

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606039

DEBRA FRANKLIN, EMPLOYEE	CLAIMANT
WAL-MART, A SELF INSURED EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, TPA	RESPONDENT

OPINION FILED JULY 28, 2008

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

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, 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 May 9, 2007.

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 all relevant dates, including May 11, 2006 and May 12, 2006, the relationship of employee-self insured

employer-third party administrator existed between the parties.

3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$295.00 for total disability and \$221.00 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 a "compensable injury" to her back on either May 11, 2006, May 12, 2006, or any other date. Specifically, the claimant has failed to prove that she sustained an injury to her back that arose out of and occurred in the course of her employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury to the claimant's back and have controverted the 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the decision of the Administrative Law Judge, finds that the claimant failed to prove that she sustained an injury to her back that arose out of and occurred in the course of her employment with this respondent, that was caused by a specific incident and that is identifiable by time and place of occurrence. After a de novo review of the record, I find that the preponderance of the evidence shows that the claimant sustained a compensable specific incident back injury that arose out of and occurred in the course of her employment with the respondent on May 11, 2006, and therefore I must respectfully dissent from the majority opinion.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be

established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical 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 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). In Edens v. Superior Marble & Glass, 346 Ark. 487 (2001), the Arkansas Supreme Court held that "identifiable by time and place" meant

subject to identification and did not require the claimant to specify the exact time of the occurrence.

Here, the claimant worked for the respondent setting modulars, labeling backstop, lifting boxes, moving shelves, and generally handling items weighing up to 30 pounds. The claimant testified that she was working at the Alma SuperStore on May 11, 2006, when she injured her back while using a ladder to put boxes on the shelves. The claimant testified that she felt her back pop, and felt a sharp pain. The claimant testified that she came down from the ladder and told a co-worker that she had hurt her back up on the ladder, but that she was able to resume her "floor" duties. Dr. Thompkins' May 26, 2006 office note contains a history of the claimant being at work on a ladder putting up boxes on shelves. Dr. Thompkins, the respondent's doctor, also indicated on the claimant's request for a leave of absence, that her back injury was a workers' compensation injury.

Arkansas Courts have long recognized that a causal relationship may be established between an

employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962). Here, the majority, by affirming and adopting the Administrative Law Judge, has erroneously placed great importance on the fact that the claimant's medical records do not initially specifically mention the work incident. However, the Arkansas Workers' Compensation Act does not require an immediate diagnosis, and it does not require that the claimant insist that the doctor's history contain the gory details of the occurrence. See Siders v. Southern Mattress Co., 240 Ark. 267, 398 S.W.2d 901 (1966). While the Court has stated that if "months" have passed between an accident and the manifestation of an injury, reasonable men might disagree about the existence of a causal connection, See Kivett v. Redmond Co., 234 Ark. 855, 355 S.W.2d 172 (1962); Wentz v. Servicemaster, 75 Ark. App. 296, 57 S.W.3d

753 (2001), here, only twelve days had passed between the diagnosis of the claimant's injury and only fifteen days had passed before the claimant formally reported her injury to her employer. Therefore, I find that the claimant's credible testimony shows that her back injury manifested almost immediately after the employment incident. Furthermore, the claimant testified that she did not have back problems before May 11, 2006 and the record is completely devoid of any evidence indicating that the claimant has suffered from back problems in the past, beyond chiropractic treatments sought over twenty years ago, as testified to by the claimant.

Although not specifically cited by the majority, the Administrative Law Judge apparently considered the respondent's argument that the claimant's back injury is a recurrence of a pre-existing condition. A recurrence is not a new injury, but merely another period of incapacitation resulting from a previous injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). A recurrence exists when the second complication is a natural and

probably consequence of a prior injury. Id. Here, the claimant has credibly testified as to the specific incident which caused the new injury. Beyond the claimant's testimony that she received chiropractic treatment twenty years ago for some "out-of-socket" vertebrae, the respondent has produced no evidence indicating what previous injury is allegedly "recurring" for the claimant, beyond speculation un-supported by the medical records regarding a twenty-year-old baby-lifting injury. In fact, the only reference to a baby-lifting injury as causation for the claimant's injury, beyond the claimant's own testimony, is a handwritten doctor's note, prefaced by a question mark and followed by the comment, "20 years ago."

It is apparent from a review of the medical record that at one point, the claimant's treating physician was informed by the adjuster that this claim would be denied due to "extensive prior treatment" received by the claimant. However, the respondent did not introduce medical evidence of any prior treatment. Based on the medical record, any finding that the claimant suffered a recurrence of a pre-

existing condition, is clearly based on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979).

Finally, I note that the Administrative Law Judge labeled the claimant's testimony as "not sufficiently credible." I disagree. Although the claimant was apparently a difficult witness, I cannot find any significant discrepancies in her testimony. The Commission may not arbitrarily disregard medical evidence or the testimony of any witness. Coleman v. Pro Transportation, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (2007). Even if the Full Commission finds that the claimant is a poor historian, that determination would not suffice to find that she is not a credible witness. Forrest v. Cornerstone Construction, Full Commission Opinion, E309110, (1994); Brewington v. Advanced Plastics, Inc., Full Commission Opinion, E407210, (1996); Covington v. Gencorp Automotive, Inc., Full Commission Opinion, E815309 (2000).

In conclusion, I find that the claimant has shown, by a preponderance of the evidence, all of the elements of a compensable specific incident back injury. Specifically, the claimant's back injury arose out of and in the course and scope of her employment with the respondent.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner