

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606039

DEBRA FRANKLIN	CLAIMANT
WAL MART SELF INSURED	RESPONDENT
CLAIMS MANAGEMENT, TPA	RESPONDENT

OPINION FILED MAY 9, 2007

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

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

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

STATEMENT OF THE CASE

A hearing was held in the above styled claim on February 13, 2007, in Fort Smith, Arkansas. The deposition of the claimant was taken on January 17, 2007, and was admitted as Respondent's Exhibit No. 4 to the hearing. A pre-hearing order was entered in the case on December 15, 2006. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On May 11, 2006, the relationship of employee-self insured employer-carrier-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$295.00 for total disability and \$221.00 for permanent partial disability.

3. 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 on May 11, 2006.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from May 23, 2006 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

- a. The claimant contends that she sustained a compensable injury on May 11, 2006 involving her back.
- b. The claimant contends that she is entitled to temporary total disability benefits from May 23, 2006 until a date yet to be determined. Additionally, she contends that she is entitled to reasonably necessary medical treatment.
- c. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend:

"Respondent initially accepted the claim and paid some benefits while continuing to investigate the matter. Respondent later concluded that the claim was not compensable and controverted it at that point. Among other things, respondent contends that there are no objective measurable findings to substantiate the existence of an injury. The medical proof shows that the claimant suffers from degenerative arthritis, and if the claimant experienced an increase in her symptoms during the month of May 2006, then it was simply a reoccurrence or continuation of the pre-existing arthritic pain or a non work related aggravation of the pre-existing condition."

DISCUSSION

The central issue in this case is whether the claimant sustained a “compensable injury” to her back on or about May 11, 2006. The burden rests upon the claimant to prove all of the elements necessary to establish this alleged “compensable injury”.

The first of these requirements is contained in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injury or condition involving her back, which she alleges to be compensable. It further requires that the actual existence of this physical injury or condition must be supported by “objective findings”.

After consideration of the medical evidence, I find that the claimant has presented sufficient medical evidence to satisfy the requirements of Ark. Code Ann. §11-9-102(4)(D). The medical reports and records clearly diagnose the presence of physical damage or defects involving multiple levels of the claimant’s lumbar spine, particularly at the L5-S1 level. The actual existence of such physical damage or defects is supported by objectively documented abnormalities shown on an MRI study that was performed on May 23, 2006.

The claimant must next prove that these medically established and objectively documented physical damage or defects satisfy the definitional requirements for a compensable injury, as set out in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical damage or defect must arise out of and occur in the course of the employment;

- (2) The physical damage or defects must be caused by a specific incident;
- (3) The physical damage or defects must be identifiable by time and place of occurrence;
- (4) The physical damage or defects must cause internal or external physical harm to the claimant's body;
- (5) The physical damage or defects must require medical services or result in disability.

In order to satisfy the first three of these definitional requirements, the claimant must prove the existence of a causal relationship between the medically established and objectively documented physical damage or defects and a specific incident related to her employment with the respondent. However, she need not show that any specific employment related incident was the sole or even major cause of the damage or defects. Aggravations of pre-existing conditions by a specific employment related incident may also constitute a compensable injury.

The only direct evidence presented by the claimant to prove this causal relationship is her own testimony. Although the testimony of a party is never considered uncontradicted, neither can it be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant's testimony would be legally competent to show a close temporal relationship between a specific employment related incident and the initial onset of her difficulties that would be indicative of a physical injury to her back. However, after consideration of all the evidence presented, it is my opinion that the claimant's testimony

is not sufficiently credible to prove this necessary causal relationship.

At the hearing, the claimant testified that, on May 11, 2006, she was performing her assigned employment activities of putting up overstocked merchandise in the storage room of the respondent's Alma store. This required her to lift and stack items of various sizes and weights with the use of a ladder. She stated that she felt a "pop" and a sharp pain in her back. Then, approximately 15 to 20 minutes later, she felt another "pop". However, she finished this assigned task and went back on the floor. It was her testimony that she informed Amanda Leroux, the department manager for domestics, that "I hurt myself working on the ladder". She testified that she also told a co-employee, named Wanda, that she had hurt her back. However, she conceded that she did not request medical services or formally report the injury, even though she knew the proper procedures to do so. She explained her failure to follow this procedure that she didn't know that she had "hurt herself".

Next, the claimant testified that on May 12, 2006, she was again on the ladder working with some sheets and had another "bad pop" and pain in her back. She again stated that she told "someone in management" about the incident and difficulties, but again admitted that she did not file a report or request for medical treatment. She conceded that she finished her shift on that date. She testified that on Saturday and Sunday, May 13 and May 14, 2006, she was in pain and did not do any physical activity.

She testified that on Monday, May 15, 2006, she got up and went to the respondent's store in Alma and told the first manager she met "I hurt myself" or "I am hurting" and that she was "going to the doctor". Again, she was unable to recall the name of the manager or if she had told the manager that she had hurt her back "at work".

The claimant called none of the co-employees or managers that she allegedly reported her difficulties to. The only managers called to testify were called by the respondent.

Amanda Leroux testified that she did recall the claimant coming to her on some date (in early May of 2006), and telling her that her right hip was hurting that day. However, she stated that this occurred only one time, while she was supervising the claimant. She also stated that the claimant did not relate these complaints to her work, did not ask to see a doctor, and did not request any incident or accident reports. She testified that the claimant continued to work in the Alma store after this conversation until such time as she was no longer needed. When the claimant's assigned time was up, the claimant asked to stay longer, but her request was denied.

Elizabeth Lem, the personnel manager at the Alma store testified that on May 15, 2006, the claimant came to her about a matter with her "time" and, at that time, also told her that she had been to a chiropractor for her back. When she asked the claimant how she had hurt her back, the claimant told her that she "didn't know" and that this had been a problem for a long time.

She stated that she had no further conversations with the claimant and that the claimant did not report any employment related injury to her, request for medical treatment, or request that an incident or accident report be completed.

It is apparent from the evidence that the claimant was well aware of the appropriate procedures to report an employment related injury and obtain appropriate medical treatment. However, she followed none of these procedures, until after she learned of the severity of her difficulties, following the MRI. Instead she continued working her assigned hours without apparent difficulty from the date of the alleged injuries until May 15, 2006. When she did seek medical treatment, she consulted her own physicians. All of this is inconsistent with the claimant's testimony and that of her mother and sister.

In her testimony, the claimant also stated that she told each and every one of her medical providers about the specific employment related incident on May 11 and May 12, 2006, and that these incidents had precipitated her back difficulties. However, when the claimant initially sought medical treatment for her back complaints on May 15, 2006, the records of the Clouse Chiropractic Clinic note a history that the claimant's lower back difficulties had first appeared "about a week ago" and had progressively worsened. These records also contain a history of the claimant's difficulties as beginning when she was playing with a baby last weekend. They also note that the claimant had experienced previous back difficulties when lifting 20 years ago, for which she had been

treated by Dr. Engelhoven (another chiropractor) for 10 to 12 years. However, there is absolutely no mention in any of these reports and records of the Clouse Chiropractic Clinic of any employment related event causing or precipitating the claimant's lower back and leg complaints.

The claimant next sought medical treatment from Dr. George Tompkins of Spirit Med, Inc. Her initial visit with Dr. George Tompkins, appears to have occurred on May 23, 2006. However, there was no actual record or report from this visit introduced. The first record of Dr. Tompkins that has been introduced is dated May 24, 2006. There is no mention in this report of any employment related accident or event as causing or precipitating the claimant's back pain and radicular difficulties.

The first mention of any employment related activity or incident, as causing or precipitating the claimant's lower back and radicular difficulties does not appear until May 26, 2006, when the claimant finally reported a job related injury to the respondent and requested medical treatment. At that time, a history similar to that contained in the claimant's testimony is recorded.

I simply find it difficult to conceive that if the claimant experienced the employment related incidents she describes, she would have failed to have reported these when she initially sought medical care. However, I find it even harder to believe that if the claimant had reported these incidents to her initial physicians (as she testified), these physicians would have failed to note these histories in their records. Yet the hardest to believe is

that Dr. Clouse would have made up and recorded a different history of the onset of the claimant's complaints.

It is also important to note that the medically established and objectively documented physical damage or defects involving the claimant's lumbar spine appear to be essentially degenerative in nature. Clearly, these defects could have equally been caused simply by the aging process or in conjunction with any relatively minor stress or trauma of day to day life.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence that her lumbar difficulties and lower extremity difficulties arose out of and occurred in the course of her employment with the respondent, were caused by a specific incident on or about May 11, 2006, and are identifiable by time and place of occurrence. The claimant's failure to prove these three definitional requirements for a compensable injury, as defined by Ark. Code Ann. §11-9-102(4)(A)(i) defeats her claim. I have no alternative but deny and dismiss this claim in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, including May 11, 2006 and May 12, 2006, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits

of \$295.00 for total disability and \$221.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a “compensable injury” to her back on either May 11, 2006, May 12, 2006, or any other date. Specifically, the claimant has failed to prove that she sustained an injury to her back that arose out of and occurred in the course of her employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
5. The respondents have denied the occurrence of any compensable injury to the claimant’s back and have controverted the claim in its entirety.

ORDER

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

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE