

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401825

DEMETRICE ARMSTRONG, EMPLOYEE	CLAIMANT
OAK RIDGE NURSING HOME, EMPLOYER	RESPONDENT
CANNON COCHRAN MGMT. SERVICES, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 12, 2005

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

Claimant represented by the HONORABLE R. THEODOR STRICKER, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 13, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence a causal connection between her injury and the objective findings contained

within the record, and a causal connection between her injury and her employment.

4. The claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment; that the injury caused internal physical harm to the body which required medical services; that the existence and extent of the injury is established by medical evidence supported by objective findings; and that the injury was caused by a specific incident identifiable by time and place of occurrence.

5. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury to her back on May 18, 2003.

6. The claimant has failed to prove by a preponderance of the evidence that she is totally incapacitated from earning wages.

7. The claimant has therefore failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.

8. The claimant has proven by a preponderance of the evidence that the medical treatment documented in the record - specifically the treatment by Dr. Zahniser on May 19, 2003, and by Dr. Watson from January 19, 2004, through March 11, 2004, and the MRI and x-ray exams performed - was reasonably necessary in connection with the claimant's compensable injury.

9. The respondents have controverted this claim in its entirety.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 13, 2004 decision 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 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 after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by 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 \$500.00 in

accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury to her lower back on May 18, 2003, for which she is entitled to reasonable and necessary medical treatment rendered by Dr. Zahniser and Dr. Watson. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

On May 18, 2003, the claimant was involved in an incident at work when she assisted a patient that was falling out of her wheelchair. The claimant reported this incident and was provided medical treatment by the respondents. Initially, the claimant was sent to the emergency room where she was given medication. The

following day, the respondents sent the claimant to Dr. Zahniser for treatment. Dr. Zahniser noted that the claimant was given medication at the emergency room and that she was applying heat to her lower back. The claimant advised Dr. Zahniser that she was 70% improved. Dr. Zahniser ordered an x-ray of the claimant's lower spine. Dr. Robert Forward, the radiologist, stated that the x-ray revealed lower lumbar scoliosis. He also opined:

Evidence for a pelvis tilt. A shorter right lower limb should be ruled out because a shorter right lower limb can contribute to back pain and can be corrected by a right shoe elevator.

After examining the claimant and reviewing the x-rays, Dr. Zahniser found that the claimant had a decreased flexion of the lower spine secondary to pain, that she cannot stoop or squat greater than 50% secondary to pain, and that the x-rays revealed scoliosis but no other gross boney abnormality. Dr. Zahniser removed the claimant from work for a couple of days, and advised the claimant to continue with the medication from the emergency room and to continue to apply heat to her lower back.

The claimant did not seek any additional medical treatment until January 19, 2004, more than

eight months after the incident at work. Between May 19, 2003 and January 19, 2004, the claimant never requested the respondents to provide additional medical treatment. When the claimant did seek additional medical treatment, she did not return to the company physician, but rather to Dr. Watson, her family doctor.

The claimant provided Dr. Watson with a history of back pain for over a year. Moreover, she denied any injury related to her pain. Rather, the claimant advised Dr. Watson that her pain has been worse since she had a spinal about a year ago. Dr. Watson ordered an MRI which revealed a broad based posterior disc bulge at L4-L5 indenting the thecal sac with narrowing of the neuroforamina bilaterally at that level.

The claimant presented corroborating evidence from Kimberly Henry and Yolanda Hill to the extent that the claimant was involved in the incident with a patient on May 18, 2003, and that the claimant complained of pain in her lower back after this incident. Moreover, these witnesses corroborated the fact that the claimant did not complain of pain in her lower back prior to this incident. However, I cannot find that this corroborating evidence is sufficient to find that the claimant's work

related incident is causally related to the claimant's bulging disc, complaints of pain, and need for medical treatment eight months later. Ms. Hill did not offer any testimony regarding observations of the claimant since the date of the accident. Although Ms. Henry testified that she has visited with the claimant "from time to time whenever" after the incident in May of 2003, I note that this testimony is extremely vague, and insufficient to find that the pain Ms. Henry observed was after the incident in May of 2003, yet prior to the claimant seeking additional medical treatment in January of 2004.

When the claimant initially sought medical treatment, she was diagnosed with a lumbar strain, prescribed medication, and released to return to work. The claimant continued to work for over eight months without ever seeking any additional medical treatment from respondents. When the claimant did seek medical treatment for her lower back pain, she did not relate the pain to the minor strain she sustained in May of 2003. Rather the claimant advised her family physician, Dr. Watson, that she had been experiencing pain for over a year, since receiving a spinal when her child was born. Furthermore, the claimant specifically denied any

injury when she sought medical treatment in January of 2004.

Although the claimant has presented objective medical evidence of a bulging disc, I cannot find that she has established by a preponderance of the credible evidence that this bulging disc arose out of and in the course of her employment. Objective medical evidence while necessary to establish the existence and extent of an injury, is not essential to establish a causal relationship between the injury and the work related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). Except in the most obvious cases, the existence of a causal relationship may require the assistance of expert medical evidence. John Cotton v. Ball & Prier, Full Commission Opinion, September 23, 1997, (E512437); Billy Wayne Jeeter v. B & R McGinty Mechanical Company, Full Commission Opinion, March 6, 1997, (E208256), affirmed May 6, 1998; Ortho O. Wells v. Armstrong Rubber Company, Full Commission Opinion, April 14, 1997, (D100998); and Carolyn Jackson v. Bosley Construction, Inc., Full Commission Opinion, March 6, 1997, (E009401). Nevertheless, a preponderance of other non-medical evidence is sufficient to establish a causal relation to a work-related incident. Wal-Mart

Stores, Inc. v. VanWagner, supra. Not only does the medical evidence fail to establish a causal connection between the claimant's bulging disc and her work related incident, but the non-medical evidence is also insufficient to establish such a causal relationship. The non-medical evidence reveals that the claimant returned to work and worked without a problem for over eight months before she was diagnosed with a bulging disc. During this eight month period there is no credible evidence that the claimant ever complained of continuing problems resulting from the May 2003 incident, or that she requested any additional medical treatment.

While it is unknown from this record what actually caused the claimant's bulging disc, the respondents are not required to prove a non-work-related cause. Rather, the burden is upon the claimant to prove by a preponderance of the credible evidence that her injury arose out of and in the course of her employment. To find that the bulging disc diagnosed eight months after the claimant's work related incident, eight months after the claimant was released to return to work, and eight months after the claimant worked without ever requesting additional medical treatment is causally

related to the work-related incident would require sheer speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1970). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Based upon the record before me, I am unable to find that the claimant has met her burden of proof. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner