

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F408185

MONICA GIESE, Employee	CLAIMANT
STAGE STORES, INC., Employer	RESPONDENT
ESIS, Carrier	RESPONDENT

OPINION FILED JULY 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On June 29, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 20, 2005, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties on June 7, 2004.
3. The claimant was earning sufficient wages to entitle her to compensation at the rate of \$75.00 per week.
4. Respondent has controverted this claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's low back.
2. Temporary total disability benefits.

3. Medical.
4. Attorney fee.

The claimant contends she was injured on June 7, 2004. She contends her lower back was injured due to repetitive and continual lifting of heavy boxes on a daily basis, and as a result is entitled to temporary total disability, medical, and an attorney fee.

The respondents deny claimant sustained a compensable injury. Further, respondents raise notice as a defense.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 20, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by the respondent.

FACTUAL BACKGROUND

The claimant is a 45-year-old woman who became employed by the respondent on November 12, 2001. Claimant was originally hired as a sales associate and performed that job for approximately six months before she was moved to the respondent's receiving department. Claimant's job duties in the receiving department required her to take merchandise out of boxes, put sensors on merchandise, hang the merchandise up, and transport it to various departments. The respondent is a department store which sells

clothing and various household goods.

Claimant testified that approximately two to three months prior to June 2004 she began developing pain in her low back which she attributes to her work and the lifting of boxes. On her last day to work before a vacation in June 2004, claimant testified that at the end of that day her back was hurting so bad she could hardly walk to her car. Claimant went on vacation for approximately 12 days before returning to work for respondent for approximately two more weeks. Claimant testified that during this two-week period her pain worsened and she eventually sought medical treatment from Dr. Kent Moore, a chiropractic physician. After seeing Dr. Moore on two or three occasions with no alleviation of her pain she sought medical treatment from the emergency room at St. Mary's Hospital in Rogers and was referred to Dr. Raben. Claimant has been evaluated by Dr. Raben who ordered an MRI scan which according to his report of October 4, 2004 reveals a herniated disc at the L4-5 level. Dr. Raben has primarily treated claimant conservatively with physical therapy, medication, and a referral to Dr. VanOre for pain management.

Claimant has filed this claim contending that she suffered a compensable injury to her low back while working for respondent. She seeks payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

The claimant does not contend that she suffered a specific injury identifiable by time and place of occurrence to her back. Instead, claimant contends that she suffered an injury to her back as a result of work performed over a period of time for the respondent in its shipping and receiving department. A claimant seeking benefits for a gradual onset injury to the back must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external

physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for medical treatment. *Wal-Mart Stores, Inc. v. Leach*, 74 Ark. App. 231, 48 S.W. 3d 540 (2001); *Freeman v. Con-Agra Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001). In addition, objective medical evidence is necessary to establish the existence and extent of an injury. *Wal-Mart v. Leach, supra*; *Wal-Mart Stores v. VanWagner*, 337 Ark. 443, 990 S.W. 2d 522 (1999).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant simply failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury that arose out of and in the course of her employment with the respondent.

The primary evidence supporting claimant's contention that she suffered a compensable injury is her testimony that her back pain was caused by her job activities in the respondent's receiving department. However, I do not find the claimant's testimony to be particularly credible. At the hearing claimant specifically denied any prior low back pain or treatment to her low back. However, the medical evidence contradicts this testimony. While there are some medical reports which contain only a generic description of "back pain", there are also medical reports which mention specific complaints of low back pain prior to this period of time in June 2004. The medical reports of Dr. Estes, a chiropractic physician, dated May 15, 2001 indicate that claimant was complaining of neck pain, "LBP", and her legs aching. "LBP" is a common acronym for low back pain.

Furthermore, Dr. Estes' clinic notes of July 3, 2002 specifically mentions "Low Back" as a complaint. Dr. Estes also completed a work slip that same date and indicated under the description of injury/illness "low back pain."

In addition to the medical reports from Dr. Estes, the medical records also contain records from the Rogers Medical Center. On December 14, 2001, claimant was evaluated by Megan Morgan, a nurse practitioner, at the Rogers Medical Center. Morgan's notes

reflect the following history:

Here today for low back pain, started one day ago when bending over. She has a history of this. Was seen two years ago. (Emphasis added.)

Morgan went on to assess claimant's condition as low back pain and prescribed medications, ice and heat treatment, and exercises.

Thus, while claimant denies any prior low back pain or medical treatment for her low back, the medical reports clearly indicate that claimant has had low back pain and has sought medical treatment from a chiropractic physician and a nurse practitioner. Furthermore, the notes from the nurse practitioner indicate that claimant has had a history of low back pain.

Given this discrepancy between claimant's testimony and the medical evidence, I do not find the claimant's testimony to be particularly credible.

I also note that according to claimant's testimony she knew the "whole time" that her back pain was caused by her job activities with the respondent. While the claimant did make numerous statements regarding back pain to Darlene Payne, her supervisor, by claimant's own admission she did not specifically indicate to Payne that her low back pain was related to her employment. In fact, Payne testified that it was not until August 4, 2004 after claimant had sought medical treatment on several occasions that claimant indicated that she wanted to file a workers' compensation claim.

When claimant did seek medical treatment she saw Dr. Kent Moore, a chiropractic physician. Dr. Moore's notes do not mention work as a potential source of the claimant's low back complaints. Claimant did not give a history of a potential work-related history until she sought medical treatment at the emergency room on July 21, 2004.

In finding that claimant has failed to meet her burden of proof, I do acknowledge that Dr. Raben has opined that a causal connection exists between the claimant's job activities

with the respondent and her low back injury. However, Dr. Raben in his report of October 4, 2004 indicates that his opinion is based in part upon the fact that there is no other intervening history. It is unclear from a review of Dr. Raben's report whether he was aware that claimant had previously complained of low back pain for which she sought medical treatment from Dr. Estes and from a nurse practitioner. It is also unclear from a review of Dr. Raben's report whether he was aware that claimant was a part-time employee for the respondent working generally less than 20 hours per week as opposed to a full time employee.

In summary, in order to prevail, claimant has the burden of proving by a preponderance of the evidence that she suffered a compensable injury which arose out of and in the course of her employment with the respondent. Here, claimant specifically denied any prior low back pain or treatment for her low back. However, the medical evidence indicates that claimant had sought medical treatment for complaints of low back pain from Dr. Estes and from Megan Morgan, a nurse practitioner. In fact, Morgan's office notes indicate that claimant has a history of low back pain. In addition, despite claimant's testimony that she attributed her low back pain to her job duties the "whole time," claimant admittedly did not inform her supervisor that she believed her back complaints were causally related to her work. Finally, when claimant did seek her initial medical treatment from Dr. Moore, she did not indicate that her low back pain was causally related to her employment with respondent. Instead, claimant did not mention her job to a medical provider until July 24, 2004. Furthermore, according to the testimony of Payne, claimant did not report a potential work-related injury to the respondent until August 4, 2004. Given all of this evidence, I simply find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her low back which arose out of and in the course of her employment with the respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE