

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309931

TONY LONG,  
EMPLOYEE

CLAIMANT

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

RESPONDENT

**OPINION FILED FEBRUARY 1, 2005**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondent was represented by HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on November 3, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on June 29, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or during the course of the hearing and are hereby accepted:

1. The employer/employee relationship existed on or about September 2, 2003.
2. On that date the claimant was earning wages sufficient to entitle him to a compensation rate of \$160.00 per week for TTD and \$154.00 per week for PPD.
3. This claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following during the course of the hearing:

1. Mr. Spencer's renewed motion at the November 3, 2004 hearing for a continuance or a dismissal without prejudice.
2. Admissibility of Dr. Bivins' proffered November 1, 2004 and November 2, 2004 letters.
3. Admissibility of Mr. Long's Wal-Mart employment application and Rick Wallace's letter.
4. Whether the claimant sustained a compensable back injury and the claimant's entitlement to benefits.
5. The claimant has unpaid medical bills to Glen's Rex All in Heber Springs, AR, Dr. Frank Bivins in Heber Springs, Dr. Jeffrey Ketchum in Conway, AR, Dr. Kent Krug in Heber Springs, Dr. Lawrence Alt

in Little Rock, White County Medical Center in Searcy, Baptist Memorial in Heber Springs, AR.

6. Attorney's fees.
7. The claimant has been ordered off of work by Dr. Mark Woods and Dr. Bivins. To date, he has received no TTD benefits. The claimant seeks TTD from 9/2/03 to a date yet to be determined.
8. The claimant has been prescribed morphine, and the Workers' Compensation carrier is refusing prescriptions. We are requesting reasonable and necessary medical treatment.

The record consists of the November 3, 2004 hearing transcript, all exhibits previously accepted or proffered and contained therein, and Dr. Bivins' January 12, 2005 deposition transcript.

#### DISCUSSION

1. **Mr. Spencer's Renewed Motion At The November 3, 2004 Hearing For A Continuance Or A Dismissal Without Prejudice.**

By letter dated October 4, 2004, Mr. Spencer requested a continuance of the hearing set for November 3, 2004 in order for the claimant to take Dr. Bivins' deposition. Via a letter faxed to Mr. Spencer on October 5, 2004 I declined to continue the hearing but instead advised the parties that

I would allow Mr. Spencer until January 3, 2005 to take and submit to my office a written transcript of Dr. Bivins' deposition. That deposition was in fact taken at the earliest possible date. The transcript was received in my office on January 14, 2005, and as indicated above, I have accepted that transcript as a post-hearing joint exhibit of the parties into the record.

On Thursday, October 21, 2004 (not October 15, 2004 as Mr. Spencer asserts), I received a written request from Mr. Spencer that I either continue this case indefinitely or dismiss this case without prejudice for refiling at a later date. Mr. Spencer's letter gave no explanation or justification for his request, and by an order faxed to the parties on Monday, October 25, 2004, I denied Mr. Spencer's request for a continuance, or in the alternative, a dismissal without prejudice.

At the hearing held on November 3, 2004, Mr. Spencer again requested a continuance on the grounds that (1) his two witness other than Mr. Long were not present at the hearing because (2) Mr. Spencer told Mr. Long at the time of his October 4, 2004 continuance request that the continuance would probably be granted so (3) the witnesses made other plans for November 3, 2004. [See T. 10] I have the following

observations regarding Mr. Spencer's most recent justifications for a continuance.

First, my prehearing order clearly indicated that the hearing would not be cancelled except by approval of the Administrative Law Judge and not without showing good cause. If under these circumstances Mr. Spencer advised his client to release his witnesses before I responded to his motion on October 5, 2004, then clearly Mr. Spencer knowingly assumed the risk that the requested continuance would be denied.

Second, Mr. Spencer has engaged in a repeated course showing a lack of diligence in this case as documented in my October 25, 2004 order. I on the other hand responded to his October 4, 2004 continuance request within approximately 24 hours. I had also previously warned Mr. Spencer not to request hearings if he was not prepared for a hearing.

Third, Mr. Spencer, in proffering the testimony of the absent witnesses, identified their testimony as describing major differences in Mr. Long's symptoms before and after September 2, 2003. [T. 37] There is no dispute that Mr. Long was in sufficient pain to seek out Dr. Bivins on September 4, 2004. The threshold issues in this case, as discussed more fully below are (1) whether the severe pain that sent Mr. Long to Dr. Bivins was caused by a back injury sustained

lifting a television at work on September 2, 2004 and (2) whether a back injury sustained on September 2, 2004 is established by medical evidence supported by objective findings. The proffered testimony simply does not bear on the causation and objective medical findings analysis below on which this case must be decided.

Fourth, I feel compelled to respond in passing to Mr. Spencer's suggestion that my denial of his motions in this case is somehow part of a grand Commission conspiracy to "get Spencer." [T. 12] My legal research indicates that during the six month period between June 1, 2004 and November 31, 2004, Mr. Spencer appears to have filed nineteen motions for additional time to file a brief in his appeals to the Full Commission. My research indicates that the Full Commission granted eighteen of Mr. Spencer's nineteen requests, denying Mr. Spencer's motion on one occasion when his motion was untimely filed.<sup>1</sup>

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<sup>1</sup> Edwin Carlisle v. King Trucking, Inc., Full Workers' Compensation Commission, Order filed June 9, 2004 (E909069) [**Spencer motion granted**]; Edwin Carlisle v. King Trucking, Inc., Full Workers' Compensation Commission, Order filed July 27, 2004 (E909069) [**Spencer motion granted**]; Edwin Carlisle v. King Trucking, Inc., Full Workers' Compensation Commission, Order filed August 23, 2004 (E909069) [**Spencer motion granted**]; Edwin Carlisle v. King Trucking, Inc., Full Workers' Compensation Commission, Order filed October 26, 2004 (E909069) [**Spencer motion granted**]; Wilson T. Ring v.

Coincidentally, my legal research also indicates that the motions in footnote 1 exceed the number of similar

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Stone & Sons Monument, Full Workers' Compensation Commission, Order filed July 19, 2004 (F305003) [**Spencer motion granted**]; Wilson T. Ring v. Stone & Sons Monument, Full Workers' Compensation Commission, Order filed August 24, 2004 (F305003) [**Spencer motion granted**]; Wilson T. Ring v. Stone & Sons Monument, Full Workers' Compensation Commission, Order filed October 25, 2004 (F305003) [**Spencer motion granted**]; Tina Gregg v. Spherion Corporation, Full Workers' Compensation Commission, Order filed July 16, 2004 (F301826 and F302814) [**Spencer motion granted**]; Tina Gregg v. Spherion Corporation, Full Workers' Compensation Commission, Order filed August 26, 2004 (F301826 and F302814) [**Spencer motion granted**]; Tina Gregg v. Spherion Corporation, Full Workers' Compensation Commission, Order filed November 4, 2004 (F301826 and F302814) [**Spencer motion granted**]; Herman E. Burgess v. Unimin Corporation, Full Workers' Compensation Commission, Order filed August 27, 2004 (F109912 and F109913) [**Spencer motion granted**]; Herman E. Burgess v. Unimin Corporation, Full Workers' Compensation Commission, Order filed September 20, 2004 (F109912 and F109913) [**Spencer motion granted**]; Brenda Joyce Clark v. Ronnie Dowdy Trucking, Full Workers' Compensation Commission, Order filed August 30, 2004 (E004004) [**Spencer motion granted**]; Brenda Joyce Clark v. Ronnie Dowdy Trucking, Full Workers' Compensation Commission, Order filed November 16, 2004 (E004004) [**Spencer motion denied**]; Glenda Brotherington v. White River Area Agency on Aging; Full Workers' Compensation Commission, Order filed October 4, 2004 (F214229) [**Spencer motion granted**]; Glenda Brotherington v. White River Area Agency on Aging; Full Workers' Compensation Commission, Order filed October 9, 2004 (F214229) [**Spencer motion granted**]; Victor Herzog v. Con Agra, Full Workers' Compensation Commission, Order filed October 19, 2004 (F301559) [**Spencer motion granted**]; Victor Herzog v. Con Agra, Full Workers' Compensation Commission, Order filed November 15, 2004 (F301559) [**Spencer motion granted**]; Clifford Anderson v. Custom Metal Finishers, Full Workers' Compensation Commission, Order filed November 8, 2004 (F204129 and F303483) [**Spencer motion granted**].

motions filed by all other attorneys practicing before the Full Commission combined during the same period. Not only are these Full Commission orders granting his extension requests inconsistent with Mr. Spencer's suggestion that the Commission is out to "get Spencer," Mr. Spencer's lack of diligence in pursuing his appeals is consistent with my belief that Mr. Spencer's conspiracy theory voiced at the start of the hearing in this case is simply an effort to deflect attention from his own documented lack of diligence in preparing this case for a hearing and his own error suggesting to his client that Mr. Long may release his witnesses prior to receiving an order from me regarding his motion for continuance to take Dr. Bivins' deposition.

Finally, Mr. Spencer has suggested to me in the past that claimants have an absolute right to obtain a dismissal without prejudice, as he requested in this case, notwithstanding the language in Administrative Law Judge prehearing orders stating that hearing schedules will be changed only for good cause. In my legal research, I have been unable to locate any Court decisions regarding how, if at all, voluntary dismissals pursuant to Arkansas Rule of Civil Procedure 41 apply to proceedings before the Arkansas Workers' Compensation Commission. The only Full Commission

decision I have located addressing whether voluntary dismissals are discretionary or non-discretionary with the Commission is Bertha Marie Cox v. Town & Country Discount Foods, Full Workers Compensation Commission, Opinion filed November 3, 1987 (W.C.C. No. D514450), a case in which Mr. Spencer filed a motion for voluntary dismissal. Based on Section 27 of the Arkansas Workers' Compensation Act (codified at Ark. Code Ann. § 11-9-705(a)), the Commission deemed the granting of a motion for voluntary dismissal a matter of discretion with the Commission, and not mandatory as Mr. Spencer has previously intimated to me.

In Cox, the Full Commission stated that Mr. Spencer made numerous attempts to delay the time for the hearing and failed to comply with discovery orders. Notwithstanding Mr. Spencer's conduct, the Full Commission did not wish to penalize the claimant for the actions and inactions of Mr. Spencer. Under these circumstances, the Commission granted the claimant's motion for voluntary dismissal without prejudice, and the Commission directed Mr. Spencer to pay sanctions for his non-compliance with a discovery order.

By comparison, in the present case, as discussed, the record now contains Dr. Bivins' deposition transcript, and the witness testimony proffered by Mr. Spencer has no

bearing on the facts which will determine the compensability issue in this case, as discussed below. Therefore, for all of the reasons discussed herein, I find that Mr. Spencer's renewed motion for a continuance or voluntary dismissal should be denied.

**2. Admissibility of Dr. Bivins' Proffered November 1, 2004 and November 2, 2004 Letters**

Mr. Nebben acknowledged that his objection to these letters would become moot if Dr. Bivins' deposition transcript became part of the record. [T. 6] The deposition now being part of the record, I therefore find that the admissibility of Dr. Bivins' November 1, 2004 letter and Dr. Bivins' November 2, 2004 letter is moot. Claimant's Proffered Exhibits 4 and 5 are therefore accepted into the record.

**3. Admissibility of Mr. Long's Wal-Mart Employment Application and Rick Wallace's Letter**

Mr. Spencer objected to introduction of these documents on the grounds that "you specifically say in your prehearing order that what is going to be introduced is to be attached to a packet introduced to Your Honor". [T. 8 and 65]. My prehearing order in the record makes no reference to documents being submitted to me in a packet or otherwise before the hearing. My prehearing order states that

documents are to be exchanged by the parties at least 30 days prior to the scheduled hearing, and the discussion between Mr. Spencer and Mr. Nebben on page 7-8 of the hearing transcript indicates to me that Mr. Nebben adequately advised Mr. Spencer of his intention to submit these documents into evidence and also provided a copy of these documents to Mr. Spencer. Respondents' Proffered Exhibits 2 and 3 are therefore accepted into the record.

**4. Compensability Of Mr. Long's Alleged September 2, 2004 Work-Related Low Back Injury**

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability of the aggravation. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

In the present case, I find that Mr. Long has failed to prove by a preponderance of the evidence that he sustained either a compensable new low back injury or a compensable aggravation of a pre-existing back injury while lifting a television at work on September 2, 2003, as he contends. While I do not doubt that Mr. Long was in pain when he left work on September 2, 2003, and that his pain was severe when he presented to Dr. Bivins on September 4, 2003, I also note that (1) Mr. Long has candidly acknowledged that he did not experience any snap or pop lifting the television [T. 68]; (2) In fact, Mr. Long did not feel anything when he lifted the television [T. 30]; (3) Mr. Long did not mention anything about lifting a television when he presented to Dr. Bivins on September 4, 2004 for his severe back pain; and (4) Mr. Long initially felt that his September 2, 2004 pain was the same pain that he has always dealt with. [T. 44].

In reaching my conclusion, I recognize that Dr. Bivins rendered an expert medical opinion in this case that, based on the history that Mr. Long provided him, lifting a television at work aggravated Mr. Long's pain. However, in assessing the significance of this opinion, I also note that (5) Dr. Bivins testified that he would only prescribe morphine for a patient in chronic severe pain, and Dr. Bivins was prescribing morphine (MS Contin) for Mr. Long both before and after September 2, 2004; (6) Claimant's Exhibit 1 page 1 indicates that Mr. Long had disk herniations at L3-L4 and L4-L5 as early as 1999; (7) Claimant's exhibit 1 page 8 indicates that 2002 discography testing revealed extravasation of contrast material at L5-S1; (8) Claimant's Exhibit 1 page 5 indicates that Mr. Long's pain at work in 2001 would be worse during the last half of the work day; (9) Claimant's Exhibit 1 page 5 indicates that Mr. Long experienced intractable low back and right leg pain in 2001; (10) Claimant's Exhibit 1 page 11 indicates on June 26, 2003, Mr. Long had been fired from his last two jobs because of back pain, that his pain was at that time severe, and that Mr. Long was currently trying to get on disability; and (11) Dr. Bivins acknowledged that his aggravation opinion was based only on subjective symptoms

reported to him, and that Dr. Bivins was not aware of anything objective that was different after September 2, 2003. I find that these 11 facts establish by a preponderance of the evidence that Mr. Long did not sustain a new injury or compensable aggravation on September 2, 2003, caused by lifting a television, although he did experience a gradual onset of increasingly severe symptoms beginning that day.

Even if the preponderance of the evidence in the record otherwise indicated that Mr. Long had experienced some type of new low back injury on September 2, 2004, Mr. Long has also failed to prove by a preponderance of the evidence (or proffered evidence) the existence of any new injury with medical evidence supported by objective findings as the term "objective findings" is defined in Ark. Code Ann. § 11-9-102(16)(A)(i).

In this regard, I note that neither Dr. Gregory or Dr. Bivins could identify any new injury on Mr. Long's low back MRI performed on October 3, 2003. While I note that Dr. Bivins prescribed Mr. Long muscle relaxers after the injury, Mr. Long also had an ongoing prescription for muscle relaxers before the injury. Likewise, I note that Dr. Bivins testified that any pulse abnormality in Mr. Long's

right leg observed on September 4, 2003 would be an objective medical finding. However, Dr. Bivins at no point during his deposition questioning by Mr. Spencer ever suggested whether the pulse abnormality in Mr. Long's leg on September 4, 2003 was in fact medically significant, and if so how. Therefore, Mr. Long has failed establish by a preponderance of the evidence any causal connection between the pulse abnormality detected by Dr. Bivins on September 4, 2003 and any alleged back injury at issue in this claim.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Mr. Spencer's November 3, 2004 motion for a continuance or voluntary dismissal is denied.
2. Dr. Bivins' proffered November 1, 2004 and November 2, 2004 letters are accepted into the record.
3. Mr. Long's proffered Wal-Mart employment application and Rick Wallace's proffered letter are accepted into the record.
4. Mr. Long has failed to establish by a preponderance of the credible evidence that he sustained a new injury at work on September 2, 2003 caused by lifting a television as he asserts.

5. Mr. Long has also failed to prove by a preponderance of the evidence or any proffer of evidence the existence of any new injury with medical evidence supported by objective findings as the term "objective findings" is defined in Ark. Code Ann. § 11-9-102(16)(A)(i).
6. Mr. Long has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury on September 2, 2003.
7. Consequently, the additional issues identified in the June 29, 2004 prehearing order are moot.

**ORDER**

For the reasons discussed herein, this claim must be and hereby is denied and dismissed.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge