

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311989

SANDRA L. HOOVER, EMPLOYEE CLAIMANT

WAL-MART STORES, INC.,
SELF-INSURED, EMPLOYER RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER RESPONDENT

OPINION FILED DECEMBER 30, 2004

Hearing conducted before Administrative Law Judge DALE DOUTHIT in El Dorado Union County, Arkansas.

The claimant was represented by F. MATTISON THOMAS, III, Attorney at Law, El Dorado, Arkansas.

The respondents were represented by SUSAN FOWLER, Attorney at Law, Little Rock, Arkansas.

STATEMENT

A hearing was conducted on November 16, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation law.

A prehearing telephone conference was conducted on October 12, 2004, and a prehearing order was filed on said date. At the hearing the

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parties announced that the stipulations, issues, and their respective contentions were properly set out in the prehearing order subject to additional stipulations, contentions and issues agreed to at the hearing. A copy of the prehearing order was introduced into evidence as Commission Exhibit "1", and made a part of the record without objection.

It was agreed that the employee/employer/carrier relationship existed at all relevant times, including November 13, 2003, and that the respondents controverted the claim in its entirety.

By agreement of the parties, the primary issue concerns compensability. If overcome, claimant's entitlement to associated benefits must be determined.

At the prehearing conference, the claimant contended, in summary, that she sustained a compensable injury to her back as a result of a specific incident identifiable in time and place of occurrence on November 13, 2003; that she was entitled to temporary total disability from November 13, 2003 to the present, maintaining that her healing period had not yet ended; that the respondents should be held responsible for all medical and related treatment, including, but not limited to, proposed surgery, together with continued, reasonably necessary medical treatment, and that a controverted attorney's fee should attach to any benefits awarded.

The respondents contended that the claimant could not establish a

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compensable injury occurring on November 13, 2003; and that there were no objective medical findings of a work-related injury; that the claimant's physical problems and need for treatment were the result of a pre-existing pathology, rather than a work injury.

Claimant, Sandra Hoover, was the only lay witness called to testify by the claimant. The respondents called Barbara Long, Stacy Sowell, and Tonya Monk, all employees of Wal-Mart, to testify as lay witnesses. The record is composed of the transcript of the November 16, 2004 hearing, containing a medical records exhibit submitted by the claimant consisting of thirty-six (36) pages which was admitted as Claimant's Exhibit "1". In addition, the respondents submitted a group of documentary exhibits consisting of the claimant's wage statement, AWCC Form AR-W, associate information sheet and associate incident log, which was admitted as Respondents' Exhibit "1". Respondents submitted a Medical Evidence Exhibit consisting of fifty-one (51) pages which was admitted as Respondents' Exhibit "2". Respondents submitted a transcript of the deposition of claimant, Sandra Hoover, taken on December 17, 2003, said transcript was admitted as Respondents' Exhibit "3". During cross-examination of the claimant, respondents submitted an audio tape of an interview with Ms. Hoover taken by respondents which was admitted for rebuttal purposes only, and marked Respondents' Exhibit "4".

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From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code. Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over 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 compensable injury to her back as a result of a specific incident identifiable in time and place of occurrence at the work place on November 13, 2003. Specifically, the claimant has failed to establish an injury, or aggravation, supported by objective and measurable medical findings as required by the Act.

DISCUSSION

This claim turns on the medical evidence submitted by both parties, and the credibility of the witnesses. As will be set out hereinafter, the only objective medical findings are related to a pre-existing condition, without evidence of any new injury or aggravation of the pre-existing condition. Due to the claimant's pre-existing back injuries, the medical evidence gives the

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Commission the benefit of near perfect hindsight. As will be outlined below, a MRI was conducted both pre and post accident as alleged on November 13, 2003. The medical evidence indicates that the medical provider 's conclusions are based upon the claimant's subjective complaints without objective and measurable findings of the provider. A claimant's testimony is never considered un-controverted. *Continental Express v. Harris*, 61 Ark. App. 198, 965 S.W. 2nd 811 (1998). Further, Dr. Mark Dixon stated the following regarding his findings of the November 13, 2003 accident:

"My impression was based solely on the subjective response of the patient , There was no objective evidence of injury." (RX 2, p. 44-45)

It is undisputed that the claimant had worked for the respondent-employer approximately two weeks prior to the alleged accident on November 13, 2003. Claimant alleged that she fell off a ladder while arranging toys. It is also undisputed that the claimant underwent a lumbar laminectomy on April 25, 1995 at the Baptist Hospital for removal of a large discogenic herniation at L5-S1 on the left.

Her surgical physician in 1995 was Dr. Wilber A Giles. Following her surgery Dr. Giles gave the following impression:

"Status post lumber laminectomy with discogenic displacement, L5-S1 Lumbar degenerative disc disease, mildly symptomatic." (RX 2, p. 21)

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Pertaining to the credibility of the witness, claimant testified at the full hearing the differences between the 1995 pain and the 2003-2004 pain was that in 1995 the pain was on her left side, and now, 2003-2004, the pain was on her right side. She testified she was having no problems with her right side in 1995.

Q. Let me ask it this way. Was the 1995 pain at a different location or a different type of pain than it currently is?

A. Yes. Should I describe then to now?

Q. Tell us about where you were hurting then.

A. I could not walk on my left leg. I could not put pressure on my left leg to walk.

Q. Okay. And so must (sic) of your pain was on the left side?

A. Yes.

Q. Okay. And were you having any problem with your right side in 1995?

A. No. (T. p. 28, 2-14)

Claimant's testimony does not square with Dr. Giles' June 5, 1995 report, which was after her 1995 laminectomy, wherein he reports

"Ms. Hoover states that she has had some difficulty with right hip pain." (RX "2", p. 21)

It is further undisputed that Ms. Hoover underwent a MRI in September, of 1998. According to her physical therapy notes dated August 20, 1998 (RX

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2, p. 25), she was experiencing low back pain as a result of a fall while fishing approximately one month earlier. Once again, the medical notes do not coincide with Ms. Hoover's testimony at the full hearing on November 16, 2004.

Q. Did you have any problems or pain between 1995 and when you fell off this ladder in 2003?

A. No, I didn't. (T. - P. 29, L. 4-6)

The most telling evidence in this case is the comparison of the 1998 MRI and the 2003 MRI, myelogram and CT Scan. Dr. Scott Harter, M.D., with Radiology Consultants, stated the following impressions of Ms. Hoover's September 15, 1998 MRI:

"Advanced disc degeneration and postoperative changes at L%-S1. There is mild diffuse spondylosis, a small right paramedial disc protrusion and moderate epidural fibrosis." (RX "2", P. 26)

After the November 13, 2003 incident, the claimant underwent another MRI. (RX 2, P. 42), a lumbar myelogram on March 8, 2004, (RX 2, P. 48) and a postmyelogram CT Scan on March 8, 2004 (RX 2, P. 49) with Neurological Surgery Associates.

Dr. Zachary Mason, with Neurological Surgery Associates, reviewed the claimant's myelogram and CT Scan on April 12, 2004. He reported the following:

"The findings are suggestive of degenerative disc disease

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and mild bulging. No disc herniation or stenosis is identified."

Dr. Mason went on to say that he had nothing to offer the claimant from a surgical standpoint. (RX 2, P. 50)

As set forth above, the claimant had already been diagnosed with degenerative disc disease as early as 1995 by Dr. Wilber Giles after her lumbar laminectomy at L5-S1, and the 1998 MRI evidenced advanced disc degeneration and disc protrusion. Comparing those findings to the post November 13, 2003 MRI, Myelogram, and post-myelogram, CT Scan shows me no aggravation or new injury to the claimant as reiterated by Dr. Mason on April 12, 2004. (RX 2, P. 50)

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. §11-9-102(4)(A)(i) 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 medical findings, as defined in A.C.A. §11-9-102(16), establishing the injury; and

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- 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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, she fails to establish compensability of the claim, and compensation must be denied. C. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W. 2d 876 (1997)

The claimant must prove that her injury was "...the result of an accidental injury that arose in the course of employment, and that it grew out of or resulted from, the employment." Cook v. Aluminum Co. of America, 35 Ark. App. 16, 21, 811, S.W. 2d 329, 332 (1991).

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 claimant. Complaints of pain may not be considered by the ALJ, Commission or the Courts. A.C.A. §11-9-102(16)(A)(ii).

Pursuant to Arkansas Workers' Compensation Law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison,

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82 Ark. App. 460, 120 S. W. 3rd 150 (2003). An aggravation is a new injury resulting from an independent incident. Audep v. Regal Ware, Inc. 341 Ark. 804, 205 S.W. 3rd 900 (200). An aggravation being a new injury with an independent cause, it must meet the definition of a compensable injury to establish compensability for the aggravation. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W. 2nd 5 (1998).

An analysis of the medical evidence fails to establish any new injury supported by objective findings. The medical records do show degenerative disc disease and mild bulging, but the medical evidence shows those same conditions prior to the November 13, 2003 incident. The medical evidence does not support any objective medical finding of any new injury, or aggravation to the pre-existing disease which is required under our Act. The only objective findings relate to pre-existing conditions without evidence of new injury.

The claimant has the burden of proving the job relatedness of an alleged injury without the aid of any kind of presumption in her favor. Farmers v. Little Knight Co., 220 Ark. 353, 247 S.W. 2nd 111 (1952). The burden of proof the claimant must meet is a preponderance of the evidence. Voss v. Ward's Pulpwood Yard, 248 Ark. 465, 425 S.W. 2nd 629 (1970)

ORDER

After careful consideration of all the evidence in this matter and viewing such impartially, and without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury established by medical findings. Therefore, respectfully, the above captioned claim is hereby denied and dismissed.

IT IS SO ORDERED.

DALE DOUTHIT
ADMINISTRATIVE LAW JUDGE

DATE

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