

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507016

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| VICTORIA MARIE MULINA, EMPLOYEE | CLAIMANT |
| DAIRY QUEEN, EMPLOYER | RESPONDENT |
| WESTPORT INSURANCE CORP., INSURANCE CARRIER | RESPONDENT |

OPINION FILED APRIL 18, 2007

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

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, 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 July 14, 2006. 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 the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including June 26, 2005; the claimant's average weekly wage was

\$349.59; and the claim has been controverted in its entirety.

3. The preponderance of the evidence shows that on or about June 26, 2005, the claimant suffered a compensable injury to her hip, arising out of and in the course of her employment, for which she is entitled to benefits, including reasonably necessary medical and related expenses, such as the expense of surgery performed that day.
4. As the result of the compensable injury, the claimant is entitled to be examined by Dr. Blickenstaff, at the expense of the respondents, in order to assist the Commission in assessing her current conditions and any permanent impairment she has sustained as a result of her compensable injury.
5. As the result of her compensable injury, the claimant remained in a healing period and was totally incapacitated to earn wages, so that she is entitled to benefits for temporary total disability, from the date of injury until November 14, 2005.
6. As the result of her compensable injury, the claimant remained in a healing period and was totally incapacitated to earn wages, so that she is entitled to benefits for temporary total disability, from the date of injury until November 14, 2005.
7. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fees thereon, payable one-half by the claimant and one-half by the respondents.

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 July 14, 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant has proven by a preponderance of the evidence that she sustained a compensable hip injury on June 26, 2005, for which she is entitled certain benefits, including medical and temporary total disability. My 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 in the form of a fractured hip on June 26, 2005.

The record reveals that the claimant became employed with the respondent employer in March of 2005.

The claimant testified that on June 26, 2005, she slipped and fell on a wet floor at the respondent employer restaurant (restaurant), fracturing her hip. The claimant denied any prior history of hip problems. However, the claimant testified, and the medical records corroborate, that the claimant had a history of back problems dating back to at least 1999, which required multiple surgeries. Moreover, the claimant testified that she received social security disability benefits through 2003, apparently as a result of her back condition. The claimant testified that she was unemployed from the time she stopped receiving social security disability benefits until she became employed with the respondent employer in mid-March of 2005. The record indicates that the claimant was incarcerated some time immediately prior to her employment with the respondent employer.

The claimant had reportedly fallen at the respondent restaurant prior to the alleged incident of June 26, 2005. In this regard, the claimant testified that on June 2, 2005, she slipped and fell on a wet, slippery floor, injuring her left wrist. More specifically, she stated:

I was working with a couple of other employees, Breanna and Shannon. I was walking through the front area

to go to the drive-thru, and my foot slipped on some water and ice cream on the floor. My foot hit Breanna's foot, and I fell flat on my face.

The claimant testified that she received emergency medical treatment as a result of this incident. An emergency room report dated June 2, 2005, from White County Medical Center corroborates the claimant's testimony in this regard. This report reflects that the claimant presented to the emergency room with complaints of left wrist and rib pain following a fall. Emergency room x-rays of the claimant's left wrist were negative for fracture or dislocation. The claimant was assessed with acute left wrist sprain for which she was given medications and placed in a cock-up splint.

The medical records fail to reflect that the claimant was taken off of work as result of this incident, which is consistent with her testimony that she worked after this incident through June 19, 2005. The medical records corroborate the claimant's testimony that she returned to the emergency room on June 19, 2005. However, portions of the claimant's testimony are inconsistent with the medical records of this visit. For example, the claimant indicated that she returned to the emergency room on that date primarily due to hip pain.

In addition, the claimant testified that she had missed work prior to the 19th due to her hip. More specifically, the claimant testified as follows:

Q. Did you injure yourself on June the 19th or did something happen to make you go to the hospital at that time?

A. My hip started hurting me a week or so before I went to the hospital on the 19th. I was having trouble walking, and I had a crutch to get me around. I had missed a couple of days of work because of my hip hurting me, and Joe told me to go ahead and rest it and then come back.

I was actually off for three days because that Wednesday was my day off. I couldn't walk very good. I was limping and I had to hold onto things to get around, but I was still working.

The claimant later changed her testimony somewhat to reflect that she had to stop working on the 19th and go to the emergency room due to increasing leg pain.

The emergency room report of the claimant's hospital visit of June 19, 2005, reflects the following:

HISTORY OF PRESENT ILLNESS: This 37-year-old female describes pain three days ago when she got it [her leg] turned the wrong way while she was working at Dairy Queen. It is uncertain why she waited until today to come in. Her pain is a 10. She also relates a history two weeks ago of fall, injuring her hip. The pain

is worse with movement, bearing weight. She was able to go to work today, however had to leave in the middle of it. No cough or congestion. No neck or back pain. No radicular symptoms. No prior fracture. She has had prior back surgery and has had donor sites for bones from the left hip. No other complaints.

Emergency room x-rays revealed no fracture or dislocation of the claimant's left hip. The claimant was discharged home with medications and instructions to either contact her family physician or return to the emergency room if her symptoms worsened. The claimant testified that she returned to work after her visit to the emergency room and finished her shift. She stated that she continued to work as scheduled until the 26th of June.

The claimant testified that on June 26, 2005, she had been assigned to the drive-thru window because she was "unable to walk very much". The claimant stated that she had utilized the counter space and a crutch to assist her with mobility that day. The claimant testified that she was returning to the drive-thru window area with an order when her feet went out from under her and she fell to the floor. "[O]ne leg went one way and the other leg went the other, and I went down,"

stated the claimant. The claimant testified that she felt an immediate pop and excruciating pain in her leg. The claimant stated that she started screaming for help and from the severe pain. The claimant described the pain that she experienced from this incident as similar to the leg and hip pain she had experienced before, but "intensified 100 percent". The claimant stated that a fellow employee, Peter Ayika, helped her up from the floor and brought her the crutch that she had been using. The claimant testified that she was unable to bear weight on her injured leg, so she used her crutch to make it over to an ice cream machine where she sat down and called the restaurant owner, Joe Moore. Subsequently, the claimant phoned whom she described as "a friend", Larry Vetter, to take her to the emergency room.

An emergency room report dated June 26, 2005, verifies that the claimant was seen for emergency medical treatment that day. In addition, this report corroborates the claimant's version of the incident as she described it in her testimony. An emergency room x-ray confirmed that the claimant had suffered from an acute left femoral neck fracture.

On cross-examination, the claimant clarified that her left hip pain started approximately one week

after her fall of June 2, 2005 (or, around June 13th or 14th). She stated that she could not walk "very well" during that time, and that she had to "hold onto stuff" to get around safely. She further stated that she experienced sharp, shooting pain in her left hip during that time. However, the claimant denied telling emergency room staff that she had been experiencing hip pain for three days, or that she had an incident where she turned wrong and felt immediate hip pain, as was reflected in the emergency room report of June 19, 2005. Moreover, the claimant could not recall telling her boss, Mr. Moore, that she had experienced an incident at home prior to June 19, 2005, where her hip popped as she was rising. The claimant admitted that when she returned to work following the incident of June 19, 2005, she had begun using a crutch. She denied, however, using this crutch immediately prior to her alleged fall of June 26, 2005; testifying, instead, that she had steadied herself with the counter top as she moved about.

The claimant testified that, with regard to the alleged incident of June 26, 2005, she slipped on a mixture of water and ice cream which was "all over the floor". The claimant further testified that the slippery

condition of the floor that day was visibly apparent to the other employees on duty.

Testifying at the hearing of her claim were four of the claimant's co-workers, her boss, and her landlord. First to testify on the claimant's behalf was co-worker, Mr. Peter Ayika. Mr. Ayika testified that he witnessed the claimant fall once at work, but he could not recall a specific date. Mr. Ayika stated that the claimant was leaning on a pole, she took a step with her crutch, then she fell. Mr. Ayika testified that he helped the claimant up, then she "trotted on out the door". Mr. Ayika stated that this incident occurred at approximately noon while he and the claimant were "up at the front counter". Mr. Ayika could not recall specifics about the claimant's work activities on the day he allegedly witnessed her fall because, in his words, he "wasn't paying that much attention". He did say, however, that he witnessed her fall, and that he remembered that the floor was wet. However, Mr. Ayika guessed that the floor was wet from mopping, rather than wet from ice cream or a leaky drain, since he had never witnessed anyone spilling ice cream on the floor of the restaurant. When asked to describe the mechanics of the claimant's fall, Mr. Ayika stated, "It was a fall is all I can say." Mr. Ayika recalled helping the claimant to

her feet afterwards. When pressed as to whether the claimant literally "trotted on out the door" after she fell, Mr. Ayika said that she had actually been assisted out by some "dude". In later testimony, Mr. Ayika recalled that the claimant was using a crutch at the time of this alleged incident because she had been previously injured. In addition, Mr. Ayika remembered that the claimant walked with a limp on the day in question. Finally, Mr. Ayika stated that the claimant was using her crutch and carrying a pack of cigarettes when he witnessed her fall. Clearly, Mr. Ayika's testimony contained many inconsistencies as compared to the claimant's version of events on June 26, 2005.

Next to testify on the claimant's behalf was Ms. Twyla Baker. Ms. Baker stated that she remembered two incidents where the claimant fell in June of 2005 while working at the restaurant. Ms. Baker stated that she was in the back of the restaurant and did not personally witness the first incident. Rather, she heard the claimant yell out to her, and she ran up front to find the claimant in the floor. Ms. Baker stated that the claimant refused her offer of assistance in getting back up. Although Ms. Baker could not recall the date of the first incident, she believed the second episode occurred on or about June 26, 2005. At the time of this

second incident, Ms. Baker said that she heard the claimant cry out, turned, and saw her fall down. Ms. Baker remembered that the claimant was working the front line and holding either a soft-drink cup or an ice cream at the time of the second incident. Ms. Baker denied, however, seeing a pack of cigarettes in the claimant's hand at the time. Further, Ms. Baker remembered that the claimant was having some difficulty getting around prior to this incident, and that she was limping. She could not remember if the claimant was using her crutch at the time, nor could she recall seeing anything like ice cream on the floor. Ms. Baker stated that the claimant was crying after she fell, but that she refused to allow anyone to assist her up to her feet. Ms. Baker remembered that the claimant insisted that she would be fine, and that she did not need assistance. Once up, Ms. Baker recalled that the claimant placed a phone call, presumably to Mr. Moore. Although she did not witness her leaving, Ms. Baker recalled that the claimant left shortly after making the phone call.

Last to testify on the claimant's behalf was Mr. Larry Vetter. This witness testified that he and his wife ran the Harbor House (a transitional home for women coming out of prison) at the time of the claimant's

alleged compensable injury. Mr. Vetter verified that the claimant was a tenant at the Harbor House at all relevant times. Mr. Vetter stated that it was part of his responsibility to provide transportation for the women enrolled in their program. Mr. Vetter testified that he received calls from someone at the restaurant on two separate occasions in June of 2005, stating that the claimant had injured herself and needed transportation to the hospital.

On the first occasion that Mr. Vetter was called upon to transport the claimant to the hospital, the claimant complained to Mr. Vetter primarily of arm pain. "She thought she broke her arm," stated Mr. Vetter. Mr. Vetter testified that the claimant subsequently complained of hip pain, as well. Mr. Vetter further testified that the claimant was ambulatory following her first fall, but that she walked with a limp and had visible difficulty getting around.

With regard to the second incident, Mr. Vetter stated that upon his arrival at the restaurant, the claimant was standing outside leaning up against a wall. Mr. Vetter stated that the claimant was "crying and pretty close to being hysterical." Mr. Vetter drove the claimant to the hospital, where he said it took several hospital staff to get the claimant into the emergency

room due to her severe level of pain. Mr. Vetter could not recall the specific dates on which either of these incidents occurred, but he remembered that the claimant's second incident happened sometime in the evening after the claimant had been working all day.

Restaurant owner, Mr. Jim Moore, testified for the respondent. Mr. Moore testified that he took the claimant to the emergency room on June 19, 2005, at which time she complained to him only of wrist problems. Mr. Moore denied that the claimant fell on June 19, 2005. "She just came into work and was complaining of the wrist, and that's when I took her to the emergency room to get it checked out," explained Mr. Moore. Mr. Moore further stated that he first became aware of the claimant's hip problems after June 19, 2005. Mr. Moore's testimony in this regard is as follows:

Q. When do recall her complaining about hip problems?

A. It was after the first fall, which occurred on the 18th of June. It was when she came back. She went to the emergency room on June the 19th, worked a full double shift that day and then called Monday morning complaining of hip problems.

...

A. After working the full shift on Sunday after the emergency room visit, she called me on Monday morning and said she felt her hip pop when she tried to get out of

bed. She said she wasn't able to come in because she couldn't get out of bed.

Mr. Moore stated that the claimant missed two days of scheduled work subsequent to the June 19, 2005, incident. When she returned to work, Mr. Moore witnessed the claimant using a crutch, and he verified that she appeared to be in pain.

Mr. Moore stated that he was out of town on June 26, 2005. According to his records, the claimant worked 6.6 hours that day, which put the claimant's alleged incident occurring at somewhere around 5 o'clock that afternoon.

Mr. Moore stated that the claimant eventually returned to work on November 14, 2005, after she had recovered from her hip surgery.

Next to testify for the respondent was Ms. Nila Pasley. Ms. Pasley verified that following the incident of June 19, 2005, the claimant ambulated at times with a crutch, and at other times the claimant would walk leaning or holding onto something. Ms. Pasley testified that she was in the restroom and did not witness the claimant's alleged fall on June 26, 2005. She testified that when she came out of the restroom, she observed the claimant leaning against the novelty

freezer, crying. She further testified that when she approached her, the claimant informed her that she had fallen, had called Mr. Moore, and was going to the hospital. Ms. Pasley denied seeing anything on the floor, such as ice cream, that the claimant could have slipped on. She further denied seeing a pack of cigarettes on the floor.

The last witness to testify was Jessica Barber. Ms. Barber verified that she worked with the claimant on June 26, 2005. Ms. Barber remembered seeing the claimant limp and walk with crutches that day. She further remembered the claimant complaining about her hip being sore. Ms. Barber stated that she was on the front line with the claimant when she fell. Ms. Barber described this incident as follows:

Well, I was walking the opposite way down to the other end, and she was walking behind me. She had two large drinks in her hand. The drinks hit the ground, and then I heard her yell out. So I turned around and she was sitting on the ground.

Ms. Barber stated that when she asked the claimant if she was okay, she "kinda started crying and said that we had lost her, like working." Ms. Barber did not assist the claimant up from the floor, nor did she examine the area of flooring on which the claimant had

allegedly slipped. Ms. Barber admitted that because the incident occurred behind her, she did not actually witness the claimant fall.

The record supports the conclusion that the claimant fell at work on the afternoon of June 26, 2005. The respondent contends, however, that the claimant's fall was not compensable because it was idiopathic. An idiopathic fall is one whose cause is personal in nature, or peculiar to the individual. ERC Contractor Yard & Sales v. Robertson, 335 Ark. 63, 977 S.W.2d 212 (1998); Kuhn v. Majestic Hotel, 324 Ark. 21, 918 S.W.2d 158 (1996); Little Rock Convention & Visitors Bur. v. Pack, 60 Ark. App. 82, 959 S.W.2d 415 (1997); Moore v. Darling Store Fixtures 22 Ark. App. 21, 732 S.W.2d 496 (1987). Injuries sustained due to an unexplained cause are different from injuries where the cause is idiopathic. ERC, supra. Where a claimant suffers an unexplained injury at work, it is generally compensable. Little Rock Convention & Visitors Bur., supra. Because an idiopathic injury is not related to employment, it is generally not compensable unless conditions related to the employment contribute to the risk by placing the employee in a position, which increases the dangerous effect to the fall. Id.

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. White v. Gregg Agriculture Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001); Johnson v. Riceland Foods, 47 Ark. App. 71, 884 S.W.2d 626 (1994); Scarborough v. Cherokee Enterprises, 306 Ark. 641, 816 S.W.2d 876 (1991); Ark. Coal Co. v. Steele, 237 Ark. 727, 375 S.W.2d 673 (1964); Potlatch Forests, Inc. v. Smith, 237 Ark. 468, 374 S.W.2d 166 (1964). When the Commission reviews a cold record, demeanor is merely one factor to be considered in determining credibility. Stiger, supra. Numerous other factors must be considered, including the plausibility of the witness's testimony, the consistency of the witness's testimony with the other evidence and testimony, the interest of the witness in the outcome of the case, and the witness's bias, prejudice, or motives. Id. Suffice it to say that none of the witness testimony in this claim provides concise, consistent information concerning the claimant's alleged injury of June 26, 2005. Combined with the medical records, however, it is evident that the claimant was suffering from somewhat debilitating problems with her hip prior to the incident of June 26, 2005. This conclusion is supported by consistent witness testimony that the claimant was using

a crutch on June 26, 2005. In addition, the claimant was observed by several witnesses limping, and she had openly complained of leg and hip pain prior to, and on the date in question. Furthermore, the credible testimony of Mr. Moore reflects that the claimant had reported to him that she experienced an incident at home where she felt her hip "pop" as she was getting out of bed on the evening of June 19, 2005. Finally, the majority of the witnesses denied having seen any slippery or wet substance on the floor at the time of the claimant's alleged incident. Aside from her own self-serving testimony, and the testimony of Mr. Ayika, who is plainly unreliable, there is no evidence to substantiate that the floor was slippery from ice cream or water at the time of the claimant's fall.

In my opinion, the preponderance of the evidence in this claim demonstrates that the claimant's fall on June 26, 2005, was the result of her hip condition, and, therefore, idiopathic. In addition, there is no credible evidence that a slippery substance on the floor increased the claimant's risk of falling or increased the dangerous effect of her fall. Based on the above and foregoing, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable hip injury as the result of a

work-related fall on June 26, 2005. Rather, the preponderance of the evidence demonstrates that the claimant's hip injury was the result of an idiopathic fall, and is, therefore, not compensable.

Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner