

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-958

FRED'S STORES OF TENNESSEE,
INC.; INDEMNITY INSURANCE
COMPANY OF NORTH AMERICA;
and SEDGWICK CLAIMS
MANAGEMENT

APPELLANTS

V.

MELVIN ELY

APPELLEE

Opinion Delivered April 4, 2012

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION
[NO. G001787]

AFFIRMED ON DIRECT APPEAL;
AFFIRMED ON CROSS-APPEAL

RAYMOND R. ABRAMSON, Judge

The Arkansas Workers' Compensation Commission found that appellee Melvin Ely proved he sustained a compensable injury to his right hip and awarded resulting medical treatment, temporary-total disability benefits from February 26, 2010, through March 22, 2010, and temporary-partial disability benefits beginning March 23, 2010, to a date yet to be determined. The Commission denied his claim that he sustained a compensable back injury. Appellants raise the following points on appeal: (1) the Commission committed reversible error by considering irrelevant and cumulative evidence that Ely untimely submitted after the ALJ's opinion had been issued; and (2) the finding that Ely sustained a compensable injury to his right hip is not supported by substantial evidence. Ely cross-appeals, arguing that substantial evidence does not support the Commission's finding that he failed to prove he sustained a compensable back injury. We affirm on both direct appeal and cross-appeal.



Melvin Ely, who was fifty-five years old at the time of the hearing before the ALJ, worked at Fred's in Dumas beginning in 2008. He was a co-manager, and his duties included handling overnight receiving. On February 25, 2010, he was in the stock room lifting a pallet jack when he allegedly injured his back, hips, and pelvis.

Ely was taken by ambulance to Delta Memorial Hospital. A radiology report indicates that there was no evidence of acute fracture or dislocation of the pelvic bones; there was first-degree spondylolisthesis at L5/S1; and a hernia mesh was noted in the right inguinal area and in the suprapubic area. The nursing record indicates tenderness in the suprapubic scrotum area and notes that Ely denied having any back pain.

Ely then treated with Dr. Lester Alexander on March 1, 2010. The report from that visit indicates that Ely was experiencing acute, intermittent pain. He told the doctor that he was experiencing "numbness of both lower extremities, pain in his lumbar spine, both legs get numb while . . . lying down, pain radiates to suprapubic area and down both medial thighs to knees." Dr. Alexander wrote Ely an "off work" slip covering March 1 through March 8. On a follow-up visit on March 8, Ely still reported having pain in his lower back radiating down both legs. Dr. Alexander assessed lumbar strain and bilateral lower extremity strains, kept Ely off work for another week, ordered physical therapy, and scheduled a follow-up visit for March 15. The March 15 visit revealed no changes, and an MRI of the lumbar spine was ordered. The MRI revealed no evidence of acute disc herniation or canal stenosis; it did show bilateral spondylolysis at L5 with spondylolisthesis of L5 on S1, and mild degenerative disc changes at L4-L5 and L5-S1 levels.



Ely received treatment at the VA. In April, an MRI of the right hip was done. It showed minimal degenerative changes. A June 2, 2010 radiology report notes 1) “[q]uestionable anterolateral right acetabular labral tear. This could be more definitively assessed with an MRI arthrogram of the right hip using high resolution images” and 2) “[b]ilateral small hydroceles.”

A hearing was held before the ALJ on November 19, 2010. Testifying were appellee, co-worker Rhea Edmiston, and store manager Sherita Salter. Ely testified that he had a degree in radio and television broadcasting. Before going to work for Fred’s, he worked at Wal-Mart from 1999 to 2003 as assistant manager in charge of overnight receiving; before that, he worked in the automotive industry from 1990 to 1996. He described a car accident in March 2009 in which he injured his foot and had to wear a boot.

He described his job with Fred’s as making sure the back room was ready for the truck and getting the merchandise out on the floor quickly. According to company policy, trucks had to be emptied and the stock out on the floor within twenty-four hours. He described the accident and stated that he was subsequently terminated when he accidentally took one of his wife’s Darvocet pills instead of one of his prescriptions. When he went to the VA on the previous Monday, another MRI was ordered because they thought there was a tear.

Ely testified that since the accident he had not gone back to work for Fred’s (due to his termination for the Darvocet), but he had done some consulting work for a radio station in Pine Bluff, earning \$600 to \$800.



Rhea Edmiston testified that she was not a witness to the accident, but that Ely had been limping for “quite a while” before it occurred. Sherita Salter testified that she was present on the day of the accident. She stated that before the accident Ely had sometimes complained about pain in his back and legs.

The ALJ determined that Ely failed to prove he sustained any compensable injury as alleged, and in an opinion dated February 15, 2011, denied benefits accordingly. On February 18, 2011, Ely filed a motion to reconsider and to submit new evidence. He sought to introduce into the record a December 21, 2010 MRI of his hip and asked the ALJ to reconsider her ruling. The motion was denied in a letter dated March 18, 2011.

On August 8, 2011, the Commission issued an opinion affirming in part and reversing in part the ALJ’s decision. The Commission affirmed the denial of benefits for Ely’s alleged back injury, but reversed the ALJ’s finding regarding the right hip injury.¹ In a detailed opinion, the Commission set out the medical history and testimony. The Commission noted that a December 21, 2010 MRI was not part of the record before the ALJ. That MRI of the right hip showed “[a]pparent small osteochondral fragment off of the anterolateral acetabulum with attached labrum only minimally displaced.” The Commission found that Ely had established a “compensable injury to his right hip by medical evidence supported by objective findings, namely, the small acetabular linear tear shown by diagnostic testing on June 2,

¹Commissioner McKinney wrote separately, concurring in the denial of benefits for Ely’s back and dissenting as to the finding that he proved he sustained a compensable injury to his hip. Commissioner Hood also wrote separately, concurring as to the finding that Ely sustained a compensable hip injury and dissenting as to the finding that he failed to prove a compensable back injury.



2010.” The Commission went on to find that the December 21, 2010 MRI should be admitted into evidence. The Commission awarded medical treatment for the right hip, temporary-total disability benefits from February 26, 2010, through March 22, 2010, and temporary-partial disability benefits beginning March 23, 2010, to a date yet to be determined.

Appellants appealed the award, and Ely cross-appealed the denial of benefits for his back.

I. *Direct Appeal*

There are two issues on direct appeal: (1) whether the Commission erred in admitting the new MRI, and (2) whether substantial evidence supports the finding that Ely sustained a compensable injury to his right hip.²

Appellants cite workers’ compensation statutes that generally provide that all evidence is to be submitted at the time of the initial hearing and only the record developed at the hearing is to be considered. Ark. Code Ann. §§ 11-9-704(c), 11-9-705(c)(1). The following are prerequisites for the admission of newly discovered evidence: (1) the newly discovered evidence must be relevant; (2) it must not be cumulative; (3) it must change the result; and (4) the party seeking to introduce the evidence must be diligent. *See Quinn v. Webb Wheel,*

²We note that appellants’ brief cites an unpublished opinion from this court from 2006. Unpublished decisions issued before July 1, 2009, may not be cited, quoted, or referred to in arguments, briefs, or other materials presented to any court. *See Ark. Sup. Ct. R. 5-2(c)* (2011). Additionally, appellants cite opinions of the Commission, which have no precedential value and are not binding on this court. *Taylor v. Pfeiffer Plumbing & Heating Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).



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52 Ark. App. 208, 212, 915 S.W.2d 740, 742 (1996). The Commission should be liberal, rather than stringent, about the admission of evidence. *Steak House v. Weigel*, 101 Ark. App. 81, 84, 270 S.W.3d 365, 367 (2007). This court reviews evidentiary rulings by the Commission for abuse of discretion. *See id.*

Here, appellants have cited no authority for their contention that the Commission committed reversible error in admitting the new MRI. Undoubtedly, the MRI was relevant. Whether the claimant was diligent in obtaining relevant evidence is the Commission's province to determine, and we do not find an abuse of discretion on this record. As for appellants' contention that the new MRI was cumulative, we disagree. It showed something that the previous MRI had not—an osteochondral fragment off of the anterolateral acetabulum. In sum, we find no abuse of discretion in the admission of the MRI in this case.

As for the sufficiency of the evidence, appellants make weight and credibility arguments that this court routinely rejects. They point to evidence of pain and a limp prior to the incident, degenerative changes, and an alleged lack of credibility. They ignore the June MRI that the Commission cites as objective medical evidence of injury.

On appellate review, we view the evidence in the light most favorable to the findings of the Commission and give the testimony its strongest probative force in favor of the action of the Commission. *Ellison v. Therma Tru*, 71 Ark. App. 410, 417, 30 S.W.3d 769, 773 (2000). We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion reached. *Id.* Under the substantial evidence standard of review, we affirm.



II. *Cross-Appeal*

Ely asserts that the Commission’s decision that he failed to prove that he sustained a compensable injury to his back is not supported by substantial evidence. He essentially argues that his muscle spasms are objective medical findings and that there is no other explanation for this condition arising soon after the accident. However, the Commission specifically found that Dr. Alexander’s March 1 prescription for Flexeril “as needed for muscle spasm” was not an objective medical finding establishing a compensable injury to Ely’s back. While muscle spasms can constitute objective medical findings to support compensability, *Estridge v. Waste Mgmt.*, 343 Ark. 276, 280, 33 S.W.3d 167, 170 (2000), the Commission found that there was a lack of objective finding in this particular case that Ely was suffering from muscle spasms in his back following the February 25, 2010 accident. Considering that there was no objective evidence of a back injury in Dr. Alexander’s records, along with the fact that Ely also suffered an injury to his hip,³ we find that the Commission’s opinion displays a substantial basis for denying Ely’s claim that he sustained a compensable injury to his back. Therefore, we affirm.

Affirmed on direct appeal; affirmed on cross–appeal.

³The prescription does not indicate whether the muscle spasm for which the medication was prescribed was in Ely’s back or his hip. *Cf. Fred’s, Inc. v. Jefferson*, 361 Ark. 258, 264–65, 206 S.W.3d 238, 243 (2005) (finding “a reasonable inference from the chronology of events is that the medication and physical therapy were prescribed to aid Jefferson and to treat her injury”).



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GRUBER and MARTIN, JJ., agree.

Mayton, Newkirk & Jones, by: *Mike Mayton*, for appellants.

The McNeely Law Firm, PLLC, by: *Steven R. McNeely*, for appellee/ cross-appellant.