

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507283

BRANDY PARKER GEUSZ

CLAIMANT

WAL MART STORES, INC.
SELF INSURED

RESPONDENT

OPINION FILED AUGUST 24, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in
Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville,
Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville,
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 12, 2006, in Springdale, Arkansas. A pre-hearing order was entered in this case on May 3, 2006. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties announced that they could not stipulate to the appropriate weekly compensation rates. However, as the claimant also announced that she was withdrawing her request for temporary total disability benefits (at the present time), no stipulation or finding in regard to the appropriate weekly compensation rates is necessary to resolve the issues remaining before the Commission. A copy of the pre-hearing order with these various amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On July 3, 2005, the relationship of employee-self insured employer-TPA existed between the parties.
2. The 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:

1. whether the claimant sustained a compensable injury to her back and left shoulder as a result of a specific incident on July 3, 2005.
2. The claimant's entitlement to the payment of medical expenses.

In regard to these issues, the claimant contends that she sustained a compensable injury to her back and left shoulder in a fall while performing her assigned employment duties for the respondents on July 3, 2005, and that she is entitled to medical services for these injuries.

The respondents deny that the claimant sustained any compensable injuries on July 3, 2005, and controvert the claim in its entirety.

DISCUSSION

The central issue in this case is the question of whether or not the claimant sustained compensable injuries to her back and left shoulder in a specific employment related incident or accident on July 3, 2005. The burden rests upon the claimant to prove all of the statutory requirements necessary to establish these alleged accidental injuries as "compensable injuries."

As required by Ark. Code Ann. §11-9-102(4)(D), the claimant must prove by medical evidence the actual existence of the physical

injuries or conditions alleged to be compensable. She must further prove that the actual existence of these physical injuries or conditions is supported by “objective findings” (i.e. the independent observation of findings that are beyond the claimant’s voluntary control).

The medical evidence presented does “establish” the existence of physical injuries or conditions involving the claimant’s back and left shoulder. Dr. K. V. Berestnev, a general practitioner and the respondents’ company physician, diagnosed a left shoulder contusion and lumbar strain. Dr. Cyril Raben diagnosed a “probable” disc herniation and a “derangement” of the left shoulder. Subsequently, Dr. Raben diagnosed the claimant’s back difficulties as a “derangement” at L3-4 and L4-5. Dr. Jacob Kaler, an orthopaedic surgeon and shoulder specialist, diagnosed a left shoulder contusion. Finally, Dr. Robert Thompson, an orthopaedic surgeon, diagnosed a thoracolumbar strain/sprain.

However, the existence of these diagnosed injuries must also be based upon or supported by “objective findings,” as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i). In the present case, there is absolutely no “objective findings” (i.e. the independent observation of findings beyond the claimant’s voluntary control) to support the existence of any physical injury to her left shoulder. None of the medical records that have been introduced note the observation of any objective abnormalities involving the claimant’s left shoulder. There is no mention of bruising, swelling, redness, crepitus, etc. In fact, the numerous

physical examinations of the claimant's left shoulder show even a paucity of "subjective findings." The claimant has undergone numerous x-rays of her left shoulder, all of which were interpreted as normal. She has undergone an MRI of the shoulder joint, which also revealed no abnormality.

In his report of August 31, 2005, Dr. Kaler did note "old ecchymosis or bruising at her junction proximal mid third of the lateral arm." However, this objective clearly appears to involve an area of the claimant's left arm well below her shoulder. Thus, it would not be indicative of any injury to the shoulder itself. It is also curious to note that none of the previous physicians, that had examined the claimant noted such bruising.

In regard to the claimant's back, objective findings were noted, particularly in the area of the lumbar spine. These consist of radiographic findings, which were noted on x-rays and MRI study. However, these abnormalities are essentially in the form of degenerative changes, such as intervertebral disc dessication (dehydration) with resulting disc space narrowing and mild to minimal diffuse bulging of the annulus of the L3-4 and L4-5 intervertebral disc. These degenerative changes would not be unusual for an individual of the claimant's age and weight and would not be particularly indicative of any recent specific trauma. Curiously, on the claimant's repeated physical examinations, no objective findings generally attributable to a recent acute traumatic event, such as bruising, swelling, inflammation, or muscle spasm, were noted.

After consideration of the evidence presented, I find that the claimant has satisfied the statutory requirement of Ark. Code Ann. §11-9-102(4)(D) in regard to her alleged work related back injury. However, I find that she has failed to prove the statutory requirement of this subsection in regard to her alleged left shoulder injury. Therefore, her shoulder injury cannot constitute a “compensable injury” within the meaning of the Act.

Next, the claimant must prove that her medically established and objectively documented physical injuries satisfy the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) that the injury arose out of and occurred in the course of the employment;
- (2) that the injury was caused by a specific incident;
- (3) that the injury is identifiable by time and place of occurrence;
- (4) that the injury caused internal physical harm to her body;
- (5) that the injury required medical services or resulted in disability.

The only direct evidence presented by the claimant to prove the first three of these definitional requirements is her own testimony. Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to

address.

However, after consideration of all the evidence presented, I find that this claimant's testimony is not sufficiently credible to prove that on July 3, 2005, she sustained a physical injury to her back or left shoulder that arose out of and occurred in the course of her employment with the respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence. The claimant's failure to prove these three statutory requirements of Ark. Code Ann. §11-9-102(4)(A)(i) prevents these alleged injuries from being found to be "compensable" under the Act.

At the hearing, the claimant testified that her fall, in July of 2005, was not witnessed. She stated that she slipped off a ladder and fell striking the floor on her buttocks with the left upper part of her back striking shelving opposite from the ladder. However, she concedes that she continued to work and finish her shift. She did not immediately report her accident or injury. It was her testimony that when she went to the emergency room, later that night, she was experiencing severe pain in her mid to low back, pain in her mid back and around into her side, and pain involving her left shoulder. She stated that she advised the emergency room personnel of all of these complaints and further reported that they were the result of an employment related fall on that same day.

However, the emergency room records record absolutely no complaints involving the claimant's left shoulder. Nor do these

records contain any history of an employment related accident or fall as the cause of these complaints. One of the histories taken records:

“Chief complaint left side abdominal pain, nausea, no vomiting, started today (approximately) 1000.”

Another history records the claimant’s complaints as:

“Sharp cramping pain associated with loss of appetite and nausea.”

and further notes:

“Has had some pain back off and on for approximately one month.”

Curiously, these records list the claimant’s place of employment as Pilot Travel Centers and the responsible party for any expenses is given as the claimant and her husband’s group insurance through Tyson’s.

Numerous physical examinations were also performed during this emergency room visit and are noted in the emergency room records. These include a triage exam by the ER nurse and the physical examination by the ER physician. Neither of these reports note the observation of any evidence of acute trauma, such as bruising, abrasions, redness, swelling, etc. involving any portion of the claimant’s body, particularly her back, buttocks, and left shoulder. It is difficult to conceive that a person of the claimant’s weight could have fallen from the upper part of a 6-8 foot ladder, struck the concrete floor on her buttocks and her back on metal shelving, and not experienced any bruises or abrasions to these areas.

Finally, a pain diagram (apparently completed by the claimant) shows only mild tenderness in the lower left quadrant of the claimant's abdomen and around into the left side of her back, in the area of her kidney. Extensive testing, including CT scans, were performed on the claimant's abdomen and pelvis. All of these tests were essentially negative. No specific tests were performed on the claimant's left shoulder or mid to lower back. The only obvious reason for this failure to investigate the claimant's left shoulder or spine would be that the claimant failed to voice any complaints indicative of an injury to these areas, as the records, themselves, show.

Finally, the emergency room records indicate that the claimant was advised to return for follow up at the emergency room or with her family physician in one to two days, if she were not 100% better. However, the claimant appears to have sought no further medical treatment until July 11, 2005.

On July 11, 2005, the claimant was seen by a Dr. Cuevas, at the Community Physicians Group. This medical group is apparently the claimant's family physicians, as the medical record shows that she had previously seen them for various problems. The office notation of that date indicates that the claimant was being seen in follow up from the emergency room for left flank pain that appeared on July 4, 2005. It noted that the claimant's pain continued and that she was seeking a refill of her pain medication. This report also contains the first mention of an employment related accident as the cause of the claimant's complaints. The following history is

recorded:

“Fell off a ladder striking left posterior rib area. (emphasis mine)

“Fell off a ladder at work Sunday a 6-8-ladder-hit a metal shelving with her back left rib area.”

A diagnosis was made of a “probable torn rib cartilage.”

However, there is still no mention of any complaints involving the claimant’s left shoulder or her actual back or spine. There is also no mention that her physical examination revealed any objective findings of recent or acute trauma. There is no mention of the observation of bruising, swelling, abrasions, redness, or muscle spasms. In fact, the claimant was noted to have a full range of motion of her back.

The claimant was next seen, at the respondents’ request, by personnel at the Occupational Health Clinic. The claimant was initially seen, on July 15, 2005, by a physician’s assistant, a Max Beasley. The clinic note of that date is the first record of any complaints involving the claimant’s left shoulder. This report also contains a somewhat different description of the claimant’s alleged employment related accident:

“Patient states she was in a cooler on a 6-foot ladder and lost her footing and fell to the floor on her left side. Complains of left shoulder and rib pain. Treated at Northwest of Benton County emergency room and Dr. Elizabeth Cuevas in Gentry.” (emphasis mine)

Mr. Beasley also notes:

“She says she came down on her left shoulder and has left lower quadrant pain since the incident.” (emphasis mine)

However, Mr. Beasley also noted no objective findings of any recent or acute trauma to the claimant's shoulder or back. His physical examination of the claimant even revealed that the claimant exhibited a normal range of motion of her left shoulder. X-rays of the claimant's left shoulder were interpreted as normal. There is still no mention by the claimant of any symptoms that would be directly attributable to an injury to her actual back or lumbar spine.

The first mention of complaints directly involving the claimant's actual back or lumbar spine are not found until the claimant's return visit to the Occupational Health Clinic on July 22, 2005. At that time, she was seen by Dr. K. V. Berestnev. Dr. Berestnev noted that the claimant's symptoms now primarily involve her "back." However, he does not note any objective findings indicative of recent trauma or injury.

On July 25, 2005, the claimant returned to Dr. Berestnev and at that time he noted that the claimant's symptoms were now focused in the area of her left shoulder. However, he again records no objective findings to support the claimant's shoulder or back complaints.

On August 1, 2005, the claimant was seen by Dr. Cyril Raben upon referral from her attorney. Dr. Raben recorded complaints involving the claimant's back, neck, and entire left arm. In his clinic note, Dr. Raben recorded another somewhat different description of the claimant's fall:

"She missed her footing and fell down the entire length of the ladder. She fell across

the bottom stile (step) of the ladder with her buttocks hitting the ground and her back landing across the bottom stile (step).”

On this visit, no objective findings were noted on Dr. Raben’s physical examination to support the claimant’s subjective complaints.

An MRI was performed, at Dr. Raben’s request on the claimant’s cervical and lumbar spines. However, this study revealed no abnormalities revealing the cervical spine and only essentially degenerative changes involving the lumbar spine. An MRI of the claimant’s left shoulder, also performed at Dr. Raben’s request, was interpreted as normal.

On October 31, 2005, the claimant was seen (at Dr. Raben’s request), by Dr. R. Jacob Kaler of the Ozark Orthopaedic and Sports Medicine Clinic. Dr. Kaler noted that the claimant gave him a history of falling off an 8 foot ladder, but did not record any description of the actual fall. His physical examination again failed to reveal any objective findings to support the claimant’s left shoulder complaints or left upper extremity complaints.

Despite conservative care, the claimant continued to complain to Dr. Raben with her left shoulder, thoracic spine, and lumbar spine. When Dr. Raben advised the claimant that he had nothing further to offer her and that he was going to let her return to work, she consulted Dr. Thompson, another orthopaedic surgeon. In his report of October 28, 2005, Dr. Thompson recorded a history of the claimant’s difficulties as follows:

“Fell of (sic) a ladder and landed on her bottom on July 3, 2005. Since that time she

has had pain in the thoracolumbar region to her low back without leg pain.”

Although Dr. Thompson recorded that the claimant reported her pain to be 10 out of 10 in intensity, his physical examination continued to reveal no objective findings that would support the claimant’s extensive subjective complaints. Dr. Thompson released the claimant to return to work at light duty with no lifting or carrying greater than 5 pounds. Apparently, the claimant has not seen Dr. Thompson since.

In summary, the claimant has given conflicting descriptions of both the nature and the cause of her complaints. Her testimony concerning the occurrence of the employment related incident and the contemporaneous immediate onset of all of her difficulties, including those with her left shoulder and back, are clearly inconsistent with the medical evidence presented. Her testimony of the occurrence of a specific employment related accident as the obvious cause of all these complaints is inconsistent with her failure to immediately report the accident and injury and to request medical care from the respondents, and to even continue to seek medical care. The medical evidence also shows that the claimant’s symptoms and complaints have evolved from her lower left quadrant and kidney area to her lower back, her neck, her left shoulder, her left arm, etc. The medical evidence further fails to show any objective evidence of abnormalities sufficient to explain symptoms of the magnitude and duration described by the claimant. Such inconsistencies and contradictions must also be considered in light of the claimant’s relatively brief period of employment with

the respondent, together with the fact that the accident was unwitnessed. In light of the conflicts and contradictions, when the claimant's testimony is compared to the evidence presented, the lack of corroboration, and the absence of any outside factors that would reasonably enhance the claimant's credibility, I simply find that I can give her testimony no weight and credit.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On July 3, 2005, the relationship of employee-self insured employer existed between the parties.
3. The claimant has failed to prove by the greater weight of the credible evidence that she sustained "compensable injuries" to her back and left shoulder on July 3, 2005. Specifically, she has failed to prove by the greater weight of the credible evidence that, on that date, she sustained a physical injury to her left shoulder that is supported by objective findings, that arose out of and was in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence. She has further failed to prove that, on that date, she sustained a physical injury to her back that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
4. The respondents have denied the occurrence of any

compensable injuries to the claimant's back and left shoulder on July 3, 2005, and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge