

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIMS D809359, F400126, & F400127

**DONNA SCOTT,
EMPLOYEE**

CLAIMANT

**HOT SPRINGS
COUNTRY CLUB,
EMPLOYER**

RESPONDENT NO. 1

**LIBERTY MUTUAL
INSURANCE COMPANY,
INSURANCE CARRIER**

RESPONDENT NO. 2

**ARKANSAS PROPERTY &
CASUALTY GUARANTY
FUND; CREDIT GENERAL
INSURANCE COMPANY,
INSURANCE CARRIERS**

RESPONDENTS NO. 3

OPINION FILED APRIL 5, 2005,

Pursuant to a hearing conducted January 6, 2005, before Administrative Law Judge Richard B. Calaway in Hot Springs, Garland County, Arkansas, with

Mr. C. Burt Newell, Attorney at Law, Hot Springs, Arkansas, appearing for the claimant,

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for Respondent No. 2,
and

Mr. Kevin O'Dwyer, Attorney at Law, Little Rock, Arkansas, appearing for Respondents No. 3.

STATEMENT OF THE CASE

This is a dispute over the claimant's request for additional medical benefits for continuing care which she relates to her admittedly compensable injuries of 1987.

The claimant requested continuing medical treatment by Dr. James Arthur and the cost of medications first prescribed by Dr. Arthur and now prescribed by her family physician. An attorney's fee for controversion was also requested. Other possible issues were reserved.

Liberty Mutual contended that the medical benefits currently in dispute were neither reasonably necessary nor related to the 1987 injuries. They contended that the claimant's current problems are the result of subsequent injuries which occurred during the coverage period of Credit General. Specifically, Liberty Mutual contended that during Credit General's coverage, on or about September 1, 1998, the claimant suffered a right rotator cuff tear which was a new injury or aggravation of her previous condition and, further, that she later sustained carpal tunnel syndrome as a result of her employment on or about February, 2000. Liberty Mutual further contended that surgery for the claimant's rotator cuff tear which was performed February, 1999, and paid for by Liberty Mutual was the result of the 1998 new injury and not her 1987 injury. They requested reimbursement for the cost of that surgery and for the cost of carpal tunnel release surgery which was performed February 15, 2000.

The Fund and Credit General contended that the 1998 rotator cuff tear was a recurrence of the claimant's previous compensable injury of 1987 and was neither a new injury nor an aggravation of a pre-existing condition. Alternatively, they contended that the Fund is barred from reimbursing Liberty Mutual pursuant to Ark. Code Ann. §23-90-103. They did not deny that the claimant's carpal tunnel syndrome arose on or about February, 2000, during the coverage period of Credit General.

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; Liberty Mutual Insurance Company provided insurance coverage October 10, 1987, when the claimant sustained compensable injuries to her neck and right shoulder; her average weekly wage at that time entitled her to compensation rates of \$176.00 and \$154.00; Liberty Mutual has paid benefits for the 1987 injuries, including permanent partial disability benefits for an impairment rating of 12% to the body as a whole; Credit General provided coverage in September, 1998, and February, 2000, when new injuries are alleged to have occur; Liberty Mutual paid for all of the charges of Dr. James Arthur, ending with charges incurred July 1, 2002, which were not paid.

3. The preponderance of the evidence shows that the claimant's treatment for her cervical spine by Dr. James Arthur and medication now prescribed by her family physician are reasonably necessary in connection with her admittedly compensable injury of 1987 and should be the responsibility of Liberty Mutual Insurance Company.

4. The preponderance of the evidence shows that the claimant suffered a new injury or aggravation of her pre-existing shoulder condition in September, 1998, in the coverage period of Credit General Insurance Company and that her carpal tunnel syndrome arose in February, 2000, also during the coverage period of Credit General Insurance Company, so that Liberty Mutual is without responsibility for related benefits.

DISCUSSION

The claimant, 62 years of age at the time of the hearing, went to work as a waitress in 1986 for the Hot Springs Country Club where she continued to work as director of food and beverage sales.

Following the initial 1987 injury, the claimant experienced stiffness in her right shoulder and pain in her neck, shoulder, and upper arm. She first consulted her primary care physician, Dr. Thomas Hollis, Sr., who eventually referred her to orthopedic surgeon Dr. Bruce L. Smith, Jr. Dr. Smith's notes indicate that he had a cervical myelogram performed on the claimant at the end of June, 1988, and the claimant's testimony indicates that Dr. James M. Arthur thereafter performed surgery, a cervical spinal fusion.

Dr. Smith's note of July 19, 1988, indicated that the claimant's neck surgery only helped her slightly and that she continued to have pain in the shoulder with range of motion which he thought was getting worse. He stated that he thought "We are going to have to do a decompression on her right shoulder. She will talk with Dr. Arthur and when he gives us an okay. We will consider doing this." Thereafter, on September 15, 1988, Dr. Smith again recommended decompression surgery for impingement syndrome and rotator cuff tendinitis. His note of September 30, 1988, indicates that the claimant had returned in followup for the surgical repair of her right shoulder and was progressing quite satisfactorily. The claimant testified that following these initial neck and shoulder surgeries the "very bad discomfort" was taken care of but there was still discomfort and she still hurt in her neck, shoulder, and upper arm area on the right side. After rehabilitation, she returned to work, observing lifting restrictions of 20 pounds imposed by Dr. Arthur.

The claimant's testimony and the medical record indicate that Dr. Arthur continued to provide care for her cervical spine, while Dr. Smith provided care for her shoulder. The handwritten notes from Dr. Arthur's office are only partially legible. However, a typewritten letter dated March 14, 1994, from Dr. Arthur stated that the claimant recently had additional surgery, a cervical foraminotomy, and had since returned to work. He estimated her impairment at 10% and indicated

his plan to see her about three times a year for purposes of writing medications should she need them. The claimant's testimony indicated that Dr. Arthur continued to treat her periodically each year until respondents stopped paying the bills and then she sought additional followup from her primary care physician. Although the claimant suffered a minor low back injury as the result of a fall at work on or about September 30, 2001, the record does not show any other incident of injury involving the claimant's cervical spine and indicates that the continuing followup for the purpose of prescribing medication is reasonably necessary in connection with the compensable injury to her neck which occurred in 1987 and is the responsibility of Liberty Mutual.

The medical record also indicates that Dr. Arthur referred the claimant back to Dr. Smith in August, 1998, because of the condition of her shoulder. The claimant's testimony indicates that at about this time she was reaching at work to get a plate from a shelf and her shoulder froze so that she could not lift it up. She testified that when she discussed this with Dr. Arthur, he sent her back to Dr. Smith who treated her conservatively until an MRI in January, 1999, revealed a torn rotator cuff. Dr. Smith surgically repaired the rotator cuff in February, 1999, and continued to follow the claimant. Liberty Mutual paid for the 1999 shoulder surgery and seeks reimbursement from the Fund and Credit General.

When the record is reviewed, the preponderance of the evidence indicates that the incident in August, 1998, which resulted in a torn rotator cuff, should be considered a new injury or aggravation of the claimant's pre-existing condition, so that it is the responsibility of the Fund and Credit General, rather than Liberty Mutual. Similarly, the claimant's carpal tunnel syndrome, which arose in February, 2000, and was surgically treated February 15, 2000, does not have any connection to her original 1987 injury and arose during the coverage period of Credit General. Thus, the

claimant's carpal tunnel syndrome is not the responsibility of Liberty Mutual, since it arose during the time of Credit General's coverage.

However, counsel for Respondents No. 3 cites Ark. Code Ann. §23-90-103, a provision of the Arkansas Property & Casualty Insurance Guaranty Act that indicates that a covered claim does not include any amount due to the any insurer as subrogation recoveries or otherwise, but that this shall not prevent the insurer from presenting the excluded claim to the liquidator. Accordingly, it appears that Liberty Mutual's request for reimbursement should be here denied, although relief may be pursued with the liquidator.

AWARD

Pursuant to the foregoing opinion and the law, Respondents No. 1 and 2 are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge