

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410985

JUDITH O'CONNELL,  
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,  
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED DECEMBER 9, 2005

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

Claimant represented by the HONORABLE MARK FREEMAN, Attorney  
at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE TOD BASSETT,  
Attorney at Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed July 11, 2005. The administrative law judge  
found that the claimant proved she sustained a compensable  
injury to her left knee. The administrative law judge found  
that the claimant proved she was entitled to medical  
treatment for her compensable injury, and that the claimant  
proved she was entitled to temporary total disability from  
October 9, 2004 to February 14, 2005. The administrative

law judge found that the claimant proved she was entitled to permanent partial disability in the amount of 2%. After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

Judith Lorene O'Connell, age 50, testified that she injured her back in a 1992 automobile accident, and that the injury led to back surgery. The record indicates that Ms. O'Connell was hired by Wal-Mart Associates, Inc. in October 1999.

The claimant testified that she again injured her back in a motor vehicle accident occurring in December 2003. The record indicates that the claimant began treating with Stacy L. Powell, APN, in about December 2003. Ms. Powell treated the claimant for chronic back pain and various other conditions.

The parties stipulated that the employment relationship existed on September 23, 2004. The claimant testified on direct examination:

Q. Tell us what you did on September 23<sup>rd</sup>, 2004, when you were working at Neighborhood Market, how you hurt your left knee. Tell us what you did.

A. I was - I have a problem getting down on my knees because of my back. So I went to get down. I went down on my right knee and I kind of dropped and my left knee was twisted and I felt a real bad pain. It took my breath away, and I just sat there for a minute and then it went away....

Q. That day did you tell anyone at the store that you think you may have hurt your left knee?

A. No.

Q. Not at all?

A. No.

Q. Why not?

A. Because I didn't think it was - it stopped bothering me....

Q. When did it start really bothering you?

A. Well, I was limping a little bit Friday, but it wasn't painful. It actually started bothering me by Sunday. I couldn't even walk on it by Sunday....Tuesday I went to the doctor.

The record indicates that either Stacy L. Powell or Jalana K. Silvey, LPN, reported the following on September 28, 2004: "Patient states that her whole left leg is hurting. States that the pain is in her groin area also. Denies injury. States that bending her knee increases the pain." It was noted that the claimant's leg pain had begun five days earlier. It was also noted that the claimant was

limping on her right leg. The claimant was assessed with "Muscle strain, left groin."

With regard to the "denies injury" language in the September 28, 2004 report, the claimant testified on cross-examination, "I don't know why they - the only thing I can figure out is her secretary had put that in there, but Stacy herself knew that it happened at work."

The claimant testified that she was unable to work beginning September 28, 2004. The record contains the following note, apparently from Jalana K. Silvey, LPN: "Judith is missing work (9/28) due to illness/pain; she will return to work (sic) until Tuesday, Oct. 5<sup>th</sup>."

Ryan Ardary testified for the respondents that he was assistant manager for the respondent-employer in September 2004. Mr. Ardary testified that the claimant "told me that she wouldn't be coming in to work and that at that time she didn't know when she would be back to work, but, you know, I didn't go any further into it, why she would be out, but she just was not going to be coming back to work." Mr. Ardary testified that the claimant never told him she had injured her knee at work.

The claimant's testimony indicated that she returned to work for one full day on October 5, 2004. The claimant testified, "I went back because I thought - you know, sometimes if you're, like, in pain and you do things you work it out and I thought maybe if it was just my groin I could, you know, work it out....It just got worse by the end of the day."

Dr. Terry J. Sites reported on October 11, 2004:

This is a first time orthopedic evaluation by me of the above named patient, a 50 year old, 5'7", 190 lb female who was squatting at work when she had sudden pain in her left lower extremity. She initially thought it was hip pain, had a cortisone shot, but is now having localized pain over the medial and posterior aspect of her left knee, with no previous injury or event. She has been unable to work. This occurred on 09-22-04....

She has a moderate effusion at her knee, limiting flexion to 110°....

X-RAY: Review of x-rays, left hip, without report, shows a normal hip other than an inferior acetabular osteophyte or fleck avulsion. Left knee x-rays obtained today, for views, show no fractures, dislocations, or other abnormalities.

Dr. Sites' impression was "1. Probable torn medial meniscus and/or additional intra-articular pathology - knee, left. 2. Normal left hip." Dr. Sites stated, "Following a full discussion I advised crutches, and we will obtain an

MRI and see her back next week. We will fill out a medical leave from 10-11-04 to 11-01-04."

Joint Exhibit One in the record is a First Report Of Injury Or Illness, prepared by a manager for the respondent-employer on October 12, 2004. The First Report indicates that the claimant's last work date was October 5, 2004, and that the respondent was notified on October 7, 2004. With regard to how the injury occurred, the First Report stated, "Assoc. squatted to rt. knee, fell to knee, pulled left leg around, felt pain in groin area ...."

The record also contains a Worker's Compensation Request For Medical Care. A member of management indicated a date of injury on September 23, 2004, and that the injury was reported on October 7, 2004. The manager described the accident: "Associate squatted down on Rt. knee, fell to knee pulled left leg around, felt pain in groin area when she pulled her left leg around." The manager wrote that there was "swelling." On the Request For Medical Care, a physician diagnosed sprain of the left knee with a possible torn meniscus. Dr. Gary L. Moffitt indicated on October 14, 2004 that the claimant could return to restricted work.

The claimant testified, however, that no light duty was available.

Dr. Moffitt wrote to a representative of the respondent-carrier on October 14, 2004:

At the request of and authorization by CMI, we are seeing Ms. Judy O'Connell. Ms. O'Connell is seen today for an injury to her left knee. While at work on the 23<sup>rd</sup> of September she was resetting shelves. She was on her right knee and whenever she did this she felt a pop occur in her left knee. She has seen her personal physician for this who gave her a corticosteroid injection intramuscularly which did not help. She was then referred to Dr. Sites. He feels that there is probably a torn medial meniscus and had scheduled her for an MRI this morning. She did not keep that appointment since she was coming to our facility.

On examination, she does have swelling and effusion of the knee....

It does appear that she probably has a torn medial meniscus. I would recommend an MRI of the knee because there is a significant chance she may need to have an arthroscopic procedure.

Dr. Moffitt stated on October 21, 2004, "She may continue to work with the same restrictions."

A case manager with the respondent-carrier informed the claimant on November 12, 2004, "I am responding to the workers' compensation claim that you have filed with your store. Pursuant to the filing of your claim, we have

conducted an investigation to determine whether or not your alleged work injury arose out of and in the course and scope of your employment. As a result of that investigation, we have determined that your injury did not so occur. Therefore, at this time, we must decline your claim for workers' compensation benefits."

The record contains a Central Nurse Triage note dated November 12, 2004: "Patient calling about visit on 09/28/04. In subjective field it is noted that patient denied injury. Patient states that she stated that she injured her leg when she went down on one knee at work that she felt a pull in the leg and hip. Patient states she is now being denied workers compensation due to this. Wants to know if there is anyway that this can be corrected. Dee Daniels, LPN (sp)."

Stacy L. Powell noted on November 12, 2004, "I do remember her telling me that she fell at work. I can give a letter saying that, but I cannot guarantee that it will make a difference with Workman's comp."

On November 15, 2004, the following correspondence was sent out on Ms. Powell's letterhead:

Judith is a patient of this clinic. She was seen on 9/21/04 with what she thought at the time was worsening of her chronic low back pain. She did

tell me at that time (although, not noted in the encounter of that date), that she had fallen at work. She was seen 9/28 due to intense worsening of this pain - and at that point she was having pain in the leg, which I thought was related to a pulled groin muscle from her fall. She was again seen and rechecked on 10/6/04 for this pain - which had now localized into the left leg and knee. We referred her to a specialist at this time. Her case should be reconsidered for Workman's compensation.

The claimant testified that her group medical coverage had paid her medical bills.

It was noted on November 23, 2004, apparently by Ms. Silvey, "Patient is requesting refills of Oxycodone and Oxycontin. She continues to have pain in her left knee. She was denied workman's comp. even though letter has been sent verifying that patient stated that this was a work related injury."

The following impression resulted from an MRI of the claimant's left knee dated November 29, 2004: "Findings are consistent with a partial thickness tear or sprain of the medial collateral complex. No discrete meniscal tear or pathologic marrow signal intensity change is noted. A large joint effusion and small Baker's cyst are present."

The claimant informed Dr. Sites on December 2, 2004 that the left knee continued to bother her. Dr. Sites

reported, "The MRI shows a large effusion, with no specific meniscal tear but a partial medial collateral ligament tear....She has a trace medial instability at 30° of flexion, with other stability testing normal....Following a full discussion she desires to proceed with outpatient arthroscopy....She has been scheduled 12-03-04."

The claimant continued to follow up with Dr. Sites following surgery.

A pre-hearing order was filed on January 10, 2005. The claimant contended, among other things, that she injured her left knee in the course and scope of her employment on September 23, 2004. The respondents contended, among other things, that the claimant did not sustain an accidental injury to her left knee on September 23, 2004, "or on any other date for that matter." The respondents contended that the claimant did not timely report the alleged injury, asserting, "It was not until approximately two weeks later on October 7, 2004, that the claimant finally reported the matter."

The parties agreed to litigate the following issues:  
"1. Compensability of the claimant's left knee injury on September 23, 2004. 2. Related medical. 3. The

claimant's entitlement to temporary total disability from September 28, 2004 to January 4, 2005, minus one day, which was October 5, 2004. 4. The claimant's entitlement to an impairment rating of 2% to her left knee. 5. Attorney's fee."

Dr. Sites reported on February 14, 2005:

Judy returns to the clinic today with her left knee doing much better....

I am pleased with the patient's progress. In terms of her torn meniscus she has reached maximum medical improvement, with a 2% lower extremity impairment for the partial medial meniscectomy, utilizing AMA Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup> Edition. Her work capacity is full without restriction....

After a hearing, the administrative law judge found that the claimant proved she sustained a compensable injury to her left knee on September 23, 2004. The administrative law judge found that the claimant proved she was entitled to medical treatment, and that the claimant proved she was entitled to temporary total disability from October 9, 2004 to February 14, 2005. The administrative law judge found that the claimant was entitled to permanent partial disability in the amount of 2%. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i).

The administrative law judge found in the present matter that the claimant proved she sustained a compensable injury to her left knee on September 23, 2004. The Full Commission affirms this finding. The claimant credibly testified that she twisted her left knee at work on September 23, 2004. The claimant testified that she initially felt an acute pain, but that the pain subsequently lessened enough that she did not immediately seek medical attention. We recognize that the first medical report,

dated September 28, 2004, contained language stating, "Denies injury." The claimant credibly testified, however, that she at first thought she had injured her hip, not her knee. The notation of pain beginning five days earlier corroborated the claimant's testimony that she was involved in a specific incident on September 23, 2004.

The remaining evidence of record clearly corroborates the claimant's credible testimony. Dr. Sites reported on October 11, 2004 that the claimant had felt pain in her left leg after squatting at work. The First Report Of Injury, dated October 12, 2004, indicated that the claimant had felt pain after squatting at work. The respondent-employer's Request For Medical Care indicated that the claimant was involved in an accidental injury on September 23, 2004. A manager at that time noted "swelling." Dr. Moffitt noted on October 14, 2004, "While at work on the 23<sup>rd</sup> of September she was resetting shelves. She was on her right knee and whenever she did this she felt a pop occur in her left knee."

The Full Commission finds that the claimant proved she sustained an accidental injury on September 23, 2004 causing physical harm to her left knee. The injury arose out of and

in the course of the claimant's employment, required medical services, and resulted in disability. The injury was caused by a specific incident identifiable by time and place of occurrence. The claimant also established a compensable injury by medical evidence supported by objective findings. These objective findings include the effusion noted by Dr. Sites, the swelling and effusion reported by Dr. Moffitt, and the partial thickness tear seen in the claimant's left knee in the MRI. The decision of the administrative law judge is affirmed.

B. Temporary/ Permanent Disability

For scheduled permanent injuries, the injured employee is to receive compensation for temporary total disability compensation during the healing period or until the employee returns to work, whichever occurs first. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

The administrative law judge found in the present matter, "The claimant is entitled to temporary total disability for her compensable injury from October 9, 2004 to February 14, 2005, when Dr. Sites notes that she has reached maximum medical improvement for her compensable injury." The Full Commission affirms this finding. Neither

party on appeal discusses the claimant's entitlement to temporary total disability compensation. The claimant sustained a compensable injury to her left knee on September 23, 2004, and the record indicates that the claimant entered a healing period for her scheduled injury on this date. The claimant testified that she was unable to work beginning September 28, 2004. The administrative law judge implicitly determined that the claimant did not give statutory notice until October 9, 2004, and found that the claimant was not entitled to temporary disability until October 9, 2004. The claimant does not appeal this finding and in fact asks the Full Commission to affirm the administrative law judge's decision.

Dr. Sites kept the claimant off work beginning October 11, 2004. Dr. Moffitt attempted to return the claimant to restricted work on October 14, 2004, but the claimant credibly testified that no light duty was available. Dr. Sites performed surgery on or about December 3, 2004. Dr. sites pronounced maximum medical improvement and assigned a permanent impairment rating on February 4, 2005. Permanent impairment, which is a medical condition, is any permanent functional or anatomical loss remaining after the healing

period has ended. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994). The Full Commission therefore affirms the administrative law judge's finding that the present claimant proved she was entitled to temporary total disability compensation from October 9, 2004 until February 14, 2005.

The administrative law judge found that the claimant proved she was entitled to permanent partial disability in the amount of 2% to the left lower extremity. As with temporary disability, neither party on appeal discusses the claimant's entitlement to permanent partial disability.

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Ark. Code Ann. §11-9-102(4)(F)(ii)(a) provides, "Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. §11-9-704(c)(1)(B). Pursuant to Ark. Code Ann. §11-9-522(g), and

Rule 34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4<sup>th</sup> ed. 1993) to be used in assessing anatomical impairment.

In the present matter, Dr. Sites assigned a 2% impairment rating to the claimant's left lower extremity following the compensable surgery he performed. The Full Commission finds that the 2% rating assessed by Dr. Sites is based on objective findings and comports with the Guides. We find that the claimant's compensable injury was the major cause of her anatomical impairment. The decision of the administrative law judge is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained a compensable injury to her left knee on September 23, 2004, and that all of the medical treatment of record was reasonably necessary in connection with the claimant's compensable injury. We find that the claimant proved she was entitled to temporary total disability compensation from October 9, 2004 until February 14, 2005, and that the claimant proved she was entitled to a 2% impairment rating for her left lower extremity. The Full Commission therefore affirms the opinion of the administrative law judge. The

claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(a) (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), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable left knee injury on September 23, 2004, for which she is entitled to indemnity and medical benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to meet her burden of proof.

The claimant contends that she sustained an injury to her knee on September 23, 2004. The claimant continued to

work after this alleged injury and she never reported an injury on that date. The claimant worked her entire shift the next day, a Friday, and still never reported her alleged injury. The claimant was scheduled off work that Saturday, Sunday and Monday. Although she contends that she called in on that Monday and advised either Tamara Bell or Pat Phillips that she had sustained a work related injury the previous Thursday, the claimant did not present any corroborating evidence. In fact, Tamara Bell testified on behalf of the respondents and she did not confirm the claimant's story. Ryan Ardary, an assistant manager for respondents, testified that he spoke to the claimant on the phone when she called in advising that she would not be coming to work. According to Mr. Ardary, the claimant never advised him that she injured herself at work, or that she was missing work due to a work-related injury. Moreover, the claimant testified that she reported her injury during a meeting and that she announced to "everybody" that she had injured herself at work; yet no witness either confirmed or corroborated this testimony. More importantly, however, is the fact that when the claimant first sought medical treatment after her alleged injury, she specifically denied

any recent injury. It was not until the claimant was referred to a specialist and the thought of surgery was upon the claimant, that she actually reported an injury to her employer.

It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony of the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. Morelock v. Kearney Co., 48 Ark. App. 227, 894 S.W.2d 603 (1995). I simply cannot find that the claimant's testimony regarding her alleged injury is credible. The medical records do not support the claimant's story of a work related injury on September 23<sup>rd</sup>. The claimant was seen at her family doctor's on September 21<sup>st</sup> with complaints of nasal congestion and requesting a refill of pain medication for her chronic back pain. On September 27<sup>th</sup>, four days after her alleged injury, she called her family doctor's office stating that she needed stronger pain pills because the ones prescribed on September 21<sup>st</sup> were not working. The

claimant did not mention her alleged injury at that time. On September 28<sup>th</sup>, the claimant was once again seen at her family clinic complaining of leg pain with a sudden onset five days ago. The majority finds that this medical record tends to corroborate the claimant's allegations of an injury on September 23<sup>rd</sup>. I cannot reach this conclusion. When one considers the fact that the claimant worked her entire shift on September 23<sup>rd</sup> and 24<sup>th</sup> without ever complaining of an injury or of pain in her leg, it is just as likely that the claimant fabricated an injury date of September 23<sup>rd</sup> to coincide with this medical record. Moreover, when the claimant sought medical treatment on September 28<sup>th</sup>, she specifically denied any injury. In addition, the nurse noted that the claimant has similar problems in the past. Once the claimant decided to file a workers' compensation claim, she requested that the doctor's office fix the problems with her medical records. However, when the November 15, 2004 letter of Stacy Powell, APN, is taken into consideration, this letter only casts more doubt over the claimant's alleged injury. Ms. Powell stated that the claimant actually told her on September 21, 2004, that the claimant had fallen at work. This is two days prior to the claimant's alleged

injury date. If, in fact, the medical records contain errors, this purported clarification only poses more questions: Did the claimant complain of pain in her leg on September 21<sup>st</sup> when she sought pain medication? Which date is correct? Has the claimant experienced this pain in the past? After considering all the evidence of record, I cannot place any weight upon Ms. Powell's "clarification" as it leaves more questions than it answers.

Accordingly, as I do not find either the claimant's account of an alleged injury credible nor do I find Ms. Powell's letter enlightening, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her left knee for which she is entitled to benefits. Therefore, I respectfully dissent.

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KAREN H. MCKINNEY, Commissioner