

DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA06-513

December 6, 2006

JANE REIS

APPELLANT

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. F302409]

V.

WAL-MART

APPELLEE

AFFIRMED

This appeal follows the March 23, 2006 decision of the Workers' Compensation Commission (Commission) affirming the opinion of the Administrative Law Judge (ALJ) with respect to the award of additional medical treatment for appellant Jane Reis's compensable low back injury/lumbar strain injury, but reversing with respect to the ALJ's finding that appellant proved by a preponderance of the evidence that she also suffered a compensable cervical spine injury to her neck on December 30, 2002, which finding resulted in a reversal of the award of benefits and compensation for that injury. On appeal, appellant argues that the Commission's decision is not supported by substantial evidence. We affirm.

On December 30, 2002, appellant was working for appellee Wal-Mart as a department manager for household chemicals and paper goods, when she sustained an admittedly

compensable injury to her low back in the form of a lumbar strain when she crawled in and out of a storage bin to move and lift cases of Tide laundry detergent. At the time of the incident, appellant filled out an "Associate Statement" and stated that she had injured only her back. She also filled out an AR-N injury report in which she indicated that the part of her body that she hurt was her "back (lower)." She did not mention a neck injury in either report. She was examined by Dr. Barry Carroll the day after the injury, and she reported only lower back pain that occurred after "she injured her back when she was pulling out a case of Tide yesterday." No mention was made of neck problems. Dr. Carroll referred appellant to physical therapy for "lumbar stabilization", and the physical therapy records indicate pain to the lumbar spine with tingling and aching in the right lower extremity. There is no mention of any cervical spine problems in the physical therapy reports.

Appellant saw her family physician, Dr. Harry Starnes, on January 15, 2003, at which time she complained of allergies and neck pain, along with complaining of a knot in her neck that had been present for the past year and a rash on the left side of her face. There is no mention of her back injury and no correlation between the incident and her neck pain. Dr. Starnes recommended an MRI of the cervical spine, which was performed on January 22, 2003, and indicated disc degeneration at multiple levels. In the interim, appellant had been seen by Dr. Carroll on January 17, 2003, regarding follow-up care for her lower back injuries, and again, she made no mention of any neck pain. Appellant returned to Dr. Starnes on January 28, 2003, to have him read the MRI, at which time he referred her to

neurosurgeon Dr. Ronald Williams. There is nothing in the report of that date mentioning her work-related injury or back pain. She again returned to Dr. Carroll for follow-up care on February 5, 2003, and the report from that visit simply mentions that she had undergone an MRI of the cervical spine, which showed earlier degenerative desiccation of the intravital disc of L5 S1 with a minimal diffuse inter disc bulge and mild degenerative change present within the facets bilaterally from L3-L4 through L5 to S1. No mention of neck pain is indicated in the report, nor any related assessment or recommended treatment.

On February 13, 2003, appellant was examined by Dr. Williams. She explained to him that she had been experiencing neck pain “for about two months now,” and he ordered a cervical myelogram, an EMG, and nerve conduction studies, which were performed on February 26, 2003. The tests showed multi-level degenerative disc disease. She returned to Dr. Williams the following day, and he recommended that she undergo an anterior cervical fusion. It was at this time that appellant told Dr. Williams that the “exact date her neck pain started was on December 30, 2002, at which time she also injured her back.” His report also indicated that the myelogram/post-myelogram CT showed marked foraminal stenosis at C6-7 secondary to a bone spur and disc fragment, but no correlation was drawn to the December 30, 2002 injury. She saw Dr. Carroll on March 3, 2003, and his report from that date stated that “[s]he reports some pain in her neck,” and noted that she was scheduled to see a neurologist on March 10, 2003.

On March 10, 2003, appellant was examined by Dr. Wayne Bruffet, a neurologist at the Arkansas Spine Center. He noted the injury to her back on December 30, 2002, and stated that probably ninety-percent of her problem was in her low back. He also explained that he reviewed her MRI scans of her neck and low back, but not her cervical studies extensively because she was there for her low back. He also noted some disc desiccation in her lumbar spine, but no evidence of disc herniation. Appellant asked for a second opinion regarding her cervical spine “injury,” but Dr. Bruffet declined and said that she was in good hands with Dr. Williams.

Appellant was examined by Dr. Carroll on April 11, 2003, at which time her treatment for the compensable back injury was discussed, and she again complained that she had had some neck pain. On May 9, 2003, Dr. Williams sent a note to appellant’s then attorney, Charles Harrison, stating that appellant “indicated to [him] when she was in [his] office on February 27, 2003, that she began having back and neck difficulties when she injured her back on December 30, 2002.¹ If that is the case, then the incident should be considered the cause of her medical care.”

Dr. Harold Chakales subsequently examined appellant on May 14, 2003, and his letter stated that appellant has a cervical disc syndrome at C6-7, which appears to be central and somewhat left-sided. In his report, he also stated that appellant presented with complaints of pain as the result of a work-related injury she sustained on December 30, 2002, and that

¹He sent a similar letter to appellant’s counsel, Philip Wilson, on June 4, 2004.

she injured her low back and also had some trouble with her neck. A complete set of x-rays were made of appellant's cervical spine and they showed degenerative disc disease. Appellant continued receiving treatment for the lower back injury until March 1, 2004, at which time appellee controverted related benefits. Appellee controverted entirely appellant's alleged cervical spine injury; however, she underwent an anterior cervical fusion on her neck in December 2003 that was paid for by her group health insurance.

At the hearing before the ALJ on July 13, 2005, the issues were: (1) the compensability of appellant's cervical spine injury; (2) appellant's entitlement to medical treatment for her cervical spine; (3) appellant's entitlement to additional medical treatment for her low back injury; (4) appellant's entitlement to a nine-percent permanent impairment rating as a result of her cervical spine injury; (5) attorney's fees. Appellant was the only witness to testify at the hearing. The ALJ found in favor of appellant with respect to issues (1), (2), (3), (4) -- except at an eight-percent rating, and (5). The Commission subsequently reversed the ALJ's opinion with respect to each of the findings related to the cervical spine injury.

In appeals involving claims for workers' compensation, this court views the evidence in a light most favorable to the Commission's decision and affirms the decision if it is supported by substantial evidence. *Kimbell v. Assoc. of Rehab Indus. & Bus. Companion*, 366 Ark. 297, ___ S.W.3d ___ (2006). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether the appellee

court might have reached a different result from the Commission; if reasonable minds could reach the result found by the Commission, the appellate court must affirm the decision. *Id.* Where the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm if the Commission's decision displays a substantial basis for the denial of relief. *Id.* We will not reverse the Commission's decision unless we are convinced that fair-minded persons with the same facts before them could not have reached the conclusions arrived at by the Commission. *Dorris v. Townsends of Ark., Inc.*, 93 Ark. App. 208, ___ S.W.3d ___ (2005).

Appellate courts defer to the Commission on issues involving the weight of evidence and the credibility of witnesses. *Kimbell, supra.* However, while the Commission may be insulated to a certain degree, it is not so insulated to render appellate review meaningless. *Id.* Likewise, the Commission may not arbitrarily disregard evidence in support of a claim. *Id.*

Appellant argues that the Commission substituted its opinion regarding her credibility for that of the ALJ, and in doing so, violated her unspecified due-process right. It is undisputed that this issue was not previously raised by appellant; accordingly, it may not be raised for the first time on this appeal. *See T & T Chem., Inc. v. Priest*, 351 Ark. 537, 95 S.W.3d 750 (2003); *Johnson v. Hux*, 28 Ark. App. 187, 772 S.W. 2d 362 (1989). Appellee contends that appellant is attempting to hide a due-process argument in the context of a

review for substantial evidence. In a footnote to the majority opinion in *Kimbell, supra*, the majority pointed out that:

In the instant case, the ALJ found that Minor's testimony was not reliable. However, the Commission found credible Minor's testimony that he was not on the porch at the time of the fall. Kimball does not raise the issue of whether the Commission erred by substituting its opinion regarding the credibility of the testimony for that of the ALJ, who was present at the hearing.

Previously, we have expressed our willingness to address the issue of whether a constitutional violation may result when the Workers' Compensation Commission and a reviewing court are permitted to ignore the findings of an ALJ, the only adjudicator to see and hear the witnesses. In *Scarborough [v. Cherokee Enters.]*, 306 Ark. 641, 816 S.W.2d 876 (1991)], we did not address the constitutional question as it relates to credibility issues, because in that case, there was no disagreement among the ALJ and the Commission with respect to the credibility of witnesses. Here, there is a disagreement among the ALJ and the Commission; however, we are again unable to reach the issue because Kimball failed to raise the issue below. We take this opportunity to once again express our willingness to address this issue in the future. *Kimball*, 366 Ark. at ___, ___ S.W.3d at ___ (internal citations omitted).

When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. *Patterson v. Ark. Dep't of Health*, 343 Ark. 255, 33 S.W.3d 151 (2000). The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* Thus, we are foreclosed from determining the credibility and weight to be accorded to each witness's testimony. *Arbaugh v. AG Processing, Inc.*, 360 Ark. 491, 202 S.W.3d 519 (2005). As our law currently stands, the Commission hears workers' compensation claims de novo on the basis before the ALJ pursuant to Ark. Code Ann. § 11-9-704(c)(2), and this court has stated

that we defer to the Commission's authority to disregard the testimony of any witness, even a claimant, as not credible. *See Bray v. Int'l Wire Group*, 95 Ark. App. 206, ___ S.W.3d ___ (2006).

There is substantial evidence to support the decision of the Commission regarding appellant's alleged cervical spine injury. The medical records detail that appellant underwent significant medical examinations and testing without mentioning her neck pain, as well as the fact that she failed to note it on any of the forms she filled out related to her work-related injury. Appellee also points to Dr. Williams's letter stating that appellant's neck injury was a result of her accident at Wal-Mart and contends that his opinion was based upon an inaccurate medical history presented by appellant. There is no indication that she told him that the knot on her neck had been present for an entire year; likewise, there is no evidence that she told him that she had not reported any neck pain prior to January 15, 2003.

Appellant admitted that she did not make a claim for workers' compensation benefits related to her neck until *after* she saw Dr. Williams and after he recommended that she undergo surgery. Based on that information, the Commission rejected his opinion, as it was entitled to do through its authority to accept or reject medical opinions. *Bray, supra*.

Finally, in addition to the facts that appellant, (1) had a knot on her neck for a year prior to the December 30, 2002, incident, (2) did not complain of neck pain until weeks after the back injury, and (3) did not attribute the neck pain to the back injury until after she discovered that surgery was recommended, the neck pain was not logically attributable to the

accident. Appellant was crawling in and out of a storage bin to move and lift cases of Tide laundry detergent when she injured her lower back. She made no claim that she was lifting the boxes over her head; therefore, the mechanical aspects of the injury are consistent with a lower-back injury. This combined with the undisputed findings on the MRIs of multi-level degenerative disc disease as opposed to a traumatic injury, along with the other medical records, provide a substantial basis for the Commission's opinion. Accordingly, we affirm.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.