

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F512664 & F602296

MARIA ROJAS, EMPLOYEE

CLAIMANT

WAL-MART STORES, INC,
A SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED JULY 10, 2007

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed August 22, 2006.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 10, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by the respondent. This includes her low back, mid back, and cervical spine.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

In reaching this finding we note that the Administrative Law Judge's opinion contains a typographical error when referring to Nurse Beasley's December 27, 2005, medical records as having a Date of December 17, 2005. Clearly our review of the medical records reveals that the claimant was examined by Nurse Beasley on December 27, 2005, not December 17, 2005.

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 Hood dissents.

DISSENTING OPINION

The claimant appeals the August 22, 2006, opinion of the Administrative Law Judge finding that she did not sustain a compensable back injury and denying related

medical benefits. The Majority now affirms and adopts the decision as their own. After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been reversed. Accordingly, I must respectfully dissent.

The parties have stipulated that the claimant sustained an admittedly compensable injury to her right knee on November 18, 2005. The claimant contends that in addition to her admittedly compensable knee injury she also sustained low and mid back injuries as well as a neck injury. The Majority denies the claim based on the finding that the claimant allegedly failed to report her injuries after the accident. They further indicate that the evidence did not show that the claimant's injuries were a compensable consequence of her knee injury because the claimant testified that she had pain immediately after the November 2005 incident, and had denied being injured on December 24, 2005. After reviewing the record, I find that the claimant has met her burden of proof in showing that she sustained compensable back and neck injuries. Specifically, I find

that the claimant provided credible testimony that she reported her symptoms and that she suffered an exacerbation in pain after the incident with the shopping cart in December 2005.

In the present instance, the Majority asserts that the claimant did not report any injury to her back until December 27, 2005 and that she did not report neck or mid-back pain until March 2006. However, I find that the claimant provided credible evidence to the contrary.

The present case is complicated by the fact that the claimant's native language is not English. While the claimant is admittedly able to speak broken English, she still required an interpreter. Apparently she also required assistance in completing various forms regarding her injury. Furthermore, throughout the claimant's testimony, it seemed that there was an apparent language barrier. In my opinion, the claimant's inability to articulate in English substantially impaired her ability in satisfactorily reporting her injuries. The claimant repeatedly testified that she reported hurting all over after she fell. She

further testified that she was told that her pain was due to her knee and that as a result her other complaints were dismissed. I found this testimony to be entirely plausible considering the severity of the claimant's knee injury.

I find that it is particularly important to note that the claimant did not complete any of the accident reports. Rather, she simply had to rely on someone else to complete them for her and simply signed the forms. The claimant said she reported hurting all over and that she reported back pain. Given the nature of her fall, I find that this testimony is very credible. I also note that no one testified to rebut this testimony. Furthermore, when reviewing the content of these forms, it is apparent that the people completing the forms only focused on visible injuries.

Likewise, given the extreme severity of the claimant's knee injury, I find that it is only logical that the claimant herself would be more concerned with her knee than with any back injury. I also note that the claimant said that she reported hurting all over. Given the nature of

the claimant's fall and the apparent language barrier, it is certainly easy to imagine a scenario where the claimant, who was in extreme pain due to her knee, might not have been as vocal or as articulate in explaining she had neck and back pain as she would have been if she had not suffered a fracture of her knee.

Furthermore, I note that after the date of the accident, the remainder of the claimant's conditions were essentially ignored. There is no mention of whether the claimant's abrasions healed, nor is there any indication of whether the claimant denied any other symptoms. Once again, given the severity of the claimant's knee injury, it is more probable than not the claimant complained of back and neck problems but that they were ignored due to the severity of her knee problems.

While the Majority notes the claimant's hip pain was not recognized by Beasley until December 27, 2005, I note that in the report from Dr. Higgins, the claimant was noted to have suffered from hip and back pain for two months. This is a time frame that would clearly be

consistent with her fall at work. Furthermore, the claimant reported to both Dr. Tomlinson and Dr. Blankenship that she had suffered from back pain since the time of her fall at work. Additionally, Dr. Blankenship indicated the claimant's fall was the cause of her back pain. While I recognize that Dr. Blankenship was basing his opinion on the fact that the claimant had not suffered any past back pain, it is clear the claimant had no such problems for a period of ten years before the incident in question. As such, I find that Dr. Blankenship's opinion regarding causation should still be given credence.

I further find the claimant's neck and back symptoms were increased by her altered gait in relation to her knee. As such, even if one does not find the claimant suffered an onset of symptoms immediately after her fall, the evidence shows that her back and neck injuries were compensable consequences of her admittedly compensable knee injury.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals

discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury.

(Internal citations omitted).

Furthermore, respondents are responsible for benefits that result from an injury that is causally related to a compensable injury. However, the respondent is not responsible for benefits when the injury is sustained due to a non-work related, independent intervening cause which causes or prolongs disability or need for treatment.

Richardson v. ACF Industries, 2003 AWCC 120, Claim

No. F100097 (June 18, 2003); A.C.A. § 11-9-102(4)(F)(b). An

intervening cause does not exist unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), citing Guidry v. J&R Eads Construction Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984). The claimant's knowledge of her condition must be considered in determining whether her conduct was unreasonable under the circumstances. Lunsford v. Rich Mountain Electric Corp., 33 Ark. App. 66, 800S.W.2d 732 (1990); Lunsford v. Rich Mountain Electric Corp., 38 Ark. App. 188, 832 S.W.2d 291 (1992). However, when a primary injury is shown to have arisen out of the course of employment, the employer is responsible for any natural consequence of that injury. Wackenhunt Corp. v. Jones, 73 Ark. 158, 40 S.W.3d 333 (2001).

In this instance, it is clear the claimant suffered back and neck injuries which were then exacerbated by her altered gait. The claimant was noted to have an altered gait in various medical reports. The claimant also testified she experienced pain while in therapy and that

despite her reports to pain and request not to work, she was scheduled to work. As such, she returned to work and then experienced such hip and back pain that she could not walk. Furthermore, Dr. Beasley indicated in his report from December 27, 2005, that the claimant's gait could have caused her to have aggravated her hip bursitis. Certainly such a finding would also be consistent with the onset of back and neck pain.

While the respondents contend the claimant's injury was either due to the cart incident or degeneration, the evidence does not support their arguments. The claimant testified that the cart incident occurred when she sat down too hard on a cart while shopping due to being careful with her knee. The claimant said this did not change her condition but it was mentioned to Dr. Higgins. Notably, on the day the claimant reported the cart incident she was also noted to have been suffering from pain for two months.

Certainly the simple act of sitting down on a motorized cart should not be considered as unreasonable activity on the part of the claimant. In fact, immediately

prior to this incident, the claimant was able to ambulate. On December 13, 2005, Beasley indicated the claimant was to use crutches on an as-needed basis. On December 19, 2005, the claimant's physical therapist reported the claimant was able to walk some without her crutches but that she had to use them for long distances. Certainly, this is indicative that the claimant was not violating any restriction by shopping. In fact, the claimant testified she was injured due to attempting to be careful with her knee while she was sitting down on a motorized cart. This behavior shows the claimant was actually being protective of her injured knee in order to make sure she did not further injure it. Additionally, I note that there is no evidence to dispute the claimant's account of what happened with the cart. In sum, I find that there is simply no evidence to show that the claimant was acting outside of her restrictions or in an unreasonable manner so as to constitute an independent intervening cause and cut off the respondents' liability.

Furthermore, I find that the Majority's findings regarding the effect of the cart to be contradictory. On one

hand, they seem to find that the claimant is not credible with regard to when the onset of her complaints occurred due to the fact that she did not mention them until immediately after the cart incident. Then, they contradict themselves and find that the claimant's injury was not a compensable consequence because the claimant had testified that she had pain from the time of the fall onward and that she denied that the cart incident caused any injury. In my opinion these findings are contradictory and in error.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner