

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F401202

LINDA K. ALEXANDER, EMPLOYEE	CLAIMANT
STEAK HOUSE, EMPLOYER	RESPONDENT
FARMERS INSURANCE EXCHANGE, CARRIER	RESPONDENT

OPINION FILED DECEMBER 1, 2006

A hearing in this case was conducted on June 21, 2006, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY, III, at Mountain Home, Baxter County, Arkansas.

Claimant was represented by Frederick Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents were represented by Carol L. Worley, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A prehearing telephone conference was held on this claim on February 23, 2006. A Prehearing Order was filed on that same date. A copy of the Prehearing Order was admitted into the record as Commission Exhibit #1.

The parties agreed to two stipulations. The first stipulation listed in the Prehearing Order was modified by agreement of the parties at the hearing; both parties then confirmed the stipulations. The following stipulations are hereby accepted.

1. The employee-employer-carrier relationship existed on or about December 15, 2003 and at all other relevant times.
2. Respondents controvert this claim.

At the June 21, 2006 hearing, the parties discussed the issues set forth in the

Prehearing Order. After agreeing to modify the second issue, the parties confirmed that the issues to be litigated and resolved are limited to the following:

1. Whether Claimant's claim is barred, in whole or in part, by the applicable statute of limitations.
2. Whether Claimant sustained a compensable low back injury on or about December 15, 2003, either as a specific incident or gradual onset injury.
3. Whether Claimant is entitled to medical benefits.

DISCUSSION

Claimant worked for the Respondent employer for approximately twenty years; her employer, Jay Winham, described her as an "excellent" employee. Over the course of that time, she experienced a number of falls, and Winham "observed [Claimant] having problems with her back for 20 years." Respondents' Exhibit #2 reveals that Claimant made at least two prior claims for compensation, one for her ankle and another for her elbow, in addition to this claim now pending before the Commission.

Claimant testified to a fall that she recalled happening "the first week or two in December" of 2003.

There's a long hallway with a swinging door. Inside that swinging door, there's a garbage can and a stainless steel sink that we put all our dirty dishes on. ... [W]hen we make up our hamburgers, we put like 20 or 30 hamburgers on a big deal and bake them for a while, pre-cook them. That enables the grease to come out. Then what they do, most cooks wait until that grease cools off before they dump that into the garbage can, but a couple of them will just take it out and then dump it into the garbage can. And that melts the garbage liner, and the grease had come out on the floor, is what happened that morning. And, when I went through the door, I hit the grease. I didn't fall all the way down to hit. I mean, I twisted and turned, and I grabbed a hold -- I dropped the dishes, of course, and grabbed a hold of the stainless steel sink, and just kind of slid under that.

She “didn’t have a lot of pain or anything, at that time, at all, but it just gradually kept, you know, being worse.”

Although she did not seek medical attention initially, Claimant did take aspirin to relieve her pain. Finally, when her pain did not resolve, she presented to Dr. Mark Williams on December 30, 2003. He then referred Claimant to Dr. John Ferguson, a specialist in neurological surgery. He took Claimant off work on January 16, 2004, and operated on her low back on June 28, 2004.

The medical records indicate that Claimant complained of low back pain as early as March 22, 1993. She complained of low back pain again on August 5, 1996, and complained of pain in her mid-back on December 14, 2000.

A medical record dated December 30, 2003, the date Claimant presented to Dr. Williams, reports: “Back pain radiating into R leg, had x 6 weeks. DDD was being followed by Foster who suggested surgery 3 yr ago.” Another entry makes reference to “Back pain - worsening over 6 wks.” There is also a reference to “[n]umb toes/parasthesias.” The doctor ordered an MRI of Claimant’s lumbar spine, prescribed medication, and set a consultation for Claimant. A Request for Consultation form faxed December 30, 2003 makes reference to Claimant’s “LBP; (R)leg parathesia.” Under the heading “Patient Insurance Carrier,” the entry for workman’s compensation is not marked; rather, next to the entry “Other” appears the notation “BC/BS.”

An MRI study of Claimant’s lumbar spine was performed on January 2, 2004. The study revealed a “[v]ery abnormal area involving the L3-L4 disc space [which] includes the lower portion of the L3 vertebral body and the upper portion of the L4 vertebral body.”

Dr. John Ferguson first examined Claimant on January 16, 2004. He recorded the

following history:

The patient is a 54-year-old white female who complains of back and leg pain, which has been progressively severe over several years. The pain has been particularly severe since November of 2003. The patient now reports that the right leg pain is more severe than the left leg pain, involving the posterior aspect of the calf particularly. ... The patient denies any specific injuries, other than a fall that occurred a few years ago.

Upon examination, the doctor found a loss of normal lumbar lordosis in Claimant's back. Straight leg raising was positive on the right at 65 degrees, but negative on the left. Dr. Ferguson read Claimant's MRI study as demonstrating "severe degenerative change at L3-4 level with collapse of the disc, lateral recess stenosis, but no overt nerve root or thecal sac compression." His impression, in part, cited "[l]umbar spondylosis with severe degenerative change at L3-4 with collapse of the disc and lateral recess stenosis, right greater than left." He noted that "[a]rrangements will be made for surgery as soon as the patient resolves some insurance issues." A lumbar spine study dated January 27, 2004 resulted in an impression of "[s]evere degenerative disc disease at L3-4."

On January 28, 2004 Claimant underwent a posterior lumbar interbody fusion at the L3-4 level. The operative note of that same date records a postoperative diagnosis of "[s]pinal stenosis, L3-4, with lateral recess stenosis and instability." Claimant's procedure was unremarkable, and she was discharged on February 2, 2004 with a prognosis of satisfactory.

Claimant continued to receive follow-up care from Dr. Ferguson. X-rays taken April 6, 2004 "demonstrate[d] satisfactory fusion at the L3-4 level." Claimant reported a recurrence of low back and right hip pain on May 19, 2004. On June 25, 2004, Claimant reported that she was "perhaps a little bit better," and Dr. Ferguson found that

“[n]eurologically she is normal.” On August 20, 2004, Dr. Ferguson opined that Claimant “has now accomplished a satisfactory recovery with resolution of her back and leg pain.”

An office note signed by Dr. Ferguson on June 30, 2004 states that he called Claimant’s attorney to discuss a letter that the attorney wanted the doctor to write concerning Claimant’s medical problems. On August 20, 2004, Dr. Ferguson signed a “To Whom It May Concern” letter that offered the following:

It is my opinion that Linda Alexander’s need for surgery (posterior lumbar interbody fusion at the L3-4 level) was contributed to significantly by a long history of heavy labor, that particularly included working as a waitress with heavy carrying of trays, etc. During this period of employment she sustained several falls, the most significant of which apparently occurred in December of 2003. While the patient did not report this specific event as the cause of her low back pain, it is probable that it contributed significantly to the problem.

Subsequently, Claimant returned to Dr. Ferguson on May 18, 2006 “with complaints of back pain and right hip pain for approximately 3 months.” Upon examination, Dr. Ferguson recorded the following impression: “1) R/O progression of LS spine disease[;] 2) Normal neuro exam[.]”

At the hearing, Winham testified to the circumstances surrounding the filing of Claimant’s First Report of Injury or Illness. This document is found on page 13 of Respondents’ Exhibit #2; it is signed by “Joanna Baxter Agent” but it is not apparent when the form was completed. Winham never saw Claimant fall; rather, he recalled:

Q. You knew about the injury about the same time it happened. Is that correct?

A. The way I recall the incident is, Linda was going to have back surgery, through Blue Cross/Blue Shield. They denied the claim, saying that it was degenerative. And then [she] said, well, I fell; I would like to file a claim. We filed a claim. And that’s the process that I recall.

Q. So you didn't know about any fall until this conversation --

A. Until Linda called me and told me, they're not going to pay my insurance claim, because they say it's degenerative, but I fell at the restaurant; I would like to file a claim. We filed a claim.

Winham testified that he called his insurance agent the same day that Claimant reported her claim.

In the space on the First Report form to discuss the cause of injury there appears the notation "years of working as waitress." Winham addressed that notation.

Q. So [Claimant] told you about a fall, right?

A. She told me that the reason she wanted to file a claim on a specific fall she had was because her insurance company would not pay for her back surgery.

Q. Okay. Then are you the one that supplied this information, years of working as a waitress?

A. I don't recall that.

....

Q. Okay. But, when she told you about the fall, she didn't also say, and I'm hurting from years of working as a waitress.

A. I don't recall her telling me that.

Claimant testified that she first discussed her fall with Winham "the first of January [2004], sometime in there." After her first visit with Dr. Ferguson, they discussed the matter some more, until he finally told her the weekend prior to her surgery "to call Joanna at Farmers and place the claim." Claimant complied.

Q. Okay. And did you say, when you talked to Joanna, that it's only regarding that this injury was with regard to many years of working as a waitress? Or did you talk about falling --

A. No. I talked about slipping in the grease.

Q. Okay. So you don't know why she put down many years working as a waitress?

A. No.

Q. As far as you're concerned, it was that specific injury that you had in December of 2003.

A. Yes, sir.

Claimant addressed the date her injury occurred in the context of the histories recorded by Dr. Williams and Dr. Ferguson.

Q. And so, when Dr. Ferguson says, November of 2003, and Dr. Williams says, six weeks before December 30th of 2003, those are probably not right. Is that correct?

A. Well, I really don't know when it was that -- the actual day I fell. But I feel like it was some time in December, around the first of December, middle of December, somewhere in there. Because I just didn't have the pain for a few weeks, you know. I just didn't -- not the severe pain that I woke up with. I was taking Aleve and all kinds of, you know, over-the-counter relief to go on to work, but the actual pain down the back of my leg didn't start until the end of December, toward the end of December.

Claimant was "almost 100 percent sure that it was some time after ... Thanksgiving."

Claimant's belief that her back condition resulted from her fall is noted above. While she acknowledged prior back problems, she was certain that she felt differently after her fall: "The difference after the December slip in the grease was, I was having severe burning down the back of my legs." Her problems prior to the fall were not "that severe," so she assumed "that the slip and all that was what caused the pain to start down [her] leg."

In light of her prior claims for compensation, and her status as a supervisor, Claimant acknowledged that she knew what to do if she had a claim. Winham testified that Claimant knew where the appropriate claim-related forms were located and that she had actually completed and signed forms for other employees. He believed Claimant could

have filed a claim with the Commission herself. Nonetheless, as corroborated by the medical records, Claimant acknowledged that she submitted Dr. Williams' statement to her private health insurance carrier.

A. Compensability

Although the first issue listed by the parties involves the statute of limitations, it is not necessary to discuss that issue to resolve this claim. Instead, regardless of whether the statute of limitations bars this claim, it can be addressed by considering Claimant's burden to prove a compensable injury.

1. Gradual Onset Injury

Ark. Code Ann. § 11-9-102(4)(A)(ii)(b) defines "compensable injury" to include an injury causing internal physical harm to the body and arising out of and in the course of employment, if it is a back injury not caused by a specific incident or which is not identifiable by time and place of occurrence. See Wal-Mart Stores, Inc. v. Leach, 74 Ark. App. 231, 234, 48 S.W.3d 540, ___ (2001). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant did not sustain her burden of proving by a preponderance of the evidence that she sustained a gradual onset injury to her back. Indeed, Claimant's testimony demonstrates that she is convinced she sustained a specific incident injury: she repeatedly testified to a fall, and believes that her physical condition was worse after her alleged fall than it was before. Dr. Ferguson's August 20, 2004 statement is equivocal: he

first states that Claimant's need for surgery "was contributed to significantly by a long history of heavy labor," but then states that an alleged incident in December of 2003 probably "contributed significantly to the problem." And again, this statement is not consistent with Claimant's belief that a specific fall in December of 2003 caused her back to become symptomatic. There simply is not a preponderance of the evidence to support a gradual onset injury finding.

2. Specific Incident Injury

Pleading in the alternative, Claimant alleges she sustained a specific incident injury in December of 2003. Claimant must prove that she sustained a compensable injury as defined by Ark. Code Ann. § 11-9-102(4)(A)(i). Among other requirements, Claimant must prove that her injury was caused by a specific incident and is identifiable by time and place of occurrence. Id. Claimant must sustain her burden of proving a compensable specific incident injury by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4)(E)(i).

I find that Claimant failed to sustain her burden of proving by a preponderance of the evidence that her back condition arose out of a specific incident. The inconsistencies between the history recorded by Dr. Williams, the history recorded by Dr. Ferguson, and Claimant's testimony at the hearing make it difficult to ascertain exactly what happened and when. If the history given to Dr. Williams is correct, Claimant first felt an onset of symptoms some time in mid-November, that is, six weeks prior to December 30, 2003. Of course, Dr. Ferguson's recorded history specifically notes that Claimant "denies any specific injuries, other than a fall that occurred a few years ago." Then, in the apparent context of a denial of coverage by her private health insurance carrier, Claimant testified to a fall that occurred in early or mid-December. She could not pinpoint a specific date for

her fall. Given these inconsistencies, a preponderance of the evidence will not support a finding that Claimant sustained an injury caused by a specific incident identifiable by time and place of occurrence.

B. Remaining Issues

As noted above, it is not necessary to address the statute of limitations issue; Claimant failed to prove a compensable injury, regardless of whether her claim is barred by the statute of limitations. Similarly, it is not necessary to discuss Claimant's request for medical benefits: such benefits are payable only upon a determination that an injury is compensable. See Ark. Code Ann. § 11-9-102(4)(F)(i).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed on or about December 15, 2003 and at all other relevant times.
3. Respondents controvert this claim.
4. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a gradual onset injury to her back. Claimant testified to a specific incident injury; the evidence will not support a finding of a gradual onset injury.
5. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a compensable specific incident injury to her back. Inconsistencies between Claimant's testimony and the histories recorded by Dr. Williams and Dr. Ferguson compel the conclusion that there is not a preponderance of the evidence in support of a finding of a specific incident identifiable by time and place of occurrence.

6. Because Claimant failed to prove a compensable injury, it is not necessary to discuss her request for medical benefits or whether her claim is barred by the applicable statute of limitations.

ORDER

Claimant failed to sustain her burden of proving that she suffered a compensable injury, whether by gradual onset or specific incident. Therefore, the above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

D. FRANKLIN AREY, III
Administrative Law Judge

DFA/ml