

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512614

BENJAMIN A. HESS, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED OCTOBER 22, 2007

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

Claimant represented by HONORABLE J. MATTHEW COE, Attorney at Law, West Memphis, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN ,Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 15, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The claimant has failed to prove, by a preponderance of the evidence, that he sustained an injury arising out of and during the course of his employment with Wal-Mart Stores, Inc., as the result of a specific incident identifiable in time and place of occurrence on or about October 30, 2005.

4. The claimant has failed to prove, by a preponderance of the credible evidence, that his back injury, need for medical treatment, and disability was causally connected to a work-related injury.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

The claimant appeals the February 15, 2007, opinion of the Administrative Law Judge finding that the claimant did not sustain a compensable injury. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own. After a de novo review of the record, I find that while the claimant's testimony had minor inconsistencies, overall, it was credible and supported by the medical evidence. In contrast, the testimony of the respondent's witnesses was inconsistent and biased. The respondent-employer had admitted policies which encouraged employees not to report injuries and compensated employees for the lack of injuries. In my opinion, this policy is

appalling and simply promotes fraud. Furthermore, since this policy would provide financial incentive for witnesses testifying on behalf of the employer to lie, I cannot accord any weight to the witnesses of the respondent-employer. Accordingly, I must respectfully dissent.

The claimant in the present case contends that he was injured on October 30, 2005, while he was using a malfunctioning pallet jack. The Majority denies the claim on the basis that the claimant was not credible. Though the claimant had pre-existing back injuries, he had a significant change in the objective findings in his back after the October 30, 2005, incident. As such, the outcome of this case is largely dependent on the Commission's findings regarding credibility.

After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been reversed. In my opinion, the testimony of the witnesses presented by the respondent is not consistent and is simply not believable. In contrast, the claimant credibly testified that he injured himself while he was operating a

pallet jack machine on October 30, 2005. While receiving medical treatment, the claimant was consistent in reporting that the injury occurred while using a pallet jack. Likewise, the claimant's objective findings in the form of two disc protrusions are consistent with the mechanism of the injury described by the claimant. Accordingly, I find that the claimant should have been awarded all requested benefits.

The findings of the Administrative Law Judge on the issue of credibility are not binding on the Commission. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983); Linthicum v. Mar-Bax Shirt Co., 23 Ark. App. 26, 741 S.W.2d 275 (1987). It is the exclusive function of the Commission to determine the credibility of the witnesses and the weight to be given their testimony. Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994). Furthermore, the Commission is not required to believe the testimony the claimant or other witnesses, but may accept and translate into findings of fact only those portions of the testimony it deems worth of belief. Morelock v. Kearney Co., 48 Ark.

App. 227, 894 S.W.2d 603 (1995). Indeed, the Commission may not arbitrarily disregard any witness's testimony. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857

In my opinion, the claimant provided credible testimony that he sustained a work-related injury. The claimant was able to recall with great specificity exactly what happened with the pallet jack and how his injury occurred. The claimant was also extremely clear in his recollection regarding the subsequent progression of events, which bolsters his credibility.

Likewise, the medical records corroborate the claimant's testimony that he was injured at work. Though the claimant waited to "officially" file a workers' compensation claim, he did report the incident to Stitts on the day he returned after sustaining injury. Thus, he notified the employer of his work-related injury. The claimant said he did not file a claim for compensation at that time because he believed the injury would resolve in little time. He should not be penalized for such action, especially since

the employer's pay structure would seemingly encourage those actions.

Though the Majority would argue that the claimant's decision to wait to file a claim until November 17 is indicative that he did not sustain a work-related injury, I note that the claimant was placed on leave on November 11, 2005. The claimant's request for leave, in my opinion, simply supports the claimant's testimony that he believed his condition was a strain and would resolve. I also note the claimant's testimony that after being released by Dr. Dye, he was instructed he could not return to work without seeing the company physician. Only at that point was he instructed to file for workers' compensation benefits. Frankly, I find it would be bizarre if the claimant were asked to see a company physician unless he had already reported that he sustained a work injury.

I also note Okneco's testimony that the claimant did not report the injury to her. I find that this testimony should be given little weight. As previously indicated, it simply makes no sense to require the claimant to see a

company physician unless the injury had already been reported. Additionally, I note that it appears that Okneco returned the claimant to full duty work despite the fact that the respondent's own physician had restricted him from performing full duty work. Though Okneco said she had no knowledge the claimant was on light duty work, I simply do not find that to be believable given Okneco's job title and the fact that the claimant was already on leave at that point and providing doctor's notes to keep management informed of his condition and abilities.

The claimant also consistently reported to both Dr. Dye and to Dr. Kornblum that his injury was sustained around the end of October 2005 while he was unloading a pallet jack. This mirrors the claimant's testimony regarding the reason for his injury. While I note that the claimant admitted he put November 6, 2005, as the date of injury on the Form N, the claimant said he had simply made a mistake. I do not believe that one instance of listing an erroneous injury date is sufficient to find the claimant is not credible. I find this to be particularly true since on

November 9, 2005, the claimant told Dr. Dye he was injured around a week before.

Finally, I note the claimant's injury is consistent with the mechanism of the injury described by the claimant. As previously indicated, while the claimant had a history of back problems, his diagnostic studies did not show herniations. Likewise, there is no evidence he had ongoing back problems from 2002 to 2005. Having a strained back and herniations are both consistent with the lifting-type incident described by the claimant and support his testimony regarding how the injury occurred.

The Majority rejects the claimant's testimony and instead preferred the testimony of the respondent's witnesses. In particular they seem to rely heavily on the testimony of Morgan. However, I find that the testimony of the claimant should be given more weight than the witnesses of the respondent. There is no dispute that the respondent calculates the pay of their employees, in part, on the number of work accidents have been reported. The claimant credibly testified workers were encouraged only to file

claims on serious conditions. Additionally, it appears that the success of those claims is also a relevant factor in regard to the outcome of the employees pay. The employer was open about this policy and even had meetings on a daily basis to keep the employees aware of the bonus status at various times. Given the fact that every witness presented by the respondent was paid in accordance with this system, it is apparent that they would have a monetary incentive to discourage employees from filing workers' compensation claims in order to make more money. As such, it is not hard to understand why the claimant, who initially believed he had a strain, would not file a claim for benefits until he was certain the injury was serious. Additionally, I find that it provides incentive for the witnesses to provide biased testimony in favor of the respondent employer. Therefore, I do not believe the testimony of the respondent's witnesses should be given any weight.

The Majority places particular emphasis on the discrepancies between the testimony of the claimant and Morgan. The claimant testified that Morgan witnessed the

event. While Morgan denied having knowledge of the claimant's being injured with a pallet jack, it is significant to note that Morgan's testimony seemed to be somewhat inaccurate with regard to dates. Morgan testified that the claimant's injury occurred on November 3, 2005. He also testified that the accident occurred on a Saturday. This cannot be true, as November 3, 2005, would have been a Thursday. Likewise, Morgan even acknowledged that he does not work Thursdays. Furthermore, the claimant specifically testified that he was absent on November 3, 2005. There is no evidence to rebut that testimony. As Morgan's testimony reveals that he is a poor historian but does acknowledge that the claimant sustained a work-related injury near the end of October 2005, I find that the claimant's testimony that he injured himself while using a pallet jack is credible.

In short, I find that the claimant has consistently reported he sustained an injury due to using a jack pallet. Though there were discrepancies between the claimant's and Morgan's testimony, both agree the claimant

injured his back at work around the end of October or beginning of November. The claimant was consistent in telling his physicians that he injured his back at the end of October 2005 while using a pallet jack and the objective nature of his injuries are consistent with such an incident. Given the employer's pay structure and the incentive for employees of all levels to deny the existence of workers' compensation injuries, I find the testimony of the respondent's witnesses should be given little weight and that the testimony of the claimant should be preferred.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner