

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F307580

**TEENA E. MCGRUFF,
EMPLOYEE**

CLAIMANT

**ADDUS HEALTHCARE, INC.,
EMPLOYER**

RESPONDENT

**AMERICAN CASUALTY CO.
OF READING, PENN.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 12, 2004

Hearing conducted November 10, 2004, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. Jon B. Gann, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant and

Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over the occurrence of compensable injuries to the claimant's lumbar spine and right shoulder, as opposed to pathology unrelated to her employment, including a possible recurrence of pre-existing injuries or conditions.

The claimant contended that on May 28, 2003, she suffered compensable injuries to her lumbar spine and right shoulder, by specific incident, for which she should be awarded benefits, including reasonably necessary medical and related expenses, such as the cost of shoulder surgery, and temporary total disability benefits from the date of injury until a date to be determined as a result of her back injury, according to Dr. Jim J. Moore, as well as benefits for temporary total disability from the date of injury until June 30, 2004, as a result of her shoulder injury, according to the

opinion of Dr. Jay Lipke. An attorney's fee for controversion was also requested. Other possible issues, including permanent disability benefits, were reserved

The respondents contended that the claimant did not sustain an injury as a result of her employment, but suffers from pathology unrelated to her work, possibly representing a recurrence of her pre-existing injuries or conditions and that her alleged disability status does not flow from the alleged occurrence at work. They specifically contended that the claimant's back condition has not resulted in temporary total disability.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times, including May 28, 2003; the claimant's average weekly wage on that date was \$367.00; and the claim has been controverted in its entirety.
3. The preponderance of the evidence fails to show that the claimant suffered compensable injuries arising out of and in the course of her employment on or about May 28, 2003.

DISCUSSION

The claimant, a licensed practical nurse, testified that she suffered injuries to her lumbar spine and right shoulder May 28, 2003, while working as a private duty nurse at the home of a five-year old child who was recovering from surgery for a brain tumor, but could walk with assistance. The claimant testified that the mother had asked her to help the child walk out to the swing in the

yard and as they proceeded down the steps, with the claimant holding the child's hand in her right hand, the child lifted her feet unexpectedly, placing additional weight on the claimant's right hand. The claimant stated that she was pulled severely but was not going to let the child fall and that she felt pain under her shoulder blade and in her back and at the top of her legs. She stated that she did not take the child out to the swing but came back into the house and reported the incident to the mother. She also stated that, thereafter, when she was offered additional overtime work by an LPN, she turned it down and explained to the LPN about the incident.

She testified that she received her first medical treatment in the emergency room about four days later and, some months later, was seen by Dr. Jay Lipke who tried steroid injection therapy but eventually performed surgery for a torn rotator cuff. She also stated that Dr. Jim J. Moore treated her lumbar condition. She testified that she has not been able to work since the date of the injury and has been kept off work by her physicians. She attributes her inability to work to pain and to lifting restrictions and her understanding that hospitals will not let her work because of the medication she is taking. She stated that she had no prior right shoulder problems or treatment and has had no other accidents since this occurrence. She testified that she has had back strains before and has been treated for arthritis but has not had such a back injury previously. She has requested benefits as outlined above.

It is well established that the claimant has the burden of proving entitlement to benefits, generally by a preponderance of the evidence and without the benefit of any presumption of compensability or entitlement to benefits.

Under prior law, it was the duty of the Commission to draw every legitimate inference possible in favor of the claimant, and to give the claimant the benefit of the doubt in making factual

determinations. However, current law requires that evidence as to meeting the burden of proof be weighed impartially and without giving the benefit of the doubt to any party, including the claimant. Act 10 of 1986, §10(2nd Ex. Sess.), Ark. Code Ann. §11-9-704(c)(4), effective July 1, 1986; Fowler v. McHenry, 22 Ark. App. 196 (1987). Even under prior law, when the claimant was entitled to the benefit of the doubt, conjecture and speculation, however plausible, were not permitted to supply the place of proof. Dena Construction Co. v. Herndon, 264 Ark. 791 (1979).

Here, the claim is complicated by her history of pathology, primarily to her spine, the events of a vacation just prior to the alleged incident at work, and the lack of reference to an on-the-job injury after she began to seek medical care in June, 2003, as well as the apparent failure to report the injury promptly and clearly to her employer.

The medical record which begins in May, 2001, reveals that the claimant has a history of several continuing physical problems, including pathology in her thoracic and lumbar spine and right shoulder. For example, a May 14, 2001, x-ray report showed mild small degenerative anterior endplate osteophytes of the thoracic spine, but no loss of vertebral body height, and degenerative disc disease at L3-4 and to a lesser degree L4-5. A record of personal history and physical examination by Dr. B. Ross Bandy describes the claimant as having multiple musculoskeletal symptoms. He reported that the claimant stated that she had “dislocated her tailbone” when she fell and that she had experienced mid-back and lumbosacral discomfort since falling as a teenager. His examination showed mild discomfort in the thoracic spine with rotation and flexion as well as mild discomfort in the lumbar spine with flexion, extension, and lateral bending, but does not have focal tenderness. The record shows that the claimant continued to be treated for problems with her thoracic and lumbar spine as well as several other problems, including degenerative disc disease in her cervical

spine, as revealed by an x-ray October 20, 2002. A note dated April 7, 2003, indicates that the claimant has had “increased discomfort around the right shoulder for the last few weeks, is unaware of any injury or overuse”. Her physician ordered physical therapy, heat or ice and that if unimproved, injection therapy. The medical record, which will not be repeated here, indicates a variety of problems endured by the claimant at least since 2001.

The first medical record after her alleged injury is June 2, 2003, and shows an onset of “2 weeks” of low back pain, radiating into her legs and abdomen. Joint Exhibit, P. 35. Page 36 of the same Exhibit, a handwritten note, appears to say that the claimant presented with complaints of low back pain radiating down and that this has gone on “for weeks.” The record does not indicate that the claimant’s problems were caused by her employment.

The references in this initial medical record to an onset of two weeks or weeks is consistent with the theory of the respondents that the claimant’s two week vacation and her pre-existing conditions may have combined to produce her current difficulties. The testimony shows that just before the claimant experienced the encounter with the five-year old child, she and her husband had been on a two week vacation to various places, including Myrtle Beach, parts of North Carolina, and Kentucky and that they engaged in various activity, including riding motorcycles.

Paul Goodnight, no longer an employee for the respondents, testified that after the vacation, the claimant’s husband came in to pick up her check and said that during the vacation, their backs hurt and they both had to sleep on the floor and that it was probably from riding motorcycles. She said there was no indication that the claimant was injured during her work with the five-year old child at that time. She stated that on or about June 20, when she was advised that there was a job-related connection to the claimant’s problems, she transferred the claimant to a supervisor to report

the incident. This former employee was sure that the claimant's husband had said both had experienced back trouble during the two week vacation. On the other hand, the claimant and her husband denied that the claimant had experienced back trouble during the vacation or that such back trouble had been reported to Ms. Goodnight.

Nevertheless, the medical record gives little hint that the claimant's difficulties have a causal connection to her employment until a December 30, 2003, report from Dr. Jim J. Moore, which he wrote as a result of his initial evaluation in his office. At that time, he mentioned her pain and restriction of joint range in the right shoulder and also in her low back. In January, 2004, Dr. Lipke made reference to the incident in May, 2003, as an injury to her right shoulder. However, prior to that, the medical record does not point to the claimant's employment as the source of the two problems that she now attributes to her work.

Thus, although the incident described by the claimant is a possible source of her low back and shoulder problems, it cannot be concluded on this record that the preponderance of the evidence supports such a conclusion given the claimant's previous back and shoulder problems, the clear testimony of the former employee of the respondent, the reference of the initial medical record to a two week onset or a problem that had continued for weeks which coincided more with vacation activity than an incident at work, and the general lack of reference to the claimant's employment in the medical record.

For the foregoing reasons, this request for benefits should be, and it is hereby, respectfully, denied and dismissed.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge