

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410235

BRANDY REED, EMPLOYEE	CLAIMANT
COUNTRY MART, EMPLOYER	RESPONDENT
BENCHMARK INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 11, 2005

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

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

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

Decision of Administrative Law Judge: Affirmed in part, as  
modified and reversed in part.

OPINION AND ORDER

The respondent appeals from an opinion filed by the  
administrative law judge on April 8, 2005. The  
administrative law judge found, among other things that "On  
August 14, 2004, the claimant sustained an injury arising  
out of and in the course of her employment with respondents,  
which rendered her totally disabled for the period beginning  
August 20, 2004, and continuing through February 8, 2005.

Claimant reached the end of her healing period on February 8, 2005. The claimant has a permanent physical impairment in the amount of 8% to the whole body as a result of her August 14, 2004, compensable injury. In addition to her anatomical impairment, claimant has suffered a wage-loss earning capacity in the amount of 5%, when her age, education, permanent restrictions and limitations are considered, as a result of the August 14, 2004, compensable injury. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 14, 2004."

After reviewing the entire record *de novo*, the Full Commission hereby affirms in part, and modifies 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 August 14, 2004, while working for the respondent. We find that the claimant proved she was entitled to temporary total disability compensation from August 20, 2004 through December 27, 2004. The claimant reached the end of her healing period on December 27, 2004. The claimant proved that she sustained a permanent physical impairment in the amount of 8% to the whole body as a result of her August 14, 2004, compensable injury. However, we

find that the claimant failed to prove she suffered any wage-loss disability over and above the percentage of her anatomical loss. The respondent shall pay all of the reasonable hospital and medical expenses arising out of the injury of August 14, 2004.

I. HISTORY

The claimant, age 23 (4-13-1982), graduated from high school in 2000 from Paragould High. The claimant has not taken additional classes, nor has she had any training for any specific jobs since she graduated from high school. She has worked at McDonald's, and performed job duties as a factory laborer. The claimant has worked for the respondent on two separate occasions. She initially went to work for the respondent in 2001, as a cashier and performed these duties for approximately one year. Subsequent to this employment, the claimant worked as a collector for approximately two years at Professional Credit Management. This was a full-time position and her hourly rate of pay was \$6.25 per hour.

The claimant began her most recent employment with the respondent in August of 2004, as a produce person. In this position, the claimant worked approximately 20 hours per week at an hourly rate of \$5.15.

The claimant maintains that she sustained a compensable injury to her back on August 14, 2004, as she lifted a box of bananas that weighed about 10 to 15 pounds. According to the claimant, while stacking boxes to the side, as she bent over and lifted the boxes, she felt an immediate onset of severe pain in her back that radiated into her legs. The claimant maintains that she worked for about five more minutes, but the pain became too painful and she began crying. According to the claimant, her supervisor (Bobby Wooten) approached her and told her to go sit down in the break room. The claimant went to the break room and was there for about 15 minutes. After realizing that her pain was not going to go away, she got permission to go home.

The claimant returned to work the next day and worked a few days thereafter, but her condition continued to worsen. Therefore, on August 20, 2004, the claimant sought emergency treatment for her pain and related symptoms. The claimant was hospitalized under the care of her primary care physician, Dr. Roland Hollis, for approximately five days.

A CT of the lumbar spine was taken on August 27, 2004, which revealed "focal central disc herniation at L5-S1 with no spinal stenosis or nerve root displacement." According to this report, the claimant had experienced low back pain

following lifting. The claimant reported complaints of pain in the left leg and numbness in the left foot.

On October 26, 2004, Dr. Hollis reported to the claimant's attorney:

It is my opinion to a reasonable degree of medical certainty based upon the information presented to me, including a history given by the patient, that Brandy Reed's work injury of August 14, 2004, resulted in a back injury, including a L5-S1 disc herniation, that the injury was supported by objective findings, and that the work accident was the major cause of her injury.

The claimant underwent initial evaluation with Dr. Dewayne Eubanks on November 9, 2004. Dr. Eubanks reported that the claimant was working at the County Mart on 8-14-04, when she lifted some heavy boxes and felt a "pop" in her back. He further reported that since that time, the claimant's pain had remained unabated despite conservative treatment by Dr. Hollis. Dr. Eubanks's impression was "severe left S1 radiculopathy with calf weakness, sensory loss, which was unresponsive to conservative measures." Therefore, Dr. Eubanks recommended that the most prudent approach would be a discectomy for decompression of the root.

On November 10, 2004, Dr. Eubanks reported to the claimant's attorney:

It is my opinion to a reasonable degree of medical certainty based upon the information presented to me, including a history given by the patient, that Brandy Reed's work injury of August 14, 2004, resulted in a back injury, including a L5-S1 disc herniation, that the injury was supported by objective findings, and that the work accident was the major cause of her injury. This is 100% certainty - no doubt.

Dr. Eubanks performed surgery on the claimant's back on November 15, 2004 due to a left S1 radiculopathy secondary to central/left paracentral L5-S1 contained disk herniation. This operative report reflects that Dr. Eubanks performed "left L5-S1 hemilaminotomies and open microdiscectomy for decompression of the left S1 nerve root." After this procedure had been performed, the claimant was transported to the recovery room in stable condition.

On February 8, 2005, the claimant underwent an evaluation with Dr. Terry Barnett to determine the permanent impairment rating that had resulted from the injuries that she sustained on August 14, 2004. Dr. Barnett wrote:

**Impairment Rating:** The following permanent impairment rating has been given to Ms. Brandy Reed after an orthopedic and neurological final examination was performed on Tuesday, 02/08/05. It is my opinion that this patient has reached maximum medical improvement (MMI) under Dr. Eubanks's care. It is also my opinion that this patient has sustained an 8% permanent physical impairment to the whole body. This impairment rating is based on **The American Medical Association's Guide to the Evaluation of Permanent**

Impairment 4<sup>th</sup> ed., using table 75, page 113, section 2. This patient falls under the "D" heading, surgically treated disc lesion without residual signs or symptoms.

Dr. Hollis's deposition was taken on February 9, 2004.

Dr. Hollis is a family practitioner, who has been the claimant's primary care physician since August 1, 2002 due to various complaints unrelated to her back. Dr. Hollis specifically denied that he had ever treated the claimant for any back problems, muscle strains or degenerative problems prior to August 14, 2004. According to Dr. Hollis, he first saw the claimant on August 27, 2004, due to severe pain and complaints relating to her back injury of August 14, 2004, at which point, he admitted her to the hospital in an effort to bring her pain under control. Dr. Hollis also testified that he ordered a CT scan of the claimant's lower back that revealed "a focal disc herniation at L5-S1." Although Dr. Hollis testified he was not able to tell by looking at the CAT scan when the herniation occurred, he felt it did not appear to be chronic. Dr. Hollis testified that based on the history given to him by the claimant and considering there was no indication of there being anything chronic there, he was of the opinion that the claimant's herniation was a recent onset or acute since Dr. Hollis did

not perform the claimant's surgery and had not seen the claimant since that time. As a result, Dr. Hollis testified that he did not have an opinion concerning her healing period. However, he essentially testified that his prior opinion of the situation remained the same.

A hearing was held in this matter on February 18, 2005. Dr. Kenneth Dewayne Eubanks, a neurosurgeon, was called to give testimony during the hearing. Dr. Eubanks testified that he first saw the claimant on November 9, 2004. Dr. Eubanks testified that the claimant gave him the following history:

She described being at work. She worked at Country Mart and described picking up a box of something from a low shelf or off the floor or something and specifically I remember that she not just picked it up, she picked it up, while she was twisting or turning and picking it up and that she felt a pop or pain in her back and that by the time she got home that evening that it was a lot worse. I don't have an independent recollection of whether she went home early or whatever. I think about several days later she was hurting so bad that she had to be taken to the hospital or something for pain control.

Dr. Eubanks essentially testified that the MRI revealed that the claimant had sustained "a herniated disc on the left at L5-S1 compressing her S1 nerve root," which was treated with surgery. According to Dr. Eubanks, this type injury wherein you have a lifting and twisting motion at the

same time, is the most classic thing that causes a disc herniation. Dr. Eubanks also admitted that he concluded that the claimant's accident was consistent with what he found her problem to be. Dr. Eubanks testified that as expressed in a prior opinion, he was still of the opinion within a reasonable degree of medical certainty that the claimant's work accident caused the injury. According to Dr. Eubanks, this opinion was stated with "a 100% certainty," with no doubt. He essentially testified that this was the "most slam dunk" case that he has been involved in wherein a deposition was done or anything of this nature. Dr. Eubanks further testified that the fact that the claimant worked a few days after the accident in a limited capacity did not cause him to have concern for the claimant's credibility. Specifically, Dr. Eubanks testified, "I felt like she had an injury and she kind of toughed through it and then it just got so bad that she couldn't stand it."

Dr. Eubanks testified that from the claimant's last day of work, until the day he first saw her in November, she should not have been working.

Dr. Eubanks testified:

Q. And, Doctor, did you note in your records any preexisting injury or complaint of back problems in her history in any of your notes that you took regarding Ms. Reed? Other than this 8-14-04 accident?

A. Yeah. Other than this, I don't think so. Now she asked me, I think, when she came back in to see me, she just asked me rather matter of factly said, now, Doctor, do you think this, something about she had had something happen sometime way before then and said, is it possible that this that I had came from that way back then and I don't remember the specific details about what this or that was but I remember her asking me that she asked me in a rather matter of fact way and said, you know, could this have been, do you think this was caused by that rather than the day that I hurt myself? And I said, well, didn't you tell me that you weren't bothered by, you know, before that day? Yeah. And I said, well, go over and tell me again what happened that day. She told me again and I said, no, it wasn't related to the other. I said, you know, human being have pain all the time. And they have back problems and this, some day way back yonder, commonsense tell you that if they get better and they are doing fine and then boom they have some big event that it was the event that caused your problem, not the whatever it was. And in fact to even go further than that, I have asked people, and in her case I felt like that she completely, according to her history, she completely recovered from whatever that was and that was pretty minor. It was nothing like this was. Secondly was the fact that when this event happened, she knew immediately and she was in really, you know, dire straits right from the beginning....

Upon being questioned further, Dr. Eubanks essentially testified that he did not recall whether this prior problem

was related to the upper back pain that had resulted from a urinary tract infection.

On cross-examination, Dr. Eubanks admitted that he had to be subpoenaed to testify at the hearing. Dr. Eubanks testified that he was of the impression from what the claimant told him was that she had some sort of a difficulty, but it was nothing like her present problem and that in addition to that she basically got over it and was not having problems with it until this specific moment in time. However, he could not recall how long ago this other event had occurred. According to Dr. Eubanks, the simple facts of the matter were that what happened to the claimant on that morning caused her to have a syndrome which was so out of proportion to the event that she had experienced before that it was pretty obvious that the event that she had before was not the cause of her present situation. He denied being suspicious of anything that involved the cause of the claimant's injury.

The claimant also gave testimony during the hearing. The claimant denied having any prior back problems or being treated for lower back pain prior to August 14, 2004. According to the claimant, prior to this time, Dr. Ronald Hollis was her family doctor. The claimant testified that

she had seen Dr. Hollis for various things such as a cold and the removal of a mole. In addition, the claimant testified that she had an incident wherein she suffered some back pain, but it ended up being a bladder infection. The claimant denied that she had experienced problems of pain "shooting" down her leg prior to August 14, 2004.

According to the claimant, her pain and symptoms quit after her surgery with Dr. Eubanks. The claimant testified that six weeks after the surgery, she felt like she could go back to some sort of job because she was feeling a lot better. The claimant testified that six weeks after her surgery, she returned to work for Professional Credit Management because the respondent did not have a job for her.

The claimant denied having told respondent she had a pre-existing back problem. However, she did admit to speaking with Mr. Morrison over the telephone the day after she had been admitted to the hospital, but she could not recall the conversation. The claimant testified that due to her surgery, she has been required to put personal things on hold, such as having a baby. She also testified that she had not sought higher paying factory work or any sort of work that would require heavy lifting due to her surgery.

On cross-examination, the claimant testified that she currently makes \$6.75 per hour and works 40 hours per week. The claimant admitted that she was so drugged while in the hospital that she did not remember her conversation with Mr. Morrison. The claimant denied having any previous injury to her back, and she did not remember a conversation with Dr. Eubanks about a previous injury to her back.

Bobby Dean Wooten, the produce manager for the respondent, gave testimony during the hearing. Mr. Wooten denied that the claimant ever told him that she had hurt her back on or about August 14. Mr. Wooten essentially testified that he learned of the claimant's injury the following Tuesday after her injury. Specifically, Mr. Wooten testified that the claimant called him on that day to let him know she was down in her back and would not be in to work. According to Mr. Wooten, the claimant told him that she and her husband were of the opinion that the claimant had injured her back while working for Anchor Packaging. Mr. Wooten testified that to the best of his recollection, the claimant began working for the respondent around August 10, 2004. He further testified that when he saw the claimant on the 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, she was not having any problems. However, he testified that the claimant did

mention that she felt sick one day, but she thought she had kidney problems. According to Mr. Morrison, on the morning of August 14, 2004, he looked over at the claimant and observed that she was crying. Mr. Wooten testified that he instructed the claimant to go over to the deli area and rest for awhile until she felt better. Mr. Wooten testified that the claimant told him that she was not feeling well, but he denied she ever told him she had hurt her back while working. According to Mr. Wooten, the claimant was a good worker.

Steve Morrison, the store manager for the respondent, gave testimony during the hearing. He testified that the claimant called him from the emergency room to let him know that she was worried about losing her job and that she had a ruptured disc in her back, that had resulted from her work at Anchor Packing. According to Mr. Morrison, the claimant later told him she had hurt her back lifting a case of bananas while working for the respondent.

On cross-examination, Mr. Morrison testified that the claimant's position required that she be able to lift 40 pounds. Mr. Morrison testified that at the time the claimant went to work for the respondent, as far as he could tell, she was not having problems that affected her ability

to work, nor did he see her having any problems after August 14, 2004. Mr. Morrison finally admitted that he did not observe the claimant having any difficulties because he was not in a position to supervise her activities on a daily basis.

The claimant was recalled for direct rebuttal examination. She essentially testified that while working for Anchor, she did not have any accident at work where she thought she hurt any part of her body, including her back. She further testified that she did not remember telling Mr. Morrison anything about having hurt her back at Anchor.

A Pre-hearing Conference was conducted in this claim on March 2, 2004, from which a Pre-hearing Order was filed on that same day. The parties agreed to the following stipulations: 1). That the Arkansas Workers' Compensation Commission has jurisdiction of this claim; and, 2). The existence of the employment relationship on August 14, 2004.

At the hearing, the parties further stipulated that the claimant's average weekly wage would entitle her to a compensation rate of \$62.00 per week.

During the pre-hearing conference, the parties also agreed that the issues to be litigated at the hearing were limited to the following: 1.) Compensability; 2). Temporary

total disability; 3). Permanent partial disability compensation; 4.) Medical benefits; and, 5). Wage-loss disability compensation.

The claimant contended that on August 14, 2004, that she sustained an injury to her back as a result of a specific incident while working at Country Mart. The claimant further contended that she is entitled to medical benefits, temporary total disability compensation, permanent total disability compensation and wage-loss disability compensation.

The respondent denies this claim in its entirety.

After a hearing before the Commission, the administrative law judge found, among other things, that "On August 14, 2004, the claimant sustained an injury arising out of and in the course of her employment with respondents, which rendered her totally disabled for the period beginning August 20, 2004, and continuing through February 8, 2005. Claimant reached the end of her healing period on February 8, 2005. The claimant has a permanent physical impairment in the amount of 8% to the whole body as a result of her August 14, 2004, compensable injury. In addition to her anatomical impairment, claimant has suffered a wage-loss earning capacity in the amount of 5%, when her age,

education, permanent restrictions and limitations are considered, as a result of the August 14, 2004, compensable injury. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 14, 2004."

The respondent appeals to the Full Commission.

## II. ADJUDICATION

### A. Compensability

The claimant contends that she sustained a compensable specific incident injury to her back on August 14, 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 sustained an injury arising out of and in the course of her employment with the respondent on August 14, 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. Hilard 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 August 14, 2004. Specifically, the claimant testified that on that date while lifting a box of bananas, she twisted and heard her back "pop," which resulted in an immediate onset of severe pain that radiated down her leg. The claimant testified that she attempted to continue working, but her pain became so severe she began to cry. According to the claimant, she told her supervisor (Mr. Wooten) what had happened and he instructed her to go to the break room. Although Mr. Wooten admits that he observed the claimant crying and instructed her to take a break, he denies that the claimant told him she had sustained a work-related injury at that time. The Full Commission finds that the claimant gave a plausible account

of the incident and of her having promptly reported the incident to Mr. Wooten on August 14, 2004. Moreover, we find that the claimant's account of the incident was corroborated by the medicals and Dr. Eubanks's clinical impression of the claimant's back. While we realize that Mr. Wooten and Mr. Morrison testified that the claimant told them she hurt her back while working for Anchor Packaging, the claimant denies having told him that. She also denies having injured her back at Anchor or during some other incident. With this in mind, and considering that Mr. Wooten essentially testified that he had not observed the claimant having any problems with her back prior to August 14, 2004, and there being no medical evidence in the record demonstrating that she sought medical treatment for her back prior to that date, the Full Commission finds it is more probable than not that the claimant did not suffer an injury to her back prior to August 14, 2004. In addition to this, both Drs. Hollis and Eubanks have opined that there is a causal connection between the claimant's back problems and the August 14, 2004 work-related incident. We attach significant weight to these two expert opinions since their clinical impression of the claimant's back injury is consistent with her report of the incident, and there being

no medical opinions to the contrary or any other probative evidence before the Commission suggesting that the claimant's back injury resulted from some other source. The Full Commission also finds that the administrative law judge correctly relied on the "objective findings" found in the August 30, 2004, MRI, namely "a herniated disc on the left at L5-S1, which was compressing her S1 nerve root." According to Dr. Eubanks, this type of injury occurring wherein you have a twisting and turning motion at the same time, is the most classic thing that causes a disc herniation. The claimant initially received conservative treatment for this condition under the care of Dr. Hollis, but her pain and related symptoms continued to worsen. Ultimately, on November 15, 2004, Dr. Eubanks performed surgery on the claimant's back, which significantly improved her condition.

Therefore, based on the claimant's credible testimony and the expert opinions of Drs. Hollis and Eubanks, the Full Commission finds that the claimant has proven by a preponderance of the evidence that her back condition is causally related to her employment. We therefore affirm the administrative law judge's finding that the claimant

sustained an injury arising out of and in the course of her employment with the respondent on August 14, 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.W.2d 750 (1984).

The administrative law judge found in the present matter, "The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of August 14, 2004". 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

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

The administrative law judge found in the present matter that the claimant's injury rendered her temporarily totally disabled for the period beginning August 20, 2004, continuing through February 8, 2005. The administrative law judge also found that the claimant reached the end of her healing period on February 8, 2005. The Full Commission finds that this finding should be modified. In the present matter, we find that the claimant proved she was entitled to temporary total disability compensation from August 20, 2004 until December 27, 2004. Specifically, we find that the preponderance of the evidence shows that the claimant remained totally incapacitated from earning wages from August 20, 2004, the date she quit working due to her injury, until December 27, 2004, (which is approximately some six weeks after her surgery), at which point Dr. Eubanks opined that she was basically fully released to work, and when she returned to work for Professional Credit Management. Based on Dr. Eubanks's expert opinion and the claimant's ability to successfully return to gainful

employment some six weeks after her surgery, the Full Commission finds that the preponderance of the evidence indicates that the claimant's healing period ended no later than December 27, 2004, rather than on February 8, 2005. Temporary total disability cannot be awarded after the claimant's healing period has ended. Trader v. Single Source Transportation, Workers Compensation Commission E507484 (Feb. 12, 1999). The Full Commission also finds that the claimant failed to prove she was totally incapacitated to earn wages after December 27, 2004. As a result, the Full Commission finds that the administrative law judge's award of temporary total disability compensation (from August 20, 2004 and continuing through February 8, 2005) should be modified to entitle the claimant to temporary total disability compensation from August 20, 2004 through December 27, 2004.

D. Anatomical Impairment/Wage-loss disability

An injured worker must prove by a preponderance of the evidence that she is entitled to an award for a permanent physical/anatomical impairment. Weber v. Best Western of Arkadelphia, Workers' Compensation Commission F100472 (Nov. 20, 2003). Any determination of the existence or extent of

physical impairment shall be supported by objective and measurable findings. Ark. Code Ann. § 11-9-704(c)(1).

In addition, pursuant to Ark. Code Ann. § 11-9-522(g) and our Rule 34, the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) to be used to assess anatomical impairment. Dr. Barnett in the present matter assessed the claimant an 8% anatomical impairment rating to the body as a whole due to her compensable injury using Table 75, page 113, Section 2 of the Guides. According to Dr. Barnett, the claimant falls under the "D" heading, for a surgically treated disc lesion without residual signs or symptoms. The Full Commission finds that the claimant proved she was entitled to this 8% anatomical impairment rating, that the rating was based on objective and measurable physical findings, and that the compensable injury was the major cause of the claimant's 8% anatomical impairment. Ark. Code Ann. § 11-9-102 (4) (F) (ii) (a).

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. The Commission is charged with the duty of determining such disability based upon a consideration of the medical evidence and other matters, including age,

education, and work experience. See, Ark. Code Ann. § 11-9-522(b)(1); Cross v. Crawford County Mem. Hosp., 54 Ark. App. 130, 923 S.W.2d 886 (1996).

However, so long as an employee, subsequent to his injury, has returned to work, has obtained other employment, or has a bona fide and reasonably obtainable offer to be employed at wages equal to or greater than his average weekly wage at the time of the accident, he or she shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment established by a preponderance of the medical testimony and evidence. Ark. Code Ann. §11-9-522(b)(2) (Repl. 2002). The employer or its workers' compensation insurance carrier has the burden of proving the employee's employment, or the employee's receipt of a bona fide offer to be employed, at wages equal to or greater than his average weekly wage at the time of the accident. Ark. Code Ann. §11-9-522(c)(1).

In the present matter, the administrative law judge found that, "In addition to her anatomical impairment, claimant has suffered a wage-loss earning capacity in the amount of 5%, when her age, education, permanent restrictions and limitations are considered, as a result of

the August 14, 2004, compensable injury." The Full Commission reverses this finding.

The claimant testified that while working for the respondent and at the time of her injury, she worked approximately 20 hours per week at an hourly rate of \$5.15. However, the claimant testified that she has been employed by Professional Credit Management since some six weeks subsequent to her surgery. The claimant further testified that she now works 40 hours per week at an hourly rate of \$6.75. Based on the claimant's own testimony, the Full Commission finds that subsequent to her injury, the claimant has obtained other employment at wages greater than her average weekly wage at the time of her accident. Therefore, we find that the claimant shall not be entitled to permanent partial disability benefits in excess of the 8% permanent physical impairment, as has been established by a preponderance of the medical testimony and evidence.

### III. Conclusion

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained a compensable injury on August 14, 2004, while working for the respondent. We find that the claimant proved she was entitled to temporary total disability compensation from

August 20, 2004 through December 27, 2004. The claimant reached the end of her healing period on December 27, 2004. The claimant proved that she sustained a permanent physical impairment in the amount of 8% to the whole body as a result of her August 14, 2004, compensable injury. However, we find that the claimant failed to prove she suffered any wage-loss disability over and above the percentage of her anatomical loss. The respondent shall pay all of the reasonable hospital and medical expenses arising out of the injury of August 14, 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 in part 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.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents, in part and concurs, in part.

CONCURRING & DISSENTING OPINION

I must respectfully dissent from the principal opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on August 14, 2004. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury.

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 cold 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. The claimant's credibility is suspect, at best. The evidence demonstrates that the claimant told her supervisor, as well as the store manager, that she thought she had sustained the injury while working for her previous employer. The claimant had only been

working for the respondent employer for approximately four days when this alleged incident occurred. Although the claimant stated that she did not tell Mr. Morris or Mr. Wooten that she had injured herself working for Anchor Packaging, there is no evidence in the record, medical or otherwise, to the contrary. Although the claimant did report an injury to her medical providers, the medical records do not indicate that the claimant had the injury while working for the respondent employer or that it even occurred in the course of her employment. In Dr. Hollis's initial contact with the claimant, he makes no mention that the claimant reported to him that she hurt her back while working for the respondent employer. In fact, Dr. Hollis's testimony regarding his initial contact with the claimant also makes no mention that the claimant's injury was related to any specific incident which occurred on August 14, 2004.

It is also of interest to note that Dr. Eubanks refused to provide the respondents with a deposition. Dr. Eubanks had to be subpoenaed to testify at the hearing. Dr. Eubanks admitted that the claimant had, in fact, suffered a previous back injury, but that he "didn't write it down."

I lend more credibility to the testimony to Mr. Wooten and Mr. Morris that the claimant independently reported to both of them that she had injured her back while working for Anchor Packaging. Accordingly, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury.

Even if I were to find that the claimant sustained a compensable injury, a finding which I do not make, I concur with the principle opinion find that the claimant's healing period ended on December 27, 2004, and finding that the claimant is not entitled to any wage loss disability benefits in addition to her permanent impairment rating. Simply put, the claimant is not entitled to additional permanent impairment in the form of wage loss.

Therefore, for all the reasons set forth above, I must respectfully dissent, in part from, and concur in part with, from the principle opinion.

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KAREN H. MCKINNEY, Commissioner