

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F203060

FELICIA TRAVIS,
EMPLOYEE

CLAIMANT

METHODIST NURSING HOME,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MARCH 11, 2004

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

Claimant represented by HONORABLE EDDIE H. WALKER, JR.,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by HONORABLE CAROL WORLEY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted in part.

OPINION AND ORDER

The respondents appeal from a decision of the
Administrative Law Judge filed March 10, 2003. 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. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a weekly compensation rate of \$218.00 for temporary

total disability and \$164.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that she sustained a compensable low back injury on January 30, 2002, while working for the respondent. The claimant has testified to an event from which she immediately felt back pain, received medical treatment, and has been substantiated by objective medical findings.
5. The respondents should pay for all of the medical treatment for this claimant's compensable low back injury.
6. The claimant is entitled to temporary total disability from January 21, 2002, through February 3, 2002, then again from March 14, 2002, through August 12, 2002. The claimant will again be entitled to temporary total disability from November 26, 2002, to a date to be determined. It is noted that the respondents did voluntarily pay some temporary total disability to this claimant for which they shall be given credit.
7. The claimant is entitled to temporary partial disability from August 13, 2002, through November 25, 2002.
8. The respondents have failed to prove that the claimant's claim for benefits should be barred by the Shipper's Defense. The claimant testified that she told her initial interviewer that she had had prior back problems but she was not under any ongoing restrictions and had been released by her physician. The respondents then hired the claimant and it was not until then that she filled out a questionnaire failing to set forth her prior back problems. The respondent's testimony has been that if the claimant had correctly filled out the

questionnaire she still would have been employed but perhaps in a different position.

9. The respondents have controverted this claim in its entirety.
10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

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.

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. 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's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable low back injury on January 30, 2002, and a finding that the *Shipper's* defense did not bar the claimant's claim for benefits. Based upon my de novo review of the record, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on January 30, 2002. Even if the claimant were able to prove that she sustained a compensable injury on January 30, 2002, a finding I do not make, I would find that the *Shipper's* defense barred the claimant's claim for benefits.

The record is replete with evidence that the claimant had prior back problems. The claimant sustained a prior back injury from a motor vehicle accident in 1998. The claimant consulted with Dr. Michael Standefer on October 28, 1999, whose notes stated:

HISTORY OF PRESENT ILLNESS: This is a twenty-four year old white female status post MVA one and a half years ago after which time she had neck and back pain. At that time, she had a lumbar CAT scan which showed just a centrally based disc bulge/herniation at L3-4. Since that time, she has had progressive symptoms with her lower back pain radiating into the right leg posterolaterally down to the lower leg and into the foot with some tingling in her toes. She reports favoring the right leg with reports that her right leg give out. She denies increase with cough or sneeze and denies any bowel or bladder difficulty. She also complains of intermittent neck pain with radiation at times into the right shoulder. She complains of having decreased strength in the whole right side of her body.

A few months after her visit with Dr. Standefer, the claimant was sent to the Mercy Pain Clinic. Notes from a December 15, 1999, visit reflect:

HISTORY: Felicia Pruitt is a 24-year-old white female who relates in 1988 having a motor vehicle accident, having some lumbar spine pain at that time but basically overcoming it uneventfully. She relates she has had intermittent

spine pain and has basically dealt with it with over-the-counter medications. However, she relates about three months ago that she noticed the onset of what she describes as a sharp numbing pain deep in her low back that went into her right hip and down her right leg "all the way to her toes". She relates that she cares for her 2-year-old and that she began having difficulty picking up her child, difficulty with mopping, sweeping, making up the bed, and doing laundry. All this became extremely difficult for her. She relates she could get some relief with trying to lay down, finding a position of comfort, but she realized she could never get quite comfortable. She saw her family physician. She began to take Ultram. She related it initially got to where at present, she is taking three tablets four times a day, trying to get relief with a little bit of diminution in the discomfort. She was referred to Dr. Capocelli's services for evaluation and she presents to our pain clinic at his request.

The claimant appeared to not be able to recall complaining of continued pain after the accident, but the record reflects that the claimant testified as follows:

- Q. You testified in your deposition that between February of '98 and October of '99 that you didn't have any problems with your low back.
- A. I'm not really good with dates, so I don't remember, you know, exact dates.

Q. Well, between the motor vehicle accident in February of '98, which required you to undergo that CT scan, - -

A. Right.

Q. - it was between that incident and this series of incidents that began October of '99?

A. Uh-huh.

Q. You said that time period in between you were fine. You didn't have any problems; is that right?

A. Yeah.

Q. Isn't it true, thought, that you told Dr. Capocelli that your symptoms had progressed since that motor vehicle accident?

A. I don't remember telling him that.

In addition to the claimant's motor vehicle accident which caused pain in her back, she had several incidents where she fell down stairs at her home. The following testimony reflects multiple falls:

Q. So at your deposition we talked about back problems and we talked about the February '98 motor vehicle accident and we talked about the injuries that occurred at Methodist Nursing Home, but as far as any other accidents that you said caused you low back pain, we didn't talk about any others; is that right?

- A. We talked about that I had fell down my stairs at my apartment.
- Q. Okay. But you didn't tell me that caused you any back pain, did you?
- A. I believe I did.
- Q. Well, I'll come back to that. It indicates and you told me in your deposition that in October of 1999 you woke up with a sore back.
- A. In October of '99?
- Q. Yes, ma'am.
- A. I believe I told you I slept wrong or something.
- Q. Right.
- A. Right.
- Q. The time period is what we're talking. It's October of '99. That's when you woke up or slept wrong with the low back, right?
- A. Right.
- Q. You told me that you had soreness and pulling in your low back and that you began treatment with Dr. Safari at that time.
- A. Yes, I did.
- Q. And you also told me that you had numbness in your right leg at that time.
- A. Slight numbness, yes.

Q. Okay. Now, when I asked you about what caused that, you said that you thought you had fallen or you had slept wrong, but you could not remember.

A. Right.

Q. You did later testify that you may have slipped down one step outside of your apartment in September or October of '99 before you woke up with back pain one day. Do you recall telling me that?

A. Yes. I skinned my knee.

Q. Right. And you told me that you only skinned your right knee; is that right?

A. Right.

Q. Isn't it true that on October 12th on '99 you told Dr. Zufari that your leg had given out, you fell, and your back was hurting bad?

A. Not bad. It was just hurting. He -
-

Q. You didn't tell him it was hurting bad?

A. No. I told him it was hurting?

The claimant clearly attempted to downplay the back pain she described to Dr. Zufari, and she did the same when questioned about another fall:

Q. Okay. Now, during your deposition you told me that while treating

with Dr. Capocelli you fell down two of 20 stairs in your townhouse?

A. Yes.

Q. My understanding is that you went to the emergency room at St. Edward.

A. Yes.

Q. At your deposition you told me that the incident did not involve your back, did not cause you any back pain, and did not worsen any of your back symptoms.

A. I told you that I told them my back hurt, but they told me that it didn't, you know, hurt my back. They did x-rays, as far as I remember.

Q. Ms. Travis, what I would like to do is just show you - - this is your deposition transcript from that day, and I'm looking at Page 45, Lines 2 through 3, and what I'm going to do is just read it to you here and you tell me if I read it right.

A. (Witness refers to transcript.)

Q. My question is "Did it hurt your back or neck?" and you said, "No."

A. Uh-huh.

Q. Okay. Now, what I'm going to do here is put it in some context. I'm going to turn over to Page 46 here and I'm looking at Lines 9 through

12, and I said, "Did the second slip down the stairs where your husband made you go to the St. Edward's ER, did that cause you any back pain? And you said, "No, I didn't. It just injured my tailbone." Did I read that right?

A. Right. I fell on my tail.

Q. Okay. Now, isn't it true that on November 12th of '99 - - and this would have been during your treatment with Dr. Capocelli, right?

A. (Witness nods her head affirmatively.)

Q. I'm sorry. Let me ask that question again - -

A. Yes.

Q. - - because it was kind of a two-parter. You were treating with Dr. Capocelli in November of 1999, right?

A. Yes.

Q. And then on November 12th of 1999 you told the emergency room physicians at St. Edward's that you had fell backwards down a flight of 11 stairs and that you had complained of lower back pain. Is that true?

A. Not that I remember. I never fell that far.

Q. So if the records indicate that, you believe the records are wrong?

A. I believe that they were misinformed. Because my husband was with me, and so I don't know what he told them, but I only fell down a few stairs.

The claimant next testified about two more falls that both occurred on the same day:

Q. With regard to your treatment with Dr. Capocelli, you testified that it ended in January of 2000 and that you had no symptoms. Is that right.

A. I was wrong about the date, but, yes, that's what I said.

Q. Okay. Then when did your treatment end?

A. I don't remember the exact time period. I know it was later that year.

Q. After your treatment with Dr. Capocelli ended, you testified that you did not go to a doctor again for your low back until January of 2002. Is that right?

A. As far as I remember, yes.

Q. Now, on March 1st of 2000 the emergency room notes of St. Edward Mercy Medical Center indicate that you fell down three steps during the morning hours of that day. Is that right?

A. On March 2st? I assume so.

Q. And did you complain of back pain as a result of that fall?

A. I fell on my rear end, yes.

Q. So you did complain of back pain?

A. Yes.

Q. Then later that exact same day during the evening hours you again fell down some of your stairs when your right leg gave way; is that right?

A. Those stairs were slippery. The were wood and I assume I fell down them, yes.

Q. And isn't it true that you presented to Dr. Nelson at the St. Edward Mercy Medical Center again that night - - this would be the second time?

A. I don't remember, but - - I don't remember seeing them twice in one day.

The evidence demonstrates that the claimant had an MRI of her lumbar spine on November 16, 1999, which showed central disc protrusions at L3-4, L4-5, and L5-S1. The same results were found when she had a repeat MRI on March 30, 2000. An x-ray performed shortly after the alleged injury showed normal lumbar vertebral body heights, mild L5-S1 interspace narrowing, and no spondylolisthesis. Another MRI performed on March 26, 2002, showed a moderate central disc herniation at the L3-4 level causing channel stenosis and a

bulging annulus at the L5-S1 level. The claimant subsequently had another normal lumbar spine x-ray on April 18, 2002.

The claimant was also questioned during the hearing about treatment she obtained from Dr. Shawn Miller. Though she could not remember seeing Dr. Miller, the notes from her visit with Dr. Miller on November 10, 1999 indicate that she told Dr. Miller that she had previously been employed as a nurse, but she was unable to work as she could not lift. Because of her inability to work due to her low back problem, the claimant applied for and received food stamps.

Further, Dr. Jim J. Moore, indicated in correspondence dated November 29, 2002:

Basically as best as I can tell from the information provided, the patient has had multiple injures over a period of some several years treated primarily by Dr. Capocelli and with a return to work with restriction of limitation of lifting of over 25 lbs. ...The patient does have several histories of injuries that are documents in the information sent to me. My review of the lumbar films preoperatively would certainly show evidence of some bulging prominences of the disk at L3-4, L4-5 and L5-S1 with disk degeneration as well. The changes are more obvious on MRI of some relative spinal stenosis and this is a fairly minor change, at least

in my judgement. As best as I can tell in review of the records, the patient's complaints have been fairly much consistent over the years. She has been evaluated and treated. Most of these are symptomatic complaints rather than objective findings.

It is clear from the evidence that the claimant had pre-existing lumbar problems and was subject to a 25 pound lifting restriction when she was hired by the respondent-employer. In my opinion, the guidelines set forth in the case of Shipper's Transport of Georgia v. Steppe, 265 Ark. 365, 578 S.W.2d 232 (1979), are controlling. In the Shipper's case, the Arkansas Supreme Court held that a false representation on an employment application will bar the recovery of Workers' Compensation benefits if the employer proves the following three elements:

- 1) The employee knowingly and willfully made a false representation as to her physical condition;
- 2) The employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
- 3) That there was a causal connection between the false representation and the injury.

The claimant has met all the requirements set forth in Shipper's to bar her claim for benefits. The claimant

contended that she told Joan Maurice, the person who interviewed her, that she had some minor back problems. However, when the claimant completed her post-employment questionnaire she failed to disclose to the employer that she had previously sustained some back injuries and was under a 25-pound lifting restriction as well as no repetitive bending from Dr. Capocelli. Ms. Catherine Bittick testified that had the claimant disclosed that she had lifting restrictions as well as bending restrictions that she would not have been hired as a nurse for the respondent-employer. The claimant would have been required to produce a release from her doctor stating that she was able to perform the job duties. The claimant failed to produce such a release as well as disclose on the post-employment questionnaire that she had any pre-existing back problems. In short, I find that the claimant's claim would be barred by the *Shipper's* defense even if she sustained a compensable injury.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner