

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311482

MARGARET L. STROUD,
EMPLOYEE CLAIMANT

OZARK OPPORTUNITIES, INC.,
EMPLOYER RESPONDENT

LIBERTY INSURANCE CORPORATION,
INSURANCE CARRIER RESPONDENT

OPINION FILED AUGUST 18, 2005

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

Claimant represented by the HONORABLE EVELYN E. BROOKS,
Attorney at Law, Fayetteville, 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 March 31, 2005. In
said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on August 26, 2003, and at all other relevant times.
3. Claimant's average weekly wage is \$310.00; her temporary total disability benefits rate is \$207.00.

4. Respondents controvert this claim in its entirety.
5. Claimant proved by a preponderance of the evidence that she sustained a compensable gradual onset injury to her back which first became apparent to her on August 26, 2003. Her injury arose out of and in the course of her employment, because she first noticed a problem with her back after performing her job duties of lifting and arranging furniture, shoveling pea gravel, and lifting and carrying (while bent over) heavy playground equipment. However, she could not identify a specific causal incident or specific time and place of occurrence. Her injury caused physical harm requiring medical services: she sustained a herniated disc, requiring treatment such as medications, physical therapy, and epidural and nerve block procedures. Since Claimant was asymptomatic prior to performing her enumerated job duties in August 2003, but became symptomatic after lifting the playground furniture, I find that Claimant's injury is the major cause of her disability or need for treatment. Finally, Claimant's September 24, 2003 MRI revealed a herniated disc at L5-S1; this finding, together with the medical records, constitutes medical evidence supported by objective findings that establish the injury.
6. Claimant's failure to immediately report her injury does not bar her claim, pursuant to Ark. Code Ann. §11-9-701(b)(1)(B). She did not know she had a herniated disc until her September 24, 2003 MRI. Her subjective pre-MRI belief concerning her condition and its cause was reasonable under the circumstances; she was unaware of the true nature of her injury or its cause until after her MRI.

7. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to reasonably necessary medical benefits in connection with her injury. Claimant did not have her symptoms, and consequently need treatment, until she sustained her August 2003 compensable gradual onset injury in her back. Treatment since that injury provided some relief, but she continues to experience pain, remains under a doctor's care, and is on work restrictions.
8. Claimant sustained her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 19, 2003 to June 1, 2004. Claimant credibly testified to her inability to work within that time frame. However, as of June 1, 2004, based upon Claimant's testimony and the medical record, it is apparent that Claimant's low back is as far restored as the permanent nature of her injury will permit; the record does not establish anything in the way of treatment that will improve her condition.
9. Respondent are entitled to a reduction in medical benefits payable to Claimant equal to the amount of benefits Claimant previously received under her husband's health insurance policy, pursuant to Ark. Code Ann. §11-9-411(a). Her husband's health insurance policy paid some of her medical bills.
10. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. §11-9-715. The parties stipulated that Respondents controverted this claim, which would include the indemnity benefits awarded in this opinion.

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 March 31, 2005 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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable gradual onset injury to her back which manifested itself on August 26, 2003. The claimant was employed by the respondent employer as a teacher's aide. The claimant's job responsibilities include anything and everything that was needed to take care of the children in the facility. The claimant testified that there was some new playground equipment that had to be moved and brought up to code prior to the start of the school year. She stated that over a period of approximately seven days she and two co-workers shoveled the gravel.

One day they moved the playground equipment between twenty and twenty five feet from where it had first been erected. The claimant stated that this took about thirty minutes and she did not notice any problems with her back at the time she was moving the equipment. The claimant stated that she was sore in her shoulders and her arms after moving the equipment and using the shovel. She admitted that she did not feel any pain contemporaneous with moving the equipment or using the shovel. The next day she noticed soreness but did not report an injury to anyone.

The claimant eventually sought medical treatment from Dr. Margo Lockyer because of pain in her tail bone. Dr. Lockyer referred her for an MRI which was performed on September 24, 2003. The MRI revealed that the claimant had a herniated disc at L5-S1. The claimant stated that she talked the results over with her co-workers to determine exactly what caused the discs to herniate. The claimant at first thought she had a kidney problem when she went to the doctor, but found out after the MRI to the contrary. After the claimant talked to her co-workers, they surmised that moving the equipment and using the shovel must have caused the claimant's condition. It was on September 25, 2003, that the

claimant reported a workers' compensation claim to the respondent employer.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). See, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). The claimant does not contend that the injury is identifiable by time and place of occurrence, but that the injury is a gradual onset injury. In order to prevail on a gradual onset claim, the claimant must prove by a preponderance of the evidence that he/she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by "objective findings".

However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(5)(A)(ii), the "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability

or need for treatment." Ark. Code Ann. § 11-9-102(4)(E)(ii)(Repl. 2002).

If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, she fails to establish the compensability of the claim and the claim must be denied. Reed v. ConAgra, supra.

In applying the controlling law under Act 796 of 1993 to the evidence in this case, the Commission is to strictly construe the Act. Ark. Code Ann. § 11-9-704(C)(3). Under the gradual onset exception to the specific incident requirement, the claimant must establish a causal connection between her injury and her employment by medical evidence supported by objective findings and she must establish that her injury is the major cause of her disability or need for treatment. I find that the claimant in the present case has simply failed to meet her burden of proof on the major cause requirement.

The evidence demonstrates that the claimant could not say what the cause of her problem was. She could not identify a specific injury even though there was some implication in her testimony that the condition was due to specific injury. The claimant could not

identify a gradual injury because she did a host of activities at the school getting ready for the opening day. The claimant attempted to prove that she sustained a gradual onset injury, but the proof simply does not support her contentions. All the claimant did was list everything that she did at the school prior to the MRI. However, this is not proof of a compensable injury. The claimant admitted that she did not report an injury to anyone and really did not know what the cause of her problem was until after she had the MRI and then she speculated as to what caused the condition.

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 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

The medical evidence indicates that the claimant has a degenerative condition. Dr. Aly Mohsen stated that the claimant's condition was lumbosacral radiculopathy and neuropathy associated with multiple bulging disc syndrome. He also identified her problem as progressive degenerative disc joint disease. He referred her to Dr. James Blankenship, who stated that the claimant had marked disc degeneration at the L5, S2

level. No doctor has linked any of the medical findings with the claimant's employment therefore the claimant cannot prove the causal connection between her employment and her condition. Further, the evidence does demonstrate that the claimant took a long hard trip prior to undergoing the MRI. Simply put, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury while working for the respondent employer. In my opinion, the claimant has failed to meet her burden of proof.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner