

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602968

KRYSTAL GRAY, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

**OPINION FILED MAY 21, 2008**

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 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 March 8, 2007.

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 November 30, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On November 30, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$182.00 for total disability and \$154.00 for permanent partial disability, should such benefits have been appropriate.

4. On November 30, 2004, the claimant sustained a compensable injury to her low back, in the form of a lumbar strain/sprain.

5. There is no dispute over the payment of medical expenses incurred for medical services provided to the claimant through December 14, 2004.

6. With the exception of the evaluation by Dr. Cyril Raben, on or about September 26, 2006, the claimant has failed to prove by the greater weight of the credible evidence that any medical services provided her for her various back and leg complaints, after December 14, 2004, represent "reasonably necessary medical services" for her admittedly compensable back injury of November 30, 2004. Specifically, she has failed to prove by the greater weight of the credible evidence that such medical services were necessitated by or connected with her admittedly compensable low back injury. The medical services provided to the claimant by Dr. Cyril Raben, at the time of his initial evaluation of the claimant under the authority of a change of physicians granted by this Commission, would constitute "reasonably necessary medical services" for the claimant's admittedly compensable lumbar injury under Ark. Code Ann. §11-9-508, Wal Mart Stores,

Inc. v. Brown, 82 Ark. App. 600, 120  
S.W.3rd 153 (2003).

7. The respondents have controverted the claimant's entitlement to any additional medical services for low back complaints, after December 14, 2004.

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 Hood dissents.

**CONCURRING & DISSENTING OPINION**

I must respectfully concur in part and dissent in part from the majority's opinion. Specifically, I agree that the respondent must pay for the September 26, 2006 evaluation by Dr. Raben. However, I respectfully dissent from the majority's finding that the claimant failed to establish by a preponderance of the evidence that any medical services provided her for her various back and leg complaints after December 14, 2004, represent reasonably necessary medical services for her compensable back injury of November 30, 2004. After a de novo review of the record, I find that, in addition to the evaluation by Dr. Cyril Raben on or about September 26, 2006, the claimant has proved by a preponderance of the evidence that the medical services she is seeking represent reasonably necessary medical services for her compensable back injury; therefore, I must respectfully dissent on this issue.

History

The claimant testified that on November 30, 2004, after scanning a 24-pack of soda and placing it into a

shopping cart, when she lifted up, she felt a pull in her back. The claimant testified that she reported the incident and the injury and was sent to Dr. Lewis. The claimant testified that Dr. Lewis examined her, prescribed medication and set her up with physical therapy. The claimant testified that she completed six weeks of physical therapy. The claimant testified that during the time period that she was undergoing physical therapy, she continued to have spasms, sharp pains, pulling and burning sensations in her lower back. The claimant testified that she had never had problems with her back prior to the 24-pack of soda incident at work. The claimant testified that after completing the physical therapy, she seemed to get a little better, and she continued to do her exercises, but that the pain did not go away. The claimant testified that she asked Wal-Mart if she could return to the workers' comp doctor in March of 2005, but that she was not allowed.

The claimant testified that she went on her own to see chiropractor Dr. Robert Hoffman. The claimant testified that she treated with Dr. Hoffman from March 2005 until the end of October 2005. The claimant testified that she also

saw another chiropractor, a Dr. Masters. The claimant testified that the chiropractic provided temporary relief, but that she was still having sharp pains in her back. The claimant testified that she continued to work at Wal-Mart. The claimant testified that she discovered that she was pregnant in February 2005. The claimant testified that the pain in her lower back remained the same in the weeks after she discovered she was pregnant as it was in the weeks before she discovered she was pregnant. However, the claimant testified that in March 2005 she went to the Emergency Room because she was having sharp pains and throbbing down her leg. The claimant testified that she went to see Dr. Lewis again after the ER visit but that additional medical treatment from Wal-Mart was eventually denied. The claimant testified that in May 2005, her back was hurting really bad, so her job duties at Wal-Mart were changed from cashier to people-greeter. ,The claimant testified that she went on maternity leave on August 10, 2005. After her maternity leave, the claimant did not return to work at Wal-Mart, she accepted a higher paying job elsewhere. The claimant testified that she saw a specialist,

Dr. Cyril Raben, who recommended an MRI, but that Wal-Mart denied payment.

The claimant testified that her medical bills were covered, except for co-pays, by her private health insurance through Wal-Mart. The claimant testified that she received short-term disability benefits while on maternity leave. The claimant testified that she is still having sharp pains in her lower back, and that every once in a while, she will get a throbbing pain in her leg. The claimant testified that her lumbar pain has not changed since she had the baby, although she acknowledged that the pain did increase during her pregnancy due to the weight-gain.

The medical record shows that the claimant was treated by Dr. Alice Thompson, for a lumbar sprain, reported as occurring on November 30, 2004 while lifting a 24-pack of soda, with Flexeril on December 3, 2004. The claimant was placed on light duty, no lifting, carrying, pushing, pulling greater than 15 pounds for one week, with no continuous standing or sitting, with a return visit in one week. No X-rays or MRI's were taken.

The claimant was seen by Dr. Rebecca Lewis on December 7, 2004. Dr. Lewis noted palpable muscle spasm. Physical therapy was recommended. The medical record shows that the claimant attended physical therapy. On December 14, 2004 Dr. Lewis stated that the patient's low back is "totally back to normal."

The medical record shows that on March 16, 2005 the claimant went to Siloam Springs Memorial Hospital ER reporting, in addition to other complaints, lower back pain. The emergency room records indicate that the claimant needed to follow up with workers' comp for additional physical therapy. The claimant returned to the Siloam Springs Memorial Hospital ER on March 21, 2005, again complaining of lower back pain, including "pinching." The claimant reported that the pain was related to a work-related injury in December, and that it has hurt on-and-off since December. The claimant was again advised by the ER doctor to follow-up with workers' comp for additional physical therapy. The claimant indicated at this ER visit that she was nine-weeks pregnant. A Form 3 report indicates that the claimant did, indeed, follow-up with workers comp on March 28, 2005.

A letter from Wal-Mart's doctor, Dr. Rebecca Lewis, to Dee Booher, with Claims Management, Inc., dated March 28, 2005, states:

This patient presents today with chief complaint of recurrence of her low back pain that she sustained on November 30, 2004, at Wal-Mart while lifting a 24-pack of colas. The patient does state that she is 10 weeks pregnant and is on prenatal vitamins; however, she was seen in the emergency room last Saturday for some significant pinching sensation in her low back which got worse over the course of the day. She states that the emergency room doctor "popped" her back into place and placed her on hydrocodone to take only as needed. She is seen here today in follow-up. She had originally been treated with some cortisone, gentle stretches and physical therapy when we saw her in December of 2004....**IMPRESSION:** Recurrence of lumbar sprain. **PLAN:** The patient does state she has been hearing a popping noise in her lower back. We did explain to her that with her stage of pregnancy, she will be having a chemical called relaxin released into her bloodstream at which time it does tend to loosen up the pelvic musculature and uterine ligaments. We did educate her on this. She needs to be mindful of her bending, lifting, twisting and pulling at work. Certainly some laxity of the sacroiliac joint may be expected with pregnancy and we did talk with her at length about this too. I am suggesting today that she go ahead and continue her strengthening exercises and apply warm, moist packs.

She should discontinue hydrocodone at the earliest in that this can cause fetal problems if she continues to take it at a high dose. She is aware of this and in agreement. We also talked with her about being on some light duty with no lifting over 15 pounds and no twisting and bending in the next one week. She will follow-up with us in one week for re-evaluation.

A "Form 3" dated March 28, 2005 indicates that Dr. Lewis checked a box next to the statement: "The claimant has suffered no permanent impairment due to his or her injury." However, Dr. Lewis also indicated that the claimant had a lifting restriction of no more than 15 pounds. Under description of accident, Dr. Lewis wrote "resolved lumbosacral sprain." Under diagnosis/treatment rendered, Dr. Lewis wrote: "recurrent L/S sprain."

The medical records show that the claimant returned to Dr. Lewis on April 4, 2005, at which visit the doctor noted "recurrent L-S sprain. Final report-no objective medical findings". A "Form 3" dated April 4, 2005 shows that under "Brief Description of Accident", Dr. Lewis wrote: "Recurrent L-S sprain." Under "Diagnosis/Treatment

Rendered" Dr. Lewis wrote: "Recurrent L-S sprain, Final report, no objective medical findings."

Again, Dr. Lewis wrote a letter to Dee Booher, dated April 4, 2005, stating:

This patient presents today with chief complaint of follow-up. She had injured herself originally on November 30, 2004, at Wal-Mart while twisting and lifting a 24-pack of cola cans. She states that she still feels like something is out in her back and still feels like she has some laxity over the SI joint. She states that her discomfort is constant unless she sits with one leg twisted over the other and lying on her side and then the pain seems to go away. She also has a history of intrauterine pregnancy diagnosed since we have been treating this injury. She has discontinued Vicodin....**IMPRESSION:** Persistent complaints of lumbar pain. **PLAN:** We did advise the patient that early pregnancy can have symptoms consistent with her complaints today. I feel that her compensable injury that she sustained back in November has no existing objective findings. We did talk with her about stretching and exercising at great length. We also reiterated how early pregnancy does induce production of relaxin, a hormone that can loosen pelvic musculature. She seems to understand this and is aware of it. We will final report this claim. The patient can call her Workers' Compensation carrier if she has any further questions.

The medical record contains chiropractic office notes indicating that the claimant received treatment for the lumbar region on January 3, 2006, February 16, 2006, February 17, 2006, March 10, 2006, April 28, 2006, July 6, 2006 and July 21, 2006. A chiropractic report from February 16, 2006 indicates that the claimant reported that her lower back pain was related to a "work comp. injury 2mo. before pregnancy."

A "New Patient Clinic Note" dated September 26, 2006 indicates that the claimant was seen by Dr. Cyril Raben. The report states:

Crystal began having onset of this pain some two years ago 11/2/2004 while working for Wal-Mart in Siloam Springs. Apparently she had sustained a lifting twisting injury while at work while lifting a heavy case of water. She had the immediate onset of pain and was seen and evaluated by her family physician who had suggested physical therapy, steroidal and nonsteroidal anti-inflammatories as well as analgesics. She failed to really improve on that regimen and eventually sought the assistance of a chiropractor at Siloam Springs and later has switched to a local Fayetteville chiropractor. This gives her temporary relief but then she once again has the exact same pain. Despite all this, she's managed to work through her difficulties and continues

to be employed with McKee Foods at this time. She notices that sweeping really increases her pain as does any torsion of her spine.

Under "Plan" Dr. Raben requested a lumbar MRI and recommended physical therapy.

Discussion

Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). A claimant does not have to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997).

Here, the majority found that the claimant failed to prove that the medical services she is seeking are

related to her compensable low back injury, as the majority found that the greater weight of the evidence establishes that the claimant had completely recovered from the effects of her admittedly compensable low back injury by December 14, 2004. The majority apparently agrees with the Administrative Law Judge's statement:

The medical evidence presented shows that the claimant's admittedly compensable low back injury was in the form of a lumbar strain or sprain. These types of injuries normally totally resolve with appropriate conservative treatment. The recovery time is generally within 30 days.

I find there to be absolutely no basis in the record to support the conclusion: "These types of injuries normally totally resolve with appropriate conservative treatment. The recovery time is generally within 30 days." I find that the medical record actually shows that the claimant had not recovered from the effects of her compensable injury on December 14, 2004, the date the majority, by affirming and adopting the Administrative Law Judge, has arbitrarily set as the claimant's date of maximum medical improvement. Even the reports from the respondent doctor, Dr. Lewis, clearly

show that the claimant's symptoms are "recurrent." Therefore, I must find that the majority has based its findings on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Here, the medical record clearly shows that the claimant consistently reported symptoms of her injury, and consistently sought treatment for the injury. The medical records clearly show that the claimant's lumbar injury never resolved, as acknowledged by the following statement made by the Administrative Law Judge:

The March 28, 2005 and April 4, 2005 records of Dr. Lewis note that the claimant was complaining of "recurrent" low back pain. However, the physical examinations performed at the time of these two visits (unlike the claimant's initial visits) failed to show any objective evidence to substantiate the claimant's current symptoms and complaints. While "objective findings" are not absolutely necessary to establish the existence of a continuing compensable injury, the absence of such findings is certainly relevant in

determining whether compensable injury has resolved or continuous. Essentially all subjective and objective tests were normal. Dr. Lewis diagnosed the claimant's current difficulties with her back as being attributable to the effects of her pregnancy.

The above-referenced statement is troubling for two reasons. First, the claimant does not have to provide objective medical evidence of her continued need for medical treatment. Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W.3d 211 (2000), citing Chamber Door Indus.Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Here, the claimant had a compensable lumbar injury, which Dr. Lewis stated was "recurrent" and for which Dr. Lewis consistently provided treatment, until she arbitrarily stopped, ostensibly due to the claimant's lack of continued objective medical findings. However, I am puzzled by Dr. Lewis' conflicting statements, to the point of having to challenge her credibility. Dr. Lewis appears to be engaging in the practice of insurance adjusting or legal advising rather than the practice of medicine in stating that the claimant has no "objective findings" and she will "final report" this claim. For Dr. Lewis to recommend closing out the claim

while also noting that the claimant's lumbar sprain/strain is "recurring" and while also still recommending treatment, i.e., hot-packs, exercises and lifting restrictions, simply does not make sense from a medical standpoint.

Second, there is apparently no basis for finding that the claimant is not entitled to additional reasonably necessary medical treatment for her compensable back injury other than the majority's sheer conjecture that the claimant's lumbar symptoms were no longer caused by the claimant's compensable lumbar injury, but were instead caused by her pregnancy. As the claimant's lumbar symptoms were the same before and after the claimant became pregnant, the majority, has, in effect, ruled that pregnancy is an independent intervening cause. Benefits are not payable for a condition which results from a non-work related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment. Ark. Code Ann. §11-9-102(4)(F)(iii)(Repl. 2002). There is no independent intervening cause unless the subsequent disability is caused by activity on the part of the claimant that is unreasonable under the circumstances. Davis v. Old

Dominion Freight Line, 341 Ark. 751, 205 S.W.3d 326 (2000).

Obviously, becoming pregnant is not "activity on the part of the claimant that is unreasonable under the circumstances."

I find this case most analogous to a claimant who has a compensable injury, and a need for medical treatment from that injury, but also has a pre-existing, degenerative condition, that calls into question whether the need for treatment is due to the compensable injury or advancing degeneration of the claimant's the pre-existing condition. In Williams v. L & W Janitorial, Inc., 85 Ark. App. 1, 145 S.W.3d 383 (2004), the Court considered a prior holding of this Commission that the respondent was not liable for any further medical treatment because the major cause of the knee replacement surgery then under consideration was the claimant's pre-existing arthritic condition. The Court rejected that reasoning and held that the major cause issue did not apply to medical treatment. The Court held that, in regard to determining the liability for medical treatment, the only question was whether the compensable injury was a factor. In Williams, Id., the Court's reasoning was based on Heritage Baptist Temple v. Robinson, 82 Ark. App. 460, 120

S.W.3d 150 (2003), which states that in workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. Extending the logic of Robinson, Id., every time an employer hires a woman, they are accepting that the woman may become pregnant. Every female workers' compensation claimant, barring age or infertility issues, may become pregnant at some point, possibly affecting the medical treatment the female claimant needs to receive for compensable workers' compensation injuries. Here, the employer cannot escape liability for additional reasonably necessary medical treatment for the claimant's admittedly compensable lumbar injury simply because the claimant became pregnant.

Based on the evidence of record, I am compelled to find that the claimant is being denied medical treatment because she became pregnant while receiving treatment for her compensable lumbar injury. I base this finding on the medical records which show that Dr. Lewis inexplicably stopped treating the claimant's lumbar injury the moment the claimant reported that she was pregnant. Although Dr. Lewis

did continue to note that the claimant had symptoms of a lumbar injury, instead of providing treatment, or ordering an MRI, which would certainly have been warranted due to the unresolved nature of the claimant's symptoms (but most likely could not have been performed at that time due to the claimant's pregnancy) Dr. Lewis instead started lecturing the claimant about Relaxin loosening the claimant's pelvic musculature, uterine ligature and sciatic joints, which I would note, are not the sites of the claimant's lumbar injury.

In contrast to the medically inexplicable conduct of Dr. Lewis (wrong body part, conflicting reports, insurance adjusting), Dr. Raben, whom the claimant was finally allowed to see through the Change of Physician procedure, has recommended an MRI to determine exactly why the claimant's lumbar symptoms have not resolved, and physical therapy to treat the claimant's symptoms. Based on the evidence of record, these recommendations clearly represents reasonably necessary medical treatment. See Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995).

In conclusion, I find that the claimant has met her burden of proof by a preponderance of the evidence that the medical treatment she is seeking represents reasonably necessary medical services for her compensable back injury.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner