

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505538

MISTY WEIGEL,
EMPLOYEE

CLAIMANT

THE STEAKHOUSE,
EMPLOYER

RESPONDENT

FARMERS INSURANCE EXCHANGE,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 3, 2006

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

Claimant represented by the HONORABLE FREDERICK S.
SPENCER, Attorney at Law, Mountain Home, 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 May 3, 2006. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The employee/employer relationship existed
on February 6, 2005.
2. The respondents have controverted this
claim in its entirety.
3. The claimant has established by a
preponderance of the evidence that she
sustained a compensable left knee injury on
February 6, 2005.

4. The preponderance of the evidence establishes that the MRI which the claimant has now undergone, and at a minimum a return visit to Dr. McBride to interpret that MRI and perform additional clinical testing, is also reasonably necessary medical treatment for the claimant's compensable left knee injury.

5. The claimant has failed to prove any constitutional violation.

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 May 3, 2006 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 concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority's opinion, affirming and adopting the decision of the Administrative Law Judge. In an Opinion filed May 3, 2006, the

Administrative Law Judge found that the claimant has proven by a preponderance of the evidence that she sustained a compensable left knee injury on February 6, 2005. In addition, he found that the MRI the claimant has undergone and, at a minimum, one visit to Dr. McBride to interpret that MRI and perform additional clinical testing, is reasonable and necessary for the treatment of her left knee injury. Finally, the Administrative Law Judge found that the claimant has failed to prove any constitutional violation.

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 injury to her left knee on February 6, 2005. Moreover, even if the claimant had proven that she sustained an injury at work, she failed to give proper notice of that injury to her employer. Therefore, the compensability of the claimant's claim should be denied. Moreover, the Administrative Law Judge erred in admitting an MRI report into evidence, and in allowing improper questioning about alleged prior conduct. Therefore, those items of evidence should not be considered in this review. However, the Administrative Law Judge was correct in finding that the

claimant has failed to prove a constitutional violation, and that finding should be affirmed.

According to the claimant's testimony, she sustained a knee injury while working for the respondent employer on February 6, 2005. More specifically, the claimant, who was a waitress at The Steakhouse restaurant, testified that at approximately 1:30 on the date in question she was setting down a plate, turned to pick up a spray bottle, and felt a crack and instant throbbing sensation in her knee. The claimant further testified that she immediately reported this incident to restaurant owner, Jay Winham; even rolling up her pant leg to show him her knee. According to the claimant, Mr. Winham refused to acknowledge or follow-up on this incident. The claimant stated that she also reported this incident to "Brian", an assistant manager under Mr. Winham. This, however, was never verified. The claimant testified that she made several attempts to inform Mr. Winham of her alleged injury, to no avail. Finally, on February 16, 2005, the claimant was allegedly told by Mr. Winham that she had to seek medical attention, and not to return to work until after she had done so.

A friend and former co-worker, Valerie Ross, testified on the claimant's behalf. Although Ms. Ross's

testimony generally corroborated that of the claimant, there were some notable discrepancies. For example, although Ms. Ross stated that she was an eye-witness to the claimant's injury, she testified that the claimant had a tray in her hands at the time of its occurrence - versus a plate. Further, Ms. Ross failed to testify that the claimant was reaching for a spray bottle at the time. Ms. Ross did not recall the claimant rolling up her pant leg to show Mr. Winham her knee, nor could she recall Mr. Winham having walked away from the claimant when she complained about her symptoms. Finally, this witness could not recall Mr. Winham ever telling the claimant he had no workers' compensation insurance, as the claimant alleges.

Likewise, the testimony of the claimant's fiancé, Thomas Connor, did little, if anything, to corroborate the claimant's testimony. Mr. Connor testified that the claimant was wearing a knee brace on the date of her alleged injury. However, the medical records reveal that the claimant was not prescribed a knee brace until February 16, 2005. Further, Mr. Connor offered no explanation as to why he testified that the claimant was wearing a knee brace on the day of her alleged injury when the medial records do not

corroborate this alleged fact. Therefore, Mr. Connor's testimony is essentially valueless in providing any reliable information concerning the claimant's alleged injury.

Mr. Winham testified at a supplemental hearing held a month after the first hearing on this matter. Mr. Winham testified unequivocally that neither the claimant, nor anyone else, ever informed him of the claimant's alleged injury of February 6, 2005. Further, in agreement with Ms. Ross's testimony, Mr. Winham denied that the claimant rolled up her pant leg in an attempt to show him her injured knee. Mr. Winham stated that the first notice he received of the claimant's alleged work-related claim was a copy of Form C provided to him by claimant's counsel in June of 2005.

It is well settled that questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forest Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). Moreover, when there are

contradictions in the evidence, it is within the Commission's exclusive province to reconcile the conflicting evidence and to determine the true facts. White v. Gregg Agriculture Ent., supra. 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 addition to the lack of credible witness testimony to support the claimant's allegation of a compensable knee injury, documentary evidence fails to support such a finding. The claimant did not seek medical treatment for her alleged injury until February 16, 2005, when she reported to the emergency department of the Baxter Regional Medical Center. There, the claimant reported that she twisted her knee at work a week prior. However, x-rays of the claimant's left knee revealed no obvious fractures, dislocations, or effusions. Moreover, no edema was noted in the emergency room records. More specifically, in Dr. Phillip Sadler's Emergency Room Visit report, he states:

EXTREMITIES: Without clubbing, cyanosis, or edema. The left knee is mildly tender to palpitation. Ligaments are grossly intact. Good strength and range of motion equal bilaterally. Sensations intact. Brisk capillary refill, 2+ distal pulses.

Subsequently, in his report of March 11, 2005, Dr. Anthony McBride, an orthopaedist, to whom the claimant was referred for evaluation, stated:

Her left knee reveals no significant swelling, no erythema, and no increased warmth. She has tenderness on the medial joint line. She has no gross varus or valgus instability. I can fully extend her knee and flex her knee to 90 degrees, at which time she complains of significant pain. McMurray's testing is impossible secondary to guarding but it [is] apparently more intense on the medial side than the lateral side. Lachman's is negative, but once again, she is guarding.

Pursuant to Ark. Code Ann. §11-9-102(4)(A), 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. Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Objective findings are defined at Ark. Code Ann. § 11-9-102(16) as those findings which cannot come under the voluntary control of the patient.

In summary, the claimant's testimony, the testimony of her two witnesses, and the documentary evidence were inconsistent. Clearly, therefore, the testimony of Jay Winham, in conjunction with the documentary evidence, provides the most credible account of events surrounding the claimant's alleged knee injury. This combined evidence supports a finding that the claimant has failed to prove the elements necessary to establish compensable injury.

Even if credible evidence supported a finding that the claimant sustained some type of work related injury to her knee on the date in question, which it does not, she failed to give proper notice of this alleged injury to her employer. Ark. Code Ann. §11-9-701(a) (1) provides:

Unless an injury either renders an employee physically or mentally unable to do so, or it is made known to the employer immediately after it occurs, the employee shall report the injury to the employer on a form prescribed or approved by the Commission ... and the employer shall not be responsible for disability, medical, or other benefits prior to the receipt of the employee's first report of injury.

Mr. Winham credibly testified that, although the proper procedure for reporting an injury was conspicuously posted on an entry wall, the claimant

failed to report her alleged work related injury to him. Further, he credibly testified that he did not receive notice of the claimant's alleged injury until June of 2005. The record reflects that a first report of injury form was completed by the claimant on May 25, 2005, the same being received by the Commission on June 1, 2005. Therefore, the claimant did not give proper notice of her alleged injury until well over three months after it supposedly occurred. Even though reporting procedures were conspicuously posted at the restaurant, the claimant's failure to give proper notice might be excusable had this been her first experience with work related injuries, thus, making her partially ignorant of the process. However, the claimant conceded to the fact that she was fully familiar with proper reporting procedures at the time of her alleged injury. More particularly, the claimant admitted in testimony that she had sustained at least two prior work-related injuries, perhaps three, for which she had received benefits. Further, the claimant agreed that when she presented to the emergency room on February 16, 2005, she informed emergency room personnel that she did not want to go forward with a workers' compensation claim. Even if I could agree that the claimant sustained a

compensable injury on February 6, 2005, which I can not, her failure to properly report this alleged injury is inexcusable under the circumstances of this claim. Therefore, even if the claimant was entitled to some benefits in association with her left knee, our statute clearly provides that she would not be entitled to benefits prior to June 1, 2005.

Finally, the Administrative Law Judge erred in allowing the claimant's belated MRI report to be admitted into evidence. Mr. Winham was unable to attend the first hearing on this matter, which was held February 1, 2006. Therefore, by agreement of the parties, a supplemental hearing was scheduled for the sole purpose of allowing Mr. Winham to testify. The second, or supplemental hearing, was held on March 1, 2006. Prior to the second hearing, the claimant attempted to introduce an MRI report that had been generated approximately 10 days prior to the supplemental hearing. As the respondent correctly asserts, the second hearing was to procure the testimony of Mr. Winham and to hear any rebuttal evidence that may be necessary. On the other hand, this hearing was never intended to allow the claimant extra time to scramble

for additional documentary evidence that would support her case in chief.

Ark. Code Ann. §11-9-705(c) (C) (i) provides that further hearings for the purpose of introducing additional evidence will be granted only at the discretion of the hearing officer or Commission. The claimant had been on notice for approximately a year prior to the first hearing that the respondent had controverted her claim. Therefore, she had ample time and opportunity to develop her case in chief and to introduce medical evidence prior to the first hearing. Further, the record affirms that the claimant never requested, either formally or informally, to keep the record open for the introduction of additional medical evidence subsequent to the first hearing. The claimant obtained her MRI after the first hearing. The claimant's counsel attempted to supplement the record with the MRI report by letter dated February 22, 2005. By letter dated the same day, the respondent's counsel objected, stating that this attempt was untimely. Ark. Code Ann. §11-9-705(c) (1) (A) requires that all documentary evidence shall be presented to the designated representative of the Commission at the initial hearing on a controverted claim. Further, section (c) (2) (A) required that any

party proposing to introduce medical reports at the hearing on a controverted claim shall, as a condition precedent to the right to do so, furnish to the opposing party and the Commission copies of the written reports of the physicians of their findings and opinions at least seven days prior to the date of the hearing. Because the claimant's attempted introduction of the MRI report occurred after her testimony and that of her witnesses had been heard, at which time the claimant had rested her case, and because it violated the seven day rule with regard to the first hearing, the MRI report should not have been allowed into evidence. The claimant's MRI report was not submitted in a timely fashion, and she did not exercise due diligence in procuring this diagnostic study in association with her controverted knee injury. Therefore, the Administrative Law Judge erred in allowing this report into evidence, and this report should not be considered in this appeal.

Likewise, the Administrative Law Judge erred in allowing improper questioning regarding alleged prior misconduct on behalf of the respondent employer. At the supplemental hearing of March 1, 2005, claimant's counsel directed questioning towards Mr. Winham aimed at exposing alleged past improper conduct. More

particularly, counsel for the claimant attempted to show that Mr. Winham had a general propensity to deny workers' compensation claims. Respondent's counsel objected to this line of questioning. However, citing Fraser v. Harp's Food Stores, Inc., 290 Ark. 186, 718 S.W.2d 92 (1986), as his authority, the Administrative Law Judge allowed these inquiries concerning unrelated compensation claims on the basis that these claims "arose out of the same or substantially similar circumstances." The Administrative Law Judge's reliance on Fraser ignores the second portion of the Supreme Court's analysis in that case which places the burden of proving the necessary similarity of conditions on the party offering the evidence. The claimant in this claim failed to establish any similarity between her claim and the two former claims to which her counsel referred, which involved the same claimant. In addition, the claimant's counsel conceded on record that he may have had the facts surrounding the prior claims confused. In addition, one of those claims was eventually settled, while the other was still in litigation. As the respondent correctly asserts, "Allowing such questioning puts the respondents in the precarious position of discussing and defending cases that have nothing to do

with the case at bar, and it leaves the record containing mention of statements and actions in other cases that are not accurate and have not been proven by a preponderance of the evidence." The claimant failed to prove that the claims about which Mr. Winham was questioned were substantially similar to her claim. Therefore, the claimant's counsel's line of improper questioning should not have been allowed into testimony, and should not be considered in this appeal.

In conclusion, with or without improper evidence in the record, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable knee injury on February 6, 2005. Therefore, I find that the Administrative Law Judge's decisions with regard to compensability and medical are should be reversed. Accordingly, I respectfully dissent from these findings.

Therefore, for all the reasons set forth herein, I must respectfully concur, in part, and dissent, in part from the majority's opinion.

KAREN H. MCKINNEY, Commissioner