

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F313694**

VIRGINIA L. MILLER, EMPLOYEE	CLAIMANT
FAUCON PROPERTIES, INC., EMPLOYER	RESPONDENT
CANNON COCHRAN MANAGEMENT SERVICES, INC., CARRIER/TPA	RESPONDENT

**OPINION FILED OCTOBER 11, 2007**

Hearing held on August 22, 2007, before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, in Russellville, Pope County, Arkansas.

Claimant was represented by THE HONORABLE Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents were represented by THE HONORABLE Michael Ryburn, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on August 22, 2007, in Russellville, Arkansas. A Prehearing Order was entered in this case on June 11, 2007. This Prehearing Order set forth the stipulations offered by the parties and the issues to be litigated, as well as the parties' contentions.

**Stipulations**

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed at all relevant times, including December 12, 2003.

3. The parties will agree to compensation rates prior to the hearing. (At the hearing, the parties agreed that the claimant's average weekly wage at the time of her alleged injury was \$580.00).

4. The claim has been controverted in its entirety.

5. The issues of temporary total disability benefits, permanency, medical treatment, and attorney's fees were expressly reserved by the claimant at the time of the hearing.

#### **Issues**

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Compensability of the neck, back and left shoulder injuries.

2. Constitutional issues.

3. Statute of limitations.

#### **Contentions**

The claimant contends that she sustained compensable injuries to her neck, back and left shoulder and is entitled to all related workers' compensation benefits.

The respondent contends that the claimant first reported a low back and shoulder injury. The low back condition resolved and the claimant treated for the shoulder problem. The MRI of the shoulder

did not reveal any new objective medical findings. The claimant then started treating for her shoulder. The Form C mentions only the shoulder injury. The statute of limitations bars the low back and the neck claims.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of June 11, 2007, which has been marked as Commission's Exhibit No. 1. The Order denying the claimant's Motion to Recuse was marked as Commission's Exhibit No. 2. The claimant's responses to the Prehearing Questionnaire was marked as Commission's Exhibit No. 3. The respondents' responses to the Prehearing Questionnaire was marked as Commission's Exhibit No. 4. A medical packet submitted by the claimant was marked as Claimant's Exhibit No. 1. The Form AR-2 was marked as Claimant's Exhibit No. 2. The claimant's Motion to Recuse and Brief in support in thereof has been blue-backed and marked as Claimant's Exhibit No. 3 and is hereby incorporated by reference. The January 31, 2005 claim letter was marked as Claimant's Exhibit No. 4. The accident report was marked as Claimant's Exhibit No. 5. The respondents' medical packet was marked as Respondents' Exhibit No. 1. The claimant's letter of November 2, 2004 was marked as Respondents' Exhibit No. 2. The Form N was marked as Respondents' Exhibit No. 3.

The following witnesses testified at the hearing: the claimant, Evelyn Bruce, and Nicole Miller.

### Discussion

The claimant age 59(11/03/47), had worked as an LPN for approximately 33 years. The claimant denies having had any prior troubles lifting, pulling on patients or anything of that sort that would have caused her to miss work. The claimant essentially testified that on December 12, 2003, she felt a tear or problem in her left shoulder and back after lifting a 250 pound plus patient back into bed. According to the claimant, at first, most of her trouble was with her shoulder. The claimant testified she filled out an accident report and indicated she had injured her shoulder and back.

According to the claimant, the next morning she went into the emergency room in Conway, but this was not paid for by the respondents. The claimant testified that thereafter the respondents sent her to see their doctor, Dr. John Smith, who did not do any x-rays and advised that she had strained her back. According to the claimant, her pain/problems persisted. Therefore, she sought treatment from Dr. Tammy Tucker. She also admitted to having sought treatment from the emergency room in Harrison, as they took x-rays and suggested she have an MRI done. The claimant testified this was done and the MRI revealed a torn rotator cuff. Ultimately, the claimant testified she underwent surgery with Dr. Oliver (Prior to seeing Dr. Oliver, she saw Dr. McBribe, but he left).

The claimant admits to seeing Dr. Oliver on November 5, 2005, and to undergoing surgery with him on November 10, 2005. She

testified that at this point, the pain level was worse in her shoulder than in her back. The claimant testified she underwent surgery to her back with Dr. Richardson, which was performed on November 2, 2006.

She admitted the employer has not paid her anything for her injury. The claimant further testified she is requesting benefits for an injury to her shoulder, back and neck, as a result of having lifted the obese patient back in the bed. According to the claimant, it is her understanding that the claim was denied because she did not go back to see Dr. Smith. However, the claimant testified he was 150 miles away and her need for treatment was an emergency(intense pain) is why she went to the emergency room.

The claimant testified she was able to afford surgery with Drs. Oliver and Richardson because she was on Medicaid. The claimant essentially admitted she continues to have problems with her neck, back and shoulder, as this has resulted in her inability to work.

On cross examination, the claimant testified she injured her low back and shoulder at the same time. She admitted to having completed her shift. The claimant admitted she had prior knee and neck problems, but denied they were chronic. The claimant further admitted that her back pain had resolved with medications around December 19<sup>th</sup>. The claimant disagreed with the medical report from Dr. McBride dated January 28, 2004, which indicates that her back problems had resolved. The claimant maintains she sought treatment for her back about two year after her shoulder surgery had healed.

The claimant admitted the surgery fixed her shoulder problems, and she has been since released from care, and could possibly work if she just had the shoulder problem and none of the other problems. The claimant admitted to undergoing six weeks of physical therapy after her shoulder surgery, at which point she felt she had been repaired. The claimant admitted that subsequent to this, she felt the sensation in her foot, and they started checking out her back. The claimant testified that since back surgery, she continues with pain in her back and some difficulty in walking and moving, but the pain is not constant.

She admitted to writing a letter in November of 2004 requesting that a hearing be held in Mountain Home due to her being unable to drive because of a torn rotator cuff in her left shoulder. She admitted to not making mention of a back injury and that her back was not keeping her from driving.

The claimant admitted to completing a Form N on the day of the incident (on December 12, 2003), which indicated that only her back had been injured. The claimant testified she initially complained of back and shoulder pain. She testified she is unable to work due to her knees and back.

The claimant admitted to signing the Form AR-N, but denied having completed it. She admitted to having completed the Form C, which was filed on March 14, 2005, wherein she made a claim for her left shoulder.

On redirect, the claimant testified she complained of back and shoulder problems continuously from the time of her injury.

Evelyn Bruce, gave testimony during the hearing. She testified she has been the care giver for the claimant's husband since September of 2004, and has known the claimant and her husband since 1986. Ms. Bruce testified that she had previously known the claimant to be active, but in 2004 when she visited with her, she was down in her back and unable to drive. She testified the claimant told her she had injured her back lifting a patient.

Nicole Miller, the claimant's daughter, also testified during the hearing. She corroborated her mother's testimony, as she denied the claimant had problems prior to December of 2003.

The parties stipulated that had the claimant's husband given testimony, he would corroborate the testimony of the claimant and her witnesses.

The claimant first sought treatment for her alleged injury from Conway Regional Health System on December 12, 2003, due to a low back strain. The claimant was returned to work the next day (on December 13, 2003), with restrictions.

On December 22, 2003, the claimant underwent physical therapy evaluation and treatment at Baxter Regional Medical Center Rehab Services Department. The therapist reported, in pertinent part:

HISTORY/COMPLAINTS: Patient is a 56 year old female referred to physical therapy with a diagnosis of left shoulder pain. Patient reports that she was helping a patient back in bed when she injured her shoulder and low back. She initially had pain in the low back region but her back pain has resolved with her medications. Her current complaint is pain in the left mid scapular region. Her pain has progressively gotten worse and is worse at the end of the day. She reports that she is unable to pick up anything with her left upper extremity. She reports feeling a weakness in the left upper

extremity. She is currently employed at Saint Andrews in Conway. She works five 16-hour shifts and then she is off for a week. She is an LPN and she is required to help with transfers of patients. She has been employed in Conway since March of 2003. Her past medical history includes diabetes and hypertension, which is controlled with medications.

DATE OF ONSET: 12/12/2003

The claimant returned to Baxter Regional Medical Center for physical therapy treatment on December 29, 2003. The therapist reported:

The patient has been seen for four visits with the first three visits, patient received moist hot pack along with interferential electrical muscle stimulation to decrease patient's discomfort to the point where she could tolerate a full evaluation. Today, she was reassessed with patient reporting pain with cervical spine right side bending. She also had pain with shoulder girdle protraction and depression. Patient reported pain with bilateral rotation and extension to the thoracic spine and pain with active range of motion of left shoulder elevation. Patient's clinical presentation continues to be somewhat vague. Today, she received cervical traction at 15 pounds for 10 minutes to help alleviate muscle tightness in the lower cervical and upper thoracic region. Plan is to continue to re-assess patient continuing to adjust treatment as needed. Thank you for this referral.

On December 31, 2003, the claimant returned for physical therapy care. At that time, the therapist noted that the claimant was reassessed with cervical spine non-productive of pain. However, thoracic spine flexion with cervical spine extension reproduced the claimant's pain. The claimant reported significant pain to palpation in multiple areas of the thoracic spine between T2 and T8. The claimant was discharged from physical therapy treatment on January 13, 2004.

The claimant underwent an MRI of the left shoulder on January 19, 2004, with the following results:

OPINION: There is abnormal signal at the insertion of the rotator cuff which predominantly involves the humerus with minimal high signal change in the tendon. This may represent a partial avulsion injury of the cuff. Given the lack of edema in the cuff and lack of fluid in the shoulder, this may be old. No other abnormalities are identified.

On January 28, 2004, the claimant underwent evaluation with Dr. Anthony McBribe. He reported, in pertinent part:

**History of Present Illness:** The patient is a 56-year-old female who states that on December 12, 2003 she was attempting to lift a patient's legs while at work when she felt a pulling sensation in the left shoulder and lower back. She had no prior history of shoulder pain. The back symptoms gradually resolved but she has had persistent left shoulder pain which is constant. She rates her pain at approximately 7 out of 10 intensity. She occasionally feels popping sensations in the shoulder with activity. She has had x-rays of her shoulder, as well as a MRI scan. She was told she had a rotator cuff tear and is presenting for further evaluation. She describes generalized pain around the shoulder, as well as numbness on the medial side of her upper arm and forearm. She also states she has a lesion on her left third toe which has been present for the past year.

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**Assessment:** Left shoulder pain with arm numbness, uncertain etiology

**Recommendation:** At this point, I am not convinced that the small rotator cuff tear is causing her symptoms. We have to make certain she has no underlying cervical pathology. We will proceed with MRI scan of the cervical spine....

An MRI of the claimant's cervical spine was performed on February 3, 2004, with the following impression:

IMPRESSION:

1. Suspicious for a small to moderate size right sided disc herniation at C5-C6.
2. Questionable small right sided disc herniation at C3-C4, more difficult to confirm over tangential images.
3. Mild to moderate diffuse osteoarthritis and degenerative disc disease.

The claimant saw Dr. McBribe on October 19, 2005. At which point, he reported:

She is returning for evaluation of her left shoulder rotator cuff tear. It has been a year and a half since we have scheduled this procedure for her. She never proceeded with surgery at that time. She states she is having worsening symptoms and continues to have some neck pain, as well. I have explained to her once again that we cannot help her with this neck problem. Since it has been so long since we have evaluated her rotator cuff injury, this may not be reparable at this point. She still has pain with active abduction, although she is able to abduct her arm to 90 degrees.

ASSESSMENT: Chronic rotator cuff tear of the left shoulder.

PLAN: We will proceed with a MRI scan of the left shoulder to make certain this has not progressed to a point where it is irreparable.

An MRI scan of the left shoulder was performed on October 25, 2005, with the following impression:

IMPRESSION:

1. Some signal change in the rotator cuff, suggestive of tendinosis. A definite tear is not seen.
2. Incidental note of a tiny cyst in the humerus, at the insertion of the rotator cuff.

On November 1, 2005, Dr. McBribe reported the following:

The patient returns for a follow-up on her MRI scan of the shoulder. This study reveals minimal signal in the rotator cuff. No significant degenerative changes in the glenohumeral joint. There are no destructive lesions noted in the shoulder.

ASSESSMENT: Left shoulder impingement with small rotator cuff tear without significant retraction.

PLAN: She states this hurts enough that she wants to have it repaired. Unfortunately, I'm not going to be able to repair this, given the short period of time that I have left in the surgery department. I have discussed this with my partner, Dr. Oliver, and he is going to evaluate for a possible repair.

The claimant underwent left shoulder rotator cuff repair surgery on November 10, 2005 with Dr. Todd Oliver.

Dr. Oliver reported on November 22, 2005 that the claimant was doing fine, two weeks out from left shoulder decompression and repair of small rotator cuff tear, which was extremely reparable. He further reported that the claimant's only strange complaint was of some numbness in the left foot, which the claimant reported had started about two or three days after her surgery.

His assessment was:

1. In regards to the shoulder, she is doing fine.
2. In regards to this numbness and tingling of foot, I'm not sure what could be the reason for this.

The claimant underwent evaluation with Dr. Travis Richardson on January 24, 2006, for evaluation of low back pain. The claimant reported this as being a work-related injury in December of 2003, as a result of having lifted a resident onto a bed. The claimant reported a rotator cuff injury, as well as a back injury and that she was not working. Dr. Richardson reported:

**RADIOLOGICAL DATA:** Radiographs showed some mild spondylosis, otherwise negative. The MRI scan obtained on 12-02-06 at Baxter Regional Medical center was reviewed and it does appear that she has a L5-S1 herniated nucleus pulposus, which is primarily central. The MRI scan of the cervical spine was also reviewed. There were only mild degenerative changes noted in the cervical spine.

His assessment was "HNP at L5-S1, which is likely causing her radiculopathy," for which he recommended an epidural steroid injection.

She saw Dr. Richardson on September 22, 2006, due to complaints of back with lower extremity radiation and bad knee arthritis of her right knee. He noted that an MRI had shown degenerative changes in her facet joints, as well as a possible small disc herniation at L5-S1. Dr. Richardson noted that he was not sure of all the etiology of her back pain, but her leg pain had improved tremendously, therefore he was going to send her for a discogram with Dr. Wilson.

The claimant underwent a discogram on October 6, 2006, with the following, impression:

1. Concentric annular tears at L3-L4, L4-L5, and L5-S1 shown on the diskograms, more prominent at L3-L4 and L4-L5.
2. The patient's pain response demonstrated pain which was concordant with her usual pain almost exactly at L3-L4 and similar but not quite as intense at L4-L5.

On October 20, 2006, after reviewing the discogram and MRI, Dr. Richardson recommended the claimant undergo back surgery, in the form of a L3-S1 transforaminal lumbar interbody fusion and posterior spine fusion with instrumentation and application of bone morphogenic protein.

Dr. Richardson performed the aforementioned procedure on the claimant's back on November 2, 2006. The claimant had the following preoperative and postoperative diagnoses:

PREOPERATIVE DIAGNOSES:

1. Intervertebral disk disorder and bilateral sciatica.
2. Lumbosacral spinal stenosis.
3. Degenerative joint disease.
4. Lateral recess stenosis.
5. Diskogenic back pain.

POSTOPERATIVE DIAGNOSES:

1. Intervertebral disk disorder and bilateral sciatica.
2. Lumbosacral spinal stenosis.
3. Degenerative joint disease.
4. Lateral recess stenosis.
5. Diskogenic back pain.

PROCEDURE PERFORMED: L5-S1 transforaminal interbody fusion with posterior spine fusion and application of instrumentation in nonsegmental fashion from L5 to S1 with laminectomy decompression at L5-S1.

The claimant filed an accident report on December 12, 2003, at 5:30 a.m., alleging an injury as a result of lifting a patient back into bed. A diagram demonstrates that the claimant felt pain in her left shoulder and in the lower part of her back on the right side. The claimant specifically wrote:

I was helping [patient's name omitted] to get her legs back in bed because she had worked herself to the end of the bed. I felt a sharp pain in my lower back. Mrs. [name omitted] did not want to get back in bed and was pushing against me.

Also on December 12, 2003, the claimant signed a Form AR-N wherein it is stated that she sustained a low back injury while lifting a resident, as she felt a sharp pain in her back.

The respondent filed a Form AR-2 on December 31, 2003 with the Commission controverting the claimant's claim for an injury to her back.

By way of a letter dated January 31, 2005, which was sent by certified mail, the claimant's attorney filed a claim alleging an injury to the claimant's left shoulder, back and neck as a result

of lifting an obese patient on December 13, 2005. In this letter the claimant requested temporary total disability, temporary partial disability, permanent partial disability, and permanent total disability benefits. This certified letter was delivered to the Commission February 4, 2005.

### **Adjudication**

#### **A. Statute of limitations**

The respondents contend that the Form C mentions only the shoulder injury. Therefore, the statute of limitations bars the low back and the neck claims. Based on the evidence before me, I find that the claimant's alleged low back and neck claims are not not barred by the statute of limitations.

The parties have stipulated that this claim has been controverted in its entirety and the claimant credibly testified that no benefits have been paid on this claim. Therefore, the claimant's claim of a low back and neck injury is a claim for initial benefits and is therefore governed by Ark. Code Ann. § 11-9-702 (a) (1), which provides:

(a) TIME FOR FILING.

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury.

If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

The claimant's attorney letter of January 31, 2005 (which was received by the Commission on February 4, 2005), constitutes the filing of an initial claim for compensation for the claimant's neck and back injuries. This claim for compensation was filed within two years of the date of the alleged compensable injury of December 2003. Therefore, the claimant's claim for a low back and neck injury is not barred by the statute of limitations.

**B. Motion to Recuse and Constitutional Challenges of the Act**

The claimant filed a Motion to Recuse and a Brief in support of said Motion on August 6, 2007. Therein, the claimant sought my recusal from hearing this case, and challenged, *inter alia*, the constitutionality of the Workers' Compensation Act as it provides for administrative adjudication of workers' compensation claims. In an Order dated August 7, 2007, the claimant's Motion to Recuse was denied. At the time of the hearing, the claimant challenged the constitutionality of the Act. With respect to the claimant's Motion for Recusal and the balance of the motion pertaining to the constitutional challenges, I find that the Arkansas Court of Appeals has soundly rejected the same arguments in Long v. Wal-Mart Stores, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 21, 2007). Therefore, the claimant's Motion for Recusal is denied, and I find her constitutional challenges to be without merit.

**C. Compensability**

The claimant contends that she sustained compensable injuries to her left shoulder, low back, and neck on December 12, 2003, while lifting an obese patient.

Arkansas Code Ann. §11-9-102(4)(A) defines "compensable injury" as:

(i)An accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances, including eyeglasses, contact lenses, or hearing aids, arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). The claimant must prove by a preponderance of the evidence that she sustained a compensable injury. Ark. Code Ann. § 11-9-102(4)(E)(i).

A review of the evidence demonstrates that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her left shoulder and low back on December 12, 2003, while working for the respondents, as she lifted an obese patient back into back.

Specifically, the claimant essentially testified she sustained an accidental injury to her left shoulder and low back when she lifted an obese patient back into bed, as she felt a tear or problem in her low back and left shoulder. This is corroborated by the medicals. The claimant also promptly reported the incident to the respondent, as she reported an injury to her left shoulder and

lower back. The claimant sought treatment for her low back the same day at a Conway hospital. Thereafter, the claimant consistently complained of left shoulder pain and low back pain. However, prior to this incident, the claimant had not complained of any such symptoms to her left shoulder or low back, nor had she missed work due to the same.

I also find that the claimant's left shoulder injury is established by medical evidence supported by objective findings, in the form of a small rotator cuff tear, for which she underwent surgical repair. The claimant's back injury is also established by medical evidence supported by objective findings, as found in the October 6, 2006 diskogram, namely, the concentric annular tears at L3-L4, L4-L5, and L5-S1; and the L5-S1 herniated nucleus found in the MRI of December 2, 2006, for which the claimant has undergone conservative and surgical treatment.

With respect to the claimant's alleged neck injury. I find that the claimant failed to prove by a preponderance of the credible evidence that she sustained a compensable injury to her neck/cervical on December 12, 2003, while working for the respondent. The instant claimant admits to a history of prior problems with her neck preceding her December 12, 2003 injury. When the claimant first reported her injury on the December 12, 2003, in the "Accident or Incident Report," she made absolutely no mention of any injury to her cervical area, as she reported having injured only her left shoulder and lower back. In addition to

this, in the Form AR-N, and the Form C, there is absolutely no mention or reference to a neck injury as a result of the December 12, 2003 incident. Therefore, based on all of the foregoing, I find that the claimant failed to prove by a preponderance of the credible evidence that she sustained an accidental work injury to her neck on December 12, 2003, while working for the respondent.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times, including December 12, 2003.
3. The claimant's average weekly wage was \$580.00.
4. The claim has been controverted in its entirety.
5. The claims for a neck and back injury are not barred by the statute of limitations.
6. The claimant's Motion to Recuse is denied and her constitutional challenges of the Act are found to be without merit pursuant to Long v. Wal-Mart Stores, Inc., \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (Ark. Ct. App. Feb. 21, 2007).
7. The claimant proved that she sustained compensable injuries to her left shoulder and low back while lifting a patient on December 12, 2003 during and in the course of her employment with the respondent.
8. The claimant failed to prove by a preponderance of the credible evidence that she sustained an injury to her neck during and in the course of her employment with the respondent.

**ORDER**

For the reasons set out above, I find that the claimant's claim for a neck and back injury is not barred by the statute of

limitations. I further find that the claimant proved by a preponderance of the evidence that she sustained compensable injuries to her left shoulder and low back while in the employ of the respondents. The claimant failed to prove by a preponderance of credible evidence she sustained a compensable injury to her neck on December 12, 2003. The issues of temporary total disability compensation, permanency, medical treatment, and attorney's fees are reserved.

**IT IS SO ORDERED.**

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CHANDRA HICKS  
Administrative Law Judge