

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NOS. F307481 & F308914**

**JOYCE CHOATE, EMPLOYEE**

**CLAIMANT**

**FLASH MARKET, EMPLOYER**

**RESPONDENT**

**LIBERTY INSURANCE CORPORATION,  
INSURANCE CARRIER**

**RESPONDENT NO. 1**

**ZENITH INSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT NO. 2**

**OPINION FILED FEBRUARY 26, 2004**

Hearing before Administrative Law Judge Dail Stiles on January 30, 2004, in Pine Bluff, Jefferson County, Arkansas.

Claimant represented by Mr. Kenneth A. Harper, Attorney at Law, Monticello, Arkansas.

Respondent No. 1 represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Mr. Marvin "Chip" Leibovich, Jr., Attorney at Law, Little Rock, Arkansas.

A hearing was held on January 30, 2004, to determine the compensability of an alleged injury sustained by the claimant on July 17, 2003.

It was stipulated that the claimant's earnings were sufficient to entitle her to weekly indemnity benefits of \$343.00 for temporary total disability and \$247.00 for permanent partial disability benefits. It was further stipulated that the claimant sustained a compensable injury arising out of and during the course and scope of her employment on July 27, 2001.

The claimant contends she sustained a compensable injury arising out of and during the course and scope of her employment on July 17, 2003. The claimant contends she sustained injuries to her neck, back and left arm. The claimant contends she is entitled to temporary total disability benefits from July 17,

2003 through a date yet to be determined, as well as attendant medical benefits and attorney's fees.

Respondent carrier No. 1, Liberty Insurance Corporation, who was on the risk for the respondent employer on July 17, 2003, contends the claimant did not sustain a compensable injury on July 17, 2003. In the alternative, respondent carrier No. 1 contends that if the claimant did sustain injuries on July 17, 2003, arising out of and during the course and scope of her employment, those injuries would constitute a recurrence of admittedly compensable injuries she sustained on July 27, 2001.

Respondent carrier No. 2, Zenith Insurance Company, who was on the risk for the respondent employer on July 27, 2001, contends that the claimant did not sustain a compensable injury on July 17, 2003. In the alternative, respondent carrier No. 2 contends that if the claimant did sustain work-related injuries on July 17, 2003, those injuries would constitute an aggravation or new injury and Zenith would have no liability for benefits arising out of the July 17, 2003 alleged injury.

#### **STATEMENT OF THE CASE**

The claimant worked in a management position with Flash Market in July of 2001. Flash Market is a convenience store selling some grocery items, gasoline and food.

The claimant testified that on July 27, 2001, she was reaching overhead and pulling a pan of chicken off a rack when the weight came down onto her left arm causing her to have pain in her neck, left arm and thoracic area of her spine.

That claim was accepted as compensable, and the claimant was treated by Dr. Wallick and Dr. Vora. The claimant received some physical therapy,

was off work for approximately three months and returned to her job essentially doing the same duties.

The claimant stated that she continued to have some difficulty intermittently and had to have help lifting things after she returned to her job. The claimant testified that her job duties consisted of, but were not limited to, cleaning a walk-in cooler, stacking soft drink crates, stocking shelves and doing paperwork associated with the maintaining of the business, inventory of the business and keeping up with other employees' work records. In addition, the claimant said she swept, mopped, cleaned bathrooms and would cook if the cook did not show up.

The claimant stated that on July 17, 2003, she was lifting a bag of oil and fuel absorbent. She stated that when she pulled on the bag to position it to where she could access it to fill up a bucket with the absorbent, she felt a pain in her neck, running down into her left arm and into her upper back.

The claimant said she reported that injury to the owner of the business, Cliff La Fitte.

The claimant said that the next day she called an adjuster with Zenith Insurance Company, because she felt it was just a continuation of problems she had first experienced in July of 2001, and was ultimately told by Zenith that they would not pay benefits on the claim, informing the claimant that Zenith was taking the position that the July 17, 2003 incident constituted a new injury.

The claimant commenced treatment in July of 2003 at the Monticello Medical Clinic. The claimant said she saw Dr. Tim Simon at that clinic, and that he initially told her to remain off work for one week and take physical therapy. The claimant said that in addition to prescribing physical therapy, Dr. Simon prescribed Valium and Mepergan for her.

The claimant said she returned to see Dr. Simon on approximately July 25, 2003, and she stated that Dr. Simon told her to remain off work another ten days and to continue physical therapy.

The claimant said she talked to an adjuster with Liberty Insurance Corporation and was advised to have a cervical MRI, and that Liberty would pay for the MRI. The claimant said as far as she knows Liberty has not paid for any other medical bills.

The claimant said that after being off for approximately two and a half weeks, she returned to Dr. Simon and was advised by him to return to work for only four hours a day for approximately three weeks.

The claimant testified that she was continued on the payroll until August 23, 2003. The claimant said that on August 23<sup>rd</sup>, Cliff La Fitte, her boss, advised her that her salary would be cut and she would only be paid for the four hours a day she worked. At that time, the claimant terminated her employment with the respondent and has not sought re-employment with the respondent employer.

The claimant said that she has pain in her neck and the left side of her head, her left shoulder, arm and her upper left back. She says she has a knot in her upper left back and that she has pain into her rib cage and that at times breathing is difficult. The claimant says she has trouble even doing household chores.

The claimant was ultimately referred by Dr. Simon to Dr. Harold Chakales, an orthopedist in Little Rock.

The claimant was asked on cross-examination if she had had previous difficulties with her neck, left arm and left shoulder prior to 2001. The claimant said she received an injury lifting a pan of chicken while working for an Exxon station in 1997. The claimant filed a workers' compensation claim for that injury and said that

she ultimately settled it or joint petitioned it for \$500.00. She was asked if she had received any other injuries to her neck, left shoulder or arm prior to 1997. The claimant said she fell out of a truck in 1992 and hurt her neck. The claimant was asked if she had received an injury to her neck and left arm in 1992 while working for another employer. The claimant replied in the negative. The claimant was reminded that she had given the same answer in her deposition, and was then confronted with documentation reflecting that she had had an injury while working for Tastee Freeze in 1992 while lifting a case of ice cream mix, sustaining injuries to her neck, left shoulder and arm. Cross-examination revealed that the claimant was off and received temporary total disability benefits for over a year because of that injury. The claimant had a hearing in front of another Administrative Law Judge and ultimately settled that claim by joint petition.

The claimant related again that she had sustained another work-related injury in 1997 to her neck and left arm. The claimant was asked if she was currently having the same symptoms as she had after the 1992 injury. She stated she was having the same symptoms except for some swelling in her left arm. The claimant also advised at her deposition that she had a low back injury in 1999 and received a permanent impairment rating to her low back and that she also settled that case. The claimant said that her lower back problem did not have anything to do with the claim for injuries to her neck and shoulder in July of 2001 or July of 2003.

After the 1992 compensable injury at Tastee Freeze where the claimant injured her neck, left shoulder, left arm, a cervical MRI was performed in August of 1992. That MRI revealed, "a slight reversal of the curve at the C4-5 level, but no significant disc abnormalities noted."

In a letter from Dr. Robert Dickins, a neurosurgeon in Little Rock, to Dr. DeRamos in Lake Village dated April 12, 1994, Dr. Dickins stated in part:

She had an MRI of her cervical spine performed in August 1992 and that study was interpreted as normal.

...

From a clinical standpoint, she presents a neck pain disorder which is primarily in the category of muscular spasm and loss of range of motion. She has had the experience in the past that physical therapy has actually made her worse.

On December 14, 1999, the claimant was seen by Dr. Jim Moore, a neurosurgeon in Little Rock, for a lumbar problem which arose from a job-related injury of October 13, 1999. In a report dated December 14, 1999, Dr. Moore commented about the claimant's neck as follows:

Her past history reflects some left shoulder symptoms for seven years which continue to bother her although she states that MRI of neck and thoracic was normal at the time.

On August 14, 2001, an MRI of the cervical spine was done at Drew Memorial Hospital by Dr. Robert Ridout, a radiologist. Dr. Ridout's report of August 14, 2001, stated in part:

No abnormalities in the cervical paravertebral muscular or soft tissue structures identified.

**FINDINGS:**

C2-C3: Normal disc for age.

C3-C4: Normal disc for age.

C4-C5: Normal disc for age.

C5-C6: Normal disc for age.

C6-C7: There are minimal degenerative changes C6-C7 intervertebral disc and only very minimal central only focal posterior annular disc bulging.

C7-T1: Normal disc for age.

On September 17, 2001, the claimant was seen by Dr. Steven Cathey, a neurosurgeon in North Little Rock. Dr. Cathey reviewed the MRI scan which had been taken of the claimant's neck. Dr. Cathey was seeing the claimant because

she had been complaining of a two month history of neck and upper back pain with radiation to the left shoulder. Dr. Cathey stated:

Plain cervical spine films are negative to my review. An MRI scan shows a minimal midline protrusion at C6-C7. There is absolutely no cord or nerve root impingement. I reassured Ms. Choate that this is a normal finding for a patient 42 years old. An MRI scan of her thoracic spine is also unremarkable.

The claimant had a repeat MRI of the cervical spine performed on June 26, 2002. That MRI showed basically the same findings that had been present in the 1992 cervical MRI and the 2001 cervical MRI.

After the claimant was referred to Dr. Chakales in 2003, a cervical myelogram and CT scan of the cervical spine was ordered. These tests were performed on October 21, 2003. A report of October 21, 2003, of those tests was authored by Dr. Doayne Dodd, a radiologist. The report stated in part:

**IMPRESSION:**

1. Essentially normal cervical myelogram with minimal annular bulging or posterior bony ridging at C3-4 and C4-5 resulting in very minimal anterior indentations on the thecal sac.

The report went on to state:

There is no significant canal stenosis at any level, and the neural foramen are also normal throughout the cervical spine.

Dr. Dodd's report noted at the C6-C7 level:

. . . there is minimal effacement of the thecal sac anteriorly but there is no canal stenosis and the neural foramen are patent.

**FINDING OF FACT**

The claimant did not sustain an injury arising out of and during the course and scope of her employment on July 17, 2003.

## DISCUSSION

In this case, the claimant attempted to hide from the respondent carriers in this case the injury she had sustained while working for Tastee Freeze in 1992. The claimant, after the 1992 injury with Tastee Freeze, had an MRI done of her cervical spine. The findings were consistent with a strain/sprain type injury, which was compensable prior to Act 796 of 1993. The claimant did not reveal that injury to the respondents when her deposition was taken and was going to deny any information about the 1992 injury until confronted with some documentation on cross-examination at the hearing on January 30, 2004. Subsequent diagnostic testing performed on the claimant, which has been exhaustive, after the injury of 1992, shows no changes in the claimant's cervical spine or thoracic spine other than those changes that are directly attributable to the aging process.

It should be noted that the claimant ultimately joint petitioned her 1992 claim.

After reviewing all the medical evidence and lay testimony, the claimant fails to establish by a preponderance of the evidence of record that on July 17, 2003, she sustained either a recurrence of the July 27, 2001 injury, which was accepted as compensable by respondent carrier No. 2, Zenith, or that she sustained a new injury or aggravation on that day.

I reiterate for emphasis that the claimant simply has no additional medically demonstrated findings past those from the MRI's that were taken of her cervical spine after her injury at Tastee Freeze in 1992.

The above claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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DAIL STILES  
Administrative Law Judge