

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F408400

SYLVIA WHITMAN	CLAIMANT
WAL-MART ASSOCIATES, INC.	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED DECEMBER 16, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on October 25, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on September 14, 2005. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On July 28, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$368.00 for temporary total disability and \$276.00 for permanent partial disability.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's left shoulder and neck injuries.

2. Related medical.

3. Temporary total disability from July 29, 2004, to a date to be determined.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that she was injured while working for Wal-Mart. She hurt her left shoulder and neck when she was picking up a box (30" x 30"). She has seen Dr. Mitchell and has had surgery on her left shoulder.

In regard to the foregoing issues the respondents contend that the claimant did not sustain an injury arising out of and in the course of her employment as defined by the Arkansas Workers' Compensation Act.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted medical records marked Claimant's Exhibit No. 1, a request for medical care marked Claimant's Exhibit No. 2 and hours missed marked Claimant's Exhibit No. 3. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that she was forty-three years old and she began working for the respondent in the year 2000. The claimant testified that originally she was hired as a stocker but after a year or so she became a replenishment driver. The claimant explained that her job consists of driving throughout the warehouse picking up inventory and relocating it in the warehouse. The claimant testified that she drives a forklift as well as uses a stock picker to do her job. The claimant testified that when she gets her assigned merchandise to where it is suppose to be, she will help unload for another one of the associates. The claimant testified that this unloading is physical and that she actually picks up merchandise and puts it on a table.

The claimant testified that on July 28, 2004, she had been out in the warehouse picking up merchandise and loading up her stock picker. The claimant testified that she was on the floor loading twenty-two pound boxes onto her stock picker and when she lifted one of these twenty-two pound boxes over her shoulders she felt a twinge like a pull in her left shoulder. The claimant testified that she continued working and tried to shake it off as well as kind of babied it for a period of time because she was close to her break. The claimant testified that this twinge was in the back part of her shoulder blade. The claimant testified that she reported this incident to her supervisor, Max Brown. The claimant testified that she filled out paperwork and after that she was put on a forklift which was a little lighter duty. The claimant

testified that the following day she worked but felt very uncomfortable and she took off work the next couple of days. The claimant testified that the respondents made her an appointment to be seen by Dr. Moffitt on August 3.

The claimant testified that Dr. Moffitt examined her arm and neck and ordered physical therapy as well as medications. The claimant testified that the medication and the physical therapy did not particularly help in that she still felt very uncomfortable so she returned to see Dr. Moffitt. The claimant testified that she reported that she was having a hard time sleeping because her medications were so mild they did not stop the discomfort. The claimant testified that Dr. Moffitt increased the strength of her pain medications so she could get some rest. The claimant testified that after the second visit, the respondents would not allow her to go back to the doctor. The claimant testified that, on her own, she made an appointment with Dr. Raye Mitchell. The claimant testified that Dr. Mitchell had treated her for right shoulder problems in 2003 but at that time had not treated her left shoulder. The claimant testified that she saw Dr. Mitchell on August 24, 2004, and after examination he put her on physical therapy, ordered an MRI and then surgery. The claimant testified that she thinks she had her surgery on September 13. The claimant testified that she did not work prior to her surgery and was off work following her surgery until November 14, 2004. The claimant testified that she returned to her same job but that it was much lighter because of the drop in volume of merchandise that they were

required to move. The claimant testified that due to the seasonal changes the work was not as demanding and the weights they were working with were lighter. The claimant testified that she continued to be treated by Dr. Mitchell after she returned to work but she is not currently being seen by Dr. Mitchell due to the lack of insurance. The claimant testified that she last saw Dr. Mitchell on May 28, 2005. The claimant testified that she continued to have problems with her shoulder and neck after she returned to work and that she had problems raising her arm above her shoulder with any kind of weight, her neck gets really stiff and she had migraines. The claimant testified that she currently has problems with pain, migraines and stiff neck. The claimant testified that the respondent let her go on August 24, 2005. The claimant testified that she was relocated to another warehouse before she was terminated. The claimant testified that the respondent let her go due to her not calling in when she was off work or sick. The claimant testified that she has written down the dates that she was absent from work after November explaining that these absences were due to not being able to sleep and having shoulder and neck pain. (See Claimant's Exhibit No. 3.)

On cross examination, the claimant explained that after working for about a year she became a driver for the respondent in replenishment. The claimant agreed that she did this job until July 28, 2004, and after she returned from her surgery, she continued as a driver. The claimant testified that sometime between December and January she worked at another warehouse for

about a month and a half. The claimant testified that then she was returned to driving and stayed on this job until August 24, 2005. The claimant testified that she would dispute the doctor's note that says that she is now back to have her left shoulder looked at saying that it feels very similar to the way her right shoulder felt before it was operated on. The claimant testified that she has been in two motor vehicle accidents one of which she sustained physical injury. The claimant explained that in 1980 she was in an accident resulting in her breaking her right collar bone. The claimant testified that since July 28, 2004, she has drawn short term disability from the respondent. The claimant agreed that she drew short term disability benefits from August 13, 2004, through November 8, 2004. The claimant testified that she has not drawn any long term disability benefits. The claimant testified that her personal insurance paid for her left shoulder surgery in 2004 and that this same insurance paid for her right shoulder surgery in 2003. The claimant testified that she does most of the house work and yard work although there have been times in 2003 and 2004 when she has had to pay to have these jobs done.

The medical records set forth that the claimant was seen by Dr. Raye Mitchell on July 14, 2003, for problems with her right shoulder. Dr. Mitchell writes that he thinks her problem is an AC arthropathy noting that she has a history of injury to this clavicle from a car wreck which may have contributed to this problem. Dr. Mitchell performed surgery on the claimant's right shoulder on July 21, 2003. Dr. Mitchell writes on July 31, 2003,

that he has seen the claimant for her distal clavicle dissection and that she is doing great. Dr. Mitchell returned the claimant to regular duty work two weeks after July 31, 2003.

The medical records set forth that the claimant was seen on August 3, 2004, by a physician's assistant, Max Beasley. Mr. Beasley writes that the claimant has complaints of left shoulder pain since lifting twenty pound boxes on July 28, 2004. Nurse Beasley notes that the claimant's x-rays show no fractures or dislocations. This nurse prescribed the claimant Alieve and Darvocet to help her sleep. It was recommended that the claimant work only at waist height with her left hand until rechecked. On August 5, 2004, nurse Beasley notes that the claimant has returned requesting stronger medications due to her pain and inability to sleep. The claimant was encouraged to continue her range of motion exercises and her medications were changed. On August 24, 2004, Dr. Mitchell notes that the claimant's left shoulder pain began while working lifting clothing boxes and that it radiates upward toward her neck and downward toward her axilla posteriorly and down to about the level of her triceps posteriorly and laterally. Dr. Mitchell notes that he suspects a supraspinatus tear and notes that prior to the claimant's injury her left shoulder had been doing fine. Dr. Mitchell further writes that he does not have any record of the claimant complaining about her left shoulder. Dr. Mitchell ordered an MRI for the claimant. There is a certificate to return to work form dated August 31, 2004, setting forth that the claimant is unable to return to work until after September 10 due to

shoulder pain, MRI and return appointment with Dr. Mitchell. Dr. Mitchell writes that the claimant's MRI indicates that she has degenerative changes within her cuff consistent with chronic impingement and a markedly arthritic AC joint similar to her other side. Dr. Mitchell writes that it is his opinion that she needs to have her cuff explored in addition to a distal clavicle resection and acromioplasty to unload her cuff. Dr. Mitchell writes that he will schedule surgery for the claimant. Dr. Mitchell operated on the claimant's left shoulder on September 13, 2004. The medical records set forth that Dr. Mitchell kept the claimant off work through November 3, 2004. On November 29, 2004, Dr. Mitchell writes that the claimant is still having weakness in her shoulder but not as much pain. The doctor recommended a home strengthening program and notes that she should continue on her intermediate duty at work. On January 10, 2005, Dr. Mitchell writes that the claimant's shoulder is doing well although she still has complaints of a little weakness in comparison to the other side. Dr. Mitchell restricted the claimant to lifting no more than thirty pounds, noting that she is off pain medications and has no new complaints. On April 12, 2005, Dr. Mitchell writes that the claimant reports pain in her axilla although he notes that he does not feel any nodes or unusual swelling. Dr. Mitchell writes that the claimant has quite a bit of subacromial crepitation noting that she thinks she was injured during physical therapy. The doctor writes that the claimant also is complaining of headaches, neck pain and tingling radiating all the way down to her hand. Dr. Mitchell

ordered that the claimant undergo an EMG/ENC of the left upper extremity. The claimant underwent electro diagnostic tests on April 13, 2005, of her left arm. Dr. Stephen Moon writes that the nerve conduction and EMG study of the claimant's left upper extremity reveals;

1. Left medium neuropathy at the wrist consistent with carpal tunnel syndrome and;

2. Evidence of some sharp waves in the deltoid.

The doctor writes that this finding could potentially be consistent with a C5-6 radiculopathy, although no definite spontaneous activity was noted in the paraspinal muscles. Dr. Mitchell writes on May 19, 2005, that the claimant is miserable with her shoulder. The doctor notes that she is neurovascularly intact, he suspects instability and recommended that she be seen by Dr. Park. Dr. Mitchell notes that the claimant's MRI shows some cysts in her humeral head which are old but this test does not show any clear cut pathology although he thinks she probably has more ligamentous instability. On July 20, 2005, Dr. Mitchell writes that the claimant is better noting that she is mostly driving the forklift and this is helping her shoulder quite a bit. The doctor notes that the claimant still feels as though there is something wrong and he recommended that she be seen by Dr. Johnson.

After a complete review of this entire record, I find that the claimant has proven by a preponderance of the evidence that she sustained a left shoulder injury while working for the respondent on July 28, 2004. The claimant has testified to a specific

incident while loading twenty-two pound boxes over her shoulders and felt a twinge or a pull in her shoulder. The claimant has testified that she reported this injury and paperwork was filled out that day. Although testing was not conducted immediately to identify the claimant's problem, when she was seen by Dr. Mitchell on August 24, 2004, he ordered an MRI which revealed degenerative changes within her cuff consistent with chronic impingement and recommended that she have her cuff explored in addition to a distal clavicle resection and acromioplasty. Following the claimant's shoulder surgery and follow up she continued to have complaints of weakness and discomfort in her left shoulder and neck area. The claimant also reported having headaches, neck pain and tingling radiating all the way down to her hand. Dr. Mitchell ordered and the claimant underwent electro diagnostic testing on April 13, 2005, of her left arm. Dr. Stephen Moon who read the diagnostic testing sets forth that the claimant has left medium neuropathy at the wrist consistent with carpal tunnel syndrome as well as evidence of some sharp waves in the deltoid. Dr. Mitchell further notes that the claimant's MRI shows some cysts in her humeral head and opines that she probably has more ligamentous instability. The medical records set forth that the claimant did have right shoulder surgery approximately one year prior to her left shoulder problems. Dr. Mitchell writes that prior to the claimant's injury, her left shoulder had been doing fine and his records do not set forth the claimant complaining of her left shoulder before July 28, 2004. The respondents, therefore, should

pay for all reasonable and necessary medical treatment for this claimant's left shoulder problems. I further find that the claimant has failed to prove by a preponderance of the evidence that she sustained a neck injury on July 28, 2004, while working for the respondent. The claimant did not initially complain of neck pain although eventually she did develop headaches and it was suspected that she might have a neck problem. The claimant's MRI does not reveal any objective medical findings of injury to the claimant's neck. Dr. Mitchell does write that the claimant's findings on her MRI could potentially be consistent with a C5-6 radiculopathy although no definite spontaneous activity was noted in the paraspinal muscles. Therefore, the respondents shall not be responsible for any medical treatment for this claimant's neck. I find that the claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability. The claimant was taken off work by her physicians on August 31, 2004, through her surgery and recovery period ending on or about November 3, 2004. The claimant has testified that she drew short term disability from the respondent during this period of time and if her short term disability benefits are less than her temporary total disability rate, she would be entitled to the balance or the difference between her short term disability and her workers' compensation rate for temporary total disability. The claimant could not recall what amount she received on short term disability so no amount can be calculated at this time. I find that the claimant is not entitled to additional temporary total disability

in that the medical records do not set forth that she has been released from work as a result of her compensable injury. The claimant has testified that there were days when she did not feel like coming in or that she had problems sleeping and did not go into work but this, in my opinion, does not entitle this claimant to temporary total disability for the periods of time that she voluntarily took off work.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On July 28, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a compensation rate of \$368.00 for temporary total disability and \$276.00 for permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that she sustained a left shoulder injury while working for the respondent on July 28, 2004. See discussion above.

5. The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable neck injury while working for the respondent on July 28, 2004. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable left shoulder problems.

7. The claimant would be entitled to temporary total disability from August 31, 2004, through November 3, 2004. As

discussed above, the claimant has testified that she received short term disability during this period of time and if her short term disability is less than what her temporary total disability rate is, she would be entitled to the difference between what her temporary total disability should be and what she actually received in short term disability benefits. I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability subsequent to November 3, 2004. See discussion above.

8. The respondents have controverted this claim in its entirety.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the amount of temporary total disability this claimant should have received from August 31, 2004, through November 3, 2004.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on July 28, 2004.

The claimant has failed to prove by a preponderance of the evidence that she sustained a compensable neck injury while working for the respondent on July 28, 2004.

The respondents should pay all reasonable and necessary medical treatment for his claimant's left shoulder compensable injury.

The claimant should be entitled to temporary total disability from August 31, 2004, through November 3, 2004, less whatever amount of short term disability she received during this period of time.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE