

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F503483

WILLIAM RIES, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

**OPINION FILED MARCH 23, 2007**

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

Claimant represented by HONORABLE MARVIN "CHIP" LEIBOVICH, JR., Attorney at Law, Bryant, Arkansas.

Respondent represented by HONORABLE KATHRYN HALL, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals from a decision of the Administrative Law Judge filed July 10, 2006.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer-employee-carrier relationship existed on or about March 12, 2005 and at all relevant times.

3. The claimant's average weekly wage on that date was \$459 entitling the claimant to compensation rates of \$307 per week for total disability and \$230 per week for permanent partial disability if this claim is found compensable.

4. This claim has been controverted in its entirety.

5. The claimant's period of temporary total disability at issue starts on May 1, 2005.

6. The claimant's period of temporary total disability at issue ends on July 11, 2005 when the claimant found new employment.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained a new injury as a result of the incident which he has described on March 12, 2005. To the contrary, the preponderance of the evidence establishes that the symptoms which he experienced on that date are a recurrence of problems which he experienced prior to that date.

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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

On July 10, 2006, an Administrative Law Judge issued a decision finding that the claimant did not sustain a compensable injury. The Majority now affirms and adopts that decision as their own. After a de novo review of the

record, I find that the claimant sustained a compensable injury in the form of an aggravation. Accordingly, I would have reversed the decision of the Administrative Law Judge and award related temporary total disability and medical benefits.

The claimant worked for the respondents as a "non-con order filler". The claimant testified that the job required moving various items in the respondents' distribution center. The job required the claimant to lift heavy items that could not be moved using a conveyor line. Those items would then be placed on pallets and taken to the shipping dock.

The claimant testified that on March 12, 2005, he was getting a treadmill when he was thrown backwards with the weight of the treadmill on him. The claimant estimated the weight of the treadmill to be 100 to 120 pounds.

The claimant said the accident occurred around 10:30 a.m., right before lunch, and that no manager was there. However, he told Jim, an unofficial manager, of the

injury. The claimant returned to work, but due to his injury, had to leave around 1:00 or 1:30.

The claimant testified that he did not immediately seek medical attention because he believed that he had, "just pulled something and it wasn't anything major." The claimant said that he also delayed getting treatment because he had seen the respondents discourage other employees from receiving medical treatment for work-related injuries. The claimant said that he, "told them about it, and they said to go on to the house." The claimant took the following two days off work.

The claimant testified that he was involved in more than one accident prior to the incident in question. The claimant testified that one occurred on May 28, 2004. The claimant testified that the accident occurred when an intoxicated driver hit the lady behind him, which caused her to run into his vehicle. The claimant said that he received a settlement related to that accident and that part of the settlement was in the form of chiropractic treatment. After the accident, the claimant presented with mid and low back

pain and was diagnosed with a thoracic and lumbar strain with subluxation of C2, C3, T5, T6, and L4. The claimant had an MRI on July 21, 2004. It indicated, "Images of the lumbar spine demonstrate the disks to appear intact. The vertebral bodies appear normal in height and signal intensity." It further indicated, "Essentially unremarkable MRI of the spine." He further indicated that while his symptoms resolved after the accident, he continued to seek chiropractic care on a preventative basis because it was already paid for. He further said his condition had resolved by the time he was hit with the treadmill.

The claimant said that after the treadmill fell on him, his condition became progressively worse and that about two weeks after the accident, he asked the respondents if he could see a doctor. At that point he was taken to the company doctor and placed on light duty. After two weeks the carrier decided not to accept the claimant's request for workers' compensation benefits. The claimant was instructed to leave until he could return to work without restriction.

The first medical report after the treadmill fell on the claimant is dated March 14, 2005, and is issued from Dr. Thomas D. Taylor, Chiropractor. Dr. Taylor issued a note restricting the claimant from working March 12 to March 18. The claimant sought treatment with Dr. Terrence Yates on March 28, 2005. A medical report from that date indicates that the claimant reported injuring himself when he was loading treadmills and a treadmill shifted and threw him backwards. The claimant disclosed his previous vehicle accident and indicated that after seeing a chiropractor his symptoms resolved and he had not had problems for months. The claimant was diagnosed with an acute lumbar strain and prescribed Flexeril. He was also told that he should work on modified duty for the next two weeks with no lifting more than 5-10 pounds and no repetitive stooping, bending, or twisting.

The claimant returned for treatment on March 30, 2005, and reported that he had bent to pick up some keys and felt a pop and severe pain in his low back. He reported that he had suffered from an increase pain in the accident. The

claimant was instructed to return on April 11, 2005. The report further provides that the doctor planned on considering physical therapy if the claimant's symptoms had not resolved at that point.

Another doctor's noted dated April 11, 2005, indicates that the claimant had returned and that his pain had decreased to some extent. Dr. Yates continued the claimant on light duty work with no lifting of more than 10 to 15 pounds. On April 29, 2005, Dr. Yates prescribed the claimant physical therapy. As early as May 13, 2005, the claimant began reporting that the physical therapy was improving his symptoms. However, on June 6, 2005, after the claimant continued to present with symptoms, Dr. Yates referred the claimant for an MRI.

An MRI from June 8, 2005, revealed that the claimant had a, "broad anular disk protrusion at L3/4 with impression upon the thecal sac." The claimant was noted to have another disk protrusion that was impressing upon the thecal sac at level L4/5. On June 22, 2005, Dr. Michael G. Justus noted the findings of the MRI and opined that the

claimant's symptoms may be attributable to some degree to the claimant's disc changes. On June 30, 2005, the claimant was treated by Dr. Yates again. He reported that he had an MRI performed after his accident approximately one year before. The claimant reported that the MRI from that time period returned as normal.

On February 13, 2006, an IME was performed. Dr. Schlesinger noted that the claimant's 2004 MRI was, "essentially normal" and that the MRI from 2005 revealed a slight bulging at L3-4 and L4-5. However, he indicated, "These are minimal changes and the degree of change compared to 2004 and 2005 is also quite minimal." Dr. Schlesinger recommended that the claimant use a TENS unit or a lumbar traction unit for treatment of his symptoms.

The claimant began working for another company on July 11, 2005, and at the time of the hearing was still employed by the same company. He testified that his back still hurts if he sits still for long periods of time or picks up his children. He said those conditions did not exist prior to the incident where the treadmill fell on him.

On April 14, 2006, Dr. Schlesinger indicated that he could not indicate whether the claimant's injury caused radiologic findings, but indicated that he believed that the claimant's injury was the reason he had sought treatment.

The claimant contends that he sustained a compensable injury rather than a recurrence. After a review of the record, I must agree. Specifically, I find that while the claimant had previously sustained a back injury in association with his motor vehicle accident, the preponderance of the evidence shows that condition had resolved at the time the treadmill fell on him. Furthermore, the claimant has proven that he has sustained a new, separate injury as shown by the fact that he was diagnosed with an acute strain and found to have bulging discs after the accident. Accordingly, I would have reversed the decision of the Administrative Law Judge.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of

and in the course of employment; (2) that the injury caused internal or external 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; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

I find that the claimant's testimony, when considered in conjunction with the medical records show that the claimant sustained a compensable injury. In particular, I note that the claimant testified that while he had sustained a previous injury to his back, his symptoms had resolved by the time of the accident. Furthermore, I found

his testimony that he continued to receive chiropractic care for preventive care to be credible.

Furthermore, it is apparent when reviewing the diagnostic tests from before and after the accident that the claimant's condition changed. On July 21, 2004, the claimant had an MRI. The report indicates, "MRI images of lumbar spine demonstrate the disks to appear intact. The vertebral bodies appear normal in height and signal intensity." The report further provides, "Essentially unremarkable MRI of the lumbar spine." Yet, the MRI taken after the treadmill fell on the claimant had very different results. In fact, it revealed that the claimant had broad anular bulging at two levels in his spine and that both were impressing on the thecal sac. Furthermore, narrowing of the neural foramina was noted bilaterally. I find that this is a significant change in the claimant's condition and evidences that his compensable injury is shown by objective findings.

I note that Dr. Schlesinger reviewed both MRIs and indicated that there did not appear to be a significant change. However, the claimant is not required to show a

significant change. Instead, he is only required to show any objective sign of a change that is related to a compensable injury. Likewise, I note that immediately after the injury, the claimant was diagnosed with an acute strain, indicating that his condition was new. Additionally, I note that Dr. Justus specifically indicated the claimant's disc changes could be the cause of his symptoms. Finally, I note that even Dr. Schlesinger felt the claimant's condition was the cause for him seeking treatment, indicating that the claimant sustained a compensable injury. Accordingly, I would have reversed the decision of the Administrative Law Judge and awarded all requested benefits.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner