

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409832

CAROLE AYTEKIN,  
EMPLOYEE

CLAIMANT

A-Z FACTORY CLOSE OUTS,  
EMPLOYER

RESPONDENT

FIRST COMP INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 22, 2006

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

Claimant represented by the HONORABLE GUNNER DELAY,  
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE WILLIAM FRYE,  
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 April 13, 2005. 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. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$164.00 for total disability and \$154.00 for permanent partial disability.
4. During the latter part of February or the first part of April of 2004, the claimant sustained a "compensable injury" to her lumbar spine. Specifically, the claimant has proven by the greater weight of the credible evidence that during this period she sustained a physical injury to her lower back or lumbar spine that is established by medical evidence and supported by objective findings, that arose out of and occurred in the course of her employment, that was caused by a specific incident that is identifiable by time and place of occurrence, that caused internal physical harm to her body, and that required medical services.
5. The medical services provided to the claimant for her compensable lower back or lumbar injury by and at the direction of Dr. George Thompkins and Dr. R. Wendell Ross represent "reasonably necessary medical services". Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

6. An evaluation of the claimant by a neurosurgical specialists, to (sic) order to determine the exact nature and extent of her injury, her need for continuing medical treatment, and the nature and extent of such treatment, also constitutes reasonably necessary medical services for the claimant's compensable low back or lumbar injury. Liability for these expenses also rests upon the respondents herein subject to the medical fee schedule established by this Commission.
7. The claimant is not barred from receiving any benefits for her compensable injury by the provisions of Ark. Code Ann. §11-9-701(a)(1). Specifically, the greater weight of the credible evidence shows that the claimant was never given reasonable notice of the respondents' reporting procedure, that the claimant, did, in fact, comply with the respondents' reporting procedures, and that the respondents had actual knowledge of the claimant's compensable injury on or before the date benefits first began to accrue.
8. The respondents have denied the occurrence of any compensable injury to the claimant's low back or lumbar spine and have controverted this claim in its entirety.
9. Although the claimant's attorney has provided the

claimant with valuable legal services, no benefits directly payable to the claimant are herein awarded. Therefore, at the present time, no controverted attorney's fee can be awarded to the claimant.

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 April 13, 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.

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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's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet her

burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant contended that in the last part of February or the first part of March in 2004, she sustained an injury to her back while she was lifting a box of chains. The claimant stated that she informed her supervisor, Bobby Pixley, of the incident. She stated that Mr. Pixley sent her home to rest her back. The claimant continued to work the following day and Mr. Pixley gave her light duty work. The claimant ultimately sought medical treatment from Dr. Tompkins on April 5, 2004. The claimant was again seen by Dr. Tompkins on April 7, 2004. Dr. Tompkins evaluated the claimant on April 9 and April 12, as well as April 16, 2004. The claimant was restricted from employment activities but on April 16, 2004, they were lessened. The claimant sought treatment from Dr. Tompkins on May 25, 2004. She again saw Dr. Tompkins in June. On August 26, 2004, the claimant saw Dr. Wendell Ross, who prescribed an MRI which was performed on December 15, 2004. The MRI revealed that the claimant had degenerative disk disease and several herniated disks most prominently at the L5-S1 level on the left.

The claimant did not file a Form C with the Commission until September 10, 2004. She alleged a lumbar spine injury on an unspecified date in March.

The claimant testified that she took the light duty slips to the employer. However, there was some discrepancy as to whom the light duty slips were delivered. Mr. Pixley, the claimant's supervisor at the time of the alleged injury, testified via deposition. He stated that he had given the slips to Hazel. However, Hazel Pierce, whom he references, testified that the slips were not given to her as a workers' compensation injury. She remembered getting the slips that placed the claimant on light duty but she never received a report of a workers' compensation injury from the claimant.

On April 23, 2004, the claimant went to pick up her check. When she arrived she was told by her supervisor at the time, Jason Edgar, that he wanted to talk to her. Mr. Pixley had resigned in March. The claimant testified that she waited for a while outside the office assuming she was going to be let go. The claimant never returned to the respondent employer. She subsequently went to work for a temporary agency and Cracker Barrel where she was working at the time of the hearing.

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 my opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. The evidence simply does not support a finding that the claimant ever reported a workers' compensation injury to her employer. All of the respondent employer's witnesses deny that they were ever given notice of a work related injury by either the claimant or Mr. Pixley. The claimant conceded during the hearing and during her deposition that she never told anyone other than Mr. Pixley about this alleged injury. She never asked to be sent for medical treatment. At the hearing, all she did was repeat that phrase "everyone

knew" that she had hurt her back at work but offered no details as to whom she told and when. The only evidence that is corroborative of the claimant's version of the injury and her reporting the injury is the testimony of Mr. Pixley. Mr. Pixley however, is a disgruntled former employee.

When reviewing Mr. Pixley's testimony, he stated that he thought the claimant sustained an injury of October or November of the preceding year. He believed that he delivered the doctor's excuse to Ms. Pierce and discussed the claimant's back injury with. However, Ms. Pierce's testimony directly contradicts that.

Mr. James White, the owner of the business, also confirmed that he had a personal conversation with the claimant on an unrelated matter between the time Mr. Pixley was terminated and the time he was replaced by Jason Edgar. The claimant failed to mention to Mr. White that she sustained a work related injury. Simply put, it would require conjecture and speculation for me to find that the claimant sustained a compensable injury at the time of her employment with respondent employer. 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).

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

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KAREN H. MCKINNEY, Commissioner