

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 03-021226

Employee: Debra Iliff
Employer: K-Mart Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: February 5, 2003
Place and County of Accident: Sedalia, Pettis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 24, 2004, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge R. Carl Mueller, Jr., issued November 24, 2004, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this ____20th____ day of April 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Debra Iliff

Injury No: 03-021226

Dependents: N/A
Employer: K-Mart
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: October 20, 2004
Briefs Filed: November 4, 2004
Checked by: RCM/rm

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged February 5, 2003
5. State location where accident occurred or occupational disease was contracted: alleged Sedalia, Pettis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee alleged she injured her back by repetitively bending and picking up purses on February 5, 2003.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: None.
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$2,545.12.
17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$335.00
19. Weekly compensation rate: \$223.34 for both temporary total and permanent partial disability compensation
20. Method wages computation: Stipulation
21. Compensation Payable: None
22. Second Injury Fund Claim: N/A
23. Future requirements awarded: None

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Debra Iliff Injury No: 03-021226
Dependents: N/A
Employer: K-Mart
Additional Party: State Treasurer as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: October 20, 2004
Briefs Filed: November 4, 2004 Checked by: RCM/rm

On October 20, 2004, the Employee and Employer/self-insurer appeared for a hardship hearing. The Division has jurisdiction to hear the case pursuant to §287.110. The Employee, Ms. Debra Iliff, appeared in person and with counsel, Amy Young. The Employer/self-insurer appeared through counsel, Melodie A. Powell. A corporate representative, Ms. Lancy Ulrich, for the Employer/self-insurer also was present. The primary issue the parties requested the Division to determine was whether Ms. Iliff suffered an accident arising out of and in the course of her employment. For the reasons noted below, I find that Ms. Iliff did not sustain a compensable accident on February 5, 2003 and that, therefore, no medical treatment is awarded and no temporary total disability benefits are awarded.

STIPULATIONS

The parties stipulated that:

1. On or about February 5, 2003 ("the injury date"), K-Mart was an employer operating subject to Missouri's Workers' Compensation law with its liability fully self-insured;
2. Ms. Debra Iliff was its employee working subject to the law in Sedalia, Pettis County, Missouri;
3. The Employee filed her claim within the time allowed by law;
4. The Employer did not pay Ms. Iliff any temporary total disability compensation, but did provide her with medical care costing \$2,545.12; and,

5. The parties stipulated to a \$335.00 average weekly wage resulting in a weekly compensation rate of \$223.34 for both temporary total and permanent partial disability compensation.

ISSUES

The parties requested the Division to determine:

1. Whether Ms. Iliff sustained an accident arising out of and in the course of employment?
2. Whether Ms. Iliff notified K Mart of the alleged injury as required by law?
3. Whether Ms. Iliff is entitled to temporary disability benefits?
4. Whether K Mart must provide the employee with additional medical care?
5. Whether K Mart must reimburse to Ms. Iliff the cost of this proceeding for defending the claim without reasonable ground pursuant to §287.560?

FINDINGS

Ms. Debra Iliff testified on her own behalf and presented the following exhibits which were admitted into evidence without objection:

- A - Medical Records and Reports
- B - Motion for Costs
- C - Letter dated 8/30/2002 from Dr. Miles to K Mart

The employer called three witnesses, including Cindy Hood, Pam May, and Lancy Ulrich. Additionally, the employer submitted one exhibit which was admitted into evidence without objection:

- 1 - Deposition, Debra Iliff, January 22, 2004

The employer also brought to my attention that all the medical reports relative to the case were admitted into evidence with Employee's Exhibit A. Specifically, the employer points out that the medical report upon which they rely is dated July 1, 2003 from Dr. John Miles, located on page 30 of Exhibit A.

Based on the above exhibits and the testimony of Ms. Iliff, Ms. Hood, Ms. May and Ms. Ulrich, I make the following findings.

Debra Iliff was the department manager of jewelry, accessories and cosmetics at K-Mart in Sedalia, Missouri on February 5, 2003. Included in that department were such items as purses and other soft goods. On February 5, 2003, K-Mart had to ship merchandise from Ms. Iliff's department to other stores. The merchandise included purses. The store manager, Lancy Ulrich, directed Cindy Hood, area manager of the soft lines and Ms. Iliff's supervisor, as well as Ms. Iliff to scan and box the purses for shipment. Ms. Ulrich also assisted in the process. On February 5, 2003, Ms. Hood, Ms. Iliff and Ms. Ms. Ulrich spent approximately three to three and one-half hours scanning and boxing purses to ship to other K-Mart stores. Employee first testified she spent six hours doing this job, however, she then stated she was not sure how long she spent on this task on February 5, 2003. Two witnesses for the employer testified the activity took three to three and one-half hours. The purses were located on the floor in the purse department at K-Mart. The process involved scanning the purses, placing them in a cart and taking the cart to the back of the store where they were then boxed for shipment. In addition to the responsibilities regarding the scanning and boxing of purses on February 5, 2003, Ms. Iliff was also working the jewelry counter. Several times during the three to three and one-half hour period of scanning and boxing purses, Ms. Iliff would leave the purse area and go to the jewelry counter to wait on customers who needed assistance with jewelry.

At no time on February 5, 2003 did Ms. Iliff make any mention of her back hurting to Cindy Hood, her supervisor, or to Lancy Ulrich, the store manager. Despite the fact that Ms. Iliff testified that, on February 5, 2003,

she told Ms. Hood that her back hurt, the more credible evidence comes from Ms. Hood and Ms. Ulrich. Both testified that Ms. Iliff made no mention to them on February 5, 2003 of any low back pain.

In March, 2000, Ms. Iliff sustained a work related injury while at K-Mart. This injury resulted in surgery at the L5-S1 level by Dr. John Miles of the Columbia Orthopaedic Group. Ms. Iliff was represented by counsel in the prior workers compensation matter and settled the case on October 17, 2002, for 16% to the body as a whole, or approximately \$11,000.00. She had ongoing symptoms after that injury but had no further treatment until April, 2003. Ms. Iliff was under permanent restrictions from the prior workers compensation injury, including a twenty-five pound lifting restriction as well as limitations with regard to bending, twisting, and stooping.

Ms. Iliff's supervisors as well as the store manager were aware of her permanent restrictions from the prior back injury. Both believed that Ms. Iliff was assigned work duties within the parameters of the permanent restrictions. According to the store manager, Ms. Iliff was assigned to the position of department manager for accessories, jewelry and cosmetics because it was the least physically demanding job in the store.

Ms. Iliff sought no treatment from any physician between February 5, 2003, the alleged date of accident, and March, 2003. It was not until approximately one month or longer after the alleged incident of February 5, 2003, that the employee reported to the Human Resources Director, Pam May, that she had injured her back on February 5, 2003. At that point, without further investigation, the employer arranged for Ms. Iliff to have a medical appointment with Dr. Stanley Wilson. Ms. Iliff did not attend that appointment but, rather, was rescheduled for an appointment with Dr. John Miles, on April 8, 2003.

In March, 2003, Ms. Iliff spoke to store manager Lancy Ulrich about moving to part time work with K-Mart. Specifically, she wanted to be moved to the service area or to a cashier position at K-Mart. Ms. Ulrich would not allow her to move to either of those positions because of her restrictions. The service/cashier position was much more physically demanding, including bending, twisting and leaning. Ms. Iliff became very irritated with Ms. Ulrich. Ms. Iliff informed Ms. Ulrich that she was already working part time at another jewelry store, Glascock's, in March, 2003. Ms. Iliff accepted part time work at K-Mart, however, she remained in the jewelry, accessories and cosmetics department. It was after this discussion with Ms. Ulrich that the employee pursued a workers' compensation claim.

Ms. Iliff acknowledged that, when Dr. Miles was treating her for her back injury of March 1, 2000, he specifically counseled her that there was degeneration at the L5-S1 segment and that she may need further surgeries in the future. (Exhibit A, p. 44). This counseling occurred on October 2, 2001. (Exhibit A, p. 44).

At the medical appointment with Dr. Miles on April 8, 2003, the history given to Dr. Miles was that, after the prior microdiscectomy, Ms. Iliff felt somewhat better but "when she started to work again and do all of her housework again with constant bending, her back started hurting again." (Exhibit A, p. 38). There is no history given Dr. Miles of any specific bending activity on February 5, 2003. Dr. Miles described her symptoms as "recurrent" and "mechanical in nature". (Exhibit A, p. 37). Ms. Iliff also relayed to Dr. Miles on April 8, 2003, that she was experiencing stress at work with conflicts regarding her work duties and activities. She was begun on physical therapy. The employer paid for this medical treatment with Dr. Miles.

Dr. Miles recommended an MRI in April, 2003. That MRI revealed disc dessication at the L5-S1 segment but no focal disc herniation. It further revealed that every segment in the low back had some degeneration. (Exhibit A, p. 35). The MRI taken for the March 1, 2000 injury was interpreted as showing underlying degenerative changes at the L5 disc. Additionally, a left disc protrusion at L5- S1 was found on the MRI on November 9, 2000. (Exhibit A, pp. 56-57). The employer continued to provide treatment to the claimant in May, 2003. Dr. Miles provided a report dated July 1, 2003. In that report, it was Dr. Miles' opinion that Ms. Iliff did not have any new injury on February 5, 2003. He stated: "I believe her present complaints are a direct continuation of her previous workers compensation injury which was the herniated disc at L5-S1 which required a microdiscectomy." (Exhibit A, p. 30). Dr. Miles went on to state that the process was degenerative in nature but was "directly linked with her previous injury". (Exhibit A, p. 30). Of further note in Dr. Miles' records is the fact that there is never any mention of the specific incident of February 5, 2003 in the histories provided him. While the claimant's work is mentioned in the medical records, she has testified to a specific incident involving the moving of purses on February 5, 2003 and said incident is nowhere mentioned in the medical records of Dr. John Miles, the treating physician.

The employer's witnesses - Cindy Hood, Pam May and Lancy Ulrich - had all worked with the employee for more than a year and all testified that she made complaints about her back hurting prior to February 5, 2003. The store manager testified that Ms. Iliff would complain about her back hurting "all the time". All three witnesses also heard Ms. Iliff make back complaints after February 5, 2003, however, all three testified that the back complaints Ms. Iliff made after February 5, 2003 were no different from the ones that she made prior to February 5, 2003. Further, the three witnesses for the employer all testified that Ms. Iliff did not appear to be any physically different after February 5, 2003 than she did before February 5, 2003.

Claimant presented the narrative report of David Robson, M.D. who examined her on March 16, 2004 at her attorney's request. See, Claimant's Exhibit A at 4-8. Dr. Robson opined that ". . . the activities on February 5, 2003 were a substantial factor in the worsening of her condition." *Id.* at 8. He also noted that "I feel Ms. Iliff sustained a change in pathology following the February 5, 2003 incident, given the records that I reviewed and the history that I obtained." *Id.* at 8. However, in reviewing the diagnostic studies, Dr. Robson specifically stated in the same report that the only change between her MRI study on November 9, 2000 and her MRI of April 29, 2003 was scar tissue - presumably resulting from her previous surgery - and degenerative changes. If these are the changes in pathology to which Dr. Robson refers, his opinion is of no benefit to Ms. Iliff. Just because there has been a change in pathology does not make a case compensable unless the change is due to the work incident.

RULINGS

Regarding the issue of compensability, I find that Ms. Iliff did not sustain an accident which arose out of and in the course of her employment on February 5, 2003.

While the employee alleges she did repetitive bending with regard to scanning and boxing the purses, the activity she did was varied and lasted only three to three and one-half hours. The varied activities included picking purses up, placing them in a cart, walking to the back of the store, placing purses in boxes, and preparing the boxes for shipping. All the while she was doing this, she was also moving from the purse area to the jewelry counter to wait on customers and make sales. The activity performed by the employee was not outside her previous restrictions. Additionally, based on the medical evidence, pertaining to her prior back injury, Ms. Iliff was able to remain on her feet with activity for two hours and 40 minutes. (Exhibit A, p. 39). I find that these employment activities did not cause an aggravation of any prior condition and were not a substantial factor in causing any symptoms she had. Rather, the employee's condition was one that deteriorated over time as supported by the medical evidence. Gradual deterioration or progressive degeneration of the body caused by aging is not an "injury" under §287.020.3(1), RSMo.

The more credible medical evidence is that of Dr. John Miles, the treating physician for her prior back injury, who opines that any back complaints Ms. Iliff had when he saw her in April, 2003, were directly linked to her prior back injury which had occurred in March, 2000. He had counseled Ms. Iliff in 2001 that she may need further surgeries on her back when he was treating her for the March, 2000 injury. Claimant settled the March, 2000 injury and, as such, would not be eligible for any further medical treatment under the injury of March 1, 2000. I find the opinion of Dr. Miles to be more persuasive than that of Dr. Robson because Dr. Miles was the treating physician for the original back injury, saw the employee numerous times for that injury and was in the best position to know and understand the pathology associated with her condition.

Corroborating Dr. Miles' medical evidence is the testimony of witnesses Cindy Hood, Pam May and Lancy Ulrich. Ms. Iliff made no complaints of her back hurting on February 5, 2003 and did not report any injury to store management personnel until approximately one month later, when engaged in a discussion with Lancy Ulrich as to moving to part time work. Ms. Iliff was very irritated that she would not be moved to the position she wanted. She and management disagreed on the type of work she should be doing that fit within the restrictions given by Dr. Miles for the original back injury of March 1, 2000. It was at this point that Ms. Iliff reported and filed a workers compensation claim.

The witnesses for the employer also testified that Ms. Iliff's back complaints were no worse after February 5, 2003 than they had been before the alleged injury of February 5, 2003.

Based on the foregoing, I find that Ms. Iliff did not sustain an accident which arose out of and in the course of her employment. In addition, I find that the first notice Ms. Iliff gave K-Mart that she was alleging a February 5, 2003 work injury was when she reported this to the employer on March 18, 2003. This failed to comply with Missouri law as it was beyond the period required for reporting an injury. MO.REV.STAT. §287.420. Since Ms. Iliff did not sustain a compensable injury, she does not qualify for any temporary total disability benefits. In addition, K-Mart's defense of this matter clearly was reasonable as it has prevailed on all issues and, thus, the Claimant's request for cost reimbursement is denied.

Date: _____

Made by: _____

R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Gary Estenson
Acting Director
Division of Workers' Compensation