

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F412931

DONNA NORTON, Employee	CLAIMANT
WAL-MART INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED APRIL 14, 2006

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 BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On March 15, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 11, 2006, and a pre-hearing order was filed on January 19, 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 relationship of employee-employer existed between the parties on December 8, 2004.

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

1. Compensability of injury to claimant's feet.
2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.

At the time of the hearing the claimant expounded on her request for temporary total disability benefits. Specifically, claimant acknowledged that she returned to work for

another employer in November and December 2005; therefore, she is not requesting benefits for those two months. In addition, claimant acknowledged that her request for temporary total disability benefits would terminate as of March 24, 2006. In addition, the parties were also unable to agree on a compensation rate; therefore, claimant's correct compensation rate was added as an issue.

The claimant contends that she suffered a gradual onset injury in the form of plantar fasciitis as a result of standing while working for the respondent as a cashier. Claimant seeks payment of medical benefits, temporary total disability benefits, and a controverted attorney fee.

The respondent contends that claimant did not suffer a compensable injury while in its employment.

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 her 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 11, 2006, and contained in a pre-hearing order filed January 19, 2006, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable gradual onset injury in the form of plantar fasciitis.

FACTUAL BACKGROUND

The claimant is a 37-year-old woman who has worked for the respondent as a cashier on two occasions. Claimant initially worked for the respondent for approximately

90 days beginning in September 2003. Claimant returned to work for the respondent as a cashier a second time beginning on February 4, 2004. Claimant testified that she worked on a register for two hours at a time before getting a break. Two of these breaks were 15-minute breaks and one of the breaks was a one-hour lunch break.

Claimant testified that at her work station a mat was on the floor which was approximately three-quarters of an inch thick and had a bevel around the edge of the mat which went to the floor. Claimant testified that the mat was uncomfortable and that she eventually noticed pain in the arches of her foot. Claimant testified that on the morning of December 8, 2004, she got up out of bed and could barely walk. As a result, she went to work and reported a work-related injury to Josh Petrie, the respondent's store manager. Petrie referred claimant to Jamie Reed who was responsible for accident reports. Claimant was sent by the respondent to Dr. Berestnev on December 10, 2004 and he diagnosed the claimant's condition as bilateral plantar fasciitis and noted that claimant gave a history of injury caused by standing on a slanted mat. Dr. Berestnev recommended stretching exercises, medication, and the wearing of comfortable shoes.

After claimant's initial visit with Dr. Berestnev, the respondent denied the claim and claimant subsequently sought medical treatment from the Washington Regional Medical Center emergency room on December 15, 2004. Claimant's condition was again diagnosed as bilateral plantar fasciitis and she was instructed to receive follow-up treatment with a podiatrist. Claimant received her follow-up treatment from Dr. Pirotta beginning on January 14, 2005. Dr. Pirotta also diagnosed claimant's condition as plantar fasciitis and gave claimant an injection in her left foot. On February 3, 2005, claimant returned to Dr. Pirotta and he gave claimant an injection in her right foot.

The medical records of Dr. Pirotta indicate that he continued to treat claimant with evaluations for conditions which were not related to plantar fasciitis. These conditions included a wart, a corn between claimant's toes, and hammertoes. Claimant underwent

surgery for these conditions on April 25, 2005. Medical reports from Dr. Pirotta during this period of time do not indicate that claimant was receiving any additional medical treatment for her plantar fasciitis.

Dr. Pirotta's medical report of May 23, 2005 indicates that claimant was released from his care at that time with instructions to return as needed. Claimant did not seek any additional medical treatment for plantar fasciitis until she went to the emergency room at Washington Regional Medical Center on December 17, 2005. Claimant eventually returned to Dr. Pirotta and underwent surgery for various foot conditions, including plantar fasciitis, on January 4, 2006.

After claimant's initial complaints, she continued to work for the respondent performing her job as a cashier until April 3, 2005 when she voluntarily terminated her employment.

Claimant has filed this claim contending that the plantar fasciitis is a compensable injury and seeking payment of temporary total disability benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

The claimant contends that she suffered a gradual onset injury in the form of plantar fasciitis as a result of standing on a mat while working for the respondent as a cashier. A claimant requesting workers' compensation benefits for a gradual onset injury must satisfy several elements of proof. These elements include (1) the injury arose out of and in the course of her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability; (3) the injury was the major cause of the disability or need for treatment; (4) medical evidence supported by objective findings establishing an injury, and (5) that the gradual onset injury was caused by rapid repetitive motion. A.C.A. §11-9-102(4)(A)(ii) and (E)(ii). *See also, Cottage Café, Inc. v.*

Collette, ____ Ark. App. ____, ____ S.W. 3d ____ (February 1, 2006); *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W. 3d 760 (2001).

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 her plantar fasciitis is a compensable gradual onset injury. Specifically, I find that claimant has failed to prove by a preponderance of the evidence that her plantar fasciitis was caused by rapid repetitive motion.

The Arkansas Supreme Court in *Malone v. Texarkana Public Schools*, 33 Ark. 343, 969 S.W. 2d 644 (1998) stated that “rapid repetitive motion” involves a two-pronged test. First, the task must be repetitive and second the repetitive motion must be rapid.

Claimant testified that her job as a cashier required her to stand on a floor mat which was approximately three-quarters of an inch thick and had a bevel around its edges. According to claimant’s testimony the mat did not fit her work space properly and it was necessary for her to move her feet in order to get comfortable. I do not find that claimant’s standing on the mat while working as a cashier to involve rapid repetitive motion. Even if one were to consider that claimant had to move her feet in order to get comfortable and in order to reach for items to scan them, I do not find that claimant’s activities were rapid in nature.

Furthermore, with respect to this issue, I note that claimant’s treating physicians did not seem to attribute claimant’s plantar fasciitis to any movement of her feet, but rather to the standing on the mat itself. Dr. Berestnev’s report of December 10, 2004 contains a history of injury given to him by claimant that standing on the slanted mat caused her injury. Likewise, the emergency room report from Washington Regional Medical Center dated December 15, 2004 also notes a history of injury caused by standing on a mat at work. Finally, Dr. Pirotta in a letter dated January 6, 2006 stated, “In my opinion, the fact that she had to stand on a mat in a certain position and a certain place....”

These medical reports seem to indicate that claimant's history of injury was caused not by the movement of her feet, but rather by the constant standing itself. Constant standing would not constitute a repetitive motion that is rapid.

In short, in order to prove a gradual onset injury to her feet, claimant has the burden of proving by a preponderance of the evidence that it was caused by rapid repetitive motion. Based upon the evidence presented, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that her feet were engaged in rapid repetitive motion. Therefore, claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable gradual onset injury 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