

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309688

SHARON McMILLEN,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 27, 2004

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

Claimant appears pro se.

Respondents represented by the HONORABLE CHRIS STEWART,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondent appeals an opinion and order of the
Administrative Law Judge filed March 17, 2004. 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 over this claim.
2. The stipulations agreed to by the parties and set forth above are hereby accepted as fact.
3. The respondents are liable for the treatment provided to the claimant at the emergency room.

4. The respondents have controverted liability for the treatment provided to the claimant at the emergency room.

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.

Therefore we affirm and adopt the March 17, 2004 decision of the Administrative Law Judge, including all findings and conclusions therein, 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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion, wherein the Administrative Law Judge found the respondent liable for emergency room treatment provided to the claimant on September 3, 2003. Although raised at the hearing, the issue of compensability was not addressed by the Administrative Law Judge in his opinion.

A carefully conducted de novo review of this claim in its entirety reveals that the respondents are responsible for the emergency medical treatment the claimant received on September 3, 2003. Specifically,

documentary evidence, including a request for medical care form filled out on September 3, 2003, supports the claimant's testimony concerning the events surrounding her work related incident and her subsequent emergency treatment. Therefore, the respondents are estopped from denying responsibility for the cost of the claimant's emergency medical treatment. Furthermore, although the Administrative Law Judge did not decide the issue of compensability during the hearing of February 17, 2004, the preponderance of the evidence fails to support a finding that the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102(4) (A).

The claimant testified that she was working in the respondent employer's automotive department on the evening of September 3, 2003, when she was assaulted by a customer. In a nutshell, when the claimant refused to give a customer his credit card until he paid for a service, the customer attempted to take the credit card forcefully. In the process, the customer slammed his hand down on top of the claimant's left hand and a brief struggle over the credit card ensued. The claimant testified that she later reported numbness and tingling in her left hand to her supervisors. The claimant further testified that her left hand started "showing

signs" of injury, such as redness and swelling, during her lunch break at around 6 o'clock p.m. that evening. The claimant stated that other employees, including her support manager, Rodney LeMay, noticed her symptoms. The claimant further testified that Mr. LeMay recommended that they alert a member of management, namely Chad Selby (sic), concerning the claimant's hand. The claimant said that she was instructed to put ice on her hand, and if that did not help, she could fill out the appropriate paperwork in order to proceed with medical treatment. Being left-handed, the claimant testified that Mr. Selby had to assist her in filling out the Worker's Compensation Request For Medical Care form, as contained in the evidence. After her shift, the claimant presented to a local emergency room where x-rays of the claimant's left hand were negative, identifying no fractures, dislocations, or other significant bone or joint abnormalities. Furthermore, during the emergency room examination the claimant's hand appeared pink in color and there was no obvious swelling or bruising. The claimant has received no further medical treatment in relation to this incident, nor has she missed any time from work.

An employer is generally only responsible for medical expenses when an employee is determined to have suffered a compensable injury. Ark. Code Ann. §11-9-102(5)(F)(i). However, the Arkansas Court of Appeals has applied the doctrine of estoppel to find an employer liable for medical treatment provided to the claimant at the respondents direction, where it also found that the injury was not compensable. Southern Hospitalities v. Britain, 54 Ark. App. 318, 925 S.W.2d 81 (1996). In the Britain case, the Court cited Snow v. Alcoa, 15 Ark. App. 205, 691 S.W.2d 194 (1985), wherein it had previously set forth the elements of estoppel as follows:

- 1) The party to be estopped must know the facts;
- 2) He or she must intend that their conduct shall be acted upon or must act so that the party asserting the estoppel has a right to believe the other party so intended;
- 3) The party asserting the estoppel must be ignorant of the true facts; and,
- 4) The party asserting the estoppel must rely on the other party's conduct to his or her injury.

Based upon the above and foregoing, I find that the respondent is estopped from denying liability

for the claimant's emergency treatment on September 3, 2003, in relation to her left hand. The claimant's testimony was consistent with the documentary evidence presented in this claim, which included witness statements concerning events surrounding the incident of September 3, 2003. Therefore, the credibility of the claimant's account of the incident is not questioned. Moreover, a Worker's Compensation Request For Medical Care form dated September 3, 2003, bears both the claimant's signature and that of the claimant's supervisor, thus confirming that the claimant reported her possible injury in a timely and appropriate manner. Furthermore, it is evident from the fact that the "Physician's Report" portion of this document was apparently completed by appropriate medical personnel, that the claimant believed she was authorized by the respondent employer to seek medical care for her hand. Therefore, the claimant has met her burden of proving the elements of estoppel as set forth above. Snow, supra.

The claimant has failed, however, to prove by a preponderance of the evidence that she sustained a compensable injury to her left hand arising out of the incident which occurred on September 3, 2003.

Specifically, the only medical documents presented into evidence are the emergency room report and the radiology report, both dated September 3, 2003. As stated above, the claimant testified that her hand became red and swollen after her altercation with the customer.

However, the emergency room report states that there were no obvious signs of redness, swelling, or bruising of the claimant's left hand when she presented for treatment some three hours after the incident.

Furthermore, three X-rays taken of the claimant's left hand revealed no fractures, dislocations, or other significant bone or joint abnormalities which would indicate an acute injury. Finally, a notation entered by a nurse on the emergency room report indicates that, by that time at least, the claimant was able to use her left hand to fill out emergency room paperwork. Thus, whatever symptoms the claimant displayed at work had apparently resolved by the time she was examined at the emergency room. The claimant was released by the emergency room treating physician to return to work the following day, and she has not complained of or sought treatment for her left hand subsequent to the treatment that she received on September 3, 2003.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) 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). Therefore, for an accidental injury to be compensable under the statute, the claimant must show that she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. Id. Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Finally, 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 Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001). Based

upon the above and foregoing, the claimant has failed to establish by a preponderance of the evidence the elements necessary to establish a compensable injury to her left hand. More particularly, the claimant has failed to show that the incident which arose out of her employment on September 3, 2003, caused internal or external physical injury. Additionally, due to the lack of medical evidence supported by objective findings as defined in §11-9-102(16), the claimant has failed to establish a compensable injury.

Therefore, for all the reasons set forth herein, I find that the claimant has met her burden of proving that the respondents are estopped from denying liability for the claimant's emergency medical treatment provided on September 3, 2003. The record clearly reveals that when seeking emergency medical treatment for her left hand, the claimant relied upon the respondent's conduct concerning her possible injury. However, upon reviewing the record, I would further find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her left hand on September 3, 2003.

Therefore, I must respectfully dissent from
the majority opinion.

KAREN H. McKINNEY, Commissioner