

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. F608277

RACHAEL M. ELLIOTT, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER/TPA	RESPONDENT

OPINION FILED MAY 3, 2010

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

Claimant represented by the HONORABLE C. MICHAEL WHITE,  
Attorney at Law, North Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the  
Administrative Law Judge filed October 8, 2009.

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. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that she sustained a back injury arising out of and during the course of her employment with Wal-

Mart Stores, Inc. as the result of a specific incident identifiable in time and place of occurrence on July 16, 2006.

4. The claimant has failed to prove by a preponderance of the evidence that she sustained a gradual onset injury which arose out of and during the course of her employment with Wal-Mart Stores, Inc.
5. The claimant has failed to establish by a preponderance of the evidence that her need for medical treatment and disability after July 16, 2006, is in any way causally related to an injury sustained while working for the respondent herein.

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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A. WATSON BELL, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

**DISSENTING OPINION**

I must respectfully dissent from the majority opinion. After my de novo review of the entire record, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury on July 16, 2006, to her back, and that she is entitled to medical and indemnity benefits.

The issue to be litigated at the hearing was limited to compensability; specifically, whether the claimant sustained a compensable injury to her low back as the result of either a specific incident on July 16, 2006, or in the form of a gradual onset injury.

The claimant testified that she was thirty-one years old at the time of the hearing. She had a tenth-grade

education and a work history limited to manual labor and the service industry. She was employed by Wal-Mart since 1998 or 1999, with three interruptions of approximately one month at a time. She was a stocker, meaning that she moved merchandise from the back of the store to its intended location in the store. The merchandise was stacked on a pallet and moved with a pallet jack. She was responsible for unloading the pallet, unpacking the product and placing it on the appropriate shelves. This involved heavy lifting of cases of shampoo or laundry detergent, for example, or furniture, or any other item carried by Wal-Mart.

The claimant testified that she experienced back pain in the form of pulled muscles in 2004, but that she had never experienced the kind of pain she did from July 16, 2006, forward. Before July 16, 2006, she had never had back pain sufficient to prevent her from working, doing housework, or playing with and caring for her son. On that date, after she finished stocking shampoos, she helped another employee stock laundry detergent. The detergent was in small boxes, packed into larger boxes, and stacked on a pallet. There were too many boxes for the shelves, so she loaded the extras onto a different cart and took them back

to storage, where she shelved them. Then she was told that there was an error, and she had to load them off of the shelf and back onto the cart. When she was finished, she went to the parking lot to collect and return shopping carts. She developed pain while pulling the laundry detergent off of the shelf and back onto the cart, and her back was sore while she was collecting shopping carts. There was no specific moment when she knew she was injured.

The claimant testified that she first thought she had just pulled a muscle and that it would improve on its own. She also explained that she was afraid to report an injury for fear of losing her job. This fear was based upon conversations she had with co-workers during her employment. She was aware of the accident reporting policy, but the claimant did not report her injury until the fourth day, when her pain had increased so much that she went to the emergency room. She called her employer from the emergency room, and then she went to work to complete paperwork. The claimant testified that Wal-Mart sent her to Dr. Lack, whom she saw for several visits, until Wal-Mart cut off her benefits. Under her husband's health insurance policy, she began seeing Dr. Osborne, who referred her to Dr. Eubanks,

who eventually performed surgery. Surgery helped initially, but her condition worsened.

The claimant testified that she could not work, and that cooking, cleaning, and keeping up with her young son were very difficult for her. Her son had attention deficit/hyperactivity disorder and was very active. The claimant had difficulty riding in a car without stopping often to stretch and to change position.

There are three sets of medical records concerning the claimant's back prior to July 16, 2006. On November 26, 2004, the claimant presented to St. Bernards Emergency Room with complaints of low back pain going into her left buttock. She reported pain shooting down her left leg on occasion, like an electric shock. She related this to lifting a large piece of furniture that night. She was diagnosed with musculoskeletal back pain and released with prescriptions for Ibuprofen, Robaxin and Tylenol. On February 8, 2005, she presented again to St. Bernards Emergency Room, with complaints of right low back pain that started when she woke up that morning. She felt the pain was similar to her pain in November. She stated that her pain sometimes shot down her right leg, and sometimes she

had numbness and tingling in the right leg. She was given prescriptions for Lortab, Tylenol 3 and Flexeril. On July 22, 2005, an abdominal CT scan was performed at St. Bernards, due to right-sided abdominal pain. The abdominal scan was normal but did reveal a central bulging disc at L5-S1.

The record contains no medical records regarding back pain from February 8, 2005 until July 20, 2006, when the claimant presented to the St. Bernards Emergency Room. She reported that her symptoms began four days prior when she was "pushing carts at Wal-Mart," and that she had mild pain which progressively worsened. She reported that she did not usually push carts on her job. She described the pain as dull, non-radiating, and that it was across her entire lower back. The doctor noted that she was "sitting on bed in very tense position with hands in fists, pushing down on bed with arms extended." The doctor observed "moderate severe tenderness left and right paraspinous muscles L1 to S1 reproduces pain. Patient crying after palpation of bilateral lumbar region." A lumbar strain was diagnosed, and prescriptions for Robaxin, Ibuprofen and Darvocet were given. Her restrictions were no pushing or

pulling over 10 pounds of force and no lifting over 10 pounds for one week.

A Wal-Mart form for workers' compensation injuries, dated July 21, 2006, reflects that the claimant related her problem to "pushing carts," and that she had pain and tightness in her middle and lower back. Dr. Lack saw her that day, diagnosed a back strain, and returned her to work with restrictions of no pushing, pulling, or lifting of more than 5 pounds, and no squatting, stooping, bending, or twisting. Dr. Lack's notes from that visit reflect that the claimant related her pain to restocking laundry detergents and then pushing shopping carts at work. He prescribed Ibuprofen, Darvocet, and Soma. The claimant reported that her pain was a level eight out of ten, and that it was worse in her mid-back area, radiating into her lower back. She reported that she went to the emergency room the day before and was prescribed Ibuprofen, Darvocet and Robaxin for her symptoms. Dr. Lack noted that she injured her back while stocking at Wal-Mart: "There is no specific time or place of injury. She just thought she was working too hard. She was sore. Yesterday, she could not get out of bed." Dr. Lack observed that her pain was

located in the upper lumbar region and lower thoracic region. He noted that she had no prior history of back injury. Dr. Lack stated that the problem was work related. He advised her to continue the medications prescribed by the emergency room.

The claimant returned to Dr. Lack on July 25, 2006, reporting that her back pain had worsened, to a level ten on a scale of one to ten. She had pain radiating into her lower back, her arms and hands were shaking, and she had not been to work. Her x-rays showed a straight spine and degenerative joint disease. Dr. Lack planned to have them read by a radiologist. He assessed a lumbar strain and stated that it was work related. He recommended that she continue her pharmaceutical regimen and that she undergo physical therapy to evaluate and treat her back. He returned her to work with restrictions of no heavy manual labor, no stooping, crawling, or bending, and no lifting, pushing, or pulling more than five pounds. The x-ray was interpreted by a radiologist at St. Bernards, as grossly negative. This is the last record of Dr. Lack, as the claimant's August 2, 2006 appointment was cancelled.

The claimant presented to St. Bernards Emergency room on August 3, 2006, relating the onset of pain a couple weeks prior, while lifting and twisting. Her pain was sharp and radiating down her right leg. She related that her pain was worsening. Her pain was a ten on a scale of one to ten. The diagnosis was a herniated disc in her neck or lower back. She was prescribed Prednisone and Vicodin. A lumbar CT scan from that date revealed findings at several levels. At L3-4, there was a diffuse disc bulge with no severe stenosis or herniation. At L4-5, a broad-based midline herniation was shown, along with a focal disc fragment extending below the disc space and avulsion of the endplate which occurred in the past. At this level, the thecal sac was effaced, both L5 nerve roots were mildly effaced, and there was mild-to-moderate canal stenosis. At L5-S1, there was a large central herniation. The radiologist noted that the posterior margin was difficult to identify, but there appeared to be a large disc fragment eccentric to the left with poor definition of the left S1 nerve root. Both nerve roots appeared to be involved. The claimant also had minimal spina bifida occulta posteriorly. The radiologist noted that the same findings were seen on the claimant's

July 23, 2005 CT scan. In the hearing record, that July 23, 2005 CT scan report was normal, other than identifying a central bulging disc at L5-S1.

The claimant sought treatment from Dr. Osborne on August 30, 2006. She reported that she needed to establish a primary care physician, and that she had been seen for back pain since lifting heavy objects at Wal-Mart since December of 2004: "She states she has had severe back pain for over one year. States pain more severe since July 16 of this year." The claimant reported that she had been told she had a lumbar strain and that she had been off work since July 16, 2006. She stated that she could not walk for long periods of time and that her legs went numb. She had been prescribed muscle relaxers and pain relievers initially, but she had not been taking anything for about two or three weeks. She complained of pain in her middle to lower back and pain and tingling in her buttocks and upper legs. She felt "bubbles" in her back with movement. The claimant reported to Dr. Osborne that she had not been told she had herniated discs until 2006. When she complained of back pain in 2005, she was diagnosed with a kidney infection. In her report, Dr. Osborne noted that her CT showed two

herniated discs and bulging discs. Dr. Osborne stated that the claimant had a history of work-related chronic low back pain since July 2005, and bulging discs at L3-S1, the worst being L5-S1, which was diagnosed in August 2005. Dr. Osborne also noted minimal spina bifida occulta and mild to moderate canal stenosis at L4-L5. On exam, Dr. Osborne observed a positive straight leg raise on the right, negative straight leg raise on the left, muscle spasms of the left lower lumbar area, and tenderness to palpation of L3 and L4. The diagnoses were lumbar strain and displacement of lumbar disc, spina bifida occulta, and chronic low back pain. Dr. Osborne added Naprosyn to her pharmaceutical regimen, and recommended weight loss, physical therapy, rest, heat, and NSAIDs. She deferred a neurosurgical referral, because the herniated discs were stable and the claimant had good motor function in her legs.

On September 12, 2006, the claimant returned to Dr. Osborne with complaints of increased back pain and bilateral leg pain. Physical therapy increased her pain. Naproxen did not help her pain. Dr. Osborne prescribed a Medrol Dosepak and Lortab. She also gave the claimant an injection of Demerol and Phenergan. Dr. Osborne referred

her to neurosurgery to evaluate her herniated discs, since her pain was worse.

Dr. Osborne prepared an off-work slip on September 28, 2006 for the claimant, until she was seen by a neurologist. On October 3, 2006, the claimant canceled her appointment, because she could not afford the co-payment.

The claimant presented to Dr. Osborne on October 20, 2006, after seeing Dr. Eichert, who told her she did not have herniated discs. Dr. Osborne stated that she did have herniated lumbar discs, and referred her to another doctor. She also recommended exercises.

The claimant saw Dr. Eubanks on December 5, 2006, for an evaluation of severe back pain and lower extremity pain. She reported severe low back pain since July 2006. She was a stocker at Wal-Mart, but did not recall a specific event. He observed paraspinous muscular spasm and a positive straight leg raise on the right at about 60-70 degrees. He noted the CT scan, but felt an MRI would clarify her condition. His impression was severe low back and probable right S1 radiculopathy secondary to central to right paracentral L5-S1 disc herniation. He continued her

pain medications, adding muscle relaxants and anti-inflammatory.

On January 30, 2007, Dr. Eubanks noted his plan for a L5-S1 bilateral discectomy and fusion. On February 7, 2007, this was performed. The pre- and post-operative diagnoses were severe degenerative disk disease L5-S1 with central herniated disk, right S1 radiculopathy, chronic discogenic back pain, L4-5 degenerative disk disease and lateral recess stenosis, and L3-4 degenerative disk disease. Dr. Eubanks performed bilateral L5-S1 discectomies for decompression of the right and the left S1 roots and the thecal sac centrally, L4-5 bilateral laminotomy with lateral recess decompression via medial facetectomies, L5-S1 PLIF, L5-S1 interbody prosthesis, L4-5 dynamic rod stabilization and L5-S1 static rod stabilization.

In February and March 2007, Dr. Eubanks noted the claimant's "terrific" success post-operatively. In June 2007, the claimant was reporting aches and pains, but nothing like her pre-operative status. Subsequently, according to the records, the claimant's pain began to increase to pre-operative levels.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The majority found that the claimant failed to satisfy the requirement that she prove that the injury was caused by a specific incident. In Cedar Chemical Co. v. Knight, 372 Ark. 233 (2008), the Supreme Court held that the claimant had established a specific incident injury, where he had described, in detail, his job duties and the events surrounding the onset of his pain. The Cedar Chemical

claimant was descending a flight of stairs when he noticed pain in his left knee, around 11:00 a.m., although he could not identify any specific incident that caused the pain. As part of his job duties, the claimant was required to ascend and descend up to three flights of stairs five to eight times throughout the day. After first noticing the pain, the claimant continued to work for about three hours until a half-hour break, after which he could not put much weight on his leg.

The claimant's injury is very similar to the injury in Cedar Chemical. The claimant testified that on July 16, 2006, she was performing her regular duties, stocking shampoo. When she finished, she helped another employee stock detergent, and then she went outside to collect shopping carts. While she was moving laundry detergent out of a bin and onto a cart, she developed back pain, and while she was collecting carts, her back became "really sore." She initially attributed this pain to a muscle pull, from overexertion. There was no accident, in terms of a fall, for example, but the claimant was clear in her testimony, and in her reports to the emergency room doctors, to her employer, and to Dr. Lack and Dr. Osborne,

that she related her back pain to the activities on July 16, 2006, of stocking detergent and collecting shopping carts. Despite resting her back for a total of four days, the claimant's pain increased until she was forced to the emergency room.

In both Cedar Chemical and the current claim, the claimant credibly described the onset of pain during his work duties, which subsequently interfered with the use of that body part, even though there was no unusual event or accident. Subsequent medical testing revealed objective findings of injury requiring surgical intervention in both cases. The Supreme Court placed emphasis on the fact that the Cedar Chemical claimant "described in detail his job duties and the events surrounding the onset of his pain."

I find that the claimant proved by a preponderance of the evidence that she sustained an injury caused by a specific incident identifiable by time and place.

The claimant's activities stocking laundry detergent and collecting shopping carts are clearly activities arising out of and in the course of employment. Her job for Wal-Mart was to stock merchandise, and she

credibly testified that all available employees were directed to collect carts on that date.

Medical evidence supported by objective findings established the claimant's injury. Dr. Osborne observed spinal muscle spasms, and the emergency room physicians prescribed muscle relaxers. Dr. Lack noted that the claimant's spine was straight on her second visit to him, in July 2006. The straightening of the lordotic curvature of the spine is an objective finding, demonstrative of muscle spasm. On August 3, 2006, the claimant underwent a CT scan which revealed bulging and herniated discs. There is no question that objective evidence, close in time to the date of injury, exists to establish the claimant's injury.

The claimant has also proven that the injury caused internal or external physical harm to the body which required medical services or resulted in disability. She explained the mechanism of injury, moving the boxes of detergent and then collecting carts. She consistently mentioned her job when giving her history of injury. She credibly testified that, while she had some back pain in the past, she had never had the severity of symptoms she had after July 16, 2006. She explained that her back pain in

2004 and 2005 never interfered with her ability to work, take care of her home or her very active son, but that since July 16, 2006, all of her activities were severely limited by her back pain. The claimant's activities on July 16, 2006 triggered the onset of significant pain causing disability, whether the claimant had previous back pain or not.

I note that Dr. Eubanks stated some concern about the claimant's memory of the circumstances of her injury, because she did not go into detail with him about lifting laundry detergent or collecting carts. However, the claimant did explain the circumstances consistently to the emergency room physicians, the company doctor and the claimant's primary care physician earlier in time that she saw Dr. Eubanks.

I find that the claimant proved by a preponderance of the evidence that she sustained a compensable specific incident injury on July 16, 2006.

The claimant argued, in the alternative, that she sustained a back injury, not identifiable by time and place, pursuant to Ark. Code Ann. 11-9-102(4)(A)(ii)(b). In order to prevail upon a claim for a compensable injury, which is

not a specific incident identifiable by place and time of occurrence, the claimant must prove by a preponderance of the evidence that she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death. In addition, the claimant must prove by a preponderance of the evidence that the injury was the major cause of the disability or need for treatment. Ark. Code Ann. Sec. 11-9-102(4)(E)(ii). Finally, the claimant must establish a compensable injury by medical evidence supported by objective findings. Ark. Code Ann. Sec. 11-9-102(4)(D).

I find that, even if the claimant did not suffer a specific incident, the claimant would be successful under this section of the Act. The only additional requirement here is that the injury was the major cause of the disability or need for treatment. The medical records show that the claimant did not need medical treatment for her back after February 8, 2005, other than the coincidental discovery of a herniated disc at L5-S1 when the claimant was evaluated for abdominal side pain, consistent with a later diagnosis of ovarian cysts. The claimant did not need

treatment for her back in 2006, until she developed back pain in July. The claimant's injury was the development of severe and debilitating back pain, with radiation into both legs, which was the major cause for her need for surgery. She did not need surgery prior to July 2006, because she did not have these symptoms.

The claimant has proved that she sustained a compensable injury to her back, for which the respondents are responsible for indemnity and medical benefits.

The claimant has been unable to work since July 16, 2006. She was released to return to work with restrictions, but Wal-Mart has a policy requiring a complete release before an injured employee may return to work. In August, the respondents controverted the claim. Dr. Osborne then took the claimant off of work in September until she was seen by a neurologist, and then the claimant was off work due to surgery. The claimant has not returned to work due to recalcitrant pain, either due directly to her back injury or due to a pain syndrome arising out of her back injury and surgery. I find that the claimant is entitled to temporary total disability benefits from July 16, 2006 to a date yet to be determined.

The claimant's medical care to date has been reasonable and necessary care of her compensable injury, first with conservative management of her injury, then with surgical intervention. Subsequent to surgery, the claimant's pain returned, due to the injury directly or to a pain syndrome as a result of the injury and treatment. I find that the treatment by the emergency room physicians from July 16, 2006 forward was reasonable and necessary treatment due to her severe pain. I find that the care by Dr. Osborne, Dr. Eichert (who performed a one-time evaluation with results dissatisfactory to Dr. Osborne), and Dr. Eubanks, was reasonable and necessary treatment of her compensable injury, including the surgery to her back. I also find that the treatment of the claimant's post-surgical pain, including that by Dr. Eubanks, the emergency room physicians, Dr. Osborne and Dr. Cagle, to be reasonable and necessary medical treatment of the pain or pain syndrome suffered by the claimant as a result of the compensable back injury.

After my de novo review of the entire record, I find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury on July 16,

2006, to her back, and that she is entitled to medical and indemnity benefits.

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

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PHILIP A. HOOD, Commissioner