

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F201415

NANCY GRISHAM, EMPLOYEE

CLAIMANT

S & B POWER TOOLS, EMPLOYER

RESPONDENT

**TRAVELERS INDEMNITY COMPANY
OF CONNECTICUT, CARRIER**

RESPONDENT

OPINION FILED MAY 11, 2005

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

Claimant represented by HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE DAVID LANDIS, Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

Respondent no. 1 appeals the decision by the Administrative Law Judge finding that the claimant sustained an aggravation of a pre-existing condition on January 30, 2002. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury while in the employ of respondent employer no. 1 on

September 5, 2000. This injury was accepted by the respondents and associated benefits were paid. At the time, the claimant was diagnosed with a herniated nucleus pulposus at L4-5 with right lateral recess stenosis and central canal impingement. She was also diagnosed with facet arthritis at L5-S1 and minor sacroiliac joint arthritis bilaterally. The claimant was ultimately referred to an orthopedic surgeon, Dr. Edward Cooper. Dr. Cooper treated her conservatively with physical therapy and medication but ultimately referred her to Dr. Stephen Gipson for pain management. Dr. Gipson treated the claimant with epidural steroid injections which helped with her pain and symptoms. The claimant returned to full duty work on January 15, 2001.

The claimant was seen by Dr. Gipson on May 3, 2001, for a regularly scheduled follow-up visit after 6 months. Dr. Gipson noted:

Ms. Grisham comes having done really well for six months. She recently had some pain return in her lower back across the iliolumbar fascia. I identified and injected five trigger points there using 12 cc of trigger joint solution. She tolerated this well. I will see her back on an as needed basis. I encouraged her to exercise and continue to work at full pace.

On January 30, 2002, the claimant contended that she sustained a compensable injury while repacking table saws. The claimant reported the injury to the respondent employer and received treatment by the designated medical provider. As of the date of this alleged January 30, 2002, injury, the respondent employer's insurance provider had changed from Fireman's Fund to Travelers Insurance Group. We would note that Fireman's Fund was not made a party to this case.

The claimant ultimately received treatment from Dr. Gipson on February 11, 2003. She continued to receive epidural steroid injections from Dr. Gipson. Dr. Gipson diagnosed the claimant with low back pain/lumbar spondylosis with myelopathy.

The claimant continued working for the respondent employer after the January 30, 2002, alleged injury. However, she received a voluntary lay-off in April of 2002. The claimant started a barbeque business sometime after January of 2002. However, she testified that she didn't do anything other than season the meat which the catering business prepared. The claimant alleged that all the set up was performed by her sons and that all the driving was

performed by her disabled husband, who we note suffers from seizures.

Dr. Gipson continued to treat the claimant for her subjective complaints of pain but no additional diagnostic tests were performed. The claimant did not take any time off because of the injury other than for medical treatment. She did not have any additional MRI studies.

In Maverick Transp. V. Buzzard, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated:

An aggravation is a new injury resulting from an independent incident. Farmland Ins. Co. v. DuBois, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Weldon v. Pierce Bros. Constr., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The test to determine whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983). If there is a causal connection between the primary and the subsequent disability, there is no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Guidry v. J & R Eads Const. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984), Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), Davis v. Old Dominion Freight Line, Inc. 341 Ark. 751, 20 S.W.3d 326 (2000).

In our opinion, the injury that the claimant sustained in January of 2002, was a recurrence of her prior injury. The Administrative Law Judge found that the claimant

had an aggravation which requires the claimant to prove all the elements of compensability for an injury. However, there is no objective evidence of an injury to support a finding of an aggravation. Objective medical evidence is necessary to establish the existence and extent of an injury, but not essential to establish the causal relationship between the injury and a work-related accident. Horticare Landscape Mgt. V. McDonald, 80 Ark. App. 45, 89 S.W.3d 375 (2002).

Objective findings are defined at Ark. Code Ann. § 11-9-102(16) as those findings which cannot come under the voluntary control of the patient. When the Commission determines physical or anatomical impairment, complaints of pain, straight-leg raising tests, or active range of motion tests shall not be considered objective findings. Objective medical evidence is not essential to establish the causal relationship between the injury and a work-related accident where objective medical evidence establishes the extent and existence of the injury, and a preponderance of other non-medical evidence establishes a causal relation to a work-related incident. McDonald.

After the alleged January 30, 2002 injury, the claimant was treated for subjective complaints of pain. She

never had any diagnostic procedures performed. As late as April 2, 2002, Dr. Gipson was still referring to the older MRIs that were performed before January 30, 2002. Further, in a note from Dr. Hutchison, who treated the claimant immediately after this alleged injury, he stated that the claimant's current problems were a continuation of her original injury in September of 2000. Dr. Hutchison's opinion was based upon a letter sent to Dr. Hutchison from the respondent carrier asking whether or not the claimant's current problems were the result of a new injury or if they were a continuation of her original September 2002 injury. It was in a hand-written notation that Dr. Hutchison related that "the patient's current problem is a continuation of the original injury of 9/2000."

The medical evidence is void of any objective findings of injury to the claimant. Although Dr. Gipson's report mentions the term "inflammation", it does not indicate the means by which the inflammation was detected. Inflammation cannot be detected visually as it is a nerve root and there was no additional testing performed to show any inflammation. The term inflammation alone without some indication of the means by which the inflammation was

detected is insufficient to constitute an objective medical finding. Further, Dr. Gipson's notes indicate that he was relying upon the older MRIs that were performed prior to the second alleged injury to treat the claimant's subjective complaints of pain.

Ark. Code Ann. §11-9-102(4)(A)(i) (Repl. 2002) specifically defines a compensable injury as an injury "caused by a specific incident and ... identifiable by time and place of occurrence." The Commission has held that complaints of pain while at work are not sufficient to prove by a preponderance of the evidence that the pain is work-related. Jerry Caves v. Riverside Furniture Corp., Full Commission Opinion filed August 12, 1999 (Claim No. E714394). In Hapney v. Rheem Manufacturing Co., 342 Ark. 11, 26 S.W.3d 777 (2000), the Arkansas Supreme Court affirmed the Full Commission's finding that when a claimant cannot recall anything specific happening, did not know how she was injured, did not associate her pain with any particular, specific incident, then a specific incident injury claim is meritless.

The Full Commission likewise found in Ruth Howard v. Wal-Mart, Full Commission opinion filed November 3, 1999,

(Claim No. E814194) that the claimant had failed to satisfy the specific incident element of compensability when she was "unable to identify any particular activity which caused her symptoms, and testified that she was merely hurting at the end of a long work day, and that there was no specific work-related incident."

When the claimant began her employment with the respondent employer in 1996, she indicated that she was taking Naproxin for arthritis. The diagnostic tests performed after her injury in 2002, indicated that the claimant suffered from facet arthritis in the L5-S1 discs and bilateral sacroiliac joint arthritis. Dr. Cooper's notes of September 27, 2000, indicated that the claimant was still taking Naproxin and his x-rays indicated facet joint arthritis at multiple levels.

Although Dr. Gipson used the term aggravation in his notes, it is clear that he is referring to the aggravation of her subjective pain, not of her initial injury. His notes stated:

"her pain has done well off and on until recently when she was switched to a different duty at work and lifted some boxed (sic) and aggravated her pain yet again."

This report also noted that the "pain now across the small of her back and on both sides equally, which is aggravated by bending..." These notes clearly demonstrate that Dr. Gipson used the term aggravation to describe her subjective increase in pain. He did not use it in the legal workers' compensation context meaning an aggravation of a pre-existing condition. He only found an aggravation of pain and not her injury. The claimant has presented no objective medical evidence to prove that her current problems are the result of an aggravation of her previous injury. Therefore, her problems are a recurrence of her facet arthritis, or at best, a recurrence of her previous injury. Accordingly, we find that the claimant suffered a recurrence of her pre-existing injury and/or arthritic condition on January 30, 2002. Therefore, the respondent carrier no. 1 is not responsible for any medical treatment to the claimant. We would note that the Second Injury Fund was brought in as a party to this case at the beginning and was at the hearing. However, after discovery was performed it was determined that the only issue was compensability and the

Second Injury Fund was found not to have any liability in this case.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I dissent from the majority opinion because I find that claimant suffered a compensable aggravation of a preexisting condition on January 30, 2002, and that the respondents are obligated to provide all appropriate benefits based upon that aggravation. Accordingly, I find that the Administrative Law Judge's decision was correct and should be affirmed.

The claimant originally suffered an admittedly compensable injury in September, 2000. The respondent employer's insurance carrier at that time paid her appropriate benefits based upon that injury. In the present action, the claimant alleges that she suffered a compensable

injury on January 30, 2002. By that time, the respondent employer had changed to the current carrier. The present claim was denied and has been controverted from the beginning. The majority finds on appeal that there is an alleged lack of objective findings supporting the occurrence of an aggravation on July 30, 2002.

I find that the nature and extent of claimant's injury was established in an MRI scan performed on September 8, 2000. That scan discovered that the claimant had a herniated disc at L4-L5 which did impinge into the central spinal canal. While this scan was prior to the accident which is the subject of this claim, it does establish the nature and extent of the claimant's injury.

Following her September, 2000 injury, the claimant was eventually referred to Dr. Steven Gipson, an anaesthesiologist in Memphis, Tennessee, who specializes in pain management therapy. Eventually, the claimant recovered sufficiently from her earlier injury to stop seeing Dr. Gipson. However, after her aggravation of January 30, 2002, she was almost immediately referred back to Dr. Gipson for further treatment. Dr. Gipson's treatment plan involved trigger point injections and later epidural steroid

injections. These treatments are specifically related to nerve inflammation which results from impingement. Recently, the Arkansas Supreme Court has held that treatment designed to relieve symptoms associated with an objective finding is sufficient to meet the objective medical findings criteria in the Workers' Compensation Act. See Fred's Inc. v. Jefferson, ___ Ark. ___, S. W. 3d (March 31, 2005) and Estridge v. Waste Management, 34 Ark. 276, 33 S. W. 3d. 167 (2000). I, therefore, find that this type of nerve inflammation and impingement syndrome is objective evidence of an injury and is sufficient to support a finding of a compensable aggravation of the claimant's previous condition.

For the foregoing reasons, I dissent.

SHELBY W. TURNER, Commissioner