

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501809

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| WILLIE BELL, EMPLOYEE | CLAIMANT |
| RAZORBACK CONCRETE CO., EMPLOYER | RESPONDENT |
| WAUSAU BUSINESS INS. CO., INSURANCE CARRIER | RESPONDENT |

OPINION FILED JANUARY 18, 2007

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

Claimant represented by the HONORABLE JOE M. ROGERS,
Attorney at Law, West Memphis, Arkansas.

Respondents represented by the HONORABLE MICHAEL R. MAYTON,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and
reversed in part.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed January 24, 2006. The administrative law
judge found that the claimant sustained an injury arising
out of and in the course of his employment. The
administrative law judge found that the claimant was
temporarily totally disabled "from approximately May 4,
2005, and continuing, exclusive of a one (1) month period

wherein he was employed, through the end of his healing period or returns to gainful employment." After reviewing the entire record *de novo*, the Full Commission affirms in part and reverses in part the opinion of the administrative law judge. The Full Commission finds that the claimant proved he sustained a compensable injury, for which he was entitled to reasonably necessary medical treatment. We find that the claimant did not prove he was entitled to temporary total disability compensation.

I. HISTORY

The record indicates that the claimant, Willie James Bell, Jr., reported falling in November 1996. Dr. Joseph Yao's impression in December 1996 included "Right knee pain/swelling. Possible ACL tear." An MRI of the claimant's right knee was taken in December 1996, with the following impression: "1) Fluid in the joint. 2) Suspect tear anterior cruciate ligament and tear of the lateral meniscus." Dr. Yao noted after reviewing the MRI, "ACL not well seen, possibly torn. Horizontal cleavage defect throughout lateral meniscus from anterior to posterior. Moderate effusion."

Dr. Yao operated on the claimant in December 1996: "Right knee arthroscopy, partial lateral meniscectomy,

debrided anterior cruciate ligament stump." Dr. Yao's preoperative and postoperative diagnosis was "Right knee lateral meniscus tear, anterior cruciate ligament tear."

Dr. Yao noted the following impression in April 1997: "Lateral right knee pain, swelling, probably due to residual lateral femoral condyle chondromalacia seen at arthroscopy. This was due to abrasion by the unstable lateral meniscus tear."

The claimant continued to follow up with Dr. Yao for right knee pain. Dr. Yao noted in July 1997 that the claimant's right knee had popped either while walking or jumping playing volleyball. Dr. Yao's impression was "Right knee strain." Dr. Yao's impression in August 1997 was "Right knee anterior laxity." After the claimant reported twisting his knee in October 1997, Dr. Yao's impression was "Sprain right knee."

In July 1998, the claimant reported right knee pain with swelling and popping. Dr. Yao's impression was "Right knee Sx probably due to ACL laxity with anterior instability."

The claimant returned to Dr. Yao on July 23, 1998: "7/22/98 sitting in passenger side of vehicle in his yard while working on a car stereo. Another car lost brakes,

pulled into his yard, rear ending his car at about 25 MPH. His right anterior knee struck the dashboard. Constant anterior knee pain. Pinching feeling anterior knee when kneeling. Pain when walking." Dr. Yao's impression was "Contusion anterior right knee."

The claimant contacted Dr. Yao in September 1998: "He said that he slipped on peas in the back of an 18 wheeler trailer ... Right knee popped. Knee began swelling today. Diffuse pain." Dr. Yao's subsequent impression was "Right knee anterior laxity." Dr. Yao planned an MRI to help determine if the claimant had sustained a new injury. An MRI of the claimant's right knee was thus taken in September 1998, with the following impression: "Previous tear or surgery of the anterior cruciate ligament and the anterior medial meniscus. There is a complex signal involving the lateral meniscus and the lateral collateral ligament suggesting trauma with tear and there is fluid in the joint." Dr. Yao suggested "arthroscopy, partial lateral meniscectomy. ACL recon. could be done at same time."

Dr. Yao reported in October 1998:

Mr. Willie Bell underwent 9/22/98 right knee MRI. This demonstrated thickening of the lateral collateral ligament consistent with an acute sprain. He also has a horizontal cleavage defect in the anterior horn of his lateral meniscus

consistent with a tear. Rotational or angular stresses to the knee could produce these injuries. His 9/22/98 right knee MRI also demonstrated his anterior cruciate ligament to be absent. The anterior cruciate ligament injury is old and was confirmed to have been torn at arthroscopy on 12/20/96.

Dr. Yao noted in November 1998, "The 7/22/98 auto accident is not responsible for his right knee anterior cruciate ligament tear and the need for its reconstruction. The anterior cruciate ligament was torn prior to the 7/22/98 injury."

Dr. Yao noted in June 1999, "Saw patient 6-1-99 in ER with right knee pain and swelling following playing basketball 5-29-99. He feels right knee pain and swelling have decreased." Dr. Yao's impression was, "1. Right knee improved. Anterior laxity."

The claimant's testimony indicated that he became a full-time employee for Razorback Concrete Company in July 2004, and that his work involved operating a front-end loader. The parties stipulated that the employment relationship existed on December 28, 2004. The claimant testified, "as I rushed up on the loader to get into my seat, that's when my feet, my right leg is turned. At the same time while I'm pivoting my right leg to get around the tool box is when I struck the tool box at the corner to get

into the seat. Later on that day, I let Chad know that I had injured, well, I noted the swelling. I noticed the swelling and I let Chad know."

Randy Chandler, plant manager for the respondent-employer, testified for the respondents:

A. At some point before the initial emergency room visit on January the 17th, Mr. Bell had asked me about our health insurance, because he mentioned that he needed to go get water drained off his knee....And I told him it would cover it, but he needed to keep in mind that we had a thousand dollar deductible....

Q. Did he mention to you at that time when he was telling you about that that he had hit his knee at work or did he tell you what the problem was at that point?

A. He had mentioned it to me, but it was after telling me that he needed the water pulled off of his knee, and I'm not exactly sure how long after that. I mean, it could have been a week; could have been a week and a half. But he did mention to me hitting the tool box when he climbed on the loader.

The claimant sought emergency treatment on January 17, 2005. The claimant complained of an injury to his right knee, onset " 3 wks ago." It was observed at that time, "Had arthroscopy R knee 8-9 yrs ago - hit it @ work now it is swollen painful." A physical examination of the claimant's knee revealed "swelling." X-ray showed "degenerative changes of the right knee."

It was indicated that the claimant could return to restricted work on January 17, 2005.

The claimant gave the following history to Dr. Yao on January 18, 2005: "Climbing onto front end loader, right knee infrapatellar area struck tool box. States no problems with right knee postop, had been doing well without any pain until injury on 12-28-04." Dr. Yao's physical examination of the claimant's right knee showed anterior lateral warmth, swelling, and effusion. Dr. Yao assessed "Contusion right knee." Dr. Yao noted that the claimant was on sick leave from January 11, 2005 to January 25, 2005.

On January 26, 2005, Dr. Yao continued to report anterior lateral warmth, swelling, and effusion in the claimant's right knee. Dr. Yao assessed "Contusion right knee, possible lateral meniscus tear." Dr. Yao returned the claimant to light work duty with restrictions of "Primarily sitting work with very limited walking and standing." The claimant's testimony indicated that he remained on light duty at that time.

An MRI of the claimant's right knee was taken on February 10, 2005, with the following impression:

- 1) Degenerative changes of the knee.
- 2) Joint effusion.

3) Question of tear of the posterior horn of the medial meniscus.

4) Localized area of increased signal noted at the posterior aspect of the articular surface of the knee due to a small area of osteochondritis dissecans. In addition, there is also a small area of increased signal noted at the posterior aspect of the tibial plateau which may represent a small area of osteochondritis dissecans.

On February 14, 2005, Dr. Yao's palpation of the claimant's right knee revealed anterior lateral warmth, swelling, and effusion. Dr. Yao assessed contusion right knee, possible medial meniscus tear, degenerative area in the mid-third lateral meniscus, and osteoarthritis of the right knee. Dr. Yao recommended return to work at light duty, with restrictions of primarily sitting work with very limited walking and standing. The claimant testified that his light duties included answering the phone and helping with paperwork.

Dr. Yao reported on February 15, 2005:

I received a message asking me how Mr. Bell's 2/10/05 right knee MRI findings relate to his 12/28/04 work injury where his anterior right knee struck a tool box as he was climbing onto a front end loader. The absent anterior cruciate ligament, bone spurs, and posterior tibia cyst are all pre-existing to the work injury. The lateral meniscus abnormality is probably also pre-existing since it in (sic) the area of a previous large tear.

The medial meniscus defect is new and was not present on right knee MRI scans on 12/14/96 and

9/22/98 and it was not visible at the time of right knee arthroscopy on 12/20/96. It is impossible to determine exactly when the medial meniscus defect occurred. It would be unusual to tear a meniscus by striking the anterior aspect of the knee as the 12/28/04 injury was described. I did ask Mr. Bell specifically whether he had any problems with his right knee prior to the 12/28/04 injury. He stated that his right knee had been doing well without any pain until the 12/28/04 injury. He has had continued pain. As of 2/14/05, he indicated that his knee pain had not improved and that it was still bothering him.

Treatment options at this time can include continued nonoperative treatment including rest, continued ibuprofen and use of his knee brace. Nonsurgical treatment has not led to improvement thus far, about 1.5 months following his injury. Surgical treatment can include right knee arthroscopy. Partial medial meniscectomy can be done if a tear is found in the location of the MRI defect. I told Mr. Bell that he can expect to have residual right knee pain and swelling because of the accompanying osteoarthritis. He would like to have arthroscopy since he has not noted significant improvement (sic) with nonsurgical treatment.

The claimant testified that the respondent-carrier denied authorization for surgery, and that he was not able to obtain additional medical treatment after February 16, 2005.

Dr. Yao signed the following note on February 18, 2005: "2-17-05 Willie phones request work status to return to regular duty. I spoke with Dr. Yao, he said OK to give WSR to return to regular duty." The claimant's testimony

indicated that he returned to full work duty on or about February 18, 2005.

On April 22, 2005, the claimant testified, he drove to West Memphis in order to withdraw money from a credit union so that he could pay a fine in Blytheville:

Q. And on your way back, what happened to you?

A. On the way back, coming, I think that would be the 63 exit, coming into Blytheville, they had this road block, you know, checking for ID, drivers license, I mean drivers license and insurance. And as I'm going through there, they stopped me. I give them my drivers license. And my insurance wasn't up to date, so they called it in and they found that I had a warrant at the county. I've been paying, was paying restitution, restitution fine for working and drawing unemployment....

Q. And you had gotten behind on that?

A. Yes, sir.

Q. And so as a result of that, did you get put in jail?

A. Yes, sir.

Q. And how long did you stay in jail?

A. Twelve days.

Q. All right. And did you call during the time you were in jail to see if you still had your job, if you could get back out?

A. Yes, sir.

Q. And did you talk to Randy?

A. Yes, sir.

Q. And it was your understanding that your job would be there for you if you could get back -

A. Yes, sir.

Q. - in just a short period of time?

A. Yes, sir.

Q. Did you get out of jail? After how many days?

A. Twelve.

Q. All right. And did you go back to try to get your job?

A. Yes, sir.

Q. And were you able to get it?

A. No, sir.

Q. Now, how, what, had you been able to work any since then?

A. I worked at, went back to the temp service. I explained to her what happened and told her what my boss told me and my job was intact, just can't hold it for thirty days. I got out the twelfth day. I called them on the ninth day and I talked to him, and he said, "Son, get out, your job is still intact as of now." So I got out the twelfth day, went and talked to Randy, and Randy told me he couldn't no longer keep me on.

Q. So you then started trying to find work somewhere else?

A. Yes, sir.

Q. All right. And have you been able to find any work, or how much work have you done since then?

A. I think a month, maybe a month at City Electric....

Q. Okay, and you kept it for how long?

A. Maybe a month.

Q. And why could you not do the job anymore?

A. Because the swelling of my knee and the things that they needed me to use and the packer that you pack dirt down at the new school where they was pouring concrete at, and I was working as a laborer. And so when you're using this packer, you have to brace your body against it, and I had to use my knee. And I know ain't no way I could do that....

A pre-hearing order was filed on September 6, 2005.

The claimant contended that he injured his right knee while climbing onto the front-end loader on or about December 28, 2004. The claimant contended that he was entitled to temporary total disability compensation from on or about March 1, 2005 to an undetermined date. The claimant contended that he was entitled to reasonably necessary medical treatment.

The respondents contended that the claimant did not sustain a compensable injury to his knee. The respondents contended that "the claimant's current problems with his knee and need for treatment, if any, preexisted his employment for the respondent-employer, and the respondents are not responsible for any benefits as a result of his knee

problems." The respondents contended that the claimant was "no longer employed by the respondent-employer. The claimant was working and stopped showing up for work. The respondent-employer learned that he was incarcerated, and he had to be replaced."

The administrative law judge scheduled a hearing on the issues of compensability, temporary total disability compensation, and reasonably necessary medical treatment.

A hearing was held on November 17, 2005. At that time, the respondents stipulated that the claimant "was off work from January the 19th through the 27th of January, came back to work on January the 28th with light duty, worked light duty and then got back on full duty around March the 2nd, 2005, and continued to work out at the plant through April the 22nd, 2005. That was on a Friday, and started actually started part time on April the 25th, the next Monday."

The respondents contended that "Dr. Yao released the claimant back to full duty work on February the 17th, 2005, and that even if it is compensable, he would not be entitled to any temporary disability benefits after that date, since he had been released to full duty employment."

Randy Chandler testified with regard to the claimant's arrest:

A. We had a scanner on in my pickup when I was, we were out in the shop. And I thought that I heard his name on there. And then I can't remember which one, but one of the female friends of his called up there that afternoon to let us know that Mr. Bell was incarcerated....And I can't remember if it was Monday or Tuesday, Mr. Bell called me, asking me about his job, would I hold his job for him. And I told him I'll do all I can do, but it's above me. I've got an area manager that I have to answer to. His name is Tony Beard. But if it's anything I can do to keep it, I will.

Q. Did you try to help him keep his job?

A. I honestly did.

Q. Okay. How did that all play out? He stayed in jail several days. Did you all talk some more?

A. We talked, I believe it was on that following Friday, Willie and I did. And I told him that I was going to do my best to keep his job, but he needed to hurry up and get out. Well, when Monday rolled around, when Tony called me, he asked me if Willie was there, and I said no, sir. He said, well, we're going to have to do something different. So that's when he decided to let Mr. Bell go.

Q. Okay, and then I think Mr. Bell indicated, he did, once he did get out, after twelve days or so, did he come back in and did you have to tell him he lost his job?

A. He sure did. And I had to let him know that he was going to be replaced. Because in that loader position, well, the loader position is kind of like the dispatcher. They are key people....So if that position cannot, the person can't be in that position, you need to put somebody in it....So Tony made up his mind, after a full week, that he hadn't gotten back out, that he was going to have to hire somebody else.

The administrative law judge found, in pertinent part:

4. On December 28, 2004, the claimant sustained an injury to his right knee arising out of and in the course of his employment.

5. The claimant was temporarily totally disabled and within his healing period from the December 28, 2004, scheduled right knee injury, and not working from approximately May 4, 2005, and continuing, exclusive of a one (1) month period wherein he was employed, through the end of his healing period or returns to gainful employment.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the claimant's right knee injury of December 28, 2004.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

The administrative law judge found in the present matter, "On December 28, 2004, the claimant sustained an injury to his right knee arising out of and in the course of his employment." The Full Commission affirms the administrative law judge. We find that the claimant proved he sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). The respondents assert that the claimant's condition was pre-existing and not the result of a workplace accident. The record clearly does show a host of chronic and acute problems involving the claimant's right knee. From November 1996 until June 1999, the record details a near-constant series of medical treatment and mishaps involving the claimant's knee.

However, there was generally no treatment of record for the claimant's right knee after June 1999. The claimant was driving a front-end loader for the respondents in December 2004. The claimant credibly testified that he injured his knee as the result of hitting a toolbox on the loader. There were no eyewitnesses to the accident, but the plant manager confirmed that the claimant at some point did report a workplace injury. The record shows a large number of objective medical findings after the accident. On several

occasions, Dr. Yao examined and reported objective findings of warmth, swelling, and effusion in the claimant's knee.

The Full Commission finds that the claimant proved he sustained an accidental injury to his right knee on December 28, 2004. The claimant proved that the accidental injury caused physical harm to his body, arose out of and in the course of employment, and required medical services. The accidental injury was caused by a specific incident identifiable by time and place of occurrence. The claimant established a compensable injury by medical evidence supported by objective findings.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the Full Commission finds that the claimant proved he was entitled to a right knee arthroscopy as recommended by Dr. Yao. Dr. Yao noted on February 15, 2005 that the claimant had a "new" medial meniscus defect which diagnostic testing had not revealed prior to the December 2004 accidental injury. Dr. Yao also stated, "It is impossible to determine exactly when the medial meniscus defect occurred." The respondents therefore argue that Dr. Yao's opinion was not "stated within a reasonable degree of medical certainty." See, Ark. Code Ann. §11-9-102(16)(B). Where a medical opinion is sufficiently clear to remove any reason for the trier of fact to have to guess at the cause of the injury, that opinion is stated within a reasonable degree of medical certainty. *Huffy Service First v. Ledbetter*, 76 Ark. App. 533, 69 S.W.3d 449 (2002), citing *Howell v. Scroll Tech.*, 343 Ark. 297, 35 S.W.3d 800 (2001). Expert opinions based on "could," "may," or "possibly" lack the definiteness required to prove the causal connection. *Frances v. Gaylord Container Corp.*, 341 Ark. 527, 20 S.W.3d 280 (2000).

The Full Commission is unable to determine that the language of Dr. Yao highlighted by the respondents removes Dr. Yao's opinion from the realm of reasonable medical

certainty. We note additional language from Dr. Yao's opinion, to wit: "He stated that his right knee had been doing well without any pain until the 12/28/04 injury. He has had continued pain. As of 2/14/05, he indicated that his knee pain had not improved and that it was still bothering him." The Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). In the present matter, the Full Commission finds that Dr. Yao's opinion is medically sound and entitled to significant probative weight. Based on Dr. Yao's February 15, 2005 opinion and the other evidence of record, we find that the claimant proved he was entitled to surgery as recommended by Dr. Yao. We note the claimant's testimony that he was unable to obtain additional medical treatment after February 16, 2005.

C. Temporary Disability

Finally, an employee with a scheduled injury is to receive compensation for temporary total disability during the healing period or until the employee returns to work, whichever occurs first. *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period

is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. *Id.* Whether an employee's healing period has ended is a factual determination to be made by the Commission. *Ketcher Roofing Co. v. Johnson*, 50 Ark. App. 63, 901 S.W.2d 25 (1995).

The administrative law judge found in the present matter, "The claimant was temporarily totally disabled and within his healing period from the December 28, 2004, scheduled right knee injury, and not working from approximately May 4, 2005, and continuing, exclusive of a one (1) month period wherein he was employed, through the end of his healing period or returns to gainful employment." The Full Commission reverses this finding.

The Full Commission has determined that the claimant sustained a compensable scheduled injury on December 28, 2004. Dr. Yao stated on January 26, 2005 that the claimant could return to light work duty. Dr. Yao again returned the claimant to light duty on February 14, 2005, and the

claimant testified that he was able to perform light work duty. On February 15, 2005, Dr. Yao opined that the claimant had sustained a new medial meniscus defect post-injury. Dr. Yao recommended surgery, but the claimant testified that the respondents denied surgery or other medical treatment after February 16, 2005. The Full Commission has determined *supra* that surgical treatment as recommended by Dr. Yao was reasonably necessary as a result of the claimant's compensable injury.

The claimant's testimony indicated that he returned to full work duty on or about February 18, 2005. The claimant was therefore not entitled to temporary total disability after that date. *See, Armstrong, supra*. The record indicates that the claimant worked until April 22, 2005. The claimant was then incarcerated as the result of an arrest warrant detected during a traffic stop. The claimant testified that he was in jail for 12 days. The Full Commission does not find that the respondents were obligated to hold open the claimant's job until he was released from jail. The claimant had previously returned to work for a little over two months, performing his regular duties. The claimant on appeal cites *Farmers Cooperative v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002) for the proposition that

he was entitled to continued temporary disability, because he "unsuccessfully attempted to return to the workforce." Nevertheless, we note the following language from *Biles*, citing *Pyles v. Triple F. Feeds of Texas*, 270 Ark. 729, 606 S.W.2d 146 (Ark. App. 1980): "If, during the period while the body is healing, the employee is unable to perform remunerative labor with reasonable consistency and without pain and discomfort, his temporary disability is deemed total."

We again note, however, that the instant claimant had returned to full duty and was performing remunerative labor before his arrest and incarceration beginning April 22, 2005. The claimant does not cite any authority holding that a respondent-employer is required to pay temporary disability when an employee has returned to remunerative labor but is subsequently absent from the workplace for reasons unrelated to a compensable injury. The Full Commission therefore reverses the administrative law judge's award of temporary total disability.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury. We find that the claimant proved he was entitled to reasonably necessary medical treatment

provided in connection with the compensable injury, including surgery recommended by Dr. Yao. Based on the record before us at this time, the Full Commission finds that the claimant did not prove he was entitled to temporary total disability compensation. For prevailing in part on appeal to the Full Commission, the claimant is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

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

DISSENTING OPINION

I respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits. However, I must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence

that he sustained a compensable injury and was entitled to medical treatment. In my opinion, the claimant has failed to meet his burden of proof.

The evidence demonstrates that prior to going to work for the respondent employer, the claimant had sustained countless injuries to his right knee. The claimant has degenerative changes in the form of osteoarthritis that has ravaged his knee since he severely injured it in late 1996. The claimant sustained a bump to his anterior aspect of his knee on December 28, 2004. However, the medical records do not prove that the claimant sustained a compensable injury in the course and scope of his employment with the respondent employer that was more than just a slight bump. In his letter dated February 15, 2005, the claimant's treating physician, Dr. Yao, could not state within a reasonable degree of medical certainty when the claimant's medial meniscus defect occurred. Specifically, Dr. Yao stated:

It is impossible to determine exactly when the medial meniscus defect occurred. It would be unusual to tear a meniscus by striking the anterior of the knee as the 12/28/04 injury was described.

In addition, Dr. Yao completed a Physician's Report regarding claimant's right knee on October 13, 2005. He also related at that time that he was unable to declare an exact cause of the claimant's right knee medial meniscus tear.

I acknowledge that the claimant is not required to prove his injury with a medical opinion stated within a reasonable degree of medical certainty. However, if a medical opinion is offered which, in this case it was, it must be stated with a reasonable degree of medical certainty. Francis v. Gaylord Container Corp. 341 Ark. 527, 533, 20 S.W.3d 280, 284 (2000). Moreover, the claimant must prove a causal connection. 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).

The medical opinion from Dr. Yao regarding causation is not favorable. The only evidence that the claimant has offered regarding the cause of his present medical condition is his own testimony. In my opinion, the claimant's credibility is suspect, at best. The claimant testified that he injured his right knee on November 14, 1996, while participating in a sporting activity. However, a review of Dr. Yao's December 20, 1996, operative note, indicates that the claimant "refractured distal right ulna while waxing floor 11/14/96."

Moreover, the reason the claimant was incarcerated was because he did not pay restitution for a fine he was assessed for working while drawing unemployment. It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are

within the exclusive province of the Commission. Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). Arkansas Code Annotated section 11-9-704(b)(6)(A) vests with the Commission the duty to "review the evidence" and if deemed advisable to "hear the parties, their representatives, and witnesses." The statute further requires the Commission to determine, "on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by preponderance of the evidence." A.C.A. § 11-9-704(c)(2). Thus, in determining that the Commission's authority and duty to conduct a de novo review of the entire record, including issues of credibility is constitutional, the Court of Appeals stated in Stiger v. State Tire Serv., 72 Ark. App. 250, 35 S.W.3d 335 (2000):

When the Commission reviews a cold record, demeanor is merely one factor to be considered in credibility determinations. Numerous other factors must be included in the Commission's analysis of a case and reaching its decision, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the

other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. The flexibility permitted the Commission adequately protects the claimant's right of due process of law.

Accordingly, when there are contradictions in the evidence, it is constitutionally within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. We are 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 we deem worthy of belief. Id.

It appears that the claimant has filed a workers' compensation claim for an injury previously that he sustained while undergoing an activity that was not covered under the Workers' Compensation law. It also appears that the claimant is doing the same thing again. Simply put, he is a serial claimant. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his right knee on December 28, 2004.

Because I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury, I find that he is not entitled to any temporary total disability benefits. Therefore I can concur in the majority's finding that he has failed to prove that he was entitled to temporary total disability benefits.

KAREN H. McKINNEY, Commissioner

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

CONCURRING AND DISSENTING OPINION

I respectfully concur, in part, and dissent, in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant has proved by a preponderance of the evidence that he sustained a compensable injury and is entitled to reasonably necessary medical treatment. However, I must respectfully dissent from the majority's finding that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits. In my opinion, the Claimant has met his burden of proving entitlement to temporary total disability benefits.

The Full Commission has determined that the Claimant sustained a compensable scheduled injury on December 28, 2004. Dr. Yao stated on January 26, 2005, that the Claimant could return to light duty work. Dr. Yao again returned the claimant to light duty on February 14, 2005, and the Claimant testified that he was able to perform light duty work. On February 15, 2005, Dr. Yao opined that the Claimant had sustained a new medial meniscus defect. Dr. Yoa recommended surgery, but the Claimant testified that the respondents denied surgery or other medical treatment after February 16, 2005. The Full Commission has determined supra that surgical treatment as recommended by Dr. Yao was reasonably necessary as a result of the Claimant's compensable injury.

The Claimant testified that during the time he was medically released to light duty work he was assigned the duties of answering the phone in the office and assisting the dispatcher with the paperwork. Claimant added that he was trained on how to do the paperwork. Unlike working on the front end loader, Claimant testified that while he was assigned light duty he did not work any overtime although he did work a forty-hour week, sometimes. Claimant testified that Dr. Yao directed him to use a brace for the right knee

and crutches. Claimant did not have a brace, however was allowed to use that of the brother of Randy Chandler, which he continues to wear. Claimant maintains that he actually used crutches and wore the knee brace while discharging light duty work for respondents. Claimant testified that his leg was still painful and the knee was swollen while he performed the assigned light duty work for respondents.

Claimant acknowledged that on February 17, 2005, he called Dr. Yao's office and requested to be released to return to full duty work. Claimant explained the afore:

Well, of course, getting behind and I wasn't getting any overtime by just sitting at the desk answering the phone. And I needed to be back on the yard, yet still in pain. The swelling was still there. So I figured if I could just tie something around my knee and make it numb, I can work with it. So.

Claimant noted that he had financial obligations and no other means of support. Claimant has four children and was being required to pay child support. Per his request Claimant was returned to full duty work by Dr. Yao, and did so from February 18, 2005, through April 22, 2005. Claimant testified that his leg remained painful during this period of time.

The testimony of the Claimant reflects that on the morning of April 22, 2005, while en route to West Memphis he got detained:

That morning I needed to go to West Memphis to pick up some money from the credit union. Razorback used the credit union if you wanted to save some money, put, I would have them take fifty dollars out of my check where I could have something to use in case of, you know, a time of emergency. So I asked the boss can I go to West Memphis to go and pick up this fifty dollars out of the credit union to come down here and pay on my fine.

* * *

On the way back, coming, I think that would be the 63 exit, coming into Blytheville, they had this road block, you know, checking for ID, drivers license, I mean drivers license and insurance. And as I'm going through there, they stopped me. I give them my drivers license. And my insurance wasn't up to date, so they called it in and they found that I had a warrant at the county. I've been paying, and paying restitution, restitution fine for working and drawing unemployment.

Claimant was incarcerated for twelve (12) days. During his incarceration Claimant testified that he called respondents in an effort to preserve his job. Claimant's testimony reflects that he was informed that the job would be held for a short period if he could get out of jail. Following his

release from jail Claimant returned to respondent, however the position had been filled.

After he was unable to return to the employment of respondents Claimant sought work elsewhere. Claimant testified that a few weeks after he was released from jail he worked approximately one month at City Electric. Claimant explained his reasons for leaving the job:

Because the swelling of my knee and the things that they needed me to use and the packer that you pack dirt down at the new school where they was pouring concrete at, and I was working as a laborer. And so when you're using this packer, you have to brace your body up against it, and I had to use my knee. And I know ain't no way I could do that.

Claimant asserts that given his past work history and the present status of his right knee, he is unable to find a job that he could perform.

Regarding his ability to perform regular job duties following his requested release to same from Dr. Yao, Claimant testified that while he continued to experience symptoms in the right knee he was able to do the work. Claimant explained:

Yes, sir, as long as I was sitting still and I'm using, steady using the right leg to work the machine.

And when the day is about over and when
I get up, limping, and the pain is still
there.

Claimant acknowledged that had he not encountered the road block on April 22, 2005, which resulted in the loss of his job he would have continued performing assigned job duties for respondents. Claimant's testimony reflects that he would have continued doing the front end loader job for the respondents as long as he could. Claimant noted that even while he was in jail he kept the right knee wrapped up.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. Id. The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. V. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the

healing period has ended. Crabtree, supra. The question of when the healing period has ended is a factual determination for the Commission.

The healing period is defined as that period for healing of the injury that continues until the employee is as far restored as the permanent character of the injury will permit. Arkansas Highway & Transp. Dept. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993). If the underlying condition causing the disability has become more stable and if nothing further in the way of treatment will improve that condition, the healing period has ended. The persistence of pain may not in and of itself prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Id.; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Conversely, the healing period has not ended so long as treatment is administered for the healing and alleviation of the condition. McWilliams, supra; J.A. Riggs Tractor v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990). The determination of when the healing period ends is a factual determination to be made by the Commission. McWilliams, Parker, supra.

In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that she remains within her healing period; and (2) that she has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

Although it is true that the Workers' Compensation Act must be strictly construed, Ark. Code Ann. §11-9-704(c) (3) (Repl. 1996), even a strict construction of statutes requires that they be construed in their entirety, with each subsection relating to the same subject to be read in a harmonious manner. Maxey v. Tyson Foods, Inc., 66 Ark. App. 301, 991 S.W.2d 624 (1999). Furthermore, construction of the Workers' Compensation Act must be done in light of the express purpose of that legislation, which is "to pay timely temporary and permanent disability benefits to all legitimately injured workers who suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force." Ark. Code Ann. §11-9-101 (b) (Repl. 1996). In light of the legislative purpose, it would be ludicrous to assume that the legislature sought to penalize workers who sustain

scheduled injuries, or to deter such workers from making a good-faith effort to return to the work force following such an injury. Section 11-9-512(a)'s brief reference to temporary disability benefits merely establishes the right of a worker who has sustained a scheduled injury to such benefits, and was clearly not intended to bar additional temporary total disability benefits following an unsuccessful attempt to return to the workforce. See Roberson v. Waste Management, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

_____In my opinion, Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits from approximately May 4, 2005, and continuing, exclusive of a one (1) month period wherein he was employed, through the end of his healing period or returns to gainful employment.

_____It has been found that the Claimant sustained a compensable right knee injury on December 28, 2004.

Claimant continued to work regular duty until his visit to the emergency room on January 17, 2005. Claimant was seen by Dr. Yao on January 18, 2005 and was taken off of work from January 19, 2005, through January 27, 2005. Claimant returned to light duty work on January 28, 2005 and

continued same until he requested a release to full duty from Dr. Yao on February 17, 2005. Claimant worked full duty from February 18, 2005 until the date of his incarceration on April 22, 2005. Following his release from jail Claimant was informed that he no longer had a position with the respondent-employer, so Claimant sought work elsewhere. After his release for jail, Claimant worked for approximately one month at City Electric. Claimant left that job because of his inability to perform the job duties as a result of his compensable injury.

Although Claimant was released at his request to return to his regular job duties on February 18, 2005, the evidence preponderates that he remained within his healing period relative to the December 28, 2004, compensable right knee injury. Claimant continued to experience symptoms relative to his right knee following his return to regular duties on February 19, 2005, and to apply self-help measures to address same to include borrowed use of a knee brace and wrapping the knee. Claimant was denied access to medical treatment by respondent-carrier following his February 14, 2005, visit to Dr. Yao.

_____ Claimant has made an effort to stay employed even though he was still suffering from symptoms relative to his

compensable injury. Claimant was within his healing period and not working from the date of his release from jail until he was able to secure employment at City Electric. At the time of the afore Claimant had not reached maximum medical improvement/end of his healing period.

In my opinion, the evidence preponderates that Claimant was unable to continue his employment with City Electric due to residuals of his compensable injury. Claimant has not worked beyond his approximate one month effort with City Electric and has remained within his healing period. The evidence preponderates that the Claimant remains within his healing period relative to his December 28, 2004, compensable scheduled right knee injury and was not returned to work for the three weeks following his release from jail on or about May 4, 2005. As previously noted, while Claimant did obtain a job with City Electric, the claimant was unable to continue in the employment for more that one month due to residuals of the compensable injury.

Pursuant to Ark. Code Ann. §11-9-521(a), and in accordance with Wheeler, it is my opinion that the Claimant has sustained his burden of proof by a preponderance of the evidence that he is entitled to temporary total disability

benefits for the period that he was unable to work and within his healing period subsequent to May 4, 2005.

For the forgoing reasons, I concur with the majority's finding that the Claimant has proved by a preponderance of the evidence that he sustained a compensable injury and is entitled to reasonably necessary medical treatment, and respectfully dissent from the decision to deny temporary total disability benefits.

PHILIP A. HOOD, Commissioner