

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F009947 & F001480

NICOLE R. SMITH,  
EMPLOYEE

CLAIMANT

CARE MANOR OF BAXTER COUNTY,  
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,  
INSURANCE CARRIER

RESPONDENT

**OPINION FILED MAY 7, 2004**

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, at Mountain Home, Baxter County, Arkansas.

The claimant was represented by HONORABLE FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

The respondents were represented by HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on March 3, 2004 in Mountain Home, Arkansas. A prehearing order was entered in this case on September 5, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing. However, the stipulations and issues outlined in the Prehearing Order were amended by agreement of the parties during the course of the March 3, 2004 hearing.

The following stipulations were submitted by the parties and are hereby accepted:

1. The employee/employer relationship existed on February 5, 2000 and February 26, 2000.
2. The claimant's average weekly wage during the relevant period was \$269.00 per week.
3. The respondents have controverted any benefits not already paid.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability (i.e., whether the claimant sustained a compensable back injury on November 18, 1999, on February 5, 2000, and/or on February 26, 2000).
2. Unpaid medical bills from Baxter Regional Medical Center and other providers.
3. Attorneys fees.
4. Whether the claimant's claim for additional benefits for a November 18, 1999 injury is barred by the statute of limitations.

**DISCUSSION**

The claimant became a certified nurses assistant in 1995 and continued in that field of work until she became employed by Care Manor of Baxter County in September of 1999. Beginning on November 18, 1999, the claimant experienced back pain and sought medical treatment after each of several incidents which involved moving patients. Prior to the hearing, the claimant's prehearing filings asserted that the claimant sustained compensable injuries as a result of incidents which occurred on or about February 5, 2000 and February 26, 2000. During the course of the hearing, the claimant amended her contentions to also include an injury date of November 18, 1999.

The respondents' attorney explained at the hearing that the respondents did in fact provide a brief period of benefits in December of 1999, but had subsequently taken the position that the claimant cannot establish the existence of a low back injury that occurred on November 18, 1999, on February 5, 2000, or on February 26, 2000 that is established by medical evidence supported by objective findings. In addition, during the course of the hearing the respondents' attorney indicated that no request for additional benefits for an injury allegedly sustained on

November 18, 1999 was ever filed prior to the hearing held on March 3, 2004. On that basis, the respondents' attorney alleged during the course of the hearing that any claim for additional benefits raised during the hearing on March 3, 2004 is barred by the statute of limitations.

### 1. **Compensable Injury**

The Arkansas Court of Appeals recently described the requirements necessary to establish a compensable new injury or a compensable aggravation of a pre-existing condition as follows:

"In workers' compensation law, an employer `takes the employee as he finds him,' and employment circumstances which aggravate pre-existing conditions are compensable." *Nashville Livestock Comm'n v. Cox*, 302 Ark. 69, 73, 787 S.W.2d 664, 666 (1990). An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. *Oliver v. Guardsmark, Inc.*, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996).

Arkansas Code Annotated section 11-9-102(4) (A) (i) (Supp. 1999) defines "compensable injury" as

An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of

employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by "objective findings." Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

Heritage Baptist Temple v. Robison, \_\_\_ Ark. App. \_\_\_, 120 S.W.3d 150 (2003).

In the present case, the medical evidence, in conjunction with the relevant witness testimony, persuades me by a preponderance of the evidence that the claimant began to experience low back problems as a result of a series of lifting incidents at work at Care Manor in late 1999 and early 2000. The medical treatment provided following these incidents is well documented in the medical record. Although the claimant may have had some degree of intermittent back complaints prior to the first lifting incident at work in November of 1999, I find based on the medical reports and the relevant witness testimony that the work related lifting incidents caused the need for medical treatment to the claimant's back that she received in late 1999 and early 2000. Therefore, the claimant has

established by a preponderance of the evidence that she sustained a series of accidental injuries arising out of several specific lifting incidents at work which caused internal physical harm, required medical services, and caused at least temporary disability.

However, the respondents assert that the claimant cannot establish the existence of her work related injury with medical evidence supported by "objective findings." For the reasons discussed below, I find that the record lacks the necessary objective finding or findings to establish a compensable injury. Therefore, I find that the present claim for benefits must be denied.

As the attorneys in this case know, the Arkansas Courts have recognized many types of findings adequate to satisfy the "objective findings" requirement of Act 796 of 1993. For example, passive range motion testing (but not active range of motion testing) is by definition an objective finding. Hayes v. Wal-Mart Stores, 71 Ark. Code Ann. 207, 29 S.W.3d 751 (2000). Muscle spasms observed by a physician or a physical therapist are objective medical findings. Continental Express, Inc. v. Freeman, 339 Ark. 142, 4 S.W.3d 124 (1999). A fibrous mass observed by a physician is an

objective finding. Daniel v. Firestone Building Products, 57 Ark. App. 123, 942 S.W.2d 277 (1997).

Diagnostic test results are objective findings. Thus, soft tissue swelling in the hip indicated by x-ray is an objective finding. Meister v. Safety Kleen, 339 Ark. 91, 3 S.W.3d 320 (1990). Straightening of the normal lordotic curvature of the spine, indicative of muscle spasm, is an objective finding. Estridge v. Waste Management, 343 Ark. 276, 33 S.W.3d 167 (2000). Disk abnormalities identified on diagnostic testing are objective findings. Aeroquip, Inc. v. Tilley, 59 Ark. App., 954 S.W.2d 305 (1997).

However, a physical therapist's report of "muscle tightness" is not equivalent to a physical therapist's observation of "muscle spasms", since muscle tightness can come under the voluntary control of the patient. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). Likewise, a physical therapist's observation of muscle spasms is distinguishable from a physical therapist's notation of muscle spasms based on symptoms reported by the claimant, since the claimant's report of symptoms comes within the voluntary control of the patient. See e.g., Continental Express, Inc. v. Freeman, supra.

In the present case, while the medical exhibits contain some notations of abnormal range of motion testing, the reports contain no indication that the testing was passive instead of active. The medical reports also contain several notations which appear to use the term "spasm". See R. Ex 1 pages 15, 16, and 32. However, the reports contain insufficient notation to indicate to me by a preponderance of the evidence that any spasm was ever observed or detected by medical personnel, as opposed to instead being history reported by the patient.

Likewise, the x-rays and MRIs contain at least some degree of objective abnormality. For example, a December 8, 1999 x-ray revealed six rather than five lumbar vertebrae, with the lower vertebra reported as markedly anomalous. In light of these bony abnormalities, Dr. Regnier reported that the claimant would not pass a pre-employment examination for heavy lifting of any type. Nevertheless, neither Dr. Regnier's report or any other evidence in the record indicates that the lifting incidents at work in 1999 or 2000 caused the bony abnormalities identified on December 8, 1999, as opposed to the abnormalities being pre-existing genetic variants or developmental abnormalities.

The claimant's attorney, during the course of the hearing, directed my attention to the diagnostic testing contained in claimant's Exhibit 1 at pages 25 - 26. I find that the lumbar MRI discussed on those pages fails to provide objective findings supporting an injury for several reasons. First, I note that this lumbar MRI was apparently performed in December of 2002, approximately three years after the incidents at work at issue in this claim, and the claimant had previously undergone a lumbar MRI on March 30, 2000, much more contemporaneous to the dates on injury. Absent any indication that the lumbar MRI performed in March of 2000 was defective, I find that any abnormalities that might exist in a December 2002 MRI that were not present in the March 2000 MRI are not causally related to the injury at issue.

Second, I do not interpret that the claimant's physicians have diagnosed the claimant with a disk abnormality, and third, I do not understand any abnormality identified in either the March 2000 MRI or the December 2002 MRI to be associated with traumatic injury, as opposed to being either degenerative in nature or within normal age appropriate limits.

After reviewing the entire record, I am therefore constrained to find that the claimant has failed to satisfy the evidentiary requirement of objective findings to establish the existence of a compensable injury.

**2. Statute of Limitations for November 18, 1999 Injury**

The claimant has the burden of proof in establishing that a claim for benefits for the November 18, 1999 injury was timely filed. A claim for additional benefits must be filed within two year from the date of injury or one year from the last payment of compensation. Ark. Code Ann. § 11-9-702(b)(1). The date of compensable injury is the date an injury is caused by an accident. Ark. Code Ann. § 11-9-702(a)(1)(B).

In the present case, Claimant's Exhibit 3 indicates that the only claim filed in this case was filed at the Commission on September 9, 2000, within two years of the November 18, 1999 injury date. As I understand the respondents' argument, the respondents' attorney asserts that this claim filing, which references accidents "on or about 2/05/00 2/20/00" is not sufficient to toll the statute of limitation for any injury possibly sustained instead on November 18, 1999, because the Form AR-C and accompanying cover letter do not reference a November 18, 1999 accident

and do not describe any alleged accident or injury occurring on November 18, 1999.

For his part, the claimant's attorney seems to argue that the Arkansas Supreme Court's reasoning in Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001) should control the situation presented in the present case. In Edens, the Court considered the Legislature's use of the term "identifiable" in Ark. Code Ann. § 11-9-102, and reasoned:

A strict construction of the statute does not require, as a prerequisite to compensability, that the claimant identify the precise time and numerical date upon which an accidental injury occurred. Instead the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified. The inability of the claimant to specify the date might be considered by the Commission in weighing the credibility of the evidence, but the statute does not require that the exact date be identified.

If I understand the claimant's argument correctly, the claimant asserts that, if the claimant is not required to establish an exact calendar date as a matter of proof to establish the occurrence of an accidental injury, then the claimant's use of the term "on or about" February 5, 2000 and February 20, 2000 in a claim filing should be sufficient to toll the statute of limitations in a claim for additional

benefits for an accidental injury that actually occurred on November 18, 1999.

Notably, the Arkansas Court of Appeals addressed the requirements necessary to state a claim for additional benefits in Cook v. Southwestern Bell Telephone Co., 21 Ark. App. 29, 727 S.W.2d 862 (1987). In that case, the Court ultimately concluded:

Because this was not an original claim for compensation and the employer was fully aware of the injury and its compensability, counsel's letter notifying the Commission that he had been employed to assist the claimant in connection with unpaid benefits, and listing the claimant's name, the employer's name and the WCC file number was sufficient to constitute a claim for additional benefits.

Of course, the present case is somewhat more complicated. For example, the attorney's letter and the Form-C filed in this case on September 9, 2000 reference only incidents that occurred in February of 2000, and give no indication that problems occurring on those dates might be continuations of problems originating on November 18, 1999. On the other hand, the Form AR-C indicates that the claimant sought both original benefits and additional benefits, and the respondents' attorney clarified at the hearing that the respondents in fact paid some benefits for

back problems including temporary disability compensation in December of 1999.

In light of the Courts' reasoning in Edens and Cook, the Arkansas Courts may ultimately agree with the claimant's attorney's current argument in the present case that his filings on September 9, 2000 were adequate to accomplish both a claim for original benefits for February 2000 injuries and a claim for additional benefits for a November 18, 1999 injury, particularly since the respondents had notice of, and apparently paid benefits on, the November 18, 1999 injury.

However, for my part, I conclude that the September 2000 filings were insufficient to state a claim for additional benefits for a November 19, 1999 injury, so as to toll the statute of limitations for that injury since (1) the September 2000 filings were specific as to both the accidents and the dates at issue and (2) as far as I can tell from this record the accidents described in the September 2000 filings in fact occurred in February of 2000 and not in November of 1999.

The purpose of the statute of limitations is to permit prompt investigation and treatment of injuries. St. John v. Arkansas Lime Co., 8 Ark. App. 278, 651 S.W.2d 104 (1983).

In my opinion, the fact that the claimant's November 1999 injury and February 2000 injuries happen to be to the same part of the body, while complicating any analysis, should not relieve the claimant of all burden of notifying her employer until the middle of a hearing, some four years after the fact, that she seeks additional benefits for a November 1999 injury, in addition to benefits for the timely identified February 2000 injuries.

For all of the foregoing reasons, I find that the claimant's September 2000 filings did not toll the statute of limitations for her November 1999 injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee/employer relationship existed on February 5, 2000 and on February 26, 2000.
2. The claimant's average weekly wage during the relevant period was \$269.00.
3. The respondents have controverted any benefits not already paid.
4. The claimant has failed to establish by a preponderance of the evidence the existence of a compensable injury supported by objective findings.

5. The preponderance of the evidence establishes that the present claim for additional benefits for a November 18, 1999 injury is also barred by the Statute of Limitations.

**ORDER**

For the reasons discussed herein, the present claim must be, and hereby is, denied.

IT IS SO ORDERED.

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MARK CHURCHWELL  
Administrative Law Judge