

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600453

MELINDA MARTIN, EMPLOYEE	CLAIMANT
FOOD GIANT SUPERMARKETS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 1, 2007

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

Claimant represented by the HONORABLE GARLAND L. WATLINGTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE GUY A. WADE, 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 January 12, 2007. 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 November 5, 2004, the relationship of employee-employer-carrier existed among the parties.
3. On November 5, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$139.00, for temporary total/permanent partial disability.

4. On November 5, 2004, the claimant sustained an injury to her low back arising out of and in the course of her employment with the respondents.

5. The claimant was temporarily totally disabled fro (sic) the period commencing October 9, 2006, and continuing until such time as she reach (sic) the end of her healing period or has been released and returned to appropriate work.

6. The respondent shall pay reasonable hospital and medical expenses arising out of the claimant's injury of November 5, 2004. Pursuant to the provisions of Ark. Code Ann. §11-9-411(a), respondents may claim credit for sums paid on behalf of the claimant by health care provider.

7. The respondents have controverted this claim in its entirety.

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 January 12, 2007, 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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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on November 5, 2004, for which she is entitled to temporary total disability benefits from October 9, 2006, through the end of the claimant's healing period and finding that all the medical treatment the claimant received as a result of this injury is reasonable and necessary medical treatment in connection with the claimant's compensable injury. Based upon my de novo review of the entire record, I find that the decision of the Administrative Law Judge must be affirmed in part and reversed in part.

The claimant began working for respondent employer in July of 2004. Claimant contends that on November 5, 2004, she sustained a slip and fall accident which ultimately resulted in surgery in October of 2006 for which she is entitled to medical and indemnity benefits. Conversely, respondents contend that the claimant's surgery and disability are the result of a pre-existing condition and that any need for surgery or period of disability did not arise out of her employment.

Although the claimant initially testified that before going to work for respondent employer she did not

have any back problems aside from menstrual cramps and problems that developed after she had a tubal ligation, the medical records introduced by respondents reveal a long standing history of lower back problems for the claimant. The claimant first sought medical treatment for lower back pain on November 29, 1999. At that time the claimant was diagnosed with a L-S sprain and prescribed pain medication and muscle relaxers. The claimant was again seen at the Northeast Arkansas Clinic on December 22, 2003, with complaints of back pain times 4 days. The claimant provided a history at that time of "very sharply tempered, down, poor, dep. Has 5 m/o baby Had post part. dep = 1<sup>st</sup> child Hurt back picking up." The claimant was diagnosed with a post partum depression and back strain for which she was prescribed pain medication. The claimant returned to the clinic on April 23, 2004, with regard to her depression. On June 24, 2004, the claimant again returned to the clinic in regard to her depression, but she also complained of back pain, leg cramps, and discomfort.

The claimant did not seek any medical treatment for her alleged injury of November 5, 2004, until ten days later when she returned to the Northeast Arkansas Clinic with the same complaints she was seen for on June 24, 2004, namely lower back pain and leg

cramps. However at this time the claimant also complained of no sleep, weak, and no energy. Although the claimant advised the nurse that she slipped on a wet floor on November 5, 2004, the actual history recorded in the physician's handwriting was of pain times 2 weeks which is worse during her menstrual cycle.

Interestingly, the physician indicated that the claimant was, in fact, on her menstrual period at the time of this office visit. When the claimant returned to the clinic on November 23, 2004, with continued complaints of pain from her November 15, 2004, visit, x-rays were taken which revealed straightening of the lower spine. The claimant was diagnosed with a L-S strain for which she was prescribed pain medication and muscle relaxers.

The claimant's injury occurred after July 1, 1993, thus, this claim is governed by the provisions of Act 796 of 1993. In order to establish compensability of an injury, a claimant must satisfy all the requirements set forth in Ark. Code Ann. § 11-9-102 as amended by Act 796. Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). When a claimant alleges that he sustained an injury as a result of a specific incident, identifiable by time and place of occurrence, he must prove by a preponderance of the evidence (1) the injury arose out of and in the course

of his employment; and (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death. See Ark. Code Ann. § 11-9-102(4) (A) (i) and § 11-9-102(4) (E) (i) (Repl. 2002). He must also prove (3) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. See Ark. Code Ann. § 11-9-102(4) (A) (i). Moreover, the claimant must establish (4) that the compensable injury is supported by 'objective findings' as defined in § 11-9-102(16)." Ark. Code Ann. § 11-9-102(4) (D); Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 31 Ark. App. 804, 20 S.W.3d 900 (2000). If the claimant fails to establish by a preponderance of the credible evidence any of the requirements for establishing the compensability of the injury, he fails to establish the compensability of the claim, and compensation must be denied. Jerry D. Reed, supra.

It is undisputed that the claimant suffered from back pain prior to her slip and fall incident at work. In fact, the claimant sought treatment for this back pain at least two times in the six months preceding her work related accident. Although the claimant

contends that this pre-existing back pain was related to her menstrual cycle, there is nothing in the record aside from the claimant's own self-serving testimony to support this allegation. However, no matter how sincere a claimant's beliefs are that a medical problem is related to a compensable injury, such belief is not sufficient to meet the claimant's burden of proof.

Killenberger v. Big D Liquor, Full Commission Opinion August 29, 1995 (E408248 & E408249). A review of the medical records introduced into evidence do not relate the claimant's back pain in December 2003 and June 2004 to her female problems. Moreover, when questioned about the pain she had both prior to and subsequent to the slip and fall incident, the claimant testified:

When both of them was going on, I could not distinguish the pain from either one of them. I didn't know that between the menstrual problem and the back pain, I couldn't distinguish the part.

The claimant underwent a hysterectomy in June of 2005. The medical records from the claimant's treating surgeon were not introduced into evidence. Thus, to find that the claimant's back pain and leg cramps which she experienced prior to her slip and fall and which were diagnosed as a L-S sprain were in fact related to her female reproductive organs would require

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).

The 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 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).

When reviewing the medical records, I find it significant that the claimant did not seek any medical treatment for her slip and fall incident until ten days later and at a time when she was menstruating. In my opinion, this demonstrates that the pain suffered by the claimant after her work related incident was no different than the pain she experienced prior to her accident. In fact, the claimant had already made arrangement to undergo a hysterectomy to address her pain issues before she ever fell at work. It is now known that the hysterectomy did not alleviate the claimant's complaints of back pain. Since the claimant's gynecology records were not submitted into evidence, we cannot determine why the claimant's gynecologist assumed that the claimant's back pain and leg cramps were related to her reproductive organs. It is just as likely that the claimant's back pain and leg cramps were the result of degenerative disc disease and a bulging disc as reflected in her MRI performed on October 21, 2005, as opposed to her female problems. Unfortunately, assumptions were made and no MRI was taken until after the claimant's pain persisted following her hysterectomy. Merely because the claimant was diagnosed

with a bulging disc one year after her slip and fall incident does not mean that the bulging disc must have resulted from the slip and fall. On the contrary, when the record as a whole is reviewed, it cannot be overlooked that the claimant experienced the exact same complaints of back and lower leg pain, both prior to and subsequent to her slip and fall accident. The claimant even admitted that she could not distinguish between the two.

Accordingly, based upon my de novo review of the entire record, I find that while the claimant sustained a compensable injury on November 5, 2004, when she slipped and fell at work, which is supported by the objective medical finding of straightening of the lumbar spine as revealed through x-rays taken on November 23, 2003, this injury was only a minor aggravation of her pre-existing, underlying degenerative disc disease. I further find that the claimant has failed to prove by a preponderance of the evidence that her continued need for medical treatment after November 24, 2004, including but not limited to a right L5 decompressive foraminotomy is reasonable and necessary in connection with this minor aggravation. The credible evidence of record demonstrates that the claimant experienced both lower back and lower leg pain prior to her work related fall

for which is was seeking active medical treatment. As such, the evidence fails to preponderate in favor of finding that the claimant's need for surgery is related to her work related incident. In reaching this finding I am mindful of the April 5, 2006, letter from Dr. Biggerstaff in which he opines that the claimant's need for treatment is related to her work related incident. I do not place great weight upon Dr. Biggerstaff's letter as there is no evidence that he took into consideration the claimant's complete medical history prior to rendering his opinion.

Therefore, for those reasons set forth herein, I find that the claimant has failed to prove by a preponderance of the evidence that her need for treatment and subsequent period of disability are causally related to her compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner