IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI

NO. 97-CC-00004-COA

WAL-MART STORES, INC. AND NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA **APPELLANTS**

v.

HELEN DARLENE (PACE) FOWLER **APPELLEE**

DATE OF JUDGMENT:	12/06/96
TRIAL JUDGE:	HON. ROBERT G. EVANS
COURT FROM WHICH APPEALED:	SIMPSON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANTS:	ROBERT M. CARPENTER
ATTORNEY FOR APPELLEE:	MARK K. TULLOS
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
TRIAL COURT DISPOSITION:	AFFIRMED ORDER OF THE WORKERS' COMPENSATION COMMISSION
DISPOSITION:	AFFIRMED - 06/29/1999
MOTION FOR REHEARING FILED:	7/13/99; denied 09/14/99
CERTIORARI FILED:	
MANDATE ISSUED:	10/05/99

EN BANC:

KING, J., FOR THE COURT:

¶1. This workers' compensation case comes before this Court as an appeal by the employer/carrier from the Circuit Court of Simpson County, which on December 6, 1996 affirmed the order of the Workers' Compensation Commission. This case involves a prior back injury which was admittedly work related, followed by a subsequent back injury that led to this appeal. As the appellants' brief points out, the case turns upon whether there was an intervening cause between the two injuries. The issues raised on appeal are: 1) whether Fowler's injury in July of 1994 was related to her admittedly work related injury in November of 1992; 2) whether Fowler was permanently partially disabled; and 3) whether the appellants are liable for medical treatment incurred in the July of 1994 injury.

FACTS

¶2. Helen Darlene Pace Fowler began working for Walmart Stores, Inc. [Walmart] in its store in Magee, Mississippi in 1985. On November 2, 1992, she was putting out dog food while working as a manager in the store's pets and toys department, when something popped in her back and she went numb form the waist down. Fowler filed a workers compensation claim, and was treated by Dr. Frank Wade. During the initial visit, Dr. Wade initially diagnosed a back strain and noted a slight degenerative spurring in the lumbar spine as well as a mild wedge configuration multiple dorsal vertebrae. By the end of November, 1992, Fowler returned to light work. There is *no* dispute that this injury was compensable under the Workers' Compensation Law, Miss. Code Ann. § 71-3-1, *et seq*.

¶3. After Fowler returned to work in November, 1992, she never resumed her duties that included "heavy lifting." Instead, she performed clerical duties and eventually returned to full time employment. According to her testimony, she continued to suffer from "pain in the back, and it went down in my legs." She reported this to her supervisor, and missed several days of work. Richard Burch, Walmart's store manager, confirmed that Fowler complained of continuing back pain and missed some time from work. Fowler continued to be treated by Dr. Wade, who prescribed muscle relaxants, pain pills and injections. Dr. Wade also referred Fowler to Dr. Greg Wood, an orthopedic surgeon, who saw her twice, but surgery was not found to be an appropriate treatment. Dr. Woods noted that Fowler had desiccated disks at L4-5 and L5-1, and he diagnosed degenerative disc disease. His notes from April 5th state that he found she had reached maximum medical improvement with no impairment.

¶4. On July 20, 1994, Fowler was at home, brushing her hair before going to work, when she again experienced something pop in her back and numbness in her legs. She was admitted to Magee General Hospital, where Dr. Wade again treated her. X-rays revealed slight scoliosis due to splinting and muscle spasms, and small osteophyte at the L4-5 level. Dr. Joe Ferguson, the radiologist, noted this scoliosis was not present in the x-rays taken in November 1992 .

¶5. Dr. Woods referred Fowler to a neurologist, Dr. Berth Blanchard, who testified by deposition. She stated that she reviewed an MRI taken on August 15, 1994 which did not show any disk herniation but did show degenerative changes at the L5-S1 disk. A second MRI, taken on March 3, 1995, caused her to change her diagnosis to a herniated disk at the L5-S1 level. During questioning by Fowler's attorney, she stated that the injury she first diagnosed from looking at the first MRI was related to the work related injury of November 2, 1992. Nevertheless, during cross-examination, she reviewed two additional MRI's and was asked whether the July 20, 1994 injury, incurred while Fowler brushed her hair, could be an intervening cause between the admittedly work related injury of November 2, 1992 and the ruptured disk shown in the MRI of March 3, 1995. Blanchard responded, "Yeah, I would think that that [disk rupture] definitely correlates to a more recent injury." However, upon re-direct she was asked, "[h]ow many people have you ever treated for injuries to the back that occurred that were caused by brushing or combing their hair?" Dr. Blanchard answered, "I guess she's the only one." This response concluded the deposition.

¶6. In March of 1995, Dr. Blanchard referred Fowler to Dr. Edward Connolly, a neurosurgeon, at the Oschner Clinic in New Orleans, Louisiana. Dr. Connolly initially saw Fowler on April 5, 1995. Dr. Connolly interpreted the x-rays taken on March 5, 1995 as showing minor anterior traction spurring at L3-

4 disc level, and interpreted an MRI taken that same day as showing a left para central protrusion and mild desiccation at the L4-5 level. Dr. Connolly concluded surgery was not indicated as appropriate treatment.

¶7. Fowler and Burch both testified that after the 1994 injury Dr. Blanchard restricted Fowler to not lifting in excess of twenty-five pounds and not standing for more than thirty percent of her work time. Fowler testified that she worked only thirty hours per week following the 1994 injury, and Burch testified that number was between thirty-three and thirty-five.

ANALYSIS

¶8. The administrative law judge found:

> a preponderance of [the evidence] supports a conclusion that claimant's back problems, for the most part, stemmed from a pre-existing degenerative disc problem which was dormant until aggravated by her industrial accident of November 2, 1992. Since that aggravation claimant continued to have back problems. . . . While employer contests the relationship between claimant's November2, 1992 accident and the back problems she experienced on July 20, 1994 and thereafter, I am inclined to find that they are due to the injury sustained in her accident. . . .
>
> Even assuming that claimant's back problem was not a continuation of back problems she had been experiencing since her accident, the evidence otherwise suggests the injury sustained in the accident made her easily susceptible to any additional injury she may sustained on July 20, 1994. The evidence points to a conclusion that but for the aggravation of claimant's degenerative disc problem by the November 2, 1992, claimant would not have been so easily susceptible to the July 20, 1994 injury.

¶9. Nevertheless, despite finding that Fowler's 1994 injury was a continuation of her work related injury in 1992, the administrative law judge also concluded that the recent disk rupture, which was shown in an MRI taken in March of 1995 and which Dr. Blanchard testified correlated to a more recent injury, "is not related to claimant's industrial accident of November 2, 1992 and that employer is not obligated to pay for treatment of this problem." Fowler did not file any cross-appeal, so the finding that the ruptured disk was not work related is not before this Court.

¶10. The burden of proof of affirmative defenses, including the defense of intervening cause, rests upon the employer. *Marshall Durban Companies v. Warren*, 633 So. 2d 1006, 1008 (Miss. 1994). Under the defense of intervening cause, an employer remains liable for all manifestations of an injury, regardless of how long the manifestations continue, but if an "independent agency" terminates the effect of the original injury, the employer is not liable for subsequent injuries. *Kelly Brothers Contractors, Inc. v. Windham*, 410 So. 2d 1322, 1324 (Miss. 1982).

¶11. In this case, the Workers' Compensation Commission [the Commission] affirmed the administrative law judge's decision which found Fowler's injury of 1994 was part of a continuous chain of back problems that arose from a pre-existing condition which first manifested itself because of her 1992 injury that admittedly was work related. It is well settled that when a dormant, pre-existing condition is aggravated by a work related injury, the condition is compensable. *Port Gibson Veneer and Box Co. v. Brown*, 226 Miss. 127, 130-31, 83 So.2d 757, 759 (1955). *See also* Dunn, *Mississippi Workmen's Compensation* § 164 (3rd ed. 1990). Both Dr. Woods and Dr. Blanchard diagnosed a degenerative disk condition. Since the 1992 injury, Fowler had continuously complained of back problems and sought medical treatment. As

such, the decision of the Commission was supported by credible evidence. *See Medart v. Adams,* 344 So. 2d 141, 143 (Miss. 1977). Alternatively, the Commission found that the 1992 injury made Fowler more susceptible to back injury, and therefore the 1994 injury was compensable. As with pre-existing conditions, an employer remains liable for subsequent injuries related to a prior work related injury. Dunn, *Mississippi Workmen's Compensation* § 157 (3rd ed. 1990). Dr. Ferguson's records indicated that Fowler's back condition continued to deteriorate following the 1992 injury. This decision was supported by credible evidence. *See Medart v. Adams,* 344 So. 2d at 143 (Miss. 1977).

¶12. Concerning the award of permanent partial disability benefits, the administrative hearing officer found that Fowler was "unable to work a full shift and that she is presently working between five and ten hours less per week than what she was working at the time of her injury." The Commission affirmed this decision. The testimony of Fowler and Birch supported this finding, and as such substantial, credible evidence supported the Commission's order. *Id.*

¶13. Concerning the award of medical expenses incurred in the treatment subsequent to the 1994 injury, the administrative law judge found that because the 1994 injury was related to the 1992 injury, Walmart was liable for treatment for the 1994 injury, and the Commission affirmed this finding. Having found that the Commission's finding of no intervening cause was supported by the evidence, Walmart is liable for all treatment incurred as a result of the 1994 injury. *See Jordan v. Hercules*, 600 So. 2d 179, 185 (Miss. 1992).

¶14. In conclusion, the Commission's finding that Fowler's continuing back problems were related to the admittedly work related injury of 1992 is supported by both fact and medical evidence. We find no error.

¶15. THE JUDGMENT OF THE SIMPSON COUNTY CIRCUIT COURT IS AFFIRMED. APPELLANTS ARE TAXED WITH ALL COSTS OF THIS APPEAL PLUS STATUTORY DAMAGES AND PENALTY.

BRIDGES, COLEMAN, DIAZ, IRVING, LEE, PAYNE, AND THOMAS, JJ., CONCUR. McMILLIN, C.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, P.J.

McMILLIN, C.J., DISSENTING:

¶16. I respectfully dissent. It is my view that this case is controlled by the "corollary" to a general rule of interpretation of workers' compensation law announced in *Rathborne, Hair & Ridgeway Box Co. v. Green*, 237 Miss. 588, 115 So. 2d 674 (1959). In setting out both the rule and the corollary, the Mississippi Supreme Court said:

> The rule in this State is that when a pre-existing disease or infirmity of an employee is aggravated, lighted up, or accelerated by a work-connected injury, or if the injury combines with the disease or infirmity to produce disability, the resulting disability is compensable. *A corollary to the rule just stated is that when the effects of the injury have subsided, and the injury no longer combines with the disease or infirmity to produce disability, any subsequent disability attributable solely to the disease or infirmity is not compensable.*

Id. at 676 (emphasis supplied).

¶17. In this case, Fowler had suffered a back injury at work in 1992, the severity of which was unquestionably attributable in part to the existence and resulting aggravation of a pre-existing degenerative disk disease. The evidence is undisputed that Fowler was compensated for this 1992 injury and that she subsequently returned to work. Though she reported that she continued to experience back pains after returning to work, the record is clear that her symptoms were not disabling. Neither is there any expert testimony differentiating her continuing complaints of pain between her injury and the pre-existing diseased condition of her spine.

¶18. Nearly two years after her initial injury, in 1994, Fowler felt a popping sensation in her back while she was at home preparing to report to work. As a result of that episode, Fowler experienced symptoms similar to those associated with her earlier job-related injury and was hospitalized for a time. After returning to work on a light duty status, Fowler made a claim for permanent partial disability compensation, alleging that the 1994 complications were directly traceable to her 1992 on-the-job injury. The Commission, by adopting the administrative judge's findings and conclusions, determined that the 1994 disability represented the natural progression of her condition that had its inception with the 1992 injury at work, or, alternatively, that the 1992 injury made Fowler so susceptible to this type of injury that it was compensable despite the intervening non-work-related event.

¶19. Though we are obligated to give substantial deference to the Commission's findings, we must nevertheless reverse the Commission when we determine that there is not substantial evidence in the record to support the Commission's decision. *Hollingsworth v. I.C. Isaacs & Co.*, 725 So. 2d 251 (¶ 11)(Miss. Ct. App. 1998). In this case, I am satisfied that there simply is *no* competent credible medical evidence to support either of the alternative theories that (a) the 1994 incident was merely an aggravation of an unresolved medical condition traceable to the 1992 injury, or (b) that the 1992 injury left Fowler in such a debilitated state that some additional spinal injury was essentially inevitable.

¶20. The majority attempts to shift the burden of proof to the employer by treating this as an "intervening cause" case, which it is not. Insofar as the record reveals, Fowler had made a recovery from the 1992 injury by 1994. Her treating physician, Dr. Wood, was the only person who spoke to that question. His contemporaneous written diagnosis of Fowler's condition as the result of a visit some three months prior to the 1994 incident was: "I see no significant findings other than degenerative disk disease." Dr. Blanchard, another treating physician, acknowledged that Fowler's degenerative disk disease predated her 1992 injury and was not work-related. "[I]t's just something that comes with age and just wear and tear on the spinal column just over the years," she testified in her deposition.

¶21. The majority attempts to find substantial evidence to connect Fowler's 1994 symptoms to her 1992 work injury in the testimony of Dr. Blanchard, but, at best, her testimony is equivocal. Her opinion of some connection between the 1994 symptoms and the 1992 incident was based on nothing more than Fowler's own medical history, given to Dr. Blanchard for the first time in 1994. However, later in her testimony, Dr. Blanchard was asked, "So it would be a fair statement to say that she had recovered from the incident of November of '92 until she was brushing her hair on July 20th of '94; is that right?" Dr. Blanchard replied, "That's correct. That was the implied idea that I got from her."

¶22. The best indication of the unpersuasive nature of Dr. Blanchard's evidence is that the Commission, in

making its findings, made no reference to Dr. Blanchard's testimony. Rather, the Commission, in concluding that Fowler's "back problem was a mere continuation of ongoing back problems that date back to the date of her injury of November 2, 1992," relied on the "close proximity of claimant's last doctor visit for back pain in April 1994 and the onset of back problems on July 20, 1994 . . . ." That April 1994 doctor's visit was to Dr. Wood, however, and not to Dr. Blanchard. This visit was, in fact, the very one where Dr. Wood concluded that the only detectable symptoms presented by Fowler related to her degenerative disk disease.

¶23. It is that finding by Dr. Wood, which is uncontradicted on the record, that invokes the corollary to the general rule quoted above. The medical evidence is overwhelming that Fowler had made a recovery from the 1992 injury and that its effects had subsided. The fact that Fowler was still experiencing back problems was, by all available medical evidence, traceable solely to the circumstance that she suffered from degenerative disk disease that predated her 1992 injury. That she somehow aggravated this non-work-related condition once again in 1994 while at home does nothing to create a right of compensation under our workers' compensation laws.

¶24. As to the alternative theory that Fowler's 1992 injury somehow left her particularly susceptible to additional similar injuries, that is a finding that finds no support in the record. The only indication of Fowler's continued susceptibility to injury, based on *all* of the medical evidence, was her degenerative disk disease.

¶25. I would reverse and render the judgment in Wal-Mart's favor.

SOUTHWICK, P.J., JOINS THIS SEPARATE WRITTEN OPINION.