

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G902784

BETTY A. LEWIS, EMPLOYEE CLAIMANT

WAL-MART ASSOCIATES, INC., EMPLOYER RESPONDENT NO. 1

WAL-MART CLAIMS SERVICES
INSURANCE CARRIER/TPA RESPONDENT NO. 1

DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND RESPONDENT NO. 2

OPINION FILED AUGUST 28, 2023

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

Claimant represented by the HONORABLE FREDERICK S. "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents No. 1 represented by the HONORABLE R. SCOTT ZUERKER, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID L. PAKE, 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 February 28, 2023. 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 over this claim.

2. That an employer/employee relationship existed on April 16, 2019, and all relevant times.
3. The claimant earned an average weekly wage of \$733.08, sufficient for temporary total disability and permanent partial disability rates of \$489.00/\$368.00, respectively.
4. That the claimant proved, by a preponderance of the evidence, that she suffered a compensable left hip/leg and low back injury and is entitled to reasonable and necessary medical for the treatment, which includes the payment of any reasonable and necessary, out-of-pocket medical expenses paid by the claimant.
5. The claimant is entitled to attorney fees pursuant to Ark. Code Ann. §11-9-715. This Award shall bear interest at the legal rate pursuant to Ark. Code Ann. §11-9-809.
6. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

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.

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. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2012).

Therefore, we affirm and adopt the February 28, 2023 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.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Mayton dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's determination that the claimant has proved by a preponderance of the evidence that she suffered a compensable left hip, leg, and low back injury for the following reasons:

I. The Majority's findings do not comport with the medical evidence

It is within the Commission's province to weigh all the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *Sheridan Sch. Dist. v. Wise*, 2021 Ark. App. 459, 637 S.W.3d 280 (2021). In weighing the evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Id.* However, the Commission has the authority to accept or reject medical opinions. *Williams v. Ark Dept. of Community Corrections*, 2016 Ark. App. 427, 502 S.W. 3d 520 (2016). This, however, is not a case of conflicting medical opinions requiring that we determine the weight and credibility of each practitioner's experience and opinions, but rather the Majority's findings are based on Dr. Lon Burba's testimony alone.

Dr. Burba began treating the claimant on August 30, 2019 and recommended an MRI be conducted. (Cl. Ex. 1, Pp.7-8). The results of the claimant's September 25, 2019 pelvic MRI showed that the "sacrum, iliac wings, and sacroiliac joint spaces are unremarkable. The pubic bones and

pubic symphysis appear within normal limits. No stress-related marrow edema, fracture, or vascular necrosis.” (Cl. Ex. 1, P. 9). There were no findings of any tears, cartilage loss, bursitis, or fracture. *Id.* In an attempt to locate the source of the claimant’s pain, Dr. Lon Burba ordered an EMG and found “bilateral tarsal tunnel syndrome, a right C-4 radiculitis and a left L-4 radiculitis.” (Cl. Ex. 1, P. 21). He also reviewed an MRI of the lumbar spine which “revealed degenerative changes at multiple levels with foraminal stenosis mild at L-4 . . . An MRI of the hip revealed left intertrochanteric bursitis which was mild without significant gluteal tendinopathy or tendon tear.” *Id.* In short, Dr. Burba did “not really see a surgical target” for treating the claimant’s subjective complaints. (Cl. Ex. 1, P. 24). After years of treating the claimant, Dr. Burba’s diagnosis boiled down to “degenerative disc disease . . . a low-grade neuropathy . . . some bulges and some arthritis of the spine” as well as mild gluteal tendinosis with no tear. (Cl. Ex. 2, P. 14). As discussed in greater detail below, Dr. Burba never uncovered the ultimate source of the claimant’s complaints.

At his June 8, 2022 deposition, Dr. Burba explained that to cause the degree of inflammation alleged in the claimant’s hip, “there must have been a lot of energy transfer.” (Cl. Ex. 2, P. 19).

- A. I don’t know – you know, in my mind, you know, a cart bumping against a hip, you know, to cause this kind of thing, I just can’t conceive of – of why this continues to

go on, unless that cart was really moving or that cart was really heavy or – or had a massive unexpected blow where she was unprotected. You know, there must have been a lot of energy transfer to cause this degree of inflammation in that joint.

- Q. (by Mr. Zuerker) And that's the assumption that you're working on, is that this was a violent collision between her and – and I noticed in one of your medical records, I think she showed you a picture of the cart?
- A. You know, I don't even remember that, if she did.
- Q. But the assumption – based on the degree of problems you're seeing, the assumption you're making is that this was a rather violent collision, correct?
- A. Yes, it—with a lot of energy transfer. *Id.*

Dr. Burba further explained that it would be required that the claimant be “wedged between something that kept her from moving, you know, if she, in other words, had, like, a crush injury; or if – you know, if she was in a very fragile position, like reaching and stretching on one foot, you know, and leaving her unable to protect herself.” (Cl. Ex. 2, P. 31). Dr. Burba never reviewed the video of the accident and in fact cannot himself conceive of how this injury would occur “unless that cart was really moving or that cart was really heavy or – or had a massive unexpected blow that was unexpected. You know, there must have been a lot of energy transfer to cause this degree of inflammation in that joint.” (Cl. Ex. 2, P. 19).

Throughout his deposition, Dr. Burba emphasized that “a big part of [the

question] is how heavy the cart was . . . [a]nd then even more, even more important is the velocity, how fast it was going.” (Cl. Ex. 2, P. 29-30).

In his February 28, 2023 Opinion, however, the ALJ characterized the claimant’s accident as a “light and glancing blow” to the claimant’s left side on three separate occasions. (Op., Pp. 19, 20, 22). This fact is substantiated by the video submitted by the parties. (Resp. Ex. 3 at 11:52). Rather than relying on the weight of Dr. Burba’s sworn statements, the ALJ and the Majority seemingly hinge their findings on a letter drafted by counsel for the claimant and signed by Dr. Burba on October 29, 2021 stating that his objective findings regarding the claimant’s injury were an abnormal EMG/ NCV, positive Lasegue’s sign, and an MRI of the lumbosacral spine. (Cl. Ex. 1, P. 63; Cl. Ex. 2, Pp. 10-11). These findings, however, do not comport with Dr. Burba’s later testimony regarding objective findings.

Because the Majority’s characterization of the April 16, 2019 accident upon reviewing the video as a light and glancing blow directly conflicts with Dr. Burba’s expert opinion that it would require a massive unexpected blow where the claimant was unprotected to cause the injuries sustained, there can be no doubt that the Majority erred in finding in the claimant’s favor and I must dissent on this point.

II. There are no objective findings showing that the claimant suffered a compensable injury

A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). Objective findings cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16). There is no requirement that medical testimony be based solely or expressly on objective findings, only that the record contain supporting objective findings. *Singleton v. City of Pine Bluff*, 97 Ark. App. 59, 244 S.W.3d 709 (2006).

Throughout the course of her treatment, no physician pointed to any objective findings as to the true nature of the claimant's injury. At her first appointment with Dr. Kevin Falwell on May 7, 2019, there was no indication of any misalignment or defect in the claimant's left hip and she presented with a full range of motion. (Cl. Ex. 1, P. 2). Upon review of her April 16, 2019 x-rays, Dr. Falwell noted that the results were "reportedly normal." (Cl. Ex. 1, P. 1).

As discussed above, an MRI ordered by Dr. Lon Burba showed that the "sacrum, iliac wings, and sacroiliac joint spaces are unremarkable. The pubic bones and pubic symphysis appear within normal limits. No stress-related marrow edema, fracture, or vascular necrosis." (Cl. Ex. 1, P. 9). There were no findings of any tears, cartilage loss, bursitis, or fracture. *Id.*

PA-C Kenneth Weaver found no "swelling, ecchymosis, or deformity" upon examining the claimant on October 11, 2019, and reported that the

claimant's MRI was "essentially negative." (Cl. Ex. 1, P. 11). Ultimately, PA-C Weaver found "[n]o evidence of pathology on physical exam or other modalities of evaluation." (Cl. Ex. 1, P. 18). In fact, PA-C Weaver informed the claimant he did "not believe the hip is the source of her discomfort today through any of the studies or treatment I provided." (Resp. Ex. 1, P. 14). As of May 19, 2020, Dr. Burba noted that PA-C Weaver did not feel the claimant's left hip bursitis was playing any role in her pain. (Cl. Ex. 1, P. 23). The "MRI of the pelvis revealed some fibroids, but the OB/GYN doctor did not think the fibroids were playing a role in her pain. The MRI of the lumbar spine revealed some multilevel lumbar degenerative change at L4-5 with bilateral foraminal stenosis and this basically results from hypertrophic facet osteoarthritis which the radiologist feels causes mild bilateral neuroforaminal stenosis." *Id.* Dr. Burba ultimately opined that "An MRI of the lumbosacral spine revealed loss of disc height, circumferential annular bulge, moderate hypertrophic facet osteoarthritis at L4-5. The EMG revealed mild reduction in the right and left tibial nerves; denervation of the C-4 root and the left L-4 root which is *actually chronic denervation reinnervation.*" (Cl. Ex. 1, P. 27) (emphasis added). Dr. Burba believed that the source of the claimant's pain was primarily the L-4 root and osteoarthritis. (Cl. Ex. 1, P. 28).

Dr. Carlos Roman with Proper Pain Solutions agreed that there were no objective medical findings, opining on June 16, 2020 that claimant's "lumbar spine maintains normal alignment. . . She ambulates without assistive device. Muscle tone is appropriate and symmetric" and that the claimant's complaints were not related to any sciatic nerve distribution. (Cl. Ex. 1, P. 25). As of November 20, 2020, Dr. Burba determined that the claimant had "evidence of chronic denervation at multiple sites in the LS spine which usually relates to deg disc disease." (Resp. Ex. 1, P. 17-19). In his report dated December 11, 2020, Dr. Burba noted an isotopic bone scan of the claimant's body entirely was normal and a CT angiogram of the abdomen and pelvis revealed normal blood flow through to her back and lumbosacral plexus. (Cl. Ex. 1, P. 47). "Her EMG done on 11/11/20 revealed a possible early demyelinating motor and sensory polyneuropathy with a mononeuritis multiplex type distribution in the legs and there was also chronic denervation reinnervation seen at L4, L5, and S1 especially on the left side." (Cl. Ex. 1, P. 48).

Dr. Jimmy Tucker stated in his report dated April 6, 2021 that the claimant's MRI did not show any "pathological features that would be causing this pain." (Resp. Ex. 1, P. 25-28). Dr. Tucker saw the claimant again on July 2, 2021 and reviewed an additional MRI of the claimant's left hip and stated that "[t]he MRI showed no signs of bursitis or inflammation of

the greater trochanteric area. . . At this point we have treated her aggressively for greater trochanteric bursitis and she has been nonresponsive her MRI also shows no signs of inflammation or fluid.” (Resp. Ex. 1, P. 35).

When asked at his June 8, 2022 deposition what, if any, objective findings he found during his treatment of the claimant, Dr. Burba described “unresolving intertrochanteric bursitis of the left hip.” (Cl. Ex. 2, P. 11). This was evidenced by the claimant’s MRIs and “heat in that intertrochanteric bursa . . . I can feel fluctuation or sort of an edematous or swollen feeling there, and there’s crepitus in the joint when you move the leg around.” (Cl. Ex. 2, Pp. 11-12). This statement, however, directly contradicts Dr. Burba’s prior statements and PA-C Weaver’s repeated findings. Until Dr. Burba’s deposition, each of the claimant’s treating physicians agreed that bursitis was not the source of the claimant’s ongoing pain. (See Cl. Ex. 1, P. 23). In fact, Dr. Burba previously opined that the source of her pain was degenerative disc disease and osteoarthritis specifically. (Cl. Ex. 1, P. 28). There was no evidence of the edema or crepitus that Dr. Burba describes when the claimant was examined by other physicians. (Resp. Ex. 1, P. 35). In fact, Dr. Tucker reported on July 2, 2021 that the claimant’s most recent MRI “showed no signs of bursitis or inflammation of the greater trochanteric area. There are some mild effusion in both hips consistent with mild DJD. At

this point we have treated her aggressively for greater trochanteric bursitis and she has been nonresponsive her MRI also shows no signs of inflammation or fluid.” *Id.* Dr. Burba further describes the claimant’s additional issues as “degenerative disc disease . . . a low-grade neuropathy . . . some bulges and some arthritis of the spine” as well as mild gluteal tendinosis with no tear. (Cl. Ex. 2, P. 14). These issues are definitively not related to the claimant’s April 16, 2019 injury. (Cl. Ex. 2, P. 16).

In short, Dr. Burba’s diagnosis changed from “mild bursitis” to evidently unresolving and severe just prior to his deposition taking place. The basis for this opinion seems to be not the results of medical testing by Dr. Burba or any other experts, but rather the feeling of “heat” coming from the claimant’s hip. This simply does not meet the standard of objectivity required by the Act as Dr. Burba cannot measure heat or crepitus within a reasonable degree of medical certainty. The treating physicians in this matter have been addressing subjective concerns and complaints of pain from the claimant for over four years with no objective findings showing that her complaints are work-related.

III. The claimant’s testimony is unreliable

A related issue in this matter is the ALJ’s acceptance of the claimant’s statements as fact where her testimony contradicts the record. A claimant’s testimony is never uncontroverted as a matter of law. *Nix v.*

Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). It is within the exclusive province of the Commission to determine the credibility of a witness and the weight to be given to her testimony. *Wade v. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989).

At the hearing, claimant's husband testified that "no issues right at that time" with her back, hip, or while walking prior to her injury at Walmart. (Hrng. Tr., P. 8). Mr. Lewis further stated that she did not make complaints about her back and neck "like she did after the injury." (Hrng. Tr., P. 10). At her deposition on December 5, 2019, the claimant denied any previous neck pain, and contended that any previous treatment for her back was for a fall as a teenager. (Cl. Depo., Pp. 53-54). However, one year prior to the Walmart accident, the claimant slipped in her bathroom and required medical treatment for a left knee injury. (Joint Ex. 1, P. 1; Resp. Ex. 1, P. 1). The claimant sought treatment for this injury with Dr. Jeffery Angel on April 16, 2018 and an MRI and x-ray were performed. (Joint Ex. 1, P. 1; Hrng. Tr., P. 48). Dr. Angel's findings showed lumbosacral spine-left paraspinal tenderness. (Joint Ex. 1, P. 1).

The claimant later visited Sherwood Urgent Care in Batesville on June 11, 2018 complaining of back pain and tightness. (Resp. Ex. 1, Pp. 2-4). At that time, she was diagnosed with a lumbar sprain and received a steroid injection. *Id.* The claimant's testimony disregards this history as

does the Majority. Because the nature of this claim hinges on the reliability of the claimant's testimony, I believe the Majority erred in relying on her wholly controverted testimony alone.

For the reasons stated above, I respectfully dissent.

MICHAEL R. MAYTON, Commissioner