

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113975

SYLVIA D. HUGHES, EMPLOYEE	CLAIMANT
BAE SYSTEMS, EMPLOYER	RESPONDENT
PACIFIC EMPLOYERS INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED MAY 16, 2005

Hearing held on February 17, 2005, before Honorable Dale Douthit, Administrative Law Judge, at Little Rock, Pulaski County, Arkansas.

Claimant was represented by Mr. Steven McNeely, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by E. Diane Graham, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On February 17, 2005, the above-captioned claim came on for a hearing in Little Rock, AR. A prehearing conference was conducted on December 29, 2004, and a prehearing order was entered on January 4, 2005. A copy of the January 4, 2005 prehearing order has been marked as Commission Exhibit #1 and made a part of the record, without objection.

The parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier relationship existed at all relevant times, including October 16, 2001; the parties agreed to a TTD rate of \$227.00 per week; that the claimant sustained a compensable injury on October 16, 2001 to her left shoulder for which a five percent (5%) impairment was assigned and paid by the respondents.

The parties agreed the issues to be presented for adjudication were whether the claimant

sustained a compensable cervical injury and, if overcome, whether she is entitled to associated medical and indemnity benefits and attorney fees; whether the claimant is entitled to additional TTD benefits due to her compensable left shoulder injury from February 17, 2004, to a date to be determined, and whether the claimant is entitled to additional medical treatment concerning her left shoulder, and attorney fees

The claimant contends that she sustained a compensable injury to her neck on October 16, 2001, in addition to her already admitted compensable injury to her left shoulder, due to the same October 16, 2001 incident. That due to her neck injury she claims entitlement to associated medical and indemnity benefits. Further, the claimant contends she is entitled to additional medical treatment due to her compensable left shoulder injury as well as additional TTD from February 17, 2004 to a date to be determined, and attorney fees.

Respondents contend the claimant's work related injury on October 16, 2001, as stipulated to, was accepted as compensable with regard to the left shoulder. That claimant had a MRI of the cervical spine on January 31, 2003, which was normal, and that claimant has submitted a MRI dated July 28, 2004, which shows a small central disc protrusion at C5-6, which shows no nerve root displacement. That if claimant now has a small defect at that level it cannot be attributable to the work-related injury. Further, respondents contend Dr. Lipke saw the claimant on October 14, 2003, and noted she was off work for a non-work related condition; and that claimant's time off work immediately following payment of TTD benefits is due to non-work related conditions. Respondents contend the MRI recommended by Dr. Chakales is not reasonable necessary treatment for her work related injury. That respondents are entitled to an off-

set pursuant to A.C.A. §11-9-411, should benefits be awarded.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code. Ann. §11-9-704:

- 1) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 2) The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable neck injury on October 16, 2001.
- 3) The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional TTD benefits due to her compensable left shoulder injury of October 16, 2001.
- 4) The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment recommended by Dr. Chakales is reasonably necessary and related to her October 16, 2001 compensable left shoulder injury.

DISCUSSION

1. HISTORY

The claimant began working for the respondent on February 5, 1998. On October 16, 2001, the claimant's primary job was helping with the manufacturing of flares. (T. p. 14, lines 10-

11). During her shift on October 16, 2001, the claimant testified she was changing the waste behind a machine when a steel door came off the hinges, fell, and struck her on the right knee and injured her left shoulder. (T. p. 15, lines 2-4 & lines 17-23)

The respondents accepted the left shoulder injury as compensable, and on February 25, 2002 the claimant underwent arthroscopic surgery to her left shoulder. On August 20, 2002, Dr. Lipke assigned her a five percent (5%) permanent impairment to the left shoulder, which respondents paid, and found her at maximum medical improvement. On July 9, 2002 the claimant was released to return to work, which she did. The claimant worked through September of 2003 until she took off for non-work-related left knee surgery. Dr. Bryant released the claimant to work after her non-work-related left knee surgery on November 10, 2003. The claimant worked from November 10, 2003 until February 17, 2004. On February 17, 2004 the claimant alleges she was taken off work for both breathing problems and left shoulder problems by Doctors Dietzen and Chakales, respectively. The claimant testified her lung/breathing problems resolved around May of 2004, but that her shoulder keeps her from now working.

Adjudication

This claim turns largely on the credibility of the claimant. With the inconsistencies and contradictions from the claimant, as will be set forth below. I did not find her to be a very credible witness.

I. Cervical Compensability of October 16, 2001

The medical records are abundant with neck problems the claimant had prior to October 16, 2001.

The first inconsistent statement from the claimant comes at page 22, lines 13-16 of the transcript regarding any neck problems before October 16, 2001:

Q. In regard to what you just testified in response to your attorney's question, I understood you to say that you had never had any problems with your neck before October 16, of '01?

A. I don't remember having any, that I can remember.

(T. p. 22, lines 13-16.)

The medical records are abundant with neck problems the claimant had prior to October 16, 2001. Page one of Joint Exhibit Number Two indicates claimant's complaints of tenderness in the lower cervical area on May 1, 1991, after a car accident. On May 5, 1991, Dr. Dedman, reports "She says that her pain in upper shoulders and neck improved." (CX 1, p. 2) Then, on August 25, 2000, the claimant underwent a MRI of the cervical spine, and the MRI report indicated a history of neck pain. (JX 1, p. 18)

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 A.C.A. §11-9-102(4)(a)(ii) 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 medical findings, as defined in A.C.A. §11-9-102(16), establishing the injury; and
- 4) Proof by a preponderance of the evidence the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, she fails to establish compensability of the claim, and compensation must be denied. C. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W. 2d 876 (1997)

After the October 16, 2001 incident, the claimant initially reported right knee and left shoulder injuries. A few weeks after the accident, the claimant reported some neck pain. A MRI of her neck was conducted on January 31, 2003, and reported normal. (JX1, p. 58) On July 28, 2004 another MRI was conducted on the claimant's cervical spine, which showed a small central disc protrusion/herniation at the C5-6 level abutting the midline interior surface of the cervical cord but causing no cord or nerve root displacement. (JX 2, p. 85)

Between the two post accident MRIs the claimant reported to Dr. Bryant on September 11, 2003, that she had severe left knee pain. Another strange inconsistency is that Dr. Bryant reported the following in his September 11, 2003 report:

“The patient is a 32 year old female with a complaint of severe left knee pain. She stated that she was on a horse and it bucked her off.” (JX 2, p. 66)

Subsequently the claimant had to undergo left knee surgery. But when questioned at the full

hearing about the horse fall, the claimant said it happened over 25 years ago. This examiner finds it extremely strange that Dr. Bryant would imply her severe left knee complaints on September 11, 2003 were due to an injury 25 years ago. Her explanation did not seem credible.

Q. You saw him the 11th of September and he did the knee surgery the very next day, is that right?

A. Yes, ma'am , because my leg was doubled in size.

Q. On September 11, when you first saw Doctor Bryant for your knee, his report of that date states that you told him you were on a horse and it bucked you off.

A. That was when I was a child. Me and my mother was on a horse and we both got bucked off. And I was young, I was probably six or seven when that happened.

Q. And your left knee had bothered you and been painful ever since?

A. No ma'am. He just asked and I just told him, and he asked if I ever fell on it, and I did, but I landed on my knee.

Q. When you were bucked off, you landed on your knee?

A. Yes , ma'am, and my mother landed on her head, in Camden.

(T. p. 30, lines 6-20)

Obviously something happened between the normal January 31, 2003 MRI and the July 28, 2004 MRI that showed a small protrusion. Whatever caused her left knee to double in size between the two MRIs probably caused the protrusion. I find the normal MRI of January 31, 2003 shows her

now cervical injury did not arise out of and in the course of her employment on October 16, 2001. She may need surgery for her now C5-6 protrusion; however, the October 16, 2001 incident did not give rise to the injury or need for medical treatment. The claimant must prove that her accidental injury occurred in the course of employment, and that it grew out of and resulted from the employment. Cook v. Aluminum Co. of America, 35 Ark. App. 16, 811 S.W. wd 329 (1991) Further, the credible objective medical evidence establishes no cervical injury. No doctors recommended surgery until after the MRI , which showed protrusion, and the evidence is clear the protrusion did not arise out of the October 16, 2001 incident.

II. Additional TTD Benefits for claimant's
left shoulder compensable injury.

Another disturbing inconsistency from the claimant arises from her request for TTD from February 17, 2004 to a date to be determined. The claimant testified she was taken off work on February 17, 2004, for two reasons: 1) for breathing problems, and 2) for left shoulder problems. As testified by the claimant:

- A. Well, that's where the problem come in, because both doctors took me off, Dr. Chakales for my shoulder and the other one for my lungs.

However, when the claimant filled out her report for short term disability with her employer, she stated she became unable to work on February 17, 2004, because she could "not breath." (JX 1, p. 105) There is no mention of any shoulder problem anywhere on the claimant's report. Further, there is no report from any doctor recommending she be taken off work due to her shoulder injury. This Administrative Law Judge questioned the claimant about the dual

recommendations from Doctors Chakales and Dietzen to take her off work on February 17, 2004; her response did not satisfy this Administrative Law Judge.

Q And on February the 17th, that was the last day that you worked of '04, is that right?

A. Yes, sir.

Q. Tell me again what happened that day that made you need to leave.

A. I got out there at the plant and I could not breathe, I had difficulty breathing. And the union representative wound up driving me home and my mother had taken her back home for me and they had got me to the doctor's office.

Q. What was wrong with your left shoulder that caused you not to be able to work?

A. The pain in it.

Q. That was on the 17th of February of '04?

A. I'm not really sure on the dates, but I think that was all about the same time, but they both took me off the exact same day. (T. pg. 46, lines 10-25)

To receive TTD benefits the claimant must prove by a preponderance of the evidence that she has entered a healing period and totally incapacitated to earn wages as a result of a compensable injury. Ark. Highway & Transportation Dept. v. Breashears, 272 Ark. 244, 613 S.W. 2d 392 (1981). I find the claimant was neither within a new healing period, nor totally incapacitated to earn wages due to her compensable injury and therefore deny the TTD request. Obviously, from the medical exhibits it is clear the claimant left work on February 17, 2004, due to

her lung problems, which she admitted was not work related. Further, she had received a five percent (5%) rating over a year earlier and was declared at MMI.

III. Additional Medical Treatment for claimant's left shoulder as a result of her October 16, 2001 compensable injury.

An employee must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a). What constitutes reasonable necessary medical treatment is a question of fact for the Commission. Hill v. Baptist Medical Center, 74 Ark. App. 250, 485 S.W. 3d 544 (2001) The burden of proof rests on the claimant to prove by a preponderance of the evidence that she is entitled to treatment. Geo Specialty Chemical v. Clingar, 69 Ark. App 369, 135 S.W. 3d 318 (2000).

On July 28, 2004, Dr. Chakales' report indicates a MRI of the claimant's shoulder shows impingement syndrome, bursitis and tenderness and stated she is a candidate for shoulder surgery. I find there is a lack of causal connection between the October 16, 2001 injury and the July 28, 2004 recommendation for treatment. The claimant has the burden of proving the two were connected and has failed to do so. The medical evidence never directly links the two, and taking into account the claimant's inconsistencies, I would be remiss to rely on her testimony to prove the causal connection.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable neck injury on October 16, 2001. The claimant has failed to prove by a

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preponderance of the evidence that she is entitled to additional TTD benefits, or additional medical treatment, as a result of her compensable left shoulder injury of October 16, 2001. Therefore, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

DALE DOUTHIT
Administrative Law Judge

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