

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F504690

PATRICIA WHITE,
EMPLOYEE

CLAIMANT

DOLLAR GENERAL,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JANUARY 17, 2008

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

Claimant represented by the HONORABLE KENNETH A. OLSEN,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE BETTY J. DEMORY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded
for further proceedings. *White v. Dollar General Stores*,
CA07-77 (Oct. 10, 2007). Based on our *de novo* review of the
entire record, the Full Commission finds that the claimant
did not prove she sustained a compensable injury.

I. HISTORY

Patricia Jean White, age 62, was diagnosed with acute
thoraco-lumbar strain while working for Kroger in 1991. The

claimant reported in 1995 that her "back caught" while walking across the floor at work. The claimant was diagnosed with lumbosacral strain. An x-ray of the claimant's lumbar spine was taken in March 1995: "There were degenerative bone and joint (sic) changes in evidence. There were no other abnormalities identified on this examination." The claimant reported in 1998 that she had twisted her back at home. It was noted in September 1998 that an x-ray of the lumbar spine showed normal alignment; no fractures; no subluxations; normal disc spaces; and mild degenerative change. Following a work-related incident at Kroger, the claimant underwent surgery to her left knee in August 1999. The claimant complained of back pain in 2000 and 2001.

The claimant testified that she began working for Dollar General in August 2004. The claimant was a part-time employee and testified that she worked the cash register and lifted boxes. The claimant testified that she sustained an accidental injury on April 28, 2005: "I was rolling - we were taking - it had potting soil on it. It was like a - I don't know what you would call it. It was a sort of iron like, heavy deal. I was rolling it out the door and as I rolled it out the door it had this embankment, like where

you would step down. Well, it rolled over it. I was just going to raise up on it easy, like to ease it back up on it, and when I did that, my back just popped when I went to pick up on it. Okay. I stopped what I was doing, I went and called Diane and I told her, I said, Diane, I popped my back....I waited until she got off the phone and I told her that I was trying to get that back up on the cement."

The claimant testified that Diane was a store manager. Diane Ware, a store manager, testified for the respondent:

Q. So going back to April 28, 2005, you heard Ms. White testify that she was taking a cart with some potting soil on it out to the sidewalk. Are you familiar with that cart?

A. Yes, ma'am....

Q. Did she come in at some point and get your assistance with the cart?

A. Yes, ma'am. She come to the door and told me, she said, Diane, I've let the cart roll off the sidewalk. I said, let the cart roll off the sidewalk? She said, yes. I said, okay, I'm coming. I walked on out there. The two wheels on the very end had rolled off the sidewalk about that far, you know, I'm not good with inches but maybe, you know, just a little step up onto the sidewalk....I reached down with one hand, picked it around - because all you had to do was just swing it around and just pick the end up just a little bit and it was back up on the sidewalk.

Q. Did she indicate at that point in time that she had hurt her back or had her back pop or -

A. No, ma'am.

Q. - anything like that?

A. No, ma'am.

Q. What happened the rest of the day? Did you continue working your regular shift?

A. Continued working. She got off at 3:00 that day. About 2:30, maybe 2:45, she came to me, which I was at work, I had went and done a deposit at 12:00 o'clock and come back. I didn't get off work until 5:00 that evening. She come to me and said I hurt my back. I said, how did you hurt your back? She said, well, I think I did it lifting the cart. I said, Pat, I lifted the cart. How did you hurt your back? I lifted the cart. And she stomped off, clocked out, and went home.

The claimant's attorney cross-examined Ms. Ware:

Q. And did you fill out an accident report?

A. I sure did.

Q. Did you sent it to the workers' comp people?

A. Yes, sir.

Q. Did you get a call from Becki Moore?

A. Yes, sir.

Q. Did she ask you if you thought it happened?

A. Yes, sir.

Q. Did you tell her no?

A. Yes.

Q. Why did you say no?

A. Because I have been told - well, that's hearsay I guess. No, because she told me herself that she fell off a ladder at Kroger's and hurt

her back, so what would make me think that she had hurt her back on the rolling table?

The claimant testified that she also attempted to contact "Margaret," another manager, by telephone. Marguerite Eubelis, an assistant manager at Dollar General, testified that she was off work on April 28, 2005. Ms. Eubelis testified for the respondent that she had a conversation with the claimant about her back pain: "I think it was like a week later or something. She was checking one day and she had said something to me about her back hurting, she picked up something, and I asked her why her back was hurting her and she said that she had hurt it on the cart."

The claimant's testimony indicated that her last day of work was on or about April 30, 2005.

The claimant presented to Dr. Cathryn J. Gonzales on May 5, 2005. The record indicates that Dr. Gonzalez was the claimant's personal physician and that the claimant presented to Dr. Gonzalez on her own. Dr. Gonzalez reported on May 5, 2005: "Patricia White reports that Thursday she was working and her low-back popped. It hurt a little bit at the time, but then got progressively worse later....She is tender in the lumbosacral midline and along the

paraspinous musculature. There is a moderate amount of muscle spasm noted as well."

Dr. Gonzalez assessed "Low-back pain with muscle spasm" and planned conservative treatment.

An x-ray of the claimant's lumbar spine was taken on May 9, 2005:

Five lumbar-type vertebral bodies are present and the bony structures are osteopenic. Minimal hypertrophic spurring is present in the lumbar spine. Alignment and disc spaces are otherwise well maintained. No obvious fracture is noted. Both SI joints appear unremarkable. There is mild joint space narrowing in both hips.

The impression was "Osteopenia with mild degenerative changes as described above."

An MRI scan of the claimant's lumbar spine was performed on June 14, 2005:

The visualized spinal cord is unremarkable and there is a mild scoliosis. Degenerative disc disease and bulging of the disc are present at multiple lumbar levels. There is a large Schmorl's node defect involving the superior endplate of L2 resulting in depression. Hypertrophic spurring and moderate disc space narrowing are also present at the L1-2 level associated with a patchy edema of the L2 vertebral body superiorly. No other bony abnormalities are identified. At the L1-2 level, overall findings are resulting in minimal central spinal stenosis without an obvious focal disc protrusion or significant neural foraminal encroachment. At the L2-3 level, there is mild central spinal stenosis without a focal disc protrusion or significant neural foraminal encroachment.

At the L3-4 level, there is mild central spinal stenosis without a focal disc protrusion or significant neural foraminal encroachment. At the L4-5 and L5-S1 levels, there is no significant central spinal stenosis, neural foraminal encroachment or focal disc protrusion.

A radiologist gave the following impression: "1.) Acute to subacute compression fracture or Schmorl's node defect involving the superior endplate of L2 as described above. 2.) Component of central spinal stenosis at multiple lumbar levels from L1-2 through L3-4 related to mild degenerative changes and bulging of the disc. No focal disc protrusions are identified. See text above."

Dr. Gonzales saw the claimant on June 23, 2005 and assessed "Low-back pain with compression fracture of L2....We will attempt to get an appointment with Dr. Dietz, neurosurgery, to see if the patient may be a candidate for any type of kyphoplasty or other pain relief measures."

On August 3, 2005, Dr. Gonzales filled out a form sent by the claimant's attorney on July 26, 2005. Dr. Gonzales agreed that the claimant reported she had injured her back at work. Dr. Gonzales agreed, among other things, that the claimant was "at less than maximum medical improvement and unable to work." Dr. Gonzales wrote on August 8, 2005,

"Patricia White is disabled at this time, secondary to a back injury."

A pre-hearing order was filed on September 22, 2005. The claimant contended that she sustained a compensable lumbar spine injury on April 28, 2005. The claimant contended that she was entitled to temporary total disability from April 29, 2005 to a date to be determined. The claimant contended that she was entitled to payment of medical expenses.

The respondent contended that the claimant did not sustain a compensable injury. The respondent contended that the claimant's condition was "pre-existing and any need for treatment she may have is not causally related to her employment with Dollar General."

The parties agreed to litigate the following issues: "1) Compensability. 2) If overcome, whether the claimant is entitled to associated medical and indemnity benefits and attorney fees."

A hearing was held on November 22, 2005. The claimant testified that her employment at Dollar General had been terminated. The claimant testified, "I was in such pain with my back that I wasn't able to work....I could not lift because when I would lift it would hurt. I would have

severe pain in my back....I still have the severe pain.”
The claimant testified that she was financially unable to seek additional medical treatment.

An administrative law judge (ALJ) found that the claimant proved she sustained a compensable injury. The ALJ found that the claimant proved she was entitled to reasonably necessary medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

Ark. Code Ann. §11-9-102(4) (A) defines “compensable injury”:

(i) An accidental injury causing internal or external physical harm to the body ...arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). The requirement that a compensable injury be established by medical evidence supported by objective findings applies only to the

existence and extent of the injury. *Stephens Truck Lines v. Millican*, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4)(E)(i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her low back on April 28, 2005, supported by objective medical findings." The Full Commission reverses this finding. The claimant testified that her back "popped" at work on April 28, 2005 while attempting to lift a cart. It is within the Commission's sole discretion to determine the credibility of each witness and the weight to be given their testimony. *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W.2d 362 (1989). The Commission is not required to believe or disbelieve the testimony of any witness. *Green v. Jacuzzi Brothers*, 269 Ark. 733, 600 S.W.2d 448 (Ark. App. 1980). The Commission may accept and translate into findings of fact only those portions of the testimony it deems worthy of belief. *Univ.*

of Ark. Med. Sciences v. Hart, 60 Ark. App. 13, 958 S.W.2d 546 (1997).

In the present matter, the Full Commission finds that the claimant was not a credible witness. We attach more credibility to the testimony of Diane Ware, the claimant's store manager. Ms. Ware testified that she, not the claimant, lifted the cart on April 28, 2005. Although the claimant later attempted to report an injury, the evidence does not demonstrate that there was a specific incident involving the claimant on April 28, 2005 or any other date. The claimant informed Dr. Gonzalez on May 5, 2005 that her back had "popped" at work, but the claimant neglected to inform Dr. Gonzalez that there was a specific incident involving a cart. Dr. Gonzalez assessed low back pain with muscle spasm. We recognize that a report of muscle spasm can constitute objective medical findings. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999). In the present matter, however, the evidence does not demonstrate that the finding of muscle spasm was causally related to a specific incident occurring on April 28, 2005. See, *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Nor does the evidence demonstrate that any abnormalities shown on the June 14, 2005 MRI were causally related to the alleged accidental injury. The Full Commission recognizes that Dr. Gonzalez assessed "Low back pain with compression fracture of L2." There is absolutely no probative evidence of record demonstrating that the claimant sustained a compression fracture as a result of a work-related specific incident. *See, Ford, supra.*

Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission finds that the claimant did not prove that she sustained a compensable injury in accordance with Ark. Code Ann. §11-9-102(4)(A)(i) and following. The claimant did not prove that she sustained an accidental injury causing internal or external physical harm to the body. The claimant did not prove that she sustained an accidental injury arising out of and in the course of employment or which required medical services or resulted in disability. The claimant did not prove that she sustained an accidental injury caused by a specific incident identifiable by time and place of occurrence on April 28, 2005. The claimant did not establish a compensable injury by medical evidence supported by objective findings. The decision of the

administrative law judge is reversed, and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must once again respectfully dissent from the Majority's opinion that the claimant did not prove that she sustained a compensable injury. This case comes before the Commission on remand from the Court of Appeals. On October 10, 2007, the Court of Appeals issued a decision finding that the Commission had erred in finding that the claimant failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence. The Court of Appeals instructed the Commission to make specific findings regarding which elements of the compensable injury were met or not met. After a de novo review of the record, I find that the claimant has established by a

preponderance of the evidence that she sustained a compensable injury. As such, the claimant is entitled to medical treatment associated with that injury and to temporary total disability benefits for the time period of August 3, 2005, to a date yet to be determined._____

_____The claimant worked for the respondents as a cashier. Her job duties required her to do various tasks, including stocking. The claimant contends that she injured her back when she attempted to lift a metal cart loaded with soil back onto a sidewalk.

The claimant testified that she was in the process of rolling a metal cart with soil on it out of the store and onto the sidewalk outside the store. She estimated that the cart was loaded with seven to eight bags of soil each weighing around 20 to 25 pounds. When she pushed the metal cart two wheels went off the sidewalk. The claimant then attempted to lift the metal cart and felt her back pop. She went back in the store and told Diane Ware, Manager, that she had injured her back and needed assistance lifting the cart back on the concrete.

The claimant testified as follows,

I was rolling - we were taking - it had potting soil on it. It was a sort of iron like, heavy deal. I was rolling it out the door and as I rolled it out the door it had this embankment, like where you would step down. Well, it rolled over it. I was just going to raise up on it easy, like to ease it back up on it, and when I did that, my back just popped when I went to pick up on it. Okay. I stopped what I was doing, I went and called Diane and I told her, I said, Diane, I popped my back. She said, I'm on the phone, just a minute. I waited until she got off the phone and I told her that I was trying to get that back up on the cement. Okay. She came out there and we got it up. She never said nothing about the doctor or anything, but I did tell her.

The claimant said that later, just before Ware left for the day she mentioned her injury again. The claimant testified that she worked the remainder of the day and reported for work the following day. At that time, she reported her injury to either "Margaret" (who is presumably Marguerite Eubelis) or to a co-worker, Terri Forte. The claimant testified she was instructed to contact Frank, who she believed to be the district manager. She said that Margaret gave her Frank's number. The claimant said that she also spoke with

"Becki" who was responsible for handling work-related injuries for the respondents.

The claimant said that when she was not able to obtain medical treatment, she went on her own. The claimant testified she was unsure of her last day of work but said, "It was either the 30th or the 1st, somewhere right there, because I was off two days and then I missed another day because of the pain. I'm sorry. And then I haven't worked since." The claimant testified that she was discharged because she missed work due to her work-related back injury. The claimant relayed that she still suffers from back pain associated with her injury and indicated that she did not believe she would be able to return to work because she would have to lift.

Marguerite Eubelis, Assistant Manager, testified that she has worked for the respondents for three years and worked in the capacity of an assistant manager for the last year. Eubelis testified that after the injury, the claimant told her that she had injured her back, "on the cart". She testified as follows,

I asked her if she had talked to the manager about it and she said, no, that she had mentioned it to her and

that was it. And I said, well, if you have anymore complaints, in our handbook it tells you that you have to get in touch with risk management. And I told her that she had to call them and talk to them.

On cross-examination, Eubelis said that she was unsure of what day the aforementioned conversation occurred and admitted that it could have transpired two or three days after the claimant's injury. She further said that the claimant reported that she reported the injury to Ware and that, "Diane had filled out a report on her". Eubelis said that she asked the claimant how she injured her back and the claimant responded, "And she said that, well, she had pushed a cart outside and pushed it off of the sidewalk."

Ware also testified about the incident, but indicated that she did not believe the claimant had injured herself on April 28, 2005. Ware testified that the cart in question was around seven feet tall and two feet wide. She further indicated that the cart had six wheels and weighed around ten pounds. She said that on the date in question there were no more than four \$1.00 pounds of soil on the cart. She also said the bags weighed no more than four pounds apiece.

Ware denied being on the phone at the time the injury occurred, but admitted that the claimant requested assistance in maneuvering the cart back onto the sidewalk. Ware said two wheels of the cart had rolled off the sidewalk and that she was able to reach down and lift the cart back on the sidewalk with one hand. She denied the claimant reporting an injury at that time, but admitted the claimant reported injuring herself later in the day. Ware said,

She come to me and said I hurt my back. I said, how did you hurt your back? She said, well, I think I did it lifting the cart. I said Pat, I lifted the cart. How did you hurt your back? I lifted the cart. And she stomped off, clocked out, and went home.

Ware indicated that the following day the claimant unloaded freight, some of which would have weighed up to 40 pounds. She alleged the claimant continued to work until May 9 and but that the following day the claimant called in sick. Ware further indicated that the claimant was discharged, but said, "Yes, ma'am. I had nothing to do with that, didn't even know anything about it. Corporate took care of all of that." Ware further indicated the claimant had numerous customer

complaints with people asking, "wanting to know what she was on". She testified that the claimant, "Was always stumbling when she was at work. Like I said, she didn't work half her schedule anyway."

Ware also asserted that she attributed the claimant's injury to a previous incident in which the claimant had injured her back at Kroger. She said that based on the claimant's employment application, she believed this occurred sometime in the 1990s. Ware also asserted that she believed the claimant's report of injury was either due to that incident or that it had occurred because the claimant always reported "tripping over her grandkids" at home and at work. Despite these assertions, Ware never indicated that the claimant had any past difficulty in performing her job duties or that she complained of back pain prior to the incident in question.

Numerous medical records were introduced at the time of the hearing. These records reveal that the claimant had complained of back pain in the past. Specifically, as early as 1989 the claimant complained of lower back pain. A doctor's note from May 31, 1991, from the Magnolia Hospital revealed that the claimant

had injured her back while lifting a 20 pound bag of dog food. The claimant was prescribed medication, diagnosed with an acute lumbar strain and was instructed to restrict her activities for 48 hours.

In March 1995, the claimant sought treatment for her back after she was walking across the floor at work and her back "caught." She was diagnosed with a lumbar strain. On March 25, 1995 an x-ray was performed but revealed only degenerative changes with no abnormalities. On September 18, 1998, the claimant was treated at Magnolia Urgent Care and Family Clinic after she reported twisting her back at home. An x-ray was performed and revealed no fracture. It also indicated the claimant had normal alignment no subluxation, normal disc spaces, and mild degenerative changes. She was diagnosed with a back sprain and contusion and released from working until September 23, 1998. On June 27, 2001, the claimant presented to the Magnolia Urgent Care Family Center with back pain. She was diagnosed with osteoarthritic changes and given Soma.

On May 5, 2005, the claimant reported to the Collom & Carney Clinic, located in Texarkana, Texas. She reported, "Back popped it @ work." Dr. Cathryn J.

Gonzalez treated the claimant and noted that the claimant suffered from a "moderate amount of muscle spasm." She was prescribed medication, including a pain reliever and a muscle relaxer. An x-ray performed on May 9, 2005, revealed that the claimant suffered from osteopenia with mild degenerative changes. The claimant submitted to an MRI on June 14, 2005, which indicated the claimant suffered from,

- 1.) Acute to subacute compression fracture or Schmorl's node defect involving the superior endplate of L2 as described above.
- 2.) Component of central spinal stenosis at multiple lumbar levels from L1-2 through L3-4 related to mild degenerative changes and bulging of the disc. No focal disc protrusions are identified. See text above.

A note from June 22, 2005, from Dr. Gonzales indicates that the claimant was notified of "L-spine MRI compression fx's + other changes." A note from June 23, 2005, indicates a plan of treatment was developed for the claimant. It indicated the claimant had "PROBLEM #1: Low-back pain with compression fracture of L2." Dr. Gonzales referred the claimant to Dr. Dietz, a neurosurgeon, to see if the claimant would be eligible to have a kyphoplasty or other treatment. The claimant

was also given refills of her pain medication and Flexeril.

On July 26, 2005, the claimant's attorney sent Dr. Gonzales a questionnaire regarding the claimant's injury. Dr. Gonzales replied that the claimant had no history of back problems. She further indicated that the claimant suffered from, "Probable L2 compression fracture on MRI from 6-14-05," and indicated the claimant was unable to return to work and had not reached maximum medical improvement. Dr. Gonzales issued another note on August 8, 2005, and opined that the claimant was currently disabled due to the back injury. At the time of the hearing the claimant said she had not been able to see a neurosurgeon.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-

102(16), establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant's injury occurred during the course and scope of employment as she attempted to lift the metal cart containing potting soil. The claimant credibly testified that she reported this incident to Ware on the date of the injury. This is confirmed by the fact that Ware admitted the claimant reported an injury due to lifting the cart on the day of the injury. The testimony of Eubelis also reveals that the claimant reported the injury as having occurred due to an incident with the cart. It further shows that the claimant had reported the injury to Ware but was still seeking further advise regarding how to obtain medical treatment. Furthermore, the doctor's reports confirm the claimant's account of how the injury occurred,

indicating that the claimant was injured on April 28, 2005, and that the injury occurred due to attempting to lift the cart.

The claimant's back injury is also shown by the objective findings shown throughout the medical records. On May 5, 2005, the first time of treatment after the injury, Dr. Gonzales noted the claimant suffered from a "moderate amount of muscle spasm." Likewise, the MRI performed on June 14, 2005, revealed the claimant suffered from, "Acute to subacute compression fracture or Schmorl's node defect involving the endplate of L2 as described above." While the MRI did not conclusively diagnose the claimant with a fracture, subsequent medical records indicate that the claimant did sustain a compression fracture.

On June 22, 2005, Dr. Gonzales, indicated that she notified the claimant of the compression fractures found on the MRI. Likewise, on June 23, 2005, Dr. Gonzales assessed the claimant with a compression fracture and formed a plan of treatment that was directed to treat that condition. Given the close proximity between the time of the claimant's injury, the observation of moderate muscle spasms, the findings of

the MRI indicating that the claimant had a possible compression fracture that was either acute or subacute, and given Dr. Gonzales' conclusion that the claimant suffered from a compression fracture at L2, we find that the claimant has shown that the fracture was due to lifting the cart at work.

The Majority finds that the claimant suffered from pre-existing back problems and argue that the claimant's testimony regarding how and when the injury occurred is not credible. I agree that the claimant suffered from pre-existing back problems; however, I note that prior to this incident there is no evidence to show that the claimant had suffered from a compression fracture or any other back injury that would comport with contemporaneous diagnostic records or the conclusions of Dr. Gonzales. The claimant had been to the doctor sporadically for her back since 1989 and had multiple diagnostic tests performed. Despite this treatment, no diagnostic report indicated that the claimant had compression fractures or even a defect of the Schmorl's node until the June 2005 MRI was performed. Furthermore, in our opinion, the fact that the claimant was 60 years old, suffered from

degenerative changes to the back, and had been diagnosed with osteopenia would support a finding that the claimant would be able to injure and aggravate her back more easily in the manner which she contends.

We also note the Majority's assertion that the claimant failed to disclose her previous back problems to Dr. Gonzales and that as a result Dr. Gonzales' opinion should be entitled to no weight. While the records do not indicate the claimant provided such a disclosure, in my opinion, that does not overcome the abundance of medical findings that existed only after the time of the claimant's April 28, 2005, fall. There is no evidence in the record to indicate the claimant ever reported suffering from back pain while working for the respondents. Likewise, there was no evidence presented to indicate that the claimant was unable to perform the task of heavy lifting, which she presumably would have been unable to perform if she had been suffering from back pain. Finally, the MRI indicated the claimant's injury was acute or sub-acute, which would not relate to a finding that her condition was chronic in nature.

Next we address the Majority's argument that the claimant did not provide credible testimony regarding how she injured herself. In making this assertion, the Majority largely rely on Ware's testimony. Specifically, they note Ware's testimony that the claimant did not complain of pain immediately after the accident. They also rely on Ware's testimony that the claimant was able to perform her job duties the next day and note Ware's testimony that the claimant had asked to have her hours reduced in order to draw disability.

After closely reviewing the testimony of Ware, I find that her testimony is suspect at best. Ware testified that the claimant did not lift the cart but instead asked her to lift it. She also indicated that the cart weighed no more than 10 pounds and contained no more than four bags of soil with an individual weight of four pounds per bag. Accordingly, if one believe's Ware's testimony, the cart, including the soil, could only weigh up to 26 pounds. Ware testified that the claimant's job regularly required her to lift up to 40 pounds, and that the claimant was able to continue performing those duties after the incident in question.

Likewise, there is no evidence that the claimant was unable to perform these duties prior to April 28, 2005. Accordingly, I find that it is extremely curious that the claimant would be unable to lift a 26 pound cart or that she would ask for assistance in that task. Rather, I find that it is more likely that the cart weighed more than Ware asserted. Additionally, I find it likely the claimant asked for assistance because she had injured herself in attempting to lift the cart.

I also find that it is curious that Ware could lift the cart with one hand. Even if one believes Ware's testimony regarding the weight and dimensions of the cart, the cart would have weighed some 26 pounds and would have been seven feet tall and two feet wide. Accordingly, I find that it is simply not credible that she could have lifted and maneuvered the cart while reaching down and using only one hand. Finally, if the task was as easy as Ware asserted, I find that it is curious that she would not ask the claimant why she needed assistance since she was accustomed to dealing with heavier objects.

Additionally, I note Ware's testimony regarding the conversation that occurred when the

claimant reported her injury. Ware testified, "She come to me and said I hurt my back. I said, how did you hurt your back? She said, well, I think I did it lifting the cart. I said, Pat, I lifted the cart. How did you hurt your back? I lifted the cart. And she stomped off, clocked out, and went home." Ware admitted that she was not outside when the claimant was moving the cart, indicating that she had no personal knowledge of whether the claimant attempted to lift the cart. Despite this lack of knowledge, Ware's testimony above seems to indicate that she could not even fathom the possibility that the claimant could have attempted to lift the cart before asking for assistance. Once again, since lifting was a regular part of the claimant's job, this is very odd.

Several other things regarding Ware's testimony are peculiar as well. Ware testified that the claimant asked her to reduce her hours so she could draw disability. She went on to describe that the claimant constantly received complaints that she appeared to be "on" something, was seldom at work, and stumbled constantly at work. Despite this alleged abhorrent behavior on the part of the claimant, there was no

testimony that the claimant was ever reprimanded or in danger of being discharged until she reported a work-related injury.

Even more peculiar is Ware's testimony that she had absolutely no knowledge that the claimant had been terminated after the incident in question. At the time of the injury, Ware was the store manager for the respondents' and therefore presumably involved in all personnel matters including the scheduling and termination of employees. Accordingly, I find it difficult to imagine that she would be unaware the claimant had been terminated; particularly since she believed the claimant was attempting to defraud the respondents and had actively participated in an attempt to prove the claimant did not injure herself while working.

While I acknowledge that the testimony of the claimant was suspect regarding her prior injuries, I still find her testimony regarding the incident in question to be credible. I also find that her testimony regarding the event to be more credible than that of Ware. The claimant testified that she told Ware of her injury when she asked for assistance in lifting the

cart. As the claimant admittedly asked for help in lifting the cart despite the fact that she regularly had to lift items weighing as much as 40 pounds, I find that her testimony that the cart had bags of soil that totaled a weight of around 140 to 160 pounds and that she was unable to lift the cart to be more credible than Ware's account of the events.

Likewise, I note that Ware does not dispute that she had to lift the cart for the claimant and that the claimant reported hurting her back while attempting to lift the cart on the same day of the injury. Eubelis' testimony also corroborates the claimant's testimony regarding injuring herself and reporting it to Ware. When considered in conjunction with the opinion of Dr. Gonzales' which was based on an objective diagnostic study that the claimant suffered from a compression fracture at level L2 and the MRI showing similar findings including, "stenosis at multiple lumbar levels from L1-2 through L3-4 related to mild degenerative changes and bulging of the disc," and the opinion of Dr. Gonzales that the claimant sustained a compression fracture, I find that the claimant has shown

by a preponderance of the evidence that she sustained a compensable injury.

Ultimately, I find the claimant's report of injuring her back while lifting a cart to be credible. This was the type of activity that was specifically within her job duties and was performed regularly. There is no dispute that the claimant reported an injury on the day it occurred and that she sought medical attentions shortly thereafter. This medical treatment revealed that she was having muscle spasms and an MRI, when interpreted by Dr. Gonzales, revealed the claimant had a sub-acute to acute compression fracture of her lumbar spine. Given the claimant's age and pre-existing degenerative conditions, including osteopenia, I find that the lifting episode is consistent with and reasonably related to her diagnosis of having a compression fracture. Finally, since the claimant's past diagnostic tests failed to reveal a compression fracture, I find that it is more probable than not her attempt to lift the cart caused the compression fracture. As such, I find that the claimant proved by a preponderance of the evidence that she sustained a compensable injury.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner