BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403385

TARA M. BIRD, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., SELF-INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 28, 2005

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

Claimant represented by the HONORABLE MICHAEL A. LeBOEUF, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE AMY HUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of the administrative law judge: Affirmed in part, and reversed in part.

OPINION AND ORDER

The respondent appeals and the claimant cross-appeals from an administrative law judge’s opinion filed December 30, 2004. The administrative law judge found, in pertinent part, the following: The claimant has proven by a preponderance of the evidence that she sustained an injury

arising out of and in the course of her employment, that her injury was caused by a specific incident and is identifiable by time and place of occurrence, and that her injury caused internal physical harm to the body requiring medical services. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004. The claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury. The claimant has failed to prove by a preponderance of the evidence that she is totally incapacitated from earning wages. The claimant has therefore failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.

After reviewing the entire record *de novo,* the Full Commission affirms in part, and reverses in part the opinion of the administrative law judge. The Full Commission finds that the claimant proved she sustained a compensable injury on March 25, 2004, while working for the respondent. We find that the claimant has proven by a preponderance of the evidence that the medical treatment she has received to date

for her compensable injury has been reasonably necessary in connection with the compensable injury. In addition, the Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from May 1, 2004 until May 29, 2004.

I. HISTORY

The claimant, age 22 (12/30/82), worked for the respondent stocking shelves, unloading trucks, helping customers and building displays. The claimant maintains that she sustained a back injury on March 25, 2004, while unloading a truck when a hydraulic jack malfunctioned. Shortly thereafter, the claimant reported the incident to Richard Smiley, a manager. According to the claimant, Mr. Smiley instructed her to go home and rest.

The next day, the claimant completed the proper paperwork for her injury and went for a drug screen. The respondent also directed the claimant to go see Dr. Greg Smart.

A review of the medical evidence shows that the claimant was seen by Dr. Greg Smart on March 26, 2004. At that time, the claimant complained of low back pain, mainly right-sided. She reported having injured her back the night

before as she pulled a pallet that weighed approximately 2,000 pounds. Dr. Smart assessed the claimant as having "back pain - probable lumbar strain," for which he prescribed medication. He also directed the claimant not to lift more than 10 pounds.

On March 31, 2004, the claimant was seen by Dr. Smart for follow-up care of her lower back pain. Again, Dr. Smart's assessment was "back pain, probable lumbar strain." As a result, Dr. Smart continued the claimant's current medications and restrictions.

Although the respondent referred the claimant to Dr. Smart, some time after her second visit, but before her third visit with him, the respondent notified the claimant that her claim had been denied. Therefore, the claimant sought treatment on her own from her family physician, Dr. William Harper. On April 13, 2004, the claimant underwent initial treatment and evaluation with Dr. Harper for complaints of continued pain in her back. The claimant reported a history of having had an accident at work while pulling a heavy pallet that weighed about a ton. Dr. Harper assessed the claimant as having "sciatica," for which he

prescribed medication and directed the claimant to follow-up with him in two weeks if she continued to have pain.

On April 26, 2004, the claimant was seen for follow-up care with Dr. Harper due to complaints of continued pain in her back. At that time, the claimant had some weakness associated with her legs, but no particular radiculopathy. He assessed the claimant as having, "sacroiliiitis/sciatica," for which he prescribed medications and physical therapy treatment. On that same date Dr. Harper authored a medical note wherein he stated that he was of the opinion that the claimant had sufficiently recovered to return to work on April 29, 2004. In addition, on May 3, 2004, Dr. Harper authored another note wherein he stated that in his medical opinion, the claimant had sufficiently recovered to return to work on May 30, 2004.

An MRI of the lumbar spine was performed pursuant to orders from Dr. Harper on June 3, 2004, with the following conclusion:

> Posterior broad-based herniated disc at L4-L5 with the most prominent finding seen centrally and slightly to the left of midline and extending slightly inferiorly where it compresses the thecal sac centrally.

> Evidence of degeneration of the L4-L5 disc with some loss of the T2 signal.

The claimant underwent a neurosurgical evaluation with Dr. Steven Cathey, pursuant to a referral from Dr. Harper. On July 12, 2004, Dr. Cathey wrote, in pertinent part, the following:

> Dr. Harper, I suspect Ms. Bird did indeed suffer a disc hernation at L4-L5 as a result of the occupational injury of March 24, 2004. I do not, however, believe lumbar disc surgery would be beneficial in this case. I base this on the fact that the patient has a normal neurological examination and no evidence of nerve root impingement on the MRI scan. I have discussed with her other treatment options/chronic coping mechanism to include such things as epidural steroids, comprehensive pain management, etc. I have actually encouraged her to start trying to increase her activities particularly with regard to walking and exercise. According to AMA Guidelines, she is entitled to a 5% permanent partial impairment rating to the whole person referable to the disc herniation that resulted from occupational injury of March 25, 2004.

On November 5, 2004, Dr. Harper reported that the claimant remained under his care and was receiving epidural injections from Dr. Minna Ulmer. Dr. Harper reported that although the claimant continued to exhibit pain from the low back, she was not a surgical candidate.

A review of the medical evidence of record shows that the claimant has a prior history of treatment for back pain.

Specifically, on July 28, 1997, the claimant received treatment from Dr. John Yocum for complaints of low back pain and scoliosis. The claimant also received treatment in December of 2002 and on February 12, 2003 due to complaints of generalized musculoskeletal pain.

A hearing was held in this matter on November 30, 2004. During the hearing, the claimant gave testimony. The claimant testified that she injured her back while unloading a truck. According to the claimant she was pulling between a two to three thousand pallet when one of the jacks she was using "messed up." Specifically, the claimant testified that the hydraulics kept going down while she was trying to pull it. According to the claimant, she felt something "rip and pop" in her back, then her legs started to go numb. The claimant further testified that this incident happened after her lunch break, which would have been between 6:00 p.m. and 10:00 p.m. According to the claimant, the day following her injury, the respondent directed her to see Dr. Smart, which was done. The claimant testified that Dr. Smart released her to work on limited duty of no pushing, pulling or lifting more than ten pounds. According to the claimant, she returned to work the next day and worked light duty.

The claimant essentially testified that after two visits with Dr. Smart, she discontinued her treatment with him, as she was notified by the respondent that her claim had been denied. According to the claimant, she sought treatment from her family doctor, Dr. Harper, who put her on the same restrictions as had been given her by Dr. Smart. The claimant testified that although Dr. Harper ordered physical therapy treatment for her back, he stopped this treatment because it aggravated her back. According to the claimant, after an MRI revealed a bulging disc at L4-L5, Dr. Harper referred her to Dr. Cathey, in Little Rock. The claimant testified that she has also seen a pain specialist, Dr. Ulmer, who gave her three series of injections and epidural injection shots. According to the claimant, as of the date of the hearing, she continues under treatment with Dr. Harper for her injury.

The claimant testified that she continues with low back pain, especially when sitting. According to the claimant, she has gotten some relief from the use of a heating pad during the night and medication. The claimant admitted that the respondent initially put her on light-duty work as a result of the restrictions from Dr. Smart. However, she

testified that the respondent stopped her light-duty work on April 30, 2004, when respondent made her take a leave of absence. According to the claimant, John Struthers (the store manager) and Diane Lanor met with her and advised that they did not have work for her and that she needed to take a leave of absence, which was done. The claimant essentially testified that she has not received any income from Wal-Mart since April 30th or so. The claimant further testified that she was told by John (Mr. Struthers) that she could not return to work until she was a hundred percent better.

The claimant admitted to being treated for back problems (fibromyalgia related symptoms)in '99, which was treated with Flexeril. The claimant further admitted that she was last treated by Dr. Jones for fibromyalgia in 2002. According to the claimant, after this treatment, she did not receive treatment from any other doctor due to back problems/fibromyalgia, nor did she miss school or work due to this condition. Although the claimant admitted to playing sports, she denied having ever injured her back.

According to the claimant, at the time of her injury, she was working for the respondent and going to school. The

claimant essentially testified that since her injury, she has been able to continue going to school.

On cross-examination, the claimant testified that it was her understanding that Dr. Cathey was of the opinion that she needed surgery. According to the claimant, Dr. Harper has also suggested surgery as a possibility. The claimant again admitted to having worked for the respondent until April 30, 2004. As of the date of the hearing, the claimant essentially testified that she was of the opinion that she could work restricted duty. However, the claimant admitted she has not made any attempt to find another job performing light-duty work.

A prehearing telephone conference was conducted in this claim on August 30, 2004, from which a Prehearing Order was filed on the same day. The parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction in this claim.

2. The employee/self-insured employer relationship existed at all relevant times, including March 25, 2004.

The parties agreed to litigate the following issues:

1. Whether the claimant sustained a compensable injury to her back on March 25, 2004.

2. Whether the claimant is entitled to temporary total disability (TTD) compensation.

3. Whether the medical treatment received by the claimant has been reasonably necessary in connection with a compensable injury.

The claimant contended that she sustained a compensable injury to her back on March 25, 2004; that the respondent provided some medical treatment; that she is entitled to temporary total disability benefits from March 25, 2004, to a date yet to be determined and that her medical bills should be paid by the respondent.

In contrast, the respondent contended that the claimant cannot prove an accidental injury caused by a specific incident and identifiable by time and place of occurrence, which caused internal physical harm to the claimant's back, arising out of the course of employment, which required medical services or resulted in disability or death, and is established by medical evidence supported by objective findings; that the claimant's back problems are not a compensable injury; and that the claimant is not entitled to indemnity benefits with respect to these alleged injuries.

After a hearing before the Commission, the administrative law judge found, in pertinent part, "The

claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, that her injury was caused by a specific incident and is identifiable by time and place of occurrence, and that her injury caused internal physical harm to the body requiring medical services. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004. The claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury. The claimant has failed to prove by a preponderance of the evidence that she is totally incapacitated from earning wages. The claimant has therefore failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits."

The respondent appeals and the claimant cross-appeals to the Full Commission. Specifically, the respondent appealed the portion of the administrative law judge's opinion wherein he found that the claimant sustained a compensable injury on March 25, 2004, and that she is

entitled to reasonably necessary medical treatment for her compensable injury. Hence, the claimant cross-appealed that portion of the administrative law judge's opinion wherein he found that the claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.

II. ADJUDICATION

A. Compensability

The claimant contends that she sustained a compensable specific incident injury to her back on the evening of March 25, 2004, while performing job duties for the respondent. Ark. Code Ann. §11-9-102(4)(A) defines compensable injury as:

> (i) An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, 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 the time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). The claimant bears the burden of proof in establishing a compensable injury and must sustain that

burden by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(E)(i).

The administrative law judge found that the instant claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, that her injury was caused by a specific incident and is identifiable by time and place of occurrence, and that her injury caused internal physical harm to the body requiring medical services. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004. The Full Commission affirms this finding.

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000). In the present matter, we find that the claimant was a credible witness. The claimant testified that she sustained an accidental injury at work on March 25, 2004. She further testified that her accident occurred shortly after her lunch break on that evening, which would been some time between 6:00 p.m. and 10:00 p.m. Specifically, the claimant

testified that the hydraulics kept going down as she attempted to pull it. At which time, the claimant testified that she felt something “rip and pop” in her back, which caused her legs to go numb. The claimant promptly reported the incident to the store manager, Richard Smiley. The Full Commission finds that the claimant gave a plausible and consistent account of the incident and of her having promptly reported the incident to Mr. Smiley. Moreover, we find that the claimant’s account of the incident was corroborated by the medicals.

The administrative law judge correctly relied on the “objective findings” found in the June 3, 2004, MRI, namely “a disc herniation at L4-L5", and muscle spasms, for which medication was prescribed. The claimant received conservative treatment for the aforementioned back problems in the form of injections, some physical therapy treatment, and medication.

The Full Commission recognizes that the claimant has a prior history of back problems, however, her pre-existing problems and complaints of the back were essentially asymptomatic prior to her work incident of March 25, 2004, as there is no evidence that the claimant had not missed

work or school due to back problems. Further, while the claimant had suffered occasional back pain in the past, the medical records relating to her past treatment suggests that this was muscular in nature and not the result of any disc problems. Moreover, we note as pointed out by the administrative law judge, although Dr. Cathey opined that he suspected the claimant suffered a disc herniation at L4-L5 as a result of her occupational injury, this opinion may not fall within a reasonable degree of medical certainty. However, we find that there is sufficient non-medical evidence to establish a causal connection, considering that the claimant has given a credible account of the incident, which we find to be consistent with Dr. Cathey's clinical impression of her back. Based on all of the foregoing, the Full Commission finds that the claimant has proven every element of a compensable injury. The Full Commission therefore affirms the administrative law judge's finding that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004.

B. Medical treatment

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508 (a). The claimant bears the burden of proving that he is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W2d 750 (1984).

The administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury." The Full Commission affirms this finding. We find that the claimant proved by a preponderance of the evidence that all of the medical treatment she has pursued for her back injury was reasonably necessary in connection with her compensable injury, pursuant to Ark. Code §11-9-508 (a).

C. Temporary total disability

An injured employee is entitled to temporary total disability compensation during the time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The administrative law judge found in the present matter that "the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits." The Full Commission reverses this finding. We find that the claimant proved she was entitled to temporary total disability compensation from May 1, 2004 through May 29, 2004. The preponderance of the evidence indicates that the claimant remained within her healing from March 25, 2004, the date of her compensable injury, until July 12, 2004, the date Dr. Cathey assigned her a permanent anatomical impairment rating, which strongly suggests the claimant had reached the end of her healing period. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). In addition, at that time, Dr. Cathey also opined that the claimant would not be a candidate for surgery and did not order any further treatment or diagnostic testing. However, on May 3, 2004, Dr. Harper authored a medical

statement wherein he returned the claimant to work on May 30, 2004. This evidence indicates that the claimant was not totally incapacitated to earn wages as of May 30, 2004. Therefore, based on the foregoing evidence, we find that the preponderance of the evidence clearly indicates that the claimant remained within her healing period until July 12, 2004, but she was not totally incapacitated to earn wages as of May 30, 2004. As a result, the Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from May 1, 2004 until May 29, 2004. We reverse the administrative law judge's denial of temporary total disability compensation.

III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved she sustained a compensable back injury on March 25, 2004, while working for the respondent. We also affirm the administrative law judge's finding that the claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury.

However, the Full Commission reverses the administrative law judge’s finding that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits. Rather, we find that the claimant proved she is entitled to temporary total disability compensation from May 1, 2004 until May 29, 2004.

The claimant’s attorney is entitled to maximum fees for legal services as provided by Ark. Code § 11-9-715 (Repl. 2002).

For prevailing on appeal to the Full Commission, the claimant’s attorney is entitled to an additional fee of five hundred dollars ($500.00), pursuant to Ark. Code Ann. §11-9-715 (Rep. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her lower back on March 25, 2004, for which she is entitled to medical treatment and temporary total disability benefits.

My carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004, to her lower back. Therefore, I find that the Administrative Law Judge's decision should be reversed in this regard, and the compensability of this claim should be denied.

The claimant worked as a grocery stocker for the respondent employer at the time of her alleged injury. On the evening of March 25, 2004, the claimant testified that she was pulling a two-to three-thousand pound defective pallet jack when she felt "something rip and pop in [her] back", followed by numbness in her legs. The claimant further testified that she did not alert any of her

immediate co-workers to this incident, but later reported it to her manager, Mr. Richard Smiley. Mr. Smiley asked the claimant if she could continue working, to which she responded that she could not, because she could "barely walk". The claimant then drove herself home, which was approximately five minutes away. The following day, the claimant completed the proper paperwork associated with her alleged injury.

The claimant first sought medical treatment for her alleged injury on March 26, 2004, under the direction of Dr. Greg Smart. In his report of this initial examination, Dr. Smart noted the claimant's alleged work related incident, and he assessed her with probable lumbar strain. In the history portion of his report, Dr. Smart stated that the claimant's medical history was unremarkable for back injury, citing only a minor injury when the claimant fell from a ten foot platform at age ten. A prior seizure was also noted in this section of Dr. Smart's report. Dr. Smart restricted the claimant's lifting to ten pounds and he prescribed her Vioxx and Skelaxin "for muscle spasm", although he did not state in his report that he observed muscle spasm upon physical examination of the claimant. The

claimant was next seen on April 13, 2004, by her family physician, Dr. William Harper, who assessed her with sciatica. On April 26, 2004, Dr. Harper reported that the claimant was experiencing leg weakness, with no particular radiculopathy. Dr. Harper then added sacroiliitis to his assessment of the claimant's condition. Dr. Harper injected the claimant with Celestone and Lidocaine in her right SI joint, and he referred her to physical therapy. A return-to-work slip from Dr. Harper dated April 26, 2004, reflects that the claimant could return to work on April 29, 2004. On April 30, 2004, the claimant requested a leave of absence from work.

The record reflects that the claimant underwent a series of physical therapy sessions, which she testified only worsened her back pain. Dr. Harper ordered an MRI of the claimant's lumbar spine, which was conducted on June 3, 2004. This diagnostic study revealed a posterior broad-based herniated disc at L4-5. Dr. Harper referred the claimant to Dr. Steven L. Cathey for a neurosurgical evaluation. In his report dated July 12, 2004, Dr. Cathey stated the following:

> On examination, the patient is overweight. Her neurological examination is otherwise negative. She specifically

> has no sign of lumbar radiculopathy. Straight leg raising is negative bilaterally. Point tenderness is identified in the lower back, however, there’s no restriction of movement or paraspinous muscle spasm identified.

Based upon his assessment of the claimant’s condition, Dr. Cathey did not recommend surgery as a treatment option for her. Dr. Cathey assigned the claimant a 5% permanent partial impairment rating to the body as a whole. Like Dr. Smart, the only prior back problem noted in Dr. Cathey’s report was that of the claimant having fallen off of a ladder at age ten.

The claimant obviously failed to inform both Doctors Smart and Cathey that she had a long and complicated history of prior back problems. The record reveals that the claimant was treated for low back pain and scoliosis on July 18, 1997, under the direction of Dr. John H. Yocum. The claimant, who was 14 years old at the time, gave Dr. Yocum a history of “vague back pain” for “as long as two years”. Like her examinations after her alleged compensable injury, Dr. Yocum’s examination of the claimant revealed no neurological deficits and she had a negative straight leg raise with symmetrical reflexes. Dr. Yocum discussed the

importance of weight loss with the claimant and her mother, and he discussed sending her to physical therapy for instruction in a back strengthening and scoliosis program. The medical records further reflect that the claimant underwent MRI's of her thoracic and lumbar spine at age 16, as part of a scoliosis study. The thoracic MRI confirmed minimal thoracolumbar S-shaped scoliosis "over the past several years." No evidence of acute disease was seen in a single view, however. The claimant's lumbar MRI confirmed very mild levoscoliosis of the lumbar spine, but was otherwise unremarkable. The claimant presented for emergency medical treatment at age 17 for a seizure. Under the Review of Systems section of the emergency room report, dated November 8, 2000, the following was reported:

> No muscle weakness, bone or joint pain other than some back pain on occasion. She has some mild scoliosis and some muscle aches associated with possible fibromyositis.

At age 18, the claimant presented to Dr. Yocum with bilateral rotator cuff tendinitis. In his report of that examination, dated November 28, 2001, Dr. Yocum stated:

> Past medical and social history is reviewed in the chart. She has been

> active in power lifting in the past, including bench pressing and says this was really aggravating for the shoulders.

Again, on November 12, 2002, the claimant presented to Dr. Michael Jones with generalized musculoskeletal pain. In his detailed report of that examination, Dr. Jones stated:

> Patient is a 19 year old white female whose overall general medical health has been relatively good with respect to he musculoskeletal system. She has a 5-6 year history of musculoskeletal discomfort that began with her knees and with time became more generalized. Her low back, neck, shoulders and elbows have been involved.

Dr. Jones assessed the claimant with, among other things, "multi factorial back pain with elements of mechanical, positional, and minimal degenerative disease overlapping to produce a complex and difficult to manage etiology of the back". Dr. Jones gave the claimant informational brochures pertaining to her condition, told her to walk 10-15 minutes in the evenings, instructed her to apply moist warm heat to her affected areas, and prescribed her Bextra and Flexeril. In addition, he planned to obtain

baseline rheumatologic laboratory in order to rule out an underlying inflammatory connective tissue disease, and he ordered x-rays of the claimant's neck and shoulders.

In a follow-up visit with Dr. Harper on February 12, 2003, Dr. Harper reported that the claimant's condition had remained "relatively stable" since her last visit, especially with regards to her subdeltoid bursal complaints and trochanteric bursal complaints. Dr. Harper added, however, that the claimant's multi factorial neck complaints and her low back pain continued to be problematic. Dr. Harper continued the claimant on her medications, and he scheduled her to return in four months. The next time that the claimant was seen for medical treatment was after her alleged work-related injury.

The medical records clearly reveal that the claimant had a chronic degenerative back condition that required ongoing medical treatment prior to her alleged compensable injury. The claimant was diagnosed with scoliosis in 1997, at age 14, at which time she reported that her symptoms had been present for more than two years. Although the claimant's physician recommended that she undergo therapy for instruction in back strengthening and a

scoliosis program there is no evidence that the claimant pursued follow-up treatment for her condition until some two years later. At that time, the claimant again presented with complaints of pain associated with her scoliosis, which was found to be unchanged. However, the claimant's treating physician predicted at that time that the claimant's condition might worsen with time and require further evaluation. This was in September of 1999. In November of 2000, the claimant again presented to her treating physician with "muscle aches and pains" which were determined to be associated with her condition, and with possible fibromyositis. At that time, the claimant sought an evaluation from a rheumotologist, namely Dr. Jones. Also by that time, the claimant's problems had persisted for a period of five to six years, and were, therefore, well-established. However, when the claimant presented to Dr. Smart after her alleged work related injury, she failed to inform him of her lengthy history of chronic back pain and scoliosis. Rather, she informed him only of an incident which happened at age ten. With the one exception, the claimant also failed to inform Dr. Cathey of her prior back problems. When questioned about this at the hearing, the

claimant stated that she had neither informed Dr. Smart nor Dr. Cathey about her history of scoliosis and chronic back pain “Because it wasn’t dealing with my back; it was dealing with my muscles in my back.” Moreover, the claimant agreed that she denied during her deposition ever having had prior back pain or that she had ever been treated for back problems prior to her alleged work related injury. The medical records reveal, however, that the claimant received medical treatment for her chronic back condition as recently as February of 2003, when she was assessed with active myofascial type chronic pain syndrome, tronchanteric bursitis, and multifactorial back and neck pain. The medical records further reveal that the claimant was scheduled for follow-up treatment at that time, but the record is devoid of evidence that the claimant did so until her alleged injury of March 2004.

In addition to contending that the claimant’s back problems are a result of deterioration associated with her scoliosis, the respondents further contend that the claimant deliberately withheld pertinent information from her physicians, Dr. Smart and Dr. Cathey, in order to obtain treatment for her pre-existing condition at the respondents’

expense. Based upon the above and foregoing, this contention is not without merit. The claimant was well aware of her chronic back condition at the time of her treatment with the aforementioned physicians, and the fact that she was not forthcoming with this information invites curiosity about her motivation. Moreover, this practice of withholding relevant information by a claimant ultimately creates doubts in reasonable minds concerning the claimant's overall credibility. It is well established that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). Here, the claimant's credibility is greatly diminished due to her having failed to inform Dr. Smart and Dr. Cathey about her pre-existing back problems. In addition, the Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Although Dr. Cathey opined in July of

2004, that the claimant "did indeed suffer a disc herniation at L4-L5 as a result of the occupational injury of March 25, 2004", Dr. Cathey was obviously not fully informed of the claimant's medical history when he formulated this opinion. Moreover, the claimant's initial physical examinations following this alleged incident produced no objective findings of injury to the claimant's lower back. And although Dr. Smart prescribed the claimant Skelaxin for muscle spasms, he did not actually observe muscle spasms during his physical examination of the claimant. Moreover, Dr. Smart noted that the claimant's complaints were "mostly subjective." It is also significant to note that the claimant had been prescribed a similar medication in the past, specifically Flexeril, which is a muscle relaxer used to control muscle spasms.

While the Courts have held that a prescription given for muscle spasms can be an objective finding because "a doctor would not prescribe medication directed to be 'taken as needed' for muscle spasm if he did not believe muscle spasms were existent", Estridge v. Waste Management, 343 Ark. 276 (2000), surely this is not to be interpreted that a prescription for muscle relaxers can stand alone to

establish objective medical findings sufficient to prove compensability. While a prescription for muscle relaxers may present one factor in determining whether the claimant has established a compensable injury, certainly other factors must be weighed in making such a determination. In the present claim, the claimant was prescribed Skelaxin "1 tablet after work, and one at bedtime for muscle spasm". We can only guess why Dr. Smart limited the claimant's dosage of Skelaxin to afternoons and bedtime if he truly believed she might be susceptible to having muscle spasms at other times. A letter from Dr. Smart to Amy Huffman dated October 16, 2004, suggests that Dr. Smart prescribed the claimant a muscle relaxer as a matter of course. In that letter, Dr. Smart stated "It is certainly my experience that anybody who presents with lumbar strain symptomology responds better to muscle relaxers which are usually prescribed, along with non-steroidal anti-inflammatory medications and pain medications... ." The claimant's prior medical records reveal that she had reported sleeping problems to Dr. Jones due to her chronic aches and pains, for which he prescribed her Flexeril in hopes that it would help her relax at night. This demonstrates that the claimant has been prescribed a

muscle relaxer in the past for something other than muscle spasms. Perhaps Dr. Smart prescribed Skelaxin only in the afternoon and at bedtime for the same reason. In order for us to make such a determination, we would have to resort to speculation; and speculation, no matter how plausible, does not take the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979) Aside from not having observed muscle spasms during any of the claimant's visits with him, Dr. Smart noted a lack of other objective findings, as well. For instance, no irregularities were observed in the claimant's range of motion, and no significant point of tenderness was found in her back. Moreover, the claimant's physical therapist noted only muscle guarding and muscle tightness during sessions, with no spasms ever having been observed. Likewise, Dr. Cathey specifically noted in his report of July 12, 2004, "no restriction of movement or paraspinous muscle spasm identified." Therefore, a prescription for muscle relaxers, standing alone, is not sufficient to establish the compensability of the claimant's alleged back injury through objective findings. Finally, the claimant's MRI taken in June of 2004 revealed a herniated disc at L4-L5, but no

causal connection has been established which links the claimant's herniation to her alleged injury. The claimant clearly suffered from long-term and continuing back problems, which were becoming progressively worse. The claimant's previous MRI was taken in September of 1999, some five years before her most recent MRI. Between the time of the claimant's 1999 MRI and her 2004 MRI, the claimant admittedly engaged in several strenuous sports activities, including weight lifting, which could have easily caused a herniation to occur. Moreover, the claimant was under active treatment for her back problems, which continued to be "problematic", at the time of her alleged work related injury.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her lower back on March 25, 2004. More particularly, the claimant has failed to establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Rather, the preponderance of the evidence demonstrates that the claimant suffers from pre-existing degenerative disease and scoliosis which continue to worsen

over time. In addition, in spite of her known diagnosis, the claimant has engaged in strenuous sports activities which could have easily caused a herniated disc to occur in light of her pre-existing problems. Moreover, Dr. Cathey's opinion of causation is of little to no value due to the claimant's failure to fully inform him of her pre-existing problems and conditions. Therefore, I find the decision of the Administrative Law Judge concerning compensability should be reversed.

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. McKINNEY, Commissioner