

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307886

HERMAN PASCHAL, EMPLOYEE **CLAIMANT**

**GEORGIA-PACIFIC CORP.,
SELF-INSURED EMPLOYER** **RESPONDENT**

SEDGWICK CLAIMS MGMT. SVS., TPA **RESPONDENT**

OPINION FILED APRIL 28, 2004

Hearing before Administrative Law Judge J. Mark White on March 25, 2004, in El Dorado, Union County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Andrew Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 25, 2004, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on January 26, 2004, and a Prehearing Order was entered that same day. A copy of the January 26, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 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 Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; and that the employee/self-insured

employer relationship existed at all relevant times, including November 24, 1993. At the hearing, the parties also stipulated that the claimant earned wages at the rate of \$6.66 per hour.

The parties agreed that the issues to be presented were whether this claim is barred by the statute of limitations; and whether the claimant sustained a compensable injury on November 24, 1993, for which he is entitled to medical and indemnity benefits.

The claimant contends that he sustained a compensable injury on November 24, 1993, for which he is entitled to medical and indemnity benefits; and that he is entitled to temporary total disability benefits for his time off from work due to this injury.

Respondents contend that they controvert this claim in its entirety; that the claimant cannot meet the burden of proving an injury identifiable by time and place of occurrence causing internal or external harm which arose out of and in the course of employment; that this claim is barred by the affirmative defense of statute of limitations, pursuant to Ark. Code Ann. § 11-9-702; and that this claim is also barred by the notice defense, as proper notice was not given until sometime in late 2003, and said notice bars any benefits incurred prior to it.

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. A preponderance of the evidence shows that the statute of limitations for the claimant's injury began to run in November, 1993, when the true extent of his injury manifested itself and caused an incapacity to earn wages, persisting long enough to otherwise entitle him to benefits.
4. A preponderance of the evidence shows that the claimant did not file a claim for compensation with the Commission until 2003.
5. The claimant has failed to prove by a preponderance of the evidence that his claim was timely filed.
6. This claim is therefore barred by the statute of limitations.

7. The claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.
8. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

On December 17, 1993, the claimant sought treatment from Dr. Moises A. Menendez for a complaint of anal bleeding. Dr. Menendez diagnosed a rectal polyp and performed a successful surgery to remove the polyp. What Dr. Menendez described as a rectal polyp, the claimant in his testimony referred to as hemorrhoids, but the claimant and Dr. Menendez appear to be referring to the same condition.

The claimant testified that this condition developed gradually in November, 1993, after he was employed by the respondent-employer. He testified that he reported this condition to the respondent-employer as a work injury in November, 1993, and that he was told by his supervisors to seek medical treatment. The claimant's treatment was paid for by the group health insurance provided by the respondent-employer, and he received no workers' compensation benefits for this injury. When the claimant failed to return to work after his surgery – he testified that he was off from work for five months – he was terminated by the respondent-

employer. He alleged that he attempted to report the injury at various times over the following years, until July, 2003, when the respondent-third party administrator filed a first report of injury. The claimant first filed a claim for compensation with the Commission on September 19, 2003.

Robby Hanry testified that he was the safety coordinator for the respondent-employer at the time of the claimant's alleged injury, responsible for handling all reports of work injuries. He testified that he was unaware of any work injury sustained by the claimant until the claimant's report of the injury in July, 2003. The claimant specifically alleged in his testimony that he reported his alleged work injury to Hanry, but Hanry denied that the claimant had done so. Hanry testified that he remembered the claimant taking off work on one night in 1993 because of a hemorrhoid problem. He testified that the claimant subsequently never returned to work and never notified the respondent-employer of why he was off from work after that first night. Hanry testified that the respondent-employer had a policy of terminating any employee that skipped work without notice for three days.

II. Adjudication

A. Statute of Limitations

Arkansas law limits the time in which a claim for compensation may be filed.

It is the burden of the claimant, not respondents, to prove that a claim for additional compensation has been timely filed. *Aluminum Comp. Of America v. Rollon*, 76 Ark. App. 240, 64 S.W.3d 756 (2001). The relevant statute of limitations provides:

A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

ARK. CODE ANN. § 11-9-702 (a)(1)(A).

The statute was amended by Act 796 of 1993 to define the date of the compensable injury – and thus the date the statute begins to run – as the date the injury was caused by the accident. ARK. CODE ANN. § 11-9-702 (a)(1)(B). Applying such a standard to a gradual-onset injury is effectively impossible, for a gradual-onset injury by definition lacks a specific accident. Because of this difficulty, the Commission has determined that the amendments made by Act 796 of 1993 apply only to specific-incident injuries, and that the running of the statute as to gradual-onset injuries is governed by the law as it existed prior to Act 796. *Ham v. Alumacraft Boat Company*, W.C.C. E708498 (Dec. 17, 1998). That is, the statute of limitations does not commence to run until the true extent of the injury manifests and causes an

incapacity to earn wages which persists long enough to entitle claimant to benefits under Ark. Code Ann. § 11-9-501. *Id.*, citing *Donaldson v. Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950); *Shepard v. Easterling Construction Co.*, 7 Ark. App. 192, 646 S.W.2d 37 (1983); *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992). It does not appear that the courts have yet addressed this question of when the statute begins to run for a gradual-onset injury in light of Act 796 of 1993, but the Commission's interpretation is persuasive.

On its face, there is no question that this claim was filed outside the time limits allowed by statute. The claimant sustained and became aware of the full extent of his alleged injury in November, 1993. He testified that it arose gradually, not as the result of a specific incident, meaning that the law prior to Act 796 controls the running of the statute of limitations. The claimant testified that he lost a total of five months from work during 1993 and 1994 because of his injury and resulting surgery. He admitted that he did not file a claim with the Commission until 2003, nearly ten years later. Given the claimant's uncontradicted testimony, I find that a preponderance of the evidence establishes that the statute of limitations for the claimant's injury began to run in November, 1993, when the true extent of his injury manifested itself and caused an incapacity to earn wages, persisting long enough to otherwise entitle him to benefits; and that the claimant did not file a claim for

compensation with the Commission until 2003. I find that the claimant has failed to prove by a preponderance of the evidence that his claim was timely filed. This claim is therefore barred by the statute of limitations.

B. Compensability

Even if I were to conclude otherwise, I would find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. To prove compensability, there must be affirmative proof of a distinctive employment risk as the cause of the injury; the connector cannot be supplied by speculation, but it is not essential that the causal relationship between the accident and disability be established by medical evidence. *Gerber Products v. McDonald*, 15 Ark. App. 226, 691 S.W.2d 879 (1985). Where there is no medical evidence, a causal connection can be established by “common-sense observation and deduction.” *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). Such is not the case here.

The claimant alleges that the heavy lifting required by his job caused his rectal polyp. A polyp is defined by *Dorland's Illustrated Medical Dictionary*, 26th Ed., as, “a morbid excrescence, or protruding growth, from mucous membrane.”

I am at a loss to understand how heavy lifting, or any other feature of the claimant's work, could in any way cause or contribute to a polyp on the rectum.

There is no evidence in the record to establish a causal connection, other than the claimant's speculation. The claimant was asked repeatedly to explain why he thought there was a causal connection, but he offered no basis for his speculation other than the timing of the appearance of the polyp. This is not a case where a causal connection can be established by "common-sense observation and deduction." *Wal-Mart Stores, Inc. v. VanWagner, supra*. Without medical or other evidence establishing a causal connection, or some other rational explanation, I can in no way find a causal connection between the claimant's work and his alleged injury. I therefore find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment.

AWARD

The claimant has failed to prove by a preponderance of the evidence that his claim was timely filed. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge