

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500994

JENNIFER TURNER	CLAIMANT
WAL MART STORES, INC. SELF INSURED	RESPONDENT
CLAIMS MANAGEMENT, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED APRIL 26, 2006

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

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville,  
Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville,  
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 27, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this claim on December 14, 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. Immediately prior to the commencement of the hearing, the claimant announced that she was only seeking temporary total disability benefits through November 4, 2005. Thus, the second issue set out in the pre-hearing order was amended. A copy of the pre-hearing order, with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including January 11, 2005, the relationship of employee-self insured employer-carrier

existed between the parties.

2. The appropriate weekly compensation benefits are \$277.00 for total disability and \$208.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. whether the claimant sustained a compensable injury to her back as the result of a specific incident on or about January 11, 2005.
2. The claimant's entitlement to the payment of medical expenses and temporary total disability benefits from January 28, 2005 through November 4, 2005.
3. Appropriate attorney's fees.

In regard to these issues, the claimant contends:

It is the claimant's contention that claimant sustained a compensable back injury arising out of and in the course of employment with the respondent on or about 1/11/2005; Claimant contends entitlement to workers' compensation benefits as set forth in the issues response in the prehearing memorandum, and specifically reasonable necessary and related medical expense; temporary total disability benefits; Ark. Code Ann. §11-9-505 benefits; permanent partial/total disability benefits (reserved); and controverted attorney's fees."

In regard to these issues, the respondents contend:

"The respondents contend the claimant did not sustain an injury arising out of and in the course of her employment."

DISCUSSIONI. COMPENSABILITY

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The initial issue in this case is the question of whether the claimant sustained a “compensable injury” to her lower back or lumbar spine, as the result of a specific incident that occurred at work on January 11, 2005. The burden rests upon the claimant to prove all of the factual elements necessary to establish this alleged compensable injury.

Ark. Code Ann. §11-9-102(4)(D) requires that the claimant prove by medical evidence, which is supported by objective findings, the actual existence of the physical injury or condition alleged to be compensable. After consideration of the evidence presented, it is my opinion that the claimant has presented ample medical evidence to “establish” the actual existence of a physical injury to her lower back. Further, I find that the evidence reveals sufficient “objective findings” to support the existence of the medically established physical injury. Thus, the claimant has satisfied the statutory requirement of Ark. Code Ann. §11-9-102(4)(D).

The medical evidence shows that the claimant has seen a number of physicians, including two general or family practitioners, two orthopaedic surgeons, a neurologist, chronic pain management specialists, and a chiropractic doctor. Although the specific diagnosis made by these physicians appear to differ, they each opine that the claimant experienced some type of soft tissue strain or sprain involving one or more of the anatomical components of her

Lower back.

Dr. Roxanne Marshall (a general practitioner and apparently the company physician for the respondent) was the first to see and evaluate the claimant. This evaluation occurred on or about January 19 and/or January 20, 2005. Dr. Marshall diagnosed the claimant's difficulties as a lumbosacral strain or sprain with a possible radicular component.

The claimant was next evaluated and treated by Dr. John McAuley (a family practitioner and the claimant's family physician). Dr. McAuley diagnosed the claimant's lower back difficulties as a sacroiliac joint strain or sprain. This diagnosis remained essentially the same over Dr. McAuley's course of treatment of the claimant.

On February 4, 2005, the claimant came under the treatment of Dr. Jeffrey Snider (a doctor of chiropractic). Dr. Snider's diagnosis of the nature of the claimant's difficulties was persistently conveyed in rather cryptic terms by using only the diagnostic code numbers. However, these code numbers correspond, for the most part, with an acute back strain or sprain.

On March 16, 2005, the claimant was evaluated by Dr. Russell Allison (an orthopaedic surgeon). Dr. Allison diagnosed the claimant's difficulties as being attributable to a "back strain."

On July 5, 2005, the claimant was seen by Dr. Edward Sear (also an orthopaedic surgeon). Dr. Sear gave no specific opinion on the diagnosis of the claimant's continuing complaints, but noted that the etiology of these complaints was "not really clear."

Ultimately, the claimant was seen by Dr. Brent Sprinkle (apparently a neurologist, specializing in the conservative treatment of back complaints). Dr. Sprinkle's opinion was that the claimant had experienced an initial lumbar strain and possible sacroiliac joint strain that had progressed into a lumbar myofascial pain syndrome and a piriformis syndrome.

Many of the various objective tests performed on the claimant were interpreted as normal. All of the claimant's plain x-rays appear to have been interpreted as normal. Two MRI studies were performed on the claimant. The first of these was initially interpreted by the radiologist as showing "mild diffuse bulge at L4-5". However, this study was subsequently interpreted by Dr. Allison as being normal. A second MRI, some five months later, was interpreted as being negative. NCV's and an EMG on the claimant's right lower extremity also failed to show any neurological abnormalities.

However, the medical evidence does contain sufficient "objective findings" (i.e. findings beyond the claimant's voluntary control) to support the existence of a lumbosacral strain or sprain. On physical examination, Dr. McAuley repeatedly noted "swelling" in the musculature of the sacroiliac area. He also recorded a size differential between the claimant's buttocks and the calves of her legs, with the right being somewhat smaller than the left. On occasion, Dr. McAuley also observed muscle spasms involving the claimant's right sacroiliac area and right leg. Dr. Snider, in his reports and records detected an increased

hypertonicity of the paraspinal muscles in the claimant's lumbar spine.

The claimant must next prove by the greater weight of the credible evidence that this medically established and objectively supported injury to her lower back satisfies all of the definitional elements for a "compensable injury", under Ark. Code Ann. §11-9-102(4)(A)(i). These definitional elements are:

- (1) That the injury must arise out of and occur in the course of the employment;
- (2) That the injury must be caused by a "specific incident";
- (3) That the physical injury must be identifiable by time and place of occurrence;
- (4) That the physical injury must cause internal or external physical harm to the claimant's body;
- (5) That the injury must require medical services or result in disability.

The only direct evidence presented by the claimant to prove the first three of these definitional elements is her own testimony. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident and to prove the existence of a reasonably close temporal relationship between this incident and the onset of difficulties that would be indicative of the occurrence of a physical injury to her lower back.

In this regard, the claimant testified that on Tuesday, January 11, 2005, she was performing her regular employment duties for the respondent. As part of these duties, she pulled an empty pallet, weighing some 70 to 80 pounds from a shelf and was attempting to swing the pallet onto its designated place on the floor. While pivoting or twisting to the pallet, the board on the pallet that she was grasping broke. This caused her to be jerked off balance, backwards. She testified that she experienced an immediate onset of pain in her low back and right buttock and shortly thereafter, experienced muscle spasms in her low back and right hip. She stated that she immediately reported the incident and these difficulties to her supervisor, a Jack Kramer. At that time, a written report was filled out. At that time, she was also told to put ice on her back and rest it. The next day, she was placed on light duty. After her difficulties did not improve, she requested to see a doctor and was taken by the respondents to Dr. Marshall's office. After seeing Dr. Marshall, she was placed on light duty for approximately one week. The claimant testified at the end of that week, she was contacted by the respondents' claims adjuster and was informed that her workers' compensation claim was being denied. She was also told that the respondents would provide no more medical services nor would she be provided further light duty. She stated that she was advised that if she could not perform her regular job, she would have to take leave.

At the hearing, the claimant acknowledged that she had experienced prior difficulties with her low back in July of 2003,

as a result of lifting furniture. She stated that her symptoms quickly and totally resolved after only one doctor's visit and missing only four to eight hours of work.

After consideration of all the evidence presented, I find the claimant's testimony to be credible, concerning the occurrence of a specific employment related incident on January 11, 2005 and the contemporaneous onset of symptoms indicative of a physical injury to her lower back. The respondents have not refuted that the claimant immediately reported this incident. Her description of the incident has remained consistent from her initial reporting through her testimony at the hearing.

Therefore, I find that the claimant has proven the occurrence of a specific employment related incident or accident on January 11, 2005. I also find that she has proven the existence of a close temporal relationship between this employment related incident or accident and the onset of her lower back difficulties, which were indicative of the occurrence of a physical injury to this portion of her body.

Clearly, the employment related accident described by the claimant could logically have produced the medically established soft tissue strains or sprains to her lower back. Symptoms indicative of the occurrence of such an injury occurred within a reasonable period of time following this incident. There is also no other reasonable explanation for the presence of these medically established soft tissue injuries. Although the claimant had previous difficulties with her lower back, the greater weight of

the credible evidence shows that these difficulties had long since entirely resolved. There is absolutely no evidence that the claimant had experienced any problems or complaints with her lower back for a significant period of time prior to January 11, 2005. Clearly, the claimant was physically capable of performing her relatively strenuous employment activities for this respondent without any difficulty or complaint for a substantial period of time prior to January 11, 2005.

It is therefore my opinion that the claimant has proven the necessary causal relationship between the specific employment related accident or incident of January 11, 2005, and the medically established and objectively documented soft tissue strains involving the various anatomical structures of her lower back. The existence of this causal relationship is sufficient to satisfy the first three definitional elements of Ark. Code Ann. §11-9-102(4)(A)(i) (i.e. that the claimant's lower back injury arose out of and occurred in the course of her employment, was caused by a specific incident, and is identifiable by time and place of occurrence).

The medical evidence presented in and of itself, is sufficient to satisfy the remaining two definitional elements of Ark. Code Ann. §11-9-102(4)(A)(i). Clearly, the presence of swelling, hypertonicity, and muscle spasms are ample proof of actual internal physical harm to the affected portion of the claimant's anatomy. All of the various physicians, who have evaluated the claimant, have felt that various tests and conservative medical treatment

were reasonably appropriate for the claimant's lower back difficulties. The medical restrictions temporarily placed upon the claimant's employment activities, as a result of her lower back difficulties, and the resulting loss of work that these restrictions have produced would be clear evidence that her employment related lower back injury has produced "disability," at least on a temporary basis.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that she sustained a "compensable injury" to her lower back on January 11, 2005. Specifically, she has proven by medical evidence the actual existence of a physical injury to her lower back that is supported by "objective findings." She has further proven that this physical injury arose out of and occurred in the course of her employment with this respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to this portion of her body, required medical services, and resulted in disability.

## II. BENEFITS

Clearly, the Act would entitle the claimant to "reasonably necessary medical services" for her compensable injury. Medical services are "reasonably necessary" when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. These purposes or goals may be varied. They include not only active medical treatment to improve or resolve the actual physical damage caused by the physical injury, but also include

medical services to provide a reasonably accurate diagnosis of the nature and extent of the compensable injury and the medical services intended only to alleviate or relieve merely the symptom (such as pain) that are caused by the compensable injury.

After consideration of all the evidence presented, it is my opinion that the medical services provided the claimant for her lower back difficulties by and at the direction of Dr. Roxanne Marshall, Dr. John McAuley, Dr. Jeff Snider, Dr. Russell Allison, Dr. Edward Sear, and Dr. Brent Sprinkle, all constitute "reasonably necessary medical services" for the claimant's compensable injury. All of these physicians are medical experts, some with the particular expertise in the area of medicine associated with the diagnosis and treatment of back difficulties and injuries, such as those experienced by the claimant. All of the services they rendered were in connection with the claimant's lower back and radicular complaints. The services provided were of a type and nature commonly accepted and generally employed by the medical community for the diagnosis and treatment of back injuries, such as that experienced by the claimant.

The diagnostic studies performed on the claimant have, in fact, accomplished their intended purpose of allowing an accurate diagnosis of the etiology of the claimant's complaints. The services directed toward the actual treatment of the compensable injury, have, from the claimant's testimony, not been particularly successful. However, these services clearly had a reasonable expectation of success at the time they were rendered and, from the

medical evidence presented, these services appear to have accomplished some degree of success in the resolution or stabilization of the claimant's compensable injury and the alleviation or reduction of the symptoms it is producing.

The second type of benefits sought by the claimant is temporary total disability benefits from January 28, 2005 through November 14, 2005. In order to be entitled to such benefits, the claimant must prove that, during this period, she continued within her healing period from the effects of her compensable injury and was also rendered totally disabled from performing regular gainful employment, as a result of the effects of this compensable injury.

The duration of the healing period is a medical question, which must be resolved upon the basis of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the healing or resolution of the permanent damage caused by the compensable injury. Once this permanent damage has resolved or, at least stabilized, at a level where there is no further reasonable expectation of improvement, then the healing period has ended.

The medical evidence shows that the claimant continued under active medical treatment for her compensable injury from January 20, 2005 through November 4, 2005. During this time, she was provided conservative treatment by Dr. Marshall, Dr. McAuley, Dr. Snider, and Dr. Sprinkle. There is no indication, in the medical evidence, that the underlying physical damage caused by the claimant's compensable injury had resolved or at least stabilized,

at any time prior to November 4, 2005.

Therefore, I find that the claimant has proven by the greater weight of the credible evidence that she continued within her healing period from the effects of her compensable injury through at least November 11, 2005. This satisfies the first requirement for her entitlement to the temporary total disability benefits she now seeks.

As a result of her compensable back injury, the claimant was immediately restricted for medical reasons, from bending, twisting, and lifting. The respondents initially provided the claimant with limited or light duty employment, at her regular wages, that complied with these medically imposed restrictions. However, on or about January 28, 2005, the respondents elected to controvert this claim and refused to continue the claimant on light duty. The claimant was apparently given the choice of either returning to work at regular duty or taking a leave of absence. The claimant's testimony indicates that she elected to take a leave of absence and received short-term disability benefits through a policy of group insurance maintained through the respondent.

Clearly, the claimant would have had difficulty obtaining employment in the open job market. She was under rather significant medical restrictions on her potential employment activities and was receiving extensive ongoing medical treatment. Thus, when the respondents refused to provide appropriate light duty employment, on or about January 28, 2005, the claimant became effectively totally disabled as a result of the effects of her

compensable back injury.

On March 16, 2005, the claimant was evaluated by Dr. Russell Allison, an orthopaedic surgeon. At that time, Dr. Allison also reviewed the previous lumbar MRI study. It was Dr. Allison's expert medical opinion that the claimant had only experienced a back strain, that she was not a surgical candidate, and that she would improve with time. It was his further opinion that the claimant's compensable injury no longer restricted her from engaging in regular gainful employment and that she was physically capable of returning to employment without a risk of worsening her compensable injury. However, Dr. Allison also recognized that such a return to full activity might temporarily increase the claimant's level of pain. Finally, he recommended an aggressive program of physical therapy to assist the claimant, in this regard.

The claimant's testimony and the evidence presented shows that increasing her level of physical activity, resulting in an increase in the claimant's complaints and symptoms. This increased activity not only caused the claimant's pain level to increase, but also produced objective symptoms in the form of muscle spasms in the right sacroiliac area and right leg. These latter symptoms were visibly observed and noted by Dr. McAuley. These facts would cast significant doubt on Dr. Allison's opinion that the claimant's compensable injury no longer required any substantial restrictions or limitations of her physical activities. As the Appellate Courts have noted, an injured worker should not be forced to perform employment activities in increased pain and discomfort. Pyles v.

Triple F Feeds of Texas, Inc., 270 Ark. 729, 606 S.W. 2<sup>nd</sup> 146 (1980).

On July 5, 2005, the claimant came under the treatment of Dr. Edward Sear and Dr. Brent Sprinkle of the Spine Center of Arkansas Specialty Care Center, P.A. She also continued to see Dr. McAuley. The only limitations noted on the claimant's physical activities by Dr. Sear, Dr. Sprinkle, and Dr. McAuley (on and after July 5, 2005) was that the claimant needed to change positions or move frequently. During this time, the claimant's repeated physical examinations were essentially normal and no objective abnormalities were noted. The tests performed on the claimant, including a second MRI and an EMG were also normal. The claimant was also repeatedly noted to be "in no acute distress" at the time of her medical visits. No medical restrictions were specifically imposed on the claimant's physical activities after July 5, 2005.

The claimant testified that she continued to experience spasms in her back and that her symptoms and limitations remained essentially unchanged out throughout this period and even through the date of hearing. However, this testimony does not appear to be supported by the medical evidence. The claimant's testimony also indicated that she has made no attempt to seek or obtain any type of employment since her compensable injury.

The claimant's testimony reveals that she is a high school graduate and has previous experience in child care, waitressing, and retail sales. Clearly, positions in these fields exist in significant numbers in the job market which is present in the area

of the claimant's residence. Most of these positions would not require repetitive or heavy lifting or frequent or repetitive bending or twisting at the waist. Many of these positions would also allow the claimant to move and change postures as needed.

Clearly, a claimant should not be required to seek employment elsewhere, if there is a reasonable expectation of their expeditious return to their pre-injury employment position. However, after a lapse of several months, a claimant would have some duty to seek alternative suitable employment, elsewhere.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence that she continued to be rendered totally disabled from performing all types of regular gainful employment for which he would otherwise be qualified, after July 5, 2005. Therefore, she would not be entitled to an award of temporary total disability benefits continuing beyond that date.

In summary, I find that the claimant has proven by the greater weight of the credible evidence that she was rendered temporarily totally disabled, as a result of the effects of her compensable back injury, for the period of January 28, 2005 through July 5, 2005. Specifically, she has proven that during this period she continued within her healing period from the effects of this compensable injury and was also rendered totally disabled by her compensable back injury from performing all forms of regular gainful employment for which she was otherwise qualified.

III. THE EFFECT OF ARK. CODE ANN. §11-9-411

\_\_\_\_\_The provisions of Ark. Code Ann. §11-9-411 provide the respondents with a “set off” against any benefits awarded for medical services and disability that have been previously paid under a group policy of insurance. However, this subsection does not totally relieve the respondents from their primary liability for providing these benefits under the Arkansas Workers’ Compensation Act. Instead, the respondents are required to place in reserve an amount equal to this “set off”, in order to satisfy any claims for reimbursement that may be made by the group carrier. If releases of the group carrier’s claims for reimbursement are not obtained from the group carrier or an Order of this Commission entered regarding the disposition of these reserves, then the respondents are to pay these reserves to the Death & Permanent Total Disability Trust Fund of the State of Arkansas.

In the present case, it is apparent from the testimony of the claimant that certain benefits, which are herein awarded under the Arkansas Workers’ Compensation Act, have previously been paid under a group policy of insurance, as defined by Ark. Code Ann. §11-9-411. Thus, any benefits herein awarded are subject to the set off provided by this subsection. However, this “set off” has no effect on the calculation of appropriate controverted attorney’s fees. Such fees are to be calculated on the amount of disability benefits herein awarded, prior to taking the “set off”.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers’ Compensation Commission has

jurisdiction of this claim.

2. On January 11, 2005, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On January 11, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$277.00 for total disability and \$208.00 for permanent partial disability.
4. On January 11, 2005, the claimant sustained a compensable injury to her low back. Specifically, she has proven by the greater weight of the credible evidence the occurrence of an injury to her low back that is "established" by medical evidence, that is supported by "objective findings," that arose out of and occurred in the course of her employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that caused internal physical harm to her body, and that required medical services and/or resulted in disability.
5. The medical services rendered to the claimant for her compensable back injury by and at the direction of Dr. Marshall, Dr. McAuley, Dr. Snider, Dr. Allison, Dr. Saer, and Dr. Sprinkle represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. Pursuant to the provisions of this subsection, the respondents are liable for the expense of these services,

subject the medical fee schedule established by this Commission.

6. The claimant was rendered temporarily totally disabled as a result of the effects of the compensable injury for the period of January 28, 2005 through July 5, 2005. The claimant has failed to prove that her compensable injury continued to render her totally disabled after July 5, 2005.
7. The claimant received certain group insurance benefits, in the form of the payment of medical expenses and short-term disability, that would coincide with the medical expenses and temporary total disability benefits herein awarded. Under Ark. Code Ann. §11-9-411, the respondents are entitled to a "set off" for these group benefits against the corresponding workers' compensation benefits herein awarded. However, the respondents must place in reserve an amount equal to this set off in the manner required by this subsection.
8. The respondents have denied the occurrence of any compensable injury to the claimant's back and have controverted her entitlement to any benefits.
9. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on the temporary total disability benefits herein awarded.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the period of January 28, 2005 through July 5, 2005, subject to the "set off" provided by Ark. Code Ann. §11-9-411.

The respondents shall be liable for the expense incurred by the claimant as the result medical services provided her for the compensable injury by and at the direction of Dr. Marshall, Dr. McAuley, Dr. Snider, Dr. Allison, and Dr. Sear, and Dr. Sprinkle. This liability shall be subject to the medical fee schedule establish by this Commission and shall also be subject to the "set off" provided by Ark. Code Ann. §11-9-411.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded. This fee shall be calculated on such benefits prior to the application of the "set off" that is provided by Ark. Code Ann. §11-9-411. The respondents are liable for One-half of fee, in addition to any benefits payable to the claimant. The respondents shall withhold the remaining one-half of this fee from benefits herein awarded, which are payable to the claimant.

The respondents shall hold in reserve funds equal to any "set off" taken in this claim. If no releases are obtained from the group carrier or disposition of this money made by valid Order of this Commission, within five (5) years, the respondents shall pay this reserve fund to the Death & Permanent Total Disability Trust

Fund.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge