

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205441

JENIFER WILLIS, EMPLOYEE

CLAIMANT

WAL-MART, INC.,  
A SELF INSURED EMPLOYER

RESPONDENT

**OPINION FILED MARCH 27, 2007**

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

Claimant represented by HONORABLE FREDERICK SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN ,Attorney  
at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the  
Administrative Law Judge filed April 19, 2006.

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 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.

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.

---

OLAN W. REEVES, Chairman

---

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

An Administrative Law Judge issued an Opinion dated April 19, 2006. First, the Judge held that the claimant's motions regarding his recusal and the constitutionality of the Commission were without merit and should be denied. The Judge further found that the claimant had not established that there was any objective evidence supporting the existence of an injury as a result of a job related accident and, accordingly, she was not entitled to any additional medical or disability benefits. From that decision, the claimant filed an appeal of the Judge's decision, specifically including his denial of the pretrial motions. The Majority now affirms and adopts the decision of the Judge as their own.

After a de novo review of the record, I concur with the Majority's decision regarding the claimant's pretrial motion. However, I must respectfully dissent to their finding that the claimant did not sustain a compensable injury on May 8, 2002. Furthermore, I must

respectfully dissent from their decision to deny the claimant medical treatment and denying the claimant additional permanent and temporary disability benefits.

I first find that the claimant has shown that claimant has met her burden of proof in showing the existence of an injury as supported by objective evidence. In discussing this issue, I note that there appears to be little dispute that the lifting incident described by the claimant occurred. According to the claimant's testimony, on May 8, 2002, she was working in the bakery department at the respondent's store in Mountain Home, Arkansas. She stated that she was setting a case of "mini pies" onto a cart when she felt a sudden and severe pain in her lower back. The claimant testified that she almost immediately began suffering from pain and numbness that radiated into her leg, forcing her to sit down. The claimant immediately notified her supervisor. The claimant's sister, who also worked in the store, testified that she helped the claimant to the break room, and later took her to the doctor. The claimant's testimony was further corroborated by Rebecca Wohlers, a

coworker. Ms. Wohlers testified that she saw the claimant in the store's break room immediately following the accident and that the claimant told her at that time that she had injured her back. Ms. Wohlers testified that the claimant was pale and shaken and appeared to be in severe pain. Further, at the hearing, during a discussion between the Administrative Law Judge and the respondent's counsel, the only objection to compensability raised by the respondent was whether the claimant satisfied the requirement of proving an injury by objective findings.

In my opinion, the claimant has met her burden of establishing that she was injured in a job-related accident and that the existence of the injury is supported by objective medical findings. The claimant first received medical treatment on May 8, 2002, the date of her injury. On that date, she saw Dr. Lance Lincoln, the respondent's selected physician, whose progress notes reflect that she suffered a sharp pain in her lower back while carrying three cases of mini pies. He notes further that she is having pain from her lower back through her leg to her left ankle. He

finds that her lower back is tender and that she has positive straight leg raising tests. Lastly, Dr. Lincoln stated his assessment that the claimant was suffering from a HNP radiculopathy. While the doctor did not specifically mention that the claimant was suffering from muscle spasms, he did prescribe Skelaxin, a muscle relaxant usually prescribed for muscle spasms. Dr. Lincoln saw the claimant again on May 13, 2002, and he notes that she is still taking her Skelaxin.

Dr. Lincoln also referred the claimant to physical therapy. In a physical therapist report dated May 13, 2002, the physical therapist reviewed the claimant's symptoms and outlined a physical therapy plan. In an addendum approving the treatment plan, Dr. Lincoln noted that the claimant was suffering from neuralgia/neuritis. Those conditions refer to pain and other radicular symptoms along a nerve area and are frequently accompanied by muscle spasms and loss of muscle tone. See Tabers Cyclopedia Medical Dictionary, 15<sup>th</sup> Edition.

Subsequent reports from Dr. Lincoln and from the physical therapists who were seeing the claimant, stated

that she was having radicular symptoms such as pain such as pain radiating from her lower back into her leg.

Interestingly, Dr. Lincoln later adds Celebrex, an anti-inflammatory medication, to the list of the claimant's medicines. He also changes her from Skelaxin to Flexeril, a different anti-spasm medication.

Eventually, the claimant underwent a lumbar MRI and was referred to Dr. Luke Knox, a Fayetteville neurosurgeon, for evaluation. In his report of August 14, 2002, Dr. Knox states that the MRI scan did not reveal disc herniations or other reasons for the claimant's radicular symptoms. However, he did specifically note the presence of muscle spasms in the claimant's back.

In evaluating this medical evidence, the Majority notes that Dr. Lincoln had prescribed Skelaxin to the claimant. They correctly find that this medication is often prescribed to treat muscle spasms. The Majority also cites prior Supreme Court Opinions which had held that muscle spasms were objective findings sufficient to support the existence of a compensable injury, and that it was proper to

infer the existence of muscle spasms based upon a doctor's prescription of an anti-spasm medication. However, the Majority still concludes that the claimant had not established that there was any objective evidence of an injury. Prior Supreme Court decisions were disregarded because of the Majority's conclusion that, "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."

The Supreme Court Opinions that the Majority is referring to is Estridge v. Waste Management, 343 Ark. 276, 33 S. W. 3d 167 (2000) and Fred's Inc. v. Jefferson, 361 Ark. 258, \_\_\_ S. W. 3d \_\_\_ (2005). In Estridge, the Supreme Court noted that a prescription issued by a doctor stating that the medicine was for "muscle spasm" would meet the criteria for a claimant to establish that there was objective evidence of an injury. Since that time, that ruling has been followed by this Commission and the Appellate Courts of this state. In the Fred's Inc. decision,

the Court was presented with a situation in which a physician had not specifically noted the presence of muscle spasms in treating the claimant, but did prescribe the claimant medication to treat that condition. The Court once again held that a prescription for a recognized anti-spasm medication was sufficient to satisfy the objective evidence requirement.

In my opinion, since the claimant's treating physician prescribed her medications which treat muscle spasms and inflammation, both objective findings, and the presence of objective findings were confirmed in reports from Dr. Lincoln dated August 7, 2002 and Dr. Knox dated August 14, 2002, the claimant has offered sufficient evidence to meet the requirement that she established the existence of her injury by objective medical findings. In my opinion, the facts of this case are directly in line with those set out in the Fred's Inc. Opinion. In that case, as is the situation here, there was little doubt that the claimant had been involved in a job-related accident. The employer referred the claimant to a doctor who began

treating her and prescribed Celebrex and Flexeril, two medications that were also prescribed to the claimant in the present case. The Fred's Inc. Opinion also noted that the claimant had complained of muscle spasms. Likewise, in the present case, the claimant advised Dr. Lincoln that her leg and back were shaking (see Dr. Lincoln's report of May 13, 2002) and she told the physical therapist that her back and leg muscles were twitching (see physical therapy report of May 13, 2002). It appears to me that the facts of this case are nearly identical to the facts stated in the Fred's Inc. case. I also note that the Commission reached a similar result with essentially the same facts in Smith v. O'Reilly Automotive Inc., Full Commission Opinion, April 18, 2006 (F303464 and F303465). In that case, the Commission also held that the presence of a prescription for medication commonly used to treat muscle spasms was enough to constitute an objective finding.

The Majority's decision to disregard the previous Supreme Court precedent is apparently based upon his conclusion that while the presence of anti-spasm medication

could be sufficient to meet the criteria of objective evidence, the Commission could disregard it if it chose to do so. However, I believe this conclusion is clearly contradicted by the Supreme Court. In Fred's Inc. v. Jefferson, supra, the Supreme Court specifically stated:

What is disputed here, as was the case in Estridge, is whether Jefferson presented proof of objective medical evidence and whether there was a causal connection between the injury and the medical treatment. This case is distinguishable from Estridge, however, in that Dr. Rhodes 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.* (Emphasis added).

I believe that the Supreme Court's past decisions compel a result contrary to that reached by the Majority. The claimant in this case was clearly involved in a lifting accident at work. She immediately sought medical treatment for which she was prescribed anti-spasm and anti-

inflammatory medications. She was also referred to physical therapy. She advised both her doctor and her physical therapist that she was suffering from uncontrolled muscle shaking and twitching. I believe that those factors, when combined with the statements of Dr. Lincoln that the claimant was suffering from a change in appearance of her leg and Dr. Knox's finding of muscle spasms, the claimant has clearly satisfied the requirement of establishing the existence of her injury with objective medical evidence. As noted in the highlighted portion of the above quote, the Majority's finding simply does not meet the Supreme Court's standard.

The next issue to be considered is the claimant's entitlement to additional medical treatment in the form of psychological counseling for her clinical depression. The Majority finds that the claimant had not met her burden of establishing that this treatment was the responsibility of the employer pursuant to Ark. Code Ann. §11-9-113. That section provides, in essence, that a mental injury is compensable only when it is the result of physical injury

and is diagnosed by a licensed psychiatrist or psychologist based upon the criteria established in the Diagnostic and Statistical Manual of Mental Disorders (DSM).

The Majority rejects the claim for benefits under this section because they find that the claimant had not sustained a compensable injury. They also question whether the claimant's treating physician was a licensed psychologist or psychiatrist who based his diagnosis on the DSM. I find the preponderance of the evidence shows the claimant sustained compensable physical injury, that the psychological condition was related to her physical injury, and that the opinion of her treating physician was in accordance with the statutory requirements.

The claimant testified that following her injury, she began feeling a considerable amount of stress surrounding her injury and her attempts to return to work. She stated that the pain from her back made it very difficult for her to carry out her job duties, which caused friction between her and her immediate supervisor. This friction often resulted in her being criticized, not only in

front of other employees, but store customers as well. When not at work, the pain in the claimant's back severely restricted her other activities, making it difficult for her to carry out tasks normally associated with being the mother of three children, one of whom suffers from Down Syndrome. The depression the claimant was suffering from became so severe that she frequently suffered anxiety attacks when going to work. These attacks were usually in the form of an inability to breathe and stomach upset in the form of nausea and diarrhea. Unfortunately, as the claimant's declining mental health combined with her back condition, her job performance declined even further, increasing her stress levels, aggravating her depression.

Because of the claimant's escalating symptoms of clinical depression, her treating physician eventually referred her to Ozark Counseling Services, where she was seen by Dr. Steven Austin. Dr. Austin, who identified himself in correspondence as a psychiatrist and an M.D., first saw the claimant on June 4, 2004. In his report of that date, he sets out a history of a job-related back

injury and the problems she was having at work in attempting to carry out her job duties, in spite of her limitations, and her increasingly hostile work environment. He noted that in addition to physical ailments with her back, she was suffering anxiety attacks approximately once a week. The doctor stated that the attacks were accompanied by chest tightness, breathing difficulties, dizziness, and hot flashes and sweating. He also found that her history was reliable and that she, "Wants to go back to work at sometime in the future and does not appear to be one who wants to go on disability and stay on it." Dr. Austin concluded his report by diagnosing the claimant as suffering from Dysthymic Disorder, based upon Section 300.4 of the DSM, and Panic Disorder without Agoraphobia, which corresponded to the DSM category 300.1. Dr. Austin also stated that the claimant should remain off work for at least one month. He extended his off work directive in a subsequent letter dated July 2, 2004, in which he stated that she would be off at least through her next appointment with him, which was September 27, 2004. After that visit, he directed that she

remain off work for another three months in a letter dated September 29, 2004. Dr. Austin continued keeping the claimant off work through May 20, 2005, which was the last medical report from him in the record.

I believe that the evidence clearly establishes that the claimant suffers from clinical depression with a related anxiety disorder. Further, I think the evidence is compelling that her problems in this regard are related to the effects of her job-related injury and that she is, accordingly, entitled to receive medical treatment for that condition at the respondent's expense. I also reject the Majority's suggestion that Dr. Austin is not a psychiatrist and could not diagnose her in accordance with the DSM. As indicated above, his June 4, 2004 report clearly relates the claimant's condition to the appropriate sections of the DSM. Also, he is employed by an organization that provides psychological counseling and treatment services and his correspondence indicates that he is psychiatrist and an M.D. This Commission routinely accepts the professional qualifications of medical providers based upon their

statements of the credentials. To do otherwise in this case would clearly be a contravention of accepted practice. I also find it impossible to believe that Ozark Counseling Services, not to mention the claimant's treating physicians, would allow her to be seen and treated by someone who represented himself as a psychiatrist and physician who did not, in fact, have those qualifications. For those reasons, I would have reversed the Judge's decision to deny the claimant additional medical treatment and ordered the respondents to provide such treatment to her.

The remaining issues to be decided are the claimant's entitlement to additional temporary and permanent partial disability benefits. The Majority declines to rule upon those issues because of their finding that the claimant had not sustained a compensable injury. I would have remanded this claim back to the Administrative Law Judge to decide those remaining issues before further action is taken.

First, the Commission has previously held that it is preferable for Administrative Law Judges to determine the

issues prior to the Commission's evaluating the claim. While the Commission is not bound by the findings or conclusions of the Administrative Law Judges, it is certainly beneficial to have the Judge rule on the disputed issues prior to the Commission's consideration of them.

Also, I note from my review of the discussion between the attorneys and the Administrative Law Judge prior to the hearing, there may have been some confusion over exactly what issues were in contention in regard to temporary disability. In a Prehearing Order dated July 18, 2005, the issues then under consideration were listed. One of the issues was, "Whether claimant is entitled to two weeks of temporary total disability benefits." The Order does not reference what time period the two weeks cover. At the hearing, the Judge listed the issues set out in the Prehearing Order. He then asked the attorneys if the issues were all still applicable. The claimant's attorney replied that they were and then stated, "There is a TTD of two weeks, but then, after -- Your Honor, there is -- well, we could argue the other TTD later, at a later time. She has

been off work as the result of the depression for a quite an extended period of time, we will reserve that issue until later. Unless Mr. Nebben is agreeable to do that." In response, the respondent's counsel stated, "No, we would have to either reserve it or I would have to object." The Court then stated that the issue regarding additional TTD would be reserved.

After reading that exchange, I am not entirely clear if the parties were reserving all issues regarding temporary total disability benefits or only those in addition to the two-week period referred to by the claimant's counsel. Also, it is nowhere specified in the hearing, or the Judge's Opinion, which two-week period the claimant was seeking temporary disability benefits for. As stated, the claimant was off a considerable period of time as a result of her depression. Also, she missed several periods of work prior to April 2004, as a result of her back problems.

Similar problems exist in regard to the request for additional permanent disability benefits. The record

contains a report from Dr. Knox stating that the claimant has sustained a 5% impairment to her body as a whole as a result of her back injury. Later, Dr. Knox clarifies his finding by stating that his opinion is based on subjective factors. On the other hand, Dr. Lincoln later authored a report indicating that he agrees with Dr. Knox that the claimant has sustained a 5% anatomical impairment as a result of her injury. However, there is no finding that the claimant reached the end of her healing period at any point prior to the time of the hearing. Also, the claimant was still being treated for her depression at the time of the hearing and was still complaining of problems in her back. Until such time as it can be determined whether the claimant has reached the end of her healing period and whether she has sustained any additional disability, either the result of her psychological condition or any other problems which may affect her back condition, it is not possible to accurately determine the extent of the claimant's permanent disability benefits.

It has specifically been held by the Arkansas Supreme Court that, where an issue is not sufficiently developed at the hearing so that additional evidence must be offered in order to resolve the issue, the Commission has the discretion to order a remand. See Grimes v. North American Foundry, 316 Ark. 395, 872 S. W. 2d 59 (1994). I believe that this is an appropriate situation to follow the procedure approved in the Grimes case. Not only is there some confusion over what issues were being considered in regard to the claimant's temporary disability benefits, I do not believe the claimant's entitlement to permanent disability benefits can be accurately determined until such time as the end of her healing period has been determined. I believe a remand to the Administrative Law Judge is the only way to resolve this problem.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

---

PHILIP A. HOOD, Commissioner