

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209192

MARY JONES, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 17, 2007

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

Claimant represented by the HONORABLE GREGORY R. GILES,
Attorney at Law, Texarkana, Arkansas.

Respondent represented by the HONORABLE TOD BASSETT,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The Arkansas Court of Appeals has affirmed the
Commission in part and has reversed and remanded in part.
Jones v. Wal-Mart Stores, Inc., CA07-37 (Sept. 19, 2007).
The Court of appeals has affirmed the Commission's finding
that the claimant did not prove she was entitled to
additional medical treatment. The Court has reversed and
remanded in part "for the Commission to determine whether

appellant proved the existence and extent of a permanent impairment." Following our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained a permanent anatomical impairment of 5%. We find that the claimant proved she sustained additional wage-loss disability in the amount of 5%.

I. HISTORY

Mary K. Jones, age 50, testified that she had obtained a GED and a cosmetology license.

The record indicates that Ms. Jones underwent a right nephrectomy for a poorly functioning kidney in about February 1990.

The claimant testified that she had worked at McDonald's. The claimant testified that she began working for Wal-Mart in 1993 and that she worked simultaneously for McDonald's and Wal-Mart for about five years.

The parties stipulated that an employment relationship existed on July 13, 2002. The claimant testified that she fell from a ladder and hurt "My upper back, my middle back. And my lower back hit the floor. I mean, I just fell and hit the floor." The impression following an x-ray of the claimant's coccyx on July 24, 2002 was "Negative examination

of the coccyx." The claimant testified that she did not work after July 31, 2002, although the record indicates that the respondent-employer offered the claimant temporary light duty on August 9, 2002. A physician indicated that the claimant could return to work on August 17, 2002.

A CT of the abdomen was taken on September 4, 2002 with the following impression: "1. Previous right nephrectomy. 2. Otherwise negative CT of the abdomen."

An MRI of the claimant's thoracic spine was done on September 11, 2002, with the impression, "1. Moderate central bulging at T6-7 with minimal central bulging at T9-10." And an MRI of the lumbar spine on September 11, 2002 showed the following: "1. Ten centimeter irregular area of fluid within the adipose tissue posterior to L1 through L3. One wonders if there has been previous trauma or surgery in this region. No other significant abnormalities."

A Facility Manager for the respondent-employer corresponded with the claimant on September 23, 2002: "This is our third attempt to resolve the matter of your absence from work. You have 48 hours from your receipt of this letter to respond. We need either you reurn (sic) to work or the leave of absence form you were given on September 5,

including the date and time we can expect to have you return to work filled out by your physician. Failure to do so will result in immediate termination. Your same job is open for you and you are still on the schedule...."

Dr. H.G. Weems saw the claimant on January 29, 2003 and assessed "what sounds like chronic thoracic and lumbar strain." The claimant followed up with Dr. Weems on February 26, 2003: "I discussed with her that the MRI only showed a bulging disc in the thoracic spine which was not causing any significant foraminal or spinal stenosis. She had a contusion in the soft tissues in the lumbar region but otherwise negative. I told her that she needs to go to therapy to get better and she says that she just can't go. I told her that I have nothing else to offer her at this point to help her and she is dismissed from my care."

A hearing was held on May 15, 2003. The claimant testified that her employment with Wal-Mart had been terminated. The claimant testified that she had not sought any other employment.

An administrative law judge (ALJ) filed an opinion on June 30, 2003. The ALJ found, among other things, that the claimant proved "she sustained a compensable injury to her

upper and lower back which is supported by objective medical findings of scraps (sic), edema, and bulging discs at T6-7 and T9-10." The ALJ also found that the claimant's healing period "ended on August 8, 2002, when she refused to attend work hardening to improve her condition." The ALJ filed a "Corrected" opinion on July 8, 2003, noting that the first opinion had mis-named counsel for the respondents. All other information contained in the original opinion remained as previously stated. The Full Commission affirmed and adopted the ALJ's decision in an opinion filed September 30, 2003.

The parties stipulated that the claimant was granted a change of physician to Dr. Shailesh C. Vora on May 17, 2004. Dr. Vora examined the claimant on June 28, 2004 and reported:

Mary Jones was in for neurological evaluation on 6/28/2004. When we discussed about the medication, she demanded narcotics, which I refused. When I explained to her the reason for pseudotumor cerebri and that it is unlikely secondary to neck and back injury, she did not like it and at that point she took all her papers and decided not to come back here. During the conversation I explained to her that I would investigate first with MRI's and see if I can help her or not, I may have to refer her to a neurosurgeon or pain specialist but she left. I recommend she see an ophthalmologist but she says she has seen an ophthalmologist.

I request Workers Comp to refer her to another neurologist, neurosurgeon and ophthalmologist.

The parties stipulated that the claimant was granted a change of physician to Dr. Reginald Rutherford on August 11, 2004. Dr. Rutherford provided a Consultation Report on August 17, 2004:

Ms. Jones fell 2 ½ feet from a ladder injuring her low and mid back in 2002. She reports persistent pain to present. She has proven intolerant of physical therapy which has been discontinued. She has not returned to work. She reports a plethora of complaints which she believes are related to this injury including surgery for complex ovarian cyst, hypertension, exacerbation of asthma, swelling of her left knee when her back is most painful and pseudotumor. Ms. Jones was advised that there was no reasonable possibility that the above problems could be fully and solely attributable to her back injury. Certainly there would be no causal relationship between pseudotumor, asthma or complex ovarian cyst. Hypertension may be adequately explained by obesity and smoking. Ms. Jones being advised that the only problem that I would reasonably attribute to her back injury is back pain and this represented the sole problem area that I would treat. With respect to pseudotumor, she has an established diagnosis from doctors in the Texarkana area whom she has been strongly encouraged to follow up with in that she has an existing patient/physician relationship referable to this problem area.

On review of Ms. Jones' radiographs, the only abnormality I identified of potential significance is a moderate disk herniation at T5/T6. Neurologic examination was directed towards this finding. There is no evidence of cord compression

via motor, reflex or sensory examination of the extremities.

Follow up MRI imaging of the thoracic spine was recommended to Ms. Jones. She declined. Further follow up with myself will not be scheduled. Ms. Jones was advised to follow up with her former physicians.

An x-ray of the claimant's cervical spine on August 30, 2004 was normal. A CT of the claimant's head on August 30, 2004 was negative except for minimal mucosal thickening in the anterior ethmoid air cells.

A pre-hearing order was filed on November 14, 2005. The claimant contended, among other things, that she "should be awarded a permanent impairment rating associated with her compensable injury; that she should be awarded wage-loss disability benefits in excess of the anatomical rating." The respondents contended that the claimant was not entitled to permanent benefits.

An MR of the claimant's lumbar spine was taken on or about December 29, 2005, with the following impression:

Mild desiccation of the L3-4 and L4-5 discs. Significant facet arthropathy at L4-5. As on the September 2002 study, there is abnormal signal intensity in the superficial fat of the posterior aspect of the thoracolumbar region extending from T12 to approximately L3. This is not a well-defined fluid collection but has more the appearance of diffuse edema.

And the following impression resulted from an MR of the claimant's thoracic spine performed on or about December 29, 2005:

Multilevel degenerative disease with several levels with mild posterior subligamentous disc protrusions as described above. None of these appear to significantly effect the neural structures. There is what I believe represents a mildly ectatic or prominent nerve root sleeve on the right at T7-8 that I do not believe is significant and I believe was probably present on a comparison 9-11-02 exam.

A hearing was held on February 2, 2006. The claimant agreed that she had been off work since July 31, 2002. The claimant testified that she had not tried to return to work, because "I'm not able to. My body just won't let me....I'm in constant pain, 24-hours a day....My back, from my head down to the bottoms of my feet....I just hurt whenever I do anything, and if I push it too far, I have to lay down and let it go away to a point where I can get back up."

Dr. D. Shane McAlister, a radiologist, wrote to counsel for the respondents on February 22, 2006:

At your request, I have reviewed thoracic and lumbar spine MRI's performed on Mary Kay Jones, date of birth 10-23-57, that were performed on 09-11-2002, and 12-29-2005....

SUMMARY:

This patient had a thoracic and lumbar spine MRI's and plain films performed in 2002 and again in

2005. Both examinations did demonstrate chronic degenerative disease with anterior osteophyte formation on the plain films and scattered small ventral bony ridges, bone spurs, and mild disc bulging at multiple levels that have remained stable between the two examinations and are all compatible with chronic degenerative changes. On neither exam was there any demonstration of nerve root compression, cord compression, canal stenosis, or acute injury. The subsequent examination, in 2005, was of significantly better quality and did allow better definition of the minor bone spurring and disc bulging.

Additionally, there is fluid signal intensity within the subcutaneous tissues at the level of the upper low back. This is known to be a normal finding and is more commonly seen in women and in women that are overweight. It does not indicate any pathology.

An administrative law judge filed an opinion on April 19, 2006. The ALJ found, among other things, that the claimant failed to prove she was entitled to permanent disability benefits. The Full Commission affirmed and adopted the ALJ's decision, and the Court of Appeals has reversed and remanded.

II. ADJUDICATION

A. Anatomical Impairment

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached.

Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216

(1969). Pursuant to Ark. Code Ann. §11-9-522(g), the Commission has adopted the Guides to the Evaluation of Permanent Impairment (4th ed. 1993) as an impairment rating guide. See, Workers' Compensation Commission Laws And Rules, Rule 099.34. Any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings. Ark. Code Ann. §11-9-704(c) (1) (B).

Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment. Ark. Code Ann. §11-9-102(F) (ii). "Major 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. Ark. Code Ann. §11-9-102(14).

The administrative law judge found in the present matter, "The claimant has failed to prove by a preponderance of the evidence that she is entitled to permanent disability benefits." The Full Commission reverses this finding. The claimant fell from a ladder at work and hurt her back on July 13, 2002. An MRI of the claimant's thoracic spine was done on September 11, 2002. The MRI showed moderate central

bulging at T6-7 and minimal central bulging at T9-10. Dr. Weems stated in February 2003 that the MRI "only showed a bulging disc in the thoracic spine which was not causing any significant foraminal or spinal stenosis." In a corrected opinion filed July 8, 2003, an administrative law judge found that the claimant sustained a compensable injury to her upper and lower back which was supported by objective medical findings, including "bulging discs at T6-7 and T9-10." The administrative law judge's finding that the claimant sustained bulging discs at T6-7 and T9-10 as a result of her compensable injury was affirmed and adopted by the Full Commission and is now final and *res judicata*.

Dr. Rutherford reported in August 2004 that the claimant had a moderate disc herniation at T5/T6. The record in the present matter demonstrates that, as a result of her compensable injury, the instant claimant has sustained moderate disc bulging at three thoracic levels: T5-T6, T6-7, and T9-10. The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. The instant claimant has sustained permanent anatomical impairment

pursuant to the Guides at Table 75, p. 3/113, at II.C:
"Unoperated on, with medically documented injury, pain and rigidity associated with *moderate* to *severe* degenerative changes on structural tests; includes unoperated on herniated nucleus pulposus with or without radiculopathy."

The instant claimant has proven that she sustained permanent anatomical impairment in the amount of 5%. This rating is based on objective and measurable physical findings, namely, moderate bulging and herniations at three thoracic levels. The 5% rating is derived from the Guides to the Evaluation of Permanent Impairment (4th ed. 1993). The preponderance of evidence shows that the compensable injury was the major cause of the claimant's 5% anatomical impairment. The claimant did not prove that she was entitled to any permanent rating referable to her cervical or lumbar spine.

B. Wage Loss

In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account, in addition to the percentage of permanent physical impairment, such factors as the employee's age, education,

work experience, and other matters reasonably expected to affect her future earning capacity. Ark. Code Ann. §11-9-522(b)(1).

In the present matter, the claimant is age 50 and has a GED. The claimant testified that she began working for Walmart in 1993. The claimant fell at work in 2002 and hurt her back. The claimant testified that she did not work after July 31, 2002. The record indicates, though, that light duty was available with the employer beginning August 9, 2002. A physician indicated on August 17, 2002 that the claimant could return to work. The claimant's employment was subsequently terminated because she chose not to show up for work. The Commission can consider a claimant's motivation and credibility in assessing wage-loss disability. *Henson v. General Electric*, CA 06-1356 (Ark. App. 5-30-2007). The record shows that the instant claimant is not motivated to participate in gainful employment. We find that the claimant proved she sustained 5% wage-loss disability in addition to the assessed 5% anatomical impairment. The claimant's compensable injury was the major cause of her 5% wage-loss disability.

Based on our *de novo* review of the entire record, and pursuant to the remand from the Court of Appeals, the Full Commission reverses the administrative law judge's finding that the claimant did not prove she was entitled to permanent disability benefits. The Full Commission finds that the claimant proved she sustained permanent anatomical impairment in the amount of 5% as a result of her compensable injury and additional wage-loss disability in the amount of 5%. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.