

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505538

MISTY WEIGEL,  
EMPLOYEE

CLAIMANT

THE STEAK HOUSE,  
EMPLOYER

RESPONDENT

FARMERS INSURANCE EXCHANGE,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 3, 2008

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

Claimant represented by the HONORABLE FREDERICK S. SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondent represented by the HONORABLE CAROL LOCKARD  
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded for additional findings on compensability. *The Steak House v. Weigel*, CA07-34 (Dec. 19, 2007). Pursuant to the Court's remand, the Full Commission finds that the instant claimant did not establish a compensable injury by medical evidence supported by objective findings. We therefore reverse the

administrative law judge's finding that the claimant proved she sustained a compensable injury.

I. HISTORY

The parties stipulated that the employment relationship existed on February 6, 2005. The claimant testified that while cleaning a table and reaching for a spray bottle, "I turned and (gesturing), and I was down....I felt a crack, but it felt like an instant throbbing sensation." An emergency physician examined the claimant on February 16, 2005: "This is a 30-year-old white female, who states she twisted her knee at work approximately a week ago. Since then, she has had pain in her left knee....The left knee is mildly tender to palpation." The claimant was assessed with sprain to the left knee. A Radiology Consultation Report showed the following: "Left Knee, 2 Views, February 16, 2005: The joint spaces appear fairly well maintained. No obvious fractures or dislocations are seen. There is no obvious effusion." The Impression was, "No significant abnormalities of the left knee are seen."

Dr. Anthony D. McBride evaluated the claimant on March 11, 2005:

The patient is a 30-year-old female who works as a waitress at the Steak House. She states that on

February 6, 2005, she turned on her left knee with immediate onset of severe pain and a popping sensation. She had no improvement and went to the emergency department where x-rays were taken and revealed no evidence of fractures, by report. She had continued symptoms and saw Dr. Simons who felt she may have torn a piece of cartilage in her knee....

Her left knee reveals no significant swelling, no erythema, and no increased warmth. She has tenderness on the medial joint line. She has no gross varus or valgus instability. I can fully extend her knee and flex her knee to 90 degrees, at which time she complains of significant pain. McMurray's testing is impossible secondary to guarding but it (sic) apparently more intense on the medial side than the lateral side. Lachman's is negative but once again, she is guarding.

Dr. McBride assessed "Probable medial meniscus tear of the left knee....We will proceed with a MRI scan of the left knee."

A pre-hearing order was filed on December 19, 2005. The claimant contended that she sustained a compensable injury. The respondents contended, among other things, that the claimant did not sustain a compensable injury. The parties agreed to litigate the issue of whether or not the claimant sustained a compensable injury to her left knee.

An MRI of the claimant's left knee was taken on February 17, 2006:

There is a tiny effusion. There is no convincing evidence of internal derangement of the knee. The

cruciate and collateral ligaments are intact. No meniscal abnormalities are identified. There are no pathologic signal changes in the marrow.

OPINION: A tiny effusion is noted. The left knee is normal otherwise.

An administrative law judge filed an opinion on May 3, 2006. The administrative law judge found, among other things, that the claimant proved she sustained a compensable left knee injury on February 6, 2005. The Full Commission affirmed and adopted the administrative law judge's decision. The respondents appealed to the Court of Appeals, which has held:

Guarding can be beyond the patient's control or within the patient's control. This issue is therefore a matter of fact on which the Commission should make a specific finding case by case based on the medical evidence. The Commission's opinion here lacks a finding about whether Dr. McBride concluded that Weigel's guarding was voluntary or involuntary. We do not know whether the guarding notation was a subjective or an objective finding. This fact question is for the Commission, not our court.

We therefore reverse and remand for the Commission to make additional findings of fact about Weigel's guarding. We also note that, though the Commission did not rely on the belated MRI report in determining compensability, it should consider that report on remand because we have held that the ALJ properly admitted this evidence.

II. ADJUDICATION

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). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission finds that the claimant did not establish a compensable injury by medical evidence supported by objective findings. The claimant testified that she sustained an accidental injury causing physical harm to her left knee on February 6, 2005.

The first examining physician reported mild tenderness to the claimant's left knee but no objective medical findings. A radiology report on February 16, 2005 showed that the joint spaces in the claimant's left knee were well maintained, with no obvious fractures, dislocations, or effusion. The impression was "No significant abnormalities of the left knee are seen."

Dr. McBride examined the claimant on March 11, 2005 and found "no significant swelling, no erythema, and no increased warmth. She has tenderness on the medial joint line. She has no gross varus or valgus instability....McMurray's testing is impossible secondary to guarding but it (sic) apparently more intense on the medial side than the lateral side. Lachman's is negative but once again, she is guarding." Dr. McBride did not expressly state whether or not he found the claimant's "guarding" to be a subjective or objective finding. Nevertheless, the language in Dr. McBride's March 11, 2005 report indicated that he considered the claimant's guarding to be within her voluntary control, i.e., "she is guarding." We recognize that the February 17, 2006 MRI showed "a tiny effusion" in the claimant's left knee. Stedman's Medical Dictionary,

26<sup>th</sup> Edition, generally describes "effusion" as "the escape of fluid from the blood vessels or lymphatics into the tissues or a cavity." The Full Commission is unable to find that the "tiny effusion" shown in the February 17, 2006 MRI established a compensable injury to the claimant's left knee occurring on February 6, 2005. Dr. McBride's March 11, 2005 report indicated that he planned an MRI in order to determine whether there was a meniscal tear or other condition in the claimant's knee which might require surgery. The MRI showed no such abnormality.

Pursuant to the remand from the Court of Appeals, and based on our *de novo* review of the entire record, the Full Commission finds that the instant claimant did not establish a compensable injury by medical evidence supported by objective findings. We therefore reverse the administrative law judge's finding that the claimant proved she sustained a compensable injury.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by reversing the decision of the Administrative Law Judge, has found that the claimant failed to establish by a preponderance of the evidence that she sustained a compensable left knee injury on February 6, 2005. Pursuant to the Court's remand instructions, the majority specifically found that the guarding referenced in Dr. McBride's March 11, 2005 report was within the voluntary control of the claimant, and is not an objective medical finding. The majority also, upon remand instructions from the Court, considered the February 17, 2006 MRI report, which showed a "tiny effusion." The majority found that the effusion was not sufficient to establish that a compensable injury to the claimant's left knee occurred on February 6, 2005. Based on the Court's remand instructions, I specifically find that the guarding noted in Dr. McBride's March 11, 2005 report was involuntary, and is an objective finding. I also find that the claimant has presented an objective finding of

effusion, as shown in the February 17, 2006 MRI report. Furthermore, based on the entire record, I find that the claimant has proved beyond a preponderance of the evidence that she sustained a compensable specific incident left knee injury on February 6, 2005. Therefore, I must respectfully dissent from the majority's opinion.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and

place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable left knee injury on February 6, 2005. First, the claimant proved by a preponderance of the evidence that she sustained a specific incident injury arising out of and in the course of her employment that caused internal harm to the body and which required medical services. The claimant credibly testified that on February 6, 2005, she was working as a waitress at The Steakhouse restaurant. The claimant testified that she set a plate down and as she was turning to pick up a spray bottle she felt a crack and an instant throbbing sensation. The claimant testified that on the date of injury she rolled up her blue jean leg and told the owner, Mr. Jay Winham, that she had hurt her knee and needed to go to the doctor. The claimant testified that

she also told the assistant manager, Brian, who was standing at the cash register. The claimant testified that she worked until February 16, 2005, at which time Mr. Winham told her to go to the doctor and not to return to work until she had done so.

Ms. Valerie Ross, a friend and former co-worker of the claimant testified that she observed the claimant become injured at work. Ms. Ross described the mechanism of injury essentially as the claimant turning her body (including her knee) to the side while her foot remained inadvertently planted when it should have pivoted. Ms. Ross testified that the incident occurred in the kitchen and that she had heard the claimant moan. Ms. Ross testified that she observed the claimant report the injury on the date of injury to Mr. Winham. Ms. Ross testified that she took the claimant to the emergency room on February 16, 2005.

The medical record contains the February 16, 2005 emergency room report, which contains a history that corroborates that the claimant twisted her knee at work approximately a week earlier. The medical record indicates that the claimant was diagnosed with a sprain,

and advised to rest, elevate, apply ice, wear a knee brace for seven days and use crutches to avoid placing weight on the knee for seven days. The report indicates that the claimant was to follow-up with her family doctor in seven days.

The medical record indicates that the claimant followed up with Dr. Roger Simons on March 4, 2005, and that Dr. Simons referred her to Dr. Anthony McBride. The medical report from Dr. McBride, dated March 11, 2005 also contains a history that corroborates the claimant's and Ms. Ross's testimony about how the claimant injured her knee at work on February 6, 2005.

I find that the only testimony contradicting the claimant, Ms. Ross, and the medical records is that of Mr. Winham, who testified that the claimant did not report any injury to him, and that he had no idea why the claimant had stopped working for him. When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W. 3d 649 (2001). 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. Here, I find, as the Full Commission did previously, by affirming and adopting the Administrative Law Judge, that the claimant's testimony is credible, Ms. Ross's testimony is credible, and that the medical record corroborates their credible testimony. Based on the above, I find that the claimant proved by a preponderance of the evidence that she sustained a specific incident injury arising out of and in the course of her employment that caused internal harm to the body and which required medical services.

Second, the claimant provided medical evidence supported by objective findings. Objective findings 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 Full Commission has previously found that guarding can be an objective finding. Hayes v. Employment Security Division, Workers' Compensation Commission E807300 (November 28, 2001); Spencer v. Superior Industries,

Workers' Compensation Commission Opinion E812836/E900900 (December 21, 1999); Edmondson v. Mid Ark Auto Auction, Workers' Compensation Commission E800680 (November 24, 1999); Murry v. Riceland Foods, Workers' Compensation Commission E516632 (January 20, 1999).

However, the Court of Appeals held, in the instant case, that muscle guarding is sometimes involuntary and sometimes voluntary. As voluntary guarding would not be an objective finding, the lack of which would cause the claimant to fail to meet her burden of proof, the Court of Appeals instructed the Full Commission to make a specific finding on remand as to whether Dr. McBride concluded that the claimant's guarding was voluntary or involuntary.

The pertinent section of Dr. McBride's March 11, 2005 report states:

McMurray's testing is impossible secondary to guarding but it (sic) apparently more intense on the medial side than the lateral side. Lachman's is negative but once again, she is guarding.

The majority stated that the guarding referenced by Dr. McBride must be within the claimant's

voluntary control, based on the fact that Dr. McBride stated "she is guarding." I find that the statement "she is guarding" can be interpreted as either meaning that Dr. McBride concluded that the claimant was voluntarily contracting her muscles, or that Dr. McBride concluded that the claimant's muscles were involuntarily contracting, or it could, in fact, mean both. However, I find that Dr. McBride's statement that "[the guarding is] apparently more intense on the medial side than the lateral side" can only be interpreted as meaning that Dr. McBride concluded that the claimant's muscles were involuntarily contracting. Common sense indicates that the claimant could not voluntarily move, or guard, the muscles on the medial side of her knee with greater intensity than she could voluntarily move, or guard, the muscles on the lateral side of her knee. The existence of a discrepancy in intensity of movement between the medial and lateral sides of the knee has to indicate an involuntary muscle response. Even if the claimant were capable of intentionally moving the medial muscles of her knee with more intensity than the lateral muscles of her knee, concurrently, I cannot fathom why it would

occur to her to attempt do so. Therefore, I find that Dr. McBride could not have reasonably concluded that the discrepancy in the intensity of the guarding from the medial side of the knee to the lateral side of the knee, was under the voluntary control of the claimant. I find that the guarding noted in Dr. McBride's March 11, 2005 report was involuntary and is an objective finding.

Furthermore, the Court specifically instructed the Full Commission to consider the February 17, 2006 MRI report on remand. The February 17, 2006 MRI report indicates that the claimant's left knee has a "tiny effusion." The Full Commission has previously found that effusion in the knee is an objective finding. Roberts v. Baxter International, Worker's Compensation Commission E714829 (April 12, 2001); Stone v. Aztec Paving and Heavy Construction, Inc. Workers' Compensation Commission E807346 (March 2, 2000); Thompson v. Cavanaugh Motors, Workers' Compensation Commission E505961 (Sept. 11, 1996). The majority, while seeming to acknowledge that the February 17, 2006 MRI report contains an objective finding, states:

The Full Commission is unable to find that the "tiny effusion" shown

in the February 17, 2006 MRI established a compensable injury to the claimant's left knee occurring on February 6, 2005.

The majority's conclusion as to the significance of the effusion, beyond the fact that it is an objective finding, is clearly in error. A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, Wal-Mart Stores, Inc. v. Van Wagner, 337 Ark. 443, 990 S.W. 2d 522 (1999). Here, as stated above, and as previously found by the Full Commission, the claimant's credible testimony, the credible witness testimony and the corroborating medical reports prove by a preponderance of the evidence that the claimant sustained a compensable specific incident left knee injury at work on February 6, 2005. For the majority to now disregard all of the above evidence and instead find that the February 17, 2006 MRI report alone somehow causes the claimant to fail to meet her burden of proof, is clearly in error.

In conclusion, I find that the guarding noted in Dr. McBride's March 11, 2005 report was involuntary

and is an objective finding. I find that the effusion shown on the February 17, 2006 MRI report is also an objective finding. I find that the claimant has established by a preponderance of the evidence all of the elements required to prove that she sustained a compensable specific incident left knee injury on February 6, 2005.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner