

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F107476

WOODROW SWAIM, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., SELF-INSURED EMPLOYER	RESPONDENT NO. 1
CLAIMS MANAGEMENT, INC., THIRD PARTY ADMINISTRATOR	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JULY 2, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE TOM THOMPSON, Attorney at
Law, Batesville, Arkansas.

Respondents No. 1 represented by HONORABLE PATRICK SPIVEY,
Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JUDY RUDD,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed August 14, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission
has jurisdiction of this claim.
2. The stipulations agreed to by the parties and
set forth above are hereby accepted as fact.

3. A preponderance of the evidence establishes that the claimant's right foot fracture was idiopathic in nature.
4. The claimant failed to prove by a preponderance of the evidence that his right foot fracture arose out of and in the course of his employment.
5. The claimant failed to prove by a preponderance of the evidence the elements necessary to establish the compensability of his right foot fracture.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I dissent from the Majority opinion and find that Claimant's injury is compensable. I find that Claimant incurred a fracture in his right foot while pulling a loaded pallet jack and that this fracture aggravated Claimant's preexisting diabetic condition, which ultimately lead to amputation of toes on Claimant's right foot.

The Majority notes that Claimant, a diabetic, had previous circulatory problems in his left foot that lead to amputation of toes on that foot prior to Claimant's work-related injury to his right foot. However, the medical opinions in the record and other evidence shows that Claimant's injury aggravated his preexisting condition and caused Claimant's ultimate need for amputation to his right foot following the work-related injury.

Dr. Neaville opined in a letter dated February 11, 2002, that the condition of Claimant's right foot in 1999, just prior to the injury, was not such that Claimant was predisposed to an increased risk of tissue loss due to the diabetic condition:

Notably, in 1999, the arteriogram of the right leg showed only mild disease that did not require intervention. This would not be felt to progress given he has had such aggressive management of his blood sugar levels and cholesterol levels with a separate medication. He has also been maintained on anticoagulant therapy to

assist in circulation. He has had, as the record will show, absolutely no signs of claudication to suggest that progressive vascular disease had an impact on his right foot. In the absence of poorly controlled blood sugar, evidence of progressive vascular disease or evidence of profound neuropathy, Mr. Swaim currently would not be at significant increased risk for tissue loss due to the diabetic condition alone.

Similarly, Dr. Angel also opined that Claimant's April, 2000 workplace injury ultimately led to amputation of toes in the right foot:

After reviewing his medical records and also remembering Mr. Swaim very well from our personal conversations and dealings with him during several episodes of care, it is my firm belief that amputation of his toes was related to the injury in April 2000.

I do think that he had change in his gait pattern as a result of the injury and subsequently had deterioration of the skin in his neuropathic foot which subsequently resulted in amputation of the toes.

On January 28, 2001, Dr. Angel opined that Claimant's ulcerations and neuropathy were not problematic until Claimant's workplace injury to his right foot:

I am writing this letter on behalf of my patient Woodrow Swaim. Please make note that I have thoroughly reviewed his history and it is somewhat complex. Basically, he has had ulcerations of the left foot but never ulcerations or problems with diabetic wounds to his right foot until after the accident, he states. The accident caused a 5th

proximal metatarsal fracture which was slow to heal. I recommended surgery. He was seen by another physician who recommended not doing the surgery and the metatarsal has never completely healed.

I think that this delayed union nonunion, even though he has decreased sensation, certainly could have altered his gait to the point to where it would contribute to getting another ulceration out on the distal part of the foot. In my line of thinking this certainly could be a causal relationship.

In a letter opinion dated February 10, 2003, Dr. Angel further explained the basis of his opinion that Claimant's injury combined with Claimant's preexisting condition and resulted in amputation in 2001:

I do believe amputation in 2001 was caused by both the work injury and his underlying neuropathy. I think that the neuropathy in and of itself could have caused this at some point in his life. But there is no doubt in my mind that with underlying injury and the gait alternation that it caused that he had a more direct cause for this and it happened, in my opinion, as a result 55% cause of relationship to the fracture and 45% cause of relationship to the neuropathy.

Dr. Angel also opined in a letter dated April 14, 2003, that Claimant's work-related fracture in his right foot was an acute injury and that Claimant's diabetic neuropathy was not the sole cause of Claimant's amputation. Specifically, Dr. Angel responded to the following question from Respondent's attorney as follows:

8. What significance do you give to Dr. William Alexander's statement of 2-28-99, "He does, however, have a diabetic neuropathy, worse on the left than the right. He has had problems with healing in his feet, and that also has been worse on his left than on the right"? Does he not seem to be saying that in 2-99, the patient did have right neuropathy and history of poor wound (sic) healing and findings of diminished circulation?

Question #8: Again, he did have a right neuropathy preceding the accident and again diminished circulation does cause an alteration in wound healing but in my opinion these are additive things and not causative.

While Claimant has the burden of proving by a preponderance of the evidence that his condition is causally related to his employment, a preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000); Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber & Mfg. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); Conway Convalescent Center v. Murphree, 266 Ark. 985, 588 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). As is commonly

stated, the employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a preexisting condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by accelerating or combining with the preexisting condition. See Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

Here, the preponderance of the evidence shows that the work injury combined with Claimant's preexisting condition and ultimately resulted in amputation of toes on Claimant's right foot. I find, therefore, that Claimant's right foot fracture and resulting amputation is compensable. For the foregoing reasons, I dissent.

SHELBY W. TURNER, Commissioner