

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401202

LINDA K. ALEXANDER, EMPLOYEE	CLAIMANT
STEAK HOUSE, EMPLOYER	RESPONDENT
FARMERS INSURANCE EXCHANGE, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 10, 2007

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

Claimant represented by the HONORABLE FREDERICK SPENCER,  
Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE CAROL L.  
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and  
Adopted.

## OPINION AND ORDER

Claimant appeals an opinion and order of the  
Administrative Law Judge filed December 1, 2006. In  
said order, the Administrative Law Judge made the  
following findings of fact and conclusions of law:

1. The stipulations agreed upon by the  
parties are reasonable and are approved.
2. The employee-employer-carrier relationship  
existed on or about December 15, 2003 and at  
all other relevant times.
3. Respondents controvert this claim.

4. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a gradual onset injury to her back. Claimant testified to a specific incident injury; the evidence will not support a finding of a gradual onset injury.

5. Claimant did not sustain her burden of proving by a preponderance of the evidence that she suffered a compensable specific incident injury to her back. Inconsistencies between Claimant's testimony and the histories recorded by Dr. Williams and Dr. Ferguson compel the conclusion that there is not a preponderance of the evidence in support of a finding of a specific incident identifiable by time and place of occurrence.

6. Because Claimant failed to prove a compensable injury, it is not necessary to discuss her request for medical benefits or whether her claim is barred by the applicable statute of limitations.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

The claimant alleges that she sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq.

The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

Therefore we affirm and adopt the December 1, 2006 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority opinion, which finds that the claimant did not sustain a compensable back injury. After a de novo review of the record, I find that the claimant provided credible testimony and evidence that she sustained a compensable injury. I further find that this injury occurred sometime in December 2003 and therefore is not barred by

the statute of limitations. As such, I must respectfully dissent.

After reviewing the record, I find that the claimant has shown that she sustained a compensable, specific incident injury after falling in December 2003. The claimant testified that around the beginning of December 2003, she sustained an injury to her back when she slipped on grease and fell. The claimant testified that she did not fall all the way to the ground, but that she slid in the grease, grabbed a sink, and "kind of slid under that". The claimant testified that after the incident she scolded the cook for pouring hot grease in the trash can, thus allowing it to melt the trash bag and leak onto the floor. She said she also told the Assistant Manager that someone needed to take care of the grease before someone got hurt.

The claimant testified that she treated herself with over the counter medication until December 30, 2003, at which time she went to Dr. Williams. The claimant said that she told the Assistant Manager of her doctor's appointment. The doctor's report from that date indicates that the claimant was suffering from pain radiating into her right leg. The claimant reported that a physician had recommended surgery three years before for her degenerative disc disease. The claimant

reported that she worked as a waitress and was on her feet a lot. She further reported a worsening of symptoms over the past six weeks. Specifically, the claimant reported parasthesias and numbness in her toes. The visit was paid for through a private health carrier.

Notably, an MRI was performed on January 2, 2004. It revealed that the claimant suffered from,

Very abnormal area involving the L3-L4 disc space includes the lower portion of the L3 vertebral body and the upper portion of L4 vertebral body. This is quite worrisome for discitis involving the vertebral bodies. There is edema involving both vertebral bodies. It could be secondary to acute trauma with edema, but I would recommend evaluation with a sed rate, and if indicated, orthopedic followup following certainly might be helpful.

The claimant was treated by Dr. Ferguson on January 16, 2004. The claimant denied having any specific recent traumas except for, "a fall that occurred a few years ago," but reported that her pain had become more severe since November of 2003. After additional testing, Dr. Ferguson recommended the claimant undergo surgery in the form of a fusion at L3-4. The surgical notes from that indicate that the postoperative diagnosis was, "stenosis, L3-4, with lateral recess stenosis and instability."

Dr. Ferguson later authored a report on August 20, 2004, in which he indicated that the claimant's need for surgery was caused in part by her long history of manual labor. He further indicated that the claimant's fall contributed to the problem. He opined,

During this period of employment she sustained several falls, the most significant of which apparently occurred in December of 2003. While the patient did not report any specific event as the cause of her low back pain, it is probable that it contributed significantly to the problem.

At the time of the hearing the claimant testified that she had suffered from prior falls and back problems. However, the claimant testified that after the fall her symptoms changed in that her pain worsened and that she began experiencing severe pain down the back of her legs. The claimant further testified that she told Jay Winham, Owner, of her injury around the beginning of 2004. She said that Winham told her that there was no accident report filled out and therefore he could not file a Workers' Compensation claim. The claimant further indicated that in the past, she and other workers were discouraged from filing claims for minor injuries. The claimant said that the weekend before she had surgery, Winham told her to

contact the workers' compensation carrier and that she complied with his request.

Winham testified that the claimant had worked for him for some 20 years and was an excellent employee. He said the claimant did not report any injury until after her private insurance carrier had denied payment for her surgery because it was related to degeneration. Winham testified that at that point the claimant indicated that she wanted to file a claim for compensation. Winham denied having any knowledge of the claimant's fall prior to that time. Winham also testified that he did not like to file Workers' Compensation claims for minor injuries, but said that he had never refused to file a claim.

The Administrative Law Judge denied the claimant's claim for benefits on the premise that the claimant had not provided consistent information regarding her injury. Specifically, the Administrative Law Judge noted that the claimant was unable to indicate the specific date on which her injury occurred. He also noted that the claimant had reported an onset of pain for six weeks on December 30, 2003, and then noted that Dr. Ferguson initially indicated the claimant denied any specific injury. Based on these conclusions, the Majority, by affirming and adopting the decision of the

Administrative Law Judge, finds the claimant did not show she sustained an injury due to a specific incident.

I must disagree with the assertions of the Majority. According to the Arkansas Supreme Court in Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001), Ark. Code Ann. § 11-9-102(4) (A) (i) (Supp. 2003) does not require claimant to identify the exact date on which his injury occurred. The statute instead only requires that the injury be identifiable by time and place of occurrence.

In this instance, I find that the claimant has shown that she sustained an injury that is identifiable by time and place of occurrence. Even the respondents' own witness testified that the claimant was a good employee and that she had a history of being trustworthy. While the claimant is unable to indicate the exact date of her fall, she was able to testify as to the approximate time that it occurred. The claimant testified that she fell sometime after Thanksgiving. This would logically place the time of her fall in early December of 2003. The claimant further testified that she believed her injury occurred sometime in early December 2003 and that she worked until January 2004.

In finding the claimant was not credible, the Majority appears to be asserting that the claimant did

not report her fall until her insurance carrier denied payment for surgery. However, I found the claimant's testimony that she reported the injury in early 2004 to be credible. The claimant testified that she had discussions with the assistant manager regarding her fall and her doctor's visits. While it is unclear when the claimant stopped working for the respondents, I find that the claimant would not have been reporting her doctor's visits unless she was still working for them. Furthermore, I note the claimant's testimony that Wilham would not initially complete a claim. When considering Wilham's testimony that he was reluctant to file a claim for what he considered to be minor injuries, I find the claimant's testimony to be more credible than his.

I further find that any inconsistencies in the medical records are insignificant. As the claimant admitted she did not know the exact date of her injury, it is certainly understandable that she would not be able to pinpoint the exact date of her injury when going to the doctor. Furthermore, I note that the claimant had ongoing back problems and testified that her symptoms progressed after the fall. The claimant was candid in admitting that she had prior back problems before the fall and it is evident from that testimony that the claimant was aware that at least a portion of

her need for treatment was due to her pre-existing condition. As such, it is understandable why the claimant would not initially be clear in reporting that she believed she sustained an aggravation due to falling at work.

Additionally, I believe that what is important to note is that the claimant's symptoms changed in December 2003. The most logical explanation for this would be that she aggravated her back due to falling. The claimant's medical reports do not reveal that she suffered from parasthesias until after her falling. Furthermore, the evidence is clear that the claimant was able to work prior to the fall. There was a three year lapse in the claimant's need for treatment for back pain, indicating that there was some change in the claimant's back in late 2003. In fact, Winham testified the claimant could carry up to four heavy plates, with food such as steak on them prior to her request to file a claim. Yet, shortly after a period which would be consistent with a time period in which the claimant says she fell, the claimant had to seek medical treatment and stop working.

More significantly, I find that the diagnostic studies reveal that the claimant suffered an aggravation to her degenerative condition. The claimant's MRI from

January 2004 indicated that the claimant suffered from edema to the vertebral bodies. The diagnostic report further indicated that the edema could be secondary to acute trauma. In my opinion, this is entirely consistent with the claimant's testimony that her condition worsened and changed after her fall.

Furthermore, when the findings of the MRI are considered in conjunction with the claimant's testimony that she suffered an increase and symptoms and an inability to work when she had been able to before, I find that it is apparent that the claimant sustained an aggravation to her back when she fell.

For the aforementioned reasons, I must respectfully dissent.

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PHILIP A. HOOD, Commissioner