

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F804316/F804319

CELIO LOPEZ-REGALDO, Employee	CLAIMANT
TYSON POULTRY, INC., Employer	RESPONDENT
TYNET, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 17, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by E. DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On August 20, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 18, 2008, and a pre-hearing order was filed on June 20, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to his back and back of knees on June 12, 2002.
4. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$303.00 for total disability benefits and \$227.00 for permanent partial disability benefits.

At the time of the hearing the parties agreed to stipulate that at the time of claimant's alleged gradual onset injury he earned an average weekly wage of \$422.83 which would entitle him to compensation at the rate of \$282.00 for total disability benefits and \$212.00 for permanent partial disability benefits. The parties also agreed to stipulate that the last payment of compensation with respect to the June 12, 2002 injury occurred when claimant received medical treatment on August 30, 2002.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional temporary total disability and medical for his June 12, 2002 injury.
2. Compensability of gradual onset injury to back and both knees in April 2007 and payment of temporary total disability and medical as a result thereof.
3. Statute of limitations for both claims.
4. Notice as to April 2007 injury.
5. Attorney fee.

At the time of the hearing claimant indicated that at this time he was not requesting any benefits relating to his knees or lower extremities, either with respect to the June 12, 2002 injury or to an alleged gradual onset injury occurring in April 2007. Instead, benefits are only being requested with respect to claimant's low back.

The claimant contends that as a result of his June 12, 2002 injury he is entitled to additional temporary total disability and medical. Claimant further contends that in April 2007 he developed a gradual onset injury to his low back due to repetitive activity over time. He requests benefits as a result of this claim as well.

The respondent contends it accepted the June 12, 2002 injury as compensable and paid medical expenses. The last payment of compensation was made October 14, 2002 for treatment provided on August 30, 2002. The claimant filed a claim for compensation (AR-C) with the Commission on May 5, 2008 and this claim is barred by the statute of

limitations. In regard to the April 2007 claim, respondent denies that claimant sustained a compensable injury on or about that date. Further, claimant sought treatment beginning in December 2005 for his back. His claim for compensation was filed May 5, 2008 and is barred by the statute of limitations. Further, respondent raises the defense of lack of notice.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on June 18, 2008, and contained in a pre-hearing order filed June 20, 2008, are hereby accepted as fact.

2. The parties' stipulation that at the time of claimant's alleged gradual onset injury in April 2007 he was earning an average weekly wage of \$422.83 which would entitle him to compensation at the rate of \$282.00 for total disability benefits and \$212.00 for permanent partial disability benefits is also hereby accepted as fact.

3. The parties' stipulation that the last payment of compensation benefits with respect to the June 12, 2002 injury was for medical treatment provided on August 30, 2002 is also hereby accepted as fact.

4. Claimant's claim for additional benefits for the back injury of June 12, 2002 is barred by the statute of limitations.

5. Claimant's claim for benefits relating to a gradual onset injury in April 2007 is not barred by the statute of limitations.

6. Claimant has failed to prove by a preponderance of the evidence that he

suffered a compensable gradual onset injury to his back while employed by respondent.

FACTUAL BACKGROUND

_____The claimant is a 73-year-old man who began working for the respondent in February 1995. Claimant suffered an admittedly compensable injury to his low back and legs on June 12, 2002 when he was squeezed between pallets. Claimant was initially evaluated by Dr. Berestnev who diagnosed claimant's condition as post-traumatic myalgia of the biceps femoris muscle along with chronic degenerative disc disease and degenerative joint disease of the lower back. Dr. Berestnev provided claimant with medication and work restrictions. Dr. Berestnev also prescribed physical therapy for claimant's leg injury. On August 30, 2002 claimant was released by Dr. Moffitt to return to work to full duties with no return appointment scheduled and no permanent impairment.

Claimant returned to work for the respondent and continued to perform various job duties. These job duties included work in packing, packing bags of 15 to 20 pounds of breaded chicken and placing them in boxes. Claimant also testified that he was required to stack boxes that weighed 40 to 70 pounds. Claimant also testified that he was required to empty 50-pound bags of flour and that he also performed job duties which required him to pick up chicken waste from the floor and wash the floor with a power hose and broom.

Claimant next sought medical treatment from Dr. Jones on December 2, 2005. At that time claimant was complaining of left leg muscle twitching and his condition was assessed by Dr. Jones as paresthesias of the left leg. Dr. Jones referred claimant to Dr. Candler, neurologist, for an evaluation of that condition. Claimant was initially evaluated by Dr. Candler on January 24, 2006, with complaints of a burning sensation in his left hip down to his knee and on the front of his left thigh. Dr. Candler also noted that claimant had back pain in the past but that that condition had "gotten better lately." Dr. Candler diagnosed claimant's condition as meralgia paresthetica and prescribed medication. Since

that time the claimant has continued to receive treatment from Dr. Candler and from Dr. Jones. In a note dated October 26, 2006, Dr. Candler noted that the claimant suffered from degenerative disc disease in his spine and placed a 50-pound lifting restriction on him.

Claimant continued to work for the respondent until he was taken off work by Dr. Candler on April 23, 2007 with a diagnosis of L5 radiculopathy. Dr. Candler indicated in an undated letter that claimant could perform custodial work which did not require lifting of more than 10 pounds.

Claimant has filed this claim contending that he is entitled to additional temporary total disability benefits and medical benefits for his back. Claimant contends that his current back condition is a result of the June 12, 2002 injury or that he has suffered a gradual onset injury which culminated in April 2007.

ADJUDICATION

_____The initial issue for consideration involves claimant's contention that he is entitled to additional medical treatment for his low back as a result of the compensable injury of June 12, 2002. Respondent contends that claimant's claim for compensation benefits relating to the June 12, 2002 back injury is barred by the statute of limitations. The relevant statute is codified at A.C.A. §11-9-702(b)(1) which indicates that claims for additional compensation benefits are barred unless they are filed with the Commission within one year from the date of last payment of compensation or two years from the date of injury, whichever is greater. Here, claimant filed an AR-C form requesting additional benefits relating to the June 12, 2002 injury on May 5, 2008. I find that the filing of the claim for additional benefits on May 5, 2008 was more than one year from the date of last payment of compensation and more than two years from the date of the injury. Obviously, the filing on May 5, 2008 was more than two years after the date of injury on June 12,

2002. The “last payment of compensation” is the date medical services were furnished, not the date of payment. *Superior Federal Savings & Loan v. Shelby*, 265 Ark. 599, 580 S.W. 2d 201 (1979). The parties have stipulated that the last payment of compensation benefits for the June 12, 2002 injury occurred when claimant received medical treatment from Dr. Moffitt on August 30, 2002. The filing of the claim in May 2008 was more than one year after the date of last payment of compensation.

In summary, the claimant’s claim for additional compensation benefits which was filed with the Commission on May 8, 2008 was more than one year after the date of last payment of compensation which occurred on August 30, 2002 and it was more than two years after the date of injury. Therefore, claimant’s claim for additional compensation benefits relating to the June 12, 2002 injury is barred by the statute of limitations.

The claimant also contends that he suffered a gradual onset injury to his low back as a result of his job activities with the respondent. Respondent contends that this claim is also barred by the statute of limitations. The statute of limitations governing this claim is codified at A.C.A. §11-9-702(a)(1) which provides that a claim is barred unless it is filed with the Commission within two years from the date of the compensable injury. Respondent contends that since claimant first sought medical treatment for a back injury in December 2005, his filing of the claim in May of 2008 was more than two years later; therefore, it is barred. However, the statute of limitations does not begin to run until the true extent of the injury manifests and causes an incapacity to earn wages sufficient to give rise to a claim for disability benefits. *Hall’s Cleaners v. Wortham*, 311 Ark. 103, 842 S.W. 2d 7 (1992); *Donaldson v. Calvert-McBride Printing Company*, 217 Ark. 625, 232 S.W. 2d 651 (1950); and *Shepard v. Easterling Construction Company*, 7 Ark. App. 192, 646 S.W. 2d 37 (1983). In *Joyce Hamm v. Alumacraft Boat Company*, Full Commission Opinion filed December 17, 1998 (E708498), the Full Commission found that Act 796 of 1993 did not change the law with respect to the injury date for gradual onset injuries. Therefore, for a

gradual onset injury the statute of limitations does not begin running until the claimant has suffered an apparent injury and they have also suffered a loss in wage earning capacity as a result of the injury. *Pina v. Wal-Mart Associates, Inc.*, Full Commission Opinion filed June 17, 2004 (F201405).

In this particular case, even if one assumes that claimant's back injury became apparent in December 2005 when he sought medical treatment from Dr. Jones, he did not miss work as a result of this alleged compensable injury until April 2007 when he was taken off work by Dr. Candler. Therefore, the two-year period for filing a claim did not begin running until that date and claimant's claim which was filed in May 2008 was timely filed. Accordingly, I find that claimant's claim for a gradual onset injury to his back is not barred by the statute of limitations.

In order to prove compensability of a gradual onset injury to the back, claimant has the burden of proving by a preponderance of the evidence that his injury arose out of and in the course of his employment with the respondent. He must also establish a compensable injury by medical evidence supported by objective findings and the resultant condition is compensable only if the compensable injury is the major cause of the disability or need for medical treatment. A.C.A. §11-9-102(4)(D); (4)(E)(ii).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a gradual onset injury to his low back which culminated in April 2007.

First, I believe it is important to note that claimant specifically testified that his back condition has basically been the same since the injury in June 2002.

Q. And your condition in regard to your back and your legs has basically been the same ever since this pallet accident; isn't that correct?

A. Correct.

Q. Do you recall telling me in your deposition that your back has hurt ever since 2002?

A. Yes. It was hurting since then, when I had the hit.

Claimant's testimony that his back pain has been basically the same since June 2002 is significant when one reviews the medical treatment since December 2005 which does not contain a history of a gradual onset injury attributable to claimant's job duties with the respondent. Claimant's treating physicians do not indicate that claimant suffered a gradual onset injury to his low back as a result of his job duties with the respondent. While a medical opinion addressing compensability is not necessary for a finding of compensability, the absence of such an opinion is a factor which may be considered. Claimant has testified that his back condition has essentially remained the same since the injury in June 2002. The medical evidence does not contain a history of a gradual onset injury subsequent to that date and claimant's treating physicians have not opined that claimant suffered a gradual onset injury since that date. Unfortunately for claimant while his back condition may be related to the June 2002 injury, a claim for additional benefits relating to that injury is barred by the statute of limitations as previously discussed.

In short, I simply find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a gradual onset injury to his low back which arose out of and in the course and scope of his employment with the respondent. Claimant testified that his back condition had remained essentially the same since the injury in 2002. A claim for additional benefits relating to that compensable injury is barred by the statute of limitations.

Having found that claimant failed to meet his burden of proof, it is not necessary to address the issue of notice.

ORDER

Claimant's claim for additional benefits relating to the June 12, 2002 back injury is barred by the statute of limitations. Claimant's claim for a gradual onset injury to his low back is not barred by the statute of limitations. However, claimant has failed to prove by a preponderance of the evidence that he suffered a gradual onset injury to his low back while employed by the respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$293.65.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE