

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F005922

BARRY NEEDHAM, EMPLOYEE	CLAIMANT
JOHNSON CONTROLS, EMPLOYER	RESPONDENT NO. 1
SPECIALTY RISK SERVICES, INC., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

OPINION FILED APRIL 24, 2006

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

Claimant represented by the HONORABLE MICHAEL HAMBY, Attorney at Law, Greenwood, Arkansas.

Respondent No. 1 represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent No. 2 represented by the HONORABLE TERRY PENCE, Attorney at Law, Little Rock, Arkansas.

Respondent No. 3 represented by the HONORABLE JUDY RUDD, 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 July 6, 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 pertinent dates, the relationship of employee employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his low back on June, 18, 1998.
4. Medical expenses have been paid to June 20, 1998, for the claimant's low back injury.
5. The claimant is entitled to a weekly compensation rate of \$359.00 for temporary total disability and \$269.00 for permanent partial disability.
6. The claimant has proven by a preponderance of the evidence that he is entitled to additional medical treatment for his compensable low back injury subsequent to June 20, 1998. The respondents are entitled to a credit for any group medical paid this claimant in accordance with Ark. Code Ann. §11-9-411.
7. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his neck and cervical spine on June 18, 1998.
8. The claimant is entitled to temporary total disability from February 26, 2000, until April 12, 2002, then again from October 24, 2002, until November 3, 2003. The respondents are entitled to a credit for any long term or short term disability benefits which this claimant was paid. See Ark. Code Ann. §11-9-411.
9. The claimant is entitled to a permanent partial disability rating of 12 percent to the body as a whole based on the impairment rating assessed by Dr. Raben for his initial back surgery and an additional 2 percent for a second surgery at this same level.

10. The claimant has failed to prove by a preponderance of the evidence that he is permanently or totally disabled or entitled to wage loss over and above his impairment rating.

11. There is no Second Injury Fund liability in this matter.

12. The respondents have controverted this claimant's claim for benefits as a result of his compensable low back injury.

13. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded 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.

We therefore affirm the July 6, 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.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. It is undisputed that the claimant sustained a compensable injury to his low back on June 18, 1998,

when he was involved in a motor vehicle accident. However, a review of the medical records reveals that this incident only resulted in a minor aggravation of the claimant's pre-existing condition. The claimant first sought medical treatment for his low back condition in July of 1997. The progress note for Dr. T.E. Brackman specifically states:

Barry is a young fellow that does a lot of traveling. He is on his feet a lot walking. He has been having a severe burning, uncomfortable pain in the right thigh in the area of the sciatica nerve. It has gone on for a long time. He has never sought therapy for it. On PE, there is very little finding and he did not have as much pain as I would expected when we stretched his buttocks. L-spine films are not remarkable. Has good great toe strength. DTR's are all 3+ brisk and equal. I think he has sciatica...

The claimant was prescribed pain medication and a steroid dosepack at that time.

On April 21, 1998, the claimant sought medical treatment for his low back pain from Dr. L.J. Pat Bell II. At this time the claimant presented with the following history:

c/o pain to Rt ↓ back - Radiates to Rt hip & leg - onset last summer - tx for pulled muscle last summer [with] ? Flexaril [without] relief - states pain has worsened - has not slowed work schedule ↑ [with]

walking & standing - "tearing  
sensation - burning - sharp pains."

The claimant was diagnosed with LMS,  
presumably lumbar muscle strain, and again prescribed  
pain medication and muscle relaxers.

Following his compensable injury on June 18,  
1998, the claimant sought medical treatment at Jefferson  
Regional Medical Center where he was physically examined  
in the emergency room. The claimant provided the triage  
nurse with a chief complaint of pain in his low back,  
mid back, and right side of buttocks. Although the  
physician's writing is difficult to decipher on the  
Emergency Physician's Record, under the "Systems Review"  
it appears as though the claimant complained of  
abdominal pain with nausea but without vomiting, as well  
as back pain with right leg pain and right butt pain,  
but that the x-ray was negative. The physician's  
physical exam produced findings of tenderness in the low  
back. The remaining findings of the musculoskel/back are  
illegible. The claimant was again diagnosed with an  
acute back strain at that time. Upon discharge, the  
claimant was provided with instructions that  
specifically advised:

The examination today reveals that  
your back pain is probably not  
caused by a serious condition. The

muscles of the lower back are put under a lot of strain in everyday life. When any muscle is over stretched or overworked it tightens (spasms) to protect itself. After a while, those spasms make the pain worse. Your exam shows no signs of bone (spine) or nerve (slipped disk) injury and the muscle strain should be able to heal completely. You should feel much better in a few days, and all better in a week or two...

On July 18, 1998, the claimant provided respondent employer with a Physicians Report of Injury placing restrictions upon the claimant's work. On July 20, 1998, the claimant returned Dr. L.J. Pat Bell II. The medical record from this office visit fails to disclose any mention of the intervening compensable motor vehicle accident to this physician. The history as provided by the claimant at that time only stated, "States still having back pain & pain down Rt leg & groin area - Soma and Steripred girdle in April did not help." The claimant was prescribed pain medication, muscle relaxers, and physical therapy at that time. In the Physician's Report, AR-3 Form, prepared by Dr. L.J. Pat Bell II on August 17, 1998, Dr. Bell noted under description of accident:

Pt states pulled muscle summer of 97. On 4-21-98 he came in with lower back pain Radiation to (R) hip and leg. Did not slow work schedule.

Increased pain when walking and standing

Dr. Bell further noted on this form under the Diagnosis/Treatment section:

Acute Lumbar muscle strain office care and Xrays - negative for fractures. Medications were prescribed

Dr. Bell opined that the claimant's prognosis was good and noted that the claimant could return to work on July 21, 1998.

Over a year lapsed before the claimant sought any additional medical treatment for his low back pain. The medical records in evidence reflect the claimant was seen on October 5, 1999, however, the provider is unknown. Despite the claimant's testimony and statements to his medical care providers he did not come under the care of Dr. Cyril Raben until February 4, 2000, as noted in Dr. Raben's medical report of that date.

The burden of proof rests upon the claimant to prove the compensability of his/her claim. Ringier America v. Comles, 41 Ark. App. 47, 849 S.W.2d 1 (1993). There is no presumption that a claim is compensable, that the claimant's injury is job-related or that a claimant is entitled to benefits. Crouch Funeral Home v. Crouch, 262 Ark. App. 417, 557 S.W.2d 392 (1977); O.K.

Processing, Inc. v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c)(2) (Repl. 1996). In determining whether a claimant has sustained his/her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion, Feb. 17, 1989 (D612291); B.R. Hollingshead v. Colson Caster, Full Commission Opinion, Aug. 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). In workers' compensation cases, the burden rests upon the claimant to establish his/her claim for compensation by a preponderance of the evidence. Kuhn v. Majestic Hotel, 50 Ark. App. 23, 899 S.W.2d 845 (1995); Bartlett v. Mead Container Board, 47

Ark. App. 181, 888 S.W.2d 314 (1994). 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 Commission Opinion, Dec. 13, 1989 (D512553).

In my opinion, I find that the claimant has failed to prove by a preponderance of the evidence that the medical treatment he sought after being released by Dr. Bell is reasonable and necessary in connection with his compensable injury. I do not find the claimant's testimony or history of treatment to be credible. Claimant's testimony simply is not sufficiently credible to support a finding that his treatment is causally connected to his motor vehicle accident. Mooney v. Monday & Associates, Full Commission Opinion filed August 15, 1996 (E4104794); Riley v. Craighead Nursing Center, Full Commission Opinion filed January 13, 1998 (E608290 and E608291); Anderson v. Douglas & Lomason Co., Full Commission Opinion filed December 12, 1998 (E700104); and Arnold v. Dino's, Inc., Full Commission Opinion filed August 1, 2002 (F001514). The medical records reveal that the claimant sought medical treatment as recently as two months prior to his compensable injury for the exact same symptoms as he was

having after the June accident. The claimant suffered from lower back pain with pain in his right thigh in the summer of 1997. In April of 1998, the claimant advised that his pain had worsened. The emergency room records do not disclose any additional findings other than low back, right leg and right buttocks pain. The claimant was diagnosed with a lumbar strain at that time. Moreover, and most interesting, when the claimant returned to Dr. Bell for treatment after his motor vehicle accident, he did not even provide Dr. Bell with a history of the accident. As reflected in Dr. Bell's July 20, 1998, office note, and the August 17, 1998, Physician's Report, he was under the impression that he was only treating the claimant for the muscle strain he first saw the claimant for in April of 1998. Given that Dr. Bell treated and examined the claimant shortly after the compensable injury, I am inclined to give Dr. Bell's analysis of the claimant's condition must more weight than that of Dr. Raben who did not treat the claimant until almost two years after the accident. Furthermore, Dr. Bell was fully aware of the claimant's condition prior to the motor vehicle accident as he treated the claimant for a low back strain prior to the accident. There is no evidence that Dr. Raben was ever made aware of the claimant's low back complaints prior to the motor

vehicle accident or the fact that the claimant did not require any medical treatment for over a year after he was released by Dr. Bell.

Accordingly, after I weigh all the evidence of record, I find that the claimant has failed to prove by a preponderance of the evidence that his need for medical treatment and the associated periods of temporary total disability are causally related to his compensable injury which was diagnosed as a low back strain. The claimant's symptoms prior to his injury were exactly the same as his symptoms after the injury, indicating that the claimant sustained a temporary aggravation of a pre-existing condition. Although the claimant was subsequently diagnosed with an annular tear, the evidence fails to preponderate in favor of finding that this tear resulted from the claimant's compensable injury. It is just as likely that the annular tear existed as early as 1997 when the claimant first sought medical treatment for his low back pain, as it is that it occurred during the one year lapse in medical treatment after the claimant's compensable injury. To find one way or the other would require this Commission to resort to speculation and conjecture. 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).

Therefore, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner