

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F405517

SHAONDRA P. PANNELL, EMPLOYEE **CLAIMANT**

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

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

OPINION FILED JULY 14, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on April 15, 2005, in Helena, Phillips County, Arkansas.

Claimant represented by Mr. Mike J. Etoch, Jr., Attorney at Law, Helena, Arkansas.

Respondents represented by Mr. Andrew M. Ivey, Attorney at Law, Little Rock, Arkansas.

A hearing was held on April 15, 2005, to determine compensability of the claim filed herein, as well as the calculation of claimant's wage rate.

The parties stipulated to the existence of the employee-employer relationship on May 8, 2004.

Claimant contends that on May 8, 2004, while performing her duties as stocking and maintenance for respondent-employer in West Helena, she injured her right ankle. She contends that she was employed for a period of time at light duty by respondent-employer and is presently not working at all, as her employer has told her

that no light duty is available. She contends she is still receiving medical treatment for her injury to her right foot and ankle.

Claimant further contends, with regard to the wage rate, that she was available to work a forty-hour work week; therefore, her wage rate should be calculated on that basis; as such, her average weekly wage would be \$171.00.

Respondents contend that claimant is not entitled to the requested benefits because she cannot establish that she sustained accidental injuries to her right foot and/or ankle which arose out of and in the course of her employment with respondent-employer on or about May 8, 2004.

With regard to wage rate, respondents contend that claimant was never hired to work a forty-hour work week; rather, she was hired on a part-time basis. Further, as she attends school, respondents contend that she was never available to work forty hours per week. As such, it is respondents' contention that her wage rate should be calculated on a contract-of-hire basis. Based upon this, respondents contend that claimant's average weekly wage would be \$140.19, which would correspond to compensation rates of \$94.00 for both temporary total disability and permanent partial disability benefit purposes.

STATEMENT OF THE CASE

Testimony revealed that on May 8, 2004, the date of claimant's alleged injury, she had been called into the store co-manager's office at approximately 10:20 p.m. to discuss claimant's poor attitude and actions earlier that evening when she was late in returning from her lunch break; claimant was informed that she would be given a "decision day" the next day. Claimant testified that a "decision day" was a day off with pay given to an employee to "think about things." She further testified that she was aware that the decision day was the next step prior to termination.

Rodney Pagans, the store co-manager on duty that evening, testified that claimant had been given prior verbal and written warnings and "coaching for improvement." He testified that he informed claimant at approximately 10:30 that evening that she would possibly be terminated the next day. He further testified that he was likely going to take the specific action of terminating claimant, but due to her reporting of an injury occurring that evening following the "decision day" meeting, and a dispute arising regarding whether the injury actually occurred or whether it was in retaliation for the decision day, claimant was not terminated the following day. Rather, this claim followed.

Claimant testified that on May 8, 2004, as she was finishing her work for respondent-employer, sometime between 10:30 p.m. and 11:00 p.m., she went to the back of the store to take out some trash. She testified that as she was starting back

toward the door, she slipped and fell on some soapy-like substance that was on the floor, twisting her ankle and foot under her. Claimant testified that no one witnessed her fall. She testified that as she was limping to the co-manager's office to report her injury, she saw a co-worker who worked in shipping and receiving, Donald Hartley, and told him about the accident and advised him that the substance on the floor needed to be cleaned up.

Mr. Hartley testified that the claimant did tell him she had fallen in some liquid soap, but he stated that he did not see any slippery substance on the floor. He testified that the only spot on the floor in the receiving area near the trash compactor, where claimant alleged she fell, was a mostly dried and cleaned up Hawaiian Punch spill that was sticky, rather than slippery. He testified that claimant was walking normally after her alleged fall and was not limping.

Claimant testified that she limped to the co-manager's office to report her alleged incident to Mr. Pagans, the store co-manager at the time. Mr. Pagans filled out an accident report and testified that he asked claimant if she needed to go to the doctor. He testified that she said, "No." He further testified that he told her that if she needed to go to the doctor or to the hospital, she would need to return to the store and fill out more paperwork, then a female manager would have to accompany her to the emergency room and/or doctor, pursuant to the company's policy. Claimant,

however, testified that she was advised by Mr. Pagans to simply go to the emergency room (ER) if her foot got worse.

Claimant testified that at approximately 11:00 p.m., her mother picked her up to take her home and then, shortly thereafter, took claimant to the ER because of the pain and swelling in her foot and ankle. Claimant testified that she contacted someone at respondent-employer and told them she was going to the ER. No one was called to testify to corroborate that call. Claimant treated in the ER of Helena Regional Medical Center. X-rays of three views of the claimant's right ankle showed that the bones, joints, and soft tissues appeared normal, and no fracture or dislocation was identified. An x-ray was taken of claimant's right foot at the Lee County Co-op Clinic on May 10, 2004, which showed the same results.

Claimant later treated on May 20, 2004, with Dr. Scott Hall at respondents' request. X-rays of claimant's right ankle were taken again on May 21, 2004, which showed the same results as the x-rays taken on May 9 and May 10, 2004. Dr. Hall then referred claimant to Dr. William Barr, an orthopaedist, in Clarksdale, Mississippi. Claimant did not attend the appointment with Dr. Barr. Instead, claimant testified that she sought treatment on her own, without the approval of respondent-employer, from her own physicians at the Lee County Co-op Clinic.

Medical records indicate that Dr. Apura Dalal ordered a nuclear medicine scan of claimant's right foot, which was taken on July 15, 2004, over two months after claimant's alleged fall. The results of this scan state as follows:

Multiple views of the right foot show an area of increased density seen in the metatarsal area or the fifth toe. Diffuse uptake is seen at the joint spaces of the right foot; however, this area of intense density at the distal metatarsal of the fifth toe is seen on the posterior aspect of the lateral view.

The results go on to state that a fracture is suspected.

Medical records indicate that claimant presented to UAMS Emergency Room on July 28, 2004, complaining of a toe fracture. The notes state no fracture was seen on patient's right foot from outside x-rays dated July 9, 2004, and that "*patient refused [x-ray] here.*" [Emphasis added.] An evaluation by Dr. David Knight on that same date, July 28, 2004, states under the "Subjective" heading as follows:

Patient presents with complaint of Toe Fx.

Was dx'ed with 5th metatarsal fx *after stepping off porch and turning foot.* Didn't show up on x-rays, but had a bone scan done which showed it. Says she wants a cast. I have reviewed the patient's history and clinical findings with Andy Subramaniam MD. We have discussed the patient's management and follow-up plans.

[Emphasis added.] Although the notes state that claimant was diagnosed with the metatarsal fracture after *stepping off a porch* and turning her foot, the notes go on to state that claimant "wants to sue Wal-Mart."

Claimant maintains that, since the alleged accident, she has continuously gone to see Dr. Hall of Helena, Dr. Athota of Marianna, Dr. Dalal, a specialist from Forrest City, and has gone to UAMS in Little Rock. She maintains that most of the time, she walks with crutches and still walks with a limp.

Claimant testified at the hearing that she did not have any prior right foot injuries or conditions. However, claimant was forced to admit on cross-examination that she was treated previously, on April 7, 2003, for “plantar fasciitis,” or pain in the right heel area. Claimant stated that she had forgotten about this previous condition and treatment. Claimant’s mother, Emma Newell, testified that her daughter had been treated previously for pain in her right calf, but Ms. Newell, like claimant, failed to remember claimant being treated by Dr. Vijay Reddy on April 7, 2003, for right heel pain.

Testimony revealed that following claimant’s alleged injury, she was given light-duty employment by respondent-employer, working the switchboard and that she did not miss any work, as a result. Claimant testified that at the time of her alleged injury, she was attending school each day from 8:00 a.m. until 2:00 p.m., and that she had originally been hired by respondent-employer as a part-time employee only. Claimant testified that she had never worked forty hours in a week for respondent-employer because she was a full-time student.

FINDING OF FACT

Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable right ankle or foot injury, arising out of and during the course and scope of her employment on May 8, 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 to her right ankle/foot, on or about May 8, 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 ankle or foot injury occurred on May 8, 2004. The only findings that do exist were that claimant suffered from a fractured toe after apparently slipping off a porch, from the history given to Dr. Knight.

In this examiner's opinion, a number of factors brought forth in this case work together to constrain claimant's credibility. Those factors include: the lack of any witness to claimant's alleged fall, coupled with the fact that only minutes before the alleged fall, claimant had been informed of a "decision day"; claimant's decision to go, on her own, to seek medical attention, rather than following the company policy that had been explained to her; all x-rays taken immediately after the alleged incident showing normal right foot results; claimant's failure to disclose or "remember" her prior right foot problems; and the history in Dr. Knight's notes, over two months after the alleged incident, stating that claimant had "slipped off [a] porch," injuring the fifth toe on her right foot.

In short, claimant has simply failed to prove by a preponderance of the credible evidence that she sustained any compensable ankle or foot injury on May 8, 2004. Because claimant's claim is herein denied, the issue of claimant's compensation rate need not be addressed.

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

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge