

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F807759

VICTORIA McGILL, EMPLOYEE	CLAIMANT
JONESBORO HEALTHCARE CENTER, EMPLOYER	RESPONDENT
PENNSYLVANIA MFGRS. ASSOC. INS., INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 6, 2010

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, 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 June 16, 2009. 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 July 13, 2008, the relationship of employee-employer-carrier existed among the parties, when the claimant earned an average weekly wage of \$416.61, which

generates compensation benefit rates of \$278.00/\$208.00, for temporary total/permanent partial disability.

3. On July 13, 2008, the claimant sustained an injury to her right knee arising out of and in the course of her employment, which required medical treatment and rendered (sic) temporarily totally disabled for the period commencing July 18, 2008, and continuing through the end of the healing period or until such time as she return (sic) to work.
4. The respondent shall pay all reasonably necessary hospital and medical expenses arising out of the injury of July 13, 2008.
5. 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 June 16, 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 must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she sustained an injury to her right knee on July 18, 2008. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant was employed by the respondent employer as a CNA. On July 13, 2008, there was an altercation with a patient at the respondent employer's facility. The claimant ended up being hit in the face and she had to throw her right arm to block the patient from hitting another resident with a plate cover. The claimant sustained a hit to her breast area as well. The police were called to the scene and the claimant did not report any injuries at that time. However, the claimant went to the Police station a few days later and indicated that she fell back twisting her knee on the date of the incident.

The claimant testified that at the time everything was going on, she really did not realize she was hurt. She stated that when she went to get the linen towel barrel and trash can out of the shower area, she stepped wrong and could feel her knee. After her shift was over, she had her husband take her to the

emergency room at Northeast Arkansas Baptist Hospital. The claimant indicated on the intake form that she had problems with her back, facial pain and knee pain. The claimant was diagnosed with a knee strain and was provided a knee immobilizer and crutches as well as Lorcet Plus.

The claimant returned to work on the July 16, but did not wear her knee immobilizer. The claimant testified that on that date, she called her husband at 2:00 to pick her up because she was attempting to do her job and her knee buckled. The claimant went to Marsha, the director of nursing, and indicated that her knee was not going to hold up. The claimant's husband picked her up and they went to the hospital in Paragould a few days later on July 18th. The claimant was given a shot and told to use her crutches. After leaving the emergency room, the claimant then went to the police station to file a report. The claimant has not worked since that date and is contending that the time of the altercation she received an injury to her right knee.

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, i.e., 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).

It is well established that the party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c) (2) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to

either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

In my opinion, the evidence fails to demonstrate that the claimant sustained a compensable injury to her knee on July 13, 2008. The claimant testified that she noticed her knee was giving her difficulty about 6:30 p.m. and that she limped around until she got off work at 10:00 p.m. However, the claimant did not report this complaint to her supervisor during the meeting, which took place in the dining room after the altercation. At that time, the claimant and all others involved with the altercation were told to write a statement of what happened. The claimant did not indicate in her statement that she injured her knee, nor did she indicate that she was injured to her supervisor. In fact, the claimant's supervisor, Ms. Smith, indicated that the claimant did not exhibit any signs, symptoms or otherwise indicate any complaints regarding her right knee. Ms. Smith testified that she did not observe the claimant limping at any point during her shift on that date.

The claimant contends that the medical records support her complaint of her right knee injuries because

she was provided an immobilizer and crutches. However, upon closer review of those records, there are absolutely no objective findings noted to support a knee injury other than the claimant's complaints of pain. The emergency room physician record does not even note on the diagram of the body of any right knee complaints, and there's no notation within the record revealing a contusion or swelling. The claimant was only diagnosed with a right knee strain under the clinical impression.

The claimant did not return to work until July 16<sup>th</sup>, and she testified that she only worked two to two and a half hours. The Human Resources Officer, Ms. Cook, testified that the claimant returned and worked the entire day without crutches or a brace. The claimant's job was not modified and the claimant completed her duties without any observed difficulties. In fact, the claimant again did not report any knee complaints to her supervisor, nor were there any observations regarding any knee complaints.

The claimant testified that she was forced to call her husband on that date that she returned to work because her knee buckled. However, the claimant did not even seek medical treatment on that day after she was picked up by her husband, she did not seek treatment until two days later. She testified this was because

her husband had to work. However, her husband testified that he was not employed during this time and had no appointments or engagements which would have kept him from taking his wife for medical treatment. Later, Mr. McGill testified that he was waiting to seek treatment for the claimant because he was attempting to have his health insurance pay for the visit. This is curious as the claimant's husband testified that they did not return to the Northeast Arkansas Emergency Room in Jonesboro but went to another hospital in Paragould because allegedly Northeast Arkansas had refused the claimant for this treatment. The claimant indicated that they did not have any money or way to pay for a visit. She testified that they went to a different hospital so they would not have to pay, not because of waiting for any insurance.

The respondents accepted and paid for the claimant's treatment in relation to her arm, face and chest. The claimant contends she hurt her knee as well. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her right knee. The claimant failed to report any injury to her employer and she did not exhibit any signs or symptoms of knee problem or injury on the night of the incident or when she worked a

complete shift on the night of the 16<sup>th</sup> of July.

Further, there were no objective findings of an injury to the claimant's right knee. The ER visit of July 13, 2008, which is documented by the medical records, does not indicate swelling or pain in the claimant's knee area and the diagram fails to show any knee problem. A diagnosis of knee strain was given, but there are no objective findings to support this diagnosis.

Therefore, I find that the claimant has failed to meet her burden of proof. Accordingly, I must dissent from the majority's finding.

However, if I were to find that the claimant sustained a compensable injury to her right knee, a finding I do not make, I find that the claimant was also failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002); Ark. State Hwy. Trans Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). Without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. See, Ark. Code Ann. §11-9-102(4) (D) (Supp.

2005). Although objective medical findings are not directly necessary for the Commission to award temporary total disability benefits, such findings are required for the underlying injury to be compensable. Williams v. Prostaff Temporaries, 64 Ark. App. 128, 979 S.W.2d 911 (1998), aff'd, Williams v. Prostaff Temporaries, 336 Ark. 510, 988 S.W.2d 1 (1999). When an injured employee is totally incapacitated from earning wages and remains in her healing period, he is entitled to temporary total disability. Id.

The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The question of when the healing period has ended is a factual determination for the Commission. Arkansas Highway & Trans. Dep't. v. McWilliams, 41 Ark. App. 1, 846 S.W.2d 670 (1993); Mad Butcher, supra.

In my opinion, the only limitations the claimant had are the claimant's own perception that she had an injury to her knee. The claimant produced no light duty slips or any off work slips to support her contention that she was unable to work. The claimant contended that she gave this off-work slip to Sonya Cook in Human Resources. However, the only evidence or medical from the claimant's personnel file is the aftercare instructions that the claimant got from the Northeast Arkansas Hospital. This is what the claimant gave to Ms. Cook.

Further, the claimant worked three days after the incident, an entire shift without any modifications. This was contradictory to what the claimants testified to, that she was not able to work but an hour and a half or two.

Moreover, the claimant testified that she was unable to work because there was no light duty work available for CNA's with the respondent employer. However, the claimant later acknowledged that the respondent employer had light duty work available, but she failed to return or even contact her employer with regard to the status of her condition and care. The record is clear that the claimant made absolutely no effort to return to light duty work or otherwise, and

she failed to produce any documentation of any work restrictions entitling her to temporary total disability benefits. Accordingly, I dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, Commissioner