

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F610303

SHERRI TRIMBERGER, Employee	CLAIMANT
WAL-MART ASSOCIATES, INC., Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED DECEMBER 7, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On November 14, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 22, 2007, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed among the parties at all relevant times.
3. The claimant sustained a compensable injury to her right knee, left knee, and left elbow on September 15, 2006.
4. Respondent has accepted and is paying permanent partial disability based upon a 10% rating to the right knee.
5. The claimant was earning sufficient wages to entitle her to compensation at the weekly rates of \$488.00 for total disability benefits and \$366.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of migraine headaches and injury to cervical spine.
2. Related medical.
3. Temporary total disability benefits from May 21, 2007 through July 24, 2007.
4. Attorney fee.

The claimant contends she suffered a compensable injury in the form of migraine headaches and to her cervical spine on September 15, 2006. She requests payment of related medical and temporary total disability from May 21, 2007 through July 24, 2007, as well as an attorney fee.

The respondents contend there are no measurable and objective findings to support the compensability of any alleged headaches by the claimant. In addition, the respondents contend that any headaches do not arise out of the compensable injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on August 22, 2007, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury in the form of migraine headaches or an injury to her cervical spine.

FACTUAL BACKGROUND

The claimant is a 31-year-old woman who worked for the respondent in its insurance department. Claimant suffered a compensable injury on September 15, 2006 when she was walking from one building to another at work and the heel of her shoe got caught in the sidewalk, causing her to fall and land on her right knee, left knee, and left elbow. Claimant was taken to Dr. Vandergriff for treatment and was diagnosed with bilateral knee and left elbow pain status post-contusion. X-rays were taken of the claimant's knee and she was given a brace for her right knee.

At some point the claimant was referred to Dr. Tomlinson for treatment of her right knee injury. Dr. Tomlinson attempted to treat claimant conservatively, but eventually performed surgery on claimant's right knee on November 7, 2006.

The respondent accepted as compensable injuries to the claimant's right knee, left knee, and left elbow. Respondent has paid compensation benefits including medical treatment and a permanent partial disability based upon a 10% rating to the claimant's right lower extremity.

Claimant has filed this claim contending that she also suffered a compensable injury to her cervical spine which has resulted in migraine headaches as a result of the fall on September 15, 2006. She seeks payment of medical treatment related to that injury as well as temporary total disability benefits and a controverted attorney fee.

ADJUDICATION

The claimant has a history of migraine headaches. It is unclear when these headaches began, but claimant was seeking medical treatment for this condition by at least January 2004. Claimant testified that prior to the injury on September 15, her headaches would occur only once or twice a month and sometimes not for a period of four to six months. She also testified that her headaches would last at most six days and that she

was usually incapacitated for only one day. Claimant further testified that medication will usually alleviate her headache.

In contrast to claimant's testimony regarding the frequency of migraine headaches before her compensable injury, I note that the medical records indicate a much more frequent occurrence. In a report from Dr. Wilmoth dated January 6, 2004, it is noted: "She does have a history of migraines. She can have one to six a month." (Emphasis added.) Furthermore, in a report dated October 15, 2004, Dr. Wilmoth stated: "Over the last few months, she has had 5-6 [migraines] a month." (Emphasis added.)

Claimant testified that immediately after the fall she began developing a headache while in Dr. Vandergriff's waiting room. Claimant testified that after the fall her headaches have occurred on a more frequent basis, that the headaches last longer, and that their intensity is much greater.

Pursuant to the workers' compensation law, an employer takes an employee as it finds her and employment circumstances that aggravate pre-existing conditions are compensable. *Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is, itself, compensable. *Olliver v. Guardsmark*, 68 Ark. App. 24, 3 S.W. 3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W. 3d 900 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Insurance Company v. DuBois*, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

In other words, even though the claimant had a pre-existing migraine headache condition, that condition may be compensable if the claimant can meet her burden of proving by a preponderance of the evidence that her migraine headaches were aggravated by her fall. However, in order to prove an aggravation claimant must satisfy all elements

of a compensable injury.

One of the elements of compensability is the requirement that it be established by medical evidence supported by objective findings. A.C.A. §11-9-102(4)(D). “Objective findings” are those findings which cannot come under the voluntary control of the patient. A.C.A. §11-9-102(16)(A)(i).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury in the form of migraine headaches or an injury to her cervical spine. Specifically, there are no objective findings establishing an injury.

While there seems to be no question on the part of the doctors that they believe that claimant suffers from migraine headaches and they are of the opinion that claimant’s pre-existing condition was aggravated by her fall, claimant is still required to offer medical evidence supported by objective findings establishing an injury. My review of the medical records of the treating physicians in this case fails to reveal any objective findings establishing an injury or aggravation in the form of migraine headaches or an injury to claimant’s cervical spine.

With respect to this issue, it should also be noted that Dr. Moffitt does not believe that claimant’s condition is caused by migraine headaches. Instead, he stated in a report dated December 7, 2006 that he believes claimant’s condition is the result of occipital neuralgia. While it was his belief that this condition was related to the claimant’s September 15 injury, Dr. Moffitt’s medical report contains no objective findings in support of this diagnosis.

Following claimant’s visit with Dr. Moffitt she returned to Dr. Garrett, her family physician. Dr. Garrett in a letter dated December 14, 2006 reiterated Dr. Moffitt’s opinion and referred claimant to Dr. Cannon for an injection. Claimant underwent this injection by

Dr. Cannon on January 15, 2007. On January 24, 2007, Dr. Cannon indicated that claimant did not have any evidence of bruising or swelling in the occipital nerve area. He went on to state: "Occipital neuralgia is very common in people who have had head injuries or neck injuries and results in irritation of the occipital nerve that comes out of the back of the skull between the ear and the mid-portion of the posterior aspect of the skull."

However, there is no indication that claimant suffered an injury to her head or neck as a result of the fall on September 15, 2006. Claimant specifically testified that she did not strike her head when she fell on that date. Furthermore, claimant could not even testify that her head and neck were jerked as a result of that incident.

Q. And what was the - - happening to your head and neck during that movement?

A. I'm not sure.

Q. Was it going forward?

A. Going - - It did go forward, yes.

Q. Was there any sort of jerking? Or how abrupt was the motion?

A. It all happened so quickly that I really don't remember.

It should also be noted that some of claimant's treating physicians' medical reports note a finding of tenderness to palpation in the claimant's neck area. However, tenderness is not considered an objective finding. *Kimbrell v. Arkansas Department of Health*, 66 Ark. App. 245, 989 S.W. 2d 570 (1999). Finally, it should also be noted that claimant underwent an MRI scan of her cervical spine at the request of Dr. Garrett on June 5, 2007. That MRI scan does reveal a loss of normal cervical lordosis. The report also indicates that this loss might be secondary to muscle spasm. Muscle spasm is considered an objective finding. However, the report also indicates that the finding may simply be related to the claimant's positioning during the MRI scan. "Loss of normal cervical lordosis may

be secondary to muscle spasm or positioning.” (Emphasis added.)

In summary, even though the claimant had a pre-existing history of migraine headaches, that condition may be compensable if the claimant can prove by a preponderance of the evidence that her fall on September 15 aggravated that pre-existing condition. In order to prove such an aggravation, claimant has the burden of meeting all elements of compensability including medical evidence supported by objective findings. Even though claimant’s treating physicians have related her migraine headaches to the fall, claimant must still offer objective findings establishing an injury. Here, the medical record contains no objective findings establishing an injury in the form of migraine headaches, occipital neuralgia, or an injury to the claimant’s cervical spine. Absent medical evidence supported by objective findings, the doctors’ diagnoses and their opinions with regard to causation are not sufficient to establish compensability.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury in the form of migraine headaches, occipital neuralgia, or an injury to her cervical spine as a result of her fall on September 15, 2006. Therefore, she is not entitled to medical benefits or temporary total disability benefits related to those conditions. Claimant’s claim for these benefits is hereby denied and dismissed.

The respondents are ordered to pay the court reporter’s charges for preparing the hearing transcript in the amount of \$519.25.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE