

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F608015

AMANDA VOLKMANN, EMPLOYEE	CLAIMANT
SONIC DRIVE IN, EMPLOYER	RESPONDENT
FARMERS INSURANCE EXCHANGE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 8, 2009

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE JASON LEE, 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 February 23, 2009.

In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The prior opinion is final.
2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her back on July 5, 2006.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable back injury.
4. Claimant is entitled to temporary total disability benefits beginning August 25, 2008 and continuing through a date yet to be determined. Respondent is entitled to a credit for any temporary total disability benefits paid subsequent to April 23, 2008.
5. Respondent has controverted claimant's entitlement to all unpaid temporary total disability benefits.

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 February 23, 2009 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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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I 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.

This claim was the subject of a prior hearing on February 28, 2008. An opinion was filed on March 27, 2008, finding that the claimant had met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right knee and hip on July 5, 2006. The opinion also ordered the respondents to pay all reasonable and necessary medical treatment and it awarded the claimant temporary total disability benefits beginning July 6, 2006, and continuing through November 1, 2006. That opinion was not appealed and it is therefore considered to be final.

The claimant worked as a carhop for the respondent employer. On July 5, 2006, she was taking an order to a vehicle parked behind a vehicle at the drive-through window. As she crossed in front of the vehicle at the drive-through window, the vehicle moved forward and struck her in the right hip and knee causing her knee to "kind of go to the left". The claimant was initially treated at the emergency room at Siloam Springs and eventually came under the care of Dr. Duncan, a general practitioner. Dr. Duncan diagnosed the

claimant's condition as a contusion of the hip and knee and referred the claimant to an orthopaedist for further evaluation. The claimant did not receive the evaluation by an orthopaedist because the respondent controverted the claim. It was at this point that the claimant filed a claim and the prior hearing was conducted and an opinion issued.

The claimant returned to Dr. Duncan on April 23, 2008 complaining of right knee pain. Dr. Duncan completed a form indicating that claimant had not been fully evaluated since the July 2006 injury. He noted that claimant had previously been referred to an orthopaedist. On April 23, 2008, Dr. Duncan referred the claimant to an orthopaedist.

On July 25, 2008, The claimant testified that the ox was "running and trampling and tearing down her pigpens and chasing her pigs". She testified that she was struck by the horn of the ox on her right thigh as she was trying to chase it out of her yard. The claimant sought treatment from the emergency room where she complained of pain in her right femur, right knee and lumbar spine at that time. She was evaluated and discharged with a prescription for pain medication.

The claimant was evaluated by Dr. Allard on August 25, 2008. Dr. Allard reviewed an MRI scan of the

claimant's right knee which was read as being unremarkable. Dr. Allard believed that the claimant's complaints were not the result of a problem with her right knee, but rather the result of a herniated disc which was causing radicular symptoms into her right knee. As a result, Dr. Allard ordered an MRI of the claimant's lumbar spine and opined that the claimant was unable to work. An MRI scan of the claimant's lumbar spine was performed on September 8, 2008. In a report dated September 15, 2008 Dr. Allard indicated that the MRI scan revealed herniated discs at the L4-5 and L5-S1 levels. Based upon those findings, Dr. Allard referred claimant to Dr. Knox for an evaluation.

On November 10, 2008, the claimant was evaluated by Amberlyn Naples, a nurse practitioner in Dr. Knox's office. Ms. Naples reviewed the claimant's MRI scan and noted that she had disc desiccation at the L4-5 and L5-1 levels with some bulging at both of those levels. She also noted that the L5-S1 protrusion could be compressing the nerve root. Ms. Naples prescribed medication and indicated that the claimant should be evaluated by Dr. Knox.

The claimant was evaluated by Dr. Knox on December 30, 2008. Dr. Knox indicated that claimant described a classic L5 radiculopathy. He also indicated

that after his review of the MRI scan it was not clear that there was any compressive pathology present. As a result, he ordered a myelogram to further define the claimant's problem. He also indicated that the claimant should be treated with a brace, TENS unit, and medication. The respondents denied compensability of claimant's low back condition as not being related to the claimant's compensable incident on July 5, 2006.

Ark. Code Ann. §11-9-102(4) (A) (i) (Supp. 2005) 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 is required to show that a causal connection exists 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).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). 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). Finally, medial opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act, and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that her claim is compensable, ie., that her injury was the result of an accident that arose in the course of her employment and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Further, the claimant must show a causal relationship exists

between her condition and her employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

In my opinion, a review of the evidence demonstrates that the claimant's current need for treatment is not related to her compensable injury. Dr. Knox was asked to address whether he could state within a reasonable degree for medical certainty whether the claimant's current condition was related to the incident on July 5, 2006, whether the conditions revealed in the MRI were causally related to degeneration and whether the conditions were related to an incident the claimant had with the ox on July 25, 2008. Dr. Knox, in correspondence dated January 30, 2008, stated that by history the conditions revealed in the MRI were causally related to the July 5, 2006, work incident. He also noted that her findings of disc herniations, disc bulging and disc dessication can be causally related to degeneration. Finally, Dr. Knox stated that the conditions revealed in the MRI could have been caused by incident subsequent to the July 5, 2006, work accident, including the claimant's July 25, 2008, ox encounter. It is clear to me that Dr. Knox does not have any idea what caused the problems in the claimant's lumbar spine. To find that his opinion is unequivocal requires conjecture and speculation. 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). It appears that Dr. Knox's opinion is based upon the history that the claimant has given him. A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion January 22, 1996 (Claim No. E417617). Moreover, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is not sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Furthermore, the evidence demonstrates that the claimant never complained of low back pain until she had the run in with the ox. She was not forthcoming when she met with Ms. Naples on November 10, 2008. The history provided to Ms. Naples states that the claimant "has no prior history of injury or surgery prior to the original back injury in 2006". This statement is not

correct as the claimant sought medical treatment in July for low back pain after the ox incident.

Therefore, after considering all of the evidence, I cannot find that the claimant proved by a preponderance of the evidence that her current problems with her lumbar spine are causally connected to her July 5, 2006, compensable accident. Accordingly, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, COMMISSIONER