

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409969

PEGGY CHENEY, EMPLOYEE	CLAIMANT
FRED'S INC., EMPLOYER	RESPONDENT
FEDERAL INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED JUNE 16, 2006

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE MARC I. BARETZ, Attorney at Law, Memphis, Arkansas.

Respondent represented by HONORABLE CAROL L. WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that she sustained a compensable shoulder injury on December 3, 2003. Based upon our de novo review of the record, we find that the claimant has failed to meet her burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

On December 3, 2003, the claimant was helping a co-worker get a toy down from a shelf when the toy fell and

hit the claimant on the right shoulder. The claimant testified that she fell to her knees and that she felt nauseated after the incident. The claimant stated that she reported the injury to the manager, James Barron. However, the claimant did not file a report of a workers' compensation injury until approximately ten months later when she had to have shoulder surgery for a torn rotator cuff.

The medical records demonstrate that the claimant had been treated for preexisting problems with her right shoulder up through October of 2003 and had problems with her shoulder since she was 10 years old. When the claimant was 10 years old she was injured in horse back riding accident and had to wear a cast on her shoulder for approximately six weeks. With respect to the preexisting problems, the medical evidence demonstrates that the claimant sought medical treatment from Dr. Trent Pierce on May 23, 2003. Dr. Pierce's notes from that date indicate that the claimant was complaining of discomfort and pain involving her arm. Dr. Pierce recommended Naporson,

Scolaxon, and Darvocet, and to return to him on an as needed basis. The claimant again returned to Dr. Pierce on August 25, 2003, complaining of right arm and shoulder pain. At that time, Dr. Pierce referred the claimant to orthopedist, Dr. Guy J. L'Heureux. The claimant sought treatment from Dr. L'Heureux on September 15, 2003.

Dr. L'Heureux noted:

History: This 58 year old white female is referred by Dr. Pierce for evaluation of right shoulder pain that has been present for at least six months. The patient says that at a young age, about 10 years old, she sustained an injury to the right shoulder for which she was in a cast for six weeks. She has been having pain in that right shoulder but not enough to keep her from doing her activities. She has worked in different types of factories over the years. For the past 9 or 10 months she has been working at Fred's where she does a lot of lifting, sometimes 30 to 40 pounds. She complains of pain in the right shoulder. She shows the right AC joint with pain radiating sometimes towards the arm and sometimes towards the scapula and right rig cage. Occasionally the pain will go down to the elbow. Occasionally she will have some sharp pain going down into the levator scapulae and in the scapular area. Before six months those pains were off and on and she has sometimes to sit in a

chair to be a little comfortable and she has noticed that when she has three days off in a row she is some better. There has been occasional tingling and numbness in her fingers, mainly the thumb, index and middle finger. This has not been constant and has not lasted very long.

Dr. L'Heureux then diagnosed the claimant with tendinitis of the right rotator cuff and subacromial bursitis of the right shoulder. He injected the claimant with Xylocaine and Kenalog, and prescribed Aleve and an exercise program. He told the claimant to limit her lifting to 15 pounds until he saw her again in two weeks. The claimant returned to Dr. L'Heureux on October 21, 2003. Dr. L'Heureux noted:

Ms. Cheney is 5 weeks post injection for subacromial bursitis of the right shoulder with tendinitis of the rotator cuff. The patient says that she has felt at least 50% improvement in pain and fairly good range of motion of her shoulder now. She is having more pain today because yesterday she painted a ceiling and even though she took some breaks she realized that the repetitive motion of painting triggered some increased inflammation and today she is paying for it. Overall, she is fairly happy with the results.

Recommendation: Since she is doing better I recommend that she continue the Aleve, heat and the exercise program. The patient is resuming her regular work and I will be glad to re-evaluate if there is recurrence of pain or if she doesn't regain full range of motion of her shoulder within the next month.

The medical records demonstrate that the claimant's first visit to Dr. Sanchez after the December incident was on June 4, 2004. There was no mention whatsoever in the medical records of a box falling on the claimant's shoulder. It was not until the claimant underwent an MRI on July 30, 2004, that there was a mention of a box falling on her shoulder at work. The claimant testified that she told her treating physician about the box incident. The following testimony is enlightening:

Q. You had testified a few minutes ago that your first medical treatment was with Dr. Sanchez, is that right, the first medical treatment for this injury?

A. She was the first doctor that I said anything to about it.

Q. And so when the Judge is looking through the medical reports that your attorney and myself have introduced here

today, Judge Blood is going to be able to see where you gave a history of your work-related injury to Dr. Sanchez?

A. He should be able to.

Q. Before that no history?

A. (Indicated no.)

Q. You need to say "no" for the record.

A. I'm sorry, no.

There is further evidence of inconsistencies between the claimant's testimony and the medical records. The claimant sought medical treatment from Dr. Frederick M. Azar on August 23, 2004. Dr. Azar diagnosed the claimant with a degenerative cyst of the distal clavicle. The claimant's coworkers, Pamela Moore and Nancy Whalley, both testified at the hearing about this. Ms. Moore testified that she saw a mark on the claimant's neck. Ms. Whalley testified that she saw a knot on the claimant's shoulder after the incident. At the hearing held in the matter on May 27, 2005, the claimant testified regarding the box falling on her and regarding a cyst on her shoulder:

Q. Ms. Cheney, you described for the Judge today the accident that happened, and you said that this box of like eighteen inches by three feet, or whatever, fell on your shoulder. Is that right?

A. Yes, ma'am.

Q. And in taking your deposition you indicated you actually turned around to talk to someone and the box fell. Is that right?

A. I turned my head, yes.

Q. Okay. And you described here the box fell somewhere on your shoulder?

A. Yes.

Q. And is it kind of in that clavicle area where that bone there is?

A. Yes. You've got to understand the box was pretty wide. It covered this whole part.

Q. And the red mark you had was on the top part of your shoulder?

A. Yes.

Q. Okay. And when we talk about -- the reason I'm asking is when you talked about the clavicle area, when you went to see Dr. Azar, it looks like for the first time on August 23, he indicates in his report that he explained to you that the knot that you had on your clavicle

was a cyst and it wasn't fractured, it was just something degenerative. Is that ...

A. He did not tell me that.

Q. Did you show him the problem on your shoulder?

A. Yes, ma'am.

In addition, the claimant did not file a workers' compensation claim for ten months after this alleged injury, even though the claimant was the manager of the respondent employer's store and was well aware of workers' compensation procedures. The following testimony also demonstrates that not only was the claimant knowledgeable about the workers' compensation procedures, but she also contradicted her medical records in her testimony:

Q. Okay. And you've talked today, and you said when the accident happened you said - - and I wrote it down. You said, "I knew I was hurt." Is that right? At that point in time you knew you were hurt. Is that right?

A. Yes.

Q. And you also had testified that you were in training to be a manager?

A. Yes, ma'am.

Q. And you had actually been a manager at several convenience stores for several years before this. Is that correct?

A. Yes, ma'am.

Q. So, in fact, Ms. Cheney, wouldn't you agree with me that you know in your heart that you needed to fill out an accident report, incident report, whatever you needed to do so that you could cover yourself? Is that correct?

A. Yes, ma'am.

Q. That's something that you knew because of your training?

A. Yes, ma'am.

Q. And yet that day you didn't fill out any documentation, did you?

A. No. I didn't.

Q. No injury or accident form?

A. No, I didn't.

Q. And in fact, for the next ten months you didn't fill out any injury or accident report.

A. Because...

Q. Is that correct, yes or no?

A. Yes.

Q. Now your attorney has gone through here today and touched on a couple of the medical records, and I want to ask you something. He kind of talked about how important it was for you to give a history to the doctor, and he kind of went through and talked about some of the histories you had given, but would you agree with me, Ms. Cheney, that it is very important when you go see a doctor that you tell them exactly what's wrong so they know how to treat you?

A. Yes, ma'am.

Q. So if you go in and you have a urinary tract infection, you don't tell them, "I've got a headache." You say, "I've got a urinary tract infection," and they know what to do. Is that right?

A. Yes, ma'am.

Q. If you go in and you have a right shoulder problem, you tell them everything associated with it so they know what to do. Is that correct?

A. Yes, ma'am.

Q. Okay. In looking at some of the medical records, here, Dr. Manugian, the one who did your surgery, when you went and saw him, it looks like on September 13, 2004, you again told him

what was wrong with your shoulder. Is that correct?

A. He asked.

Q. Okay. And you told him?

A. Yes.

Q. Okay. And according to his record you denied any previous problems until a box dropped on your shoulder in December 2003. Now that is not correct, is it?

A. Any problems with this arm, yes, that is correct.

Q. And you're telling me here today, and you're telling the Judge here today under oath, that you did not have any problems with your right shoulder until the box dropped on it in December 2003?

A. That is not what I'm saying.

Q. Okay. Did you, in fact, tell that to Dr. Manugian?

A. I do not recall telling him that, no.

Q. If his records indicate that you denied any previous problems until a box fell on your shoulder in December 2003 at work, you're saying that's incorrect?

A. I would say that's incorrect, yes.

Q. Okay, because that is incorrect. You've had lots of problems with your shoulder ...

A. Yes, I have.

Q. ...dating back to when you were ten years old and got dragged by a horse. Is that correct?

A. That's true.

Q. Okay. And I think Dr. L'Heureux indicated that you were in a cast for a period of time because of your shoulder at that time. Is that right?

A. I wouldn't know how Dr. L'Heureux would know that.

Q. Well, is that what you told him?

A. No, I did not.

Q. Were you, in fact?

A. Was I - - did I have a cast on my arm when I was ten?

Q. Yes.

A. Yes.

Q. Yes. It looks like actually you were in to see the doctor, Dr. L'Heureux, on October 21, 2003, and at that time you were also having problems with your right arm after painting your ceiling. Do you recall that?

A. Perhaps.

Q. So, in fact, you did have problems with your right shoulder even before this occurred?

The claimant denied telling Dr. L'Heureux about the horse dragging incident. However, how would Dr. L'Heureux have known the horse dragging incident but for the claimant telling him about it. This is just more evidence of the claimant's lack of credibility. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App. 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

Simply put, the record lacks sufficient evidence for the claimant to prove her torn rotator cuff and need for

right shoulder surgery was the result of the incident on December 3, 2003. The claimant has had longstanding problems with her shoulder starting when she was ten years old. The claimant sought medical treatment for problems with her right shoulder approximately five months and again two months prior to this incident. Further, if the claimant had thought she hurt her shoulder while at work and needed treatment for it, she knew that she needed to file a workers' compensation claim. By her own admission she was familiar with the reporting procedures and acknowledged in her testimony that she should have filed a report. Instead, she waited over seven months to mention anything to her doctor about the incident and over two months after that to file a report of injury. In our opinion, a finding of compensability is based upon conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125

(1993). Accordingly, we reverse the decision of the Administrative Law Judge and this claim is hereby denied and dismissed.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is reversing an Administrative Law Judge's finding that the claimant sustained a compensable injury to her shoulder. For the reasons set out below, I respectfully dissent from the Majority's Opinion.

The claimant was employed by the respondent in one of their department stores. On or about December 3, 2003, the claimant, who was the assistant manager at that time, was assisting two other employees who were attempting to remove a large, heavy box containing store merchandise from

a high shelf. One of the workers dropped the box and it fell, striking the claimant on her right shoulder. One of the coworkers who was assisting in this operation testified and corroborated the claimant's testimony.

The claimant stated that the blow from the falling box caused considerable pain in her shoulder and left a mark. She testified further that she advised the store manager of the incident and he stated that he would "take care of it." Another store employee testified that later on the same day, she discussed the incident with the store manager who indicated his awareness of the accident.

The claimant continued to work following her accident but continued to have problems with her shoulder and eventually sought medical treatment for her condition. An MRI performed on the claimant's shoulder on July 30, 2004, found that she had rotator cuff tears in three places, as well as an acromion tilt which caused a rotator cuff impingement. The claimant eventually underwent a surgical repair of these conditions.

The Administrative Law Judge found that the claimant's shoulder ailment was the result of being struck by the falling box. Accordingly, he ordered the respondent to pay for the claimant's medical treatment, including her surgery, and a period of temporary disability (issues relating to the claimant's permanent impairment were reserved for future determination). The Majority is reversing the Judge's determination based upon what they find to be inconsistencies in the claimant's testimony and the medical records. However, in my opinion, many of these discrepancies are either illusory or are of no significance. For example, the Majority notes that the first physician the claimant saw following the December 2003 accident was Dr. Ilsa Sanchez on June 4, 2004. They also quote a portion of the claimant's testimony in which she testified that she told Dr. Sanchez about being hit by the falling box. The Majority questioned the claimant's credibility based upon their finding that the medical evidence does not reflect that the claimant advised Dr. Sanchez about the December 2003 accident. While this is technically true, it should be

noted that the medical records do not contain any narrative reports from Dr. Sanchez regarding the office visit of June 4, 2004. The only evidence that relates to this office visit is a billing statement from Dr. Sanchez's office indicating that the claimant was billed \$120.00 for the office visit and a bone scan was scheduled. The statement also contains various diagnosis codes, some of which relate to shoulder injuries. Since the record in question is a billing statement, it is not surprising that it does not contain any narrative information as to what the claimant did or did not tell Dr. Sanchez. While it certainly would have been helpful had a progress note or other narrative statement been placed in the record regarding this office visit, it is not fair to question the claimant's credibility because it was not. The billing statement is simply not sufficient evidence to determine what the claimant did or did not tell Dr. Sanchez.

Likewise, the Majority quotes some of the cross-examination of what the claimant said she told Dr. Guy L'Heureux, a West Memphis orthopedist, and Dr. Arsan

Manugian, the doctor who performed the claimant's shoulder surgery. In the quoted testimony, the claimant states that she had advised Dr. Manugian about past shoulder problems but had not told Dr. L'Heureux about some of the problems, specifically an injury to her arm when she was 10 years old (at the time of the hearing, the claimant was 60 years of age).

My review of the medical records suggest that the claimant apparently did advise Dr. L'Heureux regarding her past medical history but did not fully advise Dr. Manugian. However, I fail to see the significance of this discrepancy. The claimant saw a variety of doctors about her shoulder problems, and I do not see any great significance that she may have had trouble remembering exactly what she had told each of her doctors. Further, at the time the claimant was receiving treatment from each of these physicians, she was not pursuing a workers' compensation claim and was having her medical expenses paid by her health insurance. Also, since neither doctor was asked to render an opinion as to the etiology of the claimant's shoulder problem, I fail to

see any great significance as to what history they were given by the claimant.

The Majority concludes their Opinion by stating that the record lacks sufficient evidence for the claimant to prove her torn rotator cuff was related to her accident on December 3, 2003. However, I find that this conclusion is contradicted by the testimony of the claimant, the corroborating witnesses, and the medical records. As indicated above, the alleged discrepancies cited by the Majority questioning the claimant's credibility are, I believe, of little significance. Also, while the claimant had suffered from some shoulder problems prior to her accident of December 3, 2003, they were of a substantially less severe nature than those that she eventually sought treatment for in June 2004. Also, even though the respondent has controverted this case in its entirety, there does not appear to be any real doubt that the claimant was injured in the incident with the falling box.

I note that the respondent's question, in their Appellate Brief, how the claimant could have suffered a torn

rotator cuff as a result of being struck on the shoulder. In this regard I refer to the MRI scan which indicated that the claimant was suffering from an acromion tilt, which impinged her rotator cuff. Rotator cuff impingement will result in chronic inflammation which can cause tendons within the rotator cuff to tear. See Medline Plus, Rotator cuff tendinitis, <<http://www.nlm.nih.gov/medlineplus/ency/article/000438.htm>> (last updated Aug. 3, 2004).

Since I find that the evidence developed at the hearing in this case is more than sufficient to meet the claimant's burden of proof, I respectfully dissent from the Majority's Opinion denying this claim.

SHELBY W. TURNER, Commissioner