

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F706017

SHARON A. DONOVAN, EMPLOYEE **CLAIMANT**

**WAL-MART ASSOCIATES, INC.,
SELF-INSURED EMPLOYER** **RESPONDENT**

**CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER/TPA** **RESPONDENT**

OPINION FILED AUGUST 4, 2008

Hearing conducted before Administrative Law Judge S. Dale Douthit in Little Rock, Pulaski County, Arkansas.

Claimant was unrepresented and appeared Pro Se.

The respondents were represented by Mr. Curtis L. Nebben, Attorney at Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on May 15, 2008, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation laws.

A prehearing conference was conducted in this claim on March 20, 2008, and a Prehearing Order was filed on that same date. A copy of the Prehearing Order was introduced as Commission Exhibit "1", and made a part of the record herein without objection, subject to any modifications made at the full hearing.

At the full hearing, the parties agreed to the following stipulations:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

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- 2) The employee-employer-carrier relationship existed at all relevant times, including March 27, 2007.
- 3) The claimant's average weekly wage was \$453.88 per week entitling the claimant to compensation rates of \$303.00 per week for temporary total disability and \$227.00 for permanent partial disability.

By agreement of the parties, the primary issue presented for determination concerned compensability of an alleged gradual onset injury to the claimant's back. If overcome, claimant's entitlement to associated benefits must be addressed.

At the full hearing, the claimant contended that she sustained a compensable gradual onset back injury while in the respondents' employ. Claimant contended that as a result of her compensable gradual onset back injury that she is entitled to all associated medical benefits, temporary total disability benefits from July 4, 2007, through March 16, 2008, and temporary partial disability benefits from March 17, 2008, to a date yet to be determined. In summary, the claimant also contended that her compensable gradual onset injury manifested itself while working for Wal-Mart while lifting batteries.

The respondents contended, in summary, at the full hearing, that the claimant did not sustain a compensable injury arising out of and in the course of her employment as defined by the Arkansas Workers' Compensation Act. Respondents also contended that there are no measurable objective medical findings to support the

definition of a compensable injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A.

§ 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has failed to prove, by a preponderance of the credible evidence, that she sustained a compensable gradual onset back injury within the meaning of the Arkansas Workers' Compensation laws. Specifically, the claimant has failed to establish a compensable gradual onset back injury with medical evidence supported by objective findings. Further, the claimant has failed to prove by a preponderance of the evidence that her injury arose out of and during the course of her employment with Wal-Mart.

DISCUSSION

The claimant testified that she began working for Wal-Mart in 1992. The claimant testified that she worked on and off for Wal-Mart at the Camp Robinson location since December 14, 1992. (T. pg. 29, lines 8-9). The claimant testified that

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she was primarily assigned to the health and beauty aids department. The claimant testified that on a normal basis she would stock various health and beauty aids such as Listerine, toothpaste, soap, and baby lotion. The claimant testified that the products she was stocking would come in on a pallet, and she would then break open the cases, and stock the individual items on the shelves.

The claimant testified that sometime around the end of September/beginning of October of 2006, she was instructed by her overnight manager, Rowena Tucker, to go to the automotive department and stock some car batteries.

The claimant testified that she only stocked car batteries for Wal-Mart one shift, and that shift took place sometime in late September or early October of 2006. The claimant testified that her one shift on stocking automotive batteries lasted less than eight hours. The claimant testified that she began having some back problems after the one shift stocking automotive batteries in late September or early October of 2006; however, never reported any work related injuries to Wal-Mart until June 8, 2007. The claimant testified that although her back problems began approximately eight months prior to reporting her back injury on June 8, 2007, she had been experiencing back problems since the automotive battery lifting shift and her back problems continued to worsen.

Q So you're saying you experienced the initial back pain in late '06, but it didn't get unbearable until middle part of '07; is that right?

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A Right.

(T. pg. 37, lines 17-20).

After the claimant lifted the automotive batteries for one shift in late September/early October of 2006, she went back to stocking health and beauty aids until she reported her back problem on June 8, 2007. The claimant contends that she sustained a compensable gradual onset back injury which began in late September/early October of 2006 and continued to worsen until she ultimately reported her injury to Wal-Mart on June 8, 2007.

Arkansas Code Annotated § 11-9-102(4)(A) defines “compensable injury”:

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(b) A back injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence.

A compensable injury must 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). The employee’s burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. A.C.A. § 11-9-102(4)(E)(ii). “Major

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cause” means more than fifty percent (50%) of the cause, and a finding of major cause shall be established according to the preponderance of the evidence. A.C.A. § 11-9-102(14).

As stated above, for the claimant to establish a compensable gradual onset back injury she must establish her back injury by medical evidence supported by objective findings. The record herein is void of any medical evidence of objective findings that support the claimant’s claim for a compensable gradual onset back injury.

It must be noted that in making my decision of lack of objective medical evidence, claimant’s proffered exhibits were not considered in this Opinion. The Prehearing Order filed in this matter on March 20, 2008, specifically states:

No documents will be allowed into evidence unless exchanged by the parties at least **seven (7) days** prior to the scheduled hearing. Any evidence, whether documentary or testimonial, that is not disclosed or exchanged in compliance with this Order and the applicable law shall not be considered at the hearing except with prior leave of the Commission and upon a showing of good cause.

(Com. Ex. No. 1, pg. 3).

It must be noted that the claimant was a party at the prehearing conference which produced the March 20, 2008, Prehearing Order and was advised of the Legal Advisor’s 1-800 number to assist her in litigating her claim. As stated in the Prehearing Order, this administrative law judge offered to continue the prehearing conference in order to allow the claimant time to get an attorney; however, the

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claimant elected to go forward unrepresented. The claimant acknowledged under oath that she did not exchange the documents that she wished to introduce at the hearing with opposing counsel within seven (7) days of the hearing:

JUDGE DOUTHIT: Okay. Ms. Donovan, do you have any documentary evidence you would like to submit today?

MS. DONOVAN: Just these papers that I have right here. (Indicating).

JUDGE DOUTHIT: Okay. Mr. Nebben, have – let me ask you this first, Ms. Donovan; did you give those to Mr. Nebben within seven days of today's hearing?

MS. DONOVAN: You mean these papers right here?

JUDGE DOUTHIT: Yes.

MS. DONOVAN: No.

JUDGE DOUTHIT: You didn't make him a copy?

MS. DONOVAN: No.

JUDGE DOUTHIT: Okay. Mr. Nebben, do you object to those documents being introduced?

MR. NEBBEN: Yes, sir, we do.

JUDGE DOUTHIT: Okay. All right, Ms. Donovan, on page 3 of the prehearing order, it says that no documents would be allowed into evidence unless exchanged by the parties at least seven days prior to the hearing. And you're stating that you did not do that; is that correct?

MS. DONOVAN: That's right.

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(T. pg. 14-15, lines 4-25 & 1).

The claimant acknowledged under oath at the full hearing that none of the documentary evidence she wished to submit at the full hearing had been exchanged with opposing counsel at least seven (7) days prior to the hearing. Therefore, the claimant was allowed to proffer her exhibits and was advised that I would not rely on her documents in rendering my Opinion.

After reviewing all the credible evidence contained in the record herein, I find that the claimant has failed to prove a compensable gradual onset back injury with medical evidence supported by objective findings. Therefore, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset back injury while in the respondents' employ.

Further, I find that the claimant has failed to prove by a preponderance of the evidence that any back injury she has arose out of and in the course of her employment. On June 8, 2007, the claimant went to Concentra Health Centers and stated per Concentra's report: "I was stocking health and beauty aids lifting boxes and condensing pallets when I felt heaviness in my lower back." (R. Ex. 1, pg. 2).

Further, the notes from the June 8, 2007, report from Concentra states: "Patient is a 51 year old female employee of Walmart/Camp Robinson who complains about her back which was injured on 4/24/2007 5:00:00 AM." The report from Concentra is void of

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any allegation of back injury occurring in late September/early October of the year 2006. Further, the medical report from Concentra on June 8, 2007, seems to pinpoint an exact injury time of 5:00 A.M. on April 24, 2007. The contradiction from the reports of injury the claimant gave to her medical providers and the testimony that she gave at the full hearing leads this examiner to find that the claimant has failed to prove by a preponderance of the evidence that any back injury she may have arose out of and in the course of her employment.

ORDER

For the reasons discussed herein, I find that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset back injury while in the respondents' employ. Therefore, this claim is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb