

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA12-122

JESSICA SWINK

APPELLANT

V.

RESTAURANT MANAGEMENT and
UNION STANDARD INSURANCE
COMPANY

APPELLEES

Opinion Delivered September 19, 2012

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[No. F809640]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

Jessica Swink appeals from the decision of the Arkansas Workers' Compensation Commission denying benefits related to her right-knee injury. On appeal, Swink argues that substantial evidence does not support the Commission's denial of her claim. We affirm.

In August 2008, Swink, who was seventeen years old at the time, worked part time as a server for appellee Market Place Grill/Restaurant Management.¹ On or about August 10, 2008, while busing tables, Swink contends she fell and injured her right knee. Swink's claim for workers'-compensation benefits was denied in its entirety by appellees.

At a hearing before an administrative law judge (ALJ), Swink testified that she was not sure of the exact date of her fall, but she thought it occurred on August 10, 2008. She said that she slipped and fell on a wet floor, hitting her bottom and lower back. There were no witnesses.

¹Union Standard Insurance Company is Market Place Grill/Restaurant Management's workers'-compensation-insurance carrier and is also an appellee in this appeal.

When she stood up, she said she noticed her right knee was hurting “really bad.” She reported her fall and knee pain to her supervisor Wesley Travis. She said that she told him she “needed to get her knee checked out,” but he told her to first complete her shift, which she did. No workers’ compensation documentation was filled out at that time.

Swink said that she did not seek medical attention until August 13, 2008, when she saw her family physician, Dr. Suh Niba. Swink said that during that visit, her knee hurt, it was swollen, and she could not bear weight on it. Dr. Niba’s corresponding medical report states, “Here for reevaluation. Pain better but still with medial swelling and pain on exertion.” Swink was referred for an MRI and placed on light-duty work.² An MRI was performed on August 15, 2008, the results of which were “[s]ome signal in the posterior horn medial meniscus that comes very close to the undersurface and may be a small focal tear of the posterior horn of the medial meniscus. Small knee effusion.” Swink was then referred to orthopedic surgeon Dr. William Sherrill, Jr., who on September 9, 2008, recommended arthroscopic surgery. According to Swink, she did not have the surgery because her claim was denied.

Additionally, Swink testified that on September 11, 2008, she approached Travis about filling out workers’-compensation paperwork for her injury. She testified that she signed the Form AR-N, but did not write any other information on it, adding that she likely gave Travis the information and that he wrote it on the form. She said that she would not have signed the form if the answers on it had not been correct.

Travis also testified. He recalled a conversation with Swink on August 10, 2008, wherein she told him that she twisted her knee. However, Travis said that Swink did not tell him that she

²Appellees provided light-duty work for Swink, and she performed it.

slipped and fell, she did not ask to see a doctor, and she did not ask to fill out workers'-compensation forms. Therefore, he did not think her injury was severe. Travis stated that Swink, on September 11, 2008, requested that he fill out workers'-compensation forms documenting the incident. He stated that she provided the information that he wrote on the forms. He said that Swink told him that she was walking around a corner and twisted her knee. She did not tell him that she had slipped and fallen.

The final witness to testify was restaurant general manager, Stephen Atchley. He testified that he was first aware of Swink's knee injury in August 2008, but learned the details of it on September 11, 2008, when the workers'-compensation forms were filled out. He said that he filled out one section of the First Report of Injury or Illness Form. He said that Swink told him that she twisted her knee when she walked out of the dish area the wrong way. He said that she did not tell him that she had slipped and fallen.

In an opinion filed June 16, 2011, the ALJ found that Swink's knee injury was not compensable because she failed to prove by a preponderance of the evidence that "she sustained any physical injury or damage to her right knee that arose out of and occurred in the course of her employment that was caused by a specific incident, and that [was] identifiable by time and place of occurrence." The ALJ found that while Swink needed only to show that the employment-related incident played some causal or contributory role in producing her knee injury, she failed to do so. The ALJ not only questioned whether an employment-related incident occurred on August 10, 2008, but he also found that if there was a fall at work, he was not convinced that it played any causal role in her right-knee difficulties.

In reaching these conclusions, the ALJ pointed to the earliest medical report in the record

dated August 13, 2008, authored by Dr. Niba, wherein he stated that Swink was returning for a “reevaluation” of her right-knee pain. The ALJ noted that this report failed to contain a history of a work-related injury or a date of injury and that Dr. Niba actually reported that Swink’s complaints had improved since her prior visit. Based on this evidence, the ALJ found that Dr. Niba “had previously seen [Swink] for difficulties with her right knee.”

The ALJ also found that Swink’s testimony lacked credibility. While the August 20, 2008 report of Dr. Sherrill and the December 8, 2008 report of Dr. Griffin stated that Swink’s knee pain started the day following the fall at work, she testified that she had immediate onset of pain in her knee. And while she testified at the hearing that her knee injury was caused when she slipped and fell in water, the ALJ found that Swink gave various other histories: “[E]ither she slipped in some water on the floor and fell[;] slipped in some water on the floor, twisted her knee and fell[;] or did not slip on anything or fall, but simply twisted her right knee.” Swink appealed the ALJ’s decision to the Commission, which in an opinion filed December 20, 2011, affirmed and adopted the ALJ’s opinion. Swink now appeals to this court.

In reviewing a decision from the Commission, we view the evidence and all reasonable inferences in the light most favorable to the Commission’s findings. *Luster v. Ben E. Keith Co.*, 2012 Ark. App. 197, at 4. We affirm those findings if they are supported by substantial evidence, which is relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Id.* at 4. We will not reverse the decision of the Commission unless we are convinced that fair-minded persons considering the same facts could not have reached the same conclusions. *Id.* The question is not whether the evidence would have supported findings contrary to the ones made by the Commission; rather, it is whether there is substantial evidence

to support the Commission's decision even though we might have reached a different conclusion if we sat as the trier of fact. *Id.*

Swink had the burden of proving a compensable injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E) (Supp. 2011). A “compensable injury” includes an accidental injury arising out of and in the course of employment that requires medical attention. Ark. Code Ann. § 11-9-102(4)(A)(i). The phrase “arising out of the employment” refers to the origin or cause of the accident, while the phrase “in the course of the employment” refers to the time, place, and circumstances under which the injury occurred. *Swaim v. Wal-Mart Assocs., Inc.*, 91 Ark. App. 120, 125, 208 S.W.3d 837, 841 (2005). The claimant must prove a causal connection between the work-related accident and the later disabling injury. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 269, 19 S.W.3d 36, 39 (2000). The determination of whether the causal connection exists is a question of fact for the Commission to determine. *Id.*, 19 S.W.3d at 39.

Swink argues that the Commission's decision must be reversed because there is substantial evidence of a causal connection between her right-knee injury and her employment-related fall. She points to evidence that she slipped and fell at work; she immediately reported a right-knee injury; one of her supervisors confirmed the report and stated that she acted as though her knee was sore; she was placed on light-duty work; medical records demonstrated that she was being treated for a right-knee injury; and medical records described her fall at work as the cause of her knee injury. Acknowledging the Commission's finding that she lacked credibility, she also argues that the only discrepancies in her testimony arose from the workers'-compensation forms prepared by appellees.

We agree with Swink that there is evidence in the record that supports her claim that she sustained a compensable injury to her right knee. The Commission cited this evidence in its opinion. However, the fact that there is evidence in the record that supports Swink's claim does not warrant reversal in this matter. The question before us is not whether the evidence would have supported findings contrary to the ones made by the Commission; rather, the question we must answer is whether there is substantial evidence to support the Commission's decision even though we might have reached a different conclusion if we had been sitting as the trier of fact. *Luster*, 2012 Ark. App. 197, at 4.

At the heart of the Commission's opinion denying Swink's claim is its finding that she lacked credibility. This finding was based on Swink's inconsistent reports about how her knee injury occurred and when the onset of pain began. The Commission also emphasized Swink's lack of knowledge concerning the exact date of the incident.

It is the function of the Commission, not this court, to determine the credibility of witnesses and the weight to be given to the evidence. *Luster*, 2012 Ark. App. 197, at 4. 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 it deems worthy of belief. *Id.* at 4. Further, while the inability to identify a certain date does not bar Swink from receiving compensation, it is within the Commission's province to consider this confusion about the date as a matter of credibility. *Id.* at 5. Based on her inconsistent versions of events, the Commission found that her testimony lacked credibility, and it questioned whether the slip and fall at work had occurred. Substantial evidence supports this finding.

In addition, the Commission placed great weight on the August 13, 2008 report of Dr.

Niba. The Commission noted that this was the first medical report in the record; no history of a work injury or date of injury was stated in the report; the report stated that Swink was being “reevaluated” for knee pain; and the report noted that her knee pain was “better.” The Commission concluded from this evidence that “Dr. Niba had previously seen [Swink] for difficulties with her right knee.” This finding supported the Commission’s conclusion that if Swink did fall at work, it did not play any causal role in Swink’s right-knee difficulties.

Because the decision of the Commission displays a substantial basis for the denial of Swink’s claim, we affirm.

Affirmed.

GLOVER and MARTIN, JJ., agree.

Michael Hamby, P.A., by: *Michael Hamby*, for appellant.

Friday, Eldredge & Clark, LLP, by: *Guy Alton Wade*, for appellees.