

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413014

ROSIE L. LATTIMORE, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED NOVEMBER 7, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on August 10, 2007 at McGehee, Desha County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE SUSAN M. FOWLER, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and temporary total disability benefits. All other issues are reserved.

At issue is whether or not this claim is barred by the statute of limitations pursuant to Ark. Code Ann. §11-9-702 and whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on November 30, 2004 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$8.40 per hour for a forty hour week. The claimant received both short and long term disability before becoming eligible for Social Security Disability. Some expenses have been paid by her group

medical carrier, Health Advantage. The claimant last worked on December 11, 2004 and was terminated on December 16, 2005.

The claimant contends she injured her right knee on November 30, 2004. She squatted down to clean behind a key counter and when she straightened up, her knee popped. The claimant came under the care of Dr. Gullett who performed surgery on the right knee on January 18, 2005. On March 15, 2005 Dr. Gullett performed surgery on the left knee. A total knee replacement for the right knee was performed on November 30, 2005. The claimant seeks payment of medical expenses and temporary total disability benefits from December 12, 2004 to a date yet to be determined.

The respondents contend this claim is barred by the statute of limitations. This claim was controverted on December 17, 2004 and the claimant did not request a hearing until January 31, 2007. Alternatively, the respondents contend the claimant's condition is the result of a preexisting condition and there is no objective evidence of a traumatic injury.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the claimant's May 25, 2007 deposition

The claimant was the only witness to testify at the hearing.

The claimant, age 45 (D.O.B. August 13, 1962), has a high school education and vo-tech training in business education. Her work experience includes jobs as a cook and cashier and factory work as a seamstress. She began working part-time for the respondent-employer in August 2000, before being promoted to department manager.

Initially, the claimant injured her left knee on December 14, 2000 while climbing a ladder in the shoe department. She reported the injury to the manager and the personnel department but no

accident form was completed and Wal-Mart did not offer to pay her expenses or benefits.

The claimant sought treatment from her family physician, Dr. Robertson, who prescribed medication and excused her from work for two weeks.

The claimant returned to work and injured her right knee on November 30, 2004, squatting and lifting heavy batteries. She finished her work limping, but her knee popped and locked when she squatted down to clean behind the key machine. She reported this injury to co-workers who helped her to the break room where she reported the injury to a manager. Once again, no accident report was completed and Wal-Mart did not offer to pay any expenses or benefits. The claimant again went to her family clinic and a nurse practitioner prescribed medication and excused her from work until December 7, 2004.

On December 8, 2004, the claimant called the personnel office and told them she was still in pain and unable to work. She was instructed to use her sick leave until she returned to work on December 11, 2004. She also spoke with a manager about the injury but remained symptomatic and has not worked since December 11, 2004.

The claimant testified she was unaware of workers' compensation benefits until the medical clinic mentioned it on December 13, 2004. The clinic's note of December 15, 2004 confirms that Wal-Mart denied the claim.

On December 14 or December 15, 2004, her employer asked her to come to the office to fill out an accident report. On December 15, 2004, she received a letter denying her claim.

The claimant began treatment with Dr. Gullett on December 27, 2004 and surgery was performed in January, 2005 to repair a torn meniscus of the right knee. In March 2005, Dr. Gullett perform surgery on the left knee. A total knee replacement was performed in November, 2005 on

the right knee. The claimant paid her treatment with her group insurance and received short and long term disability benefits through Hartford beginning in December 2004.

The claimant testified Wal-Mart never provided her with any information regarding workers' compensation. This is surprising given the fact that the claimant was a department manager. She does not remember being given any kind of employee handbook, verbal instruction, or posting notice (Tr. p. 12, 14-15, 18, 20-21). However, the claimant did have a prior workers' compensation claim with a previous employer in 1993 or 1994. Her employer took her to the ER for treatment and the claim was accepted as compensable from the start (Tr. p. 16-17).

On cross-examination, respondents' counsel pointed out that medical records from the McGehee Family Clinic in December 2000, indicate the claimant denied any history of injury to her left knee. The claimant disputed this notation but stated that her present claim does not include the 2000 injury (Tr. p. 22-24).

Respondents' counsel also pointed out that the claimant did sign an accident report form (AR-N) on December 14, 2004 and received her notice that the claim was controverted on December 15, 2004. On December 21, 2004 the Commission sent the claimant instructions about filing a claim. The claimant stated she did not file a claim because she anticipated being able to return to work (Tr. p. 33-34). Nevertheless, she consulted an attorney in October 2006 and was advised to file a claim form, (AR-C). By mistake, the claimant called the insurance adjuster instead of the Commission in October, 2006, and was informed that a letter requesting a hearing would suffice for the AR-C form. The claimant also spoke with the Legal Advisor Division of the Commission and attorneys answered questions about her case over the telephone. Despite these warnings, the claimant did not file a claim until January, 2007, knowing that Wal-Mart had denied both the

incident in 2000 as well as the one in 2004. The claimant conceded that Wal-Mart had paid nothing to her for either incident (Tr. p. 24-31). Because the claimant received a denial from Wal-Mart and assistance from several sources about filing a claim, and had previously received treatment from a workers' compensation injury, I find the doctrine of estoppel does not apply to this case.

DOCUMENTARY EVIDENCE

The respondents presented written statements from two co-workers which the claimant disputed. These statements are not notarized and the witnesses were not under oath. These statements are entitled to no evidentiary weight.

The documentary evidence also includes other records which are not in dispute, including (1) the adjuster's file, (2) the Legal Advisor's letter of December 21, 2004 confirming that the employer had denied the claim and advising the claimant to contact the Commission to pursue a claim (the letter, however, does not provide an AR-C form or caution the employee regarding the statute of limitations), (3) the claimant's hearing request of January 31, 2007, and (4) the Commission's entire file.

MEDICAL EVIDENCE

Medical records dated December 15, 2000 show the claimant was treated for left leg pain, two days in duration, without history of injury. The claimant said she was "pidgeon-toed" but did not comply with advice to wear leg braces. She was excused from work until December 18, 2000. A follow-up report dated December 19, 2000 indicates x-rays revealed degenerative joint disease. The report also recommends a consult with an orthopedic surgeon.

Medical reports of December 1, 2004 and December 27, 2004 show a history of injury consistent with the claimant's testimony regarding her November 30, 2004 right knee injury. Dr.

Gullett's notes of February 18, 2005 and March 7, 2005 mention problems with the left knee for "many months" and "many years". Dr. Gullett opined that her limp on the left had adversely affected both knees. His note of April 7, 2005 indicates the left knee was much worse than the right knee.

Medical records from 2005 show Dr. Gullett treated the claimant for meniscal tears and osteoarthritis of the left knee. Surgery, performed on March 15, 2005, revealed "significant...osteoarthritis... in the lateral compartment." Surgery was performed on the right knee on January 18, 2005 for a tear of the lateral meniscus. The claimant consulted Dr. John Lytle on November 2, 2005, and he felt that the claimant would eventually need a total knee replacement of both knees. Due to her young age, revision knee replacement was also indicated. On November 30, 2005, the claimant returned to Dr. Gullett for a total knee replacement due to "severe degenerative joint disease and osteoarthritis of the left knee."

FINDINGS AND CONCLUSIONS

The claimant contends that the statute of limitations should run from the date she became disabled by the total knee replacement on November 30, 2005, instead of the date she began to miss time from work. The claimant also contends the injury aggravated her preexisting degenerative joint disease. The underlying joint disease did not keep her from working until after the injury. (Tr. p. 33-36).

Under Ark. Code Ann. §11-9-702 a claim for compensation is barred unless filed with the Workers' Compensation Commission within two (2) years from the date of injury. An injury becomes compensable when 1) the claimant learns the extent of her injuries and 2) the claimant is off work for a period of time that entitles her to benefits for a compensable injury. Calion Lumber Co. v. Goff, 14 Ark. App. 18, 684 S.W. 2d 272 (1985), Haygood Partnership v. Whisenant, 74 Ark.

App. 185, 47 S.W.3d 277 (2001).

In the case at bar, the claimant was injured on November 30, 2004, required medical treatment, and was excused from work. In fact, the claimant never returned to work after this injury. As of December 15, 2004, she knew her employer was controverting the claim and she received correspondence from the Legal Advisor Division offering their help. Despite contacting private counsel, the claimant did not file a claim until January 31, 2007 when the Commission received her letter requesting a hearing.

Accordingly, I find the November 30, 2004 injury triggered the statute of limitations. The claimant had until November 30, 2006 to file a claim. Her letter of January 31, 2007 was too late and the claim is now barred.

Assuming arguendo, that the claim had been timely filed, I would find the claimant's right knee injury a compensable aggravation of a preexisting condition. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003). The November 2004 injury caused a meniscal tear which combined with preexisting degenerative joint disease to necessitate total knee replacement in November, 2005. Williams v. L & W Janitorial, Inc. 85 Ark. App. 1, 145 S.W.3d 383 (2004).

1. The Workers' Compensation Commission has jurisdiction of this case in which the relationship of employer-employee-carrier existed among the parties on November 30, 2004.
2. The claimant's hearing request, filed January 31, 2007 for a November 30, 2004 injury, exceeds the two year deadline under Ark. Code Ann. §11-9-702 and therefore this claim is barred by the statute of limitations.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge