

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407751

TRIENCE M. JACOBS,  
EMPLOYEE

CLAIMANT

SOUTH ARKANSAS DEV. CTR.,  
EMPLOYER

RESPONDENT

COMMERCE & INDUSTRY INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED JUNE 6, 2006

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

Claimant represented by the HONORABLE GREG GILES,  
Attorney at Law, Texarkana, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals and respondents cross appeal an  
opinion and order of the Administrative Law Judge filed  
December 2, 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. The stipulations agreed to by the parties  
are reasonable and are hereby accepted as  
fact.

3. The claimant has failed to prove by a preponderance of the evidence that the existence and extent of her alleged low-back injury is established by medical evidence supported by objective findings.

4. The claimant has therefore failed to prove by a preponderance of the evidence that she sustained a compensable injury to her low back.

5. The claimant has proven by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable left-knee injury.

6. The claimant has proven by a preponderance of the evidence that she re-entered her healing period as of March 9, 2005, that she remains in her healing period, and that she has not returned to work.

7. The claimant has therefore proven by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 9, 2005, through a date yet to be determined.

8. The respondents have controverted all benefits sought herein.

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.

The claimant alleges that she sustained a compensable low-back injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable low back injury by a preponderance of the evidence.

We therefore affirm the December 2, 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 in part 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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the portion of the Majority's opinion which finds that the claimant is entitled to additional medical treatment for her compensable left knee injury and awarding additional temporary total disability benefits. However, I must respectfully dissent from the portion of the decision finding that the claimant did not sustain a compensable low back injury.

The Majority, by adopting the decision of the Administrative Law Judge as their own, concludes that the claimant did not sustain a low back injury shown by

objective medical findings. In supporting this conclusion, they opine that the claimant's only objective finding of a back injury occurred in the form of an x-ray performed nine months after the date of injury. They go on to indicate that because of the lapse of time between the injury and the x-rays showing straightening of the spine, there is not sufficient evidence to show a causal connection.

In my opinion, the evidence shows that the claimant suffered from both a back and knee injury as a result of her fall. While there was a lapse of time prior to the x-rays being performed, I find the medical records and the claimant's testimony are sufficient to relate the injuries shown by the x-rays with the claimant's fall in June 2004.

On June 28, 2004, the claimant was diagnosed with a hip contusion. Likewise, on July 7, 2004, she presented with complaints of pain in her knee and pain that extended from her hip down into her foot. She also indicated that she had some numbness in her foot. The doctor diagnosed the claimant with, "1. Back pain, possible disk herniation. 2. Right knee pain, possible meniscal tear."

On July 14, 2004, the claimant completed a Form AR-N, and indicated that she had injured, "my left

knee up to hip." The claimant was treated by Dr. Gati on July 30, 2004. The report from that day indicates that the claimant presented with generalized pain in her back, neck, and leg. The report also provides that the claimant continued to report a shooting pain in her leg. The claimant was diagnosed with "1. Back pain, possible sciatica. 2. Right knee pain with a normal MRI." The doctor also prescribed physical therapy for her back and knee.

At that point the claimant was directed to see the respondent's physician, Dr. D'Orsay Bryant. Dr. Bryant recommended and performed knee surgery on the claimant. The claimant testified that she complained of back pain to Dr. Bryant; however, his notes fail to reveal such complaints.

On February 11, 2005, the claimant was granted a change of physician back to Dr. Gati. A doctor's note from Dr. Gati, dated March 9, 2005, provides, "She is having more and more trouble now with her back and pain within her left knee. She reports that she gets numbness within her left leg and a shooting pain from her back down her left leg." The note also indicates, "X-rays of her back show loss of lumbar lordosis with significant straightening of the spine." Once again the claimant was diagnosed with possible sciatica and disk

herniation. Dr. Gati recommended the claimant receive an MRI of the claimant's back and knee.

On May 2, 2005, Dr. Gati indicated that the straightening of the claimant's spine was consistent with muscle spasms. He also indicated that when he initially examined the claimant in July 2004, the claimant submitted to a straight leg test which caused pain. Furthermore, when she returned in March 2005, she continued to present with the same complaints and continued to have the same pain when the straight leg test was performed. The note further provides as follows, "It is my belief, based on her original complaints a year ago, her mechanism of injury, and her physical exam findings, that she has probably had a back injury as well as aggravation to her knee."

The Majority denies the claimant benefits based on the finding that she had no objective findings to her low back until some nine months after the initial date of injury. However, in my opinion, they fail to give appropriate weight to the medical records showing the claimant complained of back pain immediately after the accident. Likewise, in my opinion, the Majority fails to give appropriate consideration to Dr. Gati's opinion that the claimant's back injury was causally connected to her work-related injury in June 2004.

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. Jeter v. B.R. McGinty Mech., 62 Ark.App. 53, 968 S.W.2d 645 (1998). The basic test is whether there is a causal connection between the two episodes. Bearden Lumber Co. v. Bond, 7 Ark.App. 65, 644 S.W.2d 321 (1983). It is the Commission's duty to determine if a causal connection exists between the primary injury and any additional injuries. Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999).

While medical evidence is not required to show a causal connection, claimant must show proof by a preponderance of the evidence. Wal-Mart Stores. Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is not other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263 (1962).

If the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to sustain the Commission's refusal to make an award. Clark v. Ottenheimer, 229 Ark. 383, 314 S.W.2d 497 (1958); Johnson v. Little Rock School District, Full Commission Opinion filed April 4, 2002 (E700511 & F011921). But, if the disability does not manifest itself until many months after the accident, so that reasonable men might disagree about the existence of a causal connection between the accident and the disability, the issue becomes one of fact upon which the Commission's conclusion is controlling. Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962).

The findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the

Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). Additionally, the Commission may not arbitrarily disregard any witness's testimony. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998).

In my opinion, the evidence shows that the claimant consistently complained of back pain and was diagnosed with such an injury almost immediately after her accident. While there was a lapse in time between her work-related injury and the x-rays in March 2005, that does not dispute the evidence indicating that the claimant's injury was directly related to her work.

On the date of injury, the claimant was diagnosed with a contusion on her hip. Likewise, almost immediately after the accident, she presented with symptoms consistent with a low back injury. As early as July 7, 2004, the claimant was diagnosed with having a possible disk herniation, which lends credence to her claim that she sustained a back injury while working on June 28, 2004. Additionally, the claimant was given physical therapy for treatment of her back and until she began treatment with Dr. Bryant, the medical records

consistently indicate the claimant suffered a back injury.

The respondents assert that Dr. Bryant's notes do not contain any notes regarding the claimant's back pain. However, it is apparent that the sole focus of Dr. Bryant's treatment was related to the claimant's knee injury rather than to her back. When considered in conjunction with the claimant's testimony that she repeatedly complained of pain in her back to Dr. Bryant and the notes from Dr. Gati, indicating that the claimant repeatedly complained of back pain and ultimately diagnosing her with a back injury, I find that the claimant's back injury was causally related to her work-related fall.

The claimant testified that she had no prior history of having any back pain or condition. There is no evidence to dispute that testimony. Additionally, the only opinion given regarding whether the claimant's back injury was related to her work-related injury was given by Dr. Gati. His notes reveal that the claimant had the same symptoms when he initially treated her and when the x-rays were performed in March 2005. Additionally, he indicated that her x-rays would be consistent with the existence of muscle spasms, which would constitute an objective medical finding. Last, he

concluded, "It is my belief, based on her original complaints a year ago, her mechanism of injury, and her physical exam findings, that she has probably had a back injury as well as aggravation to her knee. I would recommend an MRI of her lumbar spine for further work-up."

Since Dr. Gati was the physician initially treating the claimant, I give great credence to his opinion that the claimant's back injury was directly related to her fall in June of 2004. The only explanation that the Majority gives for discounting his opinion is that there was a lapse of time between the time of injury and the time the x-rays were performed. However, the Majority fails to consider that the claimant consistently complained of back pain, and was diagnosed and treated for back pain by Dr. Gati. Furthermore, when Dr. Gati gave his opinion on compensability, he was well acquainted with the claimant's case and, in fact, was the physician that initially treated the claimant for her back pain. Accordingly, I find his opinion that the claimant's injury was directly related to her fall at work to be convincing.

In sum, I find the medical records, the claimant's testimony, and the opinion of Dr. Gati, all

lead to the conclusion that the injury revealed in the March 2005 x-ray was directly related to the claimant's fall on June 28, 2004. Accordingly, I must respectfully concur in part and dissent in part.

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SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

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CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, with and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that she sustained a low back injury at the time of her compensable knee injury. However, I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment in connection with her admittedly compensable left knee injury, as well as, the finding that she re-entered her healing period as of March 9, 2005, and was entitled to additional temporary total disability benefits. In my opinion, the claimant has failed to meet her burden her burden of proof.

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.

In my opinion, the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. Ark. Code Ann. §11-9-508 requires employers to provide such medical services as may be reasonably necessary in connection with the employee's injury. Air Compressor Equipment v. Sword 69 Ark. App. 162, 11 S.W.3d 1 (2000). The Commission has the authority to accept or reject medical

opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. Jim Walter Homes Travelers Ins. v. Beard 82 Ark. App. 607, 120 S.W.3d 160 (2003). Furthermore, it is well established that it is within the Commission's province to weigh all the medical evidence and to determine what is most credible. Minnesota Mining & Mfg. v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

Dr. D'Orsay Bryant, a board certified orthopaedic surgeon, performed arthroscopic surgery on the claimant's knee. His records reflect continual improvement in the claimant's condition after the surgery:

The patient is doing better than before. She stated that she was improving in PT, but her prescription ran out. The patient does require two more additional weeks of PT in order to complete her program. She is walking much better, and I'm quite pleased with that. At the end of the two weeks, the patient will be assessed for maximum medical improvement.

On November 24, 2004, Dr. Bryant released the claimant and assessed her with a 4% whole person permanent anatomical impairment rating.

After receiving her release from Dr. Bryant, the claimant resigned her job. The claimant called Ms. Cynthia Posey, personnel manager for the respondent employer, to testify on her behalf. Ms. Posey provided the following testimony regarding the claimant's resignation and her personal observation of the claimant after the same:

Q. Okay. But you have absolutely no medical documentation saying she was unable to perform her job?

A. No.

Q. And she didn't present you with anything that day when she said, "Im resigning"?

A. No. she didn't.

Q. When you had that conversation with her, when she resigned in November of 2004, did she mention to you at all any problems associated with her back?

A. No.

Q. Did she say anything to you to the effect of, "you know, I've been trying to get treatment for my back and these doctors just won't listen to me"?

A. I don't recall.

Q. Anything even remotely close to that?

A. No recollection of it.

Q. Okay. Have you seen her at all since then?

A. I ran into her once at a funeral.

Q. Okay. When she was at the funeral, how long ago was that, approximately?

A. Four or five months ago, maybe.

Q. Was she using a crutch?

A. I didn't notice one.

Q. Have you ever seen her using a crutch other than today?

A. No.

It is of note that the claimant used a crutch at the hearing but Ms. Posey had never seen her use one before the hearing. Melissa Rainwater also did not see the claimant use a crutch. Ms. Rainwater testified:

Q. Were you involved when she came back or was released to return to work in November?

A. No. She met Cynthia Posey, and I got copies showing where she was released to go back to work and chose not to.

Q. Did you ever receive any medical documentation out there indicating that she had any limitation or restrictions in her activities after November of 2004 - -

A. No.

Q. Or after she resigned?

A. No.

Q. Have you seen her at all since then?

A. One time.

Q. When did you see her?

A. I saw her a few months ago at the Curves exercise place.

Q. Exercise, like where you go in and work out?

A. Uh-huh (yes).

Q. What was she doing there?

A. She was working out.

Q. Was she using a crutch or crutches at that time?

A. I didn't notice. But when she worked out, she didn't.

Q. She was actually using the machines and stuff then?

A. Yes.

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Q. How long ago was that, I'm sorry?

A. About six months ago.

Q. Sometime last Spring?

A. Yes.

Moreover, the persistence of pain is not sufficient in itself to extend the healing period or to find that the claimant is totally incapacitated from earning wages. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). In my opinion, the claimant has failed to prove that she is totally incapacitated from earning wages. She chose to resign her job. The claimant has been diagnosed as having major depressive disorder and unspecified mental retardation. Medical records also reflect that she has been struggling with her weight. While there might be other factors keeping

the claimant from working at this time, it is certainly for reasons totally unrelated to her left knee.

Therefore, after considering all of the evidence, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment and additional indemnity benefits for her admittedly compensable left knee injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion awarding benefits.

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KAREN H. MCKINNEY, Commissioner