

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306001, F306002 & F310296

JOSEPHINE H. MASHBURN, EMPLOYEE	CLAIMANT
PAT SALMON & SONS, INC., EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 10, 2004

Hearing before Administrative Law Judge Elizabeth W. Hogan on June 24, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the Honorable Emily Paul, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by the Honorable William C. Frye, Attorney-at-Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of additional medical treatment, temporary total disability benefits, and attorney's fees.

At issue is whether or not the claimant sustained compensable injuries as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence, impartially, without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant, and benefits must be denied.

STATEMENT OF THE CASE

\_\_\_\_\_The parties stipulated to an employer-employee-carrier relationship on

August 1, 2001, (Claim #F306001), at which time the claimant injured her head and shoulders when she was struck by an overhead door. Medical expenses (Concentra) were paid before this claim was controverted.

The parties also stipulated to an employer-employee-carrier relationship on June 29, 2002, (Claim #306002), when the claimant injured her right knee, repeatedly bumping her knee while driving with a broken truck seat. Medical expenses (Concentra) were paid before this claim was controverted on July 5, 2002. The claimant was earning sufficient wages to be entitled to the maximum compensation rate, \$425.00/\$319.00, in the event this claim is found to be compensable.

The parties further stipulated to an employer-employee-carrier relationship on September 19, 2003, (Claim #F310296), at which time the claimant injured her left knee and back in a motor vehicle accident. Medical expenses were paid before this claim was controverted. The claimant was earning sufficient wages to be entitled to the maximum compensation rate \$440.00/\$330.00 in the event this claim is found to be compensable. The claimant drew unemployment benefits from October 3, 2003, to May 1, 2004, at the rate of \$340.00. The claimant's employment was terminated October 13, 2003.

The claimant contends that she remains symptomatic from the first injury on August 1, 2001, and seeks treatment of her neck.

The respondents contend there are no objective medical findings to

support a compensable injury. The claimant was released to return to work on August 16, 2001.

The claimant also contends that she remains symptomatic from the second injury on June 29, 2002, and seeks treatment of her right knee. The claimant maintains that her injury was the result of a succession of specific incidents, bumping her knee while driving a truck with a broken seat.

The respondents contend the right knee injury was reported as a gradual onset claim (see the July 5, 2002, letter from Betty Allen, Claims Manager), not a specific injury. The claimant cannot meet her burden of proof regarding “rapid and repetitive” and “major cause. The respondents also contend Dr. Carle found no objective medical evidence of an injury and released the claimant to return to work on September 22. There was no further mention of her knee until March 13, 2003, when an MRI scan confirmed a meniscus tear and advanced degenerative changes. These findings are unrelated to any work activities.

The claimant further contends that she remains symptomatic from the third injury on September 19, 2003, and seeks treatment of her back and left knee. The claimant also seeks payment of temporary total disability benefits from October 13, 2003, to a date yet to be determined, and attorney’s fees. The claimant did attempt to return to work on September 30, 2003, but was not permitted.

The respondents contend the claimant was treated after the MVA, but Dr. Carle found no objective medical evidence of an injury. The claimant has a pre-existing back condition and further treatment is unreasonable, unnecessary, and unrelated to the MVA. The claimant was released for light duty on September 21 - 26, 2003, but chose not to work because her husband was having surgery. She then worked light duty on September 26 - 27, 2003. She was terminated October 13, 2003, after it was determined that she was at fault in the MVA. Therefore, the respondents contend they are not liable for additional temporary total disability benefits. The respondents further contend that the claimant is not credible. She has filed six workers' compensation claims since she began work for the respondent-employer in November 2000. Dr. Carle's records also show positive Waddell's signs during the clinical examinations, indicating symptom magnification.

The following are submitted without objection, and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript, along with the March 25, 2004, deposition of Dr. Scott Carle, incorporated by reference.

The claimant was the only witness to testify at the hearing. She admitted that she lied about her injuries on the DOT physical in order to be hired.

The claimant, age 59, (D.O.B August 26, 1944), worked for the

respondent-employer for three years. She has been employed as a truck driver most of her adult life. Her health history includes hypertension, asthma, arthritis, gastritis, sinusitis, and surgeries for breast reduction and stomach stapling. She has not worked since October, 2003.

#### MEDICAL EVIDENCE

The claimant suffered a series of injuries prior to her employment with the respondents, and missed several years of work. She also applied for Social Security Disability due to back problems prior to her employment with the respondent.

She was treated for workers' compensation claims and examined for DOT physicals at Concentra by Drs. Carle, Warren, and Almond. The claimant also received treatment from her family physician, Dr. Zelke at Landmark Medical Clinic.

The claimant's injuries include:

- 1984 – Injury while working at UPS: back, arm, shoulder, whiplash; \$50,000.00 settlement; off work over one year.
- 1990 – Fell backwards out of a truck; injured left shoulder; off work three years.
- 3/13/00 – Back strain (no objective findings).
- 4/13/01 – DOT physical. Claimant did not disclose prior injuries to Dr. Carle.
- 4/03/01 – Right leg contusion; ankle sprain; return to regular

duty April 9, 2001/April 13, 2001.

- 7/01/01 – Right foot injury from hot coffee spill; second degree burns. Return to work July 12, 2001.
- 8/01/01 – Hit in the back of the neck by overhead door while (F306001) unloading mail; neck and shoulder complaints; negative examinations; x-rays, spurring at L5; no acute changes; prescribed physical therapy and medication; released to regular duty August 16, 2001.
- 5/06/02 – Dr. Warren. Right hand injured when caught between two buggies; diagnosed with contusion; prescribed medication and physical therapy; x-rays showed old styloid bone fracture from roller skating injury; released May 23, 2002.
- 3/07/02 – DOT physical, did not reveal prior injuries.
- 6/29/02 – Injured her right knee after repeatedly striking the (F306002) dashboard due to a defective seat; x-ray showed right patellar congenital bipartate vs. old healed nonunion patellar fx; declined Cortisone injection at Concentra; obtained brace from Dr. Warren; released July 5, 2002.
- 1/29/03 – Knot on neck for 3 weeks; rash on head.
- 2/ /03 – DOT physical; no mention of neck, shoulder, or knee problems.
- 3/04/03 – Pain in right knee for one week after bending over; tenderness in calf and thigh.
- 5/13/03 – Back and left lower extremity pain.
- 9/19/03 – Left knee and back injured in MVA; positive (F310296) Waddell's signs; normal x-rays except for age-related changes; objective improvement noted in physical therapy reports (9/26/03 – 9/29/03); released for

light duty September 23, 2003; released for full duty September 29, 2003; worked until terminated on October 13, 2003.

- 2003 – Treated for gastritis and sinusitis at Landmark Medical Clinic, but no mention of back problems.
- 2003 – Worked at AR-TeX for two months following her termination.
- 2004 – Filed EEOC claim asking for job back.

The claimant sought treatment from Dr. Almond for neck and shoulder pain after an overhead door fell on her on August 1, 2001. Her clinical exam was normal except for mild tenderness from C4-C7, but “no focal disc tenderness.” X-rays showed anterior spurring at L5 [sic], but there were no acute changes or fractures. She was diagnosed with a cervical strain and contusion, and prescribed medication, physical therapy, and modified duty. There was no mention of the thoracic spine.

On June 2, 2004, Dr. Zelk ordered an MRI scan of the cervical spine which revealed multi-level, degenerative changes with spondylosis at C5-6 and a disc protrusion at T1-2/T2-3, but there is no involvement of the thecal sac, thoracic cord or nerve roots. No physician has recommended any specific treatment for the claimant’s neck or shoulders.

The claimant sought treatment for right knee pain on July 1, 2002, with Dr. Warren of Concentra Health Center. The history of injury is recorded as occurring on June 29, 2002, at 8:30 p.m. which sounds like a specific injury.

However, the same report records a history of pain, gradually beginning three months earlier (April or May, 2002) after, "driving the truck the seat in [sic] broke and it keeps bumping knee and now it hurts regardless of what she does." The claimant was diagnosed with a sprain after a normal examination, and treated conservatively with medication and physical therapy. X-rays revealed a pre-existing knee problem identified as right patellar congenital bipartate vs. old healed nonunion patellar fracture.

The claimant returned on July 5, 2002, with continued complaints of right knee pain, but she had not filled her prescriptions. She was given samples of medication and released to return to work after a second, normal examination, noting only "tenderness." The diagnosis, however, was changed to include, "contusion."

On March 11, 2003, Dr. Zelk ordered an MRI scan of the right knee which revealed a complex tear of the medial meniscus, vertical tear to the anterior horn and Grade III - IV chondromalacia.

The claimant sought treatment from Dr. Carle after the September 19, 2003, MVA, complaining of left knee and back pain. He assessed ecchymosis and tenderness of the left knee. X-rays of the knee and back revealed no acute findings or fractures. The claimant's back showed evidence of age-related changes with scoliosis. She was prescribed medication and physical therapy. Therapist, Jerry Daniel, noted objective improvement (see his reports dated

September 26, 2003, and September 29, 2003). The claimant was released for modified duty on September 29, 2003, and regular duty on October 2, 2003. It was noted during the examination, that the claimant displayed positive Waddell's signs, indicative of malingering.

On June 2, 2004, Dr. Zelk ordered a lumbar MRI scan which revealed disc degeneration and bulging at L3-4 affecting the thecal sac near the nerve root. The radiologist suggested clinical correlation for radiculopathy in the right leg. However, the claimant's clinical exams have all been normal and she was able to complete physical therapy, including a treadmill test.

No physician has recommended any specific treatment for the back and left knee.

In his deposition, Dr. Scott Carle, a general practitioner at Concentra Medical Center, testified he specializes in occupational health services, documenting and treating work-related injuries, and performing DOT physicals. His partners are Dr. Cynthia Almost and Dr. William Warren. The respondent-employer uses the center for both their DOT physicals and workers' compensation injuries.

DOT physicals ask for the patient's history of illnesses and injuries. The claimant did not report her history of injuries. She testified that if she had been honest on the form, she wouldn't have been hired. Dr. Carle was not aware of the claimant's two prior workers' compensation claims with other employers

for back and shoulder injuries. (Depo. p.26-27)

Dr. Carle felt the claimant's symptoms were inconsistent with her physical examinations and diagnostic tests. (Depo. p. 14-24) She exhibited positive Waddell's signs for somatization disorder. Dr. Carle treated her conservatively. She did not complain of any continuing symptoms from any of her injuries and he released her for full duty with no permanent impairment.

On cross-examination, Dr. Carle conceded that clinical examinations were not foolproof. It is possible that the claimant could have had a meniscal tear and a negative McMurray's test.

Dr. Carle also explained that DOT examinations have a set criteria, looking for physical conditions that would make it unsafe for the claimant to drive a truck. If she had complained about her knee during the physical, he would not have treated her symptoms. He stated that the DOT physical is not a doctor/patient relationship – it is an examinee/examiner relationship. However, the condition of the claimant's knee is relevant to the extent that the patient's gait, range of motion, ability to squat and stand easily, and operate a truck effect driver safety.

Attorney Paul pointed out that when the claimant came to see Dr. Carle on September 22, 2003, for left knee and back problems, she mentioned that her right knee, injured a year earlier, continued to bother her. Dr. Carle indicated that he would not have treated the right knee, concentrating instead

on the reason she was sent to him, specifically, the left knee and back.

Dr. Carle felt it was unlikely that the claimant could continue to work for one year with a torn meniscus from an injury as opposed to the degenerative process. Dr. Carle would have expected the claimant to experience effusion, knee locking, and instability if she had an injury, but Dr. Carle conceded it would be difficult to determine if an acute injury aggravated the pre-existing, gradual degenerative process.

On re-direct, Dr. Carle opined that the claimant's MRI scan findings, a complete tear of the posterior horn of the medial meniscus, could be degenerative in nature. He reiterated that he found no evidence of a tear in his exam one year earlier:

ATTORNEY FRYE:

...if she does have a complex tear, can you say within a reasonable degree of medical certainty whether or not that would be in any way related back to that May incident where she bumped her knee?

DR. CARLE:

No, it's in the established literature of medicine that the posterior medial horn of the meniscus is a common place for degenerative processes to take place over the course of years. And to be able to try to delineate, you know, what component of that was acute and what was chronic is virtually impossible.

#### FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith vs. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment;
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability;
- 3) proof establishing the injury by objective medical evidence;
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

In summary, the evidence shows that the claimant reported three work-related accidents, August, 2001, June, 2002, and September, 2003, to her employer. Each time she was treated at Concentra by Drs. Carle, Warren or Almond. She was given a physical examination which was normal and tested by x-rays which showed some degenerative changes. She was not, however, tested with an MRI scan. For each of the injuries, (neck/shoulder/back/both

knees), the claimant was diagnosed with sprains or strains, treated conservatively with medication and physical therapy, and released with no impairment rating or permanent work restrictions.

Between these injuries, the claimant returned to Concentra for regular DOT physicals, but never reported continuing symptoms from these injuries. She was also treated by her family physicians, Drs. Carttar and Zelk, at Landmark Medical Clinic, without mentioning continuing symptoms from work-related injuries.

The claimant was able to continue working after these injuries until her termination in October, 2003, and was able to work for another employer.

The claimant did not have definitive testing until 2003-2004 when MRI scans confirmed a meniscal tear in the right knee, a bulging disc at L3-4, and a disc protrusion at T1-2/T2-3. It should also be noted that all these MRI findings are accompanied by chronic degenerative changes related to the aging process and obesity.

No physician has causally related the MRI findings to any work-related injury nor recommended any treatment for her condition. The claimant admitted that she lied on her DOT physicals and did not disclose previous injuries to her physicians. After her last injury, she displayed positive Waddell's signs, indicative of malingering. She also gave conflicting accounts of injury regarding her right knee.

Whether there is a causal relation between a work-related accident and disability is a question of fact for the Commission to determine. Carter vs. Flintrol, Inc. 19 Ark. App. 317, 720 S.W.2d 337 (1986).

After considering the claimant's failure to disclose her injuries suffered prior to her employment with the respondents, her ability to continue working after conservative care and release from Concentra, the lack of documented continuing symptoms, and the MRI findings of chronic degenerative changes, I find the claimant has failed to meet her burden of proving she suffered compensable injuries, by a preponderance of the credible evidence of record.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of claim #F306001 in which the relationship of employer-employee-carrier existed on August 1, 2001, at which time the claimant sustained a compensable injury to her head and shoulders, diagnosed as a cervical strain and contusion. This claim was accepted and paid as a "medical only" claim before being controverted.
- 2) The claimant has failed to prove, by a preponderance of the credible evidence of record, that her current condition, diagnosed almost three years after the accident, of degenerative changes and spondylosis at C5-6 with protrusions at T1-2/T2-3 is causally related to the incident at work in August, 2001.
- 3) The Arkansas Workers' Compensation Commission has jurisdiction of claim #F306002 in which the relationship of employer-employee-carrier existed on June 29, 2002, at which time the claimant sustained a compensable injury to her right knee, diagnosed as a knee strain and contusion with a pre-existing, congenital condition or fracture. Some medical expenses were paid before this claim was controverted.

- 4) The claimant has failed to prove, by a preponderance of the credible evidence of record, that her current condition, a medial meniscus tear, diagnosed almost nine months after the accident, is causally related to the incident at work in June, 2002.
- 5) The Arkansas Workers' Compensation Commission has jurisdiction of claim #F310296 in which the relationship of employer-employee-carrier existed on September 19, 2003, at which time the claimant sustained a compensable back and left knee injury, diagnosed as a lumbar strain. Some medical expenses were paid before this claim was controverted.
- 6) The claimant has failed to prove, by a preponderance of the credible evidence of record, that her current condition, disc degeneration and bulging at L3-4, diagnosed almost nine months after the accident, is causally related to the incident at work in September, 2003.

This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge

/jg