

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F811253

TAMMY JOHNSON, EMPLOYEE	CLAIMANT
SONIC DRIVE-IN, EMPLOYER	RESPONDENT
FARMERS INSURANCE EXCHANGE, CARRIER	RESPONDENT

OPINION FILED JANUARY 20, 2010

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

Claimant represented by HONORABLE STEVEN R. MCNEELY,  
Attorney at Law, Little Rock, Arkansas.

Respondents represented by HONORABLE JASON A. LEE, Attorney  
at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the  
Administrative Law Judge filed July 13, 2009.

The Administrative Law Judge entered the following  
findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee relationship existed on November 3, 2008.
3. The claimant's average weekly wage of \$280.00 per week entitles her to a compensation rate for temporary total disability of \$187.00 per

week and a compensation rate for permanent partial disability of \$154.00 per week.

4. Any benefits paid by Blue Cross/Blue Shield for the claimant's injuries at issue are subject to the provisions of Arkansas Code Annotated Section 11-9-411.
5. The claimant has failed to establish by a preponderance of the evidence that she sustained a compensable injury on November 3, 2008.

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.

Thus, we affirm and adopt the 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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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion affirming and adopting the opinion of an Administrative Law Judge which finds that the claimant failed to establish by a preponderance of the evidence that she sustained a compensable injury on November 3, 2008. I find the claimant credibly testified as to how she injured her knee and back on November 3, 2008, and therefore, I find that the claimant has met her burden of proof.

The Administrative Law Judge, affirmed and adopted by the majority, questioned the claimant's veracity because there were no other witnesses to the accident. However, the failure of another employee being present when the claimant injured herself is hardly the claimant's fault.

She testified she was getting ice from the business' ice machine when she slipped. I am sure if she had been able to arrange witnesses to this accident she would have done so.

The Administrative Law Judge also questioned the claimant's credibility because of the timing of her report of the injury. However, the claimant testified that, after the incident on November 3, she advised Christy Adams, her immediate superior at her place of employment. She also stated the accident happened with only about 30 minutes left on her shift and she was able to complete her work day. She then called in the following day, November 4, 2008, and left a message for the restaurant's manager advising him she would not be able to work. She reported to work on the following day, November 5, 2008, but was not able to complete her shift because of the pain of her injury.

This time line was corroborated by the testimony of Scott Hagen, the respondent employer's manager. Mr. Hagen stated that the claimant had reported to work on the 5<sup>th</sup>, but he had sent her home because of her physical problems. He also stated in his testimony that he had been advised of the claimant's injuries when she had called in on

November 4. I fail to see what other steps the claimant could have taken to report her injury.

I also believe it is significant that the claimant provided information to her treating physician who she first saw on November 5, 2008, in accordance with her hearing testimony. In the report of Dr. Kevin McLeod, an orthopedist in Arkadelphia, Arkansas, it was noted the claimant's complaint was of right back pain after a fall at work. The treatment note of that date also states the claimant was consulting with a doctor because she "fell backwards at work, hurting back." Significantly, this report does not state the claimant fell to the floor. As the claimant described her mechanism of injury at the hearing, she stated she slipped and fell backward but caught herself with her right knee and did not fall all the way down.

Dr. McLeod, in his deposition, stated he recalled the claimant having told him she did fall to the ground. This discrepancy is relied upon in attacking the claimant's credibility. However, Dr. McLeod's memory is contradicted by his own treatment notes. Obviously, the claimant would have benefitted from testifying she had fallen down in

accordance with Dr. McLeod's memory. However, she consistently stated she remained upright when she slipped. As the claimant could have strengthened her case by aligning her testimony with that of Dr. McLeod, I believe her refusal to do so lends credibility to her testimony.

In short, I believe the claimant's testimony, as supported by that of Mr. Hagan, establishes she sustained a specific incident injury on November 3, 2008. Having met that burden, the next criteria the claimant must establish for a compensable injury is showing objective medical evidence of an injury. Once again, the claimant has met her burden in this regard. At the direction of Dr. McLeod, the claimant underwent an MRI of her lumbar spine on November 25, 2008. The radiology report relating to that examination demonstrates, among other things, that the claimant had an annular tear with a broad-based disc protrusion at L4-L5. The report specifically stated the protrusion was causing "effacement of the thecal sac." The report also details a defect at L5-S1 in the form of an extruded disc, which was broad based centrally at that level. The radiologist went on to note that there was a migration of the disc fragment which also caused an effacement of the thecal sac.

I acknowledge that the claimant had suffered a back injury previous to her job-related accident. In a radiology report dated January 25, 2005, the results of an MRI test of that date are set out. The radiologist preparing the report stated: "A small central protrusion of the L4-L5 disc is noted." The report also stated there was a "slight" indentation of the anterior aspect of the thecal sac. The report also noted a small central protrusion at the L5-S1 disc. The findings of the earlier MRI are in contrast to the second one in which the disc protrusions are noted to be larger with more impingement on the thecal sac than described in the earlier MRI.

In my opinion, the subsequent MRI establishes that the claimant has suffered a worsening of her condition as a result of her job-related accident. The Administrative Law Judge dismissed these findings based upon his conclusion there was no objective evidence of a "acute injury" arising from the claimant's job. In my opinion, the Administrative Law Judge, and consequently the majority, has applied an incorrect standard, in that, he has conflated the issue of causation with that of objective evidence. The claimant is not required to establish an accident caused her injury by

objective medical evidence. Rather, the question of causation is a fact question which must be resolved based upon an evaluation of the factual evidence. The nature and extent of the injury is a medical question which is resolved by referring to the medical records. This aspect of the claim must be established by objective medical evidence. In my opinion, the medical evidence in question is clearly objective and undeniably establishes the existence of an injury.

In conclusion, I find that the claimant has established the occurrence of a job-related accident and the existence of a physical injury supported by objective medical evidence. For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner