

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F510224**

**PAMELA J. SHIREMAN**

**CLAIMANT**

**AEROSPACE EDUCATION CENTER**

**RESPONDENT EMPLOYER**

**CINCINNATI INDEMNITY CO.**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED APRIL 25, 2006**

Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JAMES W. STANLEY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on March 22, 2006. A prehearing conference was held on January 4, 2006, and a prehearing order was filed the same day. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on August 28, 2005.
2. The temporary total disability rate is \$256.

The claimant contends that she sustained a compensable specific incident or, alternatively, gradual onset injury and is entitled to medical benefits, temporary total disability benefits from August 28, 2005 through October 31, 2005, and attorney's fees.

Respondents contend the claimant did not sustain a compensable injury arising out of and in the course of her employment. The claim has been controverted in its entirety.

### **ISSUES TO BE LITIGATED**

1. Compensability.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

From a review of 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 made in accordance with Ark. Code Ann. §11-9-704:

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on August 28, 2005.
2. The temporary total disability rate is \$256.
3. The claimant has proven by a preponderance of the evidence that she sustained a temporary aggravation of her degenerative disk condition and further find this was gradual onset supported by objective findings.
4. Respondents are responsible for the reasonable and necessary conservative medical care the claimant pursued from September 7, 2005 through October 31, 2005.

5. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from September 19, 2005 through October 15, 2005.

6. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

### **DISCUSSION**

The claimant, 49 years old, began her employment with the respondent employer in October 2004 and was the planetarium operator. The claimant described her duties:

Well, one of the things I do is actually present the shows when we have audiences come in. I'm the narrator of sorts. At Aerospace we have a part live and part canned show, so I introduce the show. We have the main program that came with the equipment, and then I do a live segment where I actually go through the night sky for that particular period and show people how to find their way around the night sky. (T., p. 8, lines 11-17.)

According to the claimant, she uses computer equipment for the programs and also cleans in between the shows, such as sweep the floor, routine cleaning and maintenance and change projector bulbs and filters on the computers.

The claimant described her health problems before this incident as having a pulled back muscle in 2002 and a broken wrist from a car wreck. The claimant denied having any left shoulder or neck problems before August 2005.

The claimant was questioned about her body movements in her job and she testified:

A [Claimant] Looking from the monitor in front of me to the west wall and then back to the monitor and then back to the west wall - - back and forth.

Q [Mr. Stanley] Moving your head to the left?

A Yes, sir.

Q How often did you have to do that movement? (T., p. 13, lines 20-25.)

A Sometimes, you know, an untold number of times within just a few minutes - - back and forth, back and forth. Sometimes it was just a matter of watching the west wall with, you know, the screen in my peripheral vision. But, especially when programming, it's a matter of back and forth, you know, and up and down and up down to see when this happens and when the cue happens and trying to sync everything. (T., p. 14, lines 1-7.)

The claimant testified that she was working seven days a week and as long as fourteen hours per day on Fridays and Saturdays before her injury. The claimant described her injury on August 28, 2005, as follows:

A [Claimant] If I'm not mistaken, it was a Sunday morning, and I was working on an innovation. And, as I was working back and forth, I was watching the dome, and, when I looked down, my neck popped.

Q [Mr. Stanley] Tell us a little bit about this neck pop sensation. Could you kind of give us a location of the part of your neck?

A It was right at the top of my shoulders, right at the base of my neck - - right there (indicating). And, you know, it popped. And I really didn't think that much about it until I started having some tingling in my left arm. (T., p. 16, lines 9-18.)

The claimant testified she had never had a popping sensation in her neck before this incident and she further testified that she had a tingling sensation in her left hand and her left shoulder started getting sore. The tingling turned into numbness in the hand. The claimant told Mr. Quimby on Friday before the September 7<sup>th</sup> holiday that she was having shoulder trouble, but she did not actually report an injury. However, she later reported a work injury to Mr. Quimby and he confirms the reporting.

The claimant first contends that she sustained a specific incident injury. To receive workers' compensation benefits for a specific-incident injury, a claimant must establish (1) that the injury arose out of and in the course of the employment, (2) that the injury caused internal or external harm to the body and required medical services, (3) medical evidence supported by objective findings establishing the injury, and (4) that the injury was caused by a specific incident and identifiable by the time and place of the occurrence. Ark. Code Ann. §11-9-102(4) (Supp. 2005). Compensation must be denied if the claimant fails to prove any one of these requirements by a preponderance of the evidence. Ark. Code Ann. §11-9-402(4)(E); *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). While §11-9-102(4) requires proof of a specific incident identifiable by time and place of occurrence, the statute does not require the claimant to identify the precise time and date upon which the injury occurred. *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001). However, the claimant's injury must be attributable to a particular, specific incident. *Hapney v. Rheem Mfg. Co.*, 342 Ark. 11, 26 S.W.3d 777 (2000).

The claimant has alternatively contended that she sustained a compensable

gradual onset injury. To prove the compensability of a gradual-onset injury, a claimant must establish by a preponderance of the evidence that the injury arose out of and in the course of his employment; that the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and that the injury was a major cause of the disability or need for treatment. *Wal-Mart Stores v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001); Ark. Code Ann. §11-9-102(4)(A)(ii). Objective medical evidence is necessary to establish the existence and extent of an injury, but it is not essential to establish the causal relationship between the injury and the job. *Wal-Mart Stores v. Leach*, *supra*; Ark. Code Ann. §11-9-102(4)(D).

In the present case, the claimant has proven by a preponderance of the evidence that she sustained a compensable gradual onset injury. I found the claimant to be a credible witness who presented a plausible account of her neck and shoulder problems and their development. The claimant sought medical treatment with Dr. Kenneth Johnston and C. Michael DuPriest, director of chiropractic and physical therapy. The claimant first treated with Dr. Johnston on September 7, 2005 and did not report any specific incident that might have caused her neck and shoulder pain; however, she complained of shoulder pain radiating into her back and arm. Dr. Johnston diagnosed the claimant with cervical impingement and did ultimately take some x-rays. Conservative treatment was recommended with muscle relaxers, pain medication and rest. In Dr. Johnston's March 8, 2006, deposition, he stated that on his September 19, 2005, examination of the patient he found her neck had less spasm and her grip strength was normal. Dr. Johnston recommended physical therapy for the claimant in addition to the medications mentioned. Dr. Johnston testified that the

prescriptions he ordered were not prescribed specifically for her degenerative disk disease but instead for the cervical strain, radiculopathy and muscle spasm.

While the medical evidence does not document a specific incident causing the claimant's symptoms of pain and numbness, the medical records do document the claimant had filed a work injury claim and the physical therapist's records document the claimant's work activities as being the temporary cause of her symptoms. Dr. Johnston also opined that the claimant's job activities were contributing factors causing the nerve impingement. I was persuaded that the medical opinions and the claimant's testimony were sufficient to satisfy the major cause requirement for a gradual injury. Dr. Johnston last saw the claimant for her cervical problems on October 27, 2005. Dr. Johnston did not recommend any follow-up care and released the claimant to return to full duty but did suggest she continue with home exercises. While the claimant might have some refill instructions on her medications, Dr. Johnston did not prescribe any additional medications.

After a careful review of the claimant's credible testimony, other testimony and considering the medical evidence, I find the claimant has proven by a preponderance of the evidence that she did sustain a gradual onset cervical injury that was supported by objective findings. I find the claimant had a temporary aggravation of her degenerative disk condition and sought medical treatment and by the time of the hearing the condition had mostly resolved.

Respondents are responsible for all the reasonable and necessary conservative treatment the claimant has undergone, to include the prescription medication beginning with Dr. Johnston's September 7, 2005, visit and ending with Dr. DuPriest's October 31,

2005, visit. Ark. Code Ann. §11-9-508.

The claimant next contends that she is entitled to temporary total disability benefits from August 28, 2005, through October 31, 2005. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

I find the claimant has proven by a preponderance of the evidence that she remained in her healing period and was unable to earn wages from September 19, 2005 through October 15, 2005. The claimant confirmed (T., p. 47) that she remained off work from September 19, 2005 through October 15, 2005, at the instruction of Dr. Johnston. Dr. Johnston's September 19, 2005, report documents that the claimant was taken off work and referred to physical therapy.

### **ORDER**

The claimant has proven by a preponderance of the evidence that she sustained a temporary aggravation of her degenerative disk condition and further find this was gradual onset supported by objective findings. Respondents are responsible for the reasonable and necessary conservative care the claimant pursued from September 7, 2005 through October 31, 2005. The claimant has proven by a preponderance of the evidence that she remained in her healing period and was totally unable to earn wages from September 19, 2005 through October 15, 2005.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be

paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

---

**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**