

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410692

ANDY SEVERNS, EMPLOYEE	CLAIMANT
PILGRIM'S PRIDE CORPORATION, EMPLOYER	RESPONDENT
AMERICAN ZURICH INSURANCE, CARRIER	RESPONDENT

**OPINION FILED JANUARY 24, 2006**

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed August 9, 2005.

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

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on August 10, 2004 and at all other relevant times.

3. Claimant did not sustain his burden of proving by a preponderance of the evidence that his August 10, 2004 incident is a compensable injury. Specifically, 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).

4. Claimant is not entitled to a change of physician, or in the alternative, an independent medical evaluation, because, under Ark. Code Ann. § 11-9-510, Respondents' liability has not been proven. In the absence of a finding of compensability, this relief cannot be awarded.

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

The claimant appeals the decision of the Administrative Law Judge rendered on August 9, 2005. The Majority now affirms and adopts that decision as their own. By relying on the decision of the Administrative Law Judge as their own, the Majority finds that the claimant did not sustain a compensable injury shown by objective medical findings. They further find the claimant is not entitled to

a change of physician or to an independent medical examination.

After a de novo review of the record, I find that the Administrative Law Judge's decision should have been reversed. In making this finding, I rely on the decisions of Estridge v. Waste Management, 343 Ark. 276 (2000); 33 S.W.3d 167 and Fred's, Inc. v. Jefferson, \_\_\_ Ark. \_\_\_ S.W.3d \_\_\_ (March 31, 2005). In my opinion, those decisions stand for the proposition that when a claimant is prescribed medication for muscle spasms, then they have established they have objective medical findings of a compensable injury. Accordingly, in my opinion, the Majority now errs as a matter of law when they fail to rule the claimant had objective medical findings of a compensable injury.

The claimant's job consisted of stacking 80 pound totes of chicken. On August 10, 2004 the claimant was throwing a stack of chicken and his right foot slipped on an ice covered metal grate. The claimant fell and hit his hip and left shoulder. Immediately after the incident the claimant went to the company nurse. The claimant was

subsequently taken to the hospital. An x-ray was performed and returned with negative results. The claimant was instructed to use ice on his back and was prescribed Toradol. He was also given a lumbar belt and diagnosed with a lumbar sprain/strain.

The next day the claimant presented to the company doctor, Dr. Krishna K. Reddy. Dr. Reddy diagnosed the claimant with a lower back sprain. He further prescribed the claimant Flexeril and told him to use a moist heating pad on his back. Lastly, Dr. Reddy restricted the claimant to perform only light duty work. The claimant performed light duty work for two to three weeks. He then returned to a job "throwing chickens". The job required heavy lifting but was at a slower pace than the claimant's initial job.

The claimant continued to suffer pain in his back and hip. On October 11, 2004, Dr. Reddy again prescribed the claimant Flexeril. On the doctor's note he indicates the claimant attributed the pain to an incident in August 2004. He also prescribed Ultram and told the claimant to use a moist heating pad. At that time the claimant completed a

Loss Incident Investigation Report indicating that his injury was sustained on August 10, 2004. On October 11, 2004 the claimant also requested to see a doctor other than Dr. Reddy, indicating that he did not feel Dr. Reddy's treatment was beneficial.

The claimant's appeal was dismissed on the sole basis that he had not sustained a compensable injury supported by objective medical findings. I note that the Administrative Law Judge further indicated that the respondent contends the claimant might have sustained an additional injury in October 2004; however, that issue was not litigated. Further, the respondent's only objection to the change of physician appears to be that the claimant sustained no objective findings. Accordingly, I will limit my discussion to the issue of whether the claimant sustained a compensable injury supported by objective medical findings.

The Majority, by affirming the decision of the Administrative Law Judge as their own, reasons the Commission is not held to the same standard of review as the

Supreme Court. They opine that the Commission would have a duty to consider the doctor's diagnosis and prescriptions, but will still be required to consider all evidence. They further indicate that Fred's Inc., is distinguishable from the present case because the claimant in that case made at least one documented complaint of muscle spasms, whereas in this case the claimant did not. In my opinion, the Majority errs in their application of Fred's Inc.. Furthermore, in my opinion, they fail to properly consider the language contained in Estridge.

In Fred's Inc. the claimant worked as a stock person. She was retrieving boxes on an aluminum ladder. The ladder collapsed and the claimant fell onto a concrete floor and landed on her back. The claimant presented with complaints of having muscle spasms. The claimant was diagnosed with a back contusion/strain. She was later prescribed Vistaril, Lorcet Plus, Flexeril, Prednisone, and Celebrex. She was also prescribed physical therapy. The medical reports contained no notes regarding the reason for

the claimant's prescriptions and physical therapy. See, Fred's Inc.; supra.

The Arkansas Supreme Court affirmed the Commission's finding that the evidence was sufficient to showing objective medical findings. They opined that,

...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.

The above language is indicative that in a situation where a claimant is prescribed a muscle relaxant when immediately following an injury, objective findings exist. While in the present case the claimant did not present with complaints of muscle spasms, the fact remains he was given muscle relaxants. Accordingly, in my opinion, there is a presumption that objective findings exist when muscle relaxers are prescribed. Furthermore, in my opinion, the evidence in the present case does not rebut that presumption.

When looking at the Estridge case, it becomes even more clear that prescribing muscle relaxants leads to a presumption that objective findings exist. In Estridge, the claimant reported a back injury after carrying and nearly dropping a railroad tie. He was diagnosed with a low back strain and radicular pain. The claimant was further prescribed Valium, "as needed for muscle spasms." The Arkansas Supreme Court found that the claimant did have objective medical findings. This decision was in part based on the fact that the claimant received muscle relaxants. The Court indicated that, "A doctor would not prescribe medication directed to be taken 'as needed for muscle spasm' if he did not believe muscle spasms were existent. This language is indicative that even in a situation where the claimant does not complain of having muscle spasms, but where they are prescribed, objective findings are presumed to exist.

In the present case, there is no dispute that the claimant was prescribed muscle relaxers immediately after the accident, the day after the accident, and on October 11,

2004. Furthermore, there is no evidence in the record to indicate that the claimant's testimony that he fell on October 10, 2004 is not credible. Likewise, Denzel Ott, Jr., Witness, testified that the company nurse requested he pick up the claimant because he was taking muscle relaxers. Ott testified that the nurse called him and that the nurse told him the claimant had an accident and had been administered pain medication and muscle relaxers. Accordingly, she asked him to retrieve the claimant.

Further indicating that the claimant had objective findings is the note on the emergency room report indicating the claimant should treat his back with ice. Additionally, the next day, Dr. Reddy instructed the claimant to use a heating pad on his back. Each of these treatments suggest the claimant had swelling in his back. Lastly, I note that the employer's own doctor diagnosed the claimant with a strained back and restricted him from performing his usual work, illustrating that the claimant's injury was a tangible injury supported by objective findings.

The Majority argues the present case is distinguishable from Fred's Inc., in that the claimant did not complain of a spasm as the claimant in Fred's Inc. did. However, the fact remains that in the present case the claimant was given muscle relaxers by two doctors and the nurse told the Ott that the claimant was being given muscle relaxers to treat his sprain. Accordingly, I find that the lack of a complaint of spasms by the claimant does not make Fred's Inc. distinguishable.

Next, I address the Majority's argument that the Commission is held to a different standard of review than the Commission, and that therefore, the evidence is indicative that the claimant did not sustain objective findings. I first note that the Commission is held to a less stringent standard of review than the Court of Appeals or the Arkansas Supreme Court. The standard of review for the Workers' Compensation Commission is a de novo review. As stated by the Court of Appeals in Willmon v. Allen Canning Co., 38 Ark. App. 105; 828 S.W.2d 868 (1992),

In White v. Air Systems, Inc., 33 Ark. App. 56, 800 S.W.2d 726 (1990), we

explained the Commission's duty in reviewing a decision of an administrative law judge.

The Arkansas Workers' Compensation is not an appellate court. It is, instead, the factfinder, and as such its duty and statutory obligation is to make specific findings of fact, on de novo review based on the record as a whole, and to decide the issues before it by determining whether the party having the burden of proof on an issue has established it by a preponderance of the evidence. (Internal citations omitted).

However, the Court of Appeals is held to a more stringent and restrictive standard of review. In Burlington Ind. V. Pickett, 64 Ark. App. 67; 983 S.W.2d 126 (1998), the Court of Appeals indicated,

When reviewing a decision of the Workers' Compensation Commission, this court views the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirms that decision if it is supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. We do not reverse a decision of the Commission unless we are convinced that fair-minded persons with the same facts before them could not have arrived at the conclusion

reached by the Commission. The issue on appeal is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; if reasonable minds could reach the Commission's conclusion, we must affirm its decision. (Internal citations omitted)

As the language above indicates, the Court of Appeals is held to a more restrictive standard in regard to when it can reverse a decision of the Commission. In spite of this, in both Estridge and in Fred's Inc., the Court found the claimant had shown objective medical findings. In particular I note the language contained in Fred's Inc. in reference to the claimant's medication indicating, "Any other construction of these events does not withstand the scrutiny or pass the test of reasonableness." In my opinion, the facts of that case are so similar to the facts in the current case that the above language is indicative that the claimant in the current case has shown objective medical findings. Accordingly, I find the Majority's rhetoric that the Commission's standard of review allows a denial of benefits unconvincing.

In conclusion, I find that the claimant provided a credible, consistent explanation of how his injury occurred. His testimony is corroborated by the medical records indicating he sustained a sprained back and prescribing him muscle relaxers. I find the present case to be analogous to Estridge and Fred's Inc. Pursuant to Estridge and Fred's Inc., I find that objective findings do exist and that the claimant should be entitled to a change of physician.

For the aforementioned reasons, I must respectfully dissent.

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SHELBY W. TURNER, Commissioner