

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F410336

SCOTT GRAHAM, Employee	CLAIMANT
WAL-MART STORES, Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED APRIL 12, 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 TOD C. BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 16, 2005, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 12, 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 existed between the parties on August 31, 2004.

At the time of the hearing the parties agreed to stipulate that claimant earned a sufficient average weekly wage to be entitled to compensation at the rate of \$220.00 per week for temporary total disability benefits.

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

1. Compensability of injury to claimant's right knee.
2. Temporary total disability benefits.

3. Medical.
4. Attorney fee.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant was injured on August 31, 2004. The claimant's job requires that he kneel almost continuously on a cement floor causing his right knee to become injured."

The respondent's contentions as set forth in its pre-hearing questionnaire are as follows: "The claimant contends that he sustained a gradual onset compensable injury to his right knee in the form of prepatellar bursitis. While the claimant's Responses to Pre-Hearing Questionnaire allege an accident injury date of August 31, 2004, the proof will not reveal a specific episode of injury. To the contrary, the bursitis was allegedly brought about by the claimant's kneeling at work while stocking. Respondent contends that the claimant's job duties were not 'rapid and repetitive' and that compensability of the claim cannot be proven by a preponderance of the credible evidence."

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 witness and to observe his 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 January 12, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. The parties' stipulation that claimant earned a sufficient average weekly wage to entitle him to compensation at the rate of \$220.00 per week for temporary total disability benefits is also hereby accepted as fact.
3. Claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable injury to his right knee while employed by the respondent.

FACTUAL BACKGROUND

The claimant is a 34-year-old man who obtained a bachelor of science degree in marketing from the University of Arkansas. Claimant was hired by the respondent as a cashier in December 1999. Claimant performed the cashier job for approximately one and a half years before he was transferred to the dairy and frozen foods department where his job duties required him to rotate milk, stock frozen food and dairy products, and fill in as a cashier when needed. Claimant testified that in order to perform this job he would have to get on his knees to rotate milk and stock product on lower shelves.

Claimant testified that approximately three weeks prior to his first visit with Dr. Arnold on September 23, 2004, he noticed a “spongy” feeling in his knee as he was kneeling down rotating milk. On September 23, 2004, Dr. Arnold diagnosed claimant’s condition as right knee prepatellar bursitis, aspirated fluid from claimant’s knee and gave claimant a knee immobilizer. Dr. Arnold’s medical report of that date indicates that claimant does some kneeling at work and that claimant believes this activity aggravated his knee condition.

The medical records indicate that claimant continued to receive follow-up treatment from Dr. Arnold who aspirated claimant’s knee on three separate occasions. Dr. Arnold also gave claimant an injection in his knee. Dr. Arnold’s most recent medical reports of November 11, 2004 and December 3, 2004, indicate that claimant’s knee condition is improving and that he should continue with his current medical treatment.

Claimant was given work restrictions involving sedentary duty by Dr. Arnold. Respondent provided claimant with a job allowing him to sit on a stool as a cashier which he performed until December 18, 2004 when he terminated his employment with respondent and went to work for Arvest Bank.

Claimant has filed this claim contending that he suffered a compensable injury to his right knee while employed by the respondent. He seeks payment of medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

The alleged injury to claimant's right knee was not the result of a specific incident identifiable by time and place of occurrence. Instead, claimant contends that his knee injury is the result of a gradual onset caused by his job duties with the respondent. In order to receive benefits for a gradual onset or cumulative trauma injury claimant has the burden of proving by a preponderance of the evidence (1) that he suffered an injury arising out of and in the course of his employment; (2) that the injury caused internal or external physical harm to the body; (3) that the injury is supported by objective findings; (4) that the injury was caused by rapid repetitive motion; and (5) that the injury was the major cause of the disability or need for medical treatment. *Stevenson v. Frolic Footwear*, 70 Ark. App. 383, 20 S.W. 3d 413 (2000); *Duncan v. Timber Ridge Group*, Full Commission Opinion filed October 25, 2001 (F006495).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his knee because claimant has failed to prove by a preponderance of the evidence that the injury was caused by rapid repetitive motion.

The test for determining whether an injury is caused by rapid repetitive motion has two parts. First, the task must be repetitive; and second, the repetitive motion must be rapid. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W. 2d 644 (1998).

Here, claimant testified that when he was stocking lower shelves or rotating milk on lower shelves he was required to get on his knees. Claimant was unsure of the percentage

of the day he had to kneel. Even if one were to accept that claimant's job duties required him to be on his knees repetitively, I find insufficient evidence that this repetitive motion was "rapid." According to the decision in *Malone*, it is not sufficient that the claimant's task be repetitive; instead, those repetitive tasks must also be rapid. Here, a preponderance of the evidence does not prove that claimant's job duties involving his knee were rapid.

In summary, while claimant's primary treating physician, Dr. Arnold, has opined that in his opinion claimant's right knee condition is causally related to his job duties with the respondent, claimant must also prove by a preponderance of the evidence that his job duties required rapid repetitive motion. While claimant may have had to kneel at work on a repetitive basis in order to stock lower shelves, I find insufficient evidence that these repetitive tasks were "rapid" in nature as required for compensability. Thus, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right knee while employed by respondent.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right knee while employed by the respondent. Therefore, his claim for compensation benefits is denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE