

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F106148

BARBARA WILLIAMS, EMPLOYEE

CLAIMANT

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

RESPONDENT

OPINION FILED JULY 13, 2005

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

Claimant represented by HONORABLE BILL STANLEY, Attorney at Law, Jonesboro, Arkansas.

Respondent represented by HONORABLE PAUL GEHRING, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant sustained compensable injuries on May 8, 2001, which recurred on August 28, 2002. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a

preponderance of the evidence. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed in the bakery department of the respondent employer. As part of her duties, she displayed products on the floor of the bakery, which required her to retrieve boxes from the freezer. According to the claimant, at approximately 8:00 a.m. on May 8, 2001, she injured her back while working. During her July 25, 2003, deposition, the claimant testified that she hurt her back as she was opening the freezer door to retrieve goods from the freezer, but she never entered the freezer. During the July 9, 2004, hearing, however, the claimant testified that she was injured when boxes fell on her in the freezer and caused her to hit her back on the freezer door. During cross-examination, she repeated that she was hurt when a fifty to sixty pound box fell on her, at which time she fell back against the freezer door. When asked about the contradictory reports, the claimant testified that the physicians' notes regarding the origin of her pain were incorrect. According to the claimant, Ms. Beatrice Farrell witnessed both incidents, and the claimant also informed

another co-worker, Ms. Lille Nelson, that she hurt herself immediately after the incidents.

The claimant testified that she immediately reported her injury to her supervisor, Patricia Luker. She stated that Ms. Luker did not respond so she waited until the end of her shift and reported the injury to the personnel manager, Jo Devasier. The claimant testified that Ms. Devasier then summoned Ms. Luker to her office on the intercom, but Ms. Luker did not appear, so the claimant went home.

The claimant returned to work the next day, and stated that she again told Ms. Devasier that she hurt her back. Ms. Devasier told her that she would need to wait until Ms. Luker returned to work before she could complete the necessary paperwork. The claimant submitted her complaint in writing on May 10, 2001, and was directed to obtain medical treatment from the respondent employer's designated medical provider. She was later placed on light duty for three weeks as a greeter.

Ms. Nelson confirmed that she was not present when the claimant allegedly injured herself, but added that the claimant told her that she had fallen and hurt her back.

During her testimony, Ms. Nelson offered conflicting accounts. At one point, she testified that she did not remember if the claimant complained of back pain. On cross-examination, however, Ms. Nelson was asked specifically whether the claimant told her about pulling the freezer door and experiencing a popping sensation in her back. She responded "yes" to each of these questions. Additionally, Ms. Nelson first testified that she did not know whether the claimant informed Ms. Luker that she had been hurt, or whether Ms. Luker had done anything in response. Moments later, again during cross, Ms. Nelson altered her testimony and stated that the claimant advised Ms. Luker that she had injured herself while Ms. Nelson was present.

Ms. Luker testified that she began working for the respondent employer in 1994. On May 8, 2001, Ms. Luker was the assistant manager. Ms. Luker's position required her to hear complaints of employees when the manager was unavailable. Ms. Luker testified that the claimant constantly complained of general back pain, but that the claimant attributed her pain to her menstrual cycle. Ms. Luker added that she did not recall any complaint of a work related injury. If the claimant had stated that she was

injured, Ms. Luker stated, she would have taken the claimant to personnel to write up the incident, even if she believed the claimant was "faking."

Ms. Luker also testified that, although she believed the claimant was able to do everything asked of her, she refused to lift heavy loads on Thursday, or to perform other requested tasks. Ms. Luker acknowledged that she did not cite the claimant for being insubordinate when she refused to perform assigned job tasks. She explained, however, that performance appraisals, by their nature, were intended to focus on the positive aspects of an employee's performance. If a problem arose with an employee, he or she would be "written up" immediately; it would not be done at the same time as the yearly performance evaluation.

The claimant testified that she returned to work after the May 2001 incident and resumed her duties, but that she injured herself again on August 28, 2002. She explained that her second injury occurred under the same circumstances as the first. Again, the claimant testified Ms. Farrell was the only witness, and that the claimant told Ms. Luker that she hurt herself. According to the claimant, Ms. Luker said

nothing. The claimant again waited until the end of her shift and then told Ms. Devasier of her alleged injury.

During her July 25, 2003, deposition, the claimant denied that either she or her employer terminated their employment relationship. She testified that her physician, Dr. James G. Alexander, did so when he declared that she was disabled. During her deposition, the claimant testified that she would never be able to return to work. Moreover, she added, she refused to consider any type of vocational rehabilitation, such as job placement or training, even if a doctor released her to return to work with very light duties. During the hearing, however, the claimant testified that she was terminated.

The claimant first visited a physician regarding her lower back pain on March 29, 1993. On that date the claimant advised Dr. James Meredith that she was "hurting all over" and "had headaches" following a motor vehicle accident in which she had been involved two days earlier. Doctor Meredith diagnosed the claimant's complaints as cervical, thoracic, and lumbar strains. He referred the claimant to Dr. Ramone P. Lopez, an orthopedic physician, for additional treatment related to the accident. In his

April 6, 1993, report, Dr. Lopez identified cervical and lumbar strains.

On April 20, 1993, the claimant underwent a CT scan of her lumbar spine, which revealed a congenital small spinal canal and diffuse disc bulge at the L4-5 level. Doctor Meredith then referred the claimant to Dr. James Rodney Feild, a Memphis neurosurgeon, who evaluated the claimant on May 3, 1993, and identified a lumbar strain. At that time, Dr. Feild observed nothing abnormal about the claimant's MRI report. However, a mere three weeks later, on May 21, 1993, Dr. Feild observed mild early water loss of the discs, as well as mild annular disc bulging. He added that he could see no herniations, protrusions, or impingements, but he concluded on May 24, 1993, that the claimant had degenerative disc disease, which did not require surgery. He released her from his care on that date, with prescriptions for Ansaid and Darvocet.

On August 6, 1993, the claimant again complained to Dr. Meredith of pain to her lower back. Doctor Meredith recognized that the claimant had degenerative disc disease and prescribed Ansaid and Vicodin. The claimant was directed not to return to work until August 15, 1993. The claimant

again complained pain to her lower back on February 24, 1994.

On May 11, 2001, the claimant presented to her family physician, Dr. Sudhir Kumar, complaining of a "sudden onset of low back pain," which she attributed to her attempt to "close a heavy door." She also complained of radiating pain down her right leg, and Dr. Kumar concluded that the claimant had a low back sprain. When the claimant returned to his office on May 14, 2001, Dr. Kumar recommended an MRI, which identified a "significant loss of intervertebral disc height, as well as signal from L2-3 up to L5-S1 level consistent with degenerative loss" and offered the following impression:

Diffuse bulge at L4-5 with hypertrophic changes of the facet joints and ligamentum flavum causing moderate to severe spinal stenosis and narrowing of both neuroforamina. Diffuse bulge at L3-4 level causing mild spinal stenosis and small bulge at L2-3 level as well.

Doctor Kumar referred the claimant to Dr. Morris W. Ray, a Memphis neurosurgeon, who examined the claimant on May 21, 2001. In his notes, Dr. Ray stated that the claimant said that her pain began when she pushed on a freezer door,

but that she had also had problems with her back in the past as a result of strains and arthritis. He noted that the claimant's MRI was abnormal, and that the claimant "has either an acute disc rupture or a chronic disc rupture with a bulge and probable acute tear at L4-5 paracentral and to the left," which caused "moderately severe spinal stenosis at L4 on the left." Doctor Ray recommended medication, physical therapy, and possibly surgery, if the claimant did not respond to conservative treatment. He also noted that the claimant has "significant facet joint disease." The claimant failed to return for her follow-up appointment with Dr. Ray on June 4, 2001.

A physical therapist's report dated May 22, 2001, revealed that the claimant had reported chronic back pain for several years. The therapist also noted that the claimant suffered from degenerative disc disease. Three days later, on May 24, 2001, the claimant was seen by Dr. Meredith, who also wrote in his notes that the claimant's pain in her lower back began as she was "pulling on a freezer door on 05/08/01." Doctor Meredith also noted the claimant's diagnosis of degenerative lumbar disc disease and that the MRI revealed:

A diffuse bulging of the disc at L4-5, which causes moderate to severe spinal stenosis narrowing of both neuroforamina. She also has bulging at L3-4 which causes mild stenosis and a small bulge at L2-3. Apparently she was told after she saw Dr. Ray that she needed to return to her Wal-Mart Company doctor and she has now been sent to see me.

On May 31, 2001, Dr. Meredith noted that the claimant continued to experience "pretty severe pain," and he recommended that she return to Dr. Ray. He added that he did "not see how [claimant] could work at any job," and concluded that he would talk to the respondent employer's workers' compensation staff about sending the claimant to a neurosurgeon.

The claimant returned to Dr. Meredith on June 7, 2001, at which time the claimant informed him that she could not go to the neurosurgeon because she "did not have a ride." However, she did inform Dr. Meredith that she was "getting better." Doctor Meredith advised the claimant that if she did not see a neurosurgeon for possible further treatment, he could do nothing more for her, and that she could return to work with restrictions.

On August 29, 2002, the claimant presented to Dr. James G. Alexander, her family physician, complaining of back and leg pain, as well as a ruptured disc. She underwent an MRI of her lumbar spine on September 4, 2002, which indicated that the claimant suffered from "focal disc herniations involving L2-3, L3-4, and L4-5, to the right of the midline. However, Dr. Alexander also observed "degenerative changes...with loss of articular cartilage laterally about the knee."

Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002) defines "compensable injury" as "[a]n 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). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226,

691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* 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).

In our opinion, a review of the evidence demonstrates that the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury to her back. The record is very clear that the claimant suffered from back pain for years. The claimant complained to her physical therapist of chronic back pain. The claimant was involved in a motor vehicle accident in 1993, and two days after this accident the claimant estimated the vehicle in which she was a passenger, which was struck on her side of the car by another traveling at approximately 100 miles per hour. The claimant repeatedly denied throughout the proceedings that she was ever involved in a motor vehicle accident. The accident occurred in 1993 near Helena, Arkansas, when a vehicle driven by another person collided with the vehicle in which the claimant was a passenger. The other vehicle hit on the claimant's side of the vehicle, and her neck was injured. Although she eventually admitted that she was involved in a collision in 1993, the claimant testified that she could not remember the nature of her injuries. The record reveals, however, that the

claimant was subsequently diagnosed by her treating physicians as having cervical, thoracic, and lumbar strains, as well as degenerative disc disease and arthritis.

During the July 9, 2004, hearing, however, the claimant denied that she had ever experienced problems with her lower back, or that she had complained of back pain to her supervisor, before May of 2001. She also specifically denied that she was ever involved in a motor vehicle accident or that she incurred injuries from that accident. When specifically asked about the accident by the Administrative Law Judge, the claimant informed him that it was her son who was involved in the accident. The claimant denied that she sought medical treatment in 1993, including an MRI and Lumbar Spine Study, or that she had been diagnosed with degenerative disc disease in 1993, despite the existence of medical evidence to the contrary. The claimant was ultimately diagnosed with degenerative disc disease and was treated by physicians for more than four months. The claimant continued to complain of back pain for at least a year after that accident.

The only evidence in the record demonstrating that the claimant suffered a compensable injury is the testimony

of the claimant. The claimant's testimony is far from credible. 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.

In our opinion, the claimant is not a credible witness. The claimant's testimony should be given little, if any, weight. The claimant gave conflicting testimony regarding the events that surrounded her alleged injury. In her July 25, 2003, deposition, the claimant testified that she hurt her back as she opening the freezer door to retrieve goods from the freezer. She stated that she never had an opportunity to enter the freezer. However, during the July 9, 2004, hearing, the claimant altered her story and testified that she was injured when boxes fell on her in the

freezer and caused her to hit her back on the freezer door. Further, the claimant has denied throughout the proceedings that she ever experienced back problems and that she was ever involved in an automobile accident. However, the medical records clearly demonstrate that the claimant was involved in a motor vehicle accident in 1993 and received medical treatment for approximately four months for back pain. The claimant ultimately admitted that she was involved in a motor vehicle accident in 1993, when she was confronted with her response to discovery requests. The claimant could not have simply forgotten that she was involved in an automobile accident from the time she testified under oath during her deposition until she later responded to the Administrative Law Judge.

The claimant testified that Ms. Beatrice Farrell witnessed both the May 8, 2001, and the August 29, 2002, alleged incidents. However, the claimant did not offer the testimony or an affidavit from Ms. Farrell into the record setting forth her recollection of the events.

Simply put, we cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury in May of 2001 or in August of 2002.

The evidence demonstrates that the claimant was involved in a major motor vehicle accident in 1993 for which she came under the care of several physicians for several months. The claimant was diagnosed with degenerative disc disease and arthritis. The claimant's testimony is replete with contradictions and inconsistencies. Accordingly, we find that the claimant has failed to meet her burden of proof. Therefore, we reverse the decision of the Administrative Law Judge. This claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.