NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F501164

BRANDI SNIDER, EMPLOYEE	CLAIMANT
OLD NAVY-GAP, EMPLOYER	RESPONDENT
INSURANCE CO. STATE OF PENNSYLVANIA, INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 9, 2006

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

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, 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 August 15, 2005. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 4, 2004, the relationship of employee-employer-carrier existed among the parties.

3. On December 4, 2004, the claimant earned wages sufficient to entitle her to weekly

compensation benefits of $187.00/$154.00, for temporary total/permanent partial disability.

4. On December 4, 2004, the claimant sustained an injury to her low back arising out of and in the course of her employment, of which respondents were notified on January 20, 2005.

5. The claimant was temporarily totally disabled for the period beginning January 21, 2005, and continuing through the end of her healing period.

6. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 4, 2004.

7. The respondents have controverted this claim in its entirety.

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 August 15, 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 December 4, 2004. My de novo review of the record demonstrates that the claimant failed to meet her burden of proof.

The evidence demonstrates that on December 22, 2004, the claimant was treated at the emergency room at St. Bernard's Medical Center. Subsequently, the claimant underwent laparoscopic surgery on December 28, 2004, for possibility of endometriosis. At the time the claimant presented to the emergency room on December 22, 2004, she was complaining of back and pelvis pain. However, it is curious as to why the claimant did not tell the emergency room personnel on December 22, 2004, that she had had an incident at work on December 4, 2004, where she suffered an injury to her low back. It is also of note that the claimant received her new schedule on January 19th or 20th, 2005, and was only given part time hours. The testimony of Ms. Carla Ann Hutchinson, a manager for the respondent employer who took over as temporary general manager on January 17, 2005, is enlightening. Ms. Hutchinson testified that she informed Kim Nolan, who made the schedules, that the claimant's hours had to be cut back to 30 hours. The claimant was not a full time associate but had been getting 40 hours

a week. Ms. Hutchinson testified that after a certain period of time, the system automatically rolled a person who got 40 hours per week into a full time status. There was only a certain number of full positions available and the claimant was not in one of those positions. Ms. Hutchinson stated that the claimant came to the office and was very upset when she saw the schedule. The claimant was suppose to work the next morning 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to 6:00 p.m.. However, she called in that morning and said that she had hurt her back.

The claimant eventually admitted that she did not decide to make a claim for workers' compensation benefits until after she found out that her hours had been cut from 40 hours a week to 30 hours per week. The claimant offered numerous excuses which included feigned ignorance about the procedure for filing a workers' compensation claim and her belief that she would "get better". However, I would note that although the claimant may not have been directly informed about the procedure for filing a workers' compensation claim, she was given an employee booklet which contained this information. It is of further note that the claimant previously worked for the respondent employer in its

Fort Smith store. The claimant failed to report an injury on December 4, 2004, to any supervisory personnel for the respondent employer.

Medical records indicate that the claimant did not declare her injuries to be work related. The claimant claimed to have lost her memory when confronted with the fact that she told the emergency room personnel on two separate occasions that her back pain was not work related. The claimant also indicated that she would be paying the medical bills herself during those visits. The claimant flatly denied ever telling the ER nurses that she would pay for the visits herself. In my opinion, the claimant's credibility is suspect at best. I give more weight to the medical records than to the claimant's testimony in this regard. 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 evidence demonstrates that the claimant worked for nearly two months with an injury she claims occurred at work, yet she failed to produce a single witness who would confirm that she had any problems or complaints prior to finding out her hours were going to be cut on January 20, 2005. Melissa Merger, another manager at Old Navy's Jonesboro store, stated that she worked with the claimant on a number of occasions, but never saw or heard anything that would lead her to believe the claimant was injured in any way. The claimant did not inform Ms. Berger of any "jolt" and she did not mention the numbness that allegedly caused her to have to quit work soon after she was re-designated as a part time employee.

The claimant's story is even more suspect given the fact that she worked with no restrictions or modifications in her employment duties for nearly two months after she claims to have injured herself. In fact, the claimant's coworkers stated that they did not even notice anything as the claimant worked during the Christmas season which is the busiest time of year for retailers. When asked whether the claimant had to have

her job duties modified in December of 2004 and January 2005, her supervisor, Carla Hutchinson testified:

> No. In fact they were working harder because that store was in such bad shape when I got there, that we were working a lot harder I think than they had normally worked and still nothing was ever said about it.

Ms. Hutchinson's testimony, as well as the failure of any of the claimant's coworkers to observe any problems the claimant may have had, clearly indicates that the claimant had no problems performing her job duties.

The claimant's memory did not improve when confronted with her own admissions to Dr. Routsong that she had not suffered a specific incident injury. In fact, nowhere in any of the medical documentation introduced at the hearing is there a narrative that lines up with the testimony the claimant provided at the hearing concerning a "little jolt in her back" in December 2004. Dr. Routsong's records from March 24, 2005, indicate that the claimant "denie[d] any specific incident." The claimant continued to deny any specific incident in her follow up visit on April 28, 2005. The claimant's conversations with Dr. Routsong are in stark contrast with the testimony she provided at the hearing concerning a possible lifting incident and the "little jolt" in her back. The claimant provided yet another

version of how she allegedly became injured when she initially decided to try to say she had a work related injury. Carla Hutchinson provided the following testimony:

> Q. And when she reported to you on the 21st in her phone call that she thought she had hurt it sometime back, what did she say was the cause of - how did she say she hurt it?
>
> A. She said she was in the side room unpacking boxes, and she thought that's when she hurt it and then went onto say that she thought one unit - or that one unit fell on her head at one time.

Ms. Hutchinson went on to state that there would be absolutely no reason for the claimant to have been in the side room on the 4th of December.

Additionally, the claimant failed to provide credible evidence of the actual date and time of her injury. Although the claimant is not required to give the actual date and time to prove compensability, it does speak to the claimant's lack of credibility in this case because of the many dates given by the claimant. The claimant testified at the hearing that she was injured on December 4, 2004. However, the claimant's Form C, filed in January 2005, listed the date of her accident as "01/24/05". Prior to making that filing, the claimant informed Carla Hutchinson that she really did

not know she had hurt herself. Ms. Hutchinson testified as follows:

> I asked her when this happened because I knew she didn't work the day before and she said that she didn't know when it happened - she thought it happened in the beginning of January.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that the claimant sustained a compensable injury. In my opinion, it is conjecture and speculation to conclude otherwise. 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). Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority's opinion.

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KAREN H. McKINNEY, Commissioner