

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F214541

SHIRLEY LEMING

CLAIMANT

WAL MART STORES, INC.  
SELF INSURED

RESPONDENT

OPINION FILED NOVEMBER 15, 2005

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in  
Springdale, Washington County, Arkansas.

Claimant represented by BOYCE DAVIS, Attorney, Lincoln, Arkansas.

Respondents represented by DAVID WALL, Attorney, Fayetteville,  
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 12, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on June 21, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. The Opinion of June 4, 2004, has become final and is res judicata of all issues raised and addressed therein.

By agreement of the parties the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's entitlement to temporary total disability benefits from December 13, 2002 through August 11, 2004.
2. Appropriate attorney's fees.
3. Date of the end of the claimant's healing period.

In regard to these issues, the claimant contends:

(a) It is the claimant's contention that there is no evidence that her healing period ended prior to Dr. Morse's examination and findings of July 27, 2004.

(b) Claimant contends that she is entitled to TTD from December 13, 2002 to July 27, 2004. Any other finding would encourage the respondent to continue to terminate employees and refuse to provide reasonable medical treatment in order to avoid compliance with the letter and spirit of the workers' Compensation Code.

(c) The claimant contends that she is entitled to a reasonable attorney's fee pursuant to the statute.

In regard to these issues, the respondents contend:

"The respondent denies the claimant is entitled to temporary total disability benefits at any point in time."

#### DISCUSSION

\_\_\_\_\_The central issue in this case is the claimant's entitlement to temporary total disability benefits. The burden rests upon the claimant to prove her entitlement to these benefits.

The issue is phrased in the pre-hearing order as the claimant's entitlement to temporary total disability benefits for her compensable mid back or thoracic spine injury from December 13, 2002 through August 11, 2004. However, the prior Opinion resolved the issue of the claimant's entitlement to temporary total disability benefits accruing on and before December 30, 2002. In the Opinion dated June 4, 2004, it was found that the claimant had proven her entitlement to temporary total disability benefits for the period beginning December 26, 2002 and continuing through at

least December 30, 2002. At the prior hearing the claimant only requested temporary total disability benefits beginning on December 26, 2002. Apparently she had continued to work for the respondent and receive her regular wages from the date of her compensable injury (on December 13, 2002), until December 26, 2002. Regardless, the claimant's entitlement to temporary total disability benefits accruing on and before December 30, 2002, has already been finally decided and is now res judicata. The claimant would not be entitled to temporary total disability benefits from December 13, 2002 though December 25, 2002.

In order to be entitled to temporary total disability benefits from December 31, 2002 through August 11, 2004, the claimant must establish two facts by the greater weight of the credible evidence. First, she must prove that she continued within her healing period from the effects of her compensable injury of December 13, 2002. Secondly, she must prove that she was rendered totally disabled from performing any form of gainful employment for which he would otherwise be qualified as a result of the effects of her compensable injury of December 13, 2002.

The issue of the duration of the healing period is a medical question, which must be resolved based upon the greater weight of the credible medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or stabilization of the actual physical damage caused by the compensable injury. The mere continuation of symptoms and complaints is not sufficient, in

and of itself, to extend the healing period.

In the present case, the only medical evidence offered, in regard to the duration of the claimant's healing period are the reports and record of Dr. Michael W. Morse, a neurologist. Dr. Morse evaluated the claimant on July 27, 2004. Although he noted that the claimant was complaining of various subjective complaints, his clinical evaluation and the MRI study performed at his request were both essentially normal. In his reports, he indicates that there was no objective evidence of any continuing physical injury or damage to the claimant's thoracic spine. He further opined that the claimant required no further evaluation and treatment. Clearly, Dr. Morse's reports and records only show that the claimant's healing period had ended prior to July 27, 2004. These reports and records expressly show when the claimant's healing period actually ended or whether it extended beyond beyond December 30, 2002.

The prior opinion had held that the medical evidence which was presented at that time showed that the claimant's healing period continued through December 30, 2002 but was not sufficient to support a finding that the claimant continued within her healing period from the effects of her compensable thoracic injury after December 30, 2002. It was for this reason that no award of temporary total disability benefits after December 30, 2002 was made at that time. The subsequent medical evidence offered does not alter this outcome.

I would also note that the claimant's initial compensable injury was diagnosed to be in the form of a muscle or soft tissue

strain. This diagnosis was unchanged by the findings of Dr. Morse. Clearly, the healing period for such a soft tissue strain or sprain would not reasonably extend for more than a period of weeks following its occurrence.

The only evidence presented by the claimant on this issue is her own testimony. At the hearing, she stated that her complaints had remained essentially unchanged from the date of her injury through the time of the hearing. Evidence of the continuation of subjective complaints is clearly not sufficient, in and of itself, to support a finding concerning the duration of the healing period. It must also be noted that her current testimony, even if credible, would at most only indicate that her condition has remained stable or unchanged throughout the interval wherein she now seeks temporary total disability benefits.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to meet her burden to prove by the greater weight of the credible evidence that she continued within her healing period from the effects of her compensable thoracic injury after December 30, 2002. Thus, she has failed to prove the first essential fact to entitle her to the additional temporary total disability benefits she now seeks.

The only evidence the claimant has offered to prove the second fact necessary for her entitlement to additional temporary total disability benefits is again her own testimony. It was her testimony that since her compensable injury, she has experienced severe pain in her neck and between her shoulders and numbness in

her right arm/hand and right leg. She stated that all she was physically capable of doing was some of her housework. She testified that she did not believe that she was physically capable of performing any type of employment since her physical injury, and has made no attempt to obtain or even look for employment since the prior hearing.

The magnitude of the claimant's symptoms and limitations as described in her testimony is clearly contrary to all of the medical evidence. There is absolutely no medical evidence of the existence of any actual physical damage to explain symptoms of this magnitude and duration. It would also appear to be a physiological impossibility for the claimant's thoracic injury to produce radicular symptoms involving both her right upper and lower extremities.

After consideration of all the evidence presented, it is my opinion that the claimant's testimony is not sufficiently credible to prove that she was rendered totally disabled from performing all forms of regular gainful employment for which she was otherwise qualified during any portion of the period from December 31, 2002 through August 11, 2004. Thus, the claimant has also failed to prove the second fact necessary to entitle her to the temporary total disability benefits she now seeks.

In regard to the issue styled "date of the end of the claimant's healing period," this issue cannot be resolved with exactness or specificity. Based upon the evidence presented, it can be said that the claimant's healing period had not ended by

December 30, 2002, but had ended by July 7, 2004. Thus, it ended sometime between December 30, 2002 and July 27, 2004. However, it cannot be determined from the evidence presented whether this date was December 31, 2002 or July 26, 2004.

For the purpose of benefits, the burden rests upon the claimant to prove that the healing period continued after December 30, 2002. This she has not done.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 13, 2002, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On December 13, 2002, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$133.00 for both total disability and permanent partial disability.
4. On December 13, 2002, the claimant sustained a compensable injury to her thoracic spine, which was in the form of a soft tissue or muscle strain.
5. The claimant's entitlement to temporary total disability benefits on and before December 30, 2002 was resolved in the prior Opinion of June 4, 2004. This Opinion has become final and is res judicata of this issue.
6. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to continued

temporary total disability benefits from December 31, 2002 through August 11, 2004. Specifically, she has failed to prove that she continued within her healing period from the effects of her compensable injury and was also rendered totally disabled from regular gainful employment as a result of the effects of the compensable injury on and after December 31, 2002.

7. The respondents have controverted the claimant's entitlement to temporary total disability benefits.
8. As no additional to temporary total disability benefits have herein been awarded, no controverted attorney's fee can be awarded to the claimant's attorney.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss the claimant's request for temporary total disability benefits from December 13, 2002 through August 11, 2004.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge