

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308749

MARY A. PHILLIPS, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 14, 2005

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

Claimant represented by the HONORABLE SCOTT HUNTER, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE SUSAN M. FOWLER, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed November 3, 2004. 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 over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence,

that she sustained a compensable injury as the result of a specific incident, identifiable by time and place of occurrence on August 1, 2003, which arose out of and during the course of her employment with Wal-Mart Stores, Inc., entitling her to appropriate workers' compensation benefits.

4. The claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury established by medical evidence supported by objective findings.
5. The claimant is entitled to temporary total disability benefits for the period beginning May 26, 2004, and continuing through July 19, 2004.
6. Respondents are responsible for all hospital, medical, mileage, and related expenses as the result of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.
7. Respondents are entitled to a credit or offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received for medical services which were paid under a group health and accident policy pursuant to A.C.A. §11-9-411 (Repl. 2002).
8. The claimant has specifically reserved the issue of permanent disability.
9. 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 November 3, 2004 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 on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion affirming and adopting the decision of the Administrative Law Judge who found, in relevant part, that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her cervical spine, which occurred on August 1, 2003. In addition, the Administrative Law Judge found that the claimant is entitled to temporary total disability benefits for the period beginning May 26, 2004 and continuing through July 19, 2004 and that the respondent is liable for all medical services and mileage related to the claimant's compensable injury. Finally, pursuant to Ark. Code Ann. §11-9-411, the Administrative Law Judge found that the respondent is entitled to a dollar-for-dollar offset for the amount of benefits that the claimant has previously received for

medical services which were paid by the claimant's group health and accident insurance policy.

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 to her cervical spine on August 1, 2003. Therefore, I find that this claim should be denied in its entirety.

On the afternoon of Friday, August 1, 2003, the claimant testified that she was lifting a box of "freezer flaps" when she felt a sudden onset of pain in her neck and back. The claimant denied ever having experienced that type pain prior to this incident. The claimant testified that she reported the incident immediately to her co-worker, Ms. Judy Farrell, who corroborated the claimant's testimony. Ms. Farrell testified that she did not see the claimant injure herself, and that she encouraged the claimant to fill out an incident report. The claimant did not report the incident to her supervisor, but instead, she finished her shift and went home for the weekend. The claimant returned to work on the following Monday and worked the entire day. On the next day, Tuesday the 5th of August, the claimant reported the incident of August 1st to her supervisor. On or about August 11th, the claimant

obtained authority to seek medical treatment for her condition.

The claimant was initially seen by Dr. James Meredith, who took x-rays of the claimant's cervical and lumbar spine. The x-rays revealed some straightening of the normal curves, which in a letter dated September 16, 2004, Dr. Meredith stated was indicative of muscle spasms. Otherwise the claimant's x-rays were normal. Dr. Meredith diagnosed the claimant with cervical and thoracolumbar strain, for which he prescribed her medications. Dr. Meredith did not anticipate that the claimant would suffer any "long-term problems" associated with her strain. Furthermore, Dr. Meredith did not take the claimant off of work.

The claimant continued to work with complaints between August, 2003, and April 2004, at which time she was seen for her symptoms by Dr. Beata Majewski. The claimant was also under Dr. Majewski's care for unrelated health problems, specifically, hypothyroidism and Sjögren's syndrome. An MRI of the claimant's cervical spine taken on April 8, 2004, showed a herniated disc at C5-C6 with cord compression and a small central disc protrusion at C3-C4 and C4-C5, without significant stenosis. Dr. Majewski referred the claimant to Dr. Robert E. Abraham for surgical

evaluation. On May 26, 2004, Dr. Abraham performed surgery on the claimant's cervical spine. The claimant returned to work for the respondent employer on July 19, 2004.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The phrase "arising out of" refers to the origin or cause of an accident, while the phrase "in the course of employment" refers to time, place and circumstances under which the injury occurred. Pilgrims Pride Corp. v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (199685); see also, Gerber Prods. v. McDonald, 15 Ark. App. 226. 692 S.W.2d 879 (1985). In order to prove that an injury has arisen "in the course of employment," the claimant must show that the injury occurred "within the time and space boundaries of the employment, while the [claimant] is carrying out the employer's purpose or advancing the employer's interests directly or indirectly." Pilgrims Pride, supra. The claimant must present "affirmative proof" that an injury "is a natural and probable consequence or incident of the employment and a natural result of one of its risks." J. & G. Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (1980). Furthermore, a causal connection between the accident and a risk which is reasonably incident to the employment must be established. Gerber Prods., Supra. Finally, the connection of the injury to the claimant's employment cannot be supplied by speculation. Id.

I find that the claimant's testimony is inconsistent concerning the circumstances surrounding her alleged accident. For example, the claimant

testified as to three different times of day at which her injury supposedly occurred. The respondent argues that the time of day at which the incident occurred is significant in that it establishes whether the claimant continued to work following her alleged injury, or whether she went home. This argument has merit due to the seriousness of a ruptured disc. Had the claimant ruptured a cervical disc on August 1st, as she has claimed, it is reasonable to expect that she would not have been able to continue to work. Furthermore, the testimony of the corroborating witnesses is, according to the respondent, of little value. None of these witnesses were "eyewitnesses" to the claimant's injury. Moreover, each witness admitted that their account of the claimant's injury was derived from information provided to them by the claimant. Finally, the claimant denied having injured her neck prior to August of 2003. The record reveals however, that the claimant sustained a "mild whiplash" type injury to her neck as a result of an automobile accident in 1993. 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. Based upon the above and foregoing, I find that the claimant and her witnesses, one of which was a close friend and another her stepmother, are lacking in credibility. Therefore, I must rely solely upon the medical evidence presented in this claim to support a finding of compensability. However, aside from her own self-serving testimony and the biased testimony of her witnesses, the claimant offers no medical opinion or medical evidence establishing that she sustained an injury to her cervical spine as a result of her employment activities on August 1, 2003.

The claimant's surgeon, Dr. Abraham, could not state within a reasonable degree of medical certainty that the claimant's herniated discs resulted from her alleged work related injury. Moreover, even though Dr. Meredith opined that "straightening of the normal curves," as was seen on the claimant's initial x-rays, is "indicative of spasms," he formed this opinion more than a year after the claimant's alleged injury. Upon

his examination of the claimant a little over a week after her alleged injury, however, Dr. Meredith made no mention of muscle spasms. Rather, the doctor referred only to the claimant's complaints of pain and tenderness, which incidentally, do not satisfy the definition of "objective findings." When the x-rays were negative, Dr. Meredith assessed the claimant with a muscle strain for which he predicted no long term problems. Furthermore, Dr. Meredith did not take the claimant off of work.

Dr. Meredith treated the claimant after her automobile accident in the early 1990's. In contrast to his noted observations and the manner in which he treated the claimant in August of 2003, after her auto accident of 1993, Dr. Meredith specifically noted muscle spasm during his examination of the claimant, he prescribed medications and heat treatment for the claimant's symptoms, and he took the claimant off of work for two weeks. And although Dr. Abraham agreed with Dr. Meredith that spinal straightening, as seen on the claimant' x-rays of 2003, could be indicative of muscle spasms, he said it could also be caused by a degenerative disease. Dr. Majewski, who treated the claimant on several occasions, observed that x-ray's

taken of the claimant's spine in 2004 revealed, among other things, "mild degenerative changes."

The Arkansas Court of Appeals has stated that "medical evidence is not required to prove the cause of an injury was work related." Searcy Indus. Laundry, Inc. v. Ferren, 82 Ark. App. 69, 110 S.W.2d 306 (2203). If a medical opinion addressing compensability is offered, however, the opinion "must be stated within a reasonable degree of medical certainty." Ark. Code Ann. §11-9-102(16) (B). Moreover, the opinion proffered by a physician must be based on more than the mere speculation that the causal relationship between the work and the injury is a "possibility." Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 40 S.W.3d 760 (2001). As previously mentioned, Dr. Abraham could not state within a reasonable degree of medical certainty that the claimant's herniated disc was caused by her alleged injury of August 2003. Although Dr. Abraham testified that the claimant's herniated disc could have been caused by a trauma, he also concluded that the claimant's herniated disc could have been caused by "normal wear and tear." In view of Dr. Majewski's finding of degenerative disc disease, Dr. Abraham's opinion regarding the possible cause of the claimant's herniated disc is insufficient to establish that the

claimant's injury arose out of and in the course of her employment with the respondent employer. Furthermore, Dr. Abraham admitted that his opinion is based entirely upon the claimant's own history concerning the cause of her subjective complaints. A doctor's opinion based entirely upon the history provided to him by the claimant is insufficient to establish causation.

In summary, the claimant has failed to provide any objective medical evidence to support a finding that she sustained a herniated disc as the result of a specific incident, identifiable by time and place of occurrence, which arose out of and in the course of her employment with the respondent employer.

Therefore, for those reasons stated herein, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner