

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602327 & F608011

JOYCE WELCHER, EMPLOYEE	CLAIMANT
DAVIS NURSING ASSOCIATION, EMPLOYER	RESPONDENT
GUARANTEE INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED APRIL 13, 2009

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

Claimant represented by HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE JOHN DAVIS, 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 June 18, 2008.

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

1. The Workers' Compensation Commission has jurisdiction of these claims on January 31, 2006 and July 11, 2006 at which time the claimant sustained compensable right shoulder injuries at a compensation rate of \$249.00/\$187.00.

2. The claimant has failed to prove by a preponderance of the credible evidence of record that she sustained a gradual Carpal Tunnel Syndrome injury, caused by rapid and repetitive motion arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, which was the major cause of disability or the need for medical treatment, pursuant to A.C.A. §11-9-102.
3. The claimant has failed to prove by a preponderance of the credible evidence of record that she sustained compensable back and neck injuries, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment of producing disability, pursuant to Ark. Code Ann. §11-9-102.
4. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

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.

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 dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant sustained a compensable injury to her right shoulder January 31 and July 11, 2006, but failed to prove compensability of her carpal tunnel syndrome, back or neck injuries. Based on a de novo review of the record, I find that the claimant has met her burden of proof by the preponderance of the evidence for a gradual onset carpal tunnel syndrome as well as compensable specific incident neck and back injuries, and therefore, I must respectfully dissent.

History

_____ The claimant worked for Davis Nursing Association as a nurse's assistant. The claimant assisted in the care of patients at the claimant's facility. The claimant's initial injury occurred on January 31, 2006, when she was attempting to lift a patient into bed.

The initial medical report on February 1, 2006, stated that the claimant complained of "back pain" and in the next line of the report "pain in upper back." The February 1, 2006 report also notes "area of spasm" noted on the right scapula. The claimant was immediately prescribed

Flexeril in an attempt to alleviate the muscle spasms. In the next medical report on February 15, 2006, the claimant again complained of "back pain" and was again prescribed Flexeril. The February 22, 2006 medical report again notes "continued back pain" and was prescribed Vicodin. The February 22, 2006 medical report also notes the claimant's "pain is localized to right scapula area and at times travels down back." On March 7, 2006, the claimant was seen for a follow-up for her back strain and the medical notes indicate complaints of lower back pain. The medical record from Dr. Gerald Morris on March 17, 2006 notes "pain... in the upper posterior trapezius rhomboid upper thoracic area." The MRI report from April 26, 2006, note "near full thickness interstitial tear of the distal infraspinatus tendon." On May 4, 2006, Dr. Stevens diagnosed the claimant with a "rotator cuff rupture" and recommended a nerve conduction study for carpal tunnel syndrome, noting:

the patient's physical examination today was more consistent with carpal tunnel than previous. This may be related to the fact that some of her shoulder pain has decreased and she can now tell more of the pain associated with the right hand.

On July 11, 2006, while the claimant was attempting to prevent an Alzheimer's patient from wandering away from the respondent's facility, the claimant was attacked by the patient. The claimant testified that the patient struck her, injuring her back, neck, and shoulder. The medical report from July 12, 2006, notes strain of the trapezius, thoracic paravertebral, and rhomboid muscles on the right side and the claimant was again prescribed Flexeril and Lorcet.

The September 13, 2006 medical records from Dr. Earl Peeples state that "if the claimant had CTS, it was unrelated to her accidents." In his IME, The first record Dr. Peeples reviews is the March 24 report, which was nearly two months after the injury and prior to an MRI of the claimant. Dr. Peeples also noted "Carpal tunnel release might be necessary depending on findings." Despite the fact that Dr. Peeples states that there were "already plans for an MRI", Dr. Peeples reviewed an MRI. It is unclear when the MRI which Dr. Peeples used for the IME on September 13, 2006 was taken. Dr. Peeples further states that the claimant "has symptoms of carpal tunnel syndrome... there is no history of specific trauma which would account for a traumatic origin for carpal tunnel syndrome." Dr. Peeples recommended a

carpal tunnel release be performed at the same time as the repair of the rotator cuff tear.

After continued complaints of general pain in her "neck and arm region", Dr. Stevens recommended another MRI to determine the cause on February 21, 2007. On October 20, 2007, the claimant was diagnosed with carpal tunnel syndrome by Dr. Kevin Collins.

Discussion

I find that the claimant has shown, by a preponderance of the evidence, that she sustained a specific incident neck and back injury as well as gradual onset carpal tunnel syndrome.

I. Neck and Back Injuries

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, the claimant presented proof by a preponderance of the evidence that her neck and back 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). 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 testified that she injured her neck and back on January 31, 2006, when she attempted to lift a patient and "felt a pop" and felt tingling in her neck. The medical record from February 1, 2006 states the back and "upper back" injuries occurred "at work." The upper back problems would later be diagnosed as strains of the trapezius, thoracic paravertebral, and rhomboid muscles, muscles which correlate to the neck and back areas of the human body. I find that the claimant's credible testimony and the medical records show that her back and neck injuries manifested almost immediately after the January 31, 2006 employment incident and, therefore, the injuries were causally related to the claimant's employment incident.

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. 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 medical records indicate that after the

claimant reported the injury to the respondent, she was sent to Justiss Lindsey Medical Clinic. The medical report from February 1, 2006, states the claimant complained of "hurt back from work...", which demonstrates that the claimant suffered an injury requiring medical services. The claimant was diagnosed as having various strains around the trapezius, thoracic paravertebral, and rhomboid muscles, which is consistent with the claimant's complaints of neck and back pain. I find that the medical records show that the claimant has consistently complained of neck and back injury throughout this claim.

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). The Arkansas Court of Appeals has held that muscle spasms constitute objective findings. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001). Muscle spasms were noted on February 1, 2006 and the claimant was prescribed Flexeril, which satisfies the objective findings requirement of Ark. Code Ann. §11-9-102(4)(D), as muscle

spasms do not come under the voluntary control of the claimant. I find that the claimant has shown proof by a preponderance of the evidence of 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. Here, the claimant testified that she was lifting a patient and felt a pop in her back and reported this to the respondent, who subsequently sent her to the clinic for treatment the following day. The claimant's credible testimony and the medical records demonstrate that the injury was caused by a specific incident at work, identifiable by time and place.

On July 11, 2006, while recovering from the initial shoulder injury and working for the respondent on light duty, the claimant attempted to stop a Alzheimer's patient from running away from the respondent's facility. As a result, the claimant was attacked by the patient and re-

injured. The test for determining 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 injury 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. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), citing Guidry v. J & R Eads Constr. Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984). I find that the actions of the claimant were not unreasonable under the circumstances. At the time of the re-injury, the claimant was working for the respondent. Because part of the claimant's duties included preventing patients from running away from the respondent's facility, it is clear that the aggravation of the claimant's neck and back injury was a natural consequence of the first injury. I find that there is no independent intervening cause for the aggravation of

the claimant's neck and back injury, and these injuries are, therefore, compensable.

The majority denies the claimant benefits for her back and neck injuries based on the finding that the claimant could not prove compensability of injuries incurred on January 31, 2006 and July 11, 2006. In the Administrative Law Judge's opinion, the judge addressed the fact that the claimant had degenerative disc disease and previous motor vehicle accidents (MVAs) in which she injured her neck and the report that "poor effort" was shown on the Functional Capacity Evaluation (FCE). I find that the medical records clearly show that the claimant consistently complained of neck and back pain and that the FCE was inconclusive and offered contradictory determinations.

The majority, by affirming and adopting the Administrative Law Judge, erred in finding that the claimant did not prove a causal connection between the neck and back injury stating:

The only injury to the claimant's lower back occurred in 2005. Medical records after the January 2006 injury concern the upper back or thoracic area. By the time she saw Dr. Sprinkle and Dr. Collins in 2007, she was complaining of lower back and right leg problems. I find there is no causal connection

between the injuries at work in 2006 and her present lower back problems.

The medical record referred to is from January 31, 2006, which states: "c/o back pain... c/o pain in upper back." A later medical record from Dr. Lester Alexander on July 19, 2006 states: "The pain is in the trapezius area and in the infraspinatus and supraspinatus muscles." The trapezius muscles are those muscles around the neck and the infraspinatus and supraspinatus muscles are those in the upper back behind and below the shoulder. This demonstrates that the claimant was consistent in describing her pain to the medical professionals, who in turn recorded her injuries with various terms and descriptions. What was erroneously construed as a new development was, in fact, a pain consistent from the very first medical report. The medical records show that on February 1, 2006, in the first medical report related to this claim, the claimant complained of both "back pain" and "pain in upper back." In the February 15, 2006 medical report, the claimant complained of "back pain" and was given a prescription for Flexeril. The February 22, 2006 medical report notes "continued back pain." The February 22, 2006 medical report also notes the

claimant's "pain is localized to right scapula area and at times travels down back." On March 7, 2006, the claimant was seen for a follow-up for her back strain and the medical notes indicate complaints of lower back pain. These medical records indicate a consistent complaint of back pain. I find that this consistency shows that there was a causal connection between the accident on January 31, 2006 and the claimant's injury.

Furthermore, the majority, by affirming and adopting the Administrative Law Judge, appears to find that the claimant "had previously injured her neck in MVAs. Therefore, I find the claimant's neck condition is not the result of any accident at work." 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). When a preexisting injury is aggravated by a later compensable injury, compensation is in order. McMillan v. U.S. Motors, 59 Ark. App. 85, 953 S.W.2d 907 (1997). The general rule is that the employer takes the employee as he finds him, and the

employment circumstances that aggravate preexisting conditions are compensable. Public Employee Claims Division v. Tiner, 37 Ark. App. 23, 822 S.W.2d 400 (1992). Here, the majority, by affirming and adopting the Administrative Law Judge, incorrectly found that the claimant's previous injuries precluded compensability.

II. Carpal Tunnel Syndrome

In this claim, there is also the issue of the claimant's carpal tunnel syndrome. Ark. Code Ann. § 11-9-102(5) (A) (ii) controls, defining "compensable injury" as:

(5) (A) (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of the employment if it is not caused by specific incident or is not identifiable by the time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition

The Arkansas Supreme Court has interpreted this statutory language to mean that a claimant is not required to prove that her condition was caused by rapid repetitive motion when the diagnosis is carpal tunnel syndrome. Kildow v. Baldwin Piano and Organ, 333 Ark. 335, 969 S.W.2d 190 (1998).

Once the presence of a gradual onset injury is established by objective medical findings, a claimant also must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of the employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was a major cause of the disability or need for treatment; and (4) the injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(5).

First, the claimant must show by a preponderance of the evidence that the gradual onset injury arose out of and in the course of the employment. The claimant credibly testified that her job duties included having to pump up a lift to raise and lower patients. The claimant also testified that she had this particular job from 2004 to 2006. The respondent has been unable to offer any evidence to the contrary. I find that the CTS injury arose out of the claimant's employment.

Second, the gradual onset injury must cause internal or external physical harm to the body which required medical services or resulted in disability or

death. It is clear from the medical records and the claimant's credible testimony that the claimant's CTS required medical services.

Third, the gradual onset injury was a major cause of the disability or need for treatment. The claimant testified that the pumping of the lifts to raise and lower patients was the cause of her CTS, and the respondent has been unable to offer any evidence to the contrary. Furthermore, it was during the time period when the claimant worked for the respondent that the claimant became aware of her CTS.

Fourth, the gradual onset injury must be established by medical evidence supported by objective findings. On May 8, 2006, Dr. Marc Stevens stated the claimant had symptoms of carpal tunnel syndrome and recommended a nerve conduction survey. Dr. Virendar Verna opined on October 18, 2006, that the nerve conduction surveys were "indicative of possible medial nerve compromise." I find that this satisfies the objective medical findings requirement.

In conclusion, I find that the claimant has met her burden of proof by the preponderance of the evidence for

a compensable gradual onset carpal tunnel syndrome as well as compensable specific incident neck and back injuries, and therefore, I must respectfully dissent.

PHILIP A. HOOD, Commissioner