

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503628

MARIA RODRIGUEZ, EMPLOYEE	CLAIMANT
J. McDANIEL CO., INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INS. CO., CARRIER	RESPONDENT

**OPINION FILED MAY 3, 2006**

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE JAMES A. ARNOLD, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed October 28, 2005.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

4. {sic} The claimant is entitled to a weekly compensation rate of \$173.00 for temporary total disability and \$154.00 for permanent partial disability.

5. The claimant is entitled to a weekly compensation rate of \$103.00 for both temporary total disability and permanent partial disability.

6. The claimant has failed to prove by a preponderance of the evidence in light of Arkansas law that she sustained a compensable injury while working for the respondent on March 22, 2005. Arkansas law requires objective medical evidence of injury before a compensable injury can be found and this claimant has failed to provide any objective medical evidence of injury.

7. This claim should be denied in its entirety.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

On October 28, 2005, an Administrative Law Judge issued a decision finding that the claimant did not sustain compensable injuries to her neck or hip. The Administrative Law Judge denied the claim based on a finding that the claimant had not shown objective findings to support a compensable injury. The Majority now affirms and adopts that decision as their own. After a de novo review of the record, I find that the decision of the Administrative Law Judge should be reversed. As such, I must respectfully dissent.

On March 22, 2005, the claimant was working on an assembly line requiring her to put small towels into boxes. The job required the claimant to stand between a conveyor belt and a table. To complete her job duties she would reach behind her to get towels off the table and then turn around and place them in the box. The claimant testified that she also stood on, "a sort of pallet" while doing her job. She indicated that as she was turning around to get additional towels, she slipped and hit her right hip on the line. She

further testified that as she fell, she hit her neck. Contradictory testimony was presented regarding whether the claimant fell to the ground; however, there appears to be no dispute that a fall of some nature did occur.

The claimant testified that she reported her injury immediately and that Melinda McDaniel, Operations Manager, took her to the emergency room. The claimant said that she suffered from swelling in her hip and neck immediately after the time of injury. McDaniel denied seeing any visible signs of injury immediately after the accident and said the claimant only complained of pain in her hip.

A report from the emergency room, dated March 22, 2005, indicated that the claimant complained of right-sided neck pain and right hip pain. The report also provided the claimant was injured due to falling and hitting a conveyer belt. A portion of the report with the heading "PHYSICAL EXAM" listed various portions of the bodies and various symptoms. Under the area entitled "EXTREMITIES", the words "hip tenderness(R)" were circled. There was no notation on a blank line to the right of that language. The report also

contained a heading entitled "CLINICAL IMPRESSION". In that portion of the report, the words "Hip Contusion R" were circled. There was also a notation with handwriting stating, "lumbosacral sprain". The report further provided that the claimant was prescribed Robaxin and Vicodin.

The claimant testified she did not return to work because she was in pain. She next saw a doctor on April 11, 2005. At that time the claimant was treated by Dr. Anthony Yawn. He diagnosed the claimant with a lumbar back strain. He also prescribed Anaprox and indicated the claimant should, "apply moist heat to affected area twice a day." He also restricted the claimant from lifting more than 20 pounds and from repetitive bending or twisting from the waist.

The claimant testified that approximately one month after her injury, she attempted to return to work, but the respondent declined to return her to work. She further indicated that she still suffers from pain in her neck and hip but said she has been unable to seek medical treatment because she could not pay for it.

At the time of the previous hearing, the only issues to be litigated were compensability, entitlement to medical benefits, and attorney's fees. The Majority, by affirming and adopting the decision of the Administrative Law Judge denies the claimant payment of medical benefits due to a finding that no objective medical findings existed.

To be compensable, an injury must be established by medical evidence supported by objective findings. Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). The Supreme Court of Arkansas has held that prescribing medication in order to treat muscle spasms is sufficient to establish the existence of objective findings. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), See also, Fred's, Inc.; and Royal and Sun Alliance v. Deborah Jefferson, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2005).

In this instance, the claimant was seen at the emergency room immediately after her injury. The report noted that the claimant had tenderness on her right hip and

indicated that the claimant suffered from a contusion. The report further diagnosed the claimant with a lumbosacral sprain and indicated that the claimant was given Robaxin and Vicodin. In my opinion, this evidence shows that the claimant had objective findings in the form of having a contusion and of suffering from muscle spasms.

The respondents argue that because contradictory testimony regarding whether the claimant fell to the floor was given, the claimant's testimony that she injured her hip and neck should be discredited. I find this argument to be unpersuasive. All parties agree that the claimant fell and hit her hip either on a metal table or on a conveyor belt. Accordingly, I do not find the issue of whether she fell against a conveyor belt or to the floor to be of any importance. Regardless of whether the claimant fell to the floor, it is undisputed she did fall and that she complained of pain in her hip and neck on the day of the injury. Likewise, it is undisputed that the claimant had no history of neck or hip pain prior to the incident in question.

The Majority relies heavily on the deposition testimony of Dr. Yawn. Dr. Yawn testified that when he examined the claimant on April 11, 2005, he observed no objective findings of an injury. He further indicated that a notation of "contusion" does not necessarily mean the doctor observed a bruise. He testified,

Q. And then we'll move on. If you put down in a report a diagnosis of contusion, not in your physical findings portion of your report but in your diagnosis portion of your report, can that diagnosis be formed basically in two ways, either visually observing a bruise or making a diagnosis of a contusion based upon a patient's statement to you that they are tender in that area and have struck something there?

A. Yes sir, that is correct.

Dr. Yawn further testified that he believed that if there was an actual observance of a bruise, it would often be noted in the portion of the report under physical exam.

Dr. Yawn opined that a contusion can also refer to tenderness rather than to an actual bruise. He said,

A contusion can actually be a tenderness, but not actually have a

darkened or pigmentation or bruising type that we see, because - especially initially it can - the bruise that we typically talk about actually may not show up initially. It may take, you know, several hours before visibly you can see a bruise, but have a tenderness at a site.

With regard to the observance of muscle spasms, Dr. Yawn testified that he did not personally observe muscle spasms in the claimant's hip or neck, but said that he did note tenderness. He also indicated Robaxin was commonly used as a muscle relaxer, and had an ancillary effect of acting as a pain reliever. He further said that it would not be unusual for a doctor to prescribe a muscle relaxer despite not actually witnessing muscle spasms. Dr. Yawn also indicated that it would be more common for a patient to complain of pain rather than specifically indicating that they suffered from muscle spasms.

The Majority opines that because there was no specific notation on the emergency room note that the claimant had a muscle spasm or a discoloration, no objective findings exist. I believe this finding is erroneous. While I

acknowledge the testimony of Dr. Yawn as to what his belief of ordinary practice would be, I note that he was not the treating physician at the emergency room. I note, specifically, his testimony, that he does not have access to the emergency room in which the claimant was treated. Furthermore, his testimony does not indicate that a physician would always make notations of discoloration rather than noting a contusion existed. Likewise, his testimony does not indicate that muscle spasm would always be noted or that prescription medication would always be given absent any objective signs of injury. I also note that the report in question was given in an emergency room whereas Dr. Yawn treated the claimant in a less hurried, clinical setting. As Dr. Yawn was not the treating physician at the emergency room and does not even have access to practice at that hospital, I find that his opinion as to what the physicians treating at that hospital would note and where they would note it is sheer speculation.

Dr. Yawn specifically testified that a patient would be more apt to complain of pain in their back than to

specifically complain of muscle spasms. In this instance, there is absolutely no indication that the claimant complained of muscle spasms. Yet, the emergency room doctor prescribed them for the claimant. While the report does not explicitly state the claimant suffered from muscle spasms, one can only conclude that the claimant did, in fact, suffer from muscle spasms, otherwise the treating physician would not have prescribed medication. In fact, in my opinion, pursuant to the holdings of the Court of Appeals in Estridge and Fred's Inc., the prescribing of those medications in itself, is proof that the claimant has objective findings of a compensable injury, particularly since the emergency room physician has not testified to the contrary.

Likewise, I find that it is unlikely that the treating physician would indicate the claimant suffered from a contusion or a bruise if he did not observe it. While the form in question contains the words "Hip contusion" under the section "CLINICAL IMPRESSION", the doctor, nonetheless took the trouble to circle that language and to go on and indicate the claimant suffered from a lumbosacral sprain.

Accordingly, I find it unlikely that the treating physician simply intended to "diagnose" the claimant with a contusion if he did not actually observe it.

Ultimately, I find that the claimant has shown that she sustained injuries to her neck and hip and that those injuries are shown by objective medical findings. The claimant's emergency room report specifically indicated the claimant suffered from tenderness and a contusion, and to try to discount that based off testimony of a physician that did not complete the reports in question is resorting to impermissible speculation and conjecture. Certainly, if the respondents had deposed the emergency room physician and he had testified that the claimant had no objective findings immediately after her injury, then the outcome of this case might be impacted. However, in this instance, there is absolutely no dispute that Dr. Yawn had no input or firsthand knowledge as to why or what the emergency room doctor meant when he completed his report. Likewise, the claimant's emergency room report specifically indicates the claimant was given muscle relaxants and suffered from a

contusion. As such, in my opinion, the claimant has shown by a preponderance of the evidence that she sustained a compensable injury shown by objective findings. Accordingly, I would have reversed the decision of the Administrative Law Judge.

For the aforementioned reasons, I must respectfully dissent.

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SHELBY W. TURNER, Commissioner