

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307282

REBECCA Y. SMITH

CLAIMANT

**WAL-MART STORES, INC.
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED MARCH 1, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE SHANNON MUSE CARROLL, Attorney at Law, Hot Springs, Arkansas.

Respondent represented by the HONORABLE TOD C. BASSETT, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on January 30, 2004. A prehearing conference was held on September 9, 2003 and a prehearing order was filed on September 10, 2003. A copy of the prehearing order was admitted into evidence without objection.

At the prehearing conference and prior to the hearing, the parties agreed to the following stipulations:

1. There was a July 5, 2003, employer-employee relationship.
2. The temporary total disability/permanent partial disability rate is \$128.

The claimant contends that she sustained a compensable specific incident injury while performing employment services on July 5, 2003 and is entitled to medical benefits. All other issues are specifically reserved.

The respondent contends the claimant did not sustain a compensable work injury on July 5, 2003. The respondent contends that the claimant was without symptomatology on that date and had no injury, or if she was in pain, it was due to a personal medical condition and was not aggravated by her work duties with the respondent employer. The claim has been controverted in its entirety, although some initial medical was paid by the respondent.

The issues to be litigated are:

1. Compensability.
2. Entitlement to medical benefits.
3. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was a July 5, 2003, employer-employee relationship.
2. The temporary total disability/partial disability rate is \$128.
3. The claimant has proven by a preponderance of the evidence that she sustained a compensable specific incident lumbar strain on July 5, 2003, arising out of and in the course of her employment.

4. The respondent is responsible for all reasonable and necessary medical treatment the claimant has sought for her compensable lumbar strain injury, to include Dr. Atta's care, physical therapy, emergency room visits and medication from July 5, 2003 through October 3, 2003.

DISCUSSION

The claimant, 21 years old, was a sales associate for the respondent employer on July 5, 2003, where she had been employed for about three months. The claimant was working as a cashier on the 2:00 p.m. to 10:00 p.m. shift and was checking out a large buggy when she scanned a case of Dr. Thunder and felt lower back pain. According to the claimant, she lifted the case of sodas and felt a sharp pain and she immediately flipped on her light to summon a manager. She finished cashing out the customer and left to find a customer service manager and she located Joel and told him she had hurt her back and she was moved to register No. 1., which is an express lane with less merchandise. She worked there about 20 minutes and she spoke with another manager, Brock, and advised him she was hurting. She was then sent to the fitting room to sit and she stayed about 10 minutes and then was sent to work the door, checking alarms and receipts. She worked about one hour there and then left for the day.

The claimant completed an incident report the next day before going to the emergency room. The claimant had an x-ray and received some medication at the emergency room and did some follow-up care with Dr. Michael Atta. Dr. Atta ordered some physical therapy as well as a MRI and a myelogram. The claimant returned to work the Wednesday following her Saturday incident. She was answering the

telephone, which was not a problem, and she worked for about five days and was off again for three to seven days. The claimant returned to work again and answered the telephones and ultimately quit on August 28, 2003. The claimant verified that she probably only worked about 35 hours between July 5, 2003 and August 28, 2003 and worked hit and miss. The claimant returned to work the second week of November 2003, doing a sit-down job at the Thrifty Nickel where she answers the telephone and does some computer work.

According to the claimant, her back is better and she follows the physical therapist's stretches. She last saw Dr. Atta on September 30, 2003. The claimant has three children, an 8-year-old, a 4-year-old and a 2-year old.

The claimant testified that she had been to the emergency room in the past a number of times for such conditions as cyst, urinary tract infection, bladder, kidney, pelvic inflammatory disease and TMJ. According to the claimant, she was without health insurance and would go to the emergency room for medical care. The claimant testified that she had never had a back injury before her July 5, 2003, incident, although her medical records might reflect back pain. She testified her back pain was associated with kidney and urinary tract problems. The claimant confirmed that she had taken pain medication for various problems, to include female problems and TMJ.

Under cross examination, the claimant verified that she and her family moved in early June 2003 and she was involved in putting items away. The claimant also confirmed that on her application for the respondent employer she did not list each and every job she had held since 1999 and that she has not worked for a single employer more than three or four months. The claimant could not recall an emergency room visit

on October 17, 2002, where the report reveals she was complaining of low back pain. The claimant also could not recall the various pain medications she had been prescribed in the emergency room. When questioned about her attempts to return to work following her light-duty release, the claimant testified that she did not have to go in because she did not need the money. The claimant testified that she did not need the money and having to do fitting room duties, as well, caused her to quit her job for the respondent.

Joel Kimery, customer service manager for the respondent employer, testified that he was neither a member of management or salaried but he supervised the claimant some during July 2003. Mr. Kimery testified that the claimant approached him on July 5, 2003 and said something about her back hurting. He could not remember the exact words she used. Mr. Kimery did remember the claimant telling him she had back problems before and had scoliosis and that her husband was bringing her some medication.

Under cross examination, Mr. Kimery testified that his shift gets pretty busy sometime. They are responsible for getting the store ready for the next day's business. Mr. Kimery confirmed that he could have misheard the claimant on July 5, 2003, or may have been distracted. Mr. Kimery confirmed that the claimant was a good employee when she was there and not an employee he had to follow up or double check. He could not recall any customer complaints about the claimant. Mr. Kimery testified that "good service pins" are given to employees for going above their job. He testified that he gives the cashiers pins he has received for things they do to help him. The pins ultimately convert into gift cards.

The claimant testified that she received a “good service pin” by a member of management before her July 5, 2003, injury.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant presented a credible account of an incident scanning a case of sodas when she felt a sharp lower back pain. She described the incident and immediately reported the problem to her supervisor and a member of management. She filed an incident report the following day with her employer and went to the emergency room where her employer followed her and met her there. The contemporaneous history provided at the emergency room is the same information the claimant presented at the hearing and this was the pain that immediately came on with her picking up and scanning a case of sodas. The claimant was diagnosed with acute lumbar strain and prescribed Darvocet, Skelaxin and Ibuprofen and later changed to

Vicodin Extra Strength and Ibuprofen. On July 11, 2003, Dr. Michael Atta saw the claimant again because of pain and upon examination, he describes bilateral paralumbar muscular spasm. A MRI was ordered and this revealed a slight central bulging of the L4-5 disc with no evidence of canal or foraminal impingement. The claimant was taken off work through July 14, 2003 and at that appointment she was referred for three sessions of physical therapy and taken off work another seven days. Dr. Atta continued the claimant on Tylox and Diazepam.

The medical evidence reveals that on July 15, 2003, a Work Status report was prepared by Bill Lee, R.N., and this returned the claimant to work on light duty. On August 6, 2003, Dr. Atta saw the claimant again for persistent back pain and ordered a myelogram and recommended the claimant remain off work until the myelogram. On August 12, 2003, Dr. Atta saw the claimant and his records reveal the myelogram presented normal results but he did order an additional two weeks of physical therapy and prescribed Diazepam and Skelaxin. A September 29, 2003, report from Spa City Therapy notes "mm spasms noted in the (L) lumbar erector spine." (Cl. Exh. No. 1, p. 55.) Dr. Atta was asked to opine regarding the claimant's L4-5 bulging discs whether the claimant's twisting injury on July 5, 2003, could have been 51% responsible for the condition and he opined, "Yes," on July 16, 2003. However, when he was presented emergency room visit reports of April 23, 2002; October 17, 2002; and March 4, 2003, he changed his opinion that, "...I cannot definitely state that the injury sustained on July 5, 2003, was the cause of the slight central bulging of the L4-L5 disc noted on the MRI scan performed on July 11, 2003." (Resp. Exh. No. 1, p. 100.) Some emergency room reports before the July 5, 2003, incident record back pain.

In the present case, I found the claimant to present credible testimony about an incident on July 5, 2003, where she felt sharp back pain after scanning a case of sodas. The incident was reported to management immediately and medical attention was sought the following day. The contemporaneous medical evidence recorded the very same details that the claimant presented in the hearing. The claimant testified that she had never had a back injury before this incident, although she had previously experienced back pain, which she attributed to various conditions such as urinary tract infections and female problems. I find the claimant proved by a preponderance of the evidence that she sustained a compensable lumbar strain injury in the course of and arising out of her employment on July 5, 2003. The medical evidence provides the objective findings required by the statute when Dr. Atta's report reveals muscle spasms after his examination. Ark. Code Ann. §11-9-102(16).

The respondent questioned the claimant about her failure to list each job on her employment application with respondent. She admitted that she had worked at a number of places for short periods of times and did not list each and every job. There was also some discussion about her failure to disclose previous back problems. Again, the claimant attributed her back pain to female and urinary tract problems rather than a back injury. There was no medical evidence introduced that provided evidence of a previous back injury; evidence of back pain was presented but no injury. I did not find these two discrepancies fatal to the claimant's case of a lumbar strain on July 5, 2003.

The respondent paid for some early medical treatment and paid for some of Dr. Michael Atta's care. I find the respondent is responsible for the reasonable and necessary care the claimant sought between July 5, 2003 and October 3, 2003. The

last medical report in evidence is a report dated September 30, 2003, from Dr. Atta where he recommends the claimant continue with her current treatment of medication and work restrictions and he released her with plans to refer her to a physiatrist. There is documentation that the claimant continued physical therapy for two more days following the September 30, 2003, visit with Dr. Atta. There is no medical evidence after October 3, 2003 and the claimant testified that she has returned to work in another field and has continued to be gainfully employed and had not seen another doctor for her back since Dr. Atta's September 30, 2003, visit. According to the claimant, since she has been working at the Thrifty Nickel she can bend over better and she has not had any problems.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable specific incident lumbar strain on July 5, 2003, arising out of and in the course of her employment. The respondent is responsible for all reasonable and necessary medical treatment the claimant has sought for her compensable lumbar strain injury, to include Dr. Atta's care, physical therapy, emergency room visits and medication from July 5, 2003 through October 3, 2003.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**