

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F600866

RAY PIATT	CLAIMANT
WAL-MART ASSOCIATES, INC.	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 9, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by ADRIENNE MURPHY, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held on October 10, 2006, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on August 29, 2006. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On December 29, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$256.00 for temporary total disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's injury to his low back on December 29, 2005.

2. Related medical.

3. The claimant's entitled to temporary total disability from December 30, 2005, to July 10, 2006.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that on December 28, 2005, he suffered a compensable, accidental injury to his lower back and that he is entitled to reasonable and necessary medical treatment for these injuries. On the evening on December 28, 2005, the claimant was working as a custodian at the Wal-Mart Home Office. He worked from 6:00 p.m. until 2:30 a.m. cleaning various offices in the building; therefore, he often worked alone. That evening, the claimant was moving chairs from the top of the table to the floor when the chairs began falling. To prevent the chairs from crashing to the floor, the claimant reached to grab them and felt a pain in his back. The next day, December 29, 2005, the claimant told his custodian supervisor, Judy Maloney, and a co-worker named Bill about his accident. On December 30, 2005, the claimant had to leave his shift two and one-half hours early because of the excruciating pain. He informed his supervisor of this. The claimant immediately began treatment with his family physician, Dr. A.D. Bicak, because his back pain was so severe. He was initially treated conservatively with prescription

medications and a back brace. When neither provided relief, the claimant had x-rays of his back taken on January 11, 2006. At that time, he was diagnosed with a compressed fracture at L-2. After the claimant informed his supervisor about his treatment, Wal-Mart arranged for the claimant to be evaluated by Dr. K.V. Berestnev. The claimant was seen by Dr. Berestnev twice, who released him to return to work. Because he had been released by Dr. Berestnev and because his severe pain was ongoing, the claimant returned to Dr. Bicak who then referred him to neurosurgeon Dr. Cyril Raben. Dr. Raben performed surgery to repair the claimant's fractured vertebrae on March 3, 2006. Since that time, the claimant has followed Dr. Raben's care and attended physical therapy at Northwest Arkansas Spine and Orthopedics. Dr. Raben released the claimant to return to restricted light duty work on July 17, 2006. The claimant also contends that he is entitled to temporary total disability benefits from the date of the accident through July 17, 2006, when he was released to return to restricted, light duty work. Finally, the claimant contends that he is entitled to a controverted attorney's fee. The claimant reserves his right to any and all additional benefits associated with this claim, including, but not limited to an anatomical impairment rating, permanent disability benefits, and/or wage loss.

In regard to the foregoing issues the respondents contend that the claimant contends that he sustained a compensable accidental injury to his lumbar spine in the form of a fractured L-2 vertebrae on December 28, 2005. There were no eyewitnesses to the alleged

incident. Respondents controvert the case in its entirety and contends that the claimant cannot prove by a preponderance of the credible evidence that he sustained a compensable injury to his lumbar spine which arose out of and during the course of his employment with the respondent on December 28, 2005.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted medical records marked Respondents' Exhibit No. 1, non-medical records marked Respondents' Exhibit No. 2 and the deposition of the claimant marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that he was seventy-eight years old and retired due to health reasons from the Rogers School District after ten years. The claimant testified that he then took a part time job working for the respondent and had been working for approximately four months before his accident. The claimant testified that he was working as a custodian, cleaning floors, mopping, scrubbing, dust mopping, running the scrubbing machine, setting up chairs and doing what has to be done. The claimant testified that his shift was from 6:00 p.m. to 2:30 a.m. The claimant testified that earlier in the evening he and Bill had been picking up chairs and setting them on the table so that Bill could buff and he could dust mop the floor. The claimant testified that

he did not work with Bill during the second shift because Bill had to go buff the lower hallway. The claimant testified that as he was taking chairs off of the tables, two chairs started to fall and in order to keep them from hitting the wall, he grabbed at the chairs and as he bent over a second set of chairs fell across the middle of his back. The claimant testified that he felt pain in his back but it was not real severe pain so he continued to do his work. The claimant testified that he had gone to work at 6:00 on December 28 but this accident occurred on December 29 after midnight. The claimant testified that he did not report his injury to anyone because he did not realize that it was as bad as it was.

The claimant testified that the next evening when he came into work he saw his supervisor, Judy Maloney, who was also the head custodian. The claimant testified that Bill was standing there also and he went up to Judy and told her that he thought that he had pulled a muscle that night. The claimant testified that he worked all of that shift and the next evening he had an opportunity to visit with Judy at which time he told her he was going home at midnight because his back was bothering him. The claimant testified that he first was seen by a doctor after the weekend and in actuality was seen by a nurse since the doctor was not in. The claimant testified that he was given medication and a notice to be off work for a week. The claimant testified that he took this off work slip to the respondent. The claimant testified that he was then seen by Dr. Garrett who had x-rays made to see what his problem was and that the following week he saw Dr. Bicak at which

time he learned that he had a fractured vertebrae in the middle of his back. The claimant testified that Dr. Garrett and the nurse practitioner are both in Dr. Bicak's office. The claimant testified that the respondent sent him to see Dr. Berestnev and the doctor gave him a prescription and put him on light duty. The claimant testified that his leg was hurting so bad he could not do light duty so he went home. The claimant testified that he did not get his prescriptions filled either because the respondent had not authorized payment and that it took three or four days in order to get his pills. The claimant testified that after he was released by the workers' compensation doctor, his claim was denied. The claimant testified that Dr. Bicak referred him to Dr. Raben who recommended that he have his vertebrae glued back together. The claimant agreed that he had his surgery in March and he has gone through work rehabilitation in order to strengthen his back area. The claimant testified that he is doing pretty well although he still is having some problems walking very far or standing very long. The claimant testified that he could return to work on light duty with the restriction of not to lift anything over ten pounds and that he is not suppose to sweep for at least a year. The claimant testified that he had looked for jobs but has not found one.

On cross examination, the claimant testified that in 1940 he fell off the wing of a B29 and fractured two vertebrae. The claimant agreed that it took him approximately six to seven months to totally heal from this incident. The claimant further agreed

that these fractures were in his lumbar spine at the L2-1 level which is where he is currently having problems. The claimant agreed that he and his wife are still working past their retirement age because their social security and retirement benefits are so low. The claimant testified that he has a little arthritis in his back but not too bad. The claimant agreed that he retired from the Rogers School District on the medical advise from his physician. The claimant testified that when he was hired by the respondent it was his understanding that he would be checking TVs but he wound up doing something else. The claimant testified that Lisa Brewer is his main supervisor, noting that she was head or manager of temporary services for the respondent. The claimant testified that he had had an injury while working for the respondent prior to his December 28, 2005, injury. The claimant testified that at that time he went to Lisa Brewer and they filled out paperwork for this injury. The claimant testified that when he saw Bill Hingle at the end of his shift on December 28 he did not say anything to Mr. Hingle about hurting his back because he did not think that there was that much to it. The claimant testified that his back was hurting but it was not hurting that bad. The claimant testified that the next morning when he got up he was hurting but again not that bad and that his back just gradually continued to get worse. The claimant again testified that when he came into work on the 29<sup>th</sup> he saw Judy Maloney and Bill Hingle and told them that he thought he had pulled a muscle in his back. The claimant agreed that when he filled out his workers' compensation claim insurance, he put

down that he had reported his injury on December 30, 2005. The claimant agreed that this was a mistake on his part. The claimant testified that he filled out his workers' compensation paperwork on January 16, 2006. The claimant testified that when he reported that he thought he had pulled something in his back to Bill Hingle and Judy Maloney he told them about the chair incident. The claimant again testified that it was a couple of days before his back really began to get bad but that it hurt all along. The claimant testified that his last day of work was December 30, 2005. The claimant testified that he did not work on January 4, 2006. The claimant testified that when he saw Dr. Bicak on January 13 he told him that he thought that he hurt his back while working with the chairs. The claimant testified that he did not give his off work slip to Judy Maloney because she was not on duty at the time. The claimant testified that he did not want to wait around until she came on duty because he was hurting too bad to set around and wait. The claimant testified that sometime later Lisa Brewer called and asked him to come in to fill out some paperwork. The claimant agreed that on January 16, 2006, he went in to fill out the requested paperwork and he was subsequently sent to the Lowell Clinic to be seen by the doctor. The claimant testified that physical therapy was recommended but before he could begin this treatment, his claim was denied. The claimant agreed that he was then seen by Dr. Raben who performed surgery and also recommended physical therapy. The claimant testified that he last saw Dr. Raben in July 2006 and has no future appointments with the doctor.

The claimant testified that his current condition is exactly like it was when he retired from the Rogers School District. The claimant agreed that he has had arthritis in his back prior to going to work for the respondent but that the discomfort was not great and he could handle the pain by taking a couple of Aleve.

On redirect examination, the claimant testified that his duties with the Rogers School District were much heavier than they were while he was working for the respondent. The claimant testified that after his fall from an airplane wing in 1948 he underwent treatment and has not had any problems in the subsequent fifty-seven years following that accident.

Lisa Brewer testified that in the fall of 2005 through January 2006 her title was that of manager of temporary services for the respondent. Ms. Brewer testified that when the claimant injured himself while working in the Star Complex, he came in and they filled out paperwork. Ms. Brewer testified that she found out through Judy Maloney, the claimant's assignment supervisor, that he had not been to work for about three weeks due to a back injury. Ms. Brewer testified that she asked Ms. Maloney if the claimant's problem was work related and that Ms. Maloney responded that she did not know. Ms. Brewer testified that she then instigated an investigation into the matter, she contacted the claimant herself and that paperwork was filled out on January 16, 2006. This witness testified that on January 16, 2006, she took the claimant to the company doctor.

On cross examination, Ms. Brewer testified that on January 16, 2006, when she filled out the workers' compensation papers with the claimant, he reported to her that he had hurt his back putting some chairs on the table and the chairs had fallen off and he had tried to catch them. This witness agreed that this incident was reported to have happened a couple of weeks earlier.

Judy Maloney testified that she is a custodial manager and works the third shift which is from 6:00 p.m. until 2:30 a.m. Ms. Maloney testified that she had supervision over the claimant but that Lisa Brewer was the claimant's boss. Ms. Maloney testified that on December 29 she does not recall the claimant coming up to her and Mr. Bill Hingle and reporting an injury. Ms. Maloney testified that if an injury had been reported she would have taken him immediately to have a drug test. This witness testified that after the claimant had been off work for some time she asked Mr. Hingle if he had gotten any phone calls or any word from the claimant and during this occasional conversation, Mr. Hingle reported that the claimant told him that he had hurt himself catching some chairs. Ms. Maloney testified that she then e-mailed Lisa Brewer and told her that the claimant had tried to catch some chairs and got hurt. Ms. Maloney testified that she never did see any note taking the claimant off work but does recall that he called in and told her that he was not going to be in for a few days. Ms. Maloney agreed that on December 30, a Friday, she recalls having a snack with the claimant. This witness testified that lots of people take off on the holidays so there is not as

much cleaning to do. Ms. Maloney testified that the claimant told her that he was going to take off the rest of the night which she agreed to. Ms. Maloney testified that she does not recall seeing the claimant after he took off work on the 30<sup>th</sup> of December.

On cross examination, Ms. Maloney testified again that she does not recall on December 29<sup>th</sup> the claimant reporting to her an incident where a chair fell on him. This witness again testified that had such a report been made he would have been sent for a drug test and statements would have been filled out. Ms. Maloney testified that when she and the claimant had their Christmas snacks and he left around midnight, she does not recall any conversation with him concerning his back hurting. Ms. Maloney was asked, "Did he, the claimant, complain at that time?" Ms. Maloney responded, "No." Ms. Maloney then was asked, "Do you remember?" Ms. Maloney responded, "Not really. I know it was---I know he probably came in because he wanted to go home for some reason, probably because of the back or maybe he was just hurting---headache, I don't remember that."

Bill Hingle testified that he works as a custodian for the respondent and that Judy Maloney is his supervisor on the third shift. This witness testified that he worked in and around the claimant for a period of about one month in the general offices. Mr. Hingle testified that the claimant did tell him that he had hurt himself while trying to catch some chairs that were falling off of a table. Mr. Hingle testified that the claimant reported this to him in January but understood it to have happened a few

days back. This witness testified that the claimant reported to him that he thought that he had pulled a muscle in trying to catch a set of chairs that were falling. Mr. Hingle testified that the claimant reported this incident to him the first day they were back at work after the New Year. Mr. Hingle testified that he then passed this information onto July Maloney. Mr. Hinkle testified that the claimant told him that he had the chair incident before the New Year's break.

The medical records set forth that the claimant was seen at the Mercy Health Center on January 3, 2006, by Debra Sweatt, a physician's assistant. In the history set forth by the claimant, it is reported that he has been having low back pain for the past four days. After examination, the claimant was diagnosed with low back pain and medications were prescribed. On January 6<sup>th</sup> the claimant was seen by Dr. David Garrett for his continued low back problems. X-rays taken on this date demonstrate what appears to be an L2 compression fracture. Dr. Garrett placed the claimant in a back brace and gave him medications as well as prescribed a lumbar support and scheduled a bone scan. Dr. Ajdahan Bicak writes on January 13, 2006, that the claimant believes that he hurt his back lifting a heavy chair. The doctor notes that the claimant underwent a bone scan which revealed an L2 vertebrae acute or subacute compression fracture. Dr. Bicak notes that the claimant does not want any type of surgical procedure done such as a kyphoplasty to stabilize his back. The doctor writes that the claimant's back brace was not tolerated. The claimant was assessed

with having a compound fracture and again medications were prescribed and a referral to Dr. Raben was made. Dr. Konstantin Berestnev writes on January 16, 2006, that he has seen the claimant who reports that he was setting chairs on a table when a few chairs started to fall and when he tried to catch the chairs some other chairs hit in the middle of his back. Dr. Berestnev notes that the claimant's MRI showed at the L2 level an acute or subacute compression fracture. Dr. Berestnev notes that the claimant had an x-ray which shows significant degenerative changes over his lumbar spine including the osteophytes at L1 through L4 area with osteophytes being large and being present around the compressed L2 vertebrae. Dr. Berestnev assesses the claimant with having lumbar strain and conservative management was recommended as well as medications. Dr. Berestnev writes on January 23, 2006, that the claimant reports that he is doing better but continues to have pain and stiffness in his lower back, noting that he is doing home exercises and feels like he has pulled his back again. After examination, Dr. Berestnev recommended physical therapy and to continue to take his medications. Dr. Berestnev also notes that the claimant is to not lift more than twenty pounds at work. Dr. Bicak writes on January 27, 2006, that the claimant does have a compression fracture, noting that he underwent a bone density test which revealed evidence of osteoporosis and further writing that the claimant has pain consistently despite taking Vicodin. Dr. Bicak prescribed medications as well as referred the claimant to Dr. Raben.

The claimant began being seen at Dr. Raben's office on February 23, 2006, for his complaints of low back pain. After examination and discussion with the claimant, surgery was scheduled for March 3, 2006, for a kyphoplasty. On March 3, 2006, the claimant was operated on by Dr. Tony Raben to repair a fractured L2 vertebrae. Dr. Raben released the claimant to work on July 17, 2006, with the following restrictions: No lifting greater than 10 pounds, no repetitive bending, standing, sitting, stooping, twisting, reaching or grasping and no climbing or crawling.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent in December 2005. It is noted that none of these witnesses are particularly sophisticated, therefore, dates and times of occurrence vary greatly. This matter is also complicated due to the type of shift which the claimant and the witnesses worked noting that the shift encompassed two days with the next shift beginning on the same day that the previous shift had ended. There is a consistent theme in this record in that the claimant did talk about and did report and did complain of chairs falling and hitting him in the back while he was working for the respondent. The medical evidence has set forth that he has sustained a compression fracture for which he required a surgical procedure to repair. It should be noted that this claimant is 78 years old and has done manual labor all of his life. It is also notes that some fifty plus years earlier he sustained a compression fracture at the same

level but subsequent to that date, has not required medical treatment for his back. This claimant has been diagnosed with arthritis as well as degenerative disc disease which is not unusual for a person of 78 years old who has done manual labor all of his life. It is my opinion that this claimant has met his burden of proof and is entitled to have his medical bills subsequent to January 16, 2006, paid for by the respondent as well as receive temporary total disability from January 16, 2006, to his release by Dr. Raben on July 10, 2006.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On December 29, 2005, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$256.00 for temporary total disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent in December 2005. See discussion above.

5. The respondent should pay for all reasonable and necessary medical treatment for this claimant's compensable injury from January 16, 2006. The claimant did not definitively report a workers' compensation injury until January 16, 2006, to the respondent.

6. The respondents should pay temporary total disability to this claimant from January 16, 2006, to July 10, 2006. See discussion above.

7. The respondents have controverted this claim in its entirety.

8. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent.

The respondents should pay for all medical treatment for this claimant's compensable injury from January 16, 2006. The respondent should pay temporary total disability from January 16, 2006, through July 10, 2006.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE