

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F210382

SHARON TEAGUE, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 16, 2005

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

Claimant represented by HONORABLE REX CHRONISTER, Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

This case comes on for review by the Full Commission from an appeal filed by the respondents. On May 4, 2005, an Administrative Law Judge filed an opinion finding that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder while working for the respondent employer on

September 4, 2002. In accordance with this finding, the respondents were ordered to pay all reasonable and necessary medical treatment in connection with the claimant's right shoulder injury, as well as temporary total disability benefits beginning March 6, through April 28, 2003, and then from June 23, 2003, through August 24, 2003.

A 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 right shoulder injury on September 4, 2005. Therefore, the compensability of this claim should be, and hereby is denied, along with all associated benefits.

On September 4, 2002, the claimant, a door greeter for the respondent employer, was allegedly involved in an incident with a suspected shoplifter on the parking lot of Wal-Mart. This alleged incident purportedly resulted in an injury to the claimant's right shoulder. During her deposition of March 24, 2004, the claimant testified that after she approached the suspect, who was at that time in her car, the suspect pulled away abruptly causing the

claimant's right arm to be jerked. More particularly, the claimant testified regarding this incident as follows:

... She [the suspect] put the baby in the front seat, and she walked around and got in the car, and I had - - she had her door open, and my arm was - - my hand was on the door.

And I asked her for her receipt, and she was going through her purse telling me, just a minute, just a minute, and then she just looked up at me and just gunned it.

...

And when she did, she jerked my arm and stuff, almost jerked me down,

During her hearing of February 24, 2005, the claimant offered a slightly different account of the above-described incident. Instead of testifying that the claimant's door was open at the time the suspect pulled away, the claimant testified that the suspect's window was rolled down. The claimant further testified that she "had hold of the door where the window goes down", and that her hand was cupped. The claimant stated that Christy Bridges, who is employed by the respondent employer, came to the

scene of this incident shortly after it occurred. The claimant stated that she informed Ms. Bridges that her shoulder and arm were hurting as a result of this incident, and that Ms. Bridges called the police. Ms. Bridges did not testify at the hearing. After a police report was made, the claimant allegedly filled out an incident report and then drove herself to her doctor's office.

The medical records reflect that the claimant was seen by Dr. Todd Hood at the Cooper Clinic in Van Buren on September 4, 2002. Dr. Hood's clinic note of that visit reflects that the claimant was involved in an incident as above described. However, his summary report of that visit states the following:

She [the claimant] has had some difficulties with prior surgery of her shoulder in the past by Dr. Griffith (sic) in 1997. She is unable to abduct her arm beyond 30 degrees.

A physical examination of the claimant by Dr. Hood revealed that the claimant's supination and pronation were intact, and that she appeared to have good sensation and grip strength. In addition, the claimant, although

complaining that her arm was "very painful", did not appear to Dr. Hood to be in acute distress. Dr. Hood did not observe any dislocation of the claimant's right shoulder, thus he assessed the claimant with a general right arm injury. Dr. Hood was unable to take X-rays of the claimant's shoulder that day due to a malfunctioning machine. Stating that the claimant "has had prior surgery and seems to be quite disabled", Dr. Hood referred her for further evaluation by a physician specializing in occupational medicine. Finally, Dr. Hood included the following Addendum to his report:

Please note, she was observed by my nurse as she left the building to lift with no difficulty her heavy purse and she was able to drive moving the steering wheel in planes without difficulty. Please note this is in sharp contrast to her examination with me when she was unable to abduct her arm beyond 30 degrees without marked pain.

In sharp contradiction to Dr. Hood's notes concerning his nurse's observations, the claimant testified that Dr. Hood placed her arm in a sling that day, and that she was, therefore, unable to drive as Dr. Hood's nurse

observed. The claimant further testified that she was in the parking lot "for three or four minutes trying to get my car in gear so I could take off with my left hand." Dr. Hood's record does not reflect the claimant was given a sling for her right arm on the day in question. Finally, the claimant testified that she was not sure if she was carrying a heavy purse that day.

The record reflects that the claimant returned to work on September 9, 2002. The medical records reflect that the claimant was next seen for medical treatment on September 25, 2002, by Kim Jaquish, RNP, at Sparks Regional Medical Center under the direction of Dr. Robert Bishop. At that time, the claimant was assessed with right shoulder rotator cuff strain, for which she was prescribed medication. On October 7, 2002, the claimant presented to Ms. Jaquish with flu-like symptoms. No mention was made in the medical report from that visit of the claimant's shoulder problems. The claimant canceled an appointment for October 21, 2002, at the River Valley Musculoskeletal Center, but was eventually seen there on November 7, 2002. A

report of that visit reflects that the claimant was seen "by her own discretion" due to her alleged denial of approval for an orthopaedic evaluation. On physical examination the claimant showed well maintained external rotation and abduction strength, with some impingement to forward flexion, more so to lateral abduction. Four X-rays taken on the date of that service revealed, however, that the claimant's AC joint appeared to be intact. In addition, these films indicated the presence of mild arthritis in the claimant's allegedly injured area, and post-surgical changes consistent with the claimant's previous acromioplasty. The only significant finding from these films was a slight proximal migration of the claimant's humerus, which the examining physician, Dr. Greg T. Jones, stated could be consistent with rotator cuff dysfunction on tear. Dr. Jones recommended that the claimant's shoulder be further evaluated with gadolinium enhanced arthrogram "given the previous surgery, the new injury, the nighttime pain and the weakness that she reports, although," he added, "I am not detecting much [pain] on my examination." Dr. Jones further

recommended that the claimant do home range-of-motion exercises and a stretching exercise regime, concerning which he commented, "She has done that before and seems well versed and formal therapy will not be necessary."

An arthrogram of the claimant's right shoulder was conducted on November 12, 2002, which showed no evidence of full thickness rotator cuff tear. Bursitis was, however, indicated from this study. Likewise, an MRI of the claimant's right shoulder was conducted on the same date. This study revealed the following:

Status post previous rotator cuff surgery. No evidence for full thickness rotator cuff tear on today's MR arthrogram.

Some thinning and irregularity of the articular surface of the paraspinal tendon as above, maybe related to post surgical and or degenerative with possible small partial tear along the undersurface. No full thickness tear is seen.

Further, minimal fluid in the subacromin/subdeltoid space was indicative of bursitis and suggestive of mild fatty atrophy of the deltoid musculature.

In his progress note dated January 24, 2003, Dr. Jones made the following comments:

A 50 year old Alma female is seen in follow-up regarding her right shoulder. Her complex history is well detailed in the initial presentation on 11-7-02 with respect to a re-injury allegedly in a work associated situation that occurred in September of 2002. I sent her for a gadolinium enhanced arthrogram/MRI. I have that available and I have personally reviewed that. I would concur with the radiologist that a complete or even significant re-disruption of the rotator cuff done previously has not occurred. ... Moderate impingement changes are seen but no acute fracture or other destructive changes are evident.

Dr. Jones stated further that his "suspicion for a full thickness cuff lesion" based on the claimant's strength and diagnostic testing was "very low". However, given the failure of conservative measures, which included an injection, to bring the claimant lasting relief from her reported pain, Dr. Jones opined that his next step should be an arthroscopic procedure. The results of this procedure, which was performed on March 6, 2003, revealed that the claimant had marked impingement with significant global

instability in her right shoulder. In his follow-up report of that procedure, Dr. Jones stated:

Certainly, her mechanism of injury with the lady jerking on her arm may have resulted in laxity of a capsular nature.

Subsequently, in a letter to the claimant's attorney dated April 2, 2003, Dr. Jones wrote:

I had first (sic) this young lady in November, 2002, at which time she related to me a history of previous shoulder injury and reconstructive surgery by Dr. Griffin in 1997 after which she had basically been asymptomatic and without problems. She was allegedly injured by her account in September, 2002, with a "jerking" injury after which time she has had unrelenting shoulder symptoms that were unresponsive to conservative therapy, and, in fact, she was taken to surgery on March 6, 2003. At that time she was found to have three separate issues, one being a fully healed rotator cuff without further disruption and two pathologic issues being damage to the AC joint with impingement and partial damage to the dorsal surface of her rotator cuff but most impressively is significant level of shoulder glenohumeral instability. All three of these issues and findings I believe are consistent with mechanism of injury and onset of symptoms with which she describes by the history provided to

me are the major cause of her current level of shoulder symptoms.

Regarding his surgical discovery of shoulder instability, Dr. Jones stated further that "the absence of such issues predating the date of injury again would be reasonably explained by the mechanism of injury and trauma that she reports in the alleged incident in the 'shoplifter apprehension' attempt that was made."

The record reveals that Dr. Jones was obviously unaware at the time that he authored the above referenced letter, that the claimant had sustained a new injury or re-injury to her right shoulder on July 22, 2002, when she fell down a flight of stairs at home. The claimant was inconsistent in her testimony as to the distance she actually fell, with the number of stairs ranging from two to ten. For example, in his clinic note dated July 23, 2002, Dr. Ronald Schlabach reported the following:

Said she went down ten steps of stairs on her back, her arm caught on railing. She mostly has pain in he right arm and right shoulder.

Subsequently, the claimant testified during her deposition that she had fallen down two steps, whereas during her hearing she testified at first that she had fallen down three steps. Later, the claimant recanted her earlier testimony and stated that she had actually fallen down seven steps.

Dr. Schlabach's physical examination of the claimant on July 23, 2002, revealed much the same results as her examination by Dr. Hood some six weeks later after her alleged work related injury. Essentially, the claimant was unable to internally rotate her right shoulder or to abduct her right arm any greater than 30 degrees laterally. However, the claimant's supination was intact as was her abduction, and she was able to make a good fist. At that time, Dr. Schlabach assessed the claimant with acute right shoulder strain, for which he told her to take Darvocet, to apply alternating heat and cool packs, and to do home exercises. Dr. Schlabach advised the claimant that if her shoulder did not improve, she would need to follow-up with Dr. Griffin to re-evaluate her rotator cuff. The claimant

was taken off of work for two days following this examination.

Likewise, also unknown to Dr. Jones, the claimant injured her right shoulder when she was hit by a heavy steel door at work on August 20, 2000. Pursuant to that injury, the claimant reported to Dr. Robert Thompson that she was experiencing pain and popping in her right shoulder.

Finally, in contradiction to what she reported to Dr. Jones, the medical records reflect that the claimant had ongoing problems with her right shoulder for well over six months after her surgery to repair her torn rotator cuff in 1998. On November 24, 1998, for example, Dr. Griffin stated that he would consider the claimant's ongoing residual aches and pains to be "thoracic outlet type symptoms as well as neurologic etiology", and that he would consider further work-up if her problems persisted.

Pursuant to Arkansas Code Annotated §11-9-102(4)(A)(i)(Repl. 2002), a compensable injury is 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. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. Furthermore, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent

knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

Although Dr. Jones ultimately opined that the claimant's shoulder problems were causally connected to her alleged injury of September 2002, a review of the basis for this doctor's opinion reveals that the claimant was not forthcoming with Dr. Jones regarding her fall down a flight of stairs six weeks prior to her alleged work related injury. More particularly, Dr. Jones stated in his letter of April 2, 2003 that the claimant had informed him that she had "basically been asymptomatic and without problems" after her injury and resulting shoulder surgery of 1997-1998. However, the record illustrates that the claimant sustained two subsequent injuries to her right shoulder after 1998; once in August of 2000, and again in July of 2002. Whereas the first re-injury of August 2000, did not appear to be as serious as the re-injury of July 2002, both instances required medical treatment. Moreover, the claimant's physical symptoms (which are described above), resulting

from her fall down the stairs in July of 2002, were identical to the symptoms with which she presented after her alleged work related injury six weeks later. In addition, the claimant was taken off of work for two days after her re-injury of July 2002. All of these factors are significant in that Dr. Jones obviously based his medical opinion concerning causation on the claimant's "account" of her medical history, which apparently contained some significant omissions. Therefore, Dr. Jones opinion concerning causation should be given little weight in that he was not fully informed of the claimant's medical history regarding her right shoulder prior to forming his opinion.

Moreover, there were no eyewitnesses - or at least none that offered testimony - to the alleged incident of September 4, 2002. The claimant was the only witness at the hearing, and her testimony concerning the details of this alleged incident was inconsistent with statements she made during her deposition. For example, whereas the claimant stated in deposition that the suspect's door was open at the time of the incident, she testified during the hearing that

the suspect's window was merely rolled down. This is significant in that the position of the claimant's body to the suspect's car at the time of this alleged incident helps determine the validity of the claimant's alleged injury. As the respondents have pointed out, had the claimant been standing on the driver's side of the suspect's car with the car door open and her right hand on the door, as she first contended that she was, then it is implausible that the claimant's right arm would have been jerked in the manner which she described. Unfortunately, we have only the claimant's own self-serving and inconsistent testimony regarding the details of her alleged accident on which to rely. Therefore, we are left to speculate as to the exact nature of the claimant's alleged work related injury, and conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). In addition, the claimant offered inconsistent

accounts of her fall down the stairs in July of 2002. Regardless of the number of steps down which she actually fell, perhaps the most important detail of the claimant's accident on July 22, 2002, was that she reported to Dr. Schlabach's nurse practitioner, Ms. Jaquish, that "her arm caught on the railing" on her way down. The claimant admitted during testimony that the trauma to her right arm that day could be considered a "jerking episode". Finally, Dr. Hood's addendum to his report of September 4, 2002, is telling, in that it describes observed physical activity on the claimant's part that was inconsistent within the physical ability which she demonstrated during her examination. Unlike the claimant, Dr. Hood has no vested interest in the outcome of this claim, and his statements contained with his report are, therefore, worthy of belief. It is well established that 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, reasonable minds would conclude that the claimant was more than a poor historian when she neglected to tell Dr. Jones about her shoulder injury, which had occurred just weeks prior to her alleged work related injury. The inconsistencies in the claimant's testimony also reveal that the claimant lacks credibility. Finally, although not directly related to her alleged compensable injury, the claimant was terminated by the respondent employer on October 3, 2003, for having violated workplace policies. More specifically, the claimant was later convicted on charges of second degree terroristic threatening against one of her co-workers. This type of criminal conduct certainly weighs against the claimant's

character and credibility, and her testimonial account of her alleged injury is, therefore, given little weight.

For the reasons stated above, the claimant has failed to prove that she sustained a compensable injury to her right shoulder on the date in question. Therefore, the compensability of this claim is hereby denied.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority finds that the claimant did not sustain a compensable injury to her right arm. In supporting this finding, the Majority argues that the claimant is not credible and finds that her injury was likely pre-existing. In my opinion, the claimant is very credible and the

evidence indicates that she sustained a compensable injury while apprehending a shop lifter on the date in question. Therefore, I must respectfully dissent.

_____ In supporting their argument that the claimant is not credible, the Majority first notes that the claimant allegedly gave inconsistent testimony regarding the placement of her hand at the time of the incident. First, I would note that the respondent admits that the claimant was in an altercation with a shoplifter and that she reported pain in her arm immediately after the event. With regard to the claimant's testimony regarding the placement of her hand, in my opinion there is no inconsistency. In her deposition of March 24, 2004, the claimant testified,

...She [the suspect] put the baby in the front seat, and she walked around and got in the car, and I had - she had her door open, and my arm was - - my hand was on the door.

And I asked her for her receipt, and she was going through her purse telling me, just a minute, just a minute, and then she just looked at me and gunned it.

Later, the claimant described the incident as follows,

... And she put the baby in the front seat and she walked around to her car and got in it and I put my hand on the door. She had her window down.

Q. Is that on the driver's side or passenger's side door?

A. Driver's. And I asked her for her receipt several more times and she was going through her purse like she was looking for the receipt. Then she looked up at me and just grinned and gunned it. When she did, she jerked me. I stumbled and I caught my balance to keep from falling.

Q. Were you holding onto the door or was your hand inside the door or do you recall?

A. I had a hold of the door where the window goes down. My hand was over it like that (demonstrating with right hand).

Q. It was kind of cupped over it?

A. Yeah.

Q. And then she took off?

A. Yes.

The Majority opines that the claimant's testimony is contradictory in that she first testified that the door was

open and then later testified that the window was rolled down. The Majority further argues that the claimant gave contradictory testimony regarding the placement of her hand. When comparing the claimant's two accounts of the incident, I see no contradiction. In my opinion, it is probable that the shoplifter initially had the door open and then shut the door as the claimant was talking to her. In fact, if the shoplifter had driven off with the door open, presumably the claimant would have mentioned it specifically. Furthermore, in my opinion if the door was open, the claimant likely would have been dragged by the car and sustained other injuries if she was still holding onto the car while its door was open.

With regard to the claimant's hand placement, the claimant's initial testimony that her hand was on the door and subsequent testimony that her hand was cupped on part of the window is easily explainable. The claimant never testified that her hand was on the portion of the door that is hidden once closed, and since the driver's window, is on the door of the car, her testimony is consistent. Lastly, I

find that since the respondent is not disputing the apprehension occurred, any minor inconsistencies in the claimant's testimony should not automatically be deemed to be falsehoods.

_____The Majority argues that the claimant is not credible because she allegedly failed to disclose her prior injuries to her physicians. In my opinion, this failure was due to the fact that the claimant's symptoms were minor in nature and had resolved. Consequently, she did not deem them worthy of mentioning. The evidence indicates that the claimant did disclose her initial injury and that she had to have surgery. This indicates that she disclosed what she believed to be the relevant information regarding her previous injuries. Though the claimant was hit by a steel door in 2000, I note that there is no evidence the claimant had further problems with her shoulder until 2002. Likewise, though the claimant fell down a flight of stairs in July 2002, she reported having no further problems until the time of her compensable injury.

While the Majority would argue that the claimant's credibility is in question because she gave contradictory testimony regarding the number of stairs she fell down, in my opinion, that was not purposeful, as the claimant admitted that she had fallen down stairs. In fact, the claimant indicated at the time of her deposition that she could not remember how many steps she had fallen down. Accordingly, in my opinion, the claimant was not purposefully distorting the facts to further her purposes.

While the claimant's treating physician was not informed of the incident in 2000 and 2002, in my opinion, there is sufficient evidence to find that the claimant sustained an injury when apprehending the shoplifter. There is no dispute that the claimant returned to work after both the 2000 and the 2002 injuries. The evidence also shows that the claimant presented to the doctor in August and presented no complaints of shoulder problems. In my opinion, this indicates that the claimant's prior accidents were minor and resolved by themselves.

Next, the Majority argues that because Dr. Hood's note indicates that his nurse saw the claimant carrying a heavy purse and driving, she is not credible. I find that the claimant's testimony should be preferred over a hearsay document in the form of a doctor's note; particularly since the note in question constitutes hearsay on multiple levels and is actually an account by the doctor of what his nurse allegedly told him regarding the claimant's behavior. Instead of relying on this note, I find the claimant's testimony that she did not recall carrying a purse, had a sling, and had difficulty moving her arm to be more credible. In supporting this, I note that it is undisputed that the claimant was diagnosed and ultimately underwent surgery for her injury. Since no one is disputing the existence or extent of the claimant's injury at the time the doctor's note was composed, I find it unlikely that the claimant would have any reason to exaggerate her symptoms or to lie regarding her condition.

Lastly, the Majority opines that because the claimant was convicted of terroristic threatening, she is

not credible. This conviction involved an incident where the claimant apparently made a generic threat of violence. However, I note that there was nothing in the claimant's actions or criminal charges that involves any element of dishonesty. As such, I find the Majority's use of this conviction in deeming the claimant not credible particularly disconcerting.

In my opinion, the claimant was in an unfortunate position in trying to help the employer. It is undisputed the claimant had never provided such services in the past. It is also undisputed that the claimant was involved in an incident with a shoplifter and that she reported pain immediately thereafter. Likewise, it is undisputed that the claimant was jerked by the car, and I find it illogical that the claimant would not be injured if she jerked her arm while holding onto the door. Though the claimant did not disclose her prior injuries when going to the doctor, the record is clear that whatever injuries she had sustained had resolved themselves and that she was able to work at the time of her injury at work. While the Majority finds the

claimant is not credible, in my opinion, her testimony was convincing and any inconsistencies were minor in nature.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner