

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201405

MARIA PINA, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., CARRIER	RESPONDENT

OPINION FILED JUNE 17, 2004

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE JASON WATSON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MATTHEW MAULDIN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondents appeal from a decision of the Administrative Law Judge filed September 3, 2003, finding that the claimant's claim is not barred by the statute of limitations and finding that the claimant established the compensability of her bilateral carpal tunnel syndrome for which she is entitled to benefits. Based upon our de novo review of the entire record, we find that this claim is barred by the statute of limitations. Therefore, we find that the decision of the Administrative Law Judge must be denied and dismissed.

The claimant began working for Sam's Travel in February of 1999. The claimant described her duties while working for Sam's Travel as follows:

I would take phone calls, and they would leave us messages with their name, address, phone number, and where they wanted to take a trip to. So I would take all the that information, write it down on labels, and later on go ahead and get the labels, put them in envelopes, get - - and I would get coupons, also, and stuff them with coupons, which we had from 10 to 15 coupons, different - - you know, hotels and rental cars and other promotions, stuff them in there and send out the - - the book that would correspond with the trip they wanted to take. And that's what I did, you know, part of the day. Then I would go and do folding of T-shirts another part of the day...

The claimant testified that in October of 1999 she complained to Sara Herlevic of numbness in her hands that traveled up to her forearms and elbows. After making this complaint, the claimant was given a computer to prepare the labels. The claimant did not request medical treatment at the time. In this regard, the claimant testified:

No. I didn't think it was really significant. And by that time they went ahead and switched me to the computer, which it wasn't as bad as when I was doing the - - writing. So, you know, I said probably it'll you know, start to ease off, but no - - we still - - we went ahead and kept on doing that with - - with the computer. Then I got moved and it got really severe afterwards.

The claimant continued in this position with Sam's Travel until around the summer of 2000 when she was promoted to taking payments. In August of 2000, the Sam's Travel

office moved out of state and the claimant began working for Wal-Mart Associates, Inc., in accounts payable where she reviewed invoices for discrepancies. According to the claimant, her job duties with Wal-Mart only required her to utilize her right hand while keying in the numbers from the invoices, while she turned the pages of the invoices with her left hand.

The medical records reveal that the claimant sought medical treatment on March 8, 2000, after she was involved in a motor vehicle accident. The claimant testified that this accident did not involve an injury to her hands or wrists as she was only a passenger and she was not gripping or holding anything at the time of the accident. Dr. Huskins recorded complaints of "immediate onset of pain in the neck, back, shoulders from the lumbar area up. Has had numbness in her hands." In a follow-up visit with Dr. Huskins' partner, Dr. Lueders, the claimant complained "still having chronic numbness and tingling that radiates down her arms."

On January 26, 2001, the claimant became a new patient of Dr. Kim Emerson. Although the claimant only sought an annual PAP exam at that time, Dr. Emerson performed a thorough examination of the claimant. Dr. Emerson recorded complaints of knee, elbow and wrist pain bilaterally for which the claimant took 800mg of Ibuprofen on a daily basis. Dr. Emerson further recorded:

"...she does(sic) numbness of her hands and she has to let go of what she is doing and then she feels a burning sensation. She is awakened at night..." During her examination of the claimant, Dr. Emerson noted among other things that the claimant had "...positive tinels and phalens bilaterally. Decreased sensation of the ulnar and radial aspects of digits 1-4 are noted...."

The claimant testified that she noticed an increase in her symptoms when the numbness and tingling stated going up her arm with a burning sensation. According to the claimant's testimony on direct examination, she did not notice a worsening or increase in her symptoms until January of 2002, which is what prompted her to report an injury to her supervisor. The claimant completed an Associates Statement for workers' compensation on January 30, 2002. In this statement the claimant indicated that she injured both her hands. Respondents sent the claimant to Dr. Gary Moffitt for an evaluation at that time. In his report dated January 31, 2002, Dr. Moffitt wrote:

Ms. Pina is seen today with complaints of pain, numbness and weakness in both hands. It has been bothering her for at least the past few weeks. She has no specific injury. She works doing data entry. She is having symptoms whenever she sleeps.

On her examination, there is no swelling or discoloration. Her grip does seem to be somewhat diminished. She has a

negative Tinel's but she has abnormal two point discrimination in the median nerve distribution bilaterally.

She probably has carpal tunnel syndrome. I am recommending nerve conduction studies. She may continue to work but will need to limit her gripping with both hands. I would recommend no more than two hours a day of data entry. She is to be reevaluated in one week.

On April 15, 2002, the claimant underwent an NCV/EMG performed by Dr. Miles Johnson. In his report of that same date, Dr. Johnson stated that the claimant's studies were consistent with a diagnosis of moderate to moderately severe carpal tunnel syndrome on the right and moderate carpal tunnel syndrome on the left.

The claimant consulted with Dr. Rodger Dickinson, Jr., an orthopedic surgeon with regard to her condition. In a report dated April 17, 2002, Dr. Dickinson noted:

I have seen Ms. Maria Pina because of pain and numbness of both hands which she has been experiencing for over a year. She has a history of doing a lot of repetitive motion, i.e., keypunch-type of operation computer work. She complains of pain and numbness consistent with carpal tunnel. EMG and nerve conduction also confirm the diagnosis of carpal tunnel syndrome. I certainly think that her occupation is of contributory nature to her carpal tunnel symptoms.

On April 18, 2002, the claimant signed a Claim for Compensation against Wal-Mart Associates, Inc., which was

mailed by her attorney to the Workers' Compensation Commission on April 23, 2002.

On cross-examination, the claimant confirmed her deposition testimony that she first became aware that her carpal tunnel problems were work-related in October of 2001. Moreover, the claimant confirmed her deposition testimony that she began to feel the numbness in her hands in approximately October of 2000. However, when questioned further, the claimant admitted that she actually experienced numbness and tingling in her hands, forearms, and elbows by October of 1999, while working at Sam's Travel.

Respondents contend that the claimant's claim first filed in April of 2002 is barred by the statute of limitations. It has long been held that the statute of limitations does not commence 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. Donaldson v. Calvert-McBride Printing Co., 217 Ark. 625, 232 S.W.2d 651 (1950); Shepard v. Easterling Construction Co., 7 Ark. App. 192, 646 S.W.2d 37 (1983); Hall's Cleaner's v. Wortham, 311 Ark. 103, 842 S.W.2d 7 (1992). Act 796 or 1993 provides that for purposes of statute of limitations, "the date of compensable injury shall be defined as the date an injury is caused by an accident as set forth in §11-9-102(5)," However, this

amendment did not address the injury date with regard to gradual onset injuries as in the present claim. In Joyce Ham v. Alumacraft Boat Co., Full Commission opinion filed December 17, 1998 (E708498), the Full Commission found that Act 796 did not change the law with respect to the injury date for gradual onset injuries. Accordingly, for gradual onset claims, for the purpose of commencing the statute of limitations, the claimant must have suffered an apparent injury, as well as, have suffered a loss in earning on account of the injury. In Minnesota Mining & Mfg. v. Baker, 337 Ark. 94, 982 S.W.2d 11 (1999), the Arkansas Supreme Court addressed when a scheduled injury claim becomes compensable for statute of limitations purposes. In Baker, supra., the court reasoned that loss of earnings are conclusively presumed in scheduled injury claimants, therefore, the statute of limitations begins to run when the scheduled injury became apparent to the claimant. Since the claimant's injury(ies) in the present claim is (are) scheduled under the Workers' Compensation Act, the statute of limitations began to run when the injury(ies) became apparent to the claimant.

After conducting our de novo review of the evidence, and without giving the benefit of the doubt to either party, we find that the claimant's injury became apparent at least by the date she reported her symptoms of

pain and numbness to Sara Herlevic in October of 1999 and she was provided accommodations by her employer. It may be argued that the dicta in Minnesota Mining & Mfg. v. Baker, supra, in which the court stated that statute of limitations began to run in that claim in February of 1978 because that claimant's hearing loss had not ceased to deteriorate until then, stands for the proposition that the statute of limitations does not begin to run until the claimant becomes aware of his injury and the injury has stabilized. We do not read the holding of Baker as requiring both the awareness of an injury, as well as, the stabilization of the injury prior to the commencement of the running of the statute of limitation. The initial claim in Baker was for permanent disability benefits. Therefore, in order to be entitled to permanent disability benefits, the hearing loss had to reach a point of stability. Accordingly, as we read the dicta in Baker, the requirement that the injury be stable is limited to hearing loss claims. Moreover, in the hearing loss claims, the annual hearing tests quantify the amount of loss experienced by the claimant. Such annual testing objectively demonstrated the amount of loss, and the time period in which the loss occurred, removing all elements of subjectivity as to time and amount of loss from the fact finding.

In our opinion, the standard for when the statute of limitations begins to run in a carpal tunnel claim was established by the Full Commission in Woods v. Tony Bull Motor Co., Full Commission Opinion filed September 9, 2000 (E901847). In Woods, this Commission interpreted Baker to mean that "...the statute of limitations commences running when the injury *develops or becomes apparent* to the employee." After analyzing the evidence in Woods, this Commission found that "...the claimant's current right side carpal tunnel injury became apparent to her no earlier than July 10, 1997, when Dr. S. Michael Jones reported numbness in the claimant's right hand." In Woods, the claimant testified that her condition and symptoms worsened the following year, nevertheless, this Commission did not take into consideration the claimant's testimony regarding the deterioration of her condition in finding when the statute of limitations began to run.

In the present claim, the claimant asserts that her carpal tunnel syndrome continued to decrease until October of 2001 and that she reached the point in January of 2002 that she reported her claim and sought medical treatment. We are not persuaded by this argument. First, unlike the hearing loss claims, there is no objective evidence in the record to corroborate the claimant's testimony as to whether or not her condition deteriorated

through October of 2001. We find that the claimant's carpal tunnel syndrome developed and became apparent to the claimant by October of 1999, while working for Sam's Travel. This finding is supported by the claimant's acknowledged report of her symptoms to her supervisor, Sare Herlevic. Moreover, when the claimant sought medical treatment for her unrelated automobile accident in March of 2000, the claimant complained of hand and arm numbness.

The claimant further argues that she did not become aware of her diagnosis until she was examined by Dr. Moffitt in January of 2002, and that she was not aware that her condition was work related until at least October of 2001. "[A] claimant's awareness that his [injury] is causally related to the working environment was not announced as an element of the inquiry" in Baker. See Smith v. Aluminum Company of America, 78 Ark. App. 15, 76 S.W.3d 909 (2002). Moreover, the medical evidence reveals that the claimant was diagnosed with carpal tunnel syndrome by Dr. Emerson in January of 2001, one year prior to the diagnosis by Dr. Moffitt.

The claimant has consistently complained of numbness in her hands and wrists since October of 1999. Although the claimant testified that she thought her symptoms would resolve after she was given a computer to perform her work after her initial complaint, the claimant

admitted at the hearing that her symptoms never resolved. Because the claimant's symptoms were sufficient to voice a complaint to her supervisor in October of 1999, we are constrained to find that the claimant's injury became apparent to her by at least October of 1999. Since the claimant did not file her claim for benefits until April of 2002, we find that this claim is barred by the statute of limitations. Accordingly, the decision of the Administrative Law Judge is reversed and this claim is denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I must respectfully dissent from the opinion of the majority finding that claimant's claim is barred by the statute of limitations.

Claimant is alleging that she sustained gradual onset injuries in the form of bilateral carpal tunnel syndrome (CTS). Accordingly, the question of whether this

claim is barred by the statute of limitations appears to be controlled by the decision in Minnesota Mining & Mfg. v. Baker, 337 Ark. 94, 989 S.W.2d 151 (1999). The Arkansas Supreme Court noted that Arkansas is technically a "compensable injury" state and found that a scheduled 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, which loss is conclusively presumed. Therefore, the statute of limitations with respect to scheduled injuries begins to run when the injury develops or becomes apparent to claimant because the loss of wage-earning capacity is conclusively presumed.

Additionally, the Court in Minnesota Mining & Mfg. v. Baker, supra, stated that claimant became aware of his hearing loss in February 1978, and the statute began to run in February 1978 "because his hearing did not continue to deteriorate." This seems to indicate that the statute does not begin to run until claimant becomes aware of his injury and the injury has stabilized or does "not continue to deteriorate."

I have been unable to locate any opinions by the Full Commission or the Arkansas courts trying to explain or utilize this part of the Supreme Court's decision. Curiously, the Court of Appeals mentioned this same passage in Alcoa v. Carlisle, 67 Ark. App. 61, 992 S.W.2d 172

(1999). On the final page of that opinion, the Court of Appeals set out the same quotation regarding the deterioration of claimant's hearing as is quoted above. The Court highlights the quotation with a footnote which states "whether a continued deterioration of work-related hearing loss affects application of the two-year limitations period has not been presented to us."

In my opinion, the statute of limitations should not begin to run on scheduled injuries until the condition becomes apparent to claimant and has become stable or does not continue to deteriorate.

Applying the facts of the present case to the above standard, I find that this claim is not barred by the statute of limitations. There cannot be any serious dispute about whether claimant's job duties were hand intensive. Claimant credibly testified that she first began to experience numbness and tingling in her upper extremities in approximately October 1999. Claimant added that her symptoms worsened significantly in September or October 2001 and pretty much remained the same since approximately October 2001. Claimant stated that it was probably around October 2001 when she first became aware that her condition was work related. In my opinion, claimant's condition did not become stable and stop deteriorating until at least September or October 2001. Claimant filed one claim in April 2002 and

another in November 2002. Each of these claims is easily within the two year period within which a claim must be filed. Accordingly, the statute of limitations does not bar this claim.

Incidentally, I note again that claimant did not realize her condition was work related until October 2001. She had not missed any time from work. Further, she first received treatment for her condition in January 2002. Thus, she would not have had a legitimate claim, or been entitled to any workers' compensation benefits, until January 2002 at the earliest. The statute of limitations should not begin to run and claimant should not be expected to file a claim, when she does not know one exists or if no compensation benefits are due. Until that time, claimant does not even have a claim or a cause of action.

Since this claim is not barred by the statute of limitations, a determination must be made as to whether claimant's carpal tunnel syndrome is a compensable injury. Claimant's injury is established by objective findings in that electrodiagnostic studies revealed bilateral carpal tunnel syndrome. As noted above, there is really no serious dispute that claimant's job duties were hand intensive and repetitive. Since claimant's injury is carpal tunnel syndrome, and is a gradual onset injury, she does not have to prove that her job duties were rapid and repetitive. The

parties' arguments concerning compensability focus almost exclusively on whether claimant has satisfied causation requirements.

It is clear that some of the participants do not understand the two types of causation that apply in this case. Since this is a gradual onset injury, this physical injury must be the major cause of the disability and need for treatment. Additionally, claimant must prove that there is a causal connection between this injury and the employment.

Claimant suffers from hyperthyroidism, was obese at the time of injury, and had a repetitive motion job with the employer. The questions asked and the opinions given continuously discuss which of these potential risk factors is the major cause (more than 50%) of claimant's disability or need for treatment. However, that is not the correct standard. Concerning the major cause requirement, claimant must only show that the physical injury is the major cause of her disability or need for treatment. Freeman v. Con-Agra Frozen Foods, 344 Ark. 296, 400 S.W.3d 760 (2001); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). In the present case, the undisputed evidence is that claimant in fact suffers from bilateral carpal tunnel syndrome and that this physical injury is the sole cause of

her disability and need for treatment. As the sole cause, it is also obviously the major cause. See Freeman, supra.

The other question is whether claimant's physical condition is causally related to her employment. In order to satisfy this burden, claimant must only prove that her employment was a factor in causing bilateral carpal tunnel syndrome. Williams v. L & W Janitorial, Inc., ____ Ark. App. ____, ____ S.W.3d ____ (February 4, 2004) (CA 03-681).

After wading through all the confusion concerning causation in the various doctors' opinions, the greater weight of the evidence indicates that claimant's employment was a contributing factor in the development of her carpal tunnel syndrome. Dr. Dickinson, claimant's treating orthopedic surgeon, opined on several occasions that the employment was "contributory to her carpal tunnel symptoms." I really do not believe even Dr. Moffitt can seriously dispute this conclusion. It should also be noted that claimant suffered from obesity and thyroid problems for many years but did not develop CTS until she performed repetitive job duties for this employer.

Based on claimant's credible testimony concerning the development and progression of her symptoms, the opinion of Dr. Dickinson that a causal connection exists, and the lack of sufficient evidence of any reasonable nonwork-related explanation for claimant's condition, I find that

claimant has proven by a preponderance of the evidence that her bilateral carpal tunnel syndrome is causally related to her employment. Accordingly, the opinion of the Administrative Law Judge should be affirmed.

For the foregoing reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner