

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF WORKER'S COMPENSATION

CASE NO. SDO 203357

FLORA ABAD,

*Injured Worker,*

vs.

K-MART CORPORATION,

*Defendants.*

DECISION AND FINDING

DECISION

In her notice of claim dated 2-10-95 the worker related she sustained a lower back strain at 2:00 p.m. on 5-19-94. The employer's acknowledgement of the claim shows the first notice was on 2-8-95.

The worker testified beginning in late March 1994 she also worked as a receiving clerk which required lifting items weighing 40 to 50 pounds, including baby cribs, dog food or anything that came into the store. She testified, as far as she could remember she hurt her lower back lifting a box of vertical blinds which was two weeks after she started in the receiving clerk duty. As far as she could remember, she talked to Mr. Garcia, personnel officer, in May 1994 telling him she had a back pain while working in receiving. He gave her a paper to sign. Her back pain hurt every day she worked in receiving. She further testified she last worked on 5-19-94 when she collapsed due to chest pain and she also felt back pain. On 6-22-94 she told Dr. Masilungan she got a back pain while working in receiving in K-Mart. She testified around June or July 1994 she told co-worker Shirley Naval about her back injury. The worker acknowledged she worked with Shirley Naval in merchandising, not in receiving.

However, Shirley Abella Naval credibly testified she worked in the fashions part of receiving which required no lifting of anything other than clothes, weighing about 20 pounds. Therefore, the testimony of the worker she worked with Ms. Naval, and the testimony of Ms. Naval shows the worker likely only worked in fashions receiving other than hard line receiving.

Further, the credible testimony of Ms. Naval shows prior to leaving K-Mart the worker never told Naval she hurt her back. In July 1994 Naval went to visit the worker and the worker said nothing about an injury at work or hurting her back. However, November 1995 the worker called Naval asking her to say that she had hurt her back and Naval refused.

The credible testimony of Luis Alejandro Garcia shows K-Mart policy requires workers to immediately report any injury, no matter how minor. The witness was on vacation from 5-5-94 to 5-23-94. When the witness returned from vacation he learned the worker had passed out. Later, she sent doctor's notes by her son. The worker had not reported an industrial injury to witness until on 2-8-95 she came to his office saying she needed to file an accident report because her back was hurting. The witness was surprised at the time, asking her to return on 2-10-95 and at that time to file an accident report and employee's claim form for workers' compensation.

A transcription of Dr. Masilungan's note of 5-19-94 refers solely to the incident of that date when the worker fainted at work. There is no reference to any history of work injury or complaint of back pain on that date.

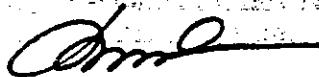
In regard to the worker's testimony when she went to see Dr. Masilungan on 6-22-94 she told him she got a back pain while working; that history is not found in Dr. Wieseltier's review of Dr. Masilungan's records though the review does show on 7-6-94 the worker was seen for low-back pain, on 8-3-94 the worker complained her back was hurting and on 9-21-94 the worker reported back pain when lifting. Another note dated 12-12-94 reported chronic low-back pain with ridiculopathy, and it appears the worker was referred to Dr. Lurie, an orthopedic surgeon. However, it is noted no report implicating a work injury was offered in support of the worker's claim from Dr. Masilungan or Dr. Lurie.

Records of Dr. Thomas Harris have been reviewed. These reflect on 1-6-95 the worker told the doctor she had had no back pain in the past but that she may have been injured by lifting heavy things at work. However, she had no specific incident where she developed low back pain. In conflict with the history given by the worker to Dr. Harris, in evidence is a chart note of 9-10-93 of Dr. Masilungan indicating multiple complaints including dizziness, headache and back pain. It was indicated the worker stated she always had back pain when sitting down for a long time.,

The worker's claim relates to back sprain on a specific day, 5-19-94, but the histories given to Drs. Harris, Kanner, Stein and Wieseltier on or after 1-6-95 indicate the worker was claiming cumulative injury due to heavy lifting. While a cumulative injury claim over a period of time is not in issue, the credible evidence indicates the worker made an after-the-fact rationalization of the cause of her back pain. There is no credible evidence of a back injury on 5-19-94. Under the circumstances, Dr. Wieseltier's opinion as shown in his report of 11-17-95 is convincing the worker's complaint of back is related to the degenerative condition noted on her x-rays, CT scan, bone scan and MRI films rather than to her employment.

### **FINDING OF FACT**

1. The worker has not proven she sustained a back injury arising out of and occurring in the course of her employment on or about 5-19-94.



**D.M. CLARK**  
**WORKERS' COMPENSATION JUDGE**

**Dated and filed in San Diego, California.**

**MAR 29 1996**  
**Service by mail on said date to all parties listed**  
**on the Official Address Record.**

