

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. F501583

JANICE L. ALFIERI, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER/TPA	RESPONDENT

OPINION FILED MAY 18, 2010

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

Claimant represented by the HONORABLE FREDERICK "RICK" SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Claimant appeals from a decision of the Administrative Law Judge filed October 16, 2009.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the claim.
2. The employee-employer-carrier relationship existed on February 5, 2005, and at all other relevant times.

3. The claimant's temporary total disability rate is \$228.00, and her permanent partial disability rate is \$171.00.
4. This claim has been controverted in its entirety.
5. The Act is constitutional. The claimant's Motion is hereby denied.
6. The claimant failed to prove by a preponderance of the evidence that she suffered a back injury, during and in the course of her employment with the respondent-employer.
7. All issues not litigated herein are reserved under the act.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant proved by a preponderance of the evidence that she sustained a specific incident back injury on February 5, 2005, while lifting a box of baby strollers.

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).

Here, the claimant has met all of the elements necessary to prove a compensable injury. First, the claimant has shown a specific incident arising out of and in the course of employment. The claimant stated that on February 5, 2005, sometime before a 12:30 a.m. break, while unloading a box of umbrella baby strollers from a pallet into a shopping cart, she felt something in her back that hurt really bad. Immediately thereafter, the claimant sat down and told one of her co-workers that she would be fine after she rested. After resting, she went on her break, and then returned to work but did not lift any more heavy items. After going back to work, she was asked if she would like to go to a doctor, which she initially refused. However, according to the claimant, after working a little while

longer, she had pain and numbness going down from her leg into her foot and heel. This pain frightened the claimant, and as a result, she asked to see a doctor and was taken to the emergency room by a co-worker. The claimant reported to the Baxter County Medical Center emergency room on February 6, 2005:

HISTORY OF THE PRESENT ILLNESS: The patient is a 60-year-old white female who presents to the Emergency Department after being involved in an accident at work. She leaned over to pick up a box which she believed is not especially heavy, felt a pop and is having sharp pain running down her lower back across her right buttock. Pain seems to have stopped, but she is having some mild tingling in her toes that waxes and wanes. The patient has had not significant injury to her low back in the past....

The respondent directed the claimant to follow-up with Dr. Burnett, who indicated:

History of injury in patients' own words: lifted a box off a pallet approx 35# felt something in back popped. C/o soreness in lt (lower) back and left leg, pins and needles in left leg.

I find, based on the claimant's credible testimony and the corroborating medical records, that the claimant has proved by a preponderance of the evidence a specific incident arising out of and in the course of her employment.

Second, the claimant has shown objective findings of a physical injury requiring medical services. The claimant was prescribed Flexeril by the emergency room. Pursuant to the Arkansas Supreme Court's ruling in Fred's, Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005), a prescription for Flexeril satisfies the objective findings requirement. Specifically, the Arkansas Supreme Court has held that treatment designed to relieve symptoms associated with an objective finding is sufficient to meet the objective medical findings criteria in the Workers' Compensation Act. See Fred's, Inc. v. Jefferson, 361 Ark. 258, 206 S.W.3d 238 (2005) and Estridge v. Waste Management, 34 Ark. 276, 33 S.W.3d 167 (2000). Additionally, Dr. Burnett prescribed a Medrol Dose Pak, a steroid medication usually used to treat inflammation. Based on the Flexeril prescription and the Medrol Dose Pak, I find the claimant has presented objective findings of an injury requiring medical services.

The claimant continued to treat with her family doctor, Dr. DeYoung, who eventually referred her to a specialist, Dr. Briggs. Dr. Briggs June 1, 2005 report states:

Chief Complaint: Low back and some left lower extremity pain.

Present Illness: The patient is a 60-year-old white female who presents with a history of lifting a large box and injuring her back. She felt pain down the left lower extremity with some numbness and tingling. She has had constant pain in both lower extremities over a long period of time day and night. This primarily increased her back pain when this occurred. Her back pain is constant and dull. It is aggravated with lifting, pushing, Valsalva and coughing. It hurts worse in the a.m. It is relieved with lying and improves if she gets up and walks.

Data review: MRI scan of the lumbar spine is reviewed and this does not reveal any nerve root compression. It does reveal some degenerative arthritis at L4-5 with some opening of the facet joints and mild subluxation at that level.

Impression: Arthritic change at L4-5 with subluxation and some aggravation of her facet pain. She may also have a restless leg syndrome because of the chronic pain of her lower extremities. This does not appear to be due to nerve root compression of the lumbar spine at the present time.

Treatment Options: I therefore recommend evaluation and possible trial treatment of restless leg syndrome to see if this would reduce her leg pain, instead of approaching surgery as a primary treatment. I will recommend facet blocks to try to accelerate improvement of her back pain. If she has recurring back

difficulties and has excessive motion at this level, then she might require fusion in the future, but currently it is not clear that this is the proper current treatment.

Unfortunately, Dr. Briggs conservative treatment plan did not work, and on September 22, 2005 the claimant reported for surgery:

HISTORY OF PRESENT ILLNESS: The patient is a 60-year-old female, seen for history of back and lower extremity pain. She relates the onset of these symptoms to an incident lifting a large box and injuring her back. Her pain is aggravated with lifting, pushing, Valsalva maneuver and coughing. The patient underwent an MRI scan of the lumbar spine which shows degenerative facet arthropathy at L4-L5 and sUBLUXATION at that level.

HOSPITAL COURSE: For this reason, the patient was taken to operating room for a wide decompressive laminectomy at L4, complete facetectomies at L4-L5, and discectomy at that level. This was followed with posterior lumbar interbody fusion and a posterolateral instrumentation and fusion effectively resulting in a 360 degree lumbar fusion through a single posterior approach. The patient tolerated this procedure well.

Contrary to the majority, I do not find that the claimant's current need for treatment pre-existed the February 5, 2005 specific incident. The employer takes the

employee as it finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003); Pearline Williams v. L&W Janitorial, Inc. 85 Ark. App. 1, 145 S.W. 3d 383 (2004). Before the incident, the claimant was able to work without interruption. Before the incident the only medical treatment the claimant received was minor chiropractic adjustments. After the incident, the claimant was taken off work completely. After the incident, the claimant underwent a fusion surgery. For the majority to conclude that the claimant's need for treatment was due to a pre-existing condition and did not stem from the lifting incident at work is simply not supported by the evidence of record.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner