

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513396

CATHIE SHELLEY, EMPLOYEE CLAIMANT

VAN BUREN SCHOOL DISTRICT, EMPLOYER RESPONDENT

RISK MANAGEMENT RESOURCES, CARRIER RESPONDENT

**OPINION FILED MARCH 8, 2007**

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

Claimant represented by HONORABLE JAMES FILYAW, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, 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 June 16, 2006.

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. On November 9, 2005, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On November 9, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$356.00 for total disability and \$257.00 for permanent partial disability, should such benefits have been appropriate.

4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained "compensable injuries" to her left hip (pelvis) and/or back on November 9, 2005. Specifically, she has failed to prove by the greater weight of the credible evidence that any physical injuries or conditions, which she has and is experiencing with these portions of her body, were in any way causally related to a specific employment incident on that date.

5. The respondents have denied the occurrence of any compensable injuries and have controverted this claim in its entirety.

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.

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

The Majority affirms and adopts the June 16, 2006, opinion of the Administrative Law Judge denying benefits as their own. By affirming and adopting the decision of the Administrative Law Judge as their own, the Majority finds that the claimant's testimony regarding her onset of pain was not credible and that her complaints were inconsistent with the histories she gave. They further find that the claimant's failure to report the injury damaged her credibility. Finally, they conclude that the claimant's actions would not have logically caused a fracture and indicated that the claimant's past problems and arthritis were the likely cause for her complaints.

After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been reversed. The claimant consistently and credibly relayed that she had an onset of pain after lifting trash on the date in question. This was corroborated by Sheila

Pinkerton, coworker. Likewise, the claimant reported an onset of pain after lifting trash throughout the course of receiving medical treatment. I further find that the claimant's pre-existing arthritis was not the cause for the claimant's condition. Not one physician indicated that the claimant's arthritis could cause a fracture. Additionally, the claimant had x-rays performed shortly before the injury and they revealed a fractured pelvis. Finally, I note that the claimant was diagnosed with osteoporosis. As her doctors indicated that osteoporosis could attribute to her fracture in the event that she did not have significant trauma, I find that it is entirely plausible that a seemingly non-eventful activity would cause her to sustain a fracture. Accordingly, I must respectfully dissent.

The claimant works as a custodian for the respondents. She contends that she sustained a compensable injury on November 9, 2005, after lifting a heavy trash bag at work. The claimant described the incident as follows,

The little books and magazines; they were full of them. So I get extra trash bags and put them in there, and I put -  
- you know, individually, you put them

in your bag. Well, when I put some of the trash in the can itself, you know, there's several bags - - I mean cans that I can put in there. And so when I went to pull it out, it was just heavier than I thought it was, and by the time I got all that downstairs - - I couldn't carry it downstairs; I had to drag it downstairs, and by the time I got down there, I was hurting so bad I couldn't walk. Now, I did go ahead and sweep my rooms, I did go ahead and work that day; I did go ahead and work the next day, but I couldn't do it fast and I couldn't do it thoroughly. And then on Friday, I couldn't go back that Friday.

The claimant testified that when she returned from break she told two other custodians, Sheila Pinkerton and Leon that she was hurting after lifting the bag. She described that her pain started in her groin and was in her hip, back, and went down her leg.

The claimant admitted that she had a history of suffering from back problems due to arthritis. However, she testified that it never caused her to miss work and said the pain she experienced after lifting the trash was different than what she experienced in relation to her work injury. Furthermore, the claimant presented with hip pain on

September 21, 2005 and x-rays did not reveal any fracture to her pelvis.

Pinkerton largely corroborated the claimant's version of events surrounding the injury. She indicated that on the date in question the claimant mentioned the trash in the library was heavy. Pinkerton said that around midday the claimant was complaining that she was having back pain that was different than that she experienced with her arthritis. She also said that as the day progressed the claimant said, "I kind of wonder if I might have hurt myself?" The claimant's husband further indicated that after the day the claimant lifted the trash she appeared to behave differently and to be in pain.

The claimant presented for treatment with Dr. Paul Bean on November 11, 2005. At that time she reported that she was having left hip pain that had began the day before. The claimant reported that she could not remember any specific trauma. However, the note also provides, "The patient did lift some heavy trash bags yesterday and I think that might have been what set things in motion but she has

not had any pain on the right hip." Dr. Bean diagnosed the claimant with underlying osteoarthritis and released the claimant from working. He indicated that the claimant should stay on Arthrotec to help with inflammation and prescribed Darvocet. He also instructed the claimant to return the following Tuesday for reassessment in order to determine if she could return to work or whether he would need to refer her to an orthopedist.

On November 21, 2005, a CT scan was performed. It identified that the claimant had,

1. Moderate facet hypertrophy and degenerative type changes L4-5 with fragmentation as noted with spondylotic ridging and at least moderate canal stenosis.
2. Mild spondylosis and equivocal disc protrusion at L5-S1.

On December 6, 2005, the claimant again reported suffering pain in her groin after lifting trash. The claimant was diagnosed with a left iliac wing fracture as shown by x-rays. The radiology report indicated, "There is a fracture defect through the left iliac wing. It is difficult to determine the age of the fracture but it could be acute

or old. Is there a history of old trauma?". The report goes on to indicate, "Fracture of the left iliac wing, age undetermined, but could be acute in the context of acute trauma. If there is not a history of old trauma, this should be assumed to be acute." Another doctor's report from the same day provides, "Left iliac wing fracture, suspected pathologic with minimal history of trauma."

On December 8, 2005, Dr. Bean indicated that the claimant was having ongoing problems with back pain. He further noted that a repeat x-ray showed the claimant had a pelvic fracture. He indicated, "The question is whether this is a pathologic fracture or if this is just related to strain, stress, or lifting." He further reiterated that the claimant had been lifting books on the day her pain started. Dr. Bean recommended a CT of the pelvis and a bone density test.

A CT scan was performed on December 8, 2005. The report provided, "Because the intrinsic bone itself does not appear to be destroyed, not highly suspicious for a pathologic fracture and would need clinical correlation. If

this is a simple fracture, there should have been significant trauma to this region."

On December 15, 2005, a bone density test was performed. The doctor indicated, "The patient has no findings of osteopenia, osteoporosis, or increased risk for fracture at this time. If indeed, the patient had a pelvic fracture with minimal trauma, then she does have osteoporosis." Dr. Deneke further recommended that if the fracture was related to minimal trauma, then to make sure the claimant had another series of tests and treatment.

On January 16, 2006, the claimant returned for follow-up care. Dr. Bean indicated that there was no, "obvious source" for the cause of the fracture. He indicated that the claimant had a pelvic fracture of unknown etiology. He further diagnosed the claimant with, "Osteoporosis which could attribute to her fracture."

After a de novo review of the record, I find that the preponderance of the evidence shows the claimant sustained a compensable injury. In my opinion, the claimant's testimony regarding her injury is credible.

Likewise, her testimony regarding the occurrence of the injury was corroborated by her husband and Pinkerton. I also note the claimant consistently reported that she suffered pain after lifting trash throughout the course of medical treatment. Furthermore, the medical reports are consistent with the claimant having sustained a pelvic fracture. This is evidenced by the fact that the multitude of medical reports seem to indicate that if there was only minimal trauma, the claimant should be presumed to have osteoporosis and that be considered the cause of her fracture.

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 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 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). Furthermore, the claimant is not

required to show that the injury is the major cause for the need for treatment in order to establish compensability.

Williams v. L & W Janitorial, Inc., 85 Ark. App. 1 (2004), 145 S.W.3d 383 (2004).

In the present instance, I find that the only plausible explanation for the claimant's fracture is due to lifting trash. The claimant worked for the respondent without incident for some 25 years before this accident. Yet, after lifting this trash, the claimant felt immediate pain in her groin and left hip. In fact, the pain was so bad that she told Pinkerton of the pain and indicated that she might have injured herself while lifting the trash. Likewise, the claimant's husband testified that the claimant moved differently after the day of the injury and was complaining of pain.

It has long been recognized that "if the claimant's disability arises soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, we may say without hesitation that there is no substantial evidence to

sustain the commission's refusal to make an award." Hall v. Pittman Constr. Co., 235 Ark. 104, 357 S.W.2d 263 (1962).

Likewise, the medical reports indicate that the claimant's lifting trash likely produced the fracture. Though the claimant had a history of hip pain, she had x-rays of her hips on September 21, 2005 which were negative for fractures. Rather the x-rays only revealed degenerative changes. In contrast, after lifting the trash, the claimant's x-rays revealed a fracture. Likewise, on December 6, 2005, Dr. Holder indicated that the claimant's fracture was suspected to be pathologic. Additionally, on the same date Dr. Bulteman indicated that if there was no history of an old trauma, then the claimant's history should be presumed to be acute. Furthermore, on December 8, 2005, Dr. Diment indicated that while the claimant's fracture was "not highly suspicious for a pathologic fracture" if it was a simple fracture there should have been significant trauma. On December 15, 2005, Dr. Deneke gave essentially the same diagnosis and indicated that if the claimant suffered from a pelvic fracture with minimal trauma, then she did suffer

from osteoporosis. Finally, I note that on January 16, 2006, Dr. Bean indicated that the claimant had osteoporosis which could attribute to her fracture. As previously discussed, the claimant explicitly denied any such trauma and there is no evidence to rebut that testimony. Accordingly, the only logical conclusion is that the claimant's fracture was due to lifting the trash at work.

Despite the assertions of the Majority, the claimant immediately related her injury to lifting the trash when seeking medical attention. On November 11, 2005, the claimant reported that she had lifting heavy trash bags the previous day. While the claimant denied any evidence of "specific trauma" it is clear that she felt that lifting the trash bags had an impact on her condition, otherwise she would not have relayed it to the physician. Furthermore, throughout the course of her treatment the claimant reported that she had pain after lifting the trash.

The Majority argues that the claimant's testimony was, "internally contradictory and inconsistent with other histories she has given". They further opine that the

claimant's immediate return to work after the incident and her failure to file an immediate claim to be inconsistent. However, I reject such a contention. The claimant credibly testified that she believed she had simply sustained a strain and that it would resolve. This is entirely consistent with her work history and I find that she should not be penalized for attempting to return to work after injuring herself. As to any delay in seeking treatment, I note that the claimant presented for medical treatment within one week of the injury. Certainly this cannot be construed as a delay in seeking treatment. Finally, I address the Majority's argument that the claimant's delay in reporting the injury to the respondent makes her less credible. While the claimant admittedly did not report her injury to the respondents until December 5, 2005, it is undisputed that she told Pinkerton of the incident. This was corroborated by Pinkerton and by the initial medical report which indicates the claimant had been lifting heavy trash the day before.

The Majority further argues that the claimant's lifting trash could not logically produce her fracture. However, I find that the medical records do not support such a finding. At the time the claimant was diagnosed with a fracture, there was a suspected pathologic component. Additionally, the claimant has been noted to have severe, pre-existing arthritis and Dr. Deneke explicitly indicated that if there was no significant trauma the claimant suffered from osteoporosis. Likewise, on January 16, 2006, Dr. Bean diagnosed the claimant with osteoporosis and indicated that the condition could have attributed to the claimant's fracture. Therefore, I find that the preponderance of the evidence shows that the claimant sustained a compensable injury and is entitled to related medical and temporary total disability benefits.

For the aforementioned reasons, I must respectfully dissent

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PHILIP A. HOOD, Commissioner