

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F710240

JOY DESPAIN, EMPLOYEE	CLAIMANT
FRANKLIN ELECTRIC COMPANY, EMPLOYER	RESPONDENT
HELMSMAN MANAGEMENT SERVICES, CARRIER	RESPONDENT

OPINION FILED MAY 4, 2009

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

Claimant represented by HONORABLE KENNETH HIXSON, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE JAMES A. ARNOLD, II, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 19, 2008.

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

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on March 5, 2008, and contained in the pre-hearing order filed March 6, 2008, are hereby accepted as fact.

2. The parties' stipulation that claimant filed an AR-C form on October 17, 2007 is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left thumb in 1993 or to her right middle and index finger in 1994.

4. Even if claimant had met her burden of proving compensable injuries in 1993 and 1994, any claim for additional compensation benefits would be barred by the statute of limitations.

5. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left thumb on or about November 22, 2005.

The claimant alleges that he 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.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part, and dissent, in part, from the majority's opinion. The majority, by affirming and adopting the June 19, 2008, opinion of an Administrative Law Judge, finds that the claimant failed to prove compensability of a right index finger, right middle finger, and left thumb injury incurred on or about November 22, 2005. Specifically, I agree that the claimant has failed to prove that she suffered a compensable injury to her right middle and index fingers. However, based upon a

de novo review of the record, I find that the claimant suffered a compensable specific incident left thumb injury. Therefore, I must respectfully dissent on this issue.

The claimant testified that on or about November 22, 2005, while she was getting three sleeves of Styrofoam cups out of a box, her thumb "popped." The claimant testified that she spoke to Mr. Phillips, who is in charge of the respondent's Workers' Compensation reporting and that he filled-in forms and she signed those forms regarding the work injury.

The medical records indicate that on November 23, 2005, the claimant presented to Dr. Rebecca Lewis, an industrial medicine specialist, complaining of pain in her left palm at the base of the thumb. The medical record notes an injury date of November 22, 2005.

The previous medical records indicate that the claimant had a complaint of left thumb pain in 1993-1994, but that there were no medical complaints regarding the injury between December 2, 1994 and November 23, 2005. The complaints from December 21, 1993, regarded pain "involving her left thumb." The December 21, 1993, medical records from Dr. Sites indicate that there "is no history of catching or locking of the thumb, and none detected today."

The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant was not able to show objective medical findings from the 2005 left thumb injury. The majority, by affirming and adopting the Administrative Law Judge, also finds that any claim for the left thumb injury would be barred by the statute of limitations. I find that the claimant has shown objective medical findings for her left thumb injury and that the statute of limitations does not bar this claim. 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. Mikel v.

Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

First, I find that the claimant presented proof by a preponderance of the evidence that her left thumb injury arose out of and in the course of employment. 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). The claimant credibly testified that she injured her left thumb when she was picking up several packages of Styrofoam cups at once. Arkansas Courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on evidence that the injury manifested itself within a reasonable period of time following the incident so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 234 Ark. 104, 357 S.W.2d 263 (1962). The claimant credibly testified that she felt a "pop" when she picked up the packages of cups. The claimant credibly testified that she had not experienced left thumb problems in the past 12 years. There are no medical records regarding

the claimant's thumb injury since 1994, demonstrating that the claimant's prior gradual onset injury had resolved. The medical notes from Dr. Lewis on November 23, 2005, relate the injury to the previous day. I find that the medical records and the claimant's credible testimony show that her left thumb injury manifested almost immediately after her injury on November 22, 2005.

Second, the claimant has presented proof by a preponderance of the evidence establishing an injury that caused internal or external physical harm to the body which required medical services or resulted in disability or death. In order for an injury to be compensable under Arkansas Workers' Compensation law, the claimant must show an injury causing internal or external physical harm to the body which required medical services or resulted in disability or death. Ark. Code Ann. §11-9-102(4)(A)(i). The claimant presented to Dr. Rebecca Lewis on November 23, 2005 with complaints of left thumb pain and later required surgery. I find that the claimant has shown proof by a preponderance of the evidence that the claimant suffered an injury which caused internal or external physical harm to the body which required medical services.

Third, the claimant must show medical evidence of an injury, supported by objective findings. Ark. Code Ann.

§11-9-102(4)(D). 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). Here, the medical records indicate that the claimant visited the Industrial Medicine Clinic on November 23, 2005 with complaints of pain at the base of the left thumb. The note from the respondent's doctor, Dr. Rebecca Lewis, notes "possibly a soft tissue mass appreciated over the flexor tendon of the thumb." It is clear that a "mass" indicates something which is not under the voluntary control of the claimant. Therefore, I find that the claimant has shown objective medical findings.

Lastly, the claimant has presented 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. 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 credibly testified that her injury occurred in November of 2005. The first post-1994 medical record addressing the claimant's finger and thumb injuries is dated November 23, 2005, and states that the claimant was injured on November 22, 2005. I

find that the specific incident giving rise to this claim is identifiable by time and place of occurrence.

The respondent argues that the injury is merely an aggravation of a previous thumb injury. Case law provides that an aggravation of a preexisting condition is compensable. Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998); Public Employee Claims Div. v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992); Nashville Livestock Comm'n v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990). An aggravation is a new injury resulting from an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. Smith-Blair, Inc. v. Jones, 11 Ark. App. 273, 72 S.W.3d 560 (2002); See Actronix, Inc. v. Curtis, ___ Ark. App. ___, ___ S.W.3d ___ (Sep. 26, 2007). I find that the statute of limitations is therefore based on the November 22, 2005 specific incident, not the dates of the alleged pre-existing conditions.

In conclusion, I concur in the finding that the claimant failed to prove by a preponderance of the evidence that she suffered a compensable injury to her right middle and index fingers but as the preponderance of the evidence shows that the claimant suffered a compensable left thumb

injury on November 22, 2005, I must respectfully dissent on this issue.

PHILIP A. HOOD, Commissioner