

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F502448

KATHY ATKINS, Employee	CLAIMANT
WAL-MART STORES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED MARCH 14, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On February 13, 2006, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on November 2, 2006, and a pre-hearing order was filed on November 3, 2006. 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 employee-employer relationship existed between the parties on February 19, 2005.

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

1. Compensability.
2. Medical treatment.
3. Attorney fee.
4. Compensation rate.

At the time of the hearing the claimant chose to reserve as issues the compensation

rate and an attorney fee. Therefore, the only issues currently before the Commission involve compensability and claimant's entitlement to medical treatment.

The claimant contends she sustained a compensable injury to her back when she bent over to pick up a box. She contends she is entitled to reasonable and necessary medical treatment.

The respondents contend that claimant did not suffer a compensable injury to her low back.

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 November 2, 2005, and contained in a pre-hearing order filed November 3, 2005, 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 has a significant history of back pain beginning in 1994. An emergency room report from the Crawford County Memorial Hospital dated February 16, 1995 indicates that claimant sought medical treatment for complaints of low back pain which had existed for six months. Claimant attributed this pain to her work at a grocery store in Roland, Oklahoma. As a result of claimant's complaints of back pain she underwent an MRI scan of her lumbar spine which was read as normal. Claimant

subsequently came under the care of Dr. Douglas Parker, Jr., a neurosurgeon in Van Buren. Dr. Parker's medical treatment consisted primarily of medication and a series of epidural steroid injections. Claimant continued to be treated throughout 1995 and underwent another MRI scan on November 15, 1995 which revealed no abnormality.

Claimant next received medical treatment for her low back beginning on May 29, 2001, when she was evaluated by Dr. Cheyne. At that time the claimant was complaining of chronic bilateral hip pain which had existed for approximately three months. Claimant was also seeking treatment for complaints of a right shoulder condition. Dr. Cheyne prescribed medication and physical therapy. Dr. Cheyne's notes of June 12, 2001 indicate that claimant was complaining of low back and bilateral leg pain at that time and that claimant gave a history of suffering from chronic back pain. Dr. Cheyne ordered an MRI scan of the claimant's lumbar spine which was read as normal with no evidence of herniation.

Thereafter, on December 23, 2002, claimant sought medical treatment from the emergency room at Sparks Hospital complaining of low back pain radiating into her right leg with a history of a heavy door having fallen on her back three to four weeks earlier. Claimant again sought medical treatment from the emergency room at Sparks on November 26, 2003, when she was complaining of low and mid-back pain after lifting a refrigerator at home. Most recently, claimant sought medical treatment from the emergency room at Sparks on February 25, 2004 complaining of back pain with a recent onset. An MRI scan was again ordered which was read as revealing no disc herniation or protrusion.

In December 2004 claimant came under the care of Dr. Hoang for pain in her joints. Dr. Hoang's medical report of December 17, 2004 also notes that claimant was complaining of persistent low back pain.

At some point in time the claimant became employed by the respondent. Claimant

testified that on February 19, 2005, she was working in the respondent's layaway department when she bent over to pick up an empty box and as she straightened up felt a sharp pain in her back. Claimant testified that she reported this incident to the customer service manager. Claimant testified that the pain continued to worsen as she worked and as a result she called her husband to come pick her up at work. Claimant's husband took her to the emergency room at Sparks Regional Medical Center and she subsequently came under the care of Dr. Holder who prescribed medication and physical therapy. Claimant also underwent an MRI scan on February 24, 2005, which was interpreted as showing a protrusion at L4-5 which "does not definitely appear to contact the nerve root or cause any significant central canal narrowing." When claimant's symptoms did not improve Dr. Holder referred her to Dr. Johnson, neurosurgeon. Dr. Johnson recommended epidural steroid injections, medication, and light-duty work. When claimant's condition did not improve, Dr. Johnson recommended surgery.

Claimant has filed this claim contending that she suffered a compensable injury to her low back while working for the respondent. She seeks payment for medical treatment associated with her compensable injury.

ADJUDICATION

Claimant contends that she suffered a compensable injury to her back while lifting a box while working for respondent on February 19, 2005. Thus, claimant contends that her injury was caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;

(2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;

(3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

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 her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

While a videotape introduced into evidence shows the claimant bending over to pick up various boxes on February 19, 2005 and claimant apparently reported an injury to her supervisors and gave a consistent history of injury to the medical providers, a finding that claimant actually suffered an injury to her back while bending over to pick up the box is still primarily dependent upon claimant's credibility as a witness. In other words, the mere fact that claimant picked up boxes on February 19 and reported an injury is not sufficient to prove a compensable injury if claimant's testimony that she suffered an injury as a result of that activity is not credible. After reviewing the evidence in this case, I find that claimant's testimony is not credible.

First, I note that claimant at her deposition was asked whether she had suffered a prior injury to her low back. Claimant indicated that she had not.

Q. Had you ever previously sustained an injury to your low back anywhere?

A. No.

Claimant denied having suffered a prior injury to her low back despite medical records indicating that claimant had suffered multiple injuries to her low back for which she

sought medical treatment. As previously noted, the first of these occurred when claimant sought medical treatment for low back pain in February 1995. Claimant gave a history of the back pain having been present for some six months. Dr. Parker's medical report of March 6, 1995 indicates that claimant gave a history of seven months of low back pain which she attributed to an injury while working at a grocery store in Roland, Oklahoma. Claimant herself attributed her back pain at that time to her job activities at the grocery store in a handwritten statement which was introduced into evidence as Page Number 7 of Respondent's Exhibit Number 2.

The medical records also indicate that claimant sought medical treatment from the emergency room at Sparks Hospital on December 23, 2002. At that time the claimant was complaining of low back pain radiating into her right leg. Claimant gave a history of a heavy door having fallen on her back some three to four weeks earlier. At her deposition claimant acknowledged that the incident with the door striking her occurred, but indicated that the injury involved only her upper back and shoulder blade area, not her low back. However, the emergency room report contradicts that testimony.

Claimant also complained of a low back injury at the emergency room on November 26, 2003. At that time the claimant was complaining of low and mid-back pain after lifting a refrigerator at her home.

Thus, in contrast to claimant's testimony at her deposition that she had suffered no prior injury to her low back, the medical records indicate that claimant had sought medical treatment for three separate low back injuries.

I also note that claimant denied ever having received epidural steroid injections prior to February 19, 2005. During questioning it was noted that Dr. Johnson had recommended lumbar epidural steroid injections for treatment of claimant's condition. Claimant was then asked:

Q. Have you ever had one of those?

A. No.

A review of the medical records indicates that following her injury while working at a grocery store in late 1994 the claimant underwent a series of lumbar epidural steroid injections in 1995.

Claimant also testified at her deposition that she had never had any weakness or numbness in her left leg prior to February 19, 2005. However, the emergency room report of February 16, 2005, indicates that claimant was complaining of back pain with numbness in her legs. Furthermore, Dr. Parker's report of March 6, 1995 indicates that claimant was complaining of low back pain radiating down her back into both legs. Dr. Cheyne's report of June 12, 2001 indicates that claimant was complaining of low back and bilateral leg pain.

In addition to the medical evidence which contradicts claimant's deposition testimony, I also believe it is important to consider a second videotape introduced into evidence reflecting surveillance conducted on claimant on September 29, October 4, and October 5, 2005. Despite medical reports indicating that claimant is in a great deal of pain and that her condition is not improving but rather is getting worse, the videotapes depict a claimant who appears to be in little, if any, pain. The videotape shows the claimant performing various activities such as carrying her child, bending over for extended periods of time to stain a table, bending over to perform various other activities, and pushing a truck. The activities shown on the videotape appear to be inconsistent with claimant's testimony and her complaints to her treating physicians.

To summarize, a finding that claimant suffered a compensable injury to her low back while bending over to pick up a box while working for the respondent is dependent in large part upon the claimant's credibility as a witness. While claimant did in fact lift boxes on that date and did report an injury, those facts alone do not prove that claimant suffered an

injury while engaged in that activity. A finding that claimant suffered an injury while engaged in that activity depends in large part upon claimant's credibility as a witness. Based upon the foregoing evidence, I find that claimant's credibility as a witness is lacking and therefore find that she has failed to meet her burden of proof.

In addition, even if the claimant's credibility was not suspect, I would find that claimant has failed to meet her burden of proving by a preponderance of the evidence based upon a lack of objective findings establishing an injury. In support of her claim claimant relies upon the fact that the MRI scan dated February 27, 2004 was interpreted as revealing no disc herniation or protrusion. On the other hand, the most recent MRI scan of February 24, 2005 was interpreted as showing a broad-based disc protrusion at the L4-5 level for which Dr. Johnson has recommended surgery.

First, I believe it is important to note that the MRI report of February 24, 2005 notes that it does not appear that the protrusion is contacting a nerve root or that it is causing any significant central canal narrowing. More importantly, respondent has had two physicians review both the February 2004 and the February 2005 MRI scan, and both of those physicians have found no significant difference between the two. First, in a letter dated May 20, 2005, Dr. Shane McAlister, the staff radiologist at the Northwest Medical Center of Benton County, wrote as follows:

You have asked me to reviewed [sic] MRIs on a Kathy Atkins that were performed on 2-27-04 and 2-24-05. These were MRIs of the patient's lumbar spine and did consist of sagittal T1 and T2 weighted pulse sequences and axial T1 and T2 weighted pulse sequences. The specific question was regarding the L4-5 intervertebral disc.

There is desiccation of the L4-5 intervertebral disc identified on each examination. There is minimal loss of vertebral height at this level as well. These findings, however, remain stable when compared to previous study. There is a very mild annular disc bulging at L4-5 that is slightly asymmetric to the left of the midline. This has not progressed between the two examinations. There is no demonstration of extruded disc fragment or focal disc protrusion. There is no nerve root compression. There is

no canal stenosis, neural exit foraminal stenosis or lateral recess stenosis. There is no other demonstration of abnormality.

My impression is that between the two examinations, there has been no change in the mild degenerative disc disease at L4-5 with mild asymmetric disc bulging extending to left of midline. There is no demonstration of disc protrusion, extruded disc fragment, or nerve root compression. (Emphasis added.)

Both of the MRI scans were also reviewed by Dr. David Davis, who in a report dated August 31, 2005 stated:

MRI scans of the lumbar spine on Ms. Kathy Atkins were reviewed on August 31, 2005. There are two scans, both from Sparks Regional Medical Center. One is dated February 27, 2004, and the other is dated February 24, 2005. The scan from 2004 is mildly obscured by motion artifact. The scan from 2005 is of good quality. The neuraxis is imaged from T11-12 through S2 on each of the studies. At L5-S1, there is a very small annular bulge centrally which does not appear to involve neural elements. At L4-5, there is mild annular bulging to the left laterally extending into the left L4 neuroforamen. There is no obvious neural impingement. The scans are otherwise normal, and there is not a significant difference between the scan of 2004 and the scan of 2005. (Emphasis added.)

Thus, both Dr. McAlister and Dr. Davis have opined that there is no significant difference between the MRI scans of February 27, 2004 and February 24, 2005. Dr. McAlister and Dr. Davis are the only two physicians who have reviewed both of the MRI scans. There is no indication that the radiologist who interpreted the February 24, 2005 MRI scan reviewed the prior MRI scan to determine whether there had been any changes. Likewise, there is no evidence that Dr. Johnson reviewed the prior MRI scan. In fact, there is no indication that Dr. Johnson was even aware that claimant had a prior history of low back problems. Dr. Johnson's initial medical report dated August 16, 2005 does contain a section involving claimant's past medical history. That past medical history lists various conditions, but it does not mention any prior back problems.

Finally, even to the extent that the evidence would lead one to conclude that the February 24, 2005 MRI scan contains objective findings of an injury when compared to the prior MRI scan, I find that claimant has failed to prove that those objective findings are related to an injury which occurred on February 19, 2005. Based upon claimant's continued complaints of pain, Dr. Holder ordered an EMG/NCV study which was performed on March 18, 2005. While Dr. Knubley interpreted the study as abnormal indicating that the results would suggest a mild L4 radiculopathy, Dr. Knubley went on to indicate that the duration of the condition indicated that it had existed for at least six to eight and possibly twelve weeks:

IMPRESSION: This is an abnormal study that would suggest a mild L4 radiculopathy. The polyphasia in the tibialis anterior suggests the possibility of a more chronic process although because of an isolate muscle involvement this could implicate more problems from injury to the muscle itself of the peroneal nerve but the distribution of recruitment deficits, is more typical of an L4 distribution injury. Duration appears to be at least 6 to 8 and possibly 12 weeks if one considers the changes in the tibialis anterior muscle as being part of this process. (Emphasis added.)

Thus, even if one interpreted the most recent MRI scan as revealing objective findings of a new injury when compared to the prior MRI scan, the interpretation of the nerve conduction study test indicates that this condition had existed for six to eight or even possibly twelve weeks. Even the lesser period of six weeks would have put its onset at a date prior to February 19, 2005.

In summary, I find that 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. First, even though claimant was required to lift boxes and reported an injury on February 19, 2005, a finding that she suffered a compensable injury as a result of that activity is dependent in large part upon her credibility as a witness. For the reasons

previously discussed, I find that claimant's testimony is not credible. Furthermore, in order to prove a compensable injury claimant has the burden of offering medical evidence supported by objective findings establishing an injury. While a reading of the MRI scans separately would indicate that claimant's condition in February 2005 is different than her condition in February 2004, the only two physicians who reviewed both of the MRI scans have opined that there is no significant difference. There is no indication that Dr. Johnson reviewed the February 2004 MRI scan; in fact, there is no indication that Dr. Johnson was even aware that the claimant had a history of prior low back complaints. Finally, even if one accepts the fact that the MRI scan in February 2005 contains objective findings which were not present at the time of the MRI scan in February 2004, claimant still has the burden of proving by a preponderance of the evidence that those objective findings are causally related to an incident at work on February 19, 2005. However, the nerve conduction test indicates that claimant's condition had existed for at least six to eight or even possibly twelve weeks prior to the date of that test. Even six weeks would have been prior to the alleged date of injury. For the foregoing reasons, I find that claimant has simply failed to meet her burden of proof.

ORDER

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

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE