

**BEFORE THE ARKANSAS WORKERS' COMPENSATION  
COMMISSION**

**CLAIM NO. F403700**

**HENRIETTA ENGLISH, EMPLOYEE** **CLAIMANT**

**WAL-MART ASSOCIATES, INC.,  
EMPLOYER** **RESPONDENT**

**CLAIMS MANAGEMENT, INC.,  
INSURANCE CARRIER** **RESPONDENT**

**OPINION FILED JULY 13, 2005**

Hearing before Administrative Law Judge Cynthia Estes Rogers on April 14, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Sheila F. Campbell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Susan M. Fowler, Attorney at Law, Little Rock, Arkansas.

A hearing was held on April 14, 2005, to determine whether claimant sustained a compensable injury to her low back on March 28, 2004, and whether she is entitled to benefits, as a result.

The parties stipulated to the existence of the employee-employer relationship on March 28, 2004. It was further stipulated that the claimant was earning an average weekly wage of \$265.00.

Claimant contends that on March 28, 2004, while stocking candy for respondent-employer, she fell from a ladder and hit a display, resulting in a new injury

to her lower back or aggravating a prior degenerative condition. She seeks temporary total disability indemnity benefits from March 28, 2004, through a date yet to be determined, past and future medical expenses, and attorney's fees.

Respondents controvert any benefits claimed as a result of a low back injury. Respondents contend that claimant cannot establish a compensable injury or aggravation to her lower back on or about March 28, 2004, arising out of or in the course of her employment, identifiable by time and place of occurrence, and supported by objective, measurable physical findings.

#### **STATEMENT OF THE CASE**

Claimant, who had been employed with respondent-employer for approximately four months, testified that while stocking Easter baskets for respondent-employer at approximately 6:30 a.m. on the over-night shift on March 28, 2004, she fell from a ladder, hitting first the corner of a display box, then the floor, hard on her hip, low back, and elbows. Claimant testified that she screamed out for help, as no one was around to witness her fall. She testified that George Hunt, a co-worker, came to the scene of the fall to help her. Claimant testified that she immediately requested an ambulance, because she was in such severe pain, but that one was never called.

Claimant testified that her manager at the time, Ramona Johnson, also came to the scene of the fall with a wheelchair for her. Ms. Johnson testified that she does

not remember claimant requesting an ambulance. Mr. Hunt testified that claimant did not request an ambulance. He testified that after helping claimant into the wheelchair, he returned to work. Both Ms. Johnson and Mr. Hunt testified that they did not see claimant fall.

Claimant testified that Ms. Johnson prepared a First Report of Injury for her. Ms. Johnson testified that she told claimant she could get medical attention, but that she would have to follow company procedures, which included having a company manager accompany claimant to the doctor. Claimant refused, continued working to finish out her shift, and went home. Both the medical evidence as well as claimant's own testimony revealed that claimant did not seek medical care until she presented, on her own, at the emergency room of Jefferson Regional Medical Center approximately fourteen hours later, at 8:54 p.m. that evening. Claimant testified at the hearing that she was simply "too tired" to go to the emergency room right away, despite her "severe pain."

The emergency room records note no bruising or swelling in any of the alleged affected areas, despite claimant's testimony of heavily striking the corner of a display and the floor. A CT scan and x-rays of claimant's low back were performed at the emergency room on March 28, 2004, and revealed a significant amount of prior degeneration in claimant's lumbar spine. The ER physician, Dr. Carl Bell, diagnosed claimant with degenerative disk disease, contusion to the back and prescribed Flexeril.

Medical records indicate, however, that Dr. Bell observed no bruising and that the diagnosis of a contusion was based solely on claimant's history as she reported it to him. In addition, Dr. Bell observed no muscle spasms and only prescribed the Flexeril prophylactically, based on claimant's subjective complaints.

Cheryl Phillips, who was assistant manager on the day shift for respondent-employer on March 28, 2004, testified that she came on duty that morning and helped finish up the paperwork regarding claimant's alleged injury. She testified that claimant did not ask for medical attention that morning. She testified that claimant initially refused to see the company doctor, Dr. Gerald Morris, as is required by company policy; she testified that claimant was argumentative and threatening lawsuits, contending that respondent-employer had "no right" to get her medical records. A few days later, on April 2, 2004, claimant was examined by Dr. Morris.

Dr. Morris's notes of April 2, 2004, reflect that claimant was complaining of pain in her low back and labeled her pain as "10," on a 10-point scale. However, Dr. Morris's notes reflect no mention of any obvious objective findings, such as bruising, swelling, or spasms; in fact, Dr. Morris admits, in response to inquiries from respondents, that all of his findings were subjectively based. Based solely on claimant's complaints of pain, Dr. Morris recommended physical therapy, which claimant began on April 5, 2004.

Medical records reflect that Dr. Morris saw claimant on a few more occasions, and on April 15, 2004, Dr. Morris reported that the therapist called him with “vague suspicions” concerning claimant’s complaints of agonizing pain, as she had observed purposeful movement. The physical therapist’s notes corroborate this. The notes further reflect that the therapist discharged claimant on April 15, 2004, after only ten days, because of claimant’s continued complaints of severe pain and hypersensitivity to only light pressure. The therapist’s notes also cite that claimant demonstrated distraction range of motion of the cervical spine and lumbar spine, despite the severe restrictions and pain reported by claimant.

Respondent-employer scheduled an appointment for claimant with Dr. Kenneth Rosenzweig, an orthopaedic surgeon. Claimant saw Dr. Rosenzweig on April 20, 2004, and his notes reflect that claimant reported she was experiencing severe pain in her back and neck, with additional complaints of radicular symptoms in her legs and arms. This is the first mention in the medical reports of radicular symptoms by claimant. Dr. Rosenzweig’s notes, as well as the medical history form completed for him by claimant, reflect that claimant reported she had had no prior neck, shoulder, or back problems before March 28, 2004.

Dr. Rosenzweig’s notes indicate that claimant presented in only minimal distress, but based on her complaints, he recommended an MRI of her neck and back, which claimant testified was never taken. In response to inquiries from respondents,

Dr. Rosenzweig opined that the majority of his physical findings “can have subjective overlay” and that he observed no bruising, swelling, or muscle spasms. In addition, he stated that claimant’s pain drawing was “quite significant in regards to the magnitude and type of pain she reported and could possibly reflect symptom magnification.” In his deposition, Dr. Rosenzweig testified that most all of the tests he conducted and reported in his April 20, 2004, notes were dependent on the subjective response of the claimant.

Dr. Rosenzweig was unable to state within a reasonable degree of medical certainty whether or not the claimant’s symptoms, as noted in his April 20, 2004, exam, were related to an accident on March 28, 2004. Dr. Rosenzweig stated, “So I don’t know that I can answer with a reasonable degree of medical certainty, yes or no. With the inaccurate history that I was provided, then the hindsight does become speculation. And I don’t - - there is no information for my review at this point to clarify that hindsight to whether she did not have an injury or did propagate her injury with an additional fall.” He went on to opine that “it appears that she has had multiple episodes of hurting herself.”

Three months after seeing Dr. Rosenzweig, claimant began seeing Dr. Jon Dodson, a general practitioner. Dr. Dodson reported that his exam of claimant on July 29, 2004, revealed tenderness and palpable muscle spasm in the paraspinous muscles of the cervical spine, and restricted cervical range of motion, with localized pain on

cervical compression, without upper extremity radicular symptoms. He further reported tenderness and palpable muscle spasm in the claimant's lumbar area with restricted range of motion, positive straight leg raise with radicular symptoms in the left leg, and positive bowstring and Leseque's test. Dr. Dodson's report of muscle spasm, coming four months after the alleged incident, is the first report of such. All treating physicians prior to Dr. Dodson, and whom she saw closer in time to the alleged incident, specifically denied the presence of muscle spasm.

Although Dr. Rosenzweig noted that claimant's previous medical reports suggested she had previously experienced very similar radicular symptoms, Dr. Dodson stated in his deposition that claimant related to him that she had never had similar radicular symptoms before the alleged March 28, 2004, incident, and that she had only had two prior minor and remote car accidents in 1994 and 2001. Dr. Dodson testified that it was his opinion, within a reasonable degree of medical certainty, that claimant sustained an injury or aggravation of her prior condition on March 28, 2004. However, upon further questioning, Dr. Dodson acknowledged that his conclusions were not based upon any objective test or measurable finding, but rather upon the taking of claimant's history. He further acknowledged that his opinion concerning causation could change if he were to obtain information that claimant had additional prior injuries with similar symptoms.

Although claimant testified that she had no prior back problems before March 28, 2004, the medical records are replete with similar back injuries, as well as other injuries, sustained by claimant over the past twenty-four years. For instance, records introduced indicate that claimant had spent a night in the hospital in September of 2001 as a result of a back injury from a fall down some stairs. Claimant testified that it was actually her knee that was injured, but the medical records say, “acute lumbar strain.” Claimant also admitted on cross-examination that she had fallen while working for Tyson in 1991 – after working there only three months – scarring her back.

A workers’ compensation claim was filed in that case involving Tyson; claimant testified that she believed she had had a full hearing before an Administrative Law Judge (ALJ). An opinion was issued in regard to that case by ALJ Andrew Blood, which also makes mention of a July 1991 car accident. Claimant, however, denies that any car accident occurred in 1991; she testified at the hearing that any and all car accidents in which she was involved were prior to 1991. However, Dr. Dodson testified in deposition that claimant reported to him that she had had two prior automobile accidents on May 16, 1994, and March 2, 2001.

Although medical records indicate that claimant never sought medical treatment from Dr. Dodson again after September 16, 2004, even though Dr. Dodson related that he would continue to help her despite the refusal of workers’

compensation to pay, claimant testified that her condition today is so bad that she cannot play ball with her grandson or skate at the roller rink. She further testified that she is not able to work now and cannot stand or sit for long periods of time. She testified that she still requires pain medication.

### **FINDING OF FACT**

Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable back injury, or aggravation, arising out of and during the course and scope of her employment on March 28, 2004, or to establish a causal connection between her employment and her injury, within a reasonable degree of medical certainty.

### **DISCUSSION**

In this case, claimant alleges that she sustained a compensable injury or aggravation to her lower back, on or about March 28, 2004, arising out of or in the course of her employment, identifiable by time and place of occurrence, and supported by objective and measurable physical findings. It is this examiner's opinion that claimant has failed to prove this by a preponderance of the credible evidence.

In order to prove compensability of a claim, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury

was caused by a specific incident, identifiable by time and place of occurrence; and (4) the injury must be established by medical evidence supported by objective findings. *See* Ark Code Ann. § 11-9-102(4)(A)(i); 11-9-102(4)(D); 11-9-102(4)(E)(i).

Objective findings are those that cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16)(A)(I). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B); *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. *Id.* Further, the Commission has the authority to accept or reject medical opinions, and its resolution of the medical evidence has the force and effect of a jury verdict. *Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003).

Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Commission. *See Smith-Blair, Inc. v. Jones, supra; Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 188, 975 S.W.2d 857 (1998). 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 it deems worthy of belief. *Smith-Blair, Inc. v. Jones, supra; Arnold v. Tyson Foods, Inc.*, 64 Ark. App. 245, 983 S.W.2d 444 (1998). Furthermore, it is well established that it is within the Commission's province to weigh all the medical

evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight and credibility of the opinion and medical evidence. *Smith-Blair, Inc. v. Jones, supra; Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000).

In this case, no objective medical findings exist to establish that a work-related back injury, or aggravation of same, occurred on March 28, 2004. The only findings that do exist were the results of admittedly subjective tests and were in reliance upon claimant's history as told to her physicians by her. Moreover, based upon the medical records, claimant obviously failed to disclose a complete, accurate medical history to her treating physicians. Even Dr. Dodson – the only physician who did opine that claimant sustained an injury or aggravation of her prior condition on March 28, 2004, “within a reasonable degree of medical certainty” – acknowledged that his conclusions were subjectively based and that his opinion regarding causation could change if he were to obtain information that claimant had experienced additional prior injuries with the same or similar symptoms.

A number of factors brought forth in this case work together to constrain claimant's credibility, in this examiner's opinion. Those factors include: the lack of any witness to claimant's alleged fall, coupled with her refusal, initially, to see the company doctor; the suspicions on the part of the physical therapist that claimant's

efforts were not reliable; claimant's obvious failure to disclose an accurate medical history to her medical providers since this alleged incident; and, claimant's ceasing of medical care since September of 2004, while still complaining at the hearing that she is unable to work and continues to require pain medication today.

In short, claimant has simply failed to prove by a preponderance of the credible evidence that she sustained any compensable back injury, or aggravation, on March 28, 2004.

For all of the above-stated reasons, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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CYNTHIA ESTES ROGERS  
Administrative Law Judge