BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F303464 & F303465

MEGAN SMITH, EMPLOYEE	CLAIMANT
O'REILLY AUTOMOTIVE INC., EMPLOYER	RESPONDENT
AMERICAN CASUALTY COMPANY OF READING, CARRIER	RESPONDENT

OPINION FILED APRIL 18, 2006

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

Claimant represented by HONORABLE DAVID L. ETHREDGE, Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

This case comes before the Full Commission after being remanded by the Arkansas Court of Appeals. The case originally came before the Commission after the respondent appealed a decision of the Administrative Law Judge filed on July 19, 2004, finding the claimant suffered compensable injuries in April and September 2002, awarding her temporary total benefits for the period of October 11, 2002 to May 13, 2004, and awarding her medical expenses related to those injuries. On May 11, 2005, the Commission issued a decision

finding that the claimant did not sustain a compensable back injury in April or September of 2002. The Commission further found that the claimant suffered from a pre-existing back injury that was the source of her need for treatment to her back. On February 1, 2006, the Court of Appeals reversed and remanded the case because the Commission had made erroneous findings of fact. The first erroneous finding of fact was that the claimant suffered from a back injury at the age of 16. The second error was that until January of 2003, the claimant failed to tell Dr. Welsh that her symptoms were due to lifting items from her truck bed. The Court of Appeals directed the Commission to rectify these errors and to consider all relevant factual and medical evidence and render a decision.

After a de novo review of the record, we find that the decision of the Administrative Law Judge should be affirmed. In our opinion, the claimant gave credible testimony that in April 2002 she suffered an injury due to lifting a part at work and that she reported the injury immediately. The claimant's manager, Chris Agnew gave testimony that the claimant injured her back in April 2002 and denied having knowledge of the claimant suffering from previous back injuries, giving credence to the claimant's

testimony. The claimant also gave credible testimony that she suffered pain in her back in September 2002 as she lifted a part and that she reported that incident immediately. In our opinion, this shows the claimant properly gave notice to the respondents. The claimant was subsequently restricted from returning to work and did not come out of her healing period until May 13, 2004. As such, she is entitled to temporary total disability benefits for the time period in question. For the aforementioned reasons, we affirm the decision of the Administrative Law Judge.

The respondents attempt to assert that the claimant had a history of having back problems and that any subsequent diagnoses were due to an alleged pre-existing condition. As noted by the Court of Appeals, there is no medical evidence to support the contention that the claimant had a previous back injury. Furthermore, in our opinion, the respondents erroneously conclude that the claimant did not tell doctors that her condition was caused by lifting items out of the truck. From the time of the claimant's first visit to the doctor on, she consistently indicated that she suffered from pain when lifting items at work. Accordingly, we find her testimony to be credible in showing

she sustained compensable injuries.

The claimant began working for the respondent as a delivery specialist in March 2001. The job required her to deliver parts approximately 20 to 25 times per day. She was also required to lift heavy items out of the back of a truck in the course of delivering the parts. The employer’s policy included provisions requiring managers to complete documentation and forward to other members of management in order to allow them to submit requests for workers’ compensation claims in instances where employees reported work-related injuries.

In April 2002, the claimant lifted a part out of the back of a truck. As she was lifting and turning, she felt pain in her back. She described the pain as, ”It felt like a real bad pull and burning sensation in my back.” The claimant delivered the part and returned to the employer’s work site. Her manager, Chris Agnew, noticed the claimant holding her back. The claimant told Agnew she had injured her back. Agnew agreed to order her a back brace and told her she would have to pass a urine test. Agnew took no further steps to report the claimant’s injury. Agnew testified that he assumed the claimant injured her back while working and admitted that failing to report an injury

at work would be a policy violation.

The claimant continued to work and treated herself with over-the-counter medications. Her pain did not subside. The claimant first received treatment on August 26, 2002. She was treated by Dr. Welsh. Welsh was located across the street from the employer, so the claimant continued to seek treatment from him and scheduled her appointments during her lunch hour. During the first visit, Welsh noted that the claimant suffered from low back pain beginning at the age of about 16. He further indicated that the pain had, "been going on daily for years." He also indicated that the claimant reported doing a lot of lifting at work and that the pain had become worse within, "the last several weeks." Welsh prescribed Zanaflex, a medication used to treat muscle spasms.

The claimant subsequently began working as a Merchandising Specialist, a position that required her to do schematic changes, stock, and do inventories. It is unclear whether the position required more lifting than the delivery position. However, there is no dispute that the position did require heavy lifting and that, at times, the claimant had to act as a back-up delivery driver.

Don Newton began working as the claimant's

supervisor in July 2002. In September 2002, the claimant was making a delivery and lifted a rotor out of the truck. The claimant felt pain in her back. The same day, the claimant told Newton that she injured her back when making the delivery. Newton told the claimant to continue making deliveries, but to have installers lift the parts out of the truck for her.

On September 5, 2002, the claimant underwent an MRI. It revealed narrowing of the disks at levels L3-L4, L4-5, and L5-S1. The claimant continued to receive treatment from Dr. Welsh. On September 10, 2002, Dr. Welsh noted the claimant narrowing in her disc spaces and that she smoked less than half a pack of cigarettes per day. Dr. Welsh advised the claimant that smoking would contribute to the narrowing of disc spaces and advised her to stop smoking.

At some point, the claimant told Newton she did not want to make deliveries, but it is unclear when that conversation occurred. Newton discovered the claimant was on painkillers. He contacted his district manager and was instructed to get a statement regarding the claimant’s restrictions. Newton told the claimant that he would need to get a copy of her restrictions as other workers were

complaining that she was getting preferential treatment by not being required to make deliveries. The claimant returned with a doctor's statement releasing her from working. The claimant was advised to file a FMLA request. The claimant exhausted available leave but had not yet been released to return to work. As a result, her employment was terminated.

On October 14, 2002, the claimant was treated by Dr. Welsh. The medical records from that day indicate the claimant reported, "her back pain becomes excruciating when she has to lift items out of a truck bed, which unfortunately is required for her job."

On November 19, 2002, the claimant was treated by Dr. Robbins. She complained of pain in her lower back extending to the back of her right leg. Dr. Robbins noted that the claimant said she had been suffering from similar problems since the age of 16, but that she saw military doctors and the treatment decreased her problems. Robbins also noted the claimant said she had been lifting heavy objects and suffered from increasing back problems.

Another MRI was performed on December 12, 2002. It revealed disc bulges at levels L3-4 and L4-5 and noted there was some evidence of degenerative disc disease. On

December 16, 2002, Dr. Welsh treated the claimant and noted she had almost quit smoking. The claimant continued to receive treatment and eventually quit smoking, only to later start smoking again.

The claimant remained unemployed after October 10, 2002. She attended school to become a court reporter. At the time of the hearing, the claimant anticipated returning to work as a court reporter on May 13, 2004.

The respondent argues the claimant did not suffer a compensable injury. In supporting this contention, they argue the claimant had a history of back pain and problems, waited to see the doctor, and that her injury was not evidenced by objective findings. In our opinion, these arguments are not persuasive. There is no medical evidence indicating that the claimant suffered from a back injury prior to 2002. Though the claimant had a history of back pain, as noted by the Court of Appeals, there was no medical evidence as to a previous injury. When considered in conjunction with the claimant’s testimony that she did not suffer from back pain for an extended period of time before the incident in April of 2002 and her statements to doctors that lifting items from trucks had caused back pain, we find that the claimant has shown she sustained a compensable

injury in April 2002 and that her injury in September 2002 was a recurrence of the previous injury from April 2002.

A "compensable injury" is defined as,

> "An 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"

Ark. Code Ann. §11-9-102(4)(A)(i) (Rep.. 2002). To be compensable, an injury must also be established by medical evidence supported by objective findings, which are defined as evidence supported by objective findings, which are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). The Supreme Court of Arkansas has held that prescribing medication in order to treat muscle spasms is sufficient to establish the existence of objective findings. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), See also, Fred's, Inc.; and Royal and Sun Alliance v. Deborah Jefferson, ___ Ark. ___, ___ S.W.3d___ (2005).

In the present case, the claimant saw Dr. Welsh for the first time on August 26, 2002. At that time, Dr. Welsh prescribed Zanaflex, a medication used to treat muscle spasms. Dr. Welsh noted he believed the claimant's low back pain was secondary to a pinched nerve. On December 2, 2002, an MRI revealed the claimant had disc disease, with loss of disc height. The MRI report also indicates the claimant had disc bulges at levels L3-4 and L4-5 and, "narrowing of the central canal and of the neuroforamina" at the same levels. As noted by the court in Freds and Estridge, the presence of a muscle spasm or a prescription to treat a muscle spasm is enough to constitute an objective finding. Furthermore, the MRI revealed the claimant had narrowing between her discs and bulging discs which also shows objective findings did exist.

In addition to establishing objective findings, the claimant has the burden of proving by a preponderance of the evidence that his condition is causally related to his employment. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or

combined with the disease or infirmity to produce the disability for which compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). As is commonly stated, the employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a pre-existing condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee’s entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by accelerating or combining with the pre-existing condition. See Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

The respondent argues that because the claimant had previously received medical treatment for her back, her injury was not causally related to her employment. In supporting this finding, the respondent contends that the claimant gave contradictory statements to her doctor regarding her back symptoms and that she did not relate the incident back to lifting parts out of her truck. The respondent points, in particular, to the fact that the doctor's notes on August 26, 2002, indicate the claimant complained of daily back pain since she was 16. The respondent also calls attention to the fact that the doctors' notes did not indicate that her pain levels subsided after her partial hysterectomy in 1997.

Just as the Act does not require an immediate diagnosis, it also does not require that the claimant insist that the doctor's history contain the gory details of the occurrence. Siders v. Southern Mattress Co., 240 Ark. 267, 398 S.W.2d 901 (1966).

In our opinion, the claimant provided sufficient information to her doctors to attribute her injury to her work. From the time of the August 26, 2002 visit with Dr. Welsh on, the claimant mentioned

lifting at work in reference to her back pain being exacerbated. While the claimant did not give an exact date of the onset of her exacerbated pain, we find that she was not required to do so to be credible or to show a compensable injury. Further, Agnew admitted the claimant told him she pulled her back in April 2002, which corroborates these references in the doctor's notes.

While the claimant admits having a history of suffering from back pain, there is no medical evidence regarding any alleged previous condition. In our opinion, to now conclude the claimant's condition is due to a pre-existing condition, amounts to impermissible conjecture and speculation. As noted by the Court, 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 respondent argues that the claimant was not credible. Questions concerning the credibility of

witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

The claimant testified that she did not suffer from back pain between 1997 and the time of her injury in 2002. There is no evidence indicating that the claimant sought medical attention for her back during that time period either. The respondent failed to produce any witnesses testifying that the claimant frequently complained of back pain or having knowledge the claimant had a history of back pain. Accordingly, we conclude that the claimant's testimony that she did not suffer from pain is credible.

In our opinion, the respondent's contention that the claimant did not give consistent statements to

her doctor is also erroneous. On August 26, 2002, Dr. Welsh indicated on Progress Notes, "c/o LBP daily for years-seems to be worse when working-does a lot of lifting at work". Dr. Welsh also typed notes regarding the visit. In those notes he indicated the claimant's back problems started around the age of 16 and that she suffered from daily pain but that the pain was, "getting particularly bad over the last several weeks." On October 14, 2002, the claimant apparently told Dr. Welsh that, "her back pain becomes excruciating when she has to lift items out of a truck bed, which unfortunately is required for her job."

These consistent statements to two different doctors support the claimant's testimony regarding how she was injured and the time-line of when the injury occurred. While the notes do not indicate the claimant had a lapse in her pain from 1997 to 2002, the notes did indicate the claimant had been lifting heavy items at work and that the claimant's pain had increased as a result. It is not illogical to conclude the doctors did not put all details regarding the claimant's condition in their notes and, in our opinion, it is not required to establish a compensable claim.

Furthermore, the claimant consistently maintained that she did not suffer from back pain between 1997 and 2002. If she suffered from chronic severe back pain on a daily basis, it is unlikely she would wait five years to seek medical attention. It is also not logical that the employer would not have knowledge the claimant suffered from back pain on a continual and daily basis, given her job setting.

The respondent also argues that the claimant's delay in seeking treatment is indicative that she did not suffer an injury related to her work. We note that while the claimant did not initially seek treatment, she testified she treated the condition with over-the-counter remedies first. The testimony by Agnew that he was aware the claimant injured her back around April 2002 is in direct contradiction with the employer's claim. Agnew testified that in April 2002 he saw the claimant rubbing her back and that she indicated she had, "pulled her back." Agnew testified he assumed she pulled her back while working and went on to offer to order her a back brace. Agnew further testified he had no knowledge the claimant had previous back problems. Agnew also admitted that he did not

report the injury as required by policy and that he was aware he violated policy by failing to do so.

In our opinion, Agnew's testimony supports a finding that the claimant did not suffer from back pain between 1997 and 2002 and confirms the claimant's testimony regarding the time of her injury. It also substantiates the claimant's testimony that she injured her back at work and that she reported the injury to the employer in a timely manner.

The claimant's testimony is further bolstered by Newton's testimony regarding his dealings with the claimant regarding her back. Newton testified that he had no knowledge of the claimant's inability to make deliveries until late September 2002 when the claimant told him she could not make a delivery because she had back pain and was on medication. Newton also denied the claimant told him of any specific incidents causing injury to her back. However, Newton also testified that he was aware the claimant was going to the doctor for her back prior to her informing him she was on medication and admitted witnessing the claimant rubbing her back as though in pain.

In contrast to Newton's inconsistent

testimony, the claimant testified that she told Newton of her back problems around June or July of 2002 and indicated she told him she did not want to make deliveries. The claimant also said that in September 2002 she told Newton of an incident where she felt pain after making a delivery and lifting a rotar. The claimant also said Newton asked for a doctor's excuse because other employees were complaining that he was giving her special treatment.

If Newton had knowledge the claimant had back problems and was seeking treatment for those problems, it is unlikely he would allow her to continue working and lifting heavy items on a daily basis. As such, the claimant's testimony that Newton was aware she was going to the doctor but made an exception with regard to her delivery duties is more plausible than Newton's. When considered in conjunction with Agnew's corroborating testimony it is clear the claimant's testimony should be preferred over Newton's. Accordingly we find that the claimant sustained a compensable injury in April 2002.

We further find that the claimant's injury in September 2002 was a recurrence. In Maverick Transp.

V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

> An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998). The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening

cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

The claimant's symptoms from both the April and September 2002 injuries were virtually identical and consisted of general low back pain and of shooting pain in her right leg. On August 26, 2002, the claimant indicated that she suffered from back pain and that it seemed to "shoot down her right leg". This was reiterated on December 16, 2002, when Dr. Welsh noted the claimant had recurrent back pain and that the pain traveled down her right leg. Likewise, the record seems to indicate that the claimant suffered from ongoing pain and received periodic treatment for her low back pain between August and September 2002,

indicating her condition from April 2002 never resolved. As such, we find her injury in September 2002 was a recurrence.

In advance of the previous hearing, the respondent asserted a notice defense. The employer did not specify the reason for its assertion; however, the evidence is indicative that the claimant did, in fact, report her injuries immediately after they occurred. Arkansas Code Ann. §11-9-701(a)(1) provides,

> ”Unless an injury either renders the employee physically or mentally unable to do so, or is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.”

In this instance, the claimant testified she reported her injury in April 2002 the same day the injury occurred. This is corroborated by Agnew’s own admission that he saw the claimant rubbing her back, knew she had injured it, and assumed it was due to

work. Despite this knowledge, Agnew admits he violated company policy and did not complete an accident form or attempt to report the claimant's injury.

The doctor's notes do not show any substantial change in the claimant's condition or complaints from April to September 2002 indicating the claimant's "incident" in September 2002 was a recurrence of the previous injury. However, it is apparent that the claimant reported the incident in September in a timely manner as well. The claimant testified she told Newton of the incident the day it occurred and for the reasons discussed above, her testimony is more credible than Newton's. Therefore, the claimant reported her injury in a timely manner and the notice defense is not valid.

The claimant is seeking temporary total disability benefits from October 11, 2002 through May 12, 2004. The evidence indicates the claimant remained in her healing period and was unable to work during that time; therefore, she is entitled to the requested temporary total disability benefits.

Temporary total disability for unscheduled injuries is that period within the healing period in

which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The respondent argues that the claimant's doctor instructed her that her healing period would be determined by whether she stopped smoking. The respondent does not appear to be contesting that the claimant was unable to return to work during the aforementioned period and the medical records clearly indicate the claimant was receiving treatment and not released to return to work during that time period, which indicates the claimant remained in her healing period and was unable to work.

With regard to the allegation the claimant unnecessarily prolonged her healing period by smoking, the employer does not provide any authority to support its assertion that her failure to quit smoking should necessitate her failing to receive benefits.

Additionally, there is no convincing evidence indicating how smoking would cause a shorter healing period. On January 16, 2003, Dr. Welsh indicated six weeks would be a normal time period for a healing period if the claimant quit smoking. Dr. Welsh advised the claimant to quit smoking prior to January of 2003 and there are notes throughout the record indicating that the claimant was attempting to quit smoking and smoking less, indicating the claimant was not purposefully drawing out her healing period.

Furthermore, Dr. Welsh provided no explanation as to why the claimant's smoking would allow her to recover more quickly from a condition that did not require surgery. Specifically, Dr. Walsh's notes from February 17, 2003, indicate the claimant had not been smoking for over two weeks. A doctor's note from March 17, 2003 indicates the claimant still was not smoking. Dr. Walsh's notes indicate the normal healing period without smoking would be six weeks. However, the doctor's notes indicate the claimant stopped smoking for a period of at least six weeks and stayed in her healing period. Therefore, the notes reveal that Dr. Welsh's estimate regarding the impact

of smoking on the claimant's healing period was inaccurate. The notes also cast doubt on the premise that the claimant's smoking prevented her from healing. Since the evidence indicates that the claimant remained in her healing period and was unable to work during the time period in question, the claimant should be awarded temporary total disability benefits for the entire time period in question.

Ultimately, we find the claimant suffered from a compensable injury in April 2002 and a recurrence of that injury in September 2002. While the claimant had an alleged pre-existing back condition, as noted by the Court of Appeals, there is no medical evidence to support that finding. Furthermore, even if there were a condition of unknown nature, there is no evidence indicating that her diagnosis as of 2002 was solely due to that pre-existing condition. The claimant's testimony reveals that she had surgery in 1997 and that she did not suffer from subsequent back pain again until she lifted a part in April 2002. The claimant and the respondent's own witness, Agnew testified in April 2002 the claimant reported she, "pulled her back" indicating the claimant did, in fact,

suffer from an injury and report it. Agnew denied having knowledge of any prior injuries to the claimant’s back and, given the nature of her job, it is unlikely he would have been aware of the problem it existed. As such, one can only conclude that the claimant’s onset of back pain was due to the specific incident in April where she was lifting a part while working and that she reported the injury to management immediately.

The claimant received continual periodic treatment from August 2002 to May 2004 and was not released to return to work until May 2004, indicating that she was unable to work and remained in her healing period during the entire time for which she is requesting benefits. The claimant smoked during her healing period; however, the evidence does not support a conclusion that smoking prolonged the claimant’s healing period or that she willfully failed to quit smoking in order to prevent being able to return to work. Therefore, the claimant should be entitled to temporary total disability benefits for the time period of October 11, 2002 to May 12, 2004. Therefore, we affirm the decision of the Administrative Law Judge.

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 (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's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury in April of 2002 and in September of 2002. 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 initially sought medical treatment from Dr. Welsh on August 26, 2002. I would note that this is approximately 4 months after the claimant alleged that she had the first incident involving her back. Dr. Welsh reflected a history of the claimant's problems:

> This is 37-year old female here with lower back pain that's been going on daily for years. Really since she was about 16 it started off as a kind of popping or gristly feeling in her lower back, which she could hear in her ears, but over the years she's been treated at Navy facilities and they didn't do much for her. She says since doing a lot of lifting at work and a lot of driving a truck she's noticed the pain getting worse and now it seems to shoot down her right leg at times. Its been getting particularly bad over the past several weeks.

Doctor Welsh’s records fail to contain any complaint by the claimant of sustaining an injury at work in April of 2002, nor did he note that the back pain that the claimant experienced for years was completely ameliorated by a DNC and hysterectomy in 1997, as the claimant contends. Dr. Welsh’s notes indicated that the claimant’s office visit was to “get established with a doctor.” Her complaint was low back pain that had bothered her for years and it seemed to be worse since last July or early August. There was nothing contained in Dr. Welsh’s notes or dictation lending support to the claimant’s claim that she initially sought care from Dr. Welsh as a result of a back injury that she experienced in April of 2002.

Dr. Welsh’s notes also do not contain a second injury that the claimant purportedly had in September of 2002. It was not until January of 2003 that the claimant related to Dr. Welsh that lifting heavy items from her truck bed produced back pain.

The claimant also sought treatment from Dr. Bruce Robbins. She gave Dr. Robbins the same history that she had been plagued for years with lumbar problems and sciatic pain. She advised Dr. Robbins that

she had had back pain for 22 years, but she did mention the hysterectomy to Dr. Robbins. However, she did not tell him that it cured her back pain. The claimant was also evaluated by Dr. Asa Crowe on June 17, 2003. The claimant reported to Dr. Crowe that she had had back pain for a long period of time.

In my opinion, a review of the record demonstrates that the claimant cannot prove by a preponderance of the evidence that she sustained a compensable injury. The medical records of Dr. Welsh and Dr. Robbins both indicate that the claimant had persistent back problems for a period of time of at least 22 years prior to her seeking treatment from them. The only history the claimant gave of any incident was to Dr. Talen Savu on September 18, 2003, which I would note is a year and a half and a year later than when the claimant's alleged injuries took place. She told Dr. Welsh in January of 2003 that lifting items from her truck produced back pain but did not report an injury. Dr. Robbins and Dr. Welsh's medical records are more contemporaneous with these alleged injuries. I give more value to the opinions of Drs. Welsh and Robbins and their histories. The

claimant contends that these doctors distorted her medical history of what she told them. However, it is hard to believe that both of those doctors would distort her medical records.

Therefore, after conducting a de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained compensable injuries in April and September of 2002. The claimant has pre-existing lumbar condition which has caused pain for approximately 22 years prior to her seeking any medical treatment and prior to her commencement of employment with the respondent employer. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner