

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F213395

WILMA L. PIERCE, EMPLOYEE **CLAIMANT**

KROGER, EMPLOYER
SELF-INSURED **RESPONDENT**

SEDGWICK CLAIMS MANAGEMENT (TPA),
INSURANCE CARRIER **RESPONDENT**

OPINION FILED FEBRUARY 8, 2005

Hearing before Administrative Law Judge Cynthia Estes Rogers on November 10, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Ben E. Rice, Attorney at Law, Jacksonville, Arkansas.

Respondents represented by Ms. Wendy Scholtens Wood, Attorney at Law, Little Rock, Arkansas.

A hearing was held on November 10, 2004, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship at all relevant times. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$256.00 for temporary total disability and \$182.00 for permanent partial disability benefits.

Claimant contends that she suffered a gradual onset back injury as she was getting up from a bended kneeling position while working for respondent-employer

in October or November of 2000, which came to a head on January 14, 2002, when she could no longer work. She contends that she is entitled to temporary total disability benefits, medical expenses, and attorney's fees. The claimant reserves the issue of permanent total disability.

Respondents controvert the claim entirely, contending first that the claim is barred by the statute of limitations. Respondents alternatively assert that the claimant failed to timely report her alleged back injury, that she suffered from a pre-existing condition that is not causally related to her employment. Respondents contend that there are no objective findings to support a work-related back injury and no major cause evidence.

STATEMENT OF THE CASE

All parties agree that sometime in October or November of 2000, claimant was involved in an incident wherein she was in a bended position at the safe of respondent-employer and when she stood up, she hurt her knee. She reported the incident to her employer. Claimant first sought medical attention for this injury on November 8, 2000.

The medical records from this visit indicate no mention of back pain, although claimant testified that her back was hurting on that date. She testified that she did not tell the doctor of her back pain because her knee was hurting the most. The knee injury was accepted as compensable by respondents.

Claimant then filed the instant claim on December 12, 2002, listing the date of injury as January 14, 2002; the First Report of Injury to the employer is dated January 7, 2003. However, claimant admitted during cross-examination that she experienced back pain during the period between November 2000 and January 14, 2002. Claimant contends that January 14, 2002, was the date after which she could no longer work and; as such, she is contending that that is the appropriate date of injury.

Medical records reflect that claimant was seen numerous times for back pain in 2000, 2001, and up to January 14, 2002. According to the medical records, however, claimant never told her doctors that her back pain was related to the work-injury of November 2000, nor did she report this to her employer until January 7, 2003.

Although claimant testified that she had had a hysterectomy in 1999 and thought her back pain was a result of scar tissue from that surgery, she later testified on cross-examination that she “knew in her heart” her back pain resulted from the November 2000 incident at the safe wherein she suffered a compensable knee injury.

Claimant specifically testified as follows:

Q Okay. Your claim today is about a back claim, right?

A Right.

Q And isn't it true that the back claim that you're claiming today all started from November of 2000?

- A Yes.
- Q That's when you claim you were hurt, your back was hurt, was in November of 2000?
- A Correct.
- Q And isn't it your testimony that since that incident at the safe that – that was in November of 2000 – you've had back pain continuously up until January of 2002, when you couldn't work?
- A Correct.

Claimant admitted that she was well aware of respondent-employer's policy for reporting work-related injuries; she had, in fact, properly reported her knee injury in November of 2000. She stated, "We've been trained." She further admitted that she was involved in a motor vehicle accident, in which her car was totaled, in December of 2000, just after the November 2000 compensable knee injury. Claimant further admitted that there was no actual incident or injury on January 14, 2002, although she listed that as the "date of accident" on her December 12, 2002, claim for compensation.

Claimant admitted that she filed for and received a leave of absence from work for a period of time between January 29, 2001, and March 26, 2001, and reported the reason for the request as "illness," not "injury," although she testified that her back pain was so bad during that period that she could not work. James Smith, store manager for respondent-employer, testified that during claimant's employment with respondent-employer since 1997, she had had excessive absences for a host of

medical reasons. He testified that claimant did report the November 2000 knee injury to him but that she never mentioned a back injury.

Further, Mr. Smith testified that he signed claimant's request for leave of absence but that she did not tell him what the problem was – just that it was for medical reasons. Mr. Smith testified that respondent-employer did not learn that claimant was contending a back injury suffered in November of 2000 until January of 2003.

Claimant testified that she is now completely unable to work and is on social security disability.

FINDING OF FACT

Claimant's claim for compensation due to her alleged back injury is barred by the applicable statute of limitations.

DISCUSSION

Arkansas Code Annotated § 11-9-702(a)(1) states as follows:

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.

[Emphasis added.]

For purposes of commencing the statute of limitations under subdivision (a)(1) of § 11-9-702, the word “injury” is to be construed as “compensable injury” and an injury does not become “compensable” until (1) the injury develops or becomes apparent and (2) the claimant suffers a loss in earnings on account of the injury; thus, the statute of limitations does not begin to run until both elements of the rule are met. *Hall’s Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

In the instant case, both elements of the rule have been met. The claimant testified that she began working for respondent-employer in March of 1997. In November of 2000, claimant suffered a compensable work-related injury to her knee, as she was bending down at a safe and stood up. Claimant received medical treatment for her knee injury related to this incident; she never complained to her medical providers about back pain in regard to this incident.

The claimant testified at the hearing, however, as well as in her deposition, that she not only suffered knee pain but also back pain, as a result of this November 2000 incident. Based upon claimant’s own testimony, it is clear that she was experiencing back pain following the November 2000 incident. The medical records confirm that claimant complained of back pain in 2000, 2001, leading up to January 14, 2002.

Further, although claimant listed January 14, 2002, as the date of injury when filing her claim in December of 2002, she testified that there was no specific incident or injury that occurred on January 14, 2002, and that she did believe all her back

problems were as a result of the November 2000 incident at the safe. Obviously, claimant was aware of the fact that she suffered a back injury in November of 2000, which satisfies the first element.

The facts are further undisputed that the claimant did miss a sufficient amount of time from work following the November 2000 incident to entitle her to workers' compensation benefits. James Smith, manager for respondent-employer, testified that following the November 2000 incident, claimant was off work for over one month, per the order of Dr. Charles Schultz, claimant's neurologist. Further, Mr. Smith testified that claimant requested on February 19, 2001, a leave of absence from January 29, 2001, to March 26, 2001, but only noted "illness" as the reason. This leave was granted. According to records, claimant was being treated during this time by Dr. Phillip Tracy. As such, claimant obviously experienced a loss of earnings following the November 2000 incident, which satisfies the second element.

The evidence revealed that following claimant's November 2000 incident at the safe, she was aware of her alleged back injury. The evidence further revealed that claimant missed a sufficient amount of work following the November 2000 incident to experience a loss of earnings. Claimant did not file her claim for the gradual onset back injury until December 12, 2002, which is over two years after the November 2000 incident. As such, it is this examiner's opinion that the statute of limitations has expired. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge