

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NUMBER F205441**

**JENIFER WILLIS, EMPLOYEE**

**CLAIMANT**

**WAL-MART, INC.,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**OPINION FILED APRIL 19, 2006**

A hearing in this case was conducted on October 19, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent was represented by Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

**STATEMENT OF THE CASE**

A prehearing telephone conference was held in this claim on July 18, 2005. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to three stipulations. Two of these stipulations are listed in the Prehearing Order and were confirmed at the hearing; the parties agreed to a third stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on May 8, 2002 and at all other relevant times.
2. Respondent controverts this claim in its entirety.
3. If called to testify, the testimony of Claimant's husband, Christopher Willis, would

corroborate Claimant's testimony.

At the October 19, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. Claimant clarified her request concerning the sixth issue, as noted below. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury on May 8, 2002.
2. Whether Claimant's depression is compensable under Ark. Code Ann. § 11-9-113.
3. Whether Claimant is entitled to additional reasonably necessary medical benefits.
4. What is Claimant's average weekly wage?
5. Whether Claimant is entitled to two weeks of temporary total disability benefits.
6. Whether Claimant is entitled to permanent partial disability benefits based upon a 5% permanent impairment rating. At the hearing, Claimant's attorney specified that the only issue with regard to permanency is the impairment rating; the issue of permanent total disability was reserved.
7. Whether Claimant is entitled to an attorney's fee.
8. Whether the provisions of the Workers' Compensation Law providing for the appointment of administrative law judges and authorizing the adjudication of workers' claims by the Commission are unconstitutional for the reasons stated in Claimant's Motion to Recuse and Brief filed on June 13, 2005. The issues raised in Claimant's Motion to Recuse are incorporated herein by reference.

**RECORD**

In order to have an adequate record addressing Claimant's Motion to Recuse and

substantive constitutional challenges, the following items will be blue-backed and made a part of the Commission's record:

1. Claimant's attorney's June 13, 2005 letter to the Administrative Law Judge;
2. Claimant's June 13, 2005 Motion to Recuse;
3. Claimant's June 13, 2005 Brief on Constitutional Issues;
4. Claimant's Brief received August 3, 2005; and
5. Claimant's attorney's July 25, 2005 letter to the administrative law judge.

In addition to the foregoing items, certain opinions of the Full Commission identified below will also be blue-backed and made a part of the Commission's record.

### **MOTION TO RECUSE**

Claimant's Motion to Recuse raises a number of arguments that essentially challenge the constitutionality of the Arkansas Workers' Compensation Commission. She notes that "Judge Arey would not consciously intend to discriminate against the claimant in this case." However, Claimant argues that all administrative law judges are under pressure to rule against claimants. Claimant therefore seeks my recusal, the recusal of all other administrative law judges, and the appointment of a special administrative law judge (without specifying how that might be accomplished).

It should be noted that the Full Commission rejected these arguments in other claims. See Long v. Wal-Mart Stores, Inc., Full Workers' Compensation Commission Opinion filed January 25, 2006 (F309931) (citing cases addressing Claimant's issues in other proceedings).

Further, the rule of necessity mandates that I remain on this claim. The rule of necessity provides that an administrative officer is not disqualified because of bias or

prejudice where he or she alone has the power and authority to act, and if disqualified, action could not otherwise be taken. See Acme Brick Co. v. Missouri Pacific R.R., 307 Ark. 363, 369, 821 S.W.2d 7, \_\_\_ (1991). The Arkansas Supreme Court adopted this rule to provide an exception to disqualification where the authority of the administrative officer is exclusive, and no legal provision for calling in a substitute is provided. Id. at 370, 821 S.W.2d at \_\_\_\_. Here, there is no statutory procedure in place to address Claimant's request for the appointment of a special administrative law judge. Therefore, if one administrative law judge must recuse for the reasons given, all administrative law judges must recuse; and, even if one could be appointed, a special administrative law judge would be subject to the same infirmities which form the basis for Claimant's challenges and recusal motion. If all administrative law judges must recuse and a special administrative law judge cannot be appointed, this claim could not be heard. Therefore, pursuant to the rule of necessity, and in light of the Commission's rejection of Claimant's arguments in other cases, I will remain on this claim. Claimant's Motion to Recuse is denied.

### **CONSTITUTIONAL CHALLENGES**

Claimant raises a number of constitutional challenges to the Commission's adjudication process. Her attorney raised, and the Full Commission rejected, identical constitutional arguments in a number of prior cases. See, e.g., Long v. Wal-Mart, Full Workers' Compensation Commission Opinion filed January 25, 2006 (F309931); Plummer v. Wal-Mart, Full Workers' Compensation Commission Order filed October 10, 2005 (F209057); Bland v. Baxter Reg'l Med. Ctr., Full Workers' Compensation Commission Order filed August 16, 2005 (F204378). In the immediate proceeding, Claimant offers no new evidence or new arguments that would justify revisiting these Commission decisions.

Therefore, I find that the Claimant's constitutional challenges are without merit. The foregoing opinions will be blue-backed and made a part of the record.

## **DISCUSSION**

### **A. Compensability of May 8, 2002 Injury**

Claimant began working for Respondent on January 16, 2002. After serving as a cashier, Claimant transferred to the bakery department. She described an incident that occurred on May 8, 2002.

I was restocking the shelves, and I have to go in the freezer to get the product that I need to put on the floor. I had three cases of mini-pies, which weighed, maybe, about fifteen pounds, and I took them outside the freezer and went to set them down in the cart, and I had a pain in my lower back and a sharp pain shot down my left leg. And my knee went -- from my knee to my toes went numb instantly, and then I tried to -- I sent somebody to get my manager, and somebody else went and got my sister, because I sat down for a minute, and, you know, I thought that it would be okay. You know, to just -- and I tried to walk across -- we had tables, one against this wall and then one in the middle of the floor, and I tried to walk from one to the other and I couldn't. I couldn't walk without the pain. I mean, the pain was so bad that it would make me think my leg give out.

After completing the necessary paperwork, Claimant presented to Dr. Lance Lincoln.

Rebecca Wohlers, another of Respondent's employees, testified on Claimant's behalf; she knew Claimant because they took their breaks together. She recalled seeing Claimant on May 8, 2002.

I didn't see the injury happen to her, but I was in the break room and she came in, and she was just white. I mean, she was just ashen white. And she went to sit down, and she almost fell down when she went to sit down. And I said, what happened? And she said, I don't know. She said, I was lifting this -- I don't know what it was, because I don't work back there. Something into a cart, and she said, something happened. She says, the pain was just excruciating. She said, I don't know what happened, she said, but it really, really hurts.

Claimant indicated to Wohlers that she felt pain in her back, down her hip, and in her leg. Wohlers observed Claimant having difficulty with her leg and back after this incident.

Claimant's sister, Missy Foster, and Claimant's mother, Laquita Foster, both testified on Claimant's behalf. Neither could recall Claimant having any chronic back pain prior to the incident; both testified that Claimant subsequently suffered constant pain.

Dr. Lincoln's May 8, 2002 note records Claimant's history of "carrying 3 cases of mini pies, felt sharp in [left] low back when setting them in a cart." Dr. Lincoln did not record an objective finding. He assessed "HNP & radiculopathy" and prescribed medication including Skelaxin. Claimant returned to Dr. Lincoln on May 13, 2002, reporting that her left leg was numb and that this leg and her back felt like they were shaking. Again, the doctor failed to record any objective finding.

A physical therapist assessed Claimant on May 16, 2002. He recorded the following concerning Claimant's symptoms:

She reports her pain is nearly constant and moderate to severe in nature. Her worst pain is with riding in a car. She also has pain with prolonged sitting, standing for more than 10 minutes or any functional walking distance. She was able to sleep through most of the night until last night. She had a great deal of twitching and pain in the left leg.

While the physical therapist did not record any objective findings, he did note that Claimant was motivated to return to work and to take care of her children.

Claimant presented to Dr. Lincoln on May 14, 2002 and again on May 17, 2002. She continued to complain of pain in her left leg; on both occasions, the doctor assessed low back pain and radiculopathy. No objective findings are noted in either report. However, during the May 17, 2002 visit, Dr. Lincoln added Flexeril to Claimant's prescriptions.

Claimant underwent an MRI scan of her lumbar spine on May 20, 2002, twelve days after her incident. The resulting study recorded an impression of “[n]o evidence for herniated nucleus pulposus. No compression fractures are noted. The disks are well preserved. Good alignment is noted.”

As Claimant’s physical therapist noted on May 23, 2002, despite Claimant’s “negative MRI result, she continues to have clinical signs and symptoms of some form of radiculopathy.” A note dated May 24, 2002 records Claimant’s continuing complaints of left leg pain. Although no objective findings are noted, low back pain and leg neuropathy are assessed. Claimant continued her physical therapy and medications.

At some point in June of 2002 Claimant’s symptoms began to abate. A note dated June 7, 2002 records that Claimant’s “back [was] letting up some.” Next to the heading “Objective,” no findings are noted, merely the term “OK.” Claimant’s physical therapist recorded on June 10, 2002 that Claimant reported “feeling much better.” He recorded on June 21, 2002 that Claimant “has had some continued soreness, but no real symptoms of sciatica or radiculopathy present.”

Unfortunately, Claimant sustained a fall at work sometime later that June. Her physical therapist recorded the following in a note dated June 28, 2002:

The patient reports that she fell at work four to five days ago. She was in the process of cleaning some utensils in the kitchen when she slipped on a very greasy floor. She reports that she initially had just buttock and leg pain. Over the next two days, she had a progression of the pain. Now it appears to be better.

On July 5, 2002, Claimant reported to her physical therapist that she continued “to have leg symptoms.” A July 16, 2002 note recorded: “Getting better. Then fell & strain[ed] back again.” Claimant complained that her low back pain was worse and that her left leg was

numb “most of the time.” She also complained about her right leg. The doctor assessed “LBP-strain pattern” and prescribed Celebrex; no objective findings are noted.

On July 23, 2002, Claimant again presented to Dr. Lincoln’s office. A note of that date records Claimant’s history of “hurt back moving boxes.” Although Claimant complained about low back and left leg pain, the note does not record an objective finding, and specifically notes the absence of swelling. Claimant was assessed with persistent low back pain and left leg numbness.

Claimant’s physical therapist wrote on August 2, 2002 that Claimant “was seen for 22 visits from 5-16-02 through 7-15-02 for a diagnosis of HNP with radiculopathy. The patient did not return after the 15th of July.” Claimant did not return messages subsequent to that date, so her physical therapist discharged her at that time. He noted that “[a]s of the last time she was here, she continued to have radiculopathy and problems while at work. She had made some improvement....”

Dr. Luke Knox examined Claimant on August 9, 2002. In a letter dated August 14, 2002, he wrote:

Neurologically, I could not pick up any evidence of motor or sensory deficit. Her reflexes, although somewhat brisk, were likewise brisk in the upper extremities. She did have significant spasm with a slight list to the right. She had diminished sensation from the knees down into the feet in a glove-stocking distribution. Straight leg raising tests were negative. She had good ability to heel and toe walk.

We reviewed her MRI scan which dates back to May 20, 2002, which was 12 days following her original injury. To my review, that appears to be stone-cold normal. I saw no evidence of significant disc degeneration and/or difficulties that would explain her current symptoms. From the history that she has had of other injuries to her lumbar spine while at work, specifically the incident in July, where she slipped on grease and falling to the floor, it may be prudent to consider redoing her MRI scan at this point. I suspect again it will not show any evidence of significant compression.

Claimant did undergo an MRI scan of her lumbar spine on October 14, 2002. This study resulted in the following conclusion:

1. Chronic degenerative change of the L4-5 facets manifested as a small 5.0 mm dorsolateral synovial cyst with normal hydration of the disc and no central or lateral canal encroachment.
2. Remaining lumbar discs and vertebral bodies are within normal limits but no focal disc protrusions or extrusions and no high-grade central or lateral canal encroachment in the lumbar region.

Claimant returned to Dr. Knox on November 14, 2002 with her new MRI scan in hand. He reviewed the scan and opined that “it appears to be basically stone cold normal.” He declined to offer surgery as treatment, recommending instead that Claimant work on “increasing her exercise tolerance and getting down to a more ideal body weight.”

Claimant underwent nerve conduction studies on December 6, 2002 and May 27, 2003. Both of these studies included Claimant’s left leg; both studies reported results “within normal limits.” On April 22, 2003, Dr. Knox noted his suspicion that “there is a significant element of symptom magnification to [Claimant’s] complaints.”

To be compensable, an injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i). As one of the elements required to prove a compensable injury, Claimant must sustain her burden of proving objective findings by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i); see also Mays v. Alumnitec, Inc., 76 Ark. App. 274, 278-79, 64 S.W.3d 772, \_\_\_ (2001) (finding that a claimant failed to prove a compensable injury by a preponderance of the evidence “because the abstract is devoid of any objective findings”). “Preponderance of the evidence” means evidence of greater

convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, \_\_\_ (1947).

I find that Claimant has not sustained her burden of proving a compensable injury by a preponderance of the evidence. Specifically, the record does not contain objective findings that establish a compensable injury.

Claimant notes that Dr. Knox's August 14, 2002 letter reports "significant spasm" upon examination. However, this finding occurred three months after her May 8, 2002 incident. In the interim, Claimant's condition began to improve in early June, but she sustained a fall at work later that same month. Given these facts, a preponderance of the evidence does not connect Dr. Knox's observation of spasm with Claimant's May 8, 2002 incident. Compare Ford v Chemipulp Process, Inc., 63 Ark. App. 260, 266-67, 977 S.W.2d 5, \_\_\_ (1998) (noting the absence of evidence to connect a finding of muscle spasms with an incident that occurred almost four months earlier); Ray v. Hillis & Schafstall, Full Workers' Compensation Commission Opinion filed July 20, 1999 (E810154) (noting that the proof did not sustain a connection between the incident and a finding of muscle spasms almost three months afterwards). It would require speculation and conjecture to attribute Dr. Knox's finding of spasms to Claimant's May 8, 2002 incident, given that her condition began to improve prior to a fall at work in June of 2002.

Although Claimant did not raise this point, another arguable objective finding must be addressed. Although Claimant was initially assessed with "HNP & radiculopathy," Dr. Lincoln subsequently assessed low back pain as well. He prescribed Flexeril, Skelaxin, and other medications to treat Claimant's condition. And, on May 16, 2002, Claimant

reported to her physical therapist “a great deal of twitching and pain in the left leg.”

This proof raises the possibility of an objective finding based on the Arkansas Supreme Court decision in Fred’s, Inc. v. Jefferson, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (March 31, 2005). On appeal, respondents argued the absence of objective medical findings, contending “that the Commission erroneously relied on the ALJ’s speculation that medicine prescribed to Jefferson was for muscle spasms, because no physician or physical therapist reported witnessing or feeling Jefferson’s muscle spasms.” Id. at \_\_\_, \_\_\_ S.W.3d at \_\_\_. The court applied the substantial evidence standard of review to affirm a Commission decision in favor of compensability. The court noted:

This case is distinguishable from Estridge [v. Waste Management], 343 Ark. 276, 33 S.W.3d 167 (2000)], however, in that [the doctor] did not indicate specifically what the medications were for or specifically why he prescribed physical therapy. Yet, following the logic expressed in Estridge, a reasonable inference from the chronology of events is that the medication and physical therapy were prescribed to aid Jefferson and to treat her injury. Any other construction of these events does not withstand scrutiny or pass the test of reasonableness.

Id. at \_\_\_, \_\_\_ S.W.3d at \_\_\_.

The Fred’s, Inc. v. Jefferson opinion does not compel a decision in Claimant’s favor. The supreme court’s duty to apply the substantial evidence standard of review on appeal is distinct from the Commission’s duty to apply the preponderance of the evidence standard and weigh the evidence to make a determination in the first instance. Compare Ark. Code Ann. § 11-9-711(b)(4)(D)(standard of appellate review) with Ark. Code Ann. § 11-9-704(c)(2), (4) (Commission’s duty to apply the preponderance of the evidence standard and impartially weigh evidence). The Fred’s, Inc. v. Jefferson opinion makes it clear that a doctor’s diagnosis and prescriptions may constitute substantial evidence of

objective findings, but the Commission still has the initial duty to weigh all of the evidence.

Of course, there is additional evidence in the record. First, Claimant's May 20, 2002 MRI scan, performed some twelve days after the incident, produced normal findings: "No evidence for herniated nucleus pulposus. No compression fractures are noted. The disks are well preserved." Second, no doctor or physical therapist recorded the existence of objective findings prior to Claimant's June of 2002 fall. Although Claimant reported "twitching" in her left leg on May 16, 2002, that was not observed by any medical professional. Third, Dr. Knox opined that "there is a significant element of symptom magnification to [Claimant's] complaints." This calls into question the credibility of Claimant's reports to her medical providers, including those reports which formed the basis for her diagnosis and prescriptions. Finally, the medical records indicate that Claimant's symptoms began to abate in June of 2002, prior to her fall at work.

I find that the foregoing evidence outweighs the doctor's diagnosis and prescriptions. The preponderance of the evidence - the normal MRI study, the absence of any recorded objective findings prior to her June fall, the symptom magnification, and the evidence that Claimant's symptoms abated before her fall at work - all weigh against the existence of an objective finding based upon the diagnosis and prescriptions.

To summarize, Claimant failed to prove objective findings in support of the medical evidence. Regardless of the other elements of a compensable injury that could be demonstrated, this claim is not compensable. It should be noted that this opinion makes no determination regarding the compensability of Claimant's June of 2002 fall.

#### **B. Compensability of Claimant's Depression**

Claimant testified to experiencing depression following the May 8, 2002 injury. She

has been treated by a psychiatrist, Dr. Steve Austin. She claims that her nerves were affected because her boss treated her badly after she filed her compensation claim. She fears being around people and dislikes shopping at Respondent's store. However, on cross-examination, she testified that she is a full-time student and that she does shop at Respondent's store because it's "cheaper." Claimant's sister and mother corroborated her testimony concerning her depression.

An Adult Diagnostic Assessment form in the record indicates that Claimant was referred to receive treatment for her depression and anxiety; the form indicates that her date of admission into the treatment program was June 1, 2004. This form notes that Claimant was "[d]epressed past 2 yrs, after OTJ back injury at Walmart." A Psychiatric Evaluation dated June 4, 2004 is in the record; it is signed by "R. Stephen Austin, M.D." This form makes reference to diagnostic impressions of, among others, dysthymic disorder, panic disorder without agoraphobia, and simple phobia. It is difficult to tell whether these impressions make reference to the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. A Medication Review/Treatment Plan Update dated July 2, 2004 makes reference to the same diagnostic impressions. A July 2, 2004 "To Whom It May Concern" letter in the record is signed by "R. Steve Austin, M.D., Psychiatrist." It states that Claimant "has been a client at Ozark Counseling Services, Inc. since June 1, 2004. She has been diagnosed with Dysthymic Disorder and Panic Disorder without Agoraphobia." There are other handwritten notes from Dr. Austin in the record.

A mental injury is not a compensable injury unless it is caused by a physical injury to the employee's body. Ark. Code Ann. § 11-9-113(a)(1). This means that a physical injury must precede and cause the mental injury in order for the mental injury to be

compensable; the mental distress must be the result of the Claimant's own physical injuries. See Amlease, Inc. v. Kuligowski 59 Ark. App. 261, 264-65, 957 S.W.2d 715, \_\_ (1997). Further, the claimed mental injury shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence. Ark. Code Ann. § 11-9-113(a)(1). Finally, no mental injury is compensable unless it is diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders. Ark. Code Ann. § 11-9-113(a)(2).

I find that the Claimant has not sustained her burden of proving by a preponderance of the evidence that she suffered a compensable mental injury. First, she did not prove that a compensable physical injury caused her mental injury because she failed to prove a compensable physical injury. Second, there is no proof in the record that Claimant's depression has been diagnosed by a licensed psychiatrist or psychologist. While the July 2, 2004 "To Whom It May Concern" letter notes that Dr. Austin is a psychiatrist, there is no proof that he is actually licensed by the appropriate organization.

### **C. Remaining Issues**

It is not necessary to discuss Claimant's request for reasonable and necessary medical benefits, temporary total disability benefits, permanent partial disability benefits, or an attorney's fee. Because Claimant failed to establish by a preponderance of the evidence one of the requirements for establishing the compensability of her alleged injury, she failed to establish the compensability of her claim, and compensation must be denied. Reed v. Conagra Frozen Foods, Full Workers' Compensation Commission Opinion filed February 2, 1995 (E317744); see Ark. Code Ann. §§ 11-9-102(4)(F), -715.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on May 8, 2002 and at all other relevant times.
3. Respondent controverts this claim in its entirety.
4. If called to testify, the testimony of Claimant's husband, Christopher Willis, would corroborate Claimant's testimony.
5. Claimant's Motion to Recuse should be, and hereby is, denied. In other cases, the Commission rejected the arguments made by Claimant in this case concerning the constitutionality of the Commission. Further, the rule of necessity mandates that I remain on this claim.
6. Claimant's challenges to the constitutionality of the Commission's adjudication process should be, and hereby are, rejected. Claimant gives no reason to revisit prior Commission decisions upholding the constitutionality of its adjudication process.
7. Claimant did not sustain her burden of proving by a preponderance of the evidence that her May 8, 2002 incident is a compensable injury, because the record does not contain objective findings in support of Claimant's medical evidence as required by Ark. Code Ann. § 11-9-102(4)(D). The proof does not sustain a connection between the May 8, 2002 incident and Dr. Knox's August 14, 2002 report of "significant spasm," particularly given that Claimant's symptoms began to abate prior to sustaining a fall at work in the interim. Further, the doctor's diagnosis and prescriptions do not constitute objective findings when weighed against Claimant's normal MRI scan twelve days after the incident, the failure of any medical professional to report the existence of objective findings,

Claimant's symptom magnification, and the evidence that her symptoms began to abate prior to her fall at work.

8. Claimant did not sustain her burden of proving a compensable mental injury. She did not prove that a compensable physical injury caused her alleged mental injury and there is no proof in the record that Claimant's depression has ever been diagnosed by a licensed psychiatrist or psychologist.

9. Because Claimant failed to prove any compensable injury, it is not necessary to discuss the remaining issues in this case.

**ORDER**

Claimant failed to sustain her burden of proving that she suffered a compensable injury. Therefore, the above claim is denied and dismissed.

**IT IS SO ORDERED.**

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D. FRANKLIN AREY, III,  
Administrative Law Judge

DFA/ml