

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F308749

MARY A. PHILLIPS, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 3, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on October 1, 2004, at Forrest City, St. Francis County, Arkansas.

Claimant represented by Mr. Scott Hunter, Attorney-at-Law, Jonesboro, Arkansas.

Respondents represented by Ms. Susan M. Fowler, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted October 1, 2004, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this claim on September 1, 2004, and a Prehearing Order was filed on said date. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order subject to clarification set out below. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the employment relationship existed at all relevant

times, including August 1, 2003, and that the respondents had controverted this claim in its entirety. At the hearing, the parties agreed that the claimant's average weekly wage was \$367.93, entitling her to a compensation rate of \$245.00 per week for temporary total disability in the event the claim was found compensable.

By agreement of the parties, the primary issue presented for determination concerned compensability. If overcome, claimant's entitlement to associated benefits must be addressed.

Claimant contended, in summary, that she sustained a compensable injury as the result of a specific event identifiable in time and place of occurrence on August 1, 2003; that respondents should be held responsible for all outstanding medical, mileage, and related expenses, together with continued, reasonably necessary medical treatment; that she was entitled to temporary total disability beginning May 26, 2004, at which time she underwent surgery, and continuing through July 19, 2004, at which time claimant returned to work for the respondent herein; and that a controverted attorney's fee should attach to any benefits awarded. The claimant reserved entitlement to permanent disability benefits.

The respondents contended that the claimant did not sustain a compensable injury within the meaning of the Arkansas Workers' Compensation Laws. Respondents maintained that the claimant could not prove a

compensable injury established by medical evidence supported by objective findings, and, further, that the claimant could not establish an injury as the result of a specific incident, identifiable by time and place of occurrence which arose out of and during the course of her employment.

In addition to the claimant, she called Judy Maxine Farrell, Murline Byers, and Shirley Hawkins as corroborating witnesses. The record is composed solely of the transcript of the October 1, 2004, hearing containing several exhibits, together with the evidentiary deposition of Dr. Robert E. Abraham, introduced as "Joint Exhibit B" and retained in the Commission file in bound form. Subsequent to the hearing, respondents submitted an unsolicited letter brief in support of its contentions. Claimant's attorney submitted a response.

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 witnesses and to observe their 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 proven, by a preponderance of the credible evidence,

that she sustained a compensable injury as the result of a specific incident, identifiable by time and place of occurrence on August 1, 2003, which arose out of and during the course of her employment with Wal-Mart Stores, Inc., entitling her to appropriate workers' compensation benefits.

4. The claimant has proven, by a preponderance of the evidence, that she sustained a compensable injury established by medical evidence supported by objective findings.
5. The claimant is entitled to temporary total disability benefits for the period beginning May 26, 2004, and continuing through July 19, 2004.
6. Respondents are responsible for all hospital, medical, mileage, and related expenses as the result of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment.
7. Respondents are entitled to a credit or offset equal to, dollar-for-dollar, the amount of benefits the claimant has previously received for medical services which were paid under a group health and accident policy pursuant to A.C.A. §11-9-411 (Repl. 2002).
8. The claimant has specifically reserved the issue of permanent disability.
9. Respondents have controverted this claim in its entirety.

DISCUSSION

The claimant, Mary Ann Phillips, is forty (40) years old. She has been employed by the respondent for fifteen (15) years. At the time of her alleged injury, the claimant worked in the shipping and receiving department. The claimant acknowledged having sustained a mild whiplash to her cervical spine as the result of a motor vehicle accident during 1993. The claimant stated that she was seen one-time only by both a general practitioner and a chiropractor, and that she returned to work within two (2) weeks. The claimant denied having any additional neck or back problems between 1993 and August 1, 2003, at which time the claimant's alleged work-related injury occurred. Admittedly, the alleged incident was not witnessed by any co-workers. Further, it is undisputed that a formal claim was not filed for several days. However, it is also undisputed that the claimant reported the incident to several co-employees at the time of its occurrence and that her associates observed her to be in pain after her report of the incident. The claimant described the injury as follows:

Q Now, tell the Judge, if you will, how you hurt yourself on August the 1st of 2003 at Wal-Mart.

A I was lifting a box of freezer flaps to go to like the meat department. They was flaps to go on a freezer door, and I would lift them off of the blue pallet to put them in a shopping cart. When I went to put them in a shopping cart, I felt pain in my neck and in my back.

Q Had you ever felt anything like that before in your neck and back?

A No, sir.

Q Tell us whether or not it continued on.

A It continued on, on and on, you know. It happened on a Friday and I don't work over the weekends. So when I come back to work that Monday, it be kind of still bothering me. When I went home that night, it really bothered me. So that Tuesday morning I went and reported to my personnel person.

Q Okay. Now, what did you tell Judy Farrell about the incident that you just testified to?

A I told her that I had pulled something in my neck and my back.

Q And did you complain of it hurting you to Ms. Farrell?

A Yes.

Q Okay. Was it hurting it?

A Yes.

Q And do you remember seeing Murline Byers and Shirley Hawkins that same day?

A Yes, yes, I did.

Q Did you complain to both of those ladies about what had happened?

A I told them that I had hurt myself, and that I was in pain. They tried to get me to do an incident report. I told them I thought I would be okay.

Q Had you ever filed a claim before of any kind?

A Yes.

Q What kind?

A Well, I had – one day I had spilled some Clorox in my face, and I had fell in November of 2003. I fell, but I never went to the doctor on any of those.

Q At Wal-Mart?

A Yes. (Tr.36-38)

The claimant testified that she immediately reported the incident to Judy Farrell who worked with the claimant in the receiving department. Ms. Farrell corroborated that the claimant reported the injury to her on the day of the incident and that the claimant appeared to be in pain. Ms. Farrell stated that following the injury, the claimant kept rubbing her neck and that, thereafter, she frequently complained that her arm was going numb. Ms. Farrell asserted that the claimant had not voiced similar complaints prior to the report of injury. (Tr.11-13, 17)

Murline Byers and Shirley Hawkins, two (2) other associates that work in different departments were called as corroborating witnesses by the claimant. They, likewise, confirmed the claimant's report of injury, their observations that she appeared to be in pain, as well as her continued complaints thereafter.

The claimant returned to work on the Monday following her injury. She stated that, initially, she felt fine, but, as she continued to perform her work, she began experiencing pain once again, as well as muscle spasms in her neck. On Tuesday, August 5, 2003, the claimant reported the injury to Janette Jenkins in the Personnel Department, at which time an incident report was filled out; however, the claimant did not specifically request medical treatment at that time. The claimant first requested medical treatment on or about August

11, 2003, at which time she was sent to the company doctor, Dr. James Meredith. Dr. Meredith took an x-ray, prescribed medication, specifically, a muscle relaxer and returned the claimant to work. (Tr.39-40, 61-62)

The claimant was subsequently advised by the third-party administrator that it would pay for the initial examination and treatment by Dr. Meredith, but that it was denying any further treatment and was declining the claimant's claim for workers' compensation benefits. (Cl. Ex. 1)

The record reflects that the claimant continued working with complaints between August, 2003, and April, 2004, at which time she was examined by Dr. Beata Majewski. Dr. Majewski had previously treated the claimant for unrelated health problems, specifically, hypothyroidism and Sjogren's syndrome. Dr. Majewski's patient history contained both the August, 2003, lifting incident at work, as well as the fall at work previously pointed out for which the claimant did not seek medical treatment. Dr. Majewski conducted additional diagnostic studies, specifically, an MRI scan which revealed disc protrusions at both C3-C4 and C4-C5, as well as a herniated disc at C5-C6, at which time Dr. Majewski referred the claimant to Dr. Robert E. Abraham for further evaluation. (Jt. Ex. A, pp.6-8)

The claimant was next examined and evaluated by Dr. Robert E. Abraham on May 17, 2004. Dr. Abraham performed surgery on May 26, 2004. The record reflects that the claimant continued working at all times before

undergoing surgery on May 26, 2004. The claimant returned to work for the respondent herein on July 19, 2004, and continued working for the respondent at the time of the within hearing.

ADJUDICATION

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)(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 medical findings, as defined in A. C. A. §11-9-102(16), 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.

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

Respondents contend that the claimant is unable to prove a compensable

injury established by medical evidence supported by objective findings, and, further, that the claimant cannot establish that she sustained an injury as the result of a specific incident identifiable by time and place of occurrence which arose out of and during the course of her employment. Respondents' contentions are totally without merit.

In a September 16, 2004, report addressed to the respondents' counsel, Dr. Meredith, the company doctor addressed two (2) specific questions. His narrative report is set out below:

As you know I saw Mary Ann Phillips on August 11, 2003 for a back injury sustained while at work at Wal-Mart in Forrest City, Arkansas. Your letter of August 24, 2004 asked me to address two specific questions.

Your first question addresses the use of Flexoril and specifically asked if I observed any spasm in my evaluation of the claimant, or if the medication was prescribed only because of a history from the claimant of spasms. In reviewing my notes, I have noticed that there is tenderness noted of the paraspinal muscles and x-rays showed straightening of the normal curves in the cervical and lumbar regions. Generally, straightening of the normal curves is indicative of spasms, so my answer to your question would be that yes there was objective evidence of spasm in this regard. I would point out that according to my notes, she was given Skelaxin rather than Flexoril but this is a similar muscle relaxant.

Your second question asked whether my response is within a reasonable degree of medical certainty, and my answer to that would be affirmative.

I hope this information is helpful to you. Please let me know if I can be of further assistance. (Jt. Ex. A, p.9)

Although I find that the claimant's injury was established by medical evidence supported by objective findings based on Dr. Meredith's report, clearly

the MRI performed in April, 2004, which confirmed the herniated disc is objective medical evidence.

A claimant is not required to establish the causal connection between a work-related incident and an injury by either expert medical opinion or objective medical evidence. See, *Wal-Mart Stores, Inc. vs. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). In fact, the Arkansas courts have long recognized that a causal relationship may be established between an employment related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall vs. Pitman Const. Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962); *Harris Cattle Co., vs. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974). The claimant's credible testimony, together with the testimony of her corroborating witnesses, and the medical evidence establishes that causal connection. *Kearby vs. Yarborough Brother's Gin Co.*, 248 Ark. 1096, 455 S.W.2d 912 (1970); *Exxon Corp. vs. Fleming*, 253 Ark. 798, 489 S.W.2d 766 (1973).

I found the claimant and her corroborating witnesses to be most credible. It is apparent that the claimant is highly motivated and has a strong work ethic as exhibited by the fact that she continued working at all times following her injury until ultimately undergoing surgery in May, 2004. Even after undergoing

a cervical laminectomy on May 26, 2004, the claimant returned to work for the employer herein on July 19, 2004, and has continued to work since that time. Further, the respondent offered no evidence whatsoever to refute the credible testimony of the claimant and her witnesses that an incident occurred. The incident and injury have been established.

It is well-settled that claimant has the burden of proving the job-relatedness of any alleged injury, without the aid of any kind of presumption in her favor. *Pearson vs. Faulkner Radio Service*, 220 Ark. 368, 247 S.W.2d 964 (1952); *Farmer vs. L.H. Knight Company*, 220 Ark. 333, 248 S.W.2d 111 (1952). The burden of proof claimant must meet is preponderance of the evidence. *Voss vs. Ward's Pulpwood Yard*, 248 Ark. 465, 425 S.W.2d 629 (1970). Under prior law, it was the duty of the Commission to draw every legitimate inference in favor of the claimant and to give claimant the benefit of the doubt in making factual determinations. However, current law requires that evidence regarding whether or not claimant has met her burden of proof be weighed impartially, without giving the benefit of the doubt to either party. *Arkansas Code Annotated §11-9-704(c)(4)*; *Wade vs. Mr. C. Cavanaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); *Fowler vs. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has proven, by a

preponderance of the credible evidence, that she sustained an injury as the result of a specific incident identifiable by time and place of occurrence on August 1, 2003, which arose out of and during the course of her employment and which has been established by medical evidence supported by objective findings. Accordingly, I hereby make the following:

AWARD

Respondent, Claims Management, Inc., is hereby directed and ordered to pay, to the claimant, temporary total disability benefits at the rate of \$245.00 per week beginning May 26, 2004, and continuing through July 19, 2004.

All benefits having accrued, respondents are to pay same in lump sum and without discount.

Additionally, respondents are responsible for all hospital, medical, mileage, and related expenses, together with continued, reasonably necessary medical treatment.

Respondents may claim an offset or credit equal to, dollar-for-dollar, the amount of benefits the claimant has previously received from a group accident and health policy pursuant to A.C.A. §11-9-411.

Additionally, the claimant's attorney, Mr. Scott Hunter, is hereby awarded the maximum statutory attorney's fee on this entire Award to be paid pursuant to A.C.A. §11-9-715.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge