

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408287

SUSAN KELLEY, EMPLOYEE	CLAIMANT
ST. ANTHONY'S HOSPITAL ASSOC., EMPLOYER	RESPONDENT
PREFERRED PROFESSIONAL INS. CO., CARRIER	RESPONDENT

OPINION FILED DECEMBER 29, 2005

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

Claimant represented by HONORABLE DONALD C. PULLEN, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by HONORABLE WALTER A. MURRAY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on April 18, 2004. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as an LPN. The claimant testified that on April 18, 2004, she was assisting to bathe a patient in a shower chair when she sustained a knee injury. The claimant stated that the patient was combative and she and two other mental health aids were attempting to bathe the patient in a shower where there were no strips that would prevent the chair from moving. The claimant stated that she stuck her foot in front of the chair to keep it from slipping when the patient moved causing her knee to twist and have a loud pop. The claimant initially sought treatment at the emergency room of the respondent employer. X-rays were performed and showed no evidence of injury. The claimant returned to work the following day. On July 26, 2004, the claimant was seen by Dr. Philip Johnson who noted that the claimant had a normal x-ray and he ordered an MRI. In a report dated August 2, 2004, Dr. Johnson noted that the claimant's MRI was normal. Dr. Johnson referred the claimant to Michael Pate, a physical therapist, who set up a physical therapy program for the claimant. The claimant was to have three visits a

week for four weeks. However, the claimant only went to two of those appointments.

The claimant continued to make subjective complaints of pain to Dr. Johnson, so he referred the claimant to Dr. Mulhollan who saw the claimant on September 7, 2004. Dr. Mulhollan noted that the claimant's MRI showed no evidence of a focal tear but noted a signal in the posterior aspect of the medial meniscus that was degenerative in nature.

On November 11, 2004, the claimant presented to Dr. John L. Wilson. Dr. Wilson noted that there were no objective findings. He did report that the claimant needed to lose weight and until she did her prognosis would be poor.

Following the initial treatment, the claimant was placed on light duty status. The claimant continued to work the remainder of April, all of May and June of 2004. The claimant stated that she did miss work on some occasions during those months, but she could not recall the specific dates. The claimant's last day to work was August 24, 2004.

On September 7, 2004, Dr. Mulhollan placed the claimant on sedentary work. The respondent employer made sedentary work available to the claimant, but she never requested it. The respondent employer attempted to contact the claimant to offer work, but they were unsuccessful. The claimant was sent a certified letter which was returned to the respondent employer as "undeliverable." The claimant has moved back to Forrest City, Arkansas, to live with her mother and has not worked anywhere since August 24, 2004.

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). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a

causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he/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). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). 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).

In our opinion, the claimant has failed to prove by a preponderance of the evidence that the April 18, 2004, incident caused her to suffer any type of injury to her knee. The medical evidence demonstrates that the claimant had prior problems with her knee and had a previous surgery in 1997. The claimant was released to return to sedentary work pursuant to Dr. Mulhollan's work restrictions. The claimant testified that the respondent employer could not provide her sedentary work. However, the testimony of Mr. Todd Ferrand, the interim program director and nurse manager for the respondent employer, testified that sedentary work was available to the claimant. Mr. Ferrand testified that the claimant never contacted the respondent employer regarding this work and he actually made several attempts to reach her by telephone but never received an

answer. We find the testimony of Mr. Ferrand to be more credible than the claimant's. 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). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. 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 that it deems worthy of belief. Id.

Neither the Workers' Compensation Act nor Arkansas case law contains a requirement that the Commission personally hear the testimony of any witness. There is nothing in the statutes that precludes the Commission from accepting or rejecting any finding made by the Administrative Law Judge, including findings pertaining to the credibility of witnesses. Stiger v. State Tire Serv.,

72 Ark. App. 250, 35 S.W.3d 335 (2000). By allowing the Commission to review evidence or, if deemed advisable, hear the parties, their representatives and witnesses, Ark. Code Ann. §11-9-704(b) (6) (A) (Repl. 2002), adequately protects a claimant's due-process rights. Id. When the Commission reviews a record, demeanor is merely one factor to be considered in determining credibility. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. "The flexibility permitted the Commission adequately protects the claimant's right of due process of law." Id.

There is further evidence of the claimant's lack of credibility. She testified that she stopped going to the physical therapy sessions because the physical therapist stopped the sessions. However, Mr. Michael Pate, the claimant's physical therapist, testified at the hearing that it was the claimant who stopped attending the physical

therapy. Neither he nor the doctor discontinued the sessions.

The Administrative Law Judge stated in his opinion that each doctor's report traced the claimant's current symptoms back to the incident at work on April 18, 2004. In our opinion, this finding is completely unsupported by the record. The Administrative Law Judge cites Dr. Johnson's July 26, 2004, report where he states that the claimant has a "post traumatic internal derangement of the right knee." However, subsequent to this report, the claimant underwent an MRI and on August 2, 2004, Dr. Johnson reported that the claimant was still having popping and pain in her knee "for which there is no good explanation, except possibly her weight." This report makes absolutely no mention of trauma. Furthermore, on August 30, 2004, Dr. Johnson again saw the claimant and made no mention of her injuries being related to trauma. In fact, Dr. Johnson reported, "[I]n view of her negative MRI, I am at a loss to explain the extent of her problems." On September 7, 2004, Dr. Mulhollan reported that "the signal in the posterior aspect of the medial meniscus"

"appears to be degenerative in nature." Not only does Dr. Mulhollan not attribute the claimant's problems to the April 18, 2004, incident, he directly stated that her problems were degenerative in nature. Simply put, there is absolutely no evidence in the record which demonstrates that the April 18, 2004, incident caused the claimant to suffer any type of injury to her knee. The claimant is extremely overweight, at the time of the hearing weighing 290 pounds and is five foot six inches tall. At the time of the incident she weighed 270 pounds. The claimant has prior knee problems. The only evidence that we have that she was not having any problems after the surgery in 1997 is her own testimony.

Although, the MRI showed "small to moderate joint effusion", there is no evidence in the record to relate this back to the April 18, 2004, incident. It is of note at the time of the alleged incident, the emergency room record demonstrates that there was not any swelling and no laceration. The emergency room physician commented that the right knee had red streaks on it from a heating pad. This is not

evidence of any injury, but is merely evidence that the claimant had an incident and she put some heat on her knee after she allegedly hurt it.

Therefore, after considering all the evidence in the record, the fact that the claimant had prior problems with her right knee, the fact the claimant is severely overweight, and the fact that the claimant was able to work for almost three months before seeking additional medical treatment after the initial incident on April 18, 2004, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury. There is simply no evidence of a causal connection between the claimant's current problems and the incident on April 18, 2004. Accordingly, we reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____The Majority reverses the decision of the Administrative Law Judge finding that the claimant sustained a compensable knee injury on April 18, 2004. The Majority opines that the claimant could not show that the incident on April 18, 2004 caused an injury to the her knee. They further find that any problem with the claimant's knee is likely due to her being overweight or due to pre-existing problems with her knee. In my opinion, the claimant provided credible testimony that she sustained a knee injury on the date in question. Furthermore, in my opinion, the medical evidence also shows the claimant's knee injury was sustained on April 18, 2004. For these reasons, I must respectfully dissent.

There is no dispute that the claimant reported sustaining an injury on April 18, 2004. The claimant testified that she was assisting a patient into the shower and that during an ensuing struggle, she twisted her knee. The medical records indicate that the claimant sought

medical treatment the same day at the emergency room. The report from the emergency room indicates the claimant heard a "pop" in her knee. The claimant returned to work but continued to have pain in her knee.

On July 30, 2004, an MRI revealed that the claimant had, "SMALL TO MODERATE JOINT EFFUSION". The MRI further suggested that the claimant had meniscal degeneration. On August 2, 2004, Dr. Philip Johnson opined that the MRI of the claimant's knee was normal. He further indicated that he thought the only "good" explanation for the claimant's condition was due to her weight. The claimant continued receiving treatment for her knee and on September 7, 2004, Dr. James S. Mulhollan opined that it was, "impossible to predict whether the patient has a meniscus tear." Dr. Mulhollan further proposed treating the claimant by trying to establish quadriceps function and by doing arthroscopic surgery. The claimant has not sought further treatment from Dr. Mulhollan because the respondent would not authorize it.

_____The Majority finds that the claimant's condition is not causally related to her knee injury. In supporting this finding, they rely on the fact that the claimant had prior knee problems. While the claimant admits to having knee surgery in the 1990s, it is unclear when the surgery occurred. There are no medical reports regarding the surgery in the record. Furthermore, the medical documents that refer to the surgery list different dates for the surgery. The report from July 26, 2004 from Dr. Johnson indicates that the claimant had a "cartilage repair" in 1994. However, a doctor's note from September 7, 2004, authored by Dr. Mulhollan indicates the claimant had surgery on her knee in 1997. Regardless of when the operation occurred, there is nothing in the record that would indicate that the claimant had problems between the time period after she had the surgery and the incident on April 18, 2004. Furthermore, I would note that even if the surgery occurred as late as 1997, there was a lapse of seven years between the surgery and the time of the claimant's injury in 2001. When considering the claimant's testimony that she had no

problems after having the surgery and the respondent's failure to produce any evidence to the contrary, I find that the claimant's injury was likely due to the incident on April 18, 2004. In my opinion, to now conclude that she had ongoing problems with that surgery, amounts to impermissible speculation and conjecture on the part of the Majority.

_____The Majority next argues that the claimant's knee injury could be from her being overweight or degenerative in nature. While it is true that the medical reports contain evidence indicating that the claimant's weight and that degeneration might contribute to her knee problem, I note that these explanations do not explain why she would suddenly have an onset of symptoms only after the incident on April 18, 2004. It also fails to entertain the notion that even if the claimant's condition was in part due to those factors but was exacerbated by the incident, the injury would amount to an aggravation and still be compensable.

_____In my opinion, the claimant has shown that she has objective medical findings which show she sustained a

compensable injury. The claimant's MRI showed a joint effusion, and while Dr. Johnson testified the popping was likely due to the claimant's weight, Dr. Mulhollan indicated that a meniscal tear could not be determined without arthroscopy. In my opinion, the claimant's MRI revealing a joint effusion shows the claimant had objective findings and the respondent's denial of additional treatment simply resulted in being unable to ascertain the severity of her condition.

Lastly, the Majority argues that because the claimant was able to work for a period of three months after sustaining the injury, she is not credible and did not sustain an injury. In my opinion, this ignores the fact that the claimant sought medical attention immediately after the injury. It also diminishes her attempt to return to work. In my opinion, if the claimant were simply attempting to avoid returning to work, she would not have attempted to return to work after the incident. Accordingly, in my opinion, it is not logical to presume that because she returned to work she is not credible. Instead, in my opinion, it shows that the

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claimant was attempting to return to work but was unable due to her knee condition.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner