

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412412

BRIAN GOVIERA

CLAIMANT

WAL-MART

RESPONDENT

CLAIMS MANAGEMENT, INC.
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 22, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by ALAN LANE, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on June 7, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on March 31, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On November 14, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$233.00 for temporary total disability and \$175.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's low back injury on November 14, 2004.
2. Related medical.
3. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained an injury while in the scope and course of his employment to his lower back on November 14, 2004. On that date, he was working for respondent employer in Rogers, Arkansas, lifting and handing 30-35 pound containers of cat litter down off of a riser when he felt pain in his low back.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury as defined by the Arkansas Workers' Compensation Act. This includes, but is not limited to, whether the claimant has measurable and objective findings to support the definition of the compensable injury.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The parties submitted a joint medical exhibit marked Joint Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he worked for the respondent as an over night stocker in the pet department. The claimant explained that his job involved pulling freight to the floor, down loading the freight, setting the freight out on the floor and then stocking

it onto the shelves. The claimant testified that there are usually two people working in the department but there are times when he would work by himself.

The claimant testified that on November 14, 2004, he was stocking making an end cap of thirty-five pound buckets of Tidy Cat cat liter. The claimant testified that he was taking the buckets of cat liter off the pallet and placing them onto the shelf. The claimant testified that he really did not feel anything different because working in that department, he was often sore when he would leave because of the heavy work. The claimant further explained that he also has stacked and thrown fifty pound bags of dog food, carrying cases of cans as well as stocking the cat litter. The claimant testified that he finished out his shift and went home. The claimant testified that the next morning he could not move. The claimant testified that there was another employee working by the name of Bobby Bouchet but that he, the claimant, was stocking the cat liter by himself. The claimant testified again that working in the pet department he would often times go home feeling sore and tired after throwing bags of dog food all night. The claimant was asked if he was sore any different than he was any other night and the claimant replied, "Not really."

The claimant testified that when he woke the next morning and tried to get out of bed it felt like someone had taken a hot poker and jabbed it into his back. The claimant testified that he went to work that day and informed the management that his back was hurting. The claimant testified that he reported that he was sore

and hurting real bad and told the other people in the department that he would have to do lighter lifting. The claimant testified that he reported to his supervisors, Don Shuler and Wade, around 2:00 a.m. that his back was hurting real bad and that he had done something the night before. The claimant testified that his supervisors told him that he could just pull empty pallets back for the rest of the shift. The claimant testified that there was never an incident report made until the next Wednesday when he informed them that his back was not getting any better and, in fact, was getting worse. The claimant testified that at that time, an incident report was filled out. The claimant testified that he was told that they would get him in to see a doctor. The claimant testified that the following day, Thursday, he was unable to go into work remembering that he could barely get off his couch. The claimant testified that this was the only day that he was unable to go into work.

The claimant testified that the respondents sent him to see the company doctor in Lowell. The claimant testified that he was diagnosed with having a severe pinched sciatic nerve and was told not to lift anything over forty pounds and prescribed Celebrex, to go home and to take it easy. The claimant testified that the doctor also took x-rays. The claimant testified that he did tell the doctor at the Lowell clinic how he thought he hurt himself stocking cat litter. The claimant testified that he demonstrated to the doctor the job which he was doing which injured his back. The claimant testified that he disagrees with the doctor's narration as

to how he did his job. The claimant testified that he went back to work the next day and gave the respondents his weight lifting restriction. The claimant testified that when he returned to see the doctor in a week, he was told that the doctor would not see him because he was not covered by workers' compensation. The claimant testified that he has not seen another doctor since he cannot afford it. The claimant testified that he returned to work and tried to work within his weight restrictions. The claimant testified that his last date to work for the respondent was April 22, 2005.

On cross examination, the claimant agreed that he left the employment with the respondent voluntarily. The claimant agreed that when he left work on the morning of November 14, 2004, he was sore just like he was every other day when he left work. The claimant also agreed that he was unaware that there was any problem until he woke up the next morning.

The medical records set forth that the claimant was seen at the Lowell clinic by Dr. Konstantin Berestnev on November 19, 2004. The doctor notes that the claimant was loading cat litter onto the shelves when he hurt his low back. After examination of the claimant and review of the claimant's x-rays, the doctor diagnosed the claimant with having lumbar strain. The doctor recommended that the claimant do stretching exercises, prescribed Celebrex and that he avoid lifting more than forty pounds with a follow up visit in one week.

After a review of this complete record, I find that the claimant has failed to prove by a preponderance of the evidence in light of Arkansas law that he sustained a compensable injury to his low back on November 14, 2004, when working for the respondent. Arkansas law requires that a compensable injury be evidenced by objective medical findings of injury. See Ark. Code Ann. §11-9-102(4)(D) and subdivision (16). At the one doctor's visit the claimant was allowed to attend, Dr. Berestnev does not note muscle spasm or any other objective findings on which to establish a compensable injury.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On November 14, 2004, the relationship of employee-employer-carrier existed between the parties.
3. The claimant is entitled to a weekly compensation rate of \$233.00 for temporary total disability and \$175.00 for permanent partial disability.
4. The claimant has failed to prove by a preponderance of the evidence in light of Arkansas law that he sustained a compensable injury while working for the respondent on November 14, 2004. See discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury in light of

Arkansas law while working for the respondent on November 14, 2004.
Therefore, this claim should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE