

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307282

REBECCA Y. SMITH,
EMPLOYEE

CLAIMANT

WAL-MART STORES, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED MARCH 3, 2005

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

Claimant represented by the HONORABLE SHANNON MUSE
CARROLL, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by the HONORABLE TOD C. BASSETT,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondent appeals an opinion and order of the
Administrative Law Judge filed March 1, 2004. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. There was a July 5, 2003, employer-
employee relationship.
2. The temporary total disability/partial
disability rate is \$128.
3. The claimant has proven by a preponderance
of the evidence that she sustained a
compensable specific incident lumbar strain
on July 5, 2003, arising out of and in the
course of her employment.
4. The respondent is responsible for all

reasonable and necessary medical treatment the claimant has sought for her compensable lumbar strain injury, to include Dr. Atta's care, physical therapy, emergency room visits and medication from July 5, 2003 through October 3, 2003.

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 March 1, 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 finding that the claimant sustained a specific incident compensable injury on July 5, 2003. In an opinion dated March 1, 2004, the Administrative Law Judge awarded benefits to the claimant for all reasonable and necessary medical treatment associated with her compensable injury. The respondent appeals the compensability of this claim, and denies liability for medical benefits associated therewith.

A carefully conducted de novo review of this claim reveals that the claimant has failed to prove by a preponderance of the credible evidence that she sustained a specific incident back injury, namely a lumbar strain, on July 5, 2003, arising out of and in the course of her employment. Therefore, I find that the decision of the Administrative Law Judge should be reversed and medical benefits denied.

The claimant is the young mother of three small children. On July 5, 2003, the claimant was working as a cashier for the respondent employer when she reportedly felt a sudden pain in her lower back as she turned to pick up a container of sodas. The claimant states that she attempted to immediately notify her front end supervisor (CSM) by flipping on her register light. When her CSM did not respond to her light, the claimant left her register and informed him that she had hurt her back. The claimant was taken off of her register and placed on an express register. After approximately fifteen to twenty minutes at the express register, the claimant states that she informed another manager of her problem, and that she was then reassigned to the fitting room where she could sit down. The claimant testified that fitting room duty is assigned

primarily to employees with light duty restrictions. After about ten minutes there, the claimant was reassigned to front door, where she stayed the remainder of her shift.

The following morning, July 6, 2003, the claimant called a member of management to inform them that she was "still in quite a bit of pain," and that she planned to seek medical attention. The claimant states that she was instructed to first come to the store and fill out the proper paperwork, which she did. The claimant was then seen at the emergency room of St. Joseph's Hospital, where X-rays revealed no fractures, degenerative changes, or other abnormalities. The X-rays showed, however, that the claimant has grade 0 spondylolisthesis at L5. The claimant was prescribed pain medications and muscle relaxers.

On July 7, 2003, the claimant presented to Dr. Michael K. Atta with symptoms of pain, tingling, and numbness radiating from her lower back into her right leg. In his report of this visit, Dr. Atta noted that the claimant described the pain associated with her injury as follows:

The patient states that she sustained pain which was severe enough that she dropped to her knees.

It is noted that the record is void of any evidence that the claimant literally "dropped to her knees" at the time of her alleged accident. Furthermore, other exaggerated statements made by the claimant are found throughout the record.

The claimant contends and the record reflects that the claimant experienced back pain during her shift at Wal-Mart on July 5, 2003, which she reported to her supervisors. The record reflects that the claimant filled out an employee injury report on July 6, 2003. Thereafter, the claimant consistently reported to medical service providers and treating physicians that she injured her back while lifting a case of sodas while at work for the respondent employer. Therefore, it would appear that the claimant has met her burden of proof that she sustained an injury arising out of and in the course of employment, identifiable by time and place of occurrence, which caused her physical harm, and which required medical services. However, at the hearing in November of 2003, the claimant's floor supervisor, Mr. Joel Kimery, Jr., testified in contradiction to the claimant's testimony regarding her work related incident on of July 5, 2003. Specifically, Mr. Kimery testified as follows:

Q. Did Ms. Smith come to you at some point during your shift and have a conversation with you?

A. Something about her back was hurting, you know. That was about it: Her back was hurting.

Q. Can you remember her exact words?

A. I really can't. It's been too - It was something about her back was hurting.

Q. Well, did you take her comment to mean that she was reporting a work injury?

A. I really didn't because I hear complaints from people quite often - - you know, "My head hurts"; "My feet hurt." You know, there's a big difference in saying, "I'm hurt," and "I'm hurting,"

Upon further questioning concerning his contact with the claimant on the evening of her alleged accident, Mr. Kimery testified as follows:

Q. Subsequent to your contact with Ms. Smith twice that evening, did she ever tell you directly, at a later date, what she was doing when she says she hurt her back?

A. No.

Q. Did she have a discussion with you about her prior medical history?

A. When she was putting her money away that night, she said that she had back problems before and that her husband was bringing her back medication and that she had scoliosis.

The claimant denied making the above statements to Mr. Kimery, and she stated that the medication that her husband had in fact brought her on

the evening of July 5, 2003, namely Hydrocodone, had been prescribed to her for TMJ.

A closer examination of the claimant's testimony shows other inconsistencies. For example, throughout her extensive treatment for her alleged back injury, the claimant continually complained of worsening back pain and debilitating symptoms. However, comprehensive medical testing consistently showed normal physiological findings, and that the claimant's complaints simply did not match her objective medical test results. Moreover, the claimant insisted that she was so debilitated due to her back problems, that between July 5th and August 28th of 2003, she was physically unable to work restricted duty, which consisted mainly of answering phones for the respondent employer. The claimant, therefore, quit her job with the respondent employer near the end of August. Furthermore, medical records show that as of September 30, 2003, subjective medical testing showed an overall regression in the claimant's progress, including such symptoms as severe back pain ranging from an eight to a nine on a ten point scale; extremely limited range of motion; and, pain down both thighs up to the knee bilaterally. At that time, the claimant was "hunched over at about a 20-

degree anteflexed posture," her lateral bending was at about 5 degrees bilaterally with pain, she was unable to extend and lumbosacral flexion was only at about 40-degrees, and she appeared to have redeveloped the hyperesthesia to palpation "all over her back." Based upon the findings of this examination, Dr. Atta recommended, in part, that the claimant continue her current work restrictions, including four hour shifts. Yet, by mid-November of 2003, the claimant's condition had improved so dramatically that she was employed full-time, sometimes working as many as 50 hours a week, typing and answering phones for a new employer. The claimant worked for her new employer for approximately five to six weeks. She testified that her reason for leaving that job was due to her son's hospitalization, as opposed to her own physical condition.

The claimant was questioned extensively about her reasons for ultimately leaving her employment with the respondent. Upon direct examination, the claimant stated that she experienced difficulty performing "the phone job" due to her occasionally being required to hang up clothes left at the fitting room. However, upon re-direct examination, the claimant admitted that the true reason she resigned her employment with the

respondent in August of 2003, had little to do with her back problems. The claimant's testimony regarding this issue is as follows:

A. The reason I left is for the fact that, when I'm supposed to be on light duty, I'm not supposed to be doing everybody else's job. My job was light duty.

Q. So you were asked to do more, over and above?

A. Yes, I was.

Q. Do you have a little flexibility in your lifestyle such that you don't have to put yourself through this sort of thing and that you don't have to injure yourself further working a job?

A. Correct.

Q. You didn't just get up and leave Wal-Mart because you decided, "I just don't want to work today"; did you?

A. No. I just decided it wasn't worth the fight - the hassle that I was having to go through.

Q. And were you having to go through a fight and a hassle?

A. Yes, ma'am.

After relevancy objections were made and withdrawn, the claimant continued ...

Q. ... [T]ell me what hassles you were having to go through.

A. Well, having to put up with - I'll try to put this in a nice way - a form of sexual harassment, but not quite a form.

...

Q. Was your back causing you trouble? Did that have anything to do with why you didn't work a full 4-hour shift?

A. It was causing trouble, but not quite as bad. ... I could have dealt with it at work. But there was a lot of retaliation and stuff like that going on.

Q. So back up for a minute because now you're telling me that, part of the time when you were leaving your work at Wal-Mart, you were leaving because you were being harassed and not because your back was bothering you?

A. It was, but it wasn't quite as bad as the harassing and stuff.

Moreover, later questioning revealed inconsistencies between the claimant's history of medical treatment and her testimony regarding prior back problems. For instance, the claimant denied ever being treated for a prior back injury, however, an emergency room report dated April 23, 2002, reveals that the claimant was diagnosed, in part, with "musculoskeletal pain to lower back," which the claimant attributed solely to a UTI, and for which she received a prescription for Vicodin. However, on October 17, 2002, the claimant reported to the ER with new complaints of lower back pain with muscle spasms. The ER report of this visit states, "She [claimant] has no known injury, however, she does have three small children age 6 months

to 7 years of age, and admits to lifting them frequently." The claimant was diagnosed with acute back strain and sent home with a prescription for Valium and Vicodin.

In a letter from the claimant's case manager dated July 16, 2003, Dr. Atta responded affirmatively when asked whether the claimant's "twisting injury" on July 5, 2003, could have been 51% responsible for a slight bulge at L4-5 revealed from the claimant's recent MRI. However, Dr. Atta later recanted this opinion in a letter to the respondent's attorney, in which he wrote:

I have reviewed Ms. Smith's medical records, including the records you provided of her emergency room visits on April 23, 2002; October 17, 2002; and March 4, 2003.

With this information of the above emergency room visits, which I was not aware of while seeing the patient, I cannot definitely state that the injury sustained on July 5, 2003 was the cause of the slight central bulging of the L4-L5 disc as noted on the MRI scan performed on July 11, 2003. Even though it is possible that the twisting injury on July 5, 2003 may have caused the slight bulging mentioned, it is also very possible that she may have sustained the bulging on an earlier occasion, because of the documentation of low back pain on two earlier occasions.

Even Dr. Atta, who was the claimant's primary treating physician throughout the course of her treatment, was compelled to reevaluate his opinion concerning the exact nature of the claimant's back

problem when presented with new information concerning the claimant's medical history.

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. The inconsistencies between the information that the claimant provided to doctors during the course of her treatment, and her statements given during testimony, cast serious doubt upon the claimant's credibility. Moreover, the claimant's lack of credibility combined with the lack of objective medical findings, leads reasonable minds to conclude that perhaps her symptoms were never quite as severe as she would have everyone to believe.

In conclusion, the claimant claims to have injured her back at work on July 5, 2003, while picking

up a case of sodas, which in turn, caused her such immediate and severe pain that she "dropped to her knees." In contradiction to the claimant's statements, her supervisor, Joel Kimery, remembers that the claimant told him that her back was hurting during her shift on July 5, 2003, but he denies that she reported to him that she had injured her back. Furthermore, Mr. Kimery remembers that the claimant later informed him that she had prior problems with her back, perhaps congenital in nature. Second, in spite of comprehensive medical tests which showed no objective basis for the claimant's worsening symptoms, the claimant's condition continued to subjectively deteriorate to the point where she became debilitated.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a specific incident injury on July 5, 2003, arising out of and in the course of her employment with the respondent. Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner