

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F900230

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| LASHONDA BRYANT, EMPLOYEE | CLAIMANT |
| WAL-MART ASSOCIATES, INC., EMPLOYER | RESPONDENT |
| CLAIMS MANAGEMENT, INC., INSURANCE CARRIER | RESPONDENT |

OPINION FILED OCTOBER 18, 2010

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

Claimant appeared *pro se*.

Respondent represented by HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed and dismissed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge filed July 27, 2010, finding that the claimant proved by a preponderance of the evidence that she sustained a compensable psychological injury. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as a customer service manager. On November 21, 2008, Yvette Martin came into the claimant's work area, put

her finger on the claimant's nose and told her that "she was going to whup my ass wherever she seen me at." The claimant called for management to come to the front but claimed there was no response and ultimately called the police. The claimant filed a complaint with the police and allegedly got a no contact order for one year. The claimant testified that Ms. Martin thought that the claimant was responsible for getting Brandon Martin, Ms. Martin's son, terminated from the respondent employer.

A little after midnight, the claimant went to the emergency room having chest pains and feeling shaky. The claimant testified that she went at 9:00 p.m., but the emergency room records reflect that the time the claimant went to the emergency room was actually after 12:00, also the emergency records indicate it was November 22nd.

The claimant testified she was having problems with depression, anxiety, and panic attacks on a daily basis. She sought treatment from Dr. Lila Pappas, who referred her to Betty Feir and Associates. The claimant was automatically terminated from her job with the respondent employer for refusing to sign a counseling notice. The claimant drew unemployment for approximately six months

until she began working for West Asset Recovery making phone calls to collect bills.

For injuries deemed to be mental injuries, Ark. Code Ann. § 11-9-102(4) (C) (Supp. 2005) states, "[t]he definition of 'compensable injury' as set forth in this subdivision (4) shall not be deemed to limit or abrogate the right to recover for mental injuries as set forth in § 11-9-113 ..." Ark. Code Ann. § 11-9-113 provides:

(a)(1) A mental injury or illness is not a compensable injury unless it is caused by a physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.

(a)(2) No mental injury or illness under this section shall be compensable unless it is diagnosed by a licensed psychiatrist or psychologist and unless a diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

Since the claimant does not have a physical injury, in order to get benefits associated with a mental injury, the claimant must prove that she was the victim of a

crime of violence. In our opinion, a review of the evidence demonstrates that the claimant was not a victim of a crime of violence.

There is no proof in the record that any crime was committed. There is merely the claimant's allegation of a crime. The claimant did go to the Texarkana Police Department and made a statement to pursue charges against Yvette Martin. The only other information that can be obtained from this document is that the police department described this as terroristic threatening. There is no evidence of what charges, if any, the prosecutor brought against Yvette Martin. There is no evidence in the record that Ms. Martin was convicted of any charges. There is no evidence in the record of any plea agreement. The only evidence is the plaintiff's allegations of what Yvette Martin said to her and her testimony that she got a no contact order. The claimant admitted that she had seen Ms. Martin prior to November 21, 2008, without any type of threat. The claimant admitted that she has not seen Ms. Martin since November 21, 2008.

In our opinion, the alleged threat by Ms. Martin that she was going to "whup" the claimant's ass does not

rise to the level of a terroristic threat. If Ms. Martin was so upset with the claimant, why did she not make this threat earlier when they had crossed paths?

The Administrative Law Judge cites the case of Sander v State, 326 Ark. 415, 932 S.W.2d 315 (1996), that determined terroristic threatening included holding a knife to the victim's throat is a crime of violence. Without question, that is a crime of violence. However, in this case, there is merely an allegation by the claimant with no evidence of what was charged by a prosecutor, if anything, or any disposition by a court. In addition, the claimant was fired by Wal-Mart, and both she and her mother have made EEOC claims against Wal-Mart. Simply put, the claimant has not proven by a preponderance of the evidence that she was a victim of a crime of violence.

The Administrative Law Judge went to great lengths to determine that the claimant sustained a mental injury that met the criteria of the *Diagnostic and Statistical Manual of Mental Disorders*. In our opinion, the claimant has failed to prove that she sustained a mental injury arising out of her allegations of Yvette Martin's threat of November 21, 2008.

First and foremost, the claimant admitted that she was being treated for anxiety by Dr. Lila Pappas prior to November 21, 2008. The claimant testified that she left the police department at approximately 3:30 p.m. and went home and laid down from 6:00 to 9:00 p.m. and then went to the emergency room. However, the emergency room records reflect that her admission was at 12:14 a.m. on November 22, 2008. While the claimant complained of chest pain, headache and nausea, she was found to be in no acute distress. There is absolutely no evidence, other than the claimant's subjective complaints, of any emotional or mental problems. It should be noted that her ECG was found to be normal when compared with her ECG of May 10, 2008. We submit why did the claimant have an ECG on May 10, 2008, when she has no history of heart problems? Again, this is evidence of the claimant's pre-existing anxiety condition. The claimant's diagnosis from the emergency room is only a generalized diagnosis of anxiety based on her subjective complaints.

The claimant went to her family physician, Dr. Lila Pappas, on November 24, 2008, and again, was found to have only a generalized diagnosis of anxiety, but this fails to meet the statutory requirements of a mental illness or

injury.

On December 17, 2009, a licensed clinical social worker made a diagnosis of anxiety and depression. While it is signed off by Dr. Betty Feir, a PH.D., the claimant admitted that she never saw Dr. Feir. The claimant contends that her emotional problems have been constant and severe since the date of the incident. She claims she cannot get treatment because she has no insurance. However, the claimant was not terminated from Wal-Mart until December 13, 2008, and had insurance up until that time and she has insurance with her new job.

The claimant's testimony was that she was terminated by Wal-Mart and had about a six-month break before going to work for West Asset Recovery as a debt collector. Therefore, she had been working for West for several months before seeking treatment at Betty J. Feir, PH.D and Associates and 10 months after being terminated by the respondent employer. The claimant admitted that her job as a debt collector was a high-pressure job subjecting her to racial slurs and other insults and that she currently is able to do it for 40 hours a week. In addition, the claimant admitted in her deposition that she had been seeking

treatment for an emotional and psychological condition with Dr. Pappas going back to 2007. She also contended in claim number F811387 that she was harassed by Wal-Mart management. Therefore, even if you consider that the claimant had a valid diagnosis in late 2009, the record is void of any credible evidence that it arises out of the alleged incident with Yvette Martin on November 21, 2008.

The Administrative Law Judge acknowledges that the diagnosis made by Suzanne Gann, a licensed social worker, does not reference the DSM, and DSM code or any DSM diagnostic criteria. However, since the diagnosis was apparently done in the multi-axis DSM diagnostic system, he then concludes that it was made pursuant to the DSM. Due to the fact that there is no evidence of DSM diagnostic criteria, in our opinion, this it is too much of a leap for the Commission to make this diagnoses. The facts are not in the record. The first time Suzanne Gann saw the claimant was on September 25, 2009, ten (10) months after the incident. The claimant was seeking treatment for anxiety from Dr. Pappas as early as 2007, and that she has also alleged in another workers' compensation claim stress by Wal-Mart management.

Further, the claimant drew unemployment for six months upon leaving work for the respondent employer and then went to the high pressure job as a debt collector. The claimant is subjected to racial slurs and berating on the telephone on a regular basis in that position.

In our opinion, the claimant is a disgruntled employee who has suffered from anxiety since at least 2007. She has filed another claim against the respondent employer for stress induced by management. There is no evidence that any crime was committed, other than the claimant's own self-serving testimony. It is also of note that the claimant did not seek treatment for this alleged mental injury until after she had gone to work for another employer in the high stress job of debt collecting. Simply put, we cannot find that the claimant has proven by a preponderance of the evidence that she has sustained a mental injury pursuant to Ark. Code Ann. 11-9-113. Accordingly, we reverse the decision of the Administrative Law Judge. This claim is hereby denied & dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, contrary to the majority, I find that a person placing a finger on the claimant's nose and threatening to "whup" her ass whenever she sees her, does rise to the level of terroristic threatening. Apparently, the Texarkana Police Department agrees, as they also described this act as terroristic threatening. I cannot fathom why the majority would deem itself to have knowledge superior to the Texarkana Police Department regarding criminal matters.

I find, as did the Administrative Law Judge, that the claimant was the victim of a crime of violence and is entitled to benefits for a mental injury under Ark. Code

Ann. §11-9-113 (a)(1). I also agree with the Administrative Law Judge that the claimant has satisfied §11-9-113 (a)(2), in that, her diagnosis of adjustment disorder following the incident at work meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders.

For the aforementioned reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner