

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403942

SUSIE A. NOWLIN,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 28, 2005

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

Claimant represented by the HONORABLE GREG GILES,
Attorney at Law, Texarkana, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals and respondents cross appeal an
opinion and order of the Administrative Law Judge filed
January 26, 2005. 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 of this
claim.
2. The stipulations agreed to by the
parties are reasonable and are hereby
accepted as fact.

3. The claimant has proven by a preponderance of the evidence that she sustained an injury caused by a specific incident and identifiable by time and place of occurrence; and that her injury arose out of and in the course of her employment.

4. The claimant has proven by a preponderance of the evidence that the existence and extent of her right knee injury is established by medical evidence supported by objective findings; and that she sustained an injury causing internal or external physical harm to the right knee requiring medical services.

5. The claimant has therefore proven by a preponderance of the evidence that she sustained a compensable injury to her right knee.

6. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment after April 8, 2004, was reasonably necessary in connection with the compensable injury.

7. The claimant has proven by a preponderance of the evidence that she was within her healing period and had not returned to work from March 23, 2004, until April 8, 2004.

8. The claimant has therefore proven by a preponderance of the evidence that she was entitled to temporary total disability benefits from March 23, 2004, until April 8, 2004.

9. The claimant has failed to prove by a preponderance of the evidence that she was within her healing period after April 8, 2004.

10. The claimant has therefore failed to prove by a preponderance of the evidence that she was entitled to temporary total

disability benefits after April 8, 2004.

11. The respondents have controverted this claim in its entirety.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the January 26, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion 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 in part 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

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I concur with the majority's finding that the claimant suffered a compensable injury to her right knee. However, I strongly object to the majority's finding that the claimant is not entitled to any medical or disability benefits in connection with this injury after April 8, 2004. For that reason, I respectfully dissent from that portion of the majority's opinion.

There is no doubt that, prior to her compensable injury, the claimant had a history of knee problems. In 1987 she was involved in a motorcycle accident causing, among other injuries, a broken right

leg. In surgically resetting her broken leg, pins were inserted into her right knee to stabilize her broken tibia.

The claimant had another knee injury in 1994 which resulted in a partially torn cartilage. This injury was surgically repaired and the claimant was released to return to work with no impairment.

After both of those injuries, the claimant resumed active employment in jobs involving frequent lifting, bending and stooping and which required her to remain on her feet much of the day. At the time of her injury, the claimant was employed in the respondent's inventory control system at one of their stores. The claimant described her job as follows:

"I was ICS grocery. That included stocking, palletizing, moving pallets, constantly using the jack. I'm up and down ladders, climbing up on top of risers. I was certified with the scissor lift and for the electrical. Everything. I was on my knees constantly. I was pulling weight, helping the customers. We would go in and set seasonal stuff up. And they really put me in seasonal, because I was good at moving the merchandise from the tractor trailer rigs outside into the store. That included pulling pallets, pulling carts full of merchandise."

The majority relies upon the reports of Dr. James Mulhollan, a Little Rock orthopedist, and Dr. Mark Sateriale, a radiologist. The claimant was referred to

Dr. Mulhollan by the respondents shortly after her injury. In a report dated April 1, 2004, Dr. Mulhollan noted that the claimant was injured on March 23 when she was run over by a pallet jack weighing approximately 2600 pounds. According to Dr. Mulhollan's report, the claimant advised him that her knee popped but did not twist. He then stated, "In her mind, there was immediate swelling." I am not sure what Dr. Mulhollan meant by the phrase, "In her mind," since the accident report documents prepared by the claimant's employer notes that she was suffering from a swollen knee immediately following the incident. In commenting on the claimant's symptoms, Dr. Mulhollan stated, "I think **most** of the MRI findings relate to her previous surgery" (emphasis added). He also discussed the limited mobility the claimant had in her right knee and the difficulty that created in obtaining appropriate x-rays and MRI scans. He also stated in his report that he was not able to establish any diagnosis besides the fact that the claimant had an injured extremity, a contusion, a sprain or some sort of non surgical derangement. He concluded his report by stating that, "I hope she does well enough to try at her regular job on April 8."

Dr. Mulhollan prepared a second report dated August 19, 2004, in which he was responding to some questions from respondents' counsel. In this report Dr. Mulhollan makes several unusual comments. For example, he stated that he could not determine whether there was any effusion in the claimant's knee and states that at the time of his visit, the claimant's knee was "not especially swollen." He also noted that Dr. Sateriale failed to comment on the presence of the effusion, which Dr. Mulhollan said he "invariably" does. He also commented that his "impression" was that the claimant's recent MRI findings were all due to a previous knee problem. However, he qualified this statement by mentioning that he only had one half of the claimant's past surgical reports so that he did not know exactly what had been done to the claimant in the past. At the end of the report he stated, "All of my answers are my best guesses, based on my educational background and their medical certainties with significant limitations, especially no complete previous operative report.

I find that Dr. Mulhollan's opinions can be given little, if any, weight. In both of his written reports he admitted that he did not have sufficient information to assess the claimant's condition.

However, that did not seem to stop him from opining that the claimant's problems are all preexisting. However, the Workers' Compensation Act requires that medical opinions, to be considered by us, must be stated within a reasonable degree of medical certainty. While physicians do not have to use any particular "magic words," their opinions must be stated in such a manner so as to indicate a clear belief on the part of the doctor. Words such as probable, likely, or similar phrases have been held to be sufficient to satisfy that requirement. However, I am not aware of any case that has held that "best guesses" meets the statutory standard. Nor am I aware of any past case in which we placed any credence on a doctor who relies on guess work to make his findings and conclusions.

I also note that Dr. Mulhollan did not accurately review Dr. Sateriale's reports. This is surprising in that in his report of August 19, 2004, Dr. Mulhollan states that his connection with Dr. Sateriale is that the later physician reads and reviews all of his radiology reports. Even more surprising, Dr. Sateriale apparently does not practice in Arkansas. Dr. Mulhollan refers to him as being in Boston. But, I note that his mailing address is in Andover, Maryland.

Dr. Sateriale's March 30, 2004, report does note the presence of a small effusion in the claimant's knee, contrary to Dr. Mulhollan's statement. His report also states that signal changes are compatible with either a partial tear or post operative change. While it is true that Dr. Sateriale later opined in his report of August 30, 2004, that the changes he discovered were post surgical in nature, it should be noted that his specialty is radiology and not orthopedics. I do not believe that a radiologist is the proper specialist to opine as to the nature and extent of an orthopedic injury such as that suffered by the claimant. For that reason, I would likewise give his opinions little weight.

I find that the opinions of Dr. D'Orsay Bryant, an orthopedic surgeon in El Dorado, Arkansas, are the ones upon which we should be relying. The Medical Cost Containment Division of this Commission had designated Dr. Bryant to be the claimant's authorized physician and the claimant saw him based upon that authorization. In a reported dated September 7, 2004, Dr. Bryant set out his observations and conclusions regarding the claimant's condition based on his examination. In that report he stated that when he

examined the claimant in June and July 2004 she still had some soft tissue swelling in her knee. He also noted that cartilaginous injuries were frequently missed by MRI's and that, were not 100 percent accurate in diagnosing knee injuries. He also explained that, while the claimant could have had a chronic injury in her knee region, she could also have an acute injury superimposed on it which would not have been readily discernable in an MRI. He also notes that the MRI performed on the claimant did not discover the presence of the cartilage damage which was known to exist because of the claimant's past medical treatments. Dr. Bryant also stated that he believed the claimant had acute injuries superimposed on her chronic knee problem and he detected patellofemoral crepitus in the claimant's knee. As he noted, this is clearly an objective finding. Lastly, Dr. Bryant stated that he believed the claimant had suffered an acute injury at work which was contributing to her current symptomatology. In fact, in a later report dated November 30, 2004, Dr. Bryant clarified his opinions and stated that the claimant's work injury did in fact cause the symptoms he had discovered in his examinations of the claimant. Dr. Bryant also

specifically stated that his opinions were based upon a reasonable degree of medical certainty.

I find that Dr. Bryant's opinions are more convincing for a number of reasons. First, Dr. Bryant had full access to the claimant's past medical records. Something neither Dr. Mulhollan or Dr. Sateriale had. Also, unlike Dr. Mulhollan, Dr. Bryant personally reviewed the claimant's MRI scans as well as her prior surgical reports and was fully aware of the claimant's past history of knees injuries. With all that information before him, he was of the opinion that the symptoms being exhibited by the claimant were the result of an acute injury superimposed on her chronic condition. Dr. Bryant supported that opinion by noting the claimant had returned to full duty employment following her past knee injuries. However, following her more recent episode, she was not able to work at that level.

I find that the claimant is clearly in need of further medical treatment. I strongly disagree with the result of the majority's decision which denies the claimant medical treatment from a doctor which this Commission has previously designated as her treating physician. In this case, we have a claimant who

suffered a compensable injury who is being denied any affective treatment of her knee. We are basing this denial on the opinions of a radiologist and a doctor who is, by his own admission, guessing. I find that the claimant has established a compensable injury to her knee and that she is entitled to reasonable and necessary medical treatment at the direction of Dr. Bryant and she would further be entitled to temporary disability benefits to a date yet to be determined.

For the reasons set out above, I respectfully dissent from the majority's findings in regard to the claimant's entitlement to additional medical and disability benefits.

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part and dissent, in part, from the majority's opinion. Specifically, I concur in the majority's finding that the claimant is not entitled to any additional medical treatment or temporary total disability benefits after April 8, 2004. However, I must respectfully dissent from

the majority's finding that the claimant sustained an injury to her right knee at the time she sustained her admittedly compensable injuries on March 23, 2004. In my opinion, the claimant has failed to meet her burden of proof.

My review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she sustained an injury to her right knee when she was run over by the pallet jack on March 23, 2004, and sustained an admittedly compensable injury to her right foot and right ankle. The evidence demonstrates that the claimant had an on-going history of right knee problems. The claimant was involved in a motor cycle accident in 1987 which required surgery to both of her knees and a screw was inserted into her right knee at that time. The claimant testified that she had no other problems after her surgery in 1987, but the record bores out that the claimant complained of knee pain on at least three separate occasions. The claimant also complained of pain in both of her legs on or about October 14, 1990. During the hearing, the claimant attributed her pain to the fact that she was nine months pregnant. However, the medical records indicate that the claimant's pregnancy should have ended on or about

September 21, 1990. The claimant sought medical treatment on February 23, 1992, for pain in both of her legs. She advised the examining physician of the previous surgery and complained that she was frequently bothered by pain. Moreover, Dr. Sateriale stated that the condition of the claimant's right knee on March 30, 2004, was related not to any acute injury, but to her previous surgeries and the degenerative changes that resulted from those surgeries.

The claimant was examined by Dr. Mulhollan who noted that the claimant complained of swelling after the incident but his examination revealed that her "knee was not especially swollen." Dr. Mulhollan also opined that the MRI findings relate to her previous surgery." Dr. Mulhollan later reiterated in an August 19, 2004, letter that the claimant's "MRI findings are all due to the previous knee problem" rather than to any injury that was sustained on March 23, 2004. Simply put, the claimant has been examined by two physicians, each of whom unequivocally concluded that the claimant's knee condition was related to her previous injuries and surgeries rather than to a traumatic injury that the claimant was alleged to have sustained on March 23, 2004.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's finding that the claimant sustained a compensable injury to her right knee on March 23, 2004. Accordingly, I must concur, in part, and dissent, in part from the majority's opinion.

KAREN H. MCKINNEY, Commissioner