

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F513732**

<b>THERESA L. LANG, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>AREA AGENCY ON AGING, EMPLOYER</b>	<b>RESPONDENT</b>
<b>RISK MANAGEMENT RESOURCES, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 31, 2007**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on March 2, 2007, at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE KENNETH A. HARPER, Attorney at Law, Monticello, Arkansas.

Respondents represented by MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on December 16, 2005 at which time the claimant was earning sufficient wages to entitle her to a compensation rate of \$103.00 in the event this claim is found to be compensable.

The claimant contends she injured her back, neck, right arm and hand on December 16, 2005 carrying five gallon buckets of water. She seeks payment of medical expenses, temporary total disability benefits from December 17, 2005 to a date yet to be determined and attorney's fees.

The respondents contend the claimant did not suffer a compensable injury identifiable by time and place of occurrence which is a major cause of the need for medical treatment.

The following were submitted without objection and comprise the evidence of record: the

parties' prehearing questionnaires and exhibits contained in the transcript along with the deposition of Dr. Carolyn Vogler (taken August 16, 2006) which has been incorporated by reference.

The claimant was the only witness to testify at the hearing.

The claimant, age 57 (D.O.B. September 2, 1950) has a high school education and training as a certified nursing assistant (CNA). She has worked for the respondent-employer for the last eight or nine years as a home health aide assisting patients with their daily needs (preparing meals, cleaning the home, bathing, running errands). The claimant is assigned five clients and usually spends two hours with each client.

On Friday, December 16, 2005, the claimant was bathing a wheelchair bound client by carrying two 5 gallon buckets of water. This daily chore started a week or two earlier when the client's mother refused to allow her son to be bathed in the bath tub. The claimant developed a pain in her upper back and right shoulder and notified her employer but no accident forms were completed. Respondents offered no witness to dispute this statement and the carrier took a recorded statement about two weeks later.

Over the weekend, the claimant's pain worsened and she sought treatment from her family physician, Dr. Vogler on Monday, December 19, 2005. The doctor was unable to alleviate her pain and referred her to the emergency room (ER). She went to the McGhee hospital but the workers' compensation carrier refused to authorize diagnostic testing. The claimant testified the carrier did pay for one prescription. This confirms the claimant's testimony that she notified her employer of the incident.

The claimant returned to Dr. Vogler and was referred to the Lake Village ER where she received a pain shot and was sent home. She also sought treatment from Dr. Young who recommended consultation with an orthopaedic surgeon. The claimant is financially unable to pursue treatment and has no group health insurance so she sought help at another ER in Pine Bluff.

#### **DOCUMENTARY EVIDENCE**

The claimant gave a recorded statement to the workers' compensation adjuster about the

cause of her condition. The claimant testified she was in pain, on medication and does not remember what she told the adjuster during a telephone conversation on December 29, 2005. The claimant stated that she injured herself lifting buckets of water but she could not remember a specific incident although the pain was severe on December 16, 2005, (p. 5-7).

### **MEDICAL EVIDENCE**

The records of general practitioner, Dr. Carol Vogler show the claimant was first treated for extreme upper back and right shoulder pain on December 19, 2005. Dr. Vogler recorded muscle spasms and prescribed medication and trigger point injections.

Both the ER records and Dr. Vogler's records show the pain started on Friday, December 16, 2005. Both the ER records and Dr. Vogler's records show the claimant suffered muscle spasms.

#### Dr. Vogler's report of 12-19-05:

Severe pain in Rt arm and shoulder since Friday. Patient presents today doubled over with pain in the back and in the right arm. She states she has been this way all weekend. She does not know what she did that pulled her muscles, although she works as a Home Health Aide and regularly has to lift and transfer patients.

#### ER records of 12-19-05:

C/o R arm & shoulder pain since Friday on & off. Worsened today...states feels better to hold arm above head. Has been in Drs office since 0815 this morning had some medication (without) relief. Has some muscle spasm in R arm & shoulder. Denies any injury to arm.

#### MRI scan of 1-23-06:

Degenerative disc disease in the cervical spine at C5-6 and C6-7... At C5-6 there is mild to moderate central canal narrowing with mild anterior cord contour flattening. In addition, there is severe right sided and moderate left sided neural foraminal stenosis.

Medical records from UAMS show a normal NCS study and mildly abnormal EMG study suggesting right C6-7 radiculopathy. Dr. Fox prescribed medication and physical therapy due to a discrepancy between her neurological exam and the imaging test, (see his report of June 1, 2006).

Dr. Vogler authored a report dated June 22, 2006 advising that the claimant had reached maximum medical improvement based on the UAMS records but was unable to return to her job due to lifting restrictions. Dr. Vogler does not specify a weight limitation or anatomical impairment.

Dr. Vogler opined the claimant's injury was work-related:

I believe her injury is work related. I base this on the fact that I had seen her as a patient prior to her injury. Prior to her injury she was an active person and did not seek medical treatment for any type of muscle pain nor did she request any type of pain medications. She was seen primarily for minor, self-limiting illnesses. She never expressed any difficulties in performing her job, nor did she ever make any complaints about her duties.

After, she was injured while lifting a patient, she was in extreme pain. According to the x-ray report she had damaged some of her vertebrae which I felt was due to 'ripping' or 'pulling' of the muscle at the facet of the vertebra.

In her deposition, Dr. Vogler testified she began treating the claimant in November, 2004 for low back pain. The claimant attributed her symptoms to excessive driving while on the job. She was treated with injections for muscle spasms which relieved her pain.

On December 19, 2005, the claimant returned to Dr. Vogler in such extreme pain that it was difficult to examine her. Medication and injections did not relieve her pain. Dr. Vogler was concerned that a heart attack or pulmonary embolus might be the cause of such extreme pain.

During the examination the claimant stated she was unsure of the cause of her symptoms but noted she did a lot of lifting as a home health aide. Sometime later, the claimant remembered lifting the buckets of water.

Q. Okay. And the fact that you had to explore more deeply what was different, is there some likelihood or some possibility that her recollection of this bucket incident may not have been the true cause of that.

A. No. I don't really think so. Because I mean, whatever happened was very acute and it had to have happened you know, within 24 hours of her developing that. And it's just that I don't think that sometimes people think about their days, you know, in such detail until after they, you know, I mean, could you tell me exactly what you did yesterday? What you lifted, what you did. Because oftentimes this kind of pain will materialize 24 hours later. So it is a process of going back and trying to figure out what was different about – what was different about that day prior to this. What did she do differently?

Dr. Vogler reviewed the ER records of right arm and shoulder pain beginning on Friday. In

the doctor's opinion, the spasms increased in intensity over the weekend, causing the claimant to seek medical attention on Monday.

Diagnostic testing revealed detachment of the facets to the vertebrae in the thoracic spine which would explain the claimant's severe pain. Testing also revealed a compression fracture and stenosis although the age of the fracture could not be determined. Dr. Vogler felt these findings correlated with the claimant's symptoms. Dr. Vogler acknowledged that the claimant also suffers from degenerative disc disease and osteophytes which is part of the aging process. Dr. Vogler opined the claimant's condition would prevent her from returning to her former job because she would be unable to lift heavy objects or patients, however she had not been provided with the claimant's job description.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force," Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

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or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

As I interpret the evidence of record, the claimant suffers from pre-existing cervical degenerative disc disease temporarily aggravated by carrying heavy buckets of water, resulting in pain and muscle spasm on December 16, 2005.

The task of carrying buckets of water was a new job duty added to the claimant's usual heavy lifting of patients. The onset of sudden severe pain in the claimant, who had been working for the respondent-employer without physical difficulties for eight or nine years, after a new job duty was added support her contention that she suffered a specific incident arising out of and in the course of her employment. The muscle spasm, recorded in the medical reports, is objective medical evidence of injury requiring medical treatment. Therefore, I find the claimant has met her burden of proving a compensable injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-claimant existed among the parties on December 16, 2005 at which time the claimant earned sufficient wages to entitle her to a compensation rate of \$103.00.
2. The claimant has proven by a preponderance of the credible evidence that she sustained a compensable injury, caused by a specific incident, arising out of and in the course of her employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30. The testing for heart disease is unrelated to this injury and not the responsibility of the carrier.
4. The respondents are directed to pay temporary total disability benefits from December 16, 2005 to June 22, 2006 as the claimant remained in her healing period, unable to work.

5. The respondents are directed to pay the court reporter's fees and expenses within thirty days.
6. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge