

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F706709

CHARLES SADBERRY, Employee	CLAIMANT
WAL-MART ASSOCIATES, Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED APRIL 7, 2008

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

On March 13, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 28, 2007, and a pre-hearing order was filed on November 29, 2007. 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 between the parties on June 26, 2007.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle him to compensation at the rate of \$247.00 for total disability benefits and \$185.00 for permanent partial disability benefits.

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

1. Compensability of injury to claimant's back on June 26, 2007.
2. Medical treatment.

3. Temporary total disability benefits from July 11, 2007 through a date yet to be determined.

4. Attorney fee.

At the time of the hearing the claimant modified his request for indemnity benefits to include temporary total disability benefits beginning July 10, 2007 and continuing through July 25, 2007, and temporary partial disability benefits beginning July 25, 2007 and continuing through a date yet to be determined.

The claimant contends he sustained a compensable injury to his back when the ladder he was standing on broke. He contends he is entitled to temporary total disability, temporary partial disability, medical, and an attorney fee.

The respondents contend the claimant did not sustain a compensable injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. This defense includes, but is not limited to, the issue of whether there are measurable and objective findings to support a 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 witness and to observe his 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 November 28, 2007, and contained in a pre-hearing order filed November 29, 2007, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle him to compensation at the rate of \$247.00 for total disability benefits and \$185.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury while employed by the respondent. Specifically, claimant has failed to prove by a preponderance of the evidence that there are objective findings establishing a compensable injury.

FACTUAL BACKGROUND

_____After being honorably discharged following six years in the United States Marine Corps, the claimant worked as an installer installing carpet, vinyl, tile, and laminate floors for approximately 23 years. The claimant has worked for the respondent on three separate occasions. Claimant's last employment with the respondent began on March 12, 2007. Claimant was hired by the respondent at that time to work in its automotive department selling tires, oil changes, and running the cash register.

Claimant testified that on June 26, 2007 he was using a ladder/step stool to straighten merchandise on the top of a shelf. As he stepped down on the bottom step the step broke, causing him to lose his balance and fall. Claimant testified that he landed on his back and had immediate pain between his shoulder blades and that his hands and arms went numb. Claimant was taken by one of the managers on duty to Dr. Lewis' office where he was evaluated by Daniel Briley, a physician's assistant.

Briley diagnosed claimant's condition as a cervical strain and prescribed medication and work restrictions. Claimant returned to work for respondent the next day with restrictions on his ability to lift. Claimant testified that the medication given to him by Briley made it difficult to concentrate and that when the medication wore off he had a great deal of pain.

Claimant was evaluated by Briley again on July 2, 2007, and his medications were changed at that time. In addition, x-rays of claimant's cervical and thoracic spine were ordered which revealed degenerative findings in the thoracic spine and scoliosis in the

cervical spine.

On or about July 10 the claimant was terminated for job abandonment by the respondent. Claimant subsequently sought medical treatment from his family physician, Dr. Eaton, at the Decatur Medical Clinic. Dr. Eaton ordered an MRI scan of the claimant's thoracic spine which was read as normal other than the finding of scoliosis. Dr. Eaton subsequently ordered physical therapy.

Approximately two weeks after claimant last worked for the respondent he began working at the Decatur General Store which is owned by Peterson Farms.

Claimant has filed this claim contending that he suffered a compensable injury to his back while working for respondent on June 26, 2007. He seeks payment of indemnity benefits, medical benefits, and a controverted attorney fee.

ADJUDICATION

_____ Claimant contends that he suffered a compensable injury to his back when the bottom step on a stool broke causing him to fall and land on his back while working for respondent on June 26, 2007. Claimant's claim is for an injury caused by a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;

(4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

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 meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury. I have no doubt that the incident occurred on June 26, 2007 as described by claimant. However, under the Arkansas Workers' Compensation law, an incident in and of itself is not sufficient to establish compensability. In addition to the incident itself, claimant also has the burden of proving by a preponderance of the evidence that there is medical evidence supported by objective findings establishing an injury. Objective findings are defined as those findings which cannot come under the voluntary control of the patient. A.C.A. 11-9-102(16)(A)(i).

A review of the evidence in this case fails to reveal objective findings establishing an injury as a result of the incident on June 26, 2007.

As previously noted, claimant received his initial medical treatment from Daniel Briley, a physician's assistant. Briley's reports from June 26 and July 2, 2007 reveal no objective findings. To the contrary, the medical reports indicate that there was no contusion, swelling, or obvious muscle spasm present. At the time of the second visit Briley ordered an x-ray of the claimant's thoracic and cervical spines. The x-ray of the thoracic spine revealed a degenerative finding of a spur formation and no tissue swelling. The x-ray of the cervical spine revealed scoliosis. The radiologist's report indicates that the scoliosis could be attributable to the claimant's positioning during the testing or to muscle spasm. No swelling was observed. Briley testified that scoliosis is a curvature of the spine. He testified that it is usually a congenital defect and that this would be the third reason why it might be present. Obviously, if the scoliosis was attributable to muscle spasm this would constitute an objective finding and satisfy the statutory requirement.

However, according to the medical evidence, it is just as likely that the scoliosis is the result of positioning during the testing or to a congenital defect.

Briley also testified during his deposition that he never saw or palpitated any muscle spasms on the claimant. With respect to this issue, it should be noted that Briley did prescribe medication in the form of a muscle relaxant for treatment of claimant's condition. However, Briley testified at his deposition that it is not unusual to prescribe this medication for a soft tissue injury even though muscle spasms are not observed. Finally, there was some testimony by Briley with regard to range of motion testing he performed on the claimant during his examinations. While Briley testified that he did place his hands on the claimant in order to feel the range of motion, he did not actively move the claimant in order to determine claimant's range of motion. Therefore, this would not constitute an objective finding since the range of motion was under the control of the claimant.

Claimant was eventually evaluated by Dr. Eaton at the Decatur Medical Clinic. Dr. Eaton's medical reports do not contain any objective findings establishing a compensable injury. Dr. Eaton ordered an MRI scan of the claimant's thoracic spine which was read as normal other than the prior finding of scoliosis. Again, according to Briley, scoliosis is usually a congenital defect. There is no indication in Dr. Eaton's medical reports that he attributed the scoliosis to muscle spasms.

Finally, I note that the physical therapist report dated December 3, 2007 indicates that claimant informed the therapist that he had been evaluated by Dr. Lewis and informed that he had muscle spasms in the thoracic region. This statement is hearsay and has been given no weight. There was also testimony at the hearing and in the deposition of Briley regarding "make up dictation" by Dr. Lewis dated March 11, 2008 for an evaluation which occurred on November 30, 2007. While the timing of this report raises some issues, I do not find the report to be particularly relevant to this case. Even if Dr. Lewis' report of March 11, 2008 did not exist, there are still no objective findings establishing an injury. Therefore,

while this report might be suspect due to the timing of the report, it does not help the claimant prove that there are objective findings establishing a compensable injury.

In short, in order to prove a compensable injury claimant not only has the burden of proving by a preponderance of the evidence that an incident at work took place, he also has the burden of proving by a preponderance of the evidence that there is medical evidence supported by objective findings establishing an injury. Here, the medical records do not contain objective findings. Specifically, no contusion, swelling, or muscle spasms are noted by any of the claimant's treating physicians. X-rays and an MRI scan of the claimant's cervical spine have returned negative with the exception of scoliosis which is a curvature of the spine. This scoliosis has been attributed to claimant's positioning, a congenital defect, or possibly to muscle spasms. Establishing a possible connection is not sufficient. Claimant has the burden of proof by a preponderance of the evidence. Accordingly, for the foregoing reasons, I find that claimant has failed to meet his burden of proof.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his back while employed by respondent on June 26, 2007. Therefore, his claim for compensation 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 \$411.50.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE