

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F608616**

<b>VERONICA MURRAY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>STANT MANUFACTURING, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>GALLAGHER BASSETT, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED MAY 30, 2008**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on February 1, 2008 at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE GEORGE S. IVORY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, 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. The prior opinion filed May 1, 2008 is hereby vacated.

At issue is whether or not the claimant sustained a specific compensable injury pursuant to 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 July 20, 2006. This claim was controverted in its entirety (Tr. p. 73-74). The claimant's group insurance carrier, Anthem Blue Cross Blue Shield, has paid some medical expenses on this claim and she received short term disability benefits for 99 days at \$26.00 in 2007 and 22 days at \$26.00 in 2008. A companion case to this claim is D. Parker v. Stant, #F609262.

The claimant contends she remains symptomatic from the 2006 injury. She seeks payment of medical treatment for a bulging disc and aggravation of preexisting degenerative disc disease, temporary total disability benefits from August 7, 2006 to August 23, 2006 and from July 27, 2007 to a date yet to be determined along with attorney's fees.

The respondents contend Dr. Lester Alexander treated the claimant conservatively and released her to return to work after five days. A year later, Dr. Chakales diagnosed degenerative disc disease. There is no causal connection between the accident and the claimant's present condition. Alternatively, in the event of an award, the respondents seek a credit against benefits paid by third parties pursuant to Ark. Code Ann. §11-9-411.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the transcript.

The following witnesses testified at the hearing: the claimant and co-workers, Davine Parker, Jim Henley and Karen Cook.

The claimant, age 51 (D.O.B. July 7, 1956) has a high school education. She has worked for the respondent-employer for the past 25 years. Her health history includes a cardiac condition, hypertension, anxiety, prior back problems (1987, 1997, 1999 and 2004), motor vehicle accidents (1983, 2001, 2006 and 2007), neck and left arm problems (1997, 2000), and a 2001 back injury at work (Tr. p. 51-57). The claimant has taken medication for anxiety and insomnia for 25 years (Tr p. 56).

The claimant and some co-workers were working at adjoining tables packing parts when a forklift struck the corner of one of the tables, causing the women to fall backward over pallets and boxes or against skids (Tr. p. 30-32, 46-51, 68). The claimant stated she fell out of her chair and struck her hip and back. She filled out an accident report and completed her work but co-workers had to assist her with lifting (Tr. p. 33-34, 69-70).

The next day she asked her employer to send her to a physician but was refused. The claimant used her group insurance to see Dr. Alexander, the company physician. Dr. Alexander ordered x-rays, an MRI scan, and physical therapy. He excused her from work from August 7, 2006 to August 23, 2006. The claimant stated the employer changed her job to something more strenuous in an effort to make her quit, however, she was physically able to work 60 hour weeks (Tr. p. 46-51, 70-71).

The claimant saw her primary physician, Dr. Derek Lewis, in order to obtain a referral to a specialist. She began treatment with Dr. Chakales in April, 2007. He performed a discogram and recommended surgery but that hasn't been scheduled as yet. Dr. Chakales excused the claimant from work indefinitely beginning July 27, 2007.

At the request of the respondents, the claimant saw Dr. Bruffett who repeated x-rays. His physical examination revealed positive Waddell's testing for malingering (Tr. p. 65-66).

The claimant stated she remains symptomatic with sleep disturbance and pain with walking, bending and lifting. She received short-term disability benefits ( \$130.00 weekly) from her employer. She has out-of pocket expenses with her group carrier and used personal leave time for some medical treatment.

On cross-examination, the claimant testified she was able to work after the incident in July 2006 until Dr. Chakales took her off work in April 2007, (Tr. p. 50-51). The claimant did not disclose her prior back injuries to Dr. Chakales. She stated she either did not remember the injuries or the treatment was for a heart condition, (Tr. p. 50-57). When confronted with reports showing a lack of symptoms, the claimant stated she had "good days and bad days" and her problems were not always evident on the days she saw a medical provider.

Medical records show no reports of right leg pain until a month after the accident (Tr. p. 59-61). Dr. Lewis' records also indicate the claimant saw him in October and November 2006, not for a referral to a back specialist, but for a routine physical examination to renew her prescriptions. She

saw Dr. Lewis again in February 2007 for a cold but again, she did not mention any back problems.

The claimant testified she had known co-worker, Davine Parker for 20 years. Ms. Parker saw Dr. Chakales on March 12, 2007 and shortly thereafter the claimant asked Dr. Lewis on March 28, 2007 for a referral to Dr. Chakales. The claimant stated she requested the referral because her pain worsened (Tr. p. 64), not because she was mimicking Ms. Parker.

Dr. Chakales ordered an EMG/NCV study which was normal and a discogram which showed mild disc bulges at L4-5 and L5-S1. He recommended a surgical fusion.

Co-worker, Davine Parker, testified she was sitting at a table next to the claimant's table when the accident happened. She did not know if the claimant's table had been hit, but she did see her fall backward (Tr. p. 8-16).

Jim Henley, maintenance team leader and trained emergency medical technician, saw the claimant on the floor after the incident. She said "ouch, that hurt." However, he incorrectly described where Ms. Parker and Mrs. Murray were sitting. Mr. Henley is no longer employed with Stant.

Karen Cook testified the forklift ran into some pallets, pushing them into three tables lined up in a row. Both Mrs. Parker and the claimant told her they were injured. Ms. Cook testified the table didn't hit the claimant but she stepped backward due to the commotion, struck her chair, and fell on boxes. Ms. Cook signed an accident report indicating the claimant's table did not move. It is noted that Ms. Cook has trouble with reading and writing.

#### **MEDICAL EVIDENCE**

Prior to the July 20, 2006 incident at work, the claimant had been treated on numerous occasions for back pain.

In 1983, she was involved in a motor vehicle accident (MVA) and reported left hand, head and back pain. In 1987, she was treated for back spasms with no history of trauma. She was prescribed medication and back exercises.

In 1997, the claimant was treated for neck, back and left arm pain. Dr. Wadley diagnosed C5 osteophyte spurring. In 1999, the claimant was treated for low back pain with no history of trauma.

In 2000, the claimant complained to Dr. Gerald Morris about neck and left arm pain which was diagnosed as neuritis. Diagnostic testing revealed degenerative changes at C5-C6.

In March 2001, the claimant was treated by Dr. Dodson for neck and back pain following an MVA. Muscle spasm in the lumbar spine was noted and medication was prescribed. The claimant was excused from work for 2 weeks. Dr. Dodson released her from his care in May 2001. In October 2001, the claimant tripped over a box at work and saw Dr. Alexander for back pain. She was prescribed medication and physical therapy. Diagnostic testing revealed sclerotic changes at L5-S1. She was released to return to work on October 18, 2001.

In 2004, the claimant saw Dr. Lewis complaining of back pain.

On July 22, 2006, the claimant saw Dr. Alexander for back, neck, hip and shoulder pain after falling from a chair at work. He diagnosed lumbar, thoracic, and cervical strains and a hip contusion. X-rays showed degenerative disc disease at L4/L5. Medication and physical therapy were prescribed and the claimant was excused from work. The claimant returned to Dr. Alexander on August 14, 2006 and he extended her leave of absence. The claimant began to complain of right leg pain in a report dated August 22, 2006. Dr. Alexander referred her to her family physician for an MRI scan.

The claimant sought treatment at the emergency room (ER) on September 11, 2006. X-rays showed no injury but scoliotic deformity was noted along with degenerative changes. The claimant was advised to follow up with a chiropractor.

The claimant saw Dr. Alexander on September 15, 2006 complaining that although she was still working, her job duties aggravated her back pain. Dr. Alexander declined to prescribe medication and scheduled an MRI scan.

An MRI scan conducted September 19, 2006 showed desiccation of the disks at L4-5 with

“minimal diffuse bulging,” no nerve root involvement, and facet arthropathy at L4-5/L5-S1.

There are no treatment records for a back injury from September, 2006 to April, 2007. The claimant saw Dr. Lewis in October and November 2006 for refills of her prescriptions (Valium, Lopressor, Dyazide, Adipex) and for a cold.

On April 2, 2007, the claimant saw Dr. Chakales. She denied back problems prior to 2006. Dr. Chakales noted facet changes at L4-5, L5-S1 with degenerative disc disease, sclerosis and arthritis of the pedicles, disc desiccation at L4-5 with bulging. His examination revealed “true involuntary spasm”. He prescribed medication but continued her working status. Dr. Chakales commented, “she had a normal EMG but acts as if she has a disc. She is still very symptomatic. Her MRI shows disc desiccation. She has right-sided sciatica.”. On a return appointment two months later in June, 2007, Dr. Chakales stated, “we did a provocative discogram which was abnormal at L4-5. I was unable to get into the L5-S1 space because of a large transverse process.” Dr. Chakales scheduled surgery for August 14, 2007, but the claimant returned to him on August 1, 2007 reporting an MVA which strained her rib cage. Dr. Chakales excused the claimant from work, estimating a minimum healing period of 90 days after surgery.

The claimant saw Dr. Wayne Bruffett on December 7, 2007 at the request of the insurance carrier. The first page of Dr. Bruffett’s report indicates he did not have the claimant’s past medical records including the MRI scan. Later in the report he states he did review her treatment. He performed a physical examination and reviewed x-rays and a post-diskogram CT report to make his diagnosis. In the physical examination, he noted positive Waddell’s signs, commenting, “she has pain with any simulated compression, trunk rotation, and even skin rolling. I cannot really do a neurologic examination because there is no voluntary cooperation with manual motor testing.”

Dr. Bruffett diagnosed a lumbar strain and exacerbation of degenerative changes of the spine based on disc desiccation and mild bulging at L4-L5 with facet arthritis at L5-S1. Dr. Bruffett opined that the healing period had ended and further treatment was unnecessary. He recommended a Functional Capacity Evaluation (FCE) to assess disability. He stated the claimant’s past medical

treatment was reasonable and necessary, and that she would continue to have “chronic, subjective complaints of back pain.”

Dr. Bruffett’s report is obviously addressing an inquiry from the carrier although the questions were not provided in the exhibit packet. If, as I suspect, he was asked about permanent impairment, the doctor commented, “I am not sure what it means by permanency on this claim.”

Numerous medical records show the claimant has been treated for anxiety, depression, and sleep disturbance for a number of years.

### **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.

The determination of whether the causal connection exists is a question of fact for the Commission to determine based on the evidence of record and the credibility of the witnesses. Jeter v. B.R. McGinty Mech., 62 Ark. App. 53, 968 S.W.2d 645 (1998), Ellison v. Therma-Tru, 71 Ark. App. 410, 30 S.W.3d 769 (2000).

It is the claimant's burden to prove a causal connection between the work-related accident and the later disabling injury. Lybrand v. Arkansas Oak Flooring Co., 266 Ark. 946, 588 S.W.2d 449 (Ark. App. 1979). Objective medical evidence is not always necessary if there is a preponderance of non-medical evidence. Horticare Landscape Management v. McDonald, 80 Ark. App. 45, 89 S.W.2d 375 (2002).

If the disability develops soon after the accident and is logically attributable to it, with nothing to suggest any other explanation for the employee's condition, "then the claimant has established a causal connection. However, if there is a span of time between the accident and the disability, a question of fact arises concerning the causal connection. Hall v. Pittman Constr. Co., 235 Ark. 104, 105-106, 357 S.W.2d 263, 264 (1962).

The evidence of record shows the claimant was startled by a forklift hitting a nearby table, stepped back into her chair and fell on boxes behind her. The claimant received conservative care and returned to work for about one year.

One month after the accident, the claimant began complaining of leg pain but diagnostic testing showed no nerve root involvement and Waddell's testing for malingering was positive. The MRI scan did show minimal bulging at L4-5 related to disc desiccation. This diagnosis is usually associated with age and wear and tear over time.

The claimant saw two specialists, Dr. Chakales and Dr. Bruffett. She told both doctors that she had no back problems prior to the accident at work in 2006 and they based their diagnosis and treatment on this incorrect history. The claimant has been treated for back pain off and on since 1983, with and without a history of trauma, suggesting temporary aggravations of her condition in the past.

After reviewing the evidence, I find the extent of the claimant's injuries is clouded by her lack of candor and the effect of her co-worker's workers' compensation claim arising out of the same accident. However, the lay testimony and Dr. Alexander's finding of a hip contusion establish a compensable injury. The claimant was entitled to have this injury evaluated by Dr. Alexander. I also

find the claimant's present condition is the result of degenerative changes unrelated to the compensable injury. Therefore, Dr. Chakales' recommended treatment is unreasonable, unnecessary and unrelated to the compensable injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 20, 2006.
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 claimant sustained a temporary exacerbation of a preexisting condition which resolved, allowing her to return to work. The claimant has failed to prove that the treatment recommended by Dr. Chakales is causally related to the compensable injury.
4. The respondents are directed to pay for Dr. Alexander's treatment within thirty days pursuant to Rule 30, along with temporary total disability benefits from August 7, 2006 to August 23, 2006.
5. 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.

6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.

7. Respondents' request for a Ark. Code Ann. §11-9-411 credit is deferred until Anthem Blue Cross Blue Shield can be given an opportunity to file a lien. Respondents are entitled to a credit against short-term disability payments.

**AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above. 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