

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H101863

WYVONNE M. HAWKINS, EMPLOYEE

CLAIMANT

**WALMART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

**WALMART CLAIM SERVICES,
THIRD-PARTY ADMINISTRATOR**

RESPONDENT

OPINION FILED JULY 6, 2022

Hearing before Chief Administrative Law Judge O. Milton Fine II on April 14, 2022, in Little Rock, Pulaski County, Arkansas.

Claimant *pro se*.

Respondents represented by Mr. James Arnold, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On April 14, 2022, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on January 24, 2022. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions were properly set forth in that order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/self-insured employer/third-party administrator relationship existed on January 27, 2021, the alleged date of injury.
3. Claimant's average weekly wage of \$574.40 entitles her to compensation rates of \$383.00/\$287.00.
4. Respondents have controverted this claim in its entirety.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. The following were litigated:

1. Whether Claimant sustained injuries to her neck and back by specific incident.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.

All other issues have been reserved.

Contentions

The respective contentions of the parties read as follows:

Claimant:

1. Claimant contends that she sustained compensable injuries to her neck and back on January 27, 2021, when a pharmacist struck her with the heel of her palm.

2. Claimant further contends that she is entitled to medical treatment, and to temporary total disability benefits from the date of injury to a date yet to be determined.

Respondents:

1. Respondents contend that Claimant's alleged neck injury in the incident that occurred on January 27, 2021, does not meet the definition of a compensable injury as defined by the Arkansas Workers' Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, deposition transcript, non-medical documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the hearing witnesses and to observe their demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her neck by specific incident.
4. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her back by specific incident.

5. Because of the above findings regarding compensability, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment and to temporary total disability benefits—are moot and will not be addressed.

CASE IN CHIEF

Summary of Evidence

The hearing witnesses were Claimant and Kim Smith. Dr. Robert McCarron testified via deposition.

In addition to the prehearing order discussed above, also admitted into evidence in this case were the following: Claimant's Exhibit 1, a comprehensive, tabbed (by Claimant) exhibit containing both medical records and other documents, consisting of four index pages and 89 pages thereafter; Claimant's Exhibit 2, a flash drive containing video footage; Respondents' Exhibit 1, a compilation of Claimant's medical records, consisting of two index pages and 49 numbered pages thereafter; Respondents' Exhibit 1A, additional medical records, consisting of five numbered pages; Respondents' Exhibit 2, a video screenshot, consisting of one index page and one page thereafter; Respondents' Exhibit 3, a flash drive containing video footage; Respondents' Exhibit 4, a compact disk containing video footage; and Respondents' Exhibit 5, the transcript¹ of the deposition of Dr. McCarron taken on March 31, 2022, consisting of 25 numbered pages plus two pages of exhibits.

¹Per Commission policy, this transcript, separately bound, has been retained in the records of the Commission.

Adjudication

A. Compensability

Introduction. Claimant has asserted that while working for Respondent Wal-Mart Associates, Inc. (“Wal-Mart”), on January 27, 2021, she suffered compensable injuries to her neck and back when a co-worker—a pharmacist named Kim Smith—struck her with the heel of her palm. Respondents do not dispute that Smith made physical contact with Claimant that day. Indeed, the video footage of the incident, discussed more fully *infra*, readily shows this. Instead, they have asserted that no compensable injury resulted from this.

Standards. Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2012), which I find applies to the analysis of Claimant’s alleged injuries, 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) (Repl. 2012). “Objective findings” are those findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16).

If Claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009

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Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

Section 11-9-102(4)(B)(i) provides that the definition of “compensable injury” excludes the following:

Injury to any active participant in assaults or combats which, although they may occur in the workplace, are the result of nonemployment-related hostility or animus of one, both, or all of the combatants and which said assault or combat amounts to a deviation from customary duties[.]

In *Flowers v. Ark. Hwy. And Transp. Dept.*, 62 Ark. App. 108, 968 S.W.2d 660, (1998), the Arkansas Court of Appeals ruled that the above provision is written in the conjunctive and that it contains three prongs that must be satisfied before the exception acts as a bar to a claim. Under *Flowers*, a claim is not compensable only if it is shown:

1. that the injured employee was an active participant in the assault or combat;
2. that the assault or combat is the result of nonemployment-related hostility or animus; and
3. that the assault or combat amounts to a deviation from customary duties.

Testimony. Claimant, who is 34 years old and has an online doctorate degree in business administration from Northcentral University in California, along with a master’s degree in communications management from Webster University, testified that she has been employed at Wal-Mart since 2006. She has worked at the Conway location on Dave Ward Drive as a pharmacy technician since 2007. Her duties included the inputting and filling of prescriptions.

Asked what happened at work on January 27, 2021, Claimant related that she clocked in around 8:45 a.m. Smith, however, showed up late for work. After the pharmacy opened for business at around 9:00 a.m., Smith purportedly “made the statement that she [Smith] had a dream that she killed two people, and what she didn’t finish, her son would.” Claimant continued:

I didn’t pay that any attention, and then approximately about maybe 10 minutes into around 9:10, 9:15, I raised my hand, because I had a question on a prescription that I know the doctor sent in incorrectly, but the pharmacists, there’s three of them, they typically want the input worded differently, and so I didn’t know how I should have worded the prescription. I knew it was wrong, I knew how I would input it, but I wanted some verification from her. And I raised my hand, and she came around and read the screen and then she asked me, “Did you really call me up there for this?” And I said yes. And I turned around, and then she struck [sic] me with a palm heel strike.

In her testimony, Claimant described Smith hitting her on a spot halfway between her neck and left shoulder with her right hand. Smith had curled the fingers of that hand and made contact with Claimant with the lower portion of that hand. When asked how she could know the configuration of Smith’s hand, considering that the place that she was supposedly struck was not in her field of vision, Claimant responded that “when I turned around, she still had her hand up like this [demonstrating the configuration].” Claimant admitted that she is familiar with martial arts training. In fact, her exhibit reflects that she obtained a first-degree black belt in Taekwondo in 2001.

In relating what allegedly happened next, Claimant stated:

Then I turned around and asked [Smith] why she hit me. And she looked straight ahead and never said anything, and the two techs behind me started laughing. And then after I asked her, “Why did you hit me?” she walks around on my left side and tells me to hit her back, but I told her no.

Then she left on my left-hand side, and then she didn't speak to me for the rest of the day.

In her written narrative that is part of her Exhibit 1, Claimant described the alleged incident this way:

The pharmacist also informed [Claimant] that she had martial arts training specifically in Karate in Morrilton, AR from about 1984 to 1985. A few minutes later, [Claimant] had a question about a prescription that was sent over incorrectly and raised her hand to get the attention of the pharmacist. The pharmacist comes around the corner and answers the question. She then stated, "Did you really call me up here to answer that question[?]" Then she proceeds to strike [Claimant] with a palm heel strike. [Claimant] turns around and asked the pharmacist why did you hit me because my neck popped when you did that. The pharmacist [stared] off straight ahead for a few seconds and then responded to [Claimant] and said hit me back. The pharmacist goes over to the left side of [Claimant] and lays down over the counter, but [Claimant] tells her no so the pharmacist raises up and leaves on [Claimant's] left side not the right side. [Claimant] then had to prop herself up by putting her left foot on her right foot and lean on the computer to finish her shift.

According to Claimant, she did not feel any serious pain from the alleged blow at first; only a pop in her neck at the time she was hit. But this changed when she took a break approximately two hours later and traveled to her vehicle. She began limping because walking was causing her to have sharp, severe pain "[i]n the mid-back" and muscle spasms near the site of the blow. Claimant began having problems sitting. As a result, she reported the alleged incident to the assistant manager of the store. In addition, she filed a complaint with the Conway Police Department. Later, on February 2, 2021, she began suffering from neck pain. She stated that on that day, she was unable to turn her head to the left.

The testimony of Claimant was that in addition to pain and muscle spasms, she attributes other problems to being struck by Smith on January 27, 2021. She began suffering from headaches, mental confusion and memory problems.² As a consequence, she dropped out of school. However, Claimant later related that the headaches resolved as of June 21, 2021, that her mental issues are now “[m]inor, but not massive,” and that she resumed her education and obtained her doctorate degree. Later, she testified: “Eventually my brain after June was fine.”

On cross-examination, Claimant added that a knot appeared on her left shoulder the day of the alleged incident. Asked whether it was still present the next day when she saw her personal physician, Dr. Ahmed Ali, Claimant responded that her mother massaged the area and applied ointment, so she was not sure. She agreed that she was suffering from muscle spasms at the time she first saw the provider furnished by Respondents.

Her testimony was that in the middle of February 2021, she was getting out of her recliner at home the middle of her back “cracked.” Because of this, she found

²In the narrative form of her exhibit, Claimant alludes to suffering a compensable mental injury under Ark. Code Ann. § 11-9-113 (Repl. 2012). However, neither party made this an issue in the proceeding; and I cannot address it *sua sponte*. See *Burkett v. Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2; *Ralston v. Automatic Auto Fin. Inc.*, 2017 AR Wrk. Comp. LEXIS 157, Claim No. G409055 (Full Commission Opinion filed March 15, 2017); *Pruitt v. Comm. Dev. Inst. Head Start*, 2013 AR Wrk. Comp. LEXIS 19, Claim No. F908541 (Full Commission Opinion filed February 12, 2013); *Carthan v. School Apparel, Inc.*, 2006 AR Wrk. Comp. LEXIS 451, Claim No. F410921 (Full Commission Opinion filed November 28, 2006). Regardless, I would note that because Claimant has not proven that she sustained a compensable physical injury (see *infra*), she cannot show that she sustained a compensable mental one under the

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herself unable to walk and went from using a cane to utilizing a wheelchair. She continued using this device for three to four months. When asked to explain why Dr. McCarron—whom she was seeing at the time—was unaware of the wheelchair, Claimant replied that his assistants wheeled her in and out of the examination room and kept it outside of that room because of space considerations. At the hearing, Claimant was using a walker to ambulate. She stated that when she is navigating familiar territory, she still uses a cane.

With respect to her present condition, Claimant stated that she is disabled. Asked whether part of the disability arises from the recliner incident as opposed to the incident involving Smith, she responded:

It varies, if that makes sense. Some days it's the lower, and other days it's—I have spasms every day on the left shoulder, but that doesn't prevent me from working. But the spine up here also hurts where she struck me. That's not every day. But down here in the lower back would be after the injury is where I have most of the problems.

The following exchange took place:

- Q. Well, are you contending at this point that whether it's related to your neck or your low back or your memory or anything else, that you are temporarily and totally disabled from working?
- A. Not that, yes.
- Q. Due to your back?
- A. Yes . . . [m]y neck, it got better after physical therapy because they did treatment on that. But I ran out of money in August, so I had to stop going to therapy.

aforementioned statute, since that provision requires a claimant to show that the former caused the latter.

- Q. Okay. So now it's primarily your back?
- A. Correct. I still have spasms on the left side, but I don't have the pain that I had.
- Q. Okay. And again, the back problem was due to getting up out of the recliner two weeks after [Smith] touched you on the left shoulder?
- A. Originally it was the upper. Then it started healing probably after three months, and then, like I said, two weeks after the incident my back cracked, so I didn't know which pain was coming off of where.

Called by Respondents, Smith testified that she has been a pharmacist for 35 years. She has been working at the same pharmacy as Claimant for the last two to three years. However, because of her duties as a relief pharmacist, Smith has known Claimant since 2008.

Turning to the events of January 27, 2021, Smith denied that she was late in opening the pharmacy. As for the dream she supposedly related to Claimant, she stated: "I don't know what she's talking about" Smith continued:

I do remember going up there that day, and you know, we were laughing and talking and all of us in the pharmacy, when [Claimant] said everybody else was laughing, because we were joking around. We weren't really busy that day. I don't recall what I went up there for, because it wasn't really a big event, and whatever I said, I just kind of pushed at her. I didn't hit her. I would never hurt [Claimant]. And she was like, "Oh, you hurt me." And I was like, I said, "Oh," I said, "I didn't mean to hurt you." I said, "You can hit me if you want to." And [Claimant] was like, "No, I'm not gonna do anything under the cameras." And then we went on and just worked, you know, normal that day. And yes, we did talk the rest of the day . . . [w]e had conversations the whole rest of the day. When I left for lunch, I mean, when I left to go home, [Claimant] was coming back in from her lunch . . . [a]nd I said, "Will I see you tomorrow." And she said, "No, I'm off tomorrow." Or maybe she said, "I'll be here the next day," and nothing was said.

Taking issue with Claimant's claim to have begun limping later that day, Smith testified that when Claimant returned to the pharmacy later that day, "you could see that she was walking back in hell bent for Georgia like nothing was wrong." As alluded to above, Smith insisted that the two of them still continued to interact after the encounter in question that day. She was shocked when a police officer appeared the next day to investigate the matter.

Shown the video footage of the pharmacy that is in evidence, Smith admitted that it depicts her using her hand to make physical contact with Claimant. Asked why she touched Claimant, Smith responded that "we were just goofing around³ that morning, and I would never try to hurt her in any way, and if I accidentally hurt her, I would feel terrible about it." (Emphasis added) She reiterated that she was "joking around" when she approached and made contact with Claimant. The portion of Smith's body that touched Claimant's shoulder was her hand. It was "[j]ust flat" at the time; her fingers were extended, not curled. Shown the configuration of a hand in a "palm heel strike" (per Claimant's testimony and the diagram in evidence, Smith related that she did not do that. In fact, she stated that she does not know what a "palm heel strike" is. She denied having any martial arts training. When asked by Claimant at the hearing whether she had told her that she had taken karate, Smith replied: "And no, I've never taken karate. You're very mistaken."

³Respondents have not raised the defense that Claimant's alleged injuries were incurred while engaged in consensual "horse play" under Ark. Code Ann. § 11-9-102(4)(B)(i) (Repl. 2012). It will not be addressed *sua sponte*. See *supra* Note 2.

Dr. McCarran was deposed on March 31, 2022. He testified that when he first saw Claimant on March 11, 2021, she informed him that on January 27, 2021, “her boss struck her just to left of midline and upper chest with a palm—palm heel strike . . . or what she described as a palm heel strike.” Claimant brought a graphic to illustrate what this blow is. The following exchange took place:

Q. Were there any visible signs of an acute injury in any part of her body?

A. Okay. The main finding on examination was tenderness to palpation in the—basically, the muscles of the neck and upper back, particularly on the left side, and her motion of her neck rotating to the left was somewhat limited.

Q. Okay. Now as far as tenderness to palpation, that’s a subjective complaint?

A. Yes.

Q. Okay. And did you cause to be performed any diagnostic testing at the initial visit?

A. Yes. Yes, I did. X-rays were obtained of the lower back and of the cervical spine.

Q. Okay. Both the lumbar and the cervical area?

A. Right, and I neglected to mention earlier she was also tender in the lumbar spine area, as well, on the left.

Q. What were the findings on x-ray?

A. The—everything appeared normal on x-ray on both the neck and the back.

Per McCarran, Claimant related that prolonged sitting and standing increased her pain, and that driving caused muscle spasms. Two weeks before he saw her, she

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experienced a sensation of popping or cracking in her back, resulting in pain and spasms in her lower back. She reported that she had been prescribed Flexeril when she presented as Sherwood Urgent Care following the alleged incident. But the doctor stated that the prescription of Flexeril did not necessarily reflect that the prescribing doctor personally observed spasms. Claimant's cervical MRI was normal. He recommended that she also undergo a lumbar MRI, along with physical therapy and prescriptions of Gabapentin and Diclofenac.

The following exchange occurred:

Q. I don't know whether that was—it was that initial MRI or the—some of the initial x-rays mentioned a slight straightening of the cervical lordosis.

A. Right.

Q. Okay. That can be indicative of either muscle spasms or a positional situation, correct?

A. Correct.

Q. Okay. And on that initial visit that you had, did you personally observe any muscle spasms?

A. Not that I—not that I recorded.

Q. Okay. And would you probably have recorded that had you observed them?

A. Yes.

The lumbar MRI, per the doctor, was “normal.” He added: “There was some bone marrow changes that would be unrelated to the injury”

Dr. McCarron's testimony was that Claimant presented with pain of 8/10-9/10, which he agreed was rather high. His observation was that “she was in obvious

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discomfort or appeared to be in obvious discomfort.” Later, on April 1, 2021, Claimant returned to him. She stated that while the medication that he had prescribed had helped, she was developing sharp, shooting pains into her legs and lower back. While he was not made aware that she was using a wheelchair at that time, he testified that neither he nor any other provider (to his knowledge) had recommended one. Moreover, he did not think one would have been indicated. The doctor stated that he never recommend that she use a walker or a cane, either. None of these were indicated from an orthopedic standpoint.

On the next visit, on April 29, 2021, Claimant was no longer using a wheelchair. But she presented as being unable to raise her arms above her head. Although he did not order her to undergo a brain MRI, it did not surprise him to learn that the results of that test were normal as well.

The doctor was shown the video footage that is in evidence of Smith making physical contact with Claimant. The following exchange took place:

Q. Doctor, from looking at the video that I showed you earlier, is there a medical reason why Ms. Hawkins would have low back complaints from the physical touching that you saw by her supervisor?

A. You know, I—I was surprised, after looking at that video, I—I expected a more dramatic injury. So it’s not the type of—what should I say—impact that you would expect to cause any prolonged back discomfort.

...

Q. Would you expect someone, regardless of what caused their complaints, in the absence of any objective findings of a physical

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injury, would you expect them to continue to have consistent complaints for over a year?

A. I mean, it—it happens on occasion, but I'd say that's unusual.

When questioned by Claimant during the deposition, the following exchange occurred:

Q. In your opinion, do you think I was faking it?

A. No, I—I didn't.

Medical Exhibits. On January 28, 2021, Claimant presented to Dr. Ahmed Ali.

The history portion of the report reads in pertinent part:

Patient comes to the clinic today for episodic visit in which she reports on January 27 she was struck in the back with the palm of the hand of an employee. Since that time she has had pain at the localized area of impact as well as additional pain in the cervical and lumbar spine.

The examination notes include the following:

BACK: No signs of trauma no ecchymosis or [b]reaks in skin.

MUSCULOSKELETAL: mild pain on L shoulder upon movement without any bruising.

Ali assessed Claimant has having “[a]cute left-sided thoracic back pain” and “[w]hiplash injury to neck,” and expounded on this: “Patient might have gotten a whiplash injury to her neck as she associates it with pain, but upon my examination there is no bruising or anything.”

On February 22, 2021, Claimant related to Elizabeth Reinhard, APRN, that she “had a knot in her back” the afternoon after she was hit. She later stated that the knot resolved on its own. Examination of the neck, back and musculoskeletal system

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showed them to be normal except for cervical and thoracic tenderness. Reinhard affirmatively noted that she found no spasms in the thoracic or lumbar areas.

On March 3, 2021, Claimant underwent a cervical MRI. It showed, per the report thereof, “[n]o acute abnormality.” This is despite the report reflecting that Claimant had “[m]ild reversal of cervical lordosis.”

Three days later, on March 11, 2021, Claimant went to Dr. McCarron for the first time. The history portion of the record reads in pertinent part:

Wyvo[nn]e presents to clinic today for the initial time to evaluate lumbar/neck pain. She is employed as a pharmacy tech. patient states that she was ass[a]ulted by her boss on 1/27/21 at a pharmacy which amounted to a palm heel strike about two inches down from the base of the neck and just to the left of the midline. She did ok initially but gradually worsened to the point she went to Sherwood [U]rgent [C]are for evaluation. She was prescribed Flexeril and Prednisone for treatment but did not receive benefit. She reports prolonged sitting and standing will increase the pain. She states that driving in a car will cause back spasms. The discomfort started in the neck. Two weeks ago her back “cracked” and the pain and spasms also involve the lumbar area. The symptoms reports [sic] are numerous. These include that her back pops and locks up.

McCarron noted that the x-rays showed “[n]o acute findings.” The doctor recommended a lumbar MRI. This test, which took place on April 1, 2021, reflected:

The bone marrow signal is isointense to disc signal on T1-weighted images. Such an appearance can be seen with chronic anemia, chronic smoking, chronic exercise, marrow packing disease, etc. . . . [n]o bone bruise . . . [n]o disc. No canal or foraminal narrowing is present.

When Claimant went back to Dr. McCarron on April 29, 2021, she reported “having a lot of muscle spasms.” But as before, the doctor did not palpate any spasms, per his report. While he found full passive range of motion in the left shoulder, he noted

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reduced range in the right.⁴ McCarron assessed her as having cervicalgia, lumbago, and adhesive capsulitis of the right shoulder, and continued her in physical therapy.

Claimant went back to Dr. Ali on June 1, 2021, requesting referral to a psychologist and reporting headaches, confusion and memory loss. He referred her to Dr. Keith Schluterman. She reported to a nurse practitioner on June 11, 2021, that

after her assault . . . she has been followed to Little Rock and back by a [car]. People have unscrewed her front porch light and stolen her front porch chairs. She reports she has forgotten how to cook at times and will get lost. She feels that all this started after she was attacked. She reports non[e] of this happened prior to the attack. She reports that this pharmacist told her [that] if she did not finish the job [that] her son would finish it.

Claimant stated to Dr. McCarron on June 17, 2021, that she was still having severe pain, and that she had begun “seeing [a] counselor for PTSD.⁵ Schluterman saw her on June 13, 2021, and performed an EEG. The results thereof were normal. Her August 13, 2021, brain MRI was normal as well.

Summaries of Claimant’s chiropractic records reveals that as of October 8, 2015, she was diagnosed as having “[s]egmental and somatic dysfunction of [the] thoracic region[.]”

⁴In her testimony, Claimant was puzzled by this reference and stated that the alleged incident did not result in an injury to her right shoulder. In any case, the compensability issue at bar does not involve the right shoulder, and cannot addressed *sua sponte*. See *supra* Note 2.

⁵See *supra* Note 2.

Non-medical Exhibits. The exhibits of this nature that were introduced at the hearing include a photograph depicting someone employing a “palm heel strike,” along with an instruction on how to perform it. The instruction reads in pertinent part:

-Extend your hand into a flat position with your fingers bent and joined at the second knuckle

. . .

-At the same time, rotate your right hip forward to drive your body weight into the attack to increase the power of the strike

-Push off on the ball of the right foot to direct your body weight into the attack from low to high

The video footage of the alleged incident is two minutes, three seconds in length, and is from distinctly different camera angles. The first looks at the pharmacy counter from an elevated position to the left. From this angle, Claimant remains in the upper left corner of the screen throughout the segment. The second footage is taken from a position directly above the counter. In this instance, Claimant remains in the bottom right portion of the screen. Both video files at six seconds show Claimant turn to the left and wave her left arm to signal someone. The first file shows Smith approach Claimant from the latter’s right hand side. Sixteen seconds into both video files, Smith’s right hand makes contact with Claimant in the approximate area described in the latter’s testimony: halfway between her left shoulder and her neck. Smith does not come into view in the overhead footage until her right arm appears from the right side of the screen and makes contact. The first file shows that as Smith approaches Claimant, she bends her right elbow and flattens her hand to where it is slightly angled forward. Her

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fingers are not curled. She makes no effort to “drive” her arm or body in increase the impact of the blow/physical contact, as described in the instructions *supra*; instead, the force appears to wholly derive from the speed of Smith’s walking stride. Smith makes physical contact with the entire palm of the hand, or nearly so; she does not use the heel of her palm. By the time Smith enters Claimant’s field of vision, the former has dropped her right arm to her side.

Neither video footage contains audio. In addition, both Smith and Claimant are wearing masks. So, whatever words the two exchanged cannot be gleaned from this. But immediately after Smith makes physical contact, the two evidently converse. At 21 seconds into both videos, Smith inexplicably turns her back to Claimant. This tends to corroborate their testimonies that Smith offered to let Claimant hit her back. However, Claimant does not do so.

At the time physical contact is made, Claimant has her back to Smith and is facing her computer screen. There is no indication from the footage that Claimant invited the contact from Smith, or even anticipated it. It is clearly non-consensual.

But the contact appears not to have much force. This is shown not only by focusing on Smith’s actions as described above, but on Claimant’s response. Once contact is made, Claimant’s body is driven forward slightly, and her head/neck is straightened to a small degree. It in no way reflects that she was the recipient of a martial arts blow administered with any significant degree of force. The footage clearly depicts not a person being struck by someone with intent to injure, but by someone

playfully (if perhaps overzealously so) making contact. The contact shown is more than a mere tap, but is much less than a shove or a blow/strike.

Discussion. The compensability element “arising out of . . . [the] employment” relates to the causal connection between the claimant’s injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant’s employment “when a causal connection between work conditions and the injury is apparent to the rational mind.” *Id.*

In this case, assuming only for the sake of argument that Claimant has established objective and measurable findings of a neck and/or back injury, she has not shown a causal connection between such findings and what occurred on January 27, 2021, at the pharmacy when Smith made physical contact with her. Simply put, the contact, as clearly depicted from two different angles in video footage, was certainly not a “palm heel strike” as described in Claimant’s testimony or in her non-medical exhibits. The footage plainly shows that, contrary to what Claimant said on the witness stand, she did not see Smith’s right arm and hand in the raised position that it was at the time physical contact was made with Claimant. Consequently, she could not have observed whether Smith’s hand was configured to show that she had deployed a “palm heel strike.” In any case, the force applied by Smith’s unwanted touching was plainly not strong or severe enough to do anything other than to invite annoyance by the recipient. The evidence readily shows that it would not have been sufficient to cause injury to any degree. In making this finding, I credit the opinion of Dr. McCarron, who treated Claimant for her alleged injuries and who had the opportunity to view the video footage.

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As he diplomatically stated in his deposition testimony quoted above: “So it’s not the type of—what should I say—impact that you would expect to cause any prolonged back discomfort.” The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002).

I note that, irrespective of her credibility issues highlighted above, Claimant seems to be sincere in her belief that the uninvited touching by Smith on the morning of January 27, 2021, caused her alleged injuries. But any belief, no matter how sincere, is not a substitute for credible evidence. *Graham v. Jenkins Engineering*, 2004 AR Wrk. Comp. LEXIS 79, Claim No. F112391 (Full Commission Opinion filed March 12, 2004).

In sum, Claimant has not proven by a preponderance of the evidence that she suffered a compensable neck and/or back injury.

B. Additional Treatment

Because of the above finding on compensability, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment and temporary total disability benefits—are moot and will not be addressed.

CONCLUSION

In accordance with the findings of fact and conclusions of law set forth above, this claim for initial benefits is hereby denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge