

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610303

SHERRI TRIMBERGER, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED OCTOBER 27, 2008

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

Claimant represented by HONORABLE LAURA J. MCKINNON, 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 December 7, 2007.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 22, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury in the form of migraine headaches or an injury to her cervical spine.

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 dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury in the form of migraine headaches or an injury to her cervical spine. Based on a de novo review of the record, I find that the claimant has proved by a preponderance of the evidence her entitlement to benefits for compensable head and neck injuries which have

caused occipital neuralgia, and therefore, I must respectfully dissent.

The claimant sustained an admittedly compensable injury on September 15, 2006, when she fell while walking from her office building to a nearby building for a meeting. The fall occurred when the heel on the claimant's shoe became caught in a sidewalk, causing her to fall forward, landing on her knees and left elbow. The injuries to the claimant's elbow and left knee were superficial and only resulted in scrapes and bruises. However, the injury to her right knee seemed to be more serious and eventually required her to undergo corrective surgery. The respondent accepted liability for the injuries to the claimant's knees and elbows and paid for all medical treatment including the surgery and appropriate temporary and permanent disability benefits. However, immediately after the fall, the claimant began having a series of headaches. The only dispute in this case is whether the headache condition for which the claimant received medical treatment was the result of the admittedly job-related fall of September 15, 2006.

The claimant had a history of receiving medical treatment for migraine headaches. The earliest medical report related to the claimant's headaches is dated October 15, 2004. Dr. Ray Etta Wilmuth, the physician who treated the claimant on that date, noted the claimant was complaining of increasing migraine headaches and that she had recently gotten a "shot" to relieve her symptoms. The report also indicates the claimant complained of having these headaches at the rate of five to six a month. Dr. Wilmuth provided the claimant some medication and a follow-up.

The claimant saw Dr. David Garrett, an associate of Dr. Wilmuth, in December 2004, and continued seeing him for treatment of her migraines and other health problems through the date of her job-related accident. Generally, Dr. Garrett noted the presence of the claimant's occasional migraine headaches and continued to prescribe her medication.

The claimant also received treatment for her migraine condition on September 13, 2006, two days before

her job-related fall. In the treatment note of that date, Dr. Garrett, said the claimant was being seen for a "migraine phenomena" and that she had a past history of migraines. The doctor stated he explained to her and her husband about migraine headaches and prescribed her medication.

At the hearing, the claimant and her ex-husband testified regarding the claimant's pre-injury headache condition. According to both of these witnesses, during the two-year period preceding the accident of September 15, 2006, the claimant occasionally suffered from severe migraine headaches, but the frequency of these headaches, by the time of the accident, had declined substantially. The testimony indicated the headaches rarely occurred more than once a month, and often the claimant would go a period of four or five months without one of her migraine headaches.

According to the claimant and her ex-husband, after September 15, 2006, the frequency of the headaches not only increased but they became more severe and debilitating. According to the claimant, she began having a headache

almost every day, as opposed to one or two a month and sometimes none for four to five months. Also, she testified her former migraines were always on the left side of her head, while, after the accident, the headaches began in her neck and ran into the right side to the top of her head. She also described the pain as being excruciating. She testified the pain was so severe that she would often begin to cry. This testimony was corroborated by her ex-husband who stated that he observed her crying in pain on more than one occasion. The post accident headaches also caused the claimant to have bouts of nausea and become so light sensitive that she had to remain in a darkened room. By the time of the hearing, the claimant testified that she still had headaches almost every day but, because of the medication she had been taking, they were less severe.

The claimant testified that the onset of her new headache condition occurred shortly after her fall. According to her, she began having a headache while in the waiting room at the doctor's office the respondent referred her to for treatment immediately after the fall. This

testimony is corroborated in a letter from Dr. Kathleen Vandergriff, dated September 15, 2006. That letter, written to the respondent's claims adjuster, began by summarizing the claimant's knee and elbow injuries and then states: "She states she is getting a headache, has a history of migraines."

The claimant next sought medical treatment for her headache condition on October 10, 2006, at the Mercy Health Center of Northwest Arkansas. On that date, she saw Nurse Debra Sweatt, who authored a treatment note in which she took the following history of illness:

She states that she has been having migraine headaches weekly since she has had a knee injury, approximately 6 weeks ago. This headache started 2 days ago on the left side of the head. She took 2 Maxalt yesterday and the headache seemed to be gone when she went to bed last night. She woke up about 2:30 this morning with nausea and vomiting. She took a BC powder and Excedrin Migraine. She now presents with a headache in the left frontal area and her vision is blurred. She has nausea. She states that her hands and feet feel fine. Her pain is a 9 out of a 10 pain scale. She denies any sinus symptoms, neck discomfort, or shoulder discomfort. She is photosensitive and sound sensitive.

She has had a history of migraines for numerous years and she does not know of any triggers for her migraines.

The claimant again sought medical treatment for her headache condition on October 12, 2006. On this occasion, she saw Dr. David Garrett. The chart note Dr. Garrett prepared on that date is significant, in that, the claimant was actually suffering from one of her headaches at the time he saw her. Dr. Garrett stated the claimant was suffering from a headache that did not go away and that her headaches were constant. The doctor further stated that when he entered the exam room, "She had her head on the table and she was tearful." He noted that she was still taking Topamax (an anti-migraine medication) which was not helping her completely. In describing the claimant's physical condition, Dr. Garrett stated: "Demonstrates a tearful lady. This is the first time I have seen her that she has not worn her makeup." An even more important comment from Dr. Garrett was the notation in the musculoskeletal section report in which he stated: "There is a lot of tension in her cervical and trapezius, worse on the right

than on the left but she does, of course, have severe scoliosis." In assessing her condition, the doctor stated her headaches were "accentuated" by the musculoskeletal aspect of her condition. Dr. Garrett concluded his report by prescribing the claimant certain medications. One of them was Xanaflex. Xanaflex is a powerful anti-spasm medication.

Later, the claimant saw Dr. Gary Moffitt, a physician specializing in occupational medicine, at the direction of the respondent. In a letter dated December 7, 2006, Dr. Moffitt outlined his examination of the claimant and noted her headache condition. He also stated she was taking Topamax, and Maxalt for headaches, and that she was taking Xanaflex and Parafon (another muscle relaxant drug also commonly prescribed for muscle spasms and related injuries).

Dr. Moffitt also stated in his letter that, during his examination of the claimant, he discovered tenderness to palpation to her skull in the area of the right occipital nerve. He noted pressure on this area causes her to have a headache. Dr. Moffitt concluded the claimant was not

suffering from migraine headaches but had sustained an occipital neuralgia that was related to the injury she sustained at work on September 15, 2006.

In a letter dated December 14, 2006, Dr. Garrett noted Dr. Moffitt's diagnosis of an occipital neuralgia. Dr. Garrett appeared to agree with this diagnosis and opined the claimant's headache condition was caused by her fall. He also directed her to seek further treatment from Dr. David Cannon, a neurologist.

The claimant saw Dr. Cannon on January 15, 2007. In a letter of that date, he stated the claimant had a "fairly exquisite tenderness over the greater occipital nerves with the right slightly more tender than the left." Dr. Cannon stated he was providing the claimant with nerve block injections. In a follow-up letter, dated January 24, 2007, Dr. Cannon further elaborated on occipital neuralgia and stated it was very common in people who had head or neck injuries and was the result of an irritation of the occipital nerve. Dr. Cannon explained this nerve comes from

the back of the skull between the ear and the mid-portion of the posterior aspect of the skull.

The majority has rejected the claim based upon the Administrative Law Judge's finding that the claimant did not offer any objective medical evidence to support the contention that her migraine headaches were the result of a job-related injury. However, the Administrative Law Judge noted that the claimants' doctors had opined her injury was the cause of her headache condition. As justification for disregarding the doctor's opinions, the Administrative Law Judge stated that the doctor's opinions were not supported by any objective evidence. But, the Administrative Law Judge acknowledged that many of the reports referred to a finding of tenderness to palpation in the claimant's neck area. While the Administrative Law Judge correctly cited Kimbrell v. Arkansas Department of Health, 66 Ark. App. 245, 989 S.W.2d 570 (1999) for the proposition that tenderness alone is not an objective finding, a closer review of the record in this case demonstrates a number of objective factors in

addition to the tenderness considered as a sole factor by the Administrative Law Judge.

The claimant and her ex-husband testified she became nauseated to the point of vomiting following the injury. Likewise, the claimant's ex-husband testified he felt muscle tightness in her shoulder and neck area when he was applying physical therapy to her area as he had been trained to do by the claimant's physical therapist. Even more significant, is Dr. Garrett's report of October 12, 2006, in which he noted muscle tension in the claimant's neck. I also find it of considerable importance that he prescribed Xanax to treat her for that condition.

The case which controls this issue is Fred's Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005). In that case, the Supreme Court considered what type of evidence would constitute objective medical evidence. The claimant in that case had sustained an injury in a fall at work and was seen by a doctor who had diagnosed the claimant having problems with her paraspinal muscles and prescribed her medication including Flexeril, a muscle relaxer and pain

medication. The Court affirmed a Commission and Law Judge finding to the effect that this constituted objective medical evidence. The Court concluded where a reasonable inference could be drawn that medication and treatment were for an objective condition, the inference satisfied the objective medical evidence requirement.

In my opinion, this case is exactly in point with the Supreme Court Opinion in Fred's Inc. Dr. Garrett noted the presence of what he called muscle tension. While it might be disputed what is meant by this term, his prescription of an anti-spasm medication is clearly in line with a logical conclusion that the claimant's muscular tension was involuntary and was the same or very similar to a muscle spasm. When Dr. Garrett's report is considered in conjunction with other objective evidence in this case, such as the observations of the claimant's husband and the severe nausea and vomiting she experienced, and further considering that these factors all had a strong temporal connection with her fall at work, I find that the claimant has more than satisfied her burden of establishing objective medical

evidence of an injury. I find that the claimant's headache condition is occipital neuralgia as determined by Dr. Moffitt and as agreed by Drs. Garrett and Cannon. I would also note that all of the claimant's doctors were of the opinion her headaches were caused by an injury sustained in the claimant's fall at work.

In conclusion, I find that the claimant sustained a compensable injury, not only to her knees and elbow but also to her head and neck area, which caused her to develop occipital neuralgia. The claimant is entitled to the requested medical treatment from Drs. Garrett, Moffitt, and Cannon and temporary total disability benefits she requested from May 21, 2007 through July 24, 2007.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner