

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F409845

**DORTHENA SCRIBNER,
EMPLOYEE**

CLAIMANT

**L'OREAL USA
PRODUCTS, INC.,
SELF-INSURED EMPLOYER**

RESPONDENT

OPINION FILED NOVEMBER 20, 2006,

Pursuant to a hearing conducted October 31, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Ms. Betty J. Demory, Attorney at Law, Little Rock, Arkansas, appearing for the respondent.

STATEMENT OF THE CASE

This was a hearing to consider the issue of compensability of the claimant's low back condition and entitlement to related benefits.

The claimant contended that she sustained compensable injuries, primarily to her low back, March 19, 2004, and should be awarded benefits, including temporary total disability benefits from the date of injury until at least August 23, 2004, as well as reasonably necessary medical and related expenses. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that:

1. The claimant did not sustain a compensable injury;
2. Her current complaints are the result of pre-existing conditions and not a work-related injury;
3. A compensable injury cannot be established by medical evidence, supported by objective findings, although there may be objective findings consistent with her pre-existing condition;

4. And, in the alternative, respondents are entitled to an offset for payment of short term disability and group insurance benefits, pursuant to Ark. Code Ann. §11-9-411.

The record, which included documentary evidence and the testimony of the claimant, Dan Speer, and Sherrie Darr, was closed at the conclusion of the hearing, consistent with the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant's average weekly wage on March 19, 2004, was \$350.00; and the claim has been controverted in its entirety.

3. The preponderance of the evidence fails to show either that the claimant sustained a compensable low back injury as the result of an injury on the job on or about March 19, 2004; that such an injury has been established by medical evidence, supported by objective findings; or that her current symptoms are the result of such an injury.

DISCUSSION

The claimant, 42 years of age at the time of the hearing, went to work August 16, 1993, as a production line worker at the employer's North Little Rock facility where it manufactures cosmetics. She testified that she injured her low back on March 19, 2004, when her chair unexpectedly started backward, causing her to slip back, strike her shin against a bracket, but without

falling to the floor because a co-worker caught her and held her on the chair. She testified that she began to feel pain in her lower back which was different from what she had felt before and which is part of the basis of this claim. However, as the employer points out, there is a history of chronic back problems predating, and complicating, this claim.

In fact, the claimant frankly testified that she first noticed low back pain in 1994 when she lifted a box of blisters and felt a “pinch” in her back. She stated that she saw the doctor then, was off work for about two weeks, and then returned to work at the same job, but that she noticed a little difference. The claimant also said that thereafter she started feeling pain from time to time during various activities, such as reaching for products on the assembly line, and that she went back and forth to the nurse for such problems and sometimes took vacation days. Medical records show that in March, 1994, the employer had the claimant treated by orthopedic specialist Dr. C. Lowry Barnes and that he returned her to full duty work March 24, 1994.

Eventually, the claimant received medical attention from her family physician, Dr. Les F. Anderson, as well as Dr. Sam McGuire and Dr. Matt L. Evans, also of the Anderson Medical Clinic. The medical record shows that Dr. Anderson saw the claimant March 20, 1996, and wrote that she had been having back pain for about two months and had an injury lifting boxes at work two years ago but did not think this was related to her condition. He diagnosed lumbosacral strain and recommended conservative care, including exercises, heat, rest, medication and possibly physical therapy. Thereafter, the claimant was seen at the clinic for various problems, such as carpal tunnel syndrome and difficulty with her shoulder that arose when she was getting out of bed and heard a pop in her right shoulder.

Dr. Anderson's records show that in January, 2003, he saw the claimant after she had finished a round of physical therapy but continued to have low back pain, and he recommended an MRI scan. After the January 22, 2003, report of the MRI scan of the lumbar spine indicated disc degeneration with moderate disc bulges at L3-4, L4-5, and L5-S1 with foraminal narrowing at L3, L4, and L5, as well as some mild nerve root compression in the left L4 and L5 foraminal, along with a posterior annular tear along the left posterolateral L4-5 disc, he referred her for a neurosurgical consultation.

On March 3, 2003, North Little Rock neurosurgeon Dr. Steven L. Cathey wrote Dr. Anderson confirming that the MRI scan showed early degenerative lumbar disc disease with some facet arthropathy at L5-S1 on the left and that the claimant's pain was well explained on the basis of early degenerative lumbar disc disease with associated osteoarthritis. He did not recommend surgery but suggested that the claimant be evaluated for pain management.

At the hearing, the claimant testified that she noticed her back condition was getting worse over time and the more she moved, the more she felt pain in her lower back. She also stated that she decided to see Dr. Karen Burks because she was not sure that her previous treatment had been appropriate.

Medical records show that Dr. Burks saw the claimant in August, 2003, and had her again undergo MRI studies in September, 2003. The report of the lumbar spine study indicated that the claimant had a mild bulging disc at L3-4; desiccation and degeneration from that level through L5-S1; superimposed on an annular bulge, posterolaterally on the left, a small broad based protrusion versus a small HNP abutting the left S1 nerve root; and also an annular tear and focal annular protrusion versus an asymmetric bulging disc posterolaterally on the left at L4-5, mildly encroaching

the neural foramen of the left L4 nerve root. Dr. Burks continued the claimant's care with physical therapy and medication.

In March, 2004, the claimant was seen by Dr. Butchaiah Garlapati, a pain specialist, whose notes indicate that she had lumbar radicular pain; degenerative disc disease at L3-4, L4-5, and L5-S1; HNP abutting left S1 nerve root; an annular tear at L4-5; chronic neck and shoulder pain; degenerative disc disease at C5-6; and right greater trochanter bursitis. His treatment included medication and lumbar epidural steroid injection therapy. During his care, on March 3, 2004, the claimant described her pain as moderate, a 5 on a scale of 10, and by March 9, 2004, a 7 out of 10. Dr. Garlapati administered a lumbar epidural steroid injection March 17, 2004, only two days prior to the incident at work, which is the subject of this claim. On March 17, the claimant again described her pain as a 7 out of 10.

Then, after the incident with the chair at work, the claimant returned to Dr. Burks whose note of March 24, 2004, stated that the claimant was complaining of severe headache and lower back pain "that started yesterday". The note stated that the claimant was not able to rid herself of the headache and wanted a shot to relieve her pain but that "her back is only a little bit worse than it usually is. She is not sure what she might have done to exacerbate the pain. She is still having trouble with her right leg but, again, not a lot worse than usual."

Evidence shows that, after the chair incident, the claimant continued to receive medical care not unlike the care she had received in the past for symptoms which were also similar to those from the past. The medical record also shows that the claimant's pre-existing pathology, demonstrated by MRI scans, was significant and could well account for her current distress, but fails to show objective findings consistent with a new injury to her back. Although the claimant testified that her

condition was worsened by the incident with a chair in March, 2004, the medical record is not consistent with this assertion and fails to provide an objective basis for drawing such a conclusion. Indeed, the claimant's physician, Dr. Karen C. Burks, in September, 2006, in response to claimant's counsel, wrote that her office notes after March 19, 2004, did not mention the March 19, 2004, incident and that Dr. Burks had no recollection of a discussion of a specific incident on a specific date that was not already recorded in her office notes. She also stated that she was unable to comment on whether this incident was a factor in aggravating the claimant's condition, but that she felt that the "nature of her work on the various lines, in general, aggravated her problems with the degenerative joint disease." She also pointed out that her June 18, 2004, clinic note reflected her feeling that the claimant needed to seek permanent disability due to her degenerative disc disease. However, she did not indicate that the claimant suffered an injury in March, 2004, or that her condition was related to such an injury, as distinguished from degenerative problems.

Thus, although the claimant's subjective symptoms may have continued to worsen after March 19, 2004, the evidence fails to reveal the occurrence of a compensable injury, within the meaning of the Act, which might be either distinguishable from her prior problems or the source of her current symptoms. Moreover, the medical record fails to reflect a significant increase in symptoms associated with the chair incident. Nevertheless, under current law the claimant's burden of proof is not satisfied by an increase in subjective symptoms, without associated objective findings - in this case, findings different from the significant pre-existing findings of degenerative pathology.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge