

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800085

BRENDA SPARKS,  
EMPLOYEE

CLAIMANT

ARKANSAS DEPARTMENT OF CORRECTION,  
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 30, 2010

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

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

Respondent represented by the HONORABLE RICHARD SMITH,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed August 24, 2009. The administrative law judge  
found that the claimant did not prove she sustained a  
compensable injury. After reviewing the entire record *de*  
*novo*, the Full Commission affirms the administrative law  
judge's opinion. The Full Commission finds that the

claimant did not establish a compensable injury by medical evidence supported by objective findings.

I. HISTORY

Brenda Lou Sparks, age 56, testified that she became employed with the Arkansas Department of Correction in December 1991. The record indicates that the claimant informed her family physician that she was suffering from back pain beginning in about October 1994. The claimant reported back pain in May 1996, April 1997, and August 1997. The claimant was prescribed Flexeril in about August 1997, according to the claimant's exhibits. The claimant was assessed with degenerative joint disease in about January 1998. Dr. Anthony D. McBride evaluated the claimant on June 30, 1998:

This patient is a pleasant lady who has had onset of increasing back pain for the past five years. She has had no history of trauma associated with this. The pain radiates from the midline lumbosacral spine around her sides toward the iliac crest. It does not radiate into the buttocks, hips or legs. She has no lower extremity numbness or weakness....The patient has been treated with multiple anti-inflammatory medications without relief....

Examination of her back reveals no point tenderness or paraspinous muscle spasms....

X-RAYS: AP view of the lumbar spine reveals she has no scoliosis. She has some SI joint

irregularities, worse on the right than on the left. Hip joints are unremarkable. Lateral flexion, extension films reveal no signs of instability. She does have T12-L1 degenerative disk changes with early changes noted L3-4 and L4-5. There is no anterolisthesis or retrolisthesis.

Dr. McBride assessed "Chronic low back pain, progressively worsening. Uncertain etiology....To begin her work-up, I will start with an MRI of her lumbar spine since most of her symptoms are typical for discogenic pain."

An MRI of the claimant's lumbar spine was taken on July 13, 1998, with the following findings:

There is lumbar spondylosis with narrowing of the L3-L4 and L4-L5 disc spaces. Associated vertebral spurs are noted. No edema is seen to indicate bone contusion or fracture. Disc dehydration is seen at L3-L4 and L4-L5. There are bulging discs at L3-L4 and L4-L5 posteriorly. Posterior annulus appears intact, and no herniation is noted. Compression of the ventral surface of the thecal sac is present. No lateralization is seen to the neuroforamina. There is also disc bulging at T12-L1, which also compresses the ventral surface of the thecal sac. No central spinal stenosis is seen.

LUMBAR SPINE X-RAYS: AP, lateral and oblique views are obtained to correlate the MRI findings. Lumbar spondylosis is seen with narrowing of the L3-L4 and L4-L5 disc spaces. Vertebral spurs are also noted. No fracture is seen. The pedicles are intact, and no paraspinous soft tissue abnormality is present.

IMPRESSION

1. Lumbar spondylosis most marked at L3-L4 and L4-L5 where disc space narrowing and disc dehydration is seen.
2. Disc bulging at L3-L4, L4-L5, and at T12-L1. No focal herniation is seen.

Dr. McBride noted on July 17, 1998, "She is returning for evaluation of her lumbar MRI study. This confirms that she has advanced L4-5 degenerative disk changes with modic end plate changes. She has early degenerative changes with bulging disks at L3-4, but this is not as severe." Dr. McBride assessed "L4-5 degenerative disk disease with back pain."

Dr. McBride diagnosed chronic back pain with lumbar spondylosis on August 26, 1998, and he performed bilateral L4-L5 and L5-S1 facet injections. Dr. McBride performed surgery on June 3, 1999: "1. Bilateral L4-L5 posterolateral intertransverse process fusions. 2. Left iliac crest bone graft harvest." The pre- and post-operative diagnosis was "L4-L5 degenerative disk disease with chronic low back pain."

Dr. McBride noted on June 15, 1999, "She is returning for evaluation of her lumbar fusion. She is two weeks postop. She is doing exceptionally well. She only takes two to three pain medications a day. She is walking

comfortably." Dr. McBride saw the claimant on September 14, 1999 and assessed "Status post lumbar fusion, doing well....At this time, we will continue her current activities. She should be able to return to work by October. We will have her return in three months for repeat x-rays." The record indicates that the claimant was a "no show" for a follow-up appointment on December 7, 1999.

Dr. McBride assessed "Mechanical back pain with previous fusion" in October 2002. An MRI scan of the claimant's lumbar spine was done in December 2002:

REPORT:

There is disk space narrowing at the L3-4 and L4-5 levels. No compression fractures are appreciated. Examination of the axial images reveal no definite herniated nucleus pulposus. No marked central canal or neuroforaminal stenosis is noted.

IMPRESSION:

Degenerative changes with marked disk space narrowing at the L3-4 level and even more pronounced at the L4-5 level but a definite herniated nucleus pulposus is not appreciated.

Dr. McBride reported on December 18, 2002:

She is returning for evaluation of her lumbar MRI scan. This study reveals a small central disk herniation at T12-L1 with degenerative disk changes developing with anterior osteophytes at L1-2 and L2-3. There are degenerative changes as well at L3-4. Unfortunately, the only healthy disk she has left is L5-S1. At this point, other than medications, bracing, and exercises, there is not much I can offer her. She understands that

with multi-level disease, she is not likely to get good relief with any forms of therapy, including surgery. We will place her on Restoril at bedtime and she can return as needed.

Dr. Safwan Sakr examined the claimant at a rheumatology clinic in February 2005. Dr. Sakr's treatment recommendations included a prescription for Flexeril.

The parties stipulated that the employment relationship existed on or about December 13, 2007 and at all relevant times. The claimant testified on direct examination:

Q. What happened to you, then, on December 13<sup>th</sup> of 2007?

A. I had to go take my physical assessment in order to keep my job, and pass it....We had to do a grip with our hands. We had to climb stairs, like ladder, climb ladders, climb stairs. Run 200 feet in 16.9 seconds, and we had to balance trays and walk up and down the stairs. And the last part was the dummy drag, that was the final part of the test.

Q. Tell me what this dummy drag looked, what did this dummy look like?

A. Well, it was just a burlap sack filled with sand or buckshot or whatever it was filled with....It had no head, but it had arms and legs.

Q. All right. And so, what were you required to do with that dummy?

A. Pick it up, drag it, like down a hallway, around the corner and start back with it.

Q. Okay. How did you drag it?

A. Well, I actually didn't get to drag it that time, but I put my arms under the arms and attempted to pick it up on my legs where I could drag it.

Q. Uh-huh. And what happened?

A. Well, a very severe pain went through my back and I dropped it. I had no strength, no energy, I was in such pain....

The claimant testified that she did not work for the respondent-employer after December 13, 2007. The claimant was seen at a Family Clinic on December 19, 2007, at which time it was noted, "Hurt back on 12/13 at work." The handwritten notes indicate that the claimant was diagnosed with musculoskeletal strain to the lumbar spine. The claimant was prescribed three medications, including Flexeril, and she was taken off work for 10 days. The claimant was treated conservatively and was prescribed Vicodin on January 2, 2008.

The claimant was referred to a neurological specialist, Dr. Thomas Briggs, who saw the claimant on March 12, 2008:

54 y.o female presents today c/o pain across her low back after dragging a 150 lb dummy. She has undergone 6 weeks of physical therapy and aquatherapy. December 13, patient was performing a physical assessment test, required for her job in the correctional system. While lifting and dragging the dummy, she felt a sharp pain in her lower back. She was unable to complete the test.

Initial pain was in her lower back, no radiation to her legs. She did have some pain in the area of the right SI joint. Presently, she describes a constant dull ache in her back, still in the area of the SI joint. She is unable to lie flat on her back....

**Pertinent Medical Findings**

Right sacroiliac joint tenderness. Otherwise normal exam.

Dr. Briggs' impression was "Ongoing Problems:

Spondylosis, Lumbar....Lumbar injury. Rule out acute injury. Previous fusion at L4-5. Previous response to lumbosacral facet injections. She did well for nearly two years after her facet injections, so this is not clearly a recurrence of her previous condition....I recommend a good MRI and lumbar flexion and extension views to rule out new disease, recurrence of old disease, or a new instability."

An MRI of the claimant's lumbar spine was performed on March 19, 2008:

Very mild chronic anterior wedge deformities T12 through L2. Spondylolysis with joint space narrowing and disc desiccation throughout the lumbar spine. Relative sparing of L2-3 and L5-S1. Endplate edema/reaction at anterior aspect of L1-2 presumably fatty Type I endplate degenerative disease. Moderate fatty type II endplate degenerative change at L3-4. Joint space narrowing most pronounced at L3-4 and L4-5. No other site of bony edema. No marrow replacement suspected. Conus medullaris terminates unremarkably. Normal enhancement. No abnormal enhancing disc material. Dura unremarkable as

well. At T12-L1, mild broad based bulge with mild ventral sac effacement. However, no significant sac stenosis. Retrolisthesis of L1 on L2 and L3 on 3. Very mild broad based posterior bulge with slight lateral recess encroachment at both levels. However, no significant sac stenosis nor neural foraminal encroachment bilaterally. At L3-4, mild broad based posterior bulge asymmetric to the left. Combined with posterior element hypertrophy, very mild circumferential sac stenosis. Mild lateral recess encroachment as well. L4-5 felt to be postoperative. No suggestion of reherniation of disc. Neural foramina unremarkable. At L5-S1, very mild broad based bulge with slight central protruding compartment. For the most part absorbed by epidural fat. No sac stenosis nor S1 nerve root displacement.

#### MR Impression

1. Postoperative lumbar spine as above. Spondylolytic changes throughout the lumbar spine most pronounced at T12-L1 as well as L3-4. There appears to be partial fusion at L4-5 probably the postoperative level.
2. Mild sac stenosis L3-4. Minimal sac compromise at upper lumbar intervertebral levels. No significant sac nor neural foraminal compromise. Multiple levels of mild lateral recess encroachment.
3. No evidence of compression deformity.

Dr. Briggs informed the claimant on March 26, 2008, "Your lumbar spine MRI shows a fused L4-5 segment. There is mild degenerative disc and facet disease at the remaining levels, but no nerve compression or instability. I do not recommend operative intervention for your current findings,

but your treatment for your low back pain depends on your progress.”

The claimant followed up with Dr. Briggs on November 21, 2008:

She continues to have pain in the lower lumbar spine, both below and above her fusion. This is primarily below her fusion, but to some degree about the L4-5 fusion.

**Pertinent Medical Findings**

Pain with flexion and extension at the lumbosacral junction, and to some degree above the fusion.

Dr. Briggs' impression was "Ongoing Problems:

Spondylosis, Lumbar ... Back Pain, Lumbar....Multiple level degenerative settling, with facet pain....She has had a good result with previous facet injections at the lumbosacral junction. I will plan to reinject the lumbosacral facets bilaterally. She may need additional facet injections at the L3-4 or above levels, as they are diseased also. She will increase her ibuprofen to 800mg tid to see if she can get some good arthritic control. Further followup as needed.”

A pre-hearing order was filed on February 2, 2009. The claimant contended that she sustained a compensable injury to her lower back on December 13, 2007. The claimant contended that her need for medical treatment was solely

related to the December 13, 2007 compensable injury. The respondents contended that the evidence contained no objective medical findings of a work injury.

The parties agreed to litigate the following issues:

1. Whether the Arkansas Workers' Compensation Act is constitutional.
2. Whether the claimant sustained a compensable injury to her lower back.
3. Whether the claimant is entitled to reasonably necessary medical treatment.
4. Whether the claimant is entitled to temporary total disability benefits.
5. Whether the claimant is entitled to a controverted attorney's fee.

After a hearing, an administrative law judge filed an opinion on August 24, 2009. The administrative law judge found, in pertinent part: "4. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her low back because her medical records in evidence are devoid of objective findings of an injury." The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

## II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The burden of proof of a compensable injury shall be on the employee, and the burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, the Full Commission finds that the claimant did not establish a compensable injury by medical evidence supported by objective findings. The claimant argues on appeal that she was "prescribed Flexeril ... for muscle spasms" which "clearly shows an acute injury" on December 13, 2007. It is well-settled that muscle spasms

can constitute objective medical findings to support compensability. *Estridge v. Waste Management*, 343 Ark. 276, 33 S.W.3d 167 (2000), citing *Continental Express, Inc. v. Freeman*, 66 Ark. App. 102, 989 S.W.2d 538 (1999). In *Estridge*, a physician expressly prescribed the claimant medication "as needed for muscle spasms." The Arkansas Supreme Court held, "A doctor would not prescribe medication directed to be taken 'as needed for muscle spasm' if he did not believe muscle spasms were existent." See *Estridge, supra*, at 281. The Supreme Court held that the Commission erred in denying benefits.

The record does not demonstrate in the present matter that the claimant was prescribed medication "as needed for muscle spasms." We note that the claimant was first prescribed Flexeril in August 1997, approximately 10 years before the alleged compensable injury. The claimant was again prescribed Flexeril by Dr. Sakr in February 2005. The claimant testified that she felt severe pain in her back after dragging a dummy on December 13, 2007. The claimant began treating at a Family Clinic on December 19, 2007. At that time, the claimant was prescribed three medications, including Flexeril, but there was no doctor's note or any

other indication that these medications were "for muscle spasms." There was no report on December 19, 2007 of bruising, swelling, or muscle spasms in the claimant's back. We note Dr. Briggs' report on March 12, 2008, "Right sacroiliac joint tenderness. Otherwise normal exam."

The evidence in the present matter does not demonstrate that the prescription for Flexeril on December 19, 2007 was proof of medical evidence establishing a compensable injury by objective medical findings. Nor are the facts of the present matter analogous to the case of *Fred's Inc. v. Jefferson*, 361 Ark. 258, 206 S.W.3d 238 (2005). In *Fred's Inc.*, the claimant was diagnosed with a back bruise following a workplace injury. The Supreme Court found a reasonable inference in *Fred's Inc.* that a prescription for medication was necessary to treat the back bruise and strain. There were no findings of a back bruise in the present matter, and again, the record does not demonstrate that there were any objective medical findings reported or noted following the alleged accident of December 13, 2007. To determine in the present matter that the prescription for Flexeril was an objective medical finding establishing a compensable injury would require conjecture and speculation,

which cannot supply the place of proof. *Dena Constr. Co. v. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (Ark. App. 1980).

Nor does the diagnostic imaging demonstrate that the instant claimant proved she sustained a compensable injury. The claimant began suffering from chronic back pain no later than October 1994. X-rays of the claimant's lumbar spine in 1998 showed SI joint irregularities and degenerative disk changes. An MRI in July 1998 revealed lumbar spondylosis, dehydration, and multi-level disc bulging. Dr. McBride performed fusions at L4-L5 in June 1999. A lumbar MRI in December 2002 demonstrated degenerative changes with marked disk space narrowing at the L3-4 level and even more pronounced at the L4-5 level. Dr. McBride subsequently reported that the only healthy disc for the claimant was L5-S1.

The claimant contends that she sustained a compensable injury on December 13, 2007. The claimant testified that she injured her back as the result of dragging a dummy at work. An MRI in March 2008 showed degenerative swelling and edema, a post-operative lumbar spine, disc bulging, but "No suggestion of reherniation of disc." Dr. Briggs informed the claimant on March 26, 2008, "Your lumbar spine MRI shows

a fused L4-5 segment. There is mild degenerative disc and facet disease at the remaining levels, but no nerve compression or instability. I do not recommend operative intervention for your current findings, but your treatment for your low back pain depends on your progress." Dr. Briggs diagnosed "Multiple level degenerative settling, with facet pain" in November 2008. Dr. Briggs did not connect any of these findings to the alleged accident of December 13, 2007. The record in the present matter does not demonstrate that any of the diagnostic imaging, including the March 19, 2008 MRI, was objective medical evidence establishing a compensable injury to the claimant's back.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not establish a compensable injury by medical evidence supported by objective findings. The claimant therefore did not prove that she sustained a compensable injury. The claimant does not contend in her brief that the Workers' Compensation Act is unconstitutional. Yet even if the claimant did so contend, the Court of Appeals has explicitly held that the Arkansas Workers' Compensation Act is not unconstitutional.

*See Long v. Wal-Mart*, 98 Ark. App. 70, 250 S.W.3d 263 (2007).

The Full Commission therefore affirms the administrative law judge's decision, and this claim is denied and dismissed.

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 a de novo review of the record, I find that the evidence of record does contain an objective finding, a Flexeril prescription. Therefore, I would reverse the decision of the Administrative Law Judge and award benefits.

The employer takes the employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003); Pearline Williams v. L&W Janitorial, Inc. 85 Ark. App. 1, 145 S.W. 3d

383 (2004). An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 s.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

Arkansas Code Annotated §11-9-102(4) (A) (i) defines "compensable injury" as:

An accidental injury causing internal or external physical harm to the body...arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

The workers' compensation statutes provide that "[a] compensable injury must be established by medical evidence supported by objective findings...." Ark. Code Ann. 11-9-102(4) (D) (Supp. 2007). "Objective findings" are defined as "those findings which cannot come under the voluntary control of the patient." Ark. Code Ann. §11-9-102 (16) (A) (i) (Supp. 2007). While objective medical evidence is necessary to establish the existence and extent of an injury, it is not essential to establish the causal

relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522, 524 (1999); Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002).

Here, the claimant has a pre-existing back condition for which she underwent an L4-L5 fusion procedure in 1999. She was also diagnosed with fibromyalgia in 2005. However, the record is clear that by the time of the specific incident in this case her pre-existing conditions were under control. In fact, the medical record shows that the claimant had not received any treatment for her back condition after November 2006. On December 13, 2007 the claimant was required to take an Essential Job Functions test to keep her job as a prison guard. One of the requirements of the Essential Job Functions test was that the claimant had to drag a 150 pound dummy down a 25 foot long hallway and turn a corner in the proper manner without stopping, tripping or falling. The claimant testified that she had her hands under the arms of the dummy and was attempting to lift it up against her legs so she could drag it when pain went shooting through her lower back and caused her to immediately drop the dummy. The claimant contacted

the respondent employer that day and was sent to Dr. Jim Bozeman on December 19, 2007. Dr. Bozeman noted that the claimant had injured her back at work and diagnosed her as having a musculoskeletal strain. He prescribed Flexeril, Vicodin and took the claimant off work for ten days. On January 2, 2008 Dr. Bozeman set the claimant up with a course of physical therapy.

Pursuant to the Arkansas Supreme Court's ruling in Fred's, Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005), Dr. Bozeman's prescription for Flexeril satisfies the objective findings requirement. Specifically, the Arkansas Supreme Court has held that treatment designed to relieve symptoms associated with an objective finding is sufficient to meet the objective medical findings criteria in the Workers' Compensation Act. See Fred's, Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005) and Estridge v. Waste Management, 34 Ark. 276, 33 S.W.3d 167 (2000).

The majority's statement that Fred's is not analogous because the claimant does not have a back bruise is specious. In Fred's, addressing the same erroneous reasoning the majority has used in the instant claim, the Court stated: "[A] reasonable inference from the chronology

of events was that the medication and physical therapy were prescribed to aid [the claimant] and to treat her injury; any other construction of these events did not withstand scrutiny or pass the test of reasonableness." Fred's, Inc. v. Jefferson, 361 Ark. at 259. Here, the claimant reported a work-related back injury to Dr. Bozeman. Dr. Bozeman diagnosed the claimant as having a musculoskeletal strain and prescribed Flexeril and Vicodin. Based on the claimant's credible testimony, the chronology of events and the medical record, the only reasonable conclusion is that the Flexeril was prescribed for muscle spasm. The majority has erred.

For the aforementioned reasons I must respectfully dissent.

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PHILIP A. HOOD, Commissioner