

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410216

JESSICA MARSHALL,
EMPLOYEE

CLAIMANT

JIM DANDY STORE,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED FEBRUARY 22, 2006

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

Claimant represented by the HONORABLE SCOTT A. SCHOLL, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by the HONORABLE GAIL O. MATTHEWS, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed September 27, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The employer-employee relationship existed on July 8, 2004.
2. No benefits have been paid in that respondents controverted the claim in its entirety.
3. The parties stipulate that for purposes of determining an appropriate compensation rate, the claimant was employed for 40 hours per week at \$6.25 per hour.

4. The claimant has established by a preponderance of the credible evidence that she sustained a compensable back injury on July 8, 2004.

5. The claimant proved by a preponderance of the credible evidence that all of the medical treatment documented in the medical record from the hearing is reasonably necessary for, and causally related to, diagnosing the extent of and/or treating Ms. Marshall's July 8, 2004 work-related back injury.

6. The claimant proved by a preponderance of the credible evidence that she is entitled to a period of temporary total disability compensation from August 13, 2004 through October 20, 2004.

7. Neither the claimant or the claimant's attorney is responsible to reimburse the respondents for the \$40 court reporter appearance fee for a deposition for which Ms. Marshall failed to appear due to lack of notice.

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 September 27, 2005 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 must respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on July 8, 2004. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant alleged that she sustained an injury as a result of an incident on July 8, 2004, when she slipped and fell. The claimant was employed by the respondent employer as a stock person. The claimant stated that on July 8, 2004, she was carrying two 8 to 10 pound boxes of sausage and she slipped and fell. The claimant testified that she knew she was injured the day following the fall and it steadily worsened until she was unable to come to work over a month after the fall. The claimant did not seek medical attention until August 13, 2004, when she sought treatment at the Rose Bud Rural Health Center.

The record contains many discrepancies with respect to the claimant's testimony and the medical records

about this alleged injury. The claimant testified at the hearing and in her deposition that she fell real hard on the floor. She stated that her feet slipped completely out from under her and she landed flat on her bottom. However, she told the medical provider at the Rose Bud Rural Health Center on August 13, 2004, that she turned a corner and felt her back twist. She stated that her legs felt weak like they were going to fall. There was absolutely no notation in these initial records that the claimant fell. The claimant sought treatment from the Ozark Mountain Orthopedic Clinic on August 18, 2004. She told the medical providers there that "her pain came on just in the last few weeks after lifting some packages of sausages." The medical records there contain no notation that the claimant fell.

There are other discrepancies as well. At her first appointment at the Rose Bud Rural Health Center, the claimant advised that she had a severe back ache down to the coccyx area for three weeks and it had progressed. On her visit to the Ozark Mountain Orthopedic Clinic she advised that she had pain in her back on and off for years but it had gotten worse in the last month and a half. The claimant testified that she first sought medical treatment for the fall from a

chiropractor but she did not have any records in evidence from a chiropractor stating that she had fallen at work. She also stated that she went to the chiropractor three and a half weeks after the fall. The claimant additionally testified that she never had any back problems until this alleged incident. However, the medical records demonstrate that the claimant has had back pain off and on for years.

The claimant's testimony regarding the injury is not only inconsistent with the medical records, but is also inconsistent with the testimony of her coworkers. The respondents offered the testimony of Yvonne Healy who is the office manager for the respondent employer. Ms. Healy testified that she had no knowledge that the claimant was contending that she had fallen at work until workers' compensation called her on August 19, 2004. According to Ms. Healy, if she had been aware of an incident she would have completed the necessary forms in July when the alleged incident took place.

Christy Guffy, the store manager, stated that she was unaware of the claimant's alleged fall on July 8, 2004. If she had been aware of the claimant's fall she would have taken the claimant to the doctor. The

claimant told her she was going to the doctor because her back was hurting due to fights with her husband.

Ruth Poczik, a cook, testified that she was also unaware of the incident. Ms. Poczik testified that if the claimant had told her about the incident she would have reported it to management.

Simply put, I cannot find that the claimant was a credible witness. 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 claimant alleges that all of the people that testified for the respondent had an incentive to falsify their testimony. It was the claimant's contention that all other respondent employer's employees were sticking together because they were aware

that her husband had abused her. In my opinion, there is no financial reason for these individuals to provide false testimony regarding their knowledge of the claimant's alleged work-related injury.

Further, the claimant implied that the respondent employer attempted to avoid a workers' compensation claim by providing her with money to go to the chiropractor and the Rose Bud Clinic. The claimant testified that Peggy Burkett, the store owner, had given the claimant money for three chiropractic visits and \$65 for the Rose Bud Clinic visits. However, the evidence demonstrates that the claimant had been loaned money by the respondent employer on numerous occasions. The respondent employer withheld the money it loaned her from her next paycheck. At one point, the claimant testified that the money she was given for the clinic was a loan, but then testified later that it was not a loan.

Ms. Healy testified that she first learned that the claimant was having back problem when she borrowed the \$65 to go to the Rose Bud Clinic. Ms. Healy loaned the claimant the money for the doctor but she was unaware that the claimant was maintaining that she was injured at work. On one occasion Ms. Guffy loaned the

claimant money to go to the doctor. However, Ms. Guffy testified that the claimant wanted to borrow the money to go to the chiropractor because she said her back was hurting due to a fight with her husband. It is also of note that the respondent employer has loaned the claimant money to have her teeth fixed and \$1000 for a child custody battle. It appears that the respondent employer is going above and beyond by trying to help its employees by loaning them money.

In my opinion, it is conjecture and speculation to find that the claimant has proven by a preponderance of the evidence that she sustained compensable injuries to her back on July 8, 2004. 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). The record contains evidence that the claimant sustained injuries during a domestic conflict with her husband. Sarah Fry testified that the claimant's back appeared to be hurting one day and the claimant advised her that "Junior did it when he

beat me." The claimant admitted that her husband was abusive and would beat her up.

Therefore, after considering all of the evidence, I cannot find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on July 8, 2004. Accordingly, I must dissent from the majority's opinion.

KAREN H. MCKINNEY, Commissioner