

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510926

ROXIANNE FULKS, EMPLOYEE	CLAIMANT
OZARK HEALTH, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA	RESPONDENT

OPINION FILED APRIL 1, 2008

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

Claimant represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

Respondent represented by HONORABLE GUY A. WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed March 20, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed on August 24, 2005, and at all other relevant times.

3. The preponderance of the evidence fails to show that the claimant suffered a recurrence of her June 20, 2003 back injury.

4. The claimant failed to prove by a preponderance of the evidence she suffered an aggravation of a preexisting condition or a new injury to her back on August 24, 2005 during and in the course of her employment with the respondent.

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.

Thus, we affirm and adopt the 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.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the decision of the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that she suffered a compensable specific incident injury to her back on August 24, 2005. Based upon a de novo review of the entire record, I find that the claimant has proved by a preponderance of the evidence that she sustained a compensable specific-incident injury on August 24, 2005, and therefore, I must respectfully dissent.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

I find that the claimant has shown, by a preponderance of the evidence, that she sustained a compensable specific incident back injury on August 24, 2005. First, the claimant presented proof by a preponderance of the evidence that her back injury arose out of and in the course of her employment and was caused by a specific incident identifiable by time and place of occurrence. The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). In Edens v. Superior Marble & Glass, 346 Ark. 487 (2001), the Arkansas Supreme Court held that "identifiable by time and place" meant subject to identification and did not require the claimant to specify the exact time of the occurrence.

The claimant worked for the respondent as a certified nursing assistant. The record shows that the claimant had a work-related lower back injury in 1993. On June 20, 2003, the claimant reported to the respondent that

she experienced some minor back pain after lifting a patient. The record shows that no medical treatment, lost time or benefits came out of the June 20, 2003 incident, although the claimant acknowledges that she had some "twinges" in her back between the 2003 incident, and the incident on August 24, 2005, which is the subject matter of this claim.

The claimant testified on August 24, 2005 while she was transferring a resident of the nursing home, she felt pain in her low back. The claimant testified that she reported the injury to her immediate supervisor, Ms. Stephanie Kennedy. Ms. Kennedy testified that she could not remember the claimant reporting the incident to her in August, although she did remember helping the claimant fill out paperwork in October. The claimant testified that the respondent did not offer any medical treatment so she went to her own doctor. The claimant testified that on August 28, 2005 she filed a notice that she was leaving work due to back pain.

The claimant testified that on August 29, 2005, she spoke with Ms. Lisa Swofford, the Director of Human Resources, about the lack of treatment being offered by the respondent. The claimant testified that Ms. Swofford told her that the respondent would not provide treatment because her complaints were from the June 20, 2003 injury, and that the statute of limitations had run out. The supervisor's report of injury dated August 29, 2005, shows that the claimant reported the August incident. The report states: "Emp. says initially injured 6-03 transferring a patient. Happened again a week ago." The employers "Form 1" dated August 30, 2005, states that the claimant's "foot has been numb for about three days" and also indicates: "Emp. says initially injured 6-03 transferring a patient. Happened again a week ago."

Ms. Swofford testified that the claimant had indeed complained to her of an injury occurring in August 2005. Ms. Swofford testified that she thought that the claimant thought her injury was related to the 2003 incident. Ms. Swofford testified that she told the claimant

that if her complaints were related to the 2003 injury that the claim would be denied due to the statute of limitations. Ms. Swofford confirmed that the "company nurse" was called in August 2005 due to the claimant's report of an injury at that time.

I find that the credible testimony of the claimant, corroborated by the testimony of Ms. Swofford and the medical records proves by a preponderance of the evidence that the claimant sustained a specific incident lower back injury on or about August 24, 2005 while performing a patient transfer. The claimant credibly testified as to the occurrence of the injury. The non-medical record, including the Supervisor's Report of Injury dated August 29, 2005, the "Form 1" dated August 30, 2005, the "Form N" dated October 7, 2005, and the second Supervisor's Report of Injury dated October 10, 2005 all indicate that the claimant attempted to report the specific incident injury that occurred in August 2005, but apparently her report was met with confusion and resistance from the respondent. Ms. Swofford's testimony corroborates the

claimant's testimony, and partially explains the respondent's confusion. According to Ms. Swofford's testimony, the respondent believed that the claimant's symptoms were related to the at-work incident in 2003. The respondent believed this partly because the claimant mentioned the 2003 incident when she reported the 2005 incident. However, I cannot find that the claimant's mention of the 2003 incident in conjunction with the 2005 incident and injury somehow prevents the claimant from meeting her burden of proof. Arkansas workers' compensation law, while it requires quite a bit from a claimant, does not require, nor permit, a claimant to self-diagnose. I find that the claimant reported the incident and the injury to the respondent immediately after its occurrence, and should not be penalized for the respondent's confusion.

Second, the claimant has presented proof by a preponderance of the evidence, supported by objective medical findings, establishing an injury that caused internal or external physical harm to the body which required medical services or resulted in disability or

death. Objective findings are defined as findings that cannot come under the voluntary control of the patient. Continental Express, Inc. v. Freeman, 66 Ark. App. 102, 989 S.W.2d 538 (1999). The medical records show that the claimant went to the Boston Mountain Rural Health Center Clinic on August 24, 2005 reporting lower back pain with a history of "a lot of pulling and lifting" in her job as a CNA. The doctor noted "tenderness" and prescribed Flexeril for muscle spasm. X-rays taken on that date indicated mild degenerative changes in the lumbar spine. The medical record shows that the claimant returned to the clinic on September 1, 2005, reporting numbness extending into her right foot. The medical record indicates that on September 1, 2005, the claimant was referred for an MRI of the lumbar spine. The September 7, 2005 MRI report showed a right paracentral/lateral disc protrusion touching and displacing the right L4 nerve root. The medical records show that the claimant eventually underwent a discectomy by Dr. Ron Williams.

The respondent has erroneously argued that the claimant's back injury is a recurrence of her pre-existing condition. A recurrence is not a new injury, but merely another period of incapacitation resulting from a previous injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Id. 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 claimant has credibly testified as to the specific incident which caused the new injury. Although the claimant testified that she has experienced pain in her low back before, a preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W. 2d 664 (1990).

In conclusion, I find that the claimant has met her burden of proof by a preponderance of the evidence for a compensable specific incident back injury on August 24, 2005.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner