

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F303464 & F303465

MEGAN SMITH, EMPLOYEE

CLAIMANT

O'REILLY AUTOMOTIVE, INC., EMPLOYER

RESPONDENT

AMERICAN CASUALTY COMPANY OF
READING, PENNSYLVANIA, CARRIER

RESPONDENT

OPINION FILED MAY 11, 2005

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

Claimant represented by HONORABLE DAVID L. ETHREDGE,
Attorney at Law, Mountain Home, Arkansas.

Respondent represented by HONORABLE FRANK B. NEWELL,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal the decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury in April of 2002 and in September of 2002. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer in the capacity of a delivery driver and then as a

merchandising specialist. In April of 2002, the claimant contended that she sustained an injury to her back while she was taking parts out of the back of her pick up truck during a delivery. She testified that she told Chris Agnew, the store manager, that she had hurt her back. Following this alleged incident, the claimant continued to perform her job duties. She testified that even though her back pain worsened she did not discuss it with anybody at the respondent employer.

In July, the claimant changed jobs and began her job as a merchandising specialist with the respondent employer. This job required more lifting and was a little more strenuous than that of the delivery driver. The claimant contended that she hurt her back again in September of 2002, while lifting heavy items from her truck.

The medical evidence indicated that the claimant had a car accident when she was approximately 16 years old and injured her back at that time. The medical evidence further demonstrated that the claimant was having back pain prior to 1997. However, the claimant testified that she had experienced problems with her menstrual cycles and had pressure and back pain that were due to the menstrual

cycles, not back pain associated with the car accident she had when she was 16. The claimant testified that following a DNC and partial hysterectomy in 1997, her back problems ceased.

The claimant initially sought medical treatment from Dr. Welsh on August 26, 2002. We note that this is approximately 4 months after the claimant alleged that she had the first incident involving her back. Dr. Welsh reflected a history of the claimant's problems:

This is 37-year old female here with lower back pain that's been going on daily for years. Really since she was about 16 it started off as a kind of popping or gristly feeling in her lower back, which she could hear in her ears, but over the years she's been treated at Navy facilities and they didn't do much for her. She says since doing a lot of lifting at work and a lot of driving a truck she's noticed the pain getting worse and now it seems to shoot down her right leg at times. Its been getting particularly bad over the past several weeks.

Dr. Welsh's records fail to contain any complaint by the claimant of sustaining an injury at work in April of 2002, nor did he note that the back pain that the claimant experienced for years was completely ameliorated by a DNC

and hysterectomy in 1997. Dr. Welsh's notes indicated that the claimant's office visit was to "get established with a doctor." Her complaint was low back pain that had bothered her for years and it seemed to be worse since last July or early August. There was nothing contained in Dr. Welsh's notes or dictation lending support to the claimant's claim that she initially sought care from Dr. Welsh as a result of a back injury that she experienced in April of 2002.

Dr. Welsh's notes also do not contain a second injury that the claimant purportedly had in September of 2002. It was not until January of 2003 that the claimant related to Dr. Welsh that lifting heavy items from her truck bed produced back pain.

The claimant also sought treatment from Dr. Bruce Robbins. She gave Dr. Robbins the same history that she had been plagued for years with lumbar problems and sciatic pain. She advised Dr. Robbins that she had had back pain for 22 years, but she did mention the hysterectomy to Dr. Robbins. However, she did not tell him that it cured her back pain. The claimant was also evaluated by Dr. Asa Crowe on June 17, 2003. The claimant reported to Dr. Crowe that she had had back pain for a long period of time.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is 'accidental' only if it is caused by a specific incident and is identifiable by time and place of occurrence." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the claimant must show that he/she sustained an accidental injury; that it caused internal or external physical injury

to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. §11-9-102(4)(E)(i) (Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

In our opinion, a review of the medical records demonstrates that the claimant did not prove by a preponderance of the evidence that she sustained a compensable injury. The medical records of Dr. Welsh and Dr. Robbins both indicate that the claimant had persistent back problems for a period of time of at least 22 years prior to her seeking treatment from them. The only history the claimant gave of any incident was to Dr. Talen Savu on

September 18, 2003, which we would note is a year and a half later than when the claimant's alleged injuries took place. The claimant told Dr. Welsh in January of 2003 that lifting items from her truck produced back pain but she did not report an injury. Dr. Robbins and Dr. Welsh's medical records are more contemporaneous with these alleged injuries. We give more value to the opinions of Drs. Welsh and Robbins and their histories. The claimant contends that these doctors distorted her medical history of what she told them. However, it is hard to believe that both of those doctors would distort her medical records in the same manner.

Further, the respondents presented the testimony of Chris Agnew, who was the store manager in April of 2002. Mr. Agnew confirmed that the claimant had advised him in April 2002 that she had pulled something in her back but she never mentioned it to Mr. Agnew again and did not report it as a work related injury.

Therefore, after conducting a de novo review of the record, we find that the claimant has failed to prove by a preponderance of the evidence that she sustained compensable injuries in April and September of 2002. The

claimant has a pre-existing lumbar condition which has caused pain for approximately 22 years prior to her commencement of employment with the respondent employer. Accordingly, the decision of the Administrative Law Judge is hereby reversed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the Majority's decision finding the claimant did not suffer compensable injuries in April and September 2002, denying her temporary total benefits for the period of October 11, 2002 to May 13, 2004, and denying payment of medical expenses related to those injuries.

The claimant gave credible testimony that in April 2002 she suffered an injury due to lifting a part at work and that she reported the injury immediately. The claimant's manager, Chris Agnew gave testimony that the claimant injured her back in April 2002 and denied having knowledge of the claimant suffering from previous back injuries, giving credence to the claimant's testimony. The claimant also gave credible testimony that she suffered a recurrence of her injury in September 2002 as she lifted a part and that she reported that incident immediately. The claimant was subsequently restricted from returning to work and did not come out of her healing period until May 13, 2004. For these reasons, I respectfully dissent.

The Majority finds the claimant did not suffer a compensable injury. In supporting this contention the Majority and respondent argue that the claimant had a history of back problems, waited to see the doctor, and that her injury was not evidenced by objective findings. A "compensable injury" is defined as,

"An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or

death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence."

Ark. Code Ann. §11-9-102(4)(A)(i) (Rep.. 2002). To be compensable, an injury must also be established by medical evidence supported by objective findings, which are defined as evidence supported by objective findings. Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). The Supreme Court of Arkansas has held that prescribing medication in order to treat muscle spasms is sufficient to establish the existence of objective findings. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000), See also, Fred's, Inc.; and Royal and Sun Alliance v. Deborah Jefferson, ___ Ark. ___, ___ S.W.3d___ (2005).

In the present case the claimant saw Dr. Welsh for the first time on August 26, 2002. At that time Dr. Welsh prescribed Zanaflex, a medication used to treat muscle spasms. Dr. Welsh noted he believed the claimant's low back pain was secondary to a pinched nerve. On December 2, 2002 an MRI revealed the claimant had disc disease with loss of

disc height. The MRI report also indicates the claimant had disc bulges at levels L3-4 and L4-5 and, "narrowing of the central canal and of the neuroforamina" at the same levels. As noted by the court in Freds and Estridge, the presence of a muscle spasm or a prescription to treat a muscle spasm is enough to constitute an objective finding. Furthermore, the MRI revealed the claimant had narrowing between her discs and bulging discs which also shows objective findings did exist. In addition to establishing objective findings, the claimant has the burden of proving by a preponderance of the evidence that his condition is causally related to his employment. See Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Questions of credibility and the weight and sufficiency to be given evidence are matters within the province of the Workers' Compensation Commission. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 188. 875 S.W.2d 857 (1998). A pre-existing 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 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 pre-existing 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 pre-existing condition. See Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

The Majority argues that because the claimant had previously received medical treatment for her back, her injury was not causally related to her employment. In supporting this finding, the Majority contends that the claimant gave contradictory statements to her doctor

regarding her back symptoms. The Majority points, in particular, to the fact that the doctor's notes on August 26, 2002 indicate the claimant complained of daily back pain since she was 16. The Majority also calls attention to the fact that the doctor's notes did not indicate that her pain levels subsided after her partial hysterectomy in 1997.

While the claimant admits having a history of suffering from back pain, she testified that she did not suffer from back pain between 1997 and the time of her injury in 2002. The claimant's testimony is corroborated by the notation on the August 26, 2002 note indicating that the claimant had been doing a lot of lifting and that her pain had worsened, "during the last several weeks." The doctor's note from Dr. Robbins also indicates the claimant received previous treatment from the military but that the treatment decreased her problems. The note also indicates the claimant had been lifting heavy items and suffering from increasing back problems. Each of these notations indicate that while the claimant had a history of back pain, she did in fact stop having pain for a long period of time prior to being injured in April 2002.

The Majority would have one think that the doctor's failure to specifically indicate the claimant did not have pain from 1997 to 2002 would be conclusive that she did suffer from pain during that time period. There is no evidence indicating that the claimant sought medical attention for her back during that time period. The respondent failed to produce any witnesses testifying that the claimant frequently complained of back pain or having knowledge the claimant had a history of back pain. Since Agnew and Newton testified they saw the claimant rubbing her back, it is curious that they would fail to have knowledge the claimant had a history of persistent back pain given her job duties, if she did indeed have persistent pain as alleged by the employer.

The Majority's finding the claimant did not give consistent statements to her doctor is also erroneous. On August 26, 2002 Dr. Welsh indicated on Progress Notes, "c/o LBP daily for years-seems to be worse when working-does a lot of lifting at work". Dr. Welsh also typed notes regarding the visit. In those notes he indicated the claimant's back problems started around the age of 16 and that she suffered from daily pain but that the pain was,

"getting particularly bad over the last several weeks." On November 19, 2002 the claimant gave similar statements to Dr. Robbins.

These consistent statements to two different doctors support the claimant's testimony regarding how she was injured and the time-line of when the injury occurred. While the notes do not indicate the claimant had a lapse in her pain from 1997 to 2002, the notes did indicate the claimant had been lifting heavy items and that the claimant's pain had increased as a result. It is not illogical to conclude the doctors did not put all details regarding the claimant's condition in their notes.

Furthermore, the claimant consistently maintained that she did not suffer from back pain between 1997 and 2002. If she suffered from chronic severe back pain on a daily basis, it is unlikely she would wait five years to seek medical attention. It is also not logical that the employer would not have knowledge the claimant suffered from back pain on a continual and daily basis, given her job setting.

The Majority also argues that the claimant's delay in seeking treatment is indicative that she did not suffer

an injury related to her work. The testimony by Agnew that he was aware the claimant injured her back around April 2002 is in direct contradiction with the Majority's finding. Agnew testified that in April 2002 he saw the claimant rubbing her back and that she indicated she had, "pulled her back." Agnew testified he assumed she pulled her back while working and went on to offer to order her a back brace. Agnew further testified he had no knowledge the claimant had previous back problems. Agnew also admitted that he did not report the injury as required by policy and that he was aware he violated policy by failing to do so. Agnew's testimony supports a finding that the claimant did not suffer from back pain between 1997 and 2002 and confirms the claimant's testimony regarding the time of her injury. It also substantiates the claimant's testimony that she injured her back at work and that she reported the injury to the employer in a timely manner.

The claimant's testimony is further bolstered by Newton's testimony regarding his dealings with the claimant and her dealings with her back. Newton testified that he had no knowledge of the claimant's inability to make deliveries until late September 2002 when the claimant told him she

could not make a delivery because she had back pain and was on medication. Newton also denied the claimant told him of any specific incidents causing injury to her back. However, Newton also testified that he was aware the claimant was going to the doctor for her back prior to her informing him she was on medication and admitted witnessing the claimant rubbing her back as though in pain. The claimant testified that she told Newton of her back problems around June or July of 2002 and indicated she told him she did not want to make deliveries. The claimant also said that in September 2002 she told Newton of an incident where she felt pain after making a delivery and lifting a rotar. The claimant also said Newton asked for a doctor's excuse because other employees were complaining that he was giving her special treatment.

If Newton had knowledge the claimant had back problems and was seeking treatment for those problems, it is unlikely he would allow her to continue working and lifting heavy items on a daily basis. As such, the claimant's testimony that Newton was aware she was going to the doctor but made an exception with regards to her delivery duties is more plausible than Newton's. When considered in conjunction

with Agnew's corroborating testimony it is clear the claimant's testimony should be preferred over Newton's.

In advance of the previous hearing the respondent asserted a notice defense. It appears the Majority did not address that issue but did conclude that the claimant's failure to file a worker's compensation claim was a factor in its finding that the claimant's injury was due to a previous injury rather than due to a work injury. The evidence is indicative that the claimant did in fact report her injury immediately after it occurred. The claimant testified she reported her injury in April 2002 on the same day the injury occurred. This is corroborated by Agnew's own admission that he saw the claimant rubbing her back, knew she had injured it, and assumed it was due to work. Despite this knowledge Agnew admits he violated company policy and did not complete an accident form or attempt to report the claimant's injury.

The doctor's notes do not show any substantial change in the claimant's condition or complaints from April to September 2002 indicating the claimant's "incident" in September 2002 was a recurrence of the previous injury. However, it is apparent that the claimant reported the

incident in September in a timely manner as well. The claimant testified she told Newton of the incident the day it occurred and for the reasons discussed above, her testimony is more credible than Newton's. Therefore, the claimant reported her injury in a timely manner and the notice defense asserted by the respondent is invalid.

The claimant suffered from a compensable injury in April 2002 and a recurrence of that injury in September 2002. While the claimant had a pre-existing back condition, the nature of that condition is unknown and there is no evidence indicating that her diagnosis as of 2002 was due to that pre-existing condition. The claimant's testimony reveals that she had surgery in 1997 and that she did not suffer from subsequent back pain again until she lifted a part in April 2002. The claimant and the respondent's own witness, Agnew testified in April 2002 the claimant reported she, "pulled her back" indicating the claimant did in fact suffer from an injury and report it. Agnew denied having knowledge of any prior injuries to the claimant's back and given the nature of her job, it is unlikely he would have been aware of the problem it existed. As such, one can only conclude that the claimant's onset of back pain was due to

the specific incident in April where she was lifting a part while working and that she reported the injury to management immediately.

In conclusion, I find the claimant suffered from a pre-existing back condition but that the claimant lifted a part in April 2002 which exacerbated and aggravated any pre-existing condition. That injury was immediately reported and the respondent simply failed to follow its own policies regarding reporting and documenting the injury in order to allow the claimant to file a worker's compensation claim. Furthermore, the claimant remained in her healing period, through no fault of her own from October 11, 2002 to May 13, 2004 and accordingly should be entitled to receive temporary total disability benefits for that time period. Therefore, I find the Administrative Law Judge's decision should have been affirmed by the Majority. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner