

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F311969

LOYCE SHAFFER	CLAIMANT
LTL, INC.	RESPONDENT
TRAVELERS INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 10, 2006

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by ROBERT MONTGOMERY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on November 8, 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 July 21, 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 September 26, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury on September 26, 2001.

4. Medical expenses have been paid.

5. Third party claim filed against Alicia Ussery in the amount of \$25,000.00 has been offered to settle law suit.

6. The claimant was earning an average weekly wage of \$500.00.

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

1. Has claimant been made whole?

2. Is the Respondent entitled to subrogate their interest from the third party settlement?

3. Claimant's entitlement to a permanent partial disability rating.

4. Have the respondents waived their right to subrogate since they did not intervene timely in the Third Party Settlement?

In regard to the foregoing issues the claimant contends that that she has not been made whole and is thus entitled to the proceeds from the third party settlement offer subject to attorney's fees and costs.

In regard to the foregoing issues the respondents contend that they are entitled to be reimbursed for the benefits paid claimant from the third party settlement.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1, Claimant's Exhibit No. 2, Claimant's Exhibit No. 3, Claimant's Exhibit No. 4, Claimant's Exhibit No. 5 and Claimant's Exhibit No. 6. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that she has worked for the respondent since 1994 as a bookkeeper and office manager as well as run errands for the company. The claimant testified and the parties have stipulated that on September 26, 2001, she was involved in a motor vehicle accident while working for the respondent. The claimant testified that as a result of this motor vehicle accident she felt a burning between her shoulder blades and into her neck and arms. The claimant testified that she was treated by Dr. Charles Stinnett and he subsequently referred her to Dr. Cannon for pain management. The claimant testified that she has had two injections by Dr. Cannon and that she is to be seen by Dr. Knox after her third injection. The claimant testified that if the third injection is not successful in relieving her pain she is fearful that she may have to go forward with the recommendation by her treating physicians for back surgery. The claimant testified that her back pain has progressively gotten worse and has caused her to have migraine headaches and she is losing feeling in part of her hands as well as a burning down her arms.

The claimant testified that the respondents have accommodated her working situation so that she has been able to continue to work with help from other employees and her daughter.

The claimant agreed that as a result of her motor vehicle accident she had to initiate litigation against the young lady who hit her. The claimant testified that she was being represented by the Niblock Law Firm and that it was agreed that they were entitled

to one third of the proceeds of the settlement amount. The claimant testified that the law firm has incurred expenses of \$1,795.33 in order to prosecute her lawsuit in the third party action. The claimant agreed that she understood that not only would the law firm be entitled to their one third of the settlement amount but also reimbursement for their out of pocket expenses. The claimant testified that to her knowledge, the respondent's carrier, Travelers Insurance, did not assist in the collection in the third party action nor did they intervene in that case nor did they share in any of the expenses of prosecuting this action. The claimant testified that since the date of her accident over four years ago she has consistently experienced back and neck pain as well as headaches. The claimant testified that she has tried all sorts of conservative measures in order to relieve her discomfort but that none of these measures have given her any prolonged reduction in her pain. The claimant testified that since her accident she also has taken several medications such as Darvocet, Ultracet, a Tylenol with Codeine, Celebrex and Flexoril as well as Nexium because of stomach problems the various medications have caused. The claimant testified that prior to her motor vehicle accident on September 26, 2001, she did not take medications nor experience any back or neck pain and had never used a TENS unit or any electrical unit of any kind.

The claimant testified that as a result of her compensable injury she has had to alter her activities and can no longer ride horses, attend trade shows, fish and dance as she had prior to her

accident. The claimant testified that at the time of her accident she had insurance with State Farm and that carrier has paid \$5,000.00 toward her medical. The claimant testified that State Farm has not asked for subrogation in her third party action.

The claimant testified that prior to her accident she did not have any physical restrictions or limitation on her work but now her doctor has restricted her use of her arm as well as lifting or doing any type of heavy work. The claimant testified that her treating physician has also issued her some permanent impairments but that the respondent has not paid any of these impairment ratings.

On cross examination, the claimant testified that even though she has had to be off for doctor's appointments and at times not felt like coming into work due to her migraine headaches, the respondent has continued her weekly salary. The claimant agreed that financially she has not suffered any financial loss since her accident. The claimant agreed that Dr. Stinnett has been her treating physician for over twenty years but she does not recall him mentioning anything to her about having stenosis or degenerative joint disease nor did he treat her for her back. The claimant agreed that as a result of her compensable injury she has a compression fracture. The claimant testified that besides being seen by Dr. Stinnett and Dr. Cannon she also has been seen by Dr. Knox. The claimant testified that she was able to drive herself to this hearing which was approximately seven miles. The claimant

testified that after this hearing she will go back to work and then drive herself home which is approximately a four-mile drive.

The medical records set forth that this claimant was treated by Dr. Stinnett on September 26, 2001, following a motor vehicle accident. Dr. Stinnett notes that the claimant reports some pain in her neck and a little in her back noting that as time goes on she gets more and more stiff. After examination, Dr. Stinnett diagnosed the claimant with muscle strain of neck, upper back and lower back and prescribed medications. On October 11, 2001, Dr. Stinnett writes that the claimant continues to report pain, numbness and tingling down into her left arm as well as pain in her mid thoracic back and lower back. Dr. Stinnett notes that the claimant reports that she has a considerable amount of pain. The claimant continued to be followed by Dr. Stinnett in 1991, 1992 and 1993 for her continuing complaints of pain in her back, neck and arms as a result of her motor vehicle accident. The claimant underwent an MRI of her thoracic spine on April 14, 2003, which showed moderate thoracic osteoarthritis and old mild compression deformity at T7. Dr. Stinnett writes on April 16, 2003, that the claimant's MRI shows a compression type fracture with reduction of height of T7 as well as some stenosis in her neck at the C5/C6 area. Dr. Stinnett writes that the claimant's stenosis, degenerative joint disease and compression fracture were either caused or aggravated by her motor vehicle accident. The medical records reflect that the claimant has continued to be treated by

Dr. Stinnett as well as Dr. Cannon for pain management and has been seen by Dr. Luke Knox.

Dr. Luke Knox, in his deposition taken on March 15, 2005, stated that when he first saw the claimant on June 12, 2003, she was complaining of neck and right arm pain as well as mid thoracic spine pain. Dr. Knox testified that after reviewing the claimant's various tests which included a mylogram, an MRI scan as well as plain films, he felt her complaints were related to her thoracic seven spine fracture as well as her cervical stenosis. Dr. Knox testified that in his opinion the radic compression fracture was cause by the claimant's motor vehicle accident and that her stenosis was probably pre-existing but aggravated by this accident. Dr. Knox was asked if the claimant could have had pre-existing stenosis without having any pain and the doctor responded, "Yes." The doctor was then asked if the claimant's motor vehicle accident would have aggravated her stenosis to the point where she would be having pain from it now, the doctor responded, "Yes, Sir." Dr. Knox testified that x-rays taken soon after an accident sometimes will not reveal a small fracture but with time the fracture progresses so that it can be more readily defined. Dr. Knox testified that he would assume that the claimant's motor vehicle accident probably played a part in her having a compression fracture. Dr. Knox testified that even after a bone has healed like the claimant's T7 vertebra, she still could have persistent discomfort. Dr. Knox testified that the claimant's compression fracture could be addressed surgically but that these surgical

options are less than optimal and for that reason he would recommend that she try to avoid surgery if possible. Dr. Knox testified that to ease the discomfort caused by the claimant's cervical stenosis the surgical options are more favorable. Dr. Knox was asked if the claimant's condition progressed to the point where she thought she needed surgery would he think that the need for surgery resulted from her motor vehicle accident. Dr. Knox responded, "I would assume that, yes." Dr. Knox testified that based on the A.M.A. Guides he would assess her compression fracture to be between 2 and 5 percent based on the extent of the thoracic spine fracture and as to the cervical stenosis he would rate her with between 6 and 7 percent to the body as a whole. Dr. Knox testified that if surgery were performed on that area, her impairment rating would increase up to about a 9 percent.

On cross examination, Dr. Knox testified that the report of the radiologist who read the claimant's bone scan would mean that that fracture is probably healed by the time that they got the bone scan. Dr. Knox agreed that the claimant's compression fracture at T7 would have nothing to do with the tingling in her arms because it is too far down her back and would not affect her arms and fingers. On redirect examination, Dr. Knox stated that he suspected that there was an element at the claimant's C5 which if this area was injured would result in some tingling, numbness and pain down either of her arms. Dr. Knox also affirmed that the claimant's MRI did show a compression fracture.

After a review of this complete record, I find that the claimant has proven by a preponderance of the evidence that she is entitled to a permanent partial impairment rating of 5 percent for her compression fracture and 7 percent for her aggravated cervical stenosis giving her a total whole body impairment of 12 percent to the body as a whole which the respondents should pay. Dr. Knox, a neurosurgeon, who has examined and evaluated the claimant has assessed the claimant with these impairment ratings according to the A.M.A. Guides. Dr. Stinnett, the claimant's longstanding family physician who has treated the claimant since the first day of her motor vehicle accident has noted in his responses to the claimant's letter dated August 19, 2005, that he would agree with Dr. Knox's assessments for the claimant's impairment rating.

I further find based on the evidence presented as well as Arkansas law that the respondents have waived their right to claim a lien or credit against proceeds of the claimant's settlement with a third party tortfeasor by their failure to intervene in the third party action. The respondent was given notice that a complaint was being filed on behalf of the respondent against the third party tortfeasor by letter of August 25, 2004. There is further correspondence to the respondents which inclosed a copy of the complaint that was filed by the respondents against the tortfeasor in the third party action on August 25, 2004. The respondents were given notice as to the date of trial as well as given information concerning dates for depositions which had been scheduled. This letter dated March 10, 2005, further sets forth that if the

respondents wish to intervene there would be no objection raised by the claimant as to their intervening. There is no evidence in this record indicating that the respondents did intervene or attempted to intervene in the third party action filed by the claimant. Ark. Code Ann. §11-9-410(a)(1) recognizes the employee's common law right to maintain a tort action against a third party, as unaffected by the making of a claim for compensation benefits against the employer. See St. Paul Fire & Marine Company v. Wood, 242 Ark. 879, 416 S.W. 2d 322 (1967). This subsection also provides that the employer and its carrier are entitled to reasonable notice and opportunity to join in the action and that they are entitled to a lien against the proceeds in the action if they, or either of them join in the action. Subsection B of Ark. Code Ann. §11-9-410 sets out the carrier's right of subrogation, giving them the right to bring action against any third party responsible for the employee's injury. Subsection C of the statute provides that the settlement of claims must have the approval of the Court or Commission. The respondents herein contends that they are entitled to a lien or set off against compensation benefits from the proceeds of the claimant's third party settlement. In John Garner Meats v. Ault, 38 Ark. App. 111, 828 S.W. 2d 866 (1992) it was found that the respondents waived their right to claim a lien or credit against the settlement proceeds by failing to intervene in the third party action. It is noted that a respondent's right to claim a lien or credit under Ark. Code Ann. §11-9-410 is preserved by intervening in the action. Jackson

Cookie v. Fausett, 17 Ark. App. 76, 703 S.W. 2d 468 (1986). In the Jackson Cookie case the Court found that where the claimant has made a claim under the Workers' Compensation Act and the respondent and/or its carrier has had a reasonable opportunity to join in the third party action, it was found that the respondent and its carrier must intervene in a third party action to have a right to credit. Based on the evidence presented in this case the respondents had notice and the opportunity to join in the claimant's law suit but they made the decision not to intervene, therefore, their right to share in the proceeds of the settlement was not preserved and they are not entitled to claim a lien or credit against the \$25,000.00 third party settlement. Since it has been found that the respondents have waived their right to any of the proceeds of the claimant's third party settlement due to their failure to intervene, the issue of whether the claimant has been made whole will not be addressed.

Based on the evidence presented as well as the petition filed with this Commission requesting that her third party settlement be approved, I find that the claimant's request of approval of her third party settlement is in order and approve the distribution of the proceeds as follows:

Settlement Total	\$25,000.00
Cost of Collection	\$10,119.73
Net to the Claimant	\$14,880.27

FINDINGS & CONCLUSIONS

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

2. On September 26, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury on September 26, 2001.

4. Medical expenses have been paid.

5. Third party claim filed against Alicia Ussery in the amount of \$25,000.00 has been offered to settle law suit.

6. The claimant was earning an average weekly wage of \$500.00.

7. The claimant has proven by a preponderance of the evidence that she is entitled to a whole body impairment rating of 12 percent based on her compensable injuries as assessed by Dr. Knox and Dr. Stinnett. Also see discussion above.

8. The respondents have waived their right to assert a claim for subrogation for any benefits paid to this claimant due to their failure to intervene in the third party action. See discussion above.

9. The claimant's request for approval of her third party settlement agreement is hereby approved as set forth in the discussion.

10. That the respondents have controverted this claimant's entitlement to an impairment rating.

11. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the claimant's impairment rating.

ORDER

The claimant has proven by a preponderance of the evidence that she is entitled to a whole body impairment rating of 12 percent which the respondents should pay.

The respondents have waived their right to any claim for a lien in the claimant's settlement with a third party tortfeasor due to their failure to intervene.

The third party settlement is hereby approved and distribution of the \$25,000.00 settlement from a third party tortfeasor shall be distributed as follows:

Settlement Total	\$25,000.00
Cost of Collection	\$10,119.73
Net to the Claimant	\$14,880.27

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