

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F200949

**SANDRA D. HARMON,
EMPLOYEE**

CLAIMANT

**KROGER LIMITED PARTNERSHIP I,
SELF-INSURED EMPLOYER**

RESPONDENT

**RSKCO SERVICES, INC.,
BENEFITS ADMINISTRATOR**

RESPONDENT

OPINION FILED AUGUST 7, 2003

Hearing conducted May 9, 2003, before Administrative Law Judge Richard B. Calaway in Malvern, Hot Spring County, Arkansas, with

Ms. Shannon Muse Carroll, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant; and

Ms. Wendy S. Wood, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the compensability of the claimant's low back condition.

The claimant contended that she sustained a compensable low back injury on or about November 18 or November 19, 2001, for which she should be awarded benefits, including reasonably necessary medical and related expenses. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant did not sustain an incident of injury to her low back as alleged and, further, that a compensable injury cannot be established by medical evidence supported by objective findings. They also contended that the claimant did not timely report the alleged injury.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times and the claimant's average weekly wage at the time of the alleged injury was \$236.98.

3. The preponderance of the evidence fails to show that the claimant sustained an injury to her low back arising out of and in the course of her employment during November, 2001.

DISCUSSION

The claimant worked for the respondent employer at its Airport Road grocery store where she started out as a cashier and supervisor and later switched to the produce department. She testified that she injured her back while working in the produce department in November, 2001, when she picked up a case of celery from a pallet on the floor to about waist level, swung it around to put it on a cart, and felt burning pain in her low back. She testified that she "immediately" told someone and that she "was thinking" it was James Fountain. She further testified that he stated that he was busy right now and would get back to her but she said that we needed to do paperwork and every time she would see him she would say she needed to do paperwork and go to the doctor. She also testified that she did not see him any more that day. She further stated that she did not remember the exact day but that it was shortly before Thanksgiving, either November 18 or 19, when the store was having a sale on celery, even though she had earlier testified in a deposition that this occurred on Tuesday before Thanksgiving, which would have been November 20.

The claimant testified that she made it known to the employer that she was having job-related back problems. For example, she stated that from November 19 through December 29 she or her husband spoke with Mr. Fountain several times about the possibility of going to the doctor for her back problem. She said that eventually he called her home and then called her on the cell phone and said that he had a doctor's appointment for her. She also testified that she talked with Raymond T. Rogers, the store manager, and he sent her home on a day when she was hurting and crying while at the courtesy booth. The claimant further testified that her employer was not helping her get doctors but told her to go to the emergency room on December 29, 2001.

The claimant testified that after the incident she was in "major pain all the time", did not have a normal life any more, her leg gets hard to motivate when she sits for a long period, sometimes her leg does not go with her and she winds up falling, and she has pain every day. She described it as a burning pain in her back with numbness in her low back and legs. She also testified that her condition interferes with her sleep and she has to take naps during the day. The claimant further testified that she worked at a convenience store with a small restaurant operated by her and her husband. She testified that she sits behind the register and rings up sales and does a minimal amount of cooking.

Dorothy G. Mitchell also testified on behalf of the claimant, stating that she had known her since the store opened, about six or eight months, and goes to the store three to five times a week. She testified about the claimant's apparent pain and limited activity at the store and that she did not believe the claimant to be exaggerating. Similar testimony in support of the claimant's apparent pain was contained in the deposition testimony of David Harmon and Margaret Kaufman. Ms. Kaufman's deposition was admitted over the objection of the respondents that she was not

medically unable to attend the hearing. However, the letter from Dr. Beebe following the hearing was adequate proof of the claimant's unavailability for medical reasons.

The respondents called several witnesses in support of their position, including Natasha Dodd, who had been the customer service manager for seven years and the claimant's supervisor when the claimant was a cashier. She testified that she was authorized to receive Reports of Injury and sent injured employees to St. Joseph's Business Health if they said that they needed medical attention. She testified that the claimant neither reported a back injury to her in November, 2001, nor told her that she was missing work because of a back injury. She stated that she first learned of the claimant's alleged injury when she returned from a vacation after the first of the year. She also stated that the claimant put in a request to be off during Thanksgiving, 2001, and that records show that the claimant worked November 12, 13, 16, 17, 18, and 19, as well as December 1, 2, 4, 5, 6, 7, 9, 10, 11, 15, 16, 17, 18, 28, and 29, but not November 20, 2001, and was off a total of about eleven days around Thanksgiving, of which six were scheduled off. She further stated that records fail to show that the claimant had called in and complained of back pain. Her testimony generally was that on some occasions the claimant either did not call in or either called in and gave no reason for missing work or did not mention a back injury. She stated that records showed that the claimant called in sick November 26, called in November 27 indicating that she would miss work, and, on December 1, worked a full shift.

Dennis Thornton testified that he had worked 24 years for the Kroger on Airport Road and, as produce manager, had been the claimant's supervisor when she worked for a short time in the produce department. He stated that even though the claimant wanted off for Thanksgiving in 2001, she had agreed to work Thanksgiving and the following Friday and Saturday if she could be off for

three days together so she could go to Dallas to see her husband. He testified that he told her if she did not work during this time, she would have to have a doctor's excuse. He said that when she returned December 1 with a doctor's excuse she told him she thought it was her back but the doctor indicated that it was something like pleurisy or upper respiratory problems that were causing her pain. He stated that he told her she would need to speak to Mr. Fountain or Mr. Rogers about that. He also testified that after that day he did not recall anytime that he spoke with the claimant about a back problem, except December 29, 2001, her last day of work. Mr. Thornton testified that the claimant stated on that day in the break room that her back was hurting and he told Mr. Rogers that he might want to check into that. He further stated that he did not recall the claimant ever being unable to work or complaining of back pain and did not see her crying at work.

James Fountain testified that he had been a co-manager at the Kroger on Airport Road and was one of the claimant's supervisors. He stated that at that time he was the primary person for receiving Reports of Injury. He said that he sends all reports to the Kroger Office in Memphis and advises claimants who need medical care to go to the company physician, Dr. Michael Garrett at St. Joseph's Business Health Center. He stated that, pursuant to Kroger's policy, he did not make appointments, but left that to the employee. He further stated that he just asks to see if they need to go to a physician so that he can say that in the report.

He testified that on December 4, 2001, the claimant reported a back injury and he asked if she needed to go to the doctor and she decided not to go, although he thought she needed to go. He stated that he did not remember the claimant to be crying at that time. He stated that the claimant did not come back to him again to ask to go to the doctor for back pain and never again complained about back pain to him. He testified that the claimant stated that she was quitting her job at the end

of December in order to get another job with more hours and more pay, and not because of a back injury.

Raymond T. Rogers testified that he had worked for Kroger about fourteen years and had been the manager of the store on Airport Road for almost five years. He testified about Kroger's policy concerning reporting of work injuries and stated that the claimant could have reported an injury to himself, Dennis Thornton, James Fountain, or another department head and that a First Report of Incident would be made and sent to the office in Memphis. He stated that according to policy employees were told that St. Joseph's Business Health provides employee's treatment for workers' compensation claims and that this information is posted by the time clock in the break room and in the co-manager's office. He stated that we tell them all they have to do is go to St. Joseph's Business Health and they will see you as a work-in. He said that the appointment is not made by Kroger but is made by the employee.

He stated that he did not recall a conversation with the claimant just a few days after the alleged accident and denied that he had discussed filing under her group health insurance. He also testified that he did not remember the claimant coming to him crying about back pain. However, he testified that he remembered on December 29 Dennis Thornton approached him about the alleged back injury and that he had heard she had not been able to go to the doctor. He stated that he called the claimant over and told her if she felt the need to go to the doctor, to go to St. Joseph's Business Health. He testified that this occurred in front of the courtesy booth. He also denied that the claimant testified that she was quitting her job at Kroger because of back pain. He testified that before December 29, 2001, the claimant had not complained about back pain or asked to go to the doctor for back pain.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Part of the claimant's burden is to establish the existence of the injury by medical evidence, supported by objective findings, that is, by findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102. Muscle spasms have been recognized as objective findings sufficient to satisfy this requirement and, here, on December 29, 2001, the claimant was prescribed medication "for spasm" and, on January 2, 2002, the company physician opined that the claimant had a mechanical injury to her back and a small amount of scoliotic change which is either normal for her or related to muscular imbalance from the injuries. He also wrote that no red flags were found and assessed her condition as thoracic strain, lumbosacral strain, and right SI joint dysfunction. These initial assessments of the claimant's condition are sufficient evidence of muscle spasm to satisfy this statutory requirement.

Thus, the pivotal question is whether the preponderance of the evidence shows or fails to show that the claimant's condition should be attributed to her employment. When the record is reviewed, and credibility of the witnesses is considered, the preponderance of the evidence fails to show that the claimant's back condition is the result of an injury arising out of and in the course of her employment in November, 2001.

For example, the initial report of the claimant's alleged injury was completed by James Fountain on December 4, 2001. He testified that the information in that report was what the claimant told him. The report states that the claimant was injured that day, December 4, 2001, when she was taking boxes off the top shelf in the produce cooler and one fell and hit her leg and hurt her back. At the hearing, Mr. Fountain testified that the claimant said she had been in the produce cooler, on a step stool, picking up some boxes, when she hurt her back. He also testified that this was when the claimant first reported the injury to him. The claimant's testimony was that she did report the injury immediately after it happened and "was thinking" that she reported it to Mr. Fountain, who did not then fill out the paperwork. Although the claimant testified that she was not permitted to see a doctor, Mr. Fountain stated that he thought she needed to go to the doctor, but she declined to do so. Later, the emergency room record of her visit of December 29, 2001, indicated that she had a back injury one month ago, without medication, and stated that she bent down this a.m. and had increased pain. The report of Dr. Eric D. Vogel concerning his contact with the claimant on that day indicated that the claimant had back pain for about a month after picking up a box at work, the pain was better, however, yesterday, she bent over to pick up an empty box and, upon standing, had increased pain in her back. Thus, by the time she first sought medical care, it appears that there was another incident that may have caused her to seek medical care. It was not demonstrated, however,

that this second possible incident occurred at work. As to the first incident, which appears to have occurred around the end of November or the first of December, the claimant's condition was not severe enough to cause her to seek medical care at that time, and, consequently, existence of an injury cannot be established by contemporaneous medical records supported by objective findings. Thus, whether the condition arose during the claimant's work or during the period of well over a week when she was absent from work, there is no contemporaneous record establishing the existence of an injury based on objective findings and, thus, her condition at that time probably should not be considered an injury for purposes of the Act.

The claimant's evidence included witnesses who observed her displays of pain-related behavior after she had left the employment. Although this evidence is consistent with her testimony that she had "major pain" on a daily basis, the video evidence offered by the respondents contradicts that exertion by the claimant, as well as her testimony that her legs sometimes interfered with her ability to walk. Similarly, the claimant's testimony is not consistent with the observations of co-workers and, the company records concerning her reports of job-related back pain. Thus, it appears that the claimant may have been uncertain about any incident which may have been related to her back condition and later came to believe that it should be attributed to an incident on November 18 or 19. However, on balance, her credibility has been diminished. Thus, given the failure of the claimant to seek medical attention in November or early December, 2001, the tendency of the claimant to change her description of the incident which caused her to seek medical care, and the inconsistency between her testimony and company records, the testimony of co-workers, and the video evidence, the preponderance of the evidence fails to show that her low back problems are the

result of lifting celery from floor level or pulling a box from a shelf in the cooler or any other incident arising out of and in the course of her employment.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge