

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F611959

PATRICIA BALLI,  
EMPLOYEE

CLAIMANT

MCKEE FOODS CORPORATION,  
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 27, 2008

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

Claimant represented by the HONORABLE EVELYN E. BROOKS,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS L.  
NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals and the respondents cross-appeal  
an opinion and order of the Administrative Law Judge  
filed July 12, 2007. In said order, the Administrative  
Law Judge made the following findings of fact and  
conclusions of law:

1. The stipulations agreed to by the parties at  
the pre-hearing conference conducted on April 12,  
2007, and contained in a pre-hearing order filed  
April 16, 2007, are hereby accepted as fact with  
the exception of stipulation number 6 regarding the  
date last medical treatment was paid.

2. The parties' stipulation that respondent last paid medical treatment on December 11, 2006 is also hereby accepted as fact.

3. Claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury.

4. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits as a result of here compensable injury.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

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).

Therefore we affirm and adopt the July 12, 2007 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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

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CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that she was entitled to additional temporary total disability benefits. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she was entitled to additional medical treatment. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant sustained an admittedly compensable injury to her head when she fell at the respondent employer on July 26, 2006. The claimant was treated for a laceration and concussion. She is now seeking additional medical benefits for vertigo.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The evidence shows that by August 3, 2006, all of the claimant's symptoms had resolved with the

exception of mild dizziness. On that date she was released to return to work with the restriction that she not work around safety-sensitive machinery. She returned for a re-check on August 10, 2006, and was released with the same restrictions with additional instructions not to drive. On August 17, 2006, the claimant returned to see Max Beasley, ANP. He noted that the claimant was working limited duties and referred her to a neurologist. The claimant was seen by Dr. Steven Moon, a neurologist, on September 18, 2006, who suspected post-traumatic canalithiasis and recommended physical therapy. He performed an MRI which came back "unremarkable other than a few chronic small vessel ischemic changes." He referred the claimant to Dr. Dorothy Mellon, an ENT.

The claimant was seen by Dr. Michael Marsh in November of 2006. Dr. Marsh prescribed physical therapy to relieve the claimant's vertigo. He advised the claimant that she was able to work as long as she did not operate hazardous machinery. Dr. Marsh performed a series of tests called an ENG and ABR designed to determine the extent of the claimant's vertigo. All of these tests produced negative results. On May 14, 2007, Dr. Marsh concluded that there was no evidence of

vertigo and he wrote that he suspected "functional disorder."

In my opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. The claimant suffered an admittedly compensable injury to her head in the form of a laceration and concussion. However, vertigo is a separate diagnosis. The only evidence that we have that the claimant suffers from vertigo is her own subjective complaints. All objective testing of the claimant have proved negative. The MRI on September 19, 2006, was unremarkable. Although it showed ischemic changes unrelated to the vertigo. Several test were run in May of 2007 which produced negative results as well. In fact, these tests were so unrevealing that Dr. Marsh concluded that he suspected that the claimant had a psychological cause for her symptoms. Simply put, there are no objective findings of an injury that would cause vertigo. There must be some objective evidence of an injury. See Watson v. Tayco, Inc., 79 Ark. App. 250, 86 S.W.3d 81 (2002). The only evidence in this case of any kind of injury is the claimant's own subjective complaints of dizziness. Objective medical evidence is

necessary to establish the existence and extent of an injury. A compensable injury must be established by medical evidence supported by objective findings, and medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. See, Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. Id. Therefore, in order to prove a compensable injury, a claimant must prove, among other things, a causal relationship between his employment and the injury. McMillan v. U.S. Motors 59 Ark. App. 85, 953 S.W.2d 907 (1997). Objective medical evidence is necessary to establish the existence and extent of an injury, but not essential to establish the causal relationship between the injury and a work-related accident. Horticare Landscape Mgt. V. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002); Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999); Wal-Mart Stores v. Leach, 74 Ark. App. 231, 48 S.W.3d 540 (2001).

Moreover, objective medical evidence is not essential to establish the causal relationship between the injury where objective medical evidence established the injury's existence, and a preponderance of other

non-medical evidence establishes a causal relation to a work-related incident. See, Wal-Mart Stores, Inc. v. VanWagner, supra; Wal-Mart v. Leach, supra. In Liaromatis v. Baxter Co. Regional Hosp., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d. \_\_\_ (CA 05-1096, May 24, 2006), the Court disagreed with the claimant's argument that the medical evidence must merely establish the existence of the injury. The question, stated the Court, is not whether there are new objective findings, but whether there is a new compensable injury. Id. It is the injury for which appellant seeks benefits that must be proved with objective medical findings. Id.

Objective findings are defined at Ark. Code Ann. § 11-9-102(16) (A) (i) as those findings which cannot come under the voluntary control of the patient. When the Commission determines physical or anatomical impairment, complaints of pain, straight-leg raising tests, or active range of motion tests shall not be considered objective findings. Ark. Code Ann. §11-9-102(16) (A) (ii) (a)&(b). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and

therefore, by statutory definition, do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996).

This case is akin to the case of Cox v. Arkansas Methodist Hospital, FC Opinion filed March 6, 2006, Claim No. F014096. In Cox, the claimant was struck in the right temple by a violent patient who had been restrained. The claimant contended, after she sustained the admittedly compensable injury, that she had a seizure disorder. All of the medical evidence failed to demonstrate any objective medical evidence of a seizure disorder. In fact, the claimant's testing all came back negative. Her treating physician opined that he suspected that there was a strong psychosomatic component involved. The Commission found that the claimant failed to prove by a preponderance of the evidence that she had a compensable seizure disorder.

In Parsons v. Arkansas Methodist Hospital, FC Opinion filed September 17, 2007, Claim No. F501700, the Court of Appeals reversed the Full Commission and remanded for further findings of fact with regard to a compensable injury to the claimant's brain. In Parsons, the claimant fell and hit her head on the edge of a desk. The Administrative Law Judge found that the

claimant had a compensable injury to her brain in addition to the physical injuries to her forehead. The Commission, on remand, found that the claimant failed to meet her burden of proof because the testing that was administered by Dr. Johnson in the form of the phonemic and semantic fluency task was not an objective medical finding establishing an injury to the claimant's brain.

After considering the evidence in this case, I cannot find that the claimant was entitled to additional medical treatment. Dizziness is purely a subjective finding and can be the symptoms of many other things. Accordingly, I find that the claimant failed to meet her burden of proof and would respectfully dissent from the majority's award of additional benefits.

For all the reasons set forth herein, I respectfully concur, in part, and dissent, in part, from the majority's opinion.

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs & dissents.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I

agree that the claimant has proved by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable head injury. However, I respectfully dissent from the majority's finding that the claimant failed to prove by a preponderance of the evidence that she is entitled to additional temporary total disability benefits. Based upon a de novo review of the record in its entirety, I find that the claimant has shown by a preponderance of the evidence her entitlement to additional temporary total disability benefits, and therefore, I must respectfully dissent on this issue.

The claimant worked for the respondent for more than twenty years. On July 25, 2006, the claimant was operating a machine that wrapped Little Debbie snacks, when she saw a "bad cake" go through the line. When the claimant reached for the "bad cake" her chair fell apart and she hit her head on the concrete floor. The fall was so severe that the claimant could not get up without assistance. The claimant was taken to Siloam Springs Hospital, where she was diagnosed with concussion, dizziness, and a scalp laceration, which required four staples. The claimant was placed on light duty restrictions. On July 27, 2006, the claimant

reported to the company's nurse practitioner with complaints of pain in her head, neck, right shoulder and dizziness. The nurse practitioner recommended that the claimant not work because of positional vertigo. The nurse practitioner gave the claimant medications and recommended some exercises. On July 31, 2006, the claimant saw the nurse practitioner again and although she was released to work, due to dizziness she was given the restriction of avoiding safety sensitive duties. The respondent placed the claimant on a light duty job of shredding paper, but the job ended at the end of October 2006. After the paper-shredding job terminated, the respondent did not offer the claimant any other light duty work.

I find that the claimant has shown by a preponderance of the evidence her entitlement to additional temporary total disability benefits from the end of October 2006, when the paper-shredding job ended, until a date yet to be determined. 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). First, the claimant has presented

proof by a preponderance of the evidence that she has remained in the healing period since the date of injury. A claimant's healing period has not ended when treatment is being administered for the healing and alleviation of the condition. Breshears, supra; J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W. 2d 51 (1990). Here, the medical records show that the claimant's treating physicians have been actively attempting to find the right treatments to alleviate the claimant's ongoing symptoms related to her compensable head injury since the date of injury. The claimant testified that she has continued to suffer from symptoms of her compensable head injury since the date of injury. The medical record shows that on August 3, 2006 the claimant was still suffering from dizziness when moving too quickly. On August 17, 2006, the nurse practitioner stated that the claimant was still having problems with vertigo, particularly when changing positions, sometimes accompanied by nausea. The medical record also shows that the claimant was referred to Dr. Moon, a neurologist, in September of 2006. Dr. Moon ordered an MRI which showed chronic vessel ischemic changes. The claimant was then referred to Dr. March, an ear, nose and throat specialist. On December 18, 2006, Dr. March

diagnosed the claimant as having benign positional vertigo related to her work injury. Benign positional vertigo is defined in Dorlands Illustrated Medical Dictionary, 28<sup>th</sup> Edition, as:

recurrent positional vertigo and nystagmus occurring when the head is placed in certain positions such as with one ear down, and relieved by returning to an upright position.

The medical record indicates that on May 14, 2007, despite receiving vestibular, or balance system therapy, the claimant's symptoms did not resolve, and, Dr. March revised his diagnosis, stating: "suspect functional disorder." Based on the above, I find that the medical records show that the claimant's treating physicians have been actively attempting, not only to reach an accurate diagnosis, but to find the right treatments to alleviate the ongoing symptoms from her compensable injury. Furthermore, none of the claimant's treating physicians have opined that the claimant has reached the end of her healing period.

Second, I find that the Administrative Law Judge erred in finding that as the claimant had been released to light duty work, the claimant could not meet her burden of proving her entitlement to temporary total disability benefits after the paper-shredding job ended.

A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984). Here, at various times, the claimant's treating physicians released her to return to work with the restriction that she could not work on heavy or hazardous machinery. While the respondent initially offered the claimant a light duty job of shredding paper, the job ended at the end of October 2006, and the respondent did not offer the claimant another job within her restrictions.

I find that the preponderance of the evidence proves that the claimant has been totally incapacitated from work since the paper-shredding job ended in October 2006. The claimant's credible testimony shows that her physical condition, due to the compensable injury, is such that she cannot even watch certain television shows because the movements on the screen make her dizzy. The claimant testified that she still cannot turn her head quickly without becoming dizzy and nauseated. The

claimant testified that due to dizziness and nausea she is still unable to drive. Clearly, due to the dizziness, nausea, and restrictions on physical activities such as turning her head and driving, all of which are related to the claimant's compensable injury, the claimant has been rendered totally incapacitated from work.

In conclusion, I find that the claimant has proved by a preponderance of the evidence her entitlement to additional reasonable and necessary medical treatment for her compensable head injury. Furthermore, I find that the claimant has proved by a preponderance of the evidence her entitlement to additional temporary total disability benefits.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

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PHILIP A. HOOD, Commissioner