BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213080

MARGARET L. BEARD, EMPLOYEE	**CLAIMANT**
BAPTIST HEALTH SYSTEM, EMPLOYER	**RESPONDENT**
CROCKETT ADJUSTMENT, TPA	**RESPONDENT**

OPINION FILED NOVEMBER 21, 2003

Hearing before Administrative Law Judge J. Mark White on October 15, 2003, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Ms. Dee A. Scritchfield, Attorney at Law, North Little Rock, Arkansas.

Respondents represented by Ms. Gail Gaines, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 15, 2003, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on May 5, 2003, and a Prehearing Conference Order was entered on that same date. A copy of the May 5, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. A second pre-hearing conference was conducted on September 22, 2003, and a Prehearing Conference Order was likewise entered on that same date. A copy of the September 22, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 2 and made a part of the record herein without objection. At the hearing, the parties

confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Orders.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer relationship existed between the parties in September of 2002; and that the claimant earned an average weekly wage of $343, entitling her to a compensation rate of $229 for temporary total disability.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury for which she is entitled to medical benefits; if the claimant sustained a compensable injury, whether she is entitled to temporary total disability benefits from October 2, 2002, through a date yet to be determined; and attorney's fees.

The claimant contends that she sustained a compensable injury on September 19, 2002, which arose out of and in the course of her employment for which she is entitled to medical and temporary total disability benefits.

The respondents contend that the claimant did not sustain a compensable injury arising out of and in the course of her employment; that the claimant did not timely report an alleged on-the-job injury; that the claimant cannot prove a specific incident nor can she prove the statutory requirements for a gradual-onset injury;

and that the claimant's complaints, including shoulder problems, are pre-existing and degenerative.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has failed to prove by a preponderance of the evidence that her work consisted of rapid repetitive motion.
4. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual-onset injury.
5. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable specific-incident injury.

DISCUSSION

I. History

The claimant was employed as a cashier in respondent-employer's hospital cafeteria. On September 19, 2002, she worked a shift from 11 a.m. to 7 p.m. She testified that on that day the ice machines in the front of the cafeteria ran out of ice, and that she went to the back eight or ten times or more to fill a container with ice and carry it to the front. Other employees were responsible for keeping the ice machine filled, and the claimant acknowledged that filling the ice machine was not part of her regular job duties. She testified that she had filled the ice machine on other occasions, but she did not specify when this had happened or how often. She testified that the employee responsible for filling the machine that day, Chester McKenzie, refused to do so because "he was mad at somebody else."

McKenzie testified at the hearing and denied that he said this and denied that he worked that day. A supervisor, Donna Gray, likewise testified that McKenzie did not work that day. Gray quoted the claimant as saying she did not want to move containers of ice; Gray said she agreed with the claimant and instructed her not to move them. Gray acknowledged that she had seen the claimant carrying small ice containers, measuring 12 inches by 12 inches by two-and-one-half inches and weighing five to eight pounds.

The claimant testified that she noticed a problem with her shoulder when she went on break. She testified at one point that she told another cashier, Christine Slaughter, that she had hurt her shoulder carrying the ice. But at another point, the claimant denied that any other cashiers were working that day. Slaughter testified and denied that the claimant told her of any injury. Slaughter did acknowledge, though, that she had previously seen the claimant carrying small ice containers.

After the break, the claimant completed all her regular duties and finished her shift. She continued to work over the next few weeks. Her shoulder continued to ache, and on or about October 8 she woke up one morning and was unable to move her shoulder. She has not returned to work since that time.

The claimant sought treatment on September 25, 2002, from Dr. Lynda Beth Milligan, complaining of pain in her left elbow. On September 28, she went to the ER with complaints of joint swelling and pain. No mention is made in either record, though, of complaints of shoulder pain. The claimant returned to Dr. Milligan on October 8. Dr. Milligan wrote in her note of that visit, "initially she was hurting in the left elbow but now she has started hurting in the shoulder and all the way down the entire arm. She denies trauma." On October 28, the claimant saw Dr. Marty Siems who ordered an MRI and bone scan. Dr. Siems quotes the claimant as saying her shoulder "had gotten fairly bad over the past 3 months," but the claimant

denied telling Dr. Siems this. Based on the MRI results, Dr. Siems diagnosed a supraspinatus rotator cuff tear with AC arthrosis. Dr. Siems performed surgery to correct the tear in April, 2003, but neither party has submitted medical records from the surgery or subsequent follow-up treatment.

The claimant acknowledged that she did not report the injury to her employer until November, after her MRI. The Form AR-N submitted by the respondents identifies the specific date of notice as November 12, 2002. In her testimony, the claimant implied that she had reported the injury to her supervisor on the day of her injury, September 19. But she later acknowledged that this testimony was new, and that she had said nothing about any such conversation in her previous deposition or in her answers to interrogatories specifically addressing the question of notice. Supervisors Donna Gray and Angela May testified that the claimant gave no notice of injury prior to November 12. May also testified that although the claimant had been on sick leave prior to November 12, she had never informed the respondents that her sick leave was due to a work injury.

II. Compensability

To prove the compensability of a gradual-onset injury, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the

course of her employment; that the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and that the injury was a major cause of the disability or need for treatment. *Wal-Mart Stores v. Leach,* 74 Ark. App. 231, 48 S.W.3d 540 (2001); ARK. CODE ANN. § 11-9-102 (4)(A)(ii). Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores v. Leach, supra;* ARK. CODE ANN. § 11-9-102 (4)(D). Gradual-onset injuries to the shoulder must be shown to have been caused by rapid repetitive motion. *High Capacity Prods. v. Moore,* 61 Ark. App. 1, 962 S.W.2d 831 (1998); ARK. CODE ANN. § 11-9-102 (4)(A)(ii)(a). The appropriate test to identify rapid repetitive motion is two-fold: the tasks must be repetitive, and the repetitive motion must be rapid. *Hapney v. Rheem Manufacturing Company,* 342 Ark. 11, 26 S.W.3d 777 (2000). The rapidity question is not reached unless the task is first repetitive. *Id.*

In the claim at bar, the claimant has failed to prove by a preponderance of the evidence that any of her work consisted of rapid repetitive movement. The claimant attributed her shoulder injury to her moving containers of ice in the cafeteria on September 19, 2002. She testified she could not remember how many times she brought containers of ice to the front that particular day but said it was at least ten

times. She later acknowledged her deposition testimony that it had instead been eight times that day. Presumably, this was an unusual occurrence, because she said the worker who ordinarily moved the ice engaged in an argument with her about his failure to move the ice that day. The claimant did not testify that transporting ice containers was a regular part of her job duties, nor did she testify that she had moved ice containers on any other day. Other than her testimony regarding the ice containers, she offered no testimony as to the movements or motion involved in her job duties.

I cannot find by a preponderance of evidence that moving an ice container eight or ten times on a single day in the space of an eight-hour shift qualifies as rapid repetitive movement. The movement in question could conceivably be considered repetitive, but it certainly could not be considered rapid. The courts have found motion to be rapid and repetitive where it involved 115 to 120 motions per day, *Boyd v. Dana Corp.*, 62 Ark. App. 78, 966 S.W.2d 946 (1998); and where it involved 190 to 210 motions per day, *Hapney v. Rheem Manufacturing Company*, 342 Ark. 11, 26 S.W.3d 777 (2000). Conversely, the courts have affirmed that work tasks are not rapid and repetitive where several different tasks are performed only 12 to 15 times per day, *Malone v. Texarkana Pub. Schs.*, 333 Ark. 343, 969 S.W.2d 644 (1998); or where the claimant performed several different motions within a brief time, but

repeated the motions at varying intervals separated by periods of several minutes or more, *Lay v. United Parcel Service,* 58 Ark. App. 35, 944 S.W.2d 867 (1997). I cannot find the work tasks in the present claim to be materially more rapid or repetitive than those of either *Malone* or *Lay*, thus I cannot find that this claimant's moving an ice container eight or ten times in an eight-hour shift constitutes rapid repetitive motion.

I find that the claimant has failed to prove by a preponderance of the evidence that her work consisted of rapid repetitive motion. Because she has failed to prove an element of compensability, I therefore find that she has failed to prove by a preponderance of the evidence that she sustained a compensable gradual-onset injury.

Likewise, the claimant has failed to establish that she sustained a compensable specific-incident injury. For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) 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(16), establishing the existence and extent of 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. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

At the end of the hearing, the claimant's attorney limited her contention to that of a gradual-onset injury. In her testimony, the claimant acknowledged that her injury was a gradual-onset injury. The claimant was unable to identify her injury by a time more specific than the day of September 9, 2003 – that is, she could not point to a particular time during that day when she was injured. She testified:

> Q. And during that shift did you have any kind of an accident carrying the ice?
>
> A. Well, I noticed that later on, when Christine and I went on break –
>
> Q. When you say Christine, Christine who?
>
> A. Slaughter.
>
> Q. Okay.
>
> A. When we went on break, I told her that my shoulder felt like it was out of place or something from carrying all the ice. And then Chester came out and we sort of had an argument.

The claimant testified that her shoulder continued to ache over the next two weeks, until November 8, when she woke up one morning and discovered her shoulder to be swollen and immovable. At no point in her testimony did the claimant offer a more specific identification of when her injury took place. She acknowledged that she did not report her injury as a work injury until after the November 8 incident. Because the claimant failed to do so, because she failed to identify a specific incident by time and because she described the onset of her injury as being gradual, I find that she has failed to prove by a preponderance of the evidence that her injury was caused by a specific incident and is identifiable by time and place of occurrence. She has therefore failed to prove by a preponderance of the evidence that she sustained a compensable specific-incident injury.

ORDER

Because the claimant failed to establish that her work tasks included rapid repetitive motion, I must therefore find that she failed to prove by a preponderance of the evidence that she sustained a compensable gradual-onset injury. Because she failed to prove by a preponderance of the evidence that she sustained an injury identifiable by time and place of occurrence, I must also find that she failed to prove by a preponderance of the evidence that she sustained a compensable specific-

incident injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

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HON. J. MARK WHITE
Administrative Law Judge