress notes that he was not convinced that the claimant had achieved a solid fusion. A limited duty release to return to work was issued to the claimant on October 21, 1996, but cautioned that the claimant could not bend, stand, or walk much and that she must continue to take medication during the day. When the claimant was examined by Dr. Barney Freeman on December 23, 1996, she provided the doctor with a history of pain persisting since surgery without any signs of improvement. Moreover, the claimant complained TO Dr. Freeman of "back pain that radiates down both legs with the right leg

being worse than the left." After reviewing the claimant's x-rays and other diagnostic studies, Dr. Freeman advised the claimant that she did not see any signs of consolidation of the bone graft, indicating that the fusion did not take. Dr. Freeman recommended the claimant for a pain management program at that time. The medical records reveal that the claimant sought treatment for back pain and all over body pain from Dr. Mays, her pain specialist, on several occasions following her release from Dr. Freeman. Dr. Mays recommended psychiatric counseling for the claimant. Dr. Mays specifically noted; "She has not responded to Prozac 20 mg and Pamelor 50 mg, and I feel that until the depression begins to lift, her fibromyalgia, her chronic right knee orthopaedic problems, and her post laminectomy pain are not going to improve significantly." By the spring of 1998, the claimant's complaints were primarily focused on the treatment of her right knee. However, in a letter dated August 24, 1998, Dr. Richard Ennis advised that he was treating the claimant for spondylolisthesis and advanced arthritis in her right knee. Again on July 14, 1999, Dr. Ennis noted that while treating the claimant for her arthritic right knee, the claimant continued to suffer from "persistent pain in the low back."

Subsequent to the work-related incident on March 16, 2001, the objective medical testing revealed Grade II spondylolisthesis at L5-S1, the same findings revealed in 1996

prior to the claimant's fusion surgery. Moreover, the claimant's subjective complaints noted by Dr. Ennis in his June 29, 2001, office notes of "increasing back pain with radiation to both lower extremities, worse on the right" are identical to the claimant's subjective complaints noted by Dr. Freeman on December 23, 1996. An MRI performed on August 16, 2001, was read to reveal "extensive degenerative disc disease at the L5-S1 level with approximately 40% anterior subluxation of L5 on S1," A New Patient Visit report prepared by Dr. Keith Bridwell on February 11, 2002, indicated that he reviewed both the claimant's current MRI scan, her pre-operative MRI scan from 1996, and her post-operative scans from 1996. After reviewing these objective testing results, Dr. Bridwell noted; "We just know what it looks like six months or so postop, and six months or so postop does not look drastically different than today." After analyzing the pre-operative more carefully, Dr. Bridwell noted that the claimant's pre-operative disc "has settled some more, the translation has increased somewhat, and it does look like her foramen is smaller at L5-S1...So there is not drastically dramatic progression of her spondylolisthesis since March of 1996, but there is some progression of the translation and some progression of the disc collapse and some progression of the foraminal stenosis as well at 5-1." The claimant underwent surgery by Dr. Bridwell on May 9, 2002, which was characterized as a

revision posterolateral spinal fusion at L5-S1.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. In order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that she sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, she must prove by a preponderance of the evidence (1) the injury arose out of and in the course of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4)(A)(i) and § 11-9-102(4)(E)(i) (Repl. 2002). She must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4)(A)(i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4)(D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant

fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the injury, she fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

The only objective medical findings of a low back injury is that of Grade II spondylolisthesis at L5-S1. This finding was clearly present in 1996 prior to the claimant's first back surgery. Although Dr. Bridwell noted some increased translation, some progression of the disc collapse, and some progression of the foraminal stenosis this comparison was made between the claimant's pre-operative diagnostic studies from 1996 and the post March 16, 2001, studies. With regard to the claimant's post-operative studies from 1996, Dr. Bridwell opined that "six months or so postop does not look drastically different than today." Accordingly, based upon the record before us, I cannot find that the observation of the claimant's spondylolisthesis progression from March of 1996 to August of 2002 is, in fact, objective medical evidence supporting a compensable injury. On the contrary, all the objective medical evidence reveals that the claimant has spondylolisthesis, a condition which clearly preceded her March 16, 2001, work related incident. While Dr. Bridwell opined that there were minimal changes in the claimant's condition when comparing her pre-operative studies from 1996 to her post "accident" studies, there is no evidence

supporting a finding that the findings on these post "accident" studies were caused by the claimant's work-related incident. The record does not establish by a preponderance of the evidence whether these minimal changes resulted from the claimant's 1996 surgery, mere degeneration, or the work related incident in March of 2001. However, given the fact that the claimant's subjective complaints from as late as 1999 are identical to her subjective complaints following the March 2001 work-related incident, I cannot conclude that the minimal changes are related to a the work-related accident. Rather, it is more likely than not that the minimal changes noted by Dr. Bridwell between the pre-surgery studies in 1996 and the post accident studies in 2001, existed prior to the claimant's 2001 accident, particularly in light of Dr. Bridwell's comments that the claimant's films from six months after the 1996 surgery does not look drastically different than the 2001 studies, and the fact that the claimant's subjective complaints both prior to and subsequent to the work-related incident are identical.

Accordingly, for those reasons set forth herein, I cannot find that the claimant has established by a preponderance of the evidence that she sustained a compensable injury to her low back as a result of the March 16, 2001, work-related incident that is supported by objective medical findings. Therefore, I must respectfully dissent from the

majority opinion's finding that the claimant sustained a compensable low back injury for which she is entitled to benefits.

Therefore, I respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner