

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F312609

SUZANNE MAGUIRE

CLAIMANT

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

RESPONDENT EMPLOYER

ORDER AND OPINION FILED JANUARY 10, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE TERENCE C. JENSEN, Attorney at Law, Benton, Arkansas.

Respondents represented by the HONORABLE AMY S. HUFFMAN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on November 10, 2004. A prehearing conference was held on June 16, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

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

1. There was a November 15, 2003, employer-employee relationship.
2. The claimant's average weekly wage was \$235.72, resulting in a compensation rate of \$157.

The claimant contends that she sustained a compensable injury on November 15, 2003 and is entitled to reasonable and necessary medical benefits and temporary total disability and temporary partial disability benefits and attorney's fees. The

claimant requests temporary total disability benefits from November 16, 2003 through March 26, 2004 and temporary partial disability benefits from March 27, 2004 through August 29, 2004.

The respondents contend the claimant did not sustain a compensable injury; specifically contending there are no objective findings. Some initial medical visits may have been paid.

ISSUES TO BE LITIGATED

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Temporary partial disability benefits.
5. 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 November 15, 2003, employer-employee relationship.
2. The claimant's average weekly wage was \$235.72, resulting in a compensation rate of \$157.

3. The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury supported by objective findings.
4. The respondents are responsible for reasonable and necessary medical treatment the claimant has pursued for her back injury.
5. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was unable to earn wages from November 16, 2003 through March 26, 2004.
6. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was unable to work full time and only worked part time from March 27, 2004 through August 6, 2004, and is entitled to temporary partial disability benefits.

DISCUSSION

The claimant, 40 years old, was working for the respondent employer on November 15, 2003, when she bent down to pick up a telzon and a printer and felt a popping in her back and sharp pain going down her leg. The telzon is a hand-held smart system that goes to the computer and allows you to determine the price of an item and then you can print. Some co-employees got a heat wrap for the claimant to put on her back and she sat in the break room for about an hour and then she returned to the floor and answered the telephone for about one hour or so. According to the claimant, her low back started swelling and she asked the assistant manager, Clint, if she could go home because of her back pain. The claimant left work about 7:00 p.m. and stayed in bed all the next day. The claimant spoke with Todd Anderson, assistant manager, on the following Monday and a doctor's appointment was made for the

following morning. The claimant saw Dr. Nick Cavaneau and received medication and was taken off work for a while. The claimant attempted work for a day and a half and was in pain and returned to Dr. Cavaneau who referred her to Dr. John Slater.

Dr. Slater took the claimant off work in December 2003 and then about January 12, 2004, he suggested she should try returning to work. The claimant worked two and one-half days and was taken off work again and she remained off work until March 26, 2004. Dr. Slater stated she could return to work for four to six hours and by April 23, 2004, he stated she could return to work six to eight hours. The claimant has recently been diagnosed with fibromyalgia and last worked for her employer on August 9, 2004. The claimant has applied for social security disability.

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. 2002). 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 has proven by a preponderance of the evidence that she sustained a compensable back injury. The claimant presented a viable explanation of sustaining a back injury. The incident was properly reported and some initial medical was paid by the respondents. The main source of contention was the lack of objective findings. In order for the claimant to meet all the elements of a compensable injury, she must prove there were “objective findings.” Objective findings are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16); *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 45 S.W.3d 408 (2001). In order to prove a compensable injury the claimant must prove, among other things, a causal relationship between his employment and the injury, *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 72 S.W.3d 889 (2002).

The Arkansas Supreme Court has stated that muscle spasms constitute objective findings. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999). In *Continental Express*, the Supreme Court affirmed the Commission’s finding of a compensable injury when the only evidence was of the claimant’s history, physical complaints, and observations by a physical therapist. In the present case, while Dr. Slater’s reports and the physical therapist’s reports do not specifically state that muscle spasms were observed, we do have the deposition testimony of Randal Green, the physical therapist taken on September 23, 2004, where he stated that he remembered the claimant and she did have muscle spasms in her back during her treatments. Mr. Green referred back to his notes written while providing physical therapy and stated that when he said “the patient is extremely sensitive to the palpation nearly to the point of

being hypersensitive. To me, that indicated that there were muscle spasms in her lower back and her right hip.” Depo., p. 15. See, also, Cl. Exh. No. 1, p. 18. Mr. Green stated that he does not always made a notation of muscle spasms in his progress notes.

Dr. John Slater was also deposed and provided testimony on September 21, 2004 and he also verified that his reports did not specifically state he observed muscle spasms of the claimant. However, Dr. Slater’s medical summaries indicate that he has the claimant taking Flexeril. The Arkansas Supreme Court has specifically held that a doctor would not prescribe medication to be taken as needed for muscle spasm if he did not believe muscle spasms were existent. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000). The Court of Appeals applied this same principle in *Fred’s Inc. v. Jefferson*, CA 04-166 (Ark. App. 12/15/04) where the claimant’s treating doctor, Dr. Rhodes, has diagnosed a contusion/strain and prescribed her Celebrex and Flexeril. The Court held that the doctor would not have prescribed the medication if the conditions did not exist.

Dr. Slater further opined on August 4, 2004, that the claimant’s facet hypertrophy at L4-5 and L5-S1 was aggravated by her work injury. Cl. Exh. No. 1, p. 43. Dr. Slater released the claimant to regular duty as of July 30, 2004, with lifting no more than 25 pounds but a full release was given for September 13, 2004.

The claimant next contends she is entitled to temporary total disability benefits from November 16, 2003 through March 26, 2004, and temporary partial disability benefits from March 27, 2004 through August 29, 2004. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be

totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The medical records document the claimant has continued to be treated by Dr. Slater shortly after her injury and through September 13, 2004. The medical documents physical therapy from January 20, 2004 through February 6, 2004. Dr. Slater's medical reports document that he continued treating the claimant and on March 26, 2004, he released her to return to light-duty work for four to six hours per day. On April 23, 2004, the claimant was released again to light-duty work but increased to six to eight hours per day. The claimant did return to light-duty work but continued to see Dr. Slater and continued to have problems with her back. By June 29, 2004, Dr. Slater's reports indicate the claimant was working eight hours per day, five days a week, but was continuing to take medication. Dr. Slater gave the claimant a full release without restrictions effective September 13, 2004. Dr. Slater's records further reveal that the claimant quit her job effective August 6, 2004.

After considering all the credible evidence, I find the claimant did remain in her healing period and was totally unable to earn wages from November 16, 2003 through March 26, 2004. The medical records support the claimant's testimony that she was unable to work and still in her healing period. The claimant also contends that she is entitled to temporary partial disability benefits from March 27, 2004 through August 29, 2004, while she was working light duty or part-time. Ark. Code Ann. §11-9-520 provides the claimant is entitled to 66 and 2/3rds of the difference between his average weekly wage prior to the accident and his wage earning capacity after the accident. The medical records document that the claimant was limited to light duty and restricted

hours beginning March 27, 2004 and was not released to unrestricted hours and duties until September 13, 2004. The medical records further indicate that the claimant left her employment on August 6, 2004. Considering all the credible information, I find the claimant has proven by a preponderance of the evidence that she is entitled to temporary partial disability benefits from March 27, 2004 through August 6, 2004. The claimant testified that she was not able to work her normal hours and the medical evidence supports she had light duty and limited hour restrictions for that time period.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable back injury supported by objective findings. The respondents are responsible for reasonable and necessary medical treatment the claimant has pursued for her back injury. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was unable to earn wages from November 16, 2003 through March 26, 2004, and is entitled to temporary total disability benefits. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was unable to work full time and only worked part time from March 27, 2004 through August 6, 2004, and is entitled to temporary permanent disability.

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**