

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F209057

KANDIDA R. PLUMMER, EMPLOYEE

CLAIMANT

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

RESPONDENT #1

SECOND INJURY FUND

RESPONDENT #2

OPINION FILED JULY 14, 2005

A hearing in this case was conducted on April 20, 2005, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent #1 was represented by Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

Respondent #2 was represented by Terry Pence, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on January 25, 2005; a Prehearing Order was filed in this matter on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to five stipulations. Four of these stipulations are set forth in the Prehearing Order and were confirmed by the parties at the hearing; the parties agreed to the fifth stipulation at the hearing. The following stipulations are hereby accepted.

1. The employee-employer relationship existed on July 29, 2002, and at all other relevant times.

2. Claimant's average weekly wage was \$335.00; her temporary total disability rate is \$223.00; and her permanent partial disability rate is \$167.00.

3. Respondents have controverted this claim in its entirety.

4. Claimant underwent two heart surgeries subsequent to July 29, 2002, that were not related to her work.

5. If called, the testimony of Michael Plummer and Vicky Evans would be the same as Claimant's testimony.

At the April 20, 2005 hearing, the parties discussed the issues set forth in the Prehearing Order. The parties agreed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury on or about July 29, 2002.
2. Whether Claimant is entitled to reasonably necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits.
4. Whether Claimant is entitled to an attorney's fee.

Claimant contends that she sustained compensable injury to her left elbow and left shoulder on or about July 29, 2002. At the beginning of the hearing, she contended that her injury arose out of a specific incident, or in the alternative, that it was a gradual onset injury; at the close of the hearing, her attorney conceded that she only states a gradual onset claim. Regardless, Claimant argues that she is entitled to medical treatment, temporary total disability benefits, and an attorney's fee.

Respondents controvert this claim in its entirety. Respondent #1 contends that there was no accident or incident, or in the alternative, that there was no rapid repetitive motion to sustain an injury. Respondent #2 argues that Claimant cannot meet her burden

of proof.

DISCUSSION

From January 9, 2002 until August 14, 2002, Claimant worked as a stocker for Respondent #1. She testified as follows concerning her job:

Q. And how do you -- just tell the judge basically what your job duties involved.

A. Well, when we'd first go in, we'd kind of like have a meeting. Then we'd go pull pallets out, and put them on the aisles where they belong, taken the groceries and set them on the floor in front of product, and then take a little break, and then come back, and start putting them on the shelves.

Essentially, Claimant and her fellow stockers used rolling pallet jacks to move previously-delivered pallets from the back of the store to the appropriate aisles. Each pallet contained a number of cases or boxes. At her January 10, 2003 deposition, entered into the record as Respondent's Exhibit #3, Claimant testified that she might move anywhere from two to ten pallets per night.

After the pallets were moved to the aisles, Claimant explained that she "could put up anywhere from 60 to 120 boxes or cases of stuff a night." Claimant initially worked from 10:30 p.m. to 7:30 a.m.; later, her shift ran from 9:00 p.m. to 7:30 a.m. Claimant testified to a quota:

Q. Did you ever have any quotas as to how much merchandise you had to put up yourself?

A. At least, I think -- well, it started out we just put up what we could. Then, as we progressed along, we had to end up putting up -- I think they said 60 a night.

Q. Sixty (60) what?

A. Cases.

Respondent's Exhibit #2 is a videotape depicting other employees of Respondent #1 performing the job described by Claimant. The pallets are large, stacked taller than these employees. The cases or boxes on each pallet vary in size; on the videotape, an employee will remove a case or box from the pallet, carry it, and place it on the floor in front of the shelf containing similar items. The videotape depicts employees unloading these cases and boxes and stocking the shelves; they open the case or box, reach in and lift out its contents, place these items on the shelf, straighten these items on the shelf, and then dispose of the case or box.

At the hearing, Claimant testified that her left elbow "slowly started hurting." She confirmed that she did not have an accident, but that "[i]t just slowly developed into a real bad pain." Claimant elaborated in her deposition:

Q. When did you first start having problems with either your left elbow or left shoulder?

A. Mid July.

Q. When did you first start noticing problems with either your left shoulder or your left elbow?

A. With my left elbow, it was in -- it would just be in little spurts of pain every once in a while when I would pick up a box or pull a pallet in mid July. Then towards the end of July, it was quite a bit of pain. That's when I went to the doctor.

Claimant noted that "after I'd started getting this pain here [in her elbow], I fell and hurt my elbow." Claimant eventually underwent surgery on her shoulder.

Larry Griggs, a risk control manager employed by Respondent #1, testified on its behalf. Claimant first presented to him on August 30, 2002, complaining about "trouble with her left elbow"; she did not complain about her shoulder at that time. He confirmed

that Respondent's Exhibit #2 is an accurate representation of a stocker's job. He denied that the stockers were under any quotas: "Not an actual quota. It's just a – not at your leisure, we, of course, we want productivity, but there's no physical quota that's listed, no." He testified that a stocker might be interrupted in his or her duties if a customer is in the aisle shopping.

The medical evidence generally reflects Claimant's course of treatment. Claimant testified that the pain became so bad that she went to the doctor "towards the end of July." A handwritten medical record dated July 30, 2002, found on page 26 of Respondent's Exhibit # 1, states: "Lt. elbow pain, fell on porch landing on elbow 2 days ago." A typewritten note of that same date states: "The patient comes in after falling on her left elbow. It is hurting and is swollen." Another handwritten note dated August 7, 2002 states: "[Left] elbow pain; worse now." As indicated, these initial medical records do not relate Claimant's injury to her employment.

A typewritten note dated August 27, 2002 states: "The patient comes in with the complaint of shoulder pain and elbow pain which started hurting.... The patient states that the pain is continuing and she feels like it was from straining on stocking things at Wal-Mart where she works." A handwritten note dated August 28, 2002 states that Claimant "filed a Medicaid [indecipherable] but when arriving at appt. claimed work comp would be paying." At her deposition, Claimant testified:

Q. Did you ever tell any of your supervisors that the work was causing your left elbow to hurt?

A. No, sir, because I didn't know it was.

Q. And why did you not know it was causing your left elbow to hurt?

A. I had no idea what was causing it.

Q. At some point in time, what led you to believe that your employment caused your left elbow to hurt?

A. When I went to the doctor and they told me.

Q. Which doctor was that?

A. Dr. Adkins.

Q. What came about from Dr. Adkins' office, them telling you?

A. He told me that it was an ongoing injury from repetitive action, and that I needed to go see a physical therapist for it.

At the hearing, Claimant testified that she was fired on August 14, 2002, and that Respondent #1 "said I filed a false claim." At her deposition, Claimant disagreed with Respondent #1's accusations.

Q. Do you agree with the reasons they fired you?

A. No, sir.

Q. What did they claim was either the integrity or the false workers' compensation claim?

A. Well, because they say that this didn't happen at Wal-Mart.

Q. Okay.

A. That it's not a work related injury.

Q. Did they say why they have that information?

A. They said it was because I fell and bumped my elbow in -- on the 29th of July and that's what caused it.

Q. Okay. Did you fall or did you bump your elbow on the 29th of July?

A. Yes. I did.

Claimant explained that the part of the elbow she bumped at home was not the part of the

elbow that hurt from her work.

A. Compensability

I first note that Claimant's credibility is called into question by her own testimony and the medical records. For example, at her deposition, she testified that Dr. Adkins told her that her employment caused her left elbow to hurt. However, Dr. Adkins' medical record dated August 27, 2002 documents that Claimant first stated "that the pain is continuing and she feels like it was from straining on stocking things at Wal-Mart where she works." Claimant failed to mention her work as a cause when she presented to the doctor on July 30, 2002; a medical record from that date indicates that she "fell on porch." Other items in the record are troubling, such as an October 30, 2002 medical record containing the notation that Claimant is "not telling us [the] truth about pain claims." Based upon the record as a whole, I find that Claimant's testimony is sometimes not consistent with the medical evidence and other statements in the record, so that her testimony is not credible.

1. Specific Incident Injury

Claimant initially argued that she sustained a compensable specific incident injury on or about July 29, 2002. In order to demonstrate the compensability of her injury, Claimant must prove, among other things, "[a]n accidental injury.... An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Ark. Code Ann. § 11-9-102(4)(A)(i). Claimant must sustain her burden of proof by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith

v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant did not sustain her burden of proving a compensable specific incident injury by a preponderance of the evidence. Specifically, she did not sustain her injury in a specific incident identifiable by time and place of occurrence. At the hearing she testified that her left elbow “slowly starting hurting.” On cross-examination, she agreed that she did not have an accident in this case, and testified that her injury “just slowly developed into a real bad pain.” In the absence of testimony establishing a specific incident identifiable by time and place of occurrence, Claimant failed to prove a compensable injury under Ark. Code Ann. § 11-9-102(4)(A)(i).

2. Gradual Onset Injury

In the alternative, Claimant argues that she sustained a gradual onset injury. Among other requirements to establish a non-carpal tunnel syndrome injury under Ark. Code Ann. § 11-9-102(4)(A)(ii)(a), Claimant must prove by a preponderance of the evidence that her injury arose out of and in the course of her employment and that it was caused by rapid repetitive motion. See Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 304, 40 S.W.3d 760, ___ (2001). The employee’s tasks must be repetitive, and the repetitive motion must be rapid; as a threshold issue, the tasks must be repetitive or the rapidity element is not reached. Hapney v. Rheem Mfg. Co., 342 Ark. 11, 17, 26 S.W.3d 777, ___ (2000).

I first find that Claimant’s left elbow condition did not arise out of and in the course of her employment. The July 30, 2002 hand-written medical record clearly states that Claimant “fell on porch landing on elbow 2 days ago.” The printed medical record of that same date does not mention Claimant’s employment as a possible cause; indeed, a

connection between Claimant's work and her left elbow injury is not made in the medical records until August 27, 2002, almost a month after July 29, 2002. An August 28, 2002 handwritten note indicates that Claimant initially sought Medicaid coverage for her alleged injury but later switched to a workers' compensation claim. Taken together, these records document that Claimant did not sustain her left elbow injury at work.

Dr. Doug Foster opined on September 19, 2002, that "this is a work-related injury." Similarly, on February 15, 2005 Dr. Anthony McBride offered his "belief ... that the major cause" of Claimant's need for treatment is related to her employment by Respondent #1. Both opinions appear to be based on history provided by Claimant, but her credibility is suspect. Therefore, I find these opinions to be less persuasive than the more contemporary medical records which report Claimant's history of a fall.

I further find that Claimant did not sustain her burden of proving by a preponderance of the evidence that her left elbow or left shoulder injuries were caused by rapid repetitive motion. Claimant testified that she would pull anywhere from two to ten pallets out into the store's aisles and then unload the contents, placing the cases and boxes on the floor in front of the appropriate shelves. After a break, the contents of these cases and boxes were shelved, and the shelves properly arranged; Claimant testified that "you could put up anywhere from 60 to 120 boxes or cases of stuff a night." Claimant's testimony, as corroborated by the videotape marked as Respondent's Exhibit #2, together indicate that her tasks are different and separated in time. Indeed, her tasks could be interrupted by a shopping customer, and they varied as she would pull out a pallet, unload its contents, place the cases or boxes on the floor where they belonged, take a break, and then shelve and straighten the items in the cases or boxes.

Even if her tasks were sufficiently repetitive to satisfy the statute, the record lacks testimony indicating how rapidly Claimant performed these tasks. For example, Claimant did not testify about the rate at which she moved the pallets, unloaded their contents, placed the cases or boxes on the floor, and stocked the shelves. How often did she perform her tasks in a minute, an hour, or over the course of a shift? How often did she move her left elbow or her left shoulder? Absent this or similar testimony, it is not possible to find her tasks to be rapid without resorting to speculation. Compare Patterson v. Jonesboro Westside High School, Full Workers' Compensation Commission Opinion filed July 29, 2003 (F003228) (noting that the claimant "did not meet this level of quantification in her testimony" to satisfy the rapid repetitive test). Thus, Claimant did not meet her burden of proving rapid repetitive motion.

B. Benefits

Based upon the foregoing, Claimant's request for medical and temporary total disability benefits must be denied. When an employee is determined to have a compensable injury, she is entitled to medical and temporary disability benefits as provided by the workers' compensation law. Ark. Code Ann. § 11-9-102(4)(F)(i). Since Claimant did not establish a compensable injury, she is not entitled to these benefits.

C. Attorney's Fee

Likewise, Claimant is not entitled to an award of an attorney's fee. Such fees are allowed only on the amount of compensation for indemnity benefits controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii). Since no indemnity benefits are awarded herein, an award of an attorney's fee is not proper.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- _____ 1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer relationship existed on July 29, 2002, and at all other relevant times.
3. Claimant's average weekly wage was \$335.00; her temporary total disability rate is \$223.00; and her permanent partial disability rate is \$167.00.
4. Respondents have controverted this claim in its entirety.
5. Claimant underwent two heart surgeries subsequent to July 29, 2002, that were not related to her work.
6. If called, the testimony of Michael Plummer and Vicky Evans would be the same as Claimant's testimony.
7. Claimant's testimony is not credible. Her statements at the hearing and at her deposition sometimes conflict with the medical records; other items in the record call her credibility into question.
8. Claimant did not sustain her burden of proving a compensable specific incident injury. She did not identify a specific incident identifiable by time and place of occurrence; instead, she testified that her left elbow "slowly started hurting" and that her injury "just slowly developed."
9. Claimant did not sustain her burden of proving a gradual onset injury arising out of and in the course of her employment. Her initial medical records do not relate her injury to her employment; one July 30, 2002 medical record reports that she "fell on porch landing on elbow 2 days ago." She did not relate her work to her injury until almost a month later.
10. In the alternative, Claimant did not sustain her burden of proving that her injury

was caused by rapid repetitive motion. Her tasks of pulling out pallets, unloading their contents, and then shelving and straightening the items in the cases or boxes, are different and separated in time and could be interrupted by a shopping customer. Even if her tasks were repetitive, there is no testimony in the record upon which to make a determination of rapidity. Thus, Claimant did not meet her burden of proving rapid and repetitive motion.

11. Because Claimant did not establish a compensable injury, she is not entitled to medical or temporary total disability benefits.

12. Because no indemnity benefits are awarded herein, Claimant is not entitled to an attorney's fee.

ORDER

Claimant failed to sustain her burden of proving that she suffered a compensable injury. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml