

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403063

CYNTHIA BURKHALTER, EMPLOYEE	CLAIMANT
DEPARTMENT OF FINANCE AND ADMINISTRATION, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS DIVISION, INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 22, 2004

Hearing before Administrative Law Judge Cynthia Estes Rogers on September 23, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Lewis E. Ritchey, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Richard S. Smith, Attorney at Law, Little Rock, Arkansas.

A hearing was held on September 23, 2004, to determine the compensability of the claim filed herein.

The parties stipulated to the existence of the employee-employer relationship on January 9, 2004. It was further stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$387.00 for temporary total disability and \$290.00 for permanent partial disability benefits.

Claimant contends that while she was under a doctor's restrictions limiting her lifting to no more than fifteen pounds as a result of a prior shoulder injury in December of 2000, which was not related to her employment, she was required by her supervisor on January 9, 2004, to lift and move several cases of envelopes that weighed approximately forty-five pounds each. Claimant contends that she injured her back as a result and aggravated the pre-existing shoulder injury from December

of 2000. Claimant further contends that she immediately notified her supervisor and was ignored. She seeks temporary total disability benefits from the date of injury to a date yet to be determined, medical benefits, rehabilitation, and attorney's fees. The claimant reserves the issue of permanent partial disability benefits.

Respondents controvert the claim entirely, contending that the claim is not compensable because claimant's injuries are not work-related but are, rather, due to degenerative disc disease which predates the alleged injury in January of 2004 and due to a pre-existing shoulder injury, which was not work-related.

STATEMENT OF THE CASE

Claimant worked for respondent employer for twenty-five years and ten months; she had specifically worked in the purchasing department for three years. She testified that she was planning to retire after reaching her twenty-eight year mark, as she would then be able to retire with full benefits. She has not worked since February 6, 2004, and has, to date, never been released by her doctors to return to work.

Claimant's employment with respondent employer was terminated on May 10, 2004. Claimant testified that she had no knowledge of this; she thought she was approved for leave without pay through July 1, 2004; however, when she called the personnel department to ask a question in mid-May, she was told that she was no longer an employee. She asked why she had been terminated, but personnel told her that their records indicated she had voluntarily resigned. Claimant testified that she never told anyone she wanted to resign and, in fact, had hoped to return to work and complete her twenty-eight years with the State.

Regardless, claimant had indisputably suffered a left shoulder injury in December of 2000, when she fell on the ice. Claimant testified that this was in no way a work-related incident. She had substantial treatment over the next few years, including two different surgeries performed to repair a torn rotator cuff in that shoulder. This injury left her with permanent work restrictions, which respondent was made aware of and agreed to in a letter from Linda Staley, Agency Fiscal Manager for respondent employer, to Dr. Bowen on March 8, 2002. Claimant testified that Ms. Staley is the supervisor to claimant's supervisor, Ms. Sharon Pojar. Claimant testified that she was restricted to lifting no more than ten to fifteen pounds – no heavy lifting, pushing, or pulling. Claimant was also restricted from lifting her arms above shoulder level.

Dr. Bowen noted several months later, on August 22, 2002, in a letter to Dr. Michael Stout, that claimant could return to her current job with the current restrictions and opined, "I do not anticipate any change in this." According to medical records, claimant had also complained of low back pain associated with her fall on the ice in December of 2000, but had received no treatment for her back, as her shoulder was the main injury.

Claimant testified that on January 9, 2004, her office had received a shipment of cases of envelopes that weighed approximately forty to fifty pounds each. She was instructed by her supervisor, Sharon Pojar, to help Ms. Pojar and the only other employee, Mary, move the cases of envelopes. Claimant testified that she reminded Ms. Pojar at that time of her lifting restrictions. Ms. Pojar insisted that they needed claimant's help, so claimant attempted to help move the cases. After moving a few, claimant testified that she felt like her shoulder "screamed out" and her back hurt; she

testified that she told Ms. Pojar she was hurting and that she was not going to lift anymore, and she ceased lifting the cases. She returned to her desk.

Claimant testified that when her supervisor returned, claimant told her that she was in pain. Claimant testified that Ms. Pojar said, "There is always something wrong with you," and went into her office, ignoring claimant's complaints. Claimant testified that she tried to work the rest of the afternoon, but at around 4:00 p.m., she told Ms. Pojar again that her shoulder and back were hurting. Ms. Pojar again dismissed claimant's complaints, so claimant left for the day. January 9, 2004, was a Friday. Claimant testified that she was in bed, in pain, all weekend thereafter.

Claimant testified that on Monday, she called into work and told Ms. Pojar that her shoulder was hurting so badly, she could not come to work that day. By Tuesday, she made it into work at around 10:00 a.m. Ms. Pojar asked her why she was late, and she explained that she had hurt her back and shoulder on Friday and that she had told Ms. Pojar that on that day, but still Ms. Pojar did not take any action. Claimant testified that she continued working, in pain, until February 5, 2004, at which time the pain was unbearable and she could no longer tolerate it.

She saw Dr. Collins on February 5, 2004, whom she had seen before for her previous shoulder injury. Dr. Collins took her off work for ten days, initially, but increased the off-work period after the end of the first ten days. Claimant testified that when she took the first off-work slip to her office and gave it to Ms. Pojar, she was told by Ms. Staley that she would have to fill out Family Medical Leave Act (FMLA) papers, since she was going to be off for more than three days. Again, Ms. Staley is Ms. Pojar's supervisor and is the person who approved claimant's continuing to work within the original restrictions placed upon her in March of 2002. Claimant

testified that she was not aware of whether Ms. Pojar had ever informed Ms. Staley of the January 9, 2004, incident, because Ms. Staley was not at work on January 9th.

Claimant eventually filled out workers' compensation papers on February 26, 2004. She testified that this came about because she was delivering FMLA paperwork to Ms. Jerry Jones at Human Resources, due to the fact that the doctor was taking her off work for the second time and it was to be for approximately sixty days. Claimant testified that Ms. Jones asked her why she had not filled out workers' compensation papers previously, at the time she was injured. Claimant testified that it was because she did not know she could file workers' compensation papers and catastrophic leave papers at the same time. Ms. Jones told claimant she could, and claimant immediately filled out the workers' compensation papers. This was roughly six weeks after the January 9th incident. She had been continuously under the care of various doctors, including Drs. Collins, Roman, Shahim, and Schlesinger since February 5, 2004, and subjected to numerous tests and treatments, such as steroid injections, X-rays, and MRIs.

Dr. Schlesinger opined on June 23, 2004, that claimant suffered from degenerative disc disease coupled with an annular tear at L5-S1, and that although the work injury did not *cause* the degenerative disc, it certainly could have aggravated it, thereby causing her level of pain. Dr. Collins opined on June 23, 2004, in reference to claimant's left shoulder condition specifically, "at this point, I think it is clear that [claimant] is becoming permanently disabled."

Claimant testified that today, her left shoulder hurts to the point that sometimes she is unable to even pick up a glass. She has swelling on the left side of her neck. Her lower back hurts and feels like ice picks. She stated, "I'm being stabbed in the

back by ice picks, and I can't sit long periods of time. I can't stand, twist, turn, bend. I can't sleep in my bed." She testified that she has gone from trying to sleep in the bed, to a chair, to a mat on the floor. She cannot even tie her shoes or put her bra on by herself. She testified that her husband has to help her get dressed every day.

Claimant remains under her doctors' care and had not, as of the date of the hearing, been released to return to work.

FINDINGS OF FACT

1. On January 9, 2004, claimant earned wages sufficient to entitle her to weekly indemnity benefits of \$387.00/\$290.00 for temporary total/permanent partial disability benefits.

2. Respondent employer was aware of the doctor's lifting restrictions claimant was under on January 9, 2004, and was reminded of those restrictions upon requiring claimant to lift cases that exceeded the restrictions.

3. Claimant told her supervisor on January 9, 2004, that the lifting of the cases was causing pain to her shoulder and back.

4. Claimant has proven, by a preponderance of the evidence, that her left shoulder and back conditions were aggravated as a result of the January 9, 2004, work-related incident, within a reasonable degree of medical certainty.

5. Claimant is entitled to temporary total disability indemnity benefits commencing January 9, 2004, and continuing through the end of her healing period, a date yet to be determined.

6. Claimant is entitled to treatment, both past and future, for complaints associated with her January 9, 2004, injuries to her left shoulder and back.

7. The issue of permanent disability is reserved.

8. Respondents have controverted this claim in its entirety.

DISCUSSION

Ark. Code Ann. § 11-9-701 states, in pertinent part, as follows:

(a)(1) Unless an injury either renders the employee physically or mentally unable to do so, *or is made known to the employer immediately after it occurs*, the employee shall report the injury to the employer on a form prescribed or approved by the Workers' Compensation Commission and to a person or at a place specified by the employer, and the employer shall not be responsible for disability, medical, or other benefits prior to receipt of the employee's report of injury.

[Emphasis added.]

Claimant offered credible testimony that she did, in fact, tell her supervisor, Sharon Pojar, immediately upon feeling pain in her left shoulder and back while lifting the cases of envelopes on Friday, January 9, 2004, that she was experiencing pain and would have to stop lifting the cases. Claimant testified that she was in bed, in pain, all weekend after the incident. She testified that she called in to work on Monday morning, reporting to Ms. Pojar that she was still in pain from the lifting on Friday and could not come in to work. No testimony was offered to discredit claimant's testimony.

The medical records reflect, and claimant admits, that she had pre-existing left shoulder problems as well as a degenerative disc problem with her lower back. Records also reflect, however, that claimant's prior shoulder condition had stabilized long before this January 9, 2004, incident, and that claimant was able to work prior to January 9, 2004, within her restrictions. She had no problems and was not seeking medical treatment for her shoulder or back, with the exception of occasional physical therapy and follow-up doctor visits for her left shoulder after her surgery in 2002.

The law is clear that the employer takes the employee as he finds him, *see Jim Walter Homes Travelers Ins. v. Beard*, 82 Ark. App. 607, 120 S.W.3d 160 (2003), and in this case, respondent employer was well aware of claimant's problems and restrictions. Notwithstanding that knowledge, however, the claimant still must prove that a work-related injury occurred in order to aggravate or worsen her pre-existing condition, and it is this examiner's opinion that the claimant herein has certainly proven by a preponderance of the evidence that she sustained compensable injuries to her back and left shoulder on January 9, 2004. As such, claimant is entitled to the relief she is requesting.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay past and future reasonable, necessary, and related medical expenses the claimant has and may incur as a result of her compensable injuries.

Respondents are directed to pay the claimant's attorney, Mr. Lewis Ritchey, the maximum attorney's fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge