

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F410732

JANICE NICHOLS,  
EMPLOYEE

CLAIMANT

OMAHA SCHOOL DISTRICT,  
EMPLOYER

RESPONDENT NO. 1

ARKANSAS SCHOOL BOARD  
ASSOCIATION WCT

RESPONDENT NO. 1

SECOND INJURY FUND

RESPONDENT NO. 2

DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND

RESPONDENT NO. 3

**OPINION FILED AUGUST 4, 2006**

Hearing before Administrative Law Judge Mark Churchwell in  
Harrison, Boone County, Arkansas.

Claimant represented by Honorable Evelyn Brooks, Attorney at  
Law, Fayetteville, Arkansas.

Respondents No. 1 represented by Honorable Curtis L. Nebben,  
Attorney at Law, Fayetteville, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on May 16,  
2006 in Harrison, Arkansas. A Prehearing Order was entered  
in this case on March 23, 2006. The 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 record.

The following stipulations were submitted by the  
parties either in the Prehearing Order or during the hearing  
and are hereby accepted:

1. The employer-employee relationship existed on or about October 1, 2004. On that date, the claimant sustained a compensable injury to her left shoulder.
2. All known medical expenses have been paid to or on behalf of the claimant for the shoulder injury.
3. The claimant has exercised her right to a one time change of physician for her admittedly compensable shoulder injury, and the Commission has selected Dr. Patrick O'Brien of Branson, Missouri to treat the claimant.
4. Claimant's shoulder injury healing period ended August 24, 2005, on which date she was assigned a 5% permanent partial impairment rating to her left upper extremity on the basis of residual mild strength deficit.
5. Respondents No. 1 have accepted a 3% permanent anatomical rating to the body as a whole for the claimant's compensable shoulder injury.
6. The claimant first saw Dr. Blankenship on August 24, 2005.

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

1. Compensability of a low back injury.
2. Medical treatment (including spinal fusion).
3. Additional TTD.

The record consists of the May 16, 2006 hearing transcript and the exhibits contained therein, except to the extent that proffered testimony has been excluded below.

### **DISCUSSION**

#### **1. Evidentiary Objections**

On page 13 of the hearing transcript, Respondents No. 1's attorney objected on hearsay grounds to the claimant's proffered testimony as to why Dr. O'Brien decided to discontinue therapy. I find that the claimant's proffered testimony is impermissible hearsay, and I have therefore not considered the proffered testimony in rendering a decision in this case.

#### **2. Compensability of Low Back Problems**

Ms. Nichols sustained an admittedly compensable left shoulder injury on October 1, 2004 while attempting to move a heavy plywood screen in her classroom. In addition to treatment for her shoulder, Ms. Nichols underwent a three level lumbar fusion surgery in November of 2005. In the present claim, Ms. Nichols contends that she sustained a compensable low back injury, in addition to her shoulder injury, on October 1, 2004, and that the respondents are

liable for her spinal fusion surgery and a period of temporary disability associated with those low back problems.

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

After reviewing the entire record, I find that the claimant has failed to meet her burden of proof of establishing a compensable low back injury on October 1, 2004 for the following reasons. First, I note that Ms. Nichols required L4-5 surgery before October of 2004 and also had a documented L5-S1 annular tear which pre-existed the October 2004 incident at work.

Second, I note that Dr. Mullis' pre-operative diagnosis for the November 11, 2005 fusion surgery at issue in the present claim was lumbar disk disease at L3-4, L4-5, and L5-S1, and Dr. Blankenship's pre-operative diagnosis was degenerative disk disease at L3-4, L4-5, L5-S1, recurrent disk disruption at L4-5, and mechanical back pain secondary to segmental instability at L4-5. Neither the reports of Dr. Mullis, Dr. Blankenship, or Dr. O'Brien attribute Ms. Nichols' 2005 low back problems to the October 1, 2004 activity of moving a screen. In fact, Dr. O'Brien's August 30, 2005 office report contains a history of increasing low back pain for three months; Dr. Blankenship's August 24, 2005 clinic note likewise contains a history of an acute onset of lower back pain in May of 2005.

Third, the claimant's Form AR-C, prepared on December 1, 2004, indicates that the claimant's back problems had subsided. While Dr. Butler's nearly illegible chiropractic notes appear to make some reference to the low back and hip at times after October of 2004, his notes also make some reference to the low back and hip on occasions before October of 2004, as recently as August of 2004.

In short, while the claimant testified that she experienced persistent back pain after October 1, 2004, I find more credible her physicians' reports and her Form AR-C

which indicate that any exacerbation of Ms. Nichols' ongoing low back problems on October 1, 2004 subsided by December 1, 2004, and that her persistent back symptoms presently at issue began in approximately May of 2005.

Because the claimant has failed to establish by a preponderance of the credible evidence that a causal connection exists between the incident at work in October of 2004 and the low back abnormalities at issue subsequently diagnosed and treated with surgery on November 11, 2005, I find that the claimant has failed to establish that she sustained a compensable low back injury on October 1, 2004.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employer-employee relationship existed on or about October 1, 2004. On that date, the claimant sustained a compensable injury to her left shoulder.

2. All known medical expenses have been paid to or on behalf of the claimant for the shoulder injury.

3. The claimant exercised her right to a one time change of physician for her admittedly compensable shoulder injury, and the Commission selected Dr. Patrick O'Brien of Branson, Missouri to treat the claimant.

4. The claimant's shoulder injury healing period ended on August 24, 2005, on which date she was assigned a

5% permanent partial impairment rating to her left upper extremity on the basis of residual mild strength deficit.

5. Respondents No. 1 have accepted a 3% permanent anatomical rating to the body as a whole for the claimant's compensable shoulder injury.

6. The claimant first saw Dr. Blankenship on August 24, 2005.

7. The claimant has failed to establish by a preponderance of the evidence that she sustained a compensable low back injury on October 1, 2004, as she contends. Specifically, the claimant has failed to establish a causal connection between her low back problems at issue and the incident which occurred on October 1, 2004.

8. Because the claimant has failed to establish by a preponderance of the evidence that she sustained a compensable low back injury on October 1, 2004, the claimant's request for medical treatment and disability benefits associated with her low back problems at issue must be denied.

**ORDER**

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

**IT IS SO ORDERED.**

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HONORABLE MARK CHURCHWELL  
Administrative Law Judge