

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708173

SANDRA LUMLEY	CLAIMANT
ASPLUNDH TREE SERVICE	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 7, 2008

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

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

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in this claim on January 28, 2008, in Springdale, Arkansas. A pre-hearing order had been entered in this case on October 16, 2007. The pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties announced that they had agreed on the appropriate compensation rates. These rates were added to the pre-hearing order. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On May 10, 2007, the relationship of employee-employer-carrier existed between the parties.

2. The appropriate weekly compensation rates are \$382.00 for total disability and \$287.00 for permanent partial disability.
3. The claim is controverted in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. whether the claimant sustained a compensable injury to her left foot, left shoulder, and lower back on May 10, 2007.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from May 11, 2007 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured on May 10, 2007. Her left foot, left shoulder and right lower back were injured when she was clearing an electric right of way. Her left foot caught on a stump causing her body to twist and she then fell striking her back on the edge of the pavement."

In regard to these issues, the respondents contend:

"The respondents will contend that the claimant did not sustain a compensable injury which arose out of and in the course of her employment with Asplundh Expert Tree Co."

## DISCUSSION

### I. COMPENSABILITY

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The first issue to be addressed concerns the question of whether the claimant sustained "compensable injuries" to her left foot, left shoulder, and lower back on May 10, 2007. The burden

rests upon the claimant to prove that these alleged employment related injuries meet all of the statutory requirements for “compensable injuries” that are imposed by the Act.

The first of these requirements are found in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence the actual existence of the physical injury or damage that is alleged to be compensable. Further, the claimant must show that the existence of this physical injury or damage is supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i). This issue is separate and distinct from the matter of causation, which is controlled by other provisions of the Act.

In the present case, the medical evidence presented is sufficient to “establish” the actual existence of various types of physical injuries or damage to the claimant’s left foot, left shoulder, and lower back. Further, the medical evidence specifically in the form of various x-rays and MRI studies of these portions of the claimant’s body demonstrate “objective findings” to support the existence of this physical damage. Thus, the claimant has satisfied the statutory requirements that are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that her alleged employment related injuries satisfy all of the definitional requirements for a “compensable injury” that are found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The injury must arise out of and occur in the course of the employment.

- (2) The injury must be caused by a specific incident.
- (3) The injury must be identifiable by time and place of occurrence.
- (4) The injury must result in internal or external physical harm to the claimant's body.
- (5) The injury must require medical services or result in disability.

In order to satisfy the first three of these definitional requirements, the claimant must first prove the occurrence of a specific employment related incident or accident. She must then prove the existence of a causal relationship between this employment related incident or accident and the medically established and objectively documented physical injuries or damage to the various portions of her body. However, she need not prove the existence of this causal relationship to an absolute or mathematical certainty. All that she need do is to prove that the existence of this causal relationship is likely or probable. Further, she need not prove the employment related incident or accident was the sole or even "major" cause of this damage. She need only show that the specific employment related incident or accident played some causal role in producing or contributing to these medically established and objectively documented physical injuries or damage.

It is my opinion that the claimant has proven by the greater weight of the credible evidence that she was involved in a specific employment related incident or accident on May 10, 2007. The

testimony of the claimant, which is corroborated by the testimony of Mike Smith (a co-employee), shows that while performing her regularly assigned employment duties on May 10, 2007, the claimant attempted to climb up an embankment onto a roadway with the help of Mr. Smith. While attempting to do this she tripped and fell. I find this testimony to be credible and to accurately depict the event described.

Next, is the question of causation. The evidence presented differs between the alleged employment related injuries to the claimant's left foot, left shoulder, and lower back. For this reason, in regard to the matter of causation, each of these alleged employment related injuries will be discussed separately, in regard to the matter of causation.

#### A. LEFT FOOT

The claimant's own statements are the only direct evidence presented to prove the existence of a causal relationship between the employment related incident of May 10, 2007, and the medically established and objectively demonstrated physical injuries or damage to her left foot. The claimant testified that she initially began to experience problems with her left foot, while she was working for the respondent in Eureka Springs. Although she did not describe any particular incident or accident, as bringing on these problems, she attributed them to her employment and reported them to her supervisor. The claimant's testimony, concerning these previous problems, is corroborated by that of James Whatley, the claimant's crew foreman. He testified that, while working on a job

in Eureka Springs, the claimant came to him and advised him that she had hurt her foot from being required to walk up and down hills. Mr. Whatley stated that he did not consider this to be a work injury and took no further action.

Although the claimant indicated that these previous complaints improved, she did not testify that these difficulties completely resolved. She described these previous difficulties as causing pain all over the bottom of her foot, like a stone bruise. The claimant distinguished these previous difficulties from those on and after May 10, 2007, by stating that after the incident on May 10, 2007, her entire foot hurt, both the top and the bottom, and that the pain was more severe. Finally, she testified that her left foot difficulties had improved by the hearing date and only caused her pain if she stood for long periods of time or walked a significant distance.

The record establishes that the claimant immediately reported the accident and difficulties with her left foot on May 10, 2007. Mr. Smith testified that the claimant complained with her left foot and ankle immediately following the accident and for the remainder of her period of employment he observed her limping with her left foot. Devon Wilson, the claimant's general foreman, testified that on May 10, 2007, the claimant reported to him that she had fallen and that her left foot was hurting. Both he and James Whatley, the crew foreman, testified that when the claimant was laid off on May 25, 2007, she advised them that she had continued to experience difficulties with her left foot.

The medical evidence presented shows that the claimant's difficulties with her left foot were consistently diagnosed as being the result of traumatic plantar fasciitis. However, this diagnosis appears to be based solely upon the claimant's subjective complaints. The initial physical examination and subsequent examinations noted no objectively discernable abnormalities to support this diagnosis, such as swelling, bruising, or other discoloration of the left foot, particularly the plantar surface. The MRI of the claimant's left foot, which was performed on December 3, 2007, expressly recited that there was no evidence of plantar fasciitis.

However, both the MRI study and the various x-rays of the claimant's left foot had shown the presence of a very small calcaneal spur. Such a spur is arthritic in nature and its development would take a considerable period of time. As it was observed less than two weeks following the employment related incident or accident on May 10, 2007, it would have obviously predated this event. More importantly, the records of Dr. John Young show that this was only an incidental finding and was unrelated to any injury, on May 10, 2007, or to the claimant's subsequent left foot difficulties. The mechanics of the accident described by the claimant and Mr. Smith would not produce the type of trauma that would be reasonably expected to cause or aggravate a very small calcaneal spur.

The only remaining "objective finding" that involves the claimant's left foot is the small amount of ankle joint effusion or

fluid that was noted on the December 13, 2007 MRI study. However, none of the previous medical records note any objective or even subjective symptoms involving the claimant's left ankle joint. There is no record of any swelling or instability involving this joint or even any pain complaints upon movement or palpitation of this joint. The claimant's various subjective symptoms, which are noted in the medical evidence and the claimant's testimony, would not be consistent with the presence of any physical injury or damage to her left ankle, and, in fact, no such injury has ever been diagnosed. This would appear to also be merely an incidental finding that is playing no role in the claimant's complaints.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove by the greater weight of the credible evidence the likely or probable existence of a causal relationship between the May 10, 2007 employment related incident, and any physical injury or damage to her left foot that is established by the medical evidence and supported by "objective" findings. Her failure to prove this causal relationship constitutes a failure to prove the occurrence of a medically established and objectively documented physical injury to her left foot that arose out of and occurred in the course of her employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence. Thus, she has failed to prove a "compensable injury" to her left foot, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i).

while this employment related incident may well have caused the claimant to temporarily suffer from traumatic plantar fasciitis, as diagnosed by Dr. Young, the existence of this particular injury is not supported by “objective findings”, as required by Ark. Code Ann. §11-9-102(4)(D). Therefore, it would not represent a “compensable injury” within the meaning of the Act.

#### B. LEFT SHOULDER

Again, the claimant’s own statements are the only direct evidence presented to prove the existence of a causal relationship between the employment related incident of May 10, 2007, and the medically established and objectively documented physical damage to her left shoulder. In her testimony, the claimant stated that she could not “recall” any prior problems with her left shoulder. In her testimony, she also stated that, immediately following the incident, she reported the accident to Devon Wilson, one of the supervisors. She further stated that she also told him that she had hurt her left foot and back. The claimant did not state that she had told him anything about her left shoulder.

As previously noted, Mr. Wilson corroborated the claimant’s testimony in regard to the reporting of a specific employment related incident or accident (i.e. a fall) on May 10, 2007. He also corroborated the testimony of the claimant in regard to the reporting of an injury to her left foot. However, in his testimony, Mr. Wilson denied that the claimant reported any injury to or complaints with any other part of her body, including her left shoulder. This testimony by Mr. Wilson coincides with that of

Mr. Smith, who was present at the time of the fall. Mr. Smith testified that the claimant only complained to him of difficulties in the area of her left foot.

James Whatley, the supervisor that laid off the claimant on May 25, 2007, testified, that at that time he advised the claimant she was laid off and she told him about a workers' compensation injury involving her left foot, but mentioned no other portion of her body. Mr. Wilson, who was also present at the time of this conversation, stated that he did not remember the claimant reporting any injury to any portion of her body, except her left foot. However, the documentary evidence (Respondent's Exhibit No. 1, pages 2-5) clearly shows that the claimant reported difficulties with her left shoulder to the respondent, on or about May 24, 2007.

The medical evidence reveals that the claimant did not seek medical services for any injury that may have arose out of the employment-related accident of May 10, 2007, until May 23, 2007. At that time, she was seen by Dr. John Young, of the Medi-Serve walk-In Clinic. In his initial report of that date, Dr. Young noted complaints involving the claimant's left foot and also her left shoulder. He further noted that these left shoulder complaints began when the claimant was being assisted up by a co-worker, immediately after her May 10, 2007 fall. Dr. Young's physical examination noted only that the claimant's left shoulder appeared "mildly tender", but exhibited a full range of motion.

After this initial visit, no mention made of any left shoulder complaints is found in Dr. Young's subsequent office notes on

August 30, 2007 and September 12, 2007. There was also no mention of any left shoulder complaints, when the claimant was seen by another physician at Medi-Serve walk In Clinic, on September 11, 2007.

The presence of left shoulder complaints does not reappear in Dr. Young's office records until November 20, 2007. At that time, Dr. Young notes that the claimant felt that she had experienced no improvement in her left shoulder complaints (or any of her other complaints).

An MRI of the claimant's left shoulder was performed at the request of Dr. Young on December 3, 2007. The radiologist noted physical damage or defects involving this shoulder that were in the form of moderate degenerative changes of the acromion with mild bone marrow edema within the distal acromion, mild supraspinatus and infraspinatus tendinosis with no evidence of a rotator cuff tear, a superior posterior labral tear with an adjacent 4 mm. paralabral cyst, and finally moderate capsular hypertrophy of the acromioclavicular joint.

Again, the majority of these objectively demonstrated physical damage or defects, involving the claimant's left shoulder are essentially degenerative in nature and likely pre-existed the employment related incident on May 10, 2007. There is no expert medical opinion offered to support a conclusion that the employment related incident or accident caused or aggravated any of these objectively documented physical damage or defects.

However, the description of the incident, which was given by the claimant and Mr. Smith, would have resulted in some degree of stress on the claimant's left shoulder joint. This stress could have reasonably and logically caused or at least aggravated the objectively documented physical damage or defects to the claimant's left shoulder. However, the claimant's current difficulties with her left shoulder could also be reasonably and logically caused or aggravated by other stress and trauma and could even be merely the result of the natural progression of the extensive degenerative changes.

The only evidence offered by the claimant to show that the employment related incident or accident was the more likely or probable cause of her current left shoulder difficulties is her own testimony that she was experiencing no difficulties with this portion of her body prior to May 10, 2007 and began experiencing difficulties that would be indicative of the occurrence of an injury or aggravation to this portion of her body contemporaneously with the occurrence of the employment related incident or accident. However, the claimant's testimony in regard to this onset of her left shoulder difficulties, is contrary to Mr. Smith's testimony that the claimant made no complaints to him with this portion of her body, on May 10, 2007, and that he did not observe her experiencing any difficulties with this portion of her body during her continued employment after May 10, 2007. The claimant's testimony, concerning the onset of her left shoulder difficulties

on May 10, 2007, is also contradicted by the testimony of Mr. Wilson that she complained only with her left foot on that date.

The first evidence that the claimant was complaining of any difficulties with her left shoulder is contained in the initial medical records of Dr. Young. On that date, Dr. Young noted that the claimant was complaining of difficulties with her left shoulder, which she attributed to the fall on May 10, 2007. However, these same records failed to note the observation of any particular findings to support a recent injury to this portion of the claimant's body, except for mild tenderness of the left shoulder. There was no indication of swelling, discoloration, impingement, or loss of range of motion of the shoulder joint.

It must also be noted that the claimant's testimony concerning the nature and severity of her left shoulder symptoms is inconsistent with her delay in seeking medical treatment. This testimony is also contradicted by her ability to continue to perform her regular employment activities without any apparent difficulty in the use of her left arm. The claimant's testimony, concerning the continuous nature and severity of these symptoms would not only be inconsistent with the findings of Dr. Young on his initial evaluation of May 23, 2007, but would also be inconsistent with the lack of any left shoulder complaints, whatsoever, in the reports of August 30, 2007, September 11, 2007, and September 12, 2007.

After consideration of all the evidence presented, it is my opinion that the claimant's testimony is not sufficiently credible

to prove that the employment related fall of May 10, 2007, was the likely or probable cause of any difficulties with her left shoulder. If any of the medically established and objectively documented physical damage or defects involving her left shoulder were caused or aggravated by this fall, it is difficult to believe that the claimant would have failed to report such difficulties for almost two weeks and performed her regular employment duties without any apparent difficulty. Therefore, she has failed to prove the occurrence of any physical injury to this portion of her body that arose out of and occurred in the course of her employment, was caused by a specific incident, and that is identifiable by time and place of occurrence. Her failure to prove these three definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i) prevents a finding of a “compensable injury” to this portion of her body.

#### C. LOWER BACK

Again, the claimant’s own statements are the only direct evidence presented to prove the existence of a causal relationship between the employment related incident of May 10, 2007 and any medically established and objectively demonstrated physical injuries or damage to her lower back or lumbar spine. In her testimony, the claimant could not “recall” any difficulties with her lower back or lumbar spine, prior to this incident. She further testified that contemporaneously with or shortly after this incident, she began experiencing significant difficulties with her lower back, that these difficulties progressively worsened, and

that she continues to experience these difficulties at the present date.

However, this testimony is contradicted by the testimony of all of the other witnesses at the hearing. Mr. Smith denied that the claimant complained to him of any difficulties with her lower back or lumbar spine on May 10, 2007, or any other date during her continued employment with the respondent. Mr. Wilson testified that, when the claimant reported the incident to him on May 10, 2007, she did not complain of any difficulties with her lower back or lumbar spine.

More importantly, the claimant's testimony is inconsistent with the medical evidence presented. When Dr. Young initially evaluated the claimant on May 23, 2007, he recorded absolutely no complaints of any type of difficulties involving the claimant's lower back or lumbar spine. His initial physical examination of the claimant also failed to note any findings consistent with a back or lumbar spine injury. The first mention of any back difficulties does not appear until the claimant's hand written note of May 24, 2007.

The MRI study that was performed at the request of Dr. Young on December 3, 2007, showed extensive degenerative changes involving almost all levels of the claimant's lumbar spine. These included significant osteophyte complexes or arthritic spurring that would have only developed over a period of years.

Clearly, it is possible that the incident which was described by the claimant and Mr. Smith, could have possibly aggravated

these extensive pre-existing degenerative defects. However, it is equally possible that these defects could have been aggravated by any number of activities or events, even activities or events that are of such a relatively minor and insignificant nature that they could have escaped the claimant's attention. In fact, any difficulties which the claimant may have experienced with her low back or lumbar spine, could have merely been due to the natural progression of the claimant's extensive degenerative and arthritic defects, simply as part of the aging process.

Again I simply do not find the claimant's testimony to be sufficiently credible to prove that the fall of May 10, 2007 was the likely or probable cause of any low back or lumbar complaints. It is difficult to conceive that, if the employment related incident of May 10, 2007 did cause or aggravate the various objectively documented defects involving her lower back or lumbar spine, that the claimant could have continued the employment with the respondent, for over two weeks without complaint or any apparent difficulties. It is also difficult to accept that the claimant would have failed to report such complaints, when she initially sought medical treatment from Dr. Young on May 23, 2007. It is also impossible to believe that, if the claimant had reported such difficulties, Dr. Young would have failed to make any of any of these complaints. It is also difficult to conceive that any back injury would have escaped detection on Dr. Young's initial physical examination.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On May 10, 2007, the relationship of employee-employer-carrier existed between the parties.

3. On May 10, 2007, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$382.00 for total disability and \$287.00 for permanent partial disability.

4. On May 10, 2007, the claimant sustained an employment related accidental fall.

5. The claimant has failed to prove that this accidental employment related fall resulted in any "compensable injuries" to her left foot, left shoulder, or lower back (lumbar spine). Specifically, she has failed to prove that this specific employment related incident was the likely or probable cause of any medically established and objectively supported physical injury to these portions of her body, either directly or in the form of an aggravation of a pre-existing condition.

6. The respondents have denied the occurrence of any compensable injuries to the claimant's left foot, left shoulder, and low back (lumbar spine) and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE