

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F212121**

**LINDA BOBBITT, EMPLOYEE**

**CLAIMANT**

**S Y M, INC., EMPLOYER**

**RESPONDENT**

**ZENITH INSURANCE COMPANY,  
INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED AUGUST 21, 2003**

Hearing before Chief Administrative Law Judge David Greenbaum on June 20, 2003, at Jonesboro, Craighead County, Arkansas.

Claimant appeared *pro se*.

Respondents represented by Mr. Jeremy Swearingen, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 20, 2003, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing conference was conducted in this case by Administrative Law Judge Elizabeth W. Hogan on June 4, 2003, and a Prehearing Order was filed on said date. A copy of the Prehearing Order was marked "Commission's Exhibit 1" and made a part of the record without objection.

At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions remained as set out in the Prehearing Order.

It was stipulated that the employee/employer/carrier relationship existed

at all relevant times, including September 13, 2002, at which time the claimant earned sufficient wages (\$457.27) to be entitled to compensation rates of \$305.00 for temporary total disability and \$229.00 for permanent partial disability in the event the claim was found compensable.

By agreement of the parties, the issues to be presented for determination include:

- 1) Compensability;
- 2) medical expenses; and,
- 3) temporary partial disability benefits.

Claimant contended, in summary, that she sustained an injury to her right shoulder as the result of a specific incident identifiable in time and place of occurrence while lifting a basket of fish at work on September 13, 2002; that her symptoms gradually worsened and that she reported the injury approximately one week later, at which time she requested medical treatment. The claimant, at her own expense, began treatment with Dr. Michael Ungerank, a chiropractor in Jonesboro, Arkansas, who recommended light-duty. The claimant seeks payment of medical expenses incurred through Dr. Ungerank and at St. Bernard's Medical Center, to date, as well as continuing medical treatment. The claimant further contends that she is entitled to temporary partial disability benefits. Prior to the injury, the claimant earned \$8.75 per hour, including over-time work as a kitchen manager and cook. After her

accident, she was placed on light-duty in the bakery and at the salad bar at the same hourly rate of pay, but her hours were reduced to thirty-eight (38) to forty (40) hours weekly. The claimant contends that prior to the injury, she earned \$25,000.00 annually, and that she now makes \$23,000.00.

The respondents contended that the claimant's symptoms were a recurrence of a pre-existing, non-work related motor vehicle accident in March, 1999, resulting in treatment for chronic neck and right shoulder pain. Respondents further contended that the claimant could not prove that the injury arose out of and in the course of her employment or that the injury was supported by objective medical evidence. Respondents rely on a March [sic] 13, 2003, report from Dr. Ron Schechter. Alternatively, in the event the claim was found to be compensable, the respondents maintained that further medical treatment was unreasonable and unnecessary, and further that the claimant was not entitled to indemnity benefits because she had continued to work full-time since her injury. Finally, respondents maintained that the chain of liability was severed by a second motor vehicle accident on October 11, 2002.

The claimant testified in her own behalf. Edward Colvin, the general manager for the employer, was called as a corroborating witness by the claimant. The record is composed solely of the transcript of the June 20, 2003, hearing containing numerous exhibits.

From a review of the record as a whole, to include medical reports,

documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties at the prehearing conference conducted June 4, 2003, and contained in the Prehearing Order are hereby accepted as fact.
3. The claimant has proven, by a preponderance of the credible evidence, that she sustained an injury to her right shoulder which arose out of and during the course of her employment with S Y M, Inc., as the result of a specific incident identifiable in time and place of occurrence on September 13, 2002, and that the injury caused internal, physical harm which required medical services and is supported by objective medical evidence.
4. The claimant has established, by a preponderance of the evidence, that she sustained a decrease in her capacity to earn pre-injury wages which would entitle her to temporary partial disability benefits.
5. As the result of claimant's compensable injury, she has sustained a

decrease in her average weekly wage of approximately \$50.00, entitling her to temporary partial disability benefits at the rate of \$33.00 per week.

6. The claimant's healing period had not ended as of the date of the within hearing.
7. Respondents are responsible for all outstanding medical and related expenses which are directly and causally related to claimant's September 13, 2002, injury, including, but not limited to the treatment provided by Dr. Michael Ungerank and at the St. Bernard's Medical Center, and respondents remain responsible for continued, reasonably necessary medical treatment.
8. The nature and extent of claimant's injury, as well as claimant's entitlement to future benefits are by necessity specifically reserved.

#### DISCUSSION

The facts in this case are basically undisputed. First, I found the claimant to be an extremely credible witness. Her testimony regarding the occurrence of a specific event at work, its prompt reporting, as well as claimant's physical problems following the work-related incident is corroborated by the employer, and supported by the medical evidence.

The claimant has worked for the employer for more than seventeen (17) years. She has continued to work at all times since her injury because the

employer has provided her with appropriate, light-duty work. Edward Colvin, the general manager for the employer investigated this claim and corroborated the claimant's testimony. Mr. Colvin opined that the claimant was an excellent worker and was extremely honest. (Tr.57-58)

It must be noted that the insurance carrier, and not the employer, disputed this claim. It contended that the claimant could not prove that her injury arose out of and in the course of her employment or that the injury was supported by objective medical findings. Respondents rely primarily upon a May 13, 2003, report from Dr. Ron Schechter, a hand selected physician chosen by the respondents, to perform an evaluation of the claimant nine (9) months after the reported incident. I did not find Dr. Schechter's report to be extremely persuasive. It must be noted that respondents obtained this report only after the claimant requested a hearing to obtain the benefits to which she felt she was entitled. It is unclear exactly what records the attorney representing the insurance company sent to Dr. Schechter concerning this claim. Because Dr. Schechter commented on some of the notes of claimant's primary care physician, Dr. Michael Ungerank, D.C., without reference to Dr. Ungerank's February 19, 2003, and June 2, 2003, narrative reports, I can only assume that said reports were never furnished to Dr. Schechter. In fact, it appears that respondents intentionally omitted these reports from the comprehensive medical packet requested at the prehearing conference and

directed in the Prehearing Order. Because these narrative reports were received and made a part of the record at the hearing, and no harm resulted from their possible omission, no disciplinary action was deemed warranted. (Tr.51-52)(Comm. Ex. 1)

The claimant, Linda Bobbitt, is fifty-eight (58) years old. She completed eight (8) years of formal schooling. The claimant began working for the respondent, S Y M, Inc., a/k/a Western Sizzlin' Steakhouse, in 1985. She began as a cook. At the time of claimant's injury, she was both a cook and a kitchen manager. On September 13, 2002, the claimant lifted a large basket of fried fish and dumped it into a bowl, at which time she felt a pop in her right shoulder. The claimant immediately reported the incident to a co-worker, Thelma Meeks. The injury occurred on a Friday afternoon near the end of claimant's work-shift. The claimant stated that her shoulder started hurting during the weekend, but that she did not work either Saturday or Sunday. The claimant returned to work on Monday, September 16, 2002. She maintained that her symptoms grew progressively worse and that she reported the incident to her immediate supervisor, Steve Schrek, who filled out an incident report. Again, the claimant continued working. She subsequently reported her injury to the general manager, Ed Colvin, and was told to seek treatment from a doctor of her own choice. The claimant was initially examined and treated by Dr. Michael Ungerank, a chiropractor in Jonesboro, Arkansas. The record

reflects that the claimant had received previous chiropractic treatment from Dr. Ungerank beginning March 3, 1999. Dr. Ungerank has treated the claimant periodically since that time. Admittedly, the record reflects that the claimant had a pre-existing condition involving both her low back and leg problems, as well as neck and shoulder pain which Dr. Ungerank attributed to wear and tear from work, and for which he provided occasional maintenance treatment. However, it is clear from Dr. Ungerank's report set out further below that in his physical examination following the admitted incident, he found additional injuries which did not exist prior to September 13, 2002.

In addition to being evaluated by Dr. Ungerank, the claimant also sought treatment at the Jonesboro Church Health Center where she was prescribed medication, alternating ice and heat therapy, as well as rest. The Jonesboro Church Health Center attempted to refer the claimant to a medical specialist; however, the claimant was contacted by a claims adjustor for the insurance carrier, Chris Hershberger, who advised the claimant that she could not see the specialist to whom she had been referred. She stated that initially Mr. Hershberger made an appointment for her to see Dr. Carpenter, but, subsequently cancelled the scheduled appointment and controverted the claim in its entirety. As previously pointed out, it was only prior to going to a formal hearing that respondents selected a medical provider to examine the claimant. (Tr.22-27)

The claimant has continued under the care and treatment of Dr. Ungerank. She maintained that her condition had improved significantly, but that she continued to experience problems and remained on restricted duty. The employer has shown good faith in meeting its obligations under our workers' compensation laws by providing the claimant light-duty. However, because of the claimant's physical restrictions, she has been precluded from working full-time, including overtime, which has resulted in a decrease in her average weekly wage. Unfortunately, there was no clear documentation concerning the claimant's decreased wages. She stated that she was earning between \$100.00 to \$150.00 less each pay period than she earned prior to her injury. Since her testimony is undisputed, I find that she has proven that her income has been diminished by at least \$50.00 per week, which would entitle her to temporary partial disability benefits at the rate of \$33.00 per week.

#### COMPENSABILITY

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A. C. A. §11-9-102(4)(A)(i)(Repl. 2002), must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of employment;
2. proof by a preponderance of the evidence that

the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;

3. medical evidence supported by objective medical findings, as defined in A. C. A. §11-9-102(16), establishing the injury; and,

4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. *Mikel vs. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant has established, by a preponderance of the evidence, all of the requirements necessary to establish compensability. The respondents contended that claimant's symptoms beginning September 13, 2002, were a recurrence of a pre-existing, non-work related motor vehicle accident in March, 1999, which resulted in treatment for chronic neck pain and right shoulder pain. The respondents further maintained that the claimant's injury was not supported by objective medical evidence. Respondents' contentions are simply without merit.

The only physician in a position to identify the claimant's physical problems before and after September 13, 2002, is Dr. Michael Ungerank, D.C.

Dr. Ungerank has treated the claimant off and on since March 3, 1999. His physical examination of the claimant on October 1, 2002, noted severe muscle spasms along the right lateral area of the claimant's cervical spine which did not exist prior to September 13, 2002. In addition, Dr. Ungerank specifically addressed respondents' alternative contention concerning an independent intervening motor vehicle accident on October 11, 2002, when the claimant was involved in a rear-end collision. Dr. Ungerank's February 19, 2003, narrative report is set out in its entirety below:

To Whom It May Concern:

Linda Bobbitt was seen in our office on 10-1-02 complaining of severe pain in the right side of her neck going into the right shoulder area, descending to the right arm and down to the elbow. Patient stated she couldn't grip anything and it hurt to raise her arm. Patient was holding the arm in a sling position guarding it from any movement to prevent pain. Patient couldn't sleep due to the pain.

Patient stated the pain started on 9-13-02 when she lifted a basket of fried fish and dumped it in a bowl and heard her shoulder articulation between the acromion and the head of the humerus make a cracking sound. The pain in the shoulder began to increase steadily until the point of 10-1-03 [sic] patient was no longer able to lift or grip anything.

In the physical examination of the patient' [sic] condition patient was experiencing severe muscle spasms along the right lateral area of the cervical spine starting at the base of occiput descending down over the scapula area out to the point of the acromion process down into the right arm.

Further muscle spasticity was noted in the area of the para vertebral muscles around T1-T2 and T5-T6 area, the interscapular

muscles on the right side and the muscles of the supraspinatus, infraspinatus, teres minor, the deltoid and biceps muscle as well.

Patient was holding the right shoulder in a lower guarded position with the right arm as stated before in front of the body. Patient couldn't abduct or extend the arm without severe pain past the shoulder level. Patient would experience pain and a restriction in the range of motion for the cervical spine when bending the cervical spine to the right or when rotating the spine to the right. Foramina compression tests showed increased pain down the right arm.

X-rays were taken of the spine that revealed the following:

1. AP cervical x-ray showed rotation of C2 spinous right and rotation of C6-C7-T1-T2 with spinous right rotated to the right side. No pathologies noted.

2. Lateral x-rays showed a normal curvature and no obvious pathologies.

3. AP Thoracic view showed rotation of the upper thoracic vertebrae of T1-T2 and the T4-T5 area, no pathologies noted.

Chiropractic analysis noted subluxations at C2, T1, T5 right ilium and left sacroiliac articulation.

In combining the physical exams, x-rays, palpation and Chiropractic analysis the following diagnosis was made:

1. Subluxation of C2 vertebrae caused by a sprain/strain type injury resulting in a radicular nerve pain, muscle spasticity and edema.

2. Sprain/strain of the anterior lateral flexor muscles of the cervical spine descend from the base of the occiput down the superior angle of the scapula and the posterior area of the clavicle.

3. Subluxation of the T1 and T5 vertebrae due to the sprain/strain type injury resulting in radicular nerve pain, muscle spasticity and edema.

4. Sprain/strain injuries to para vertebral muscles in the area of subluxations of T1 and T5.

5. Sprain/strain injury to the interscapula muscle group.

6. Severe sprain/strain injury to the rotator cuff muscles as well as the deltoids and biceps muscles.

Patient was treated with Chiropractic adjustments, neuromuscular re-education and given instructions to use ice-packs and moist heat at home.

Patient's response to care has been positive and steady for the type of injuries she had.

At this time patient is working but unable to resume normal duties due to the inability to lift any weight over the 5-10 pound range without causing the shoulder area to start to hurt again.

It will be 6-12 months before the strength will return, but with the patient being 5' 1" tall and weighing approximately 135 lbs, in my opinion if she returns to the same job there will be a chance of re injury.

The workmen's compensation insurance company claims this was a pre-existing condition.

This patient has been seen in our office off and on since 3-3-99 starting with lower back and leg problems and with neck and shoulder pain that were mainly a result of wear and tear from work. These problems were causing minimal pain with no limitation of motion, no ligamentous injury, no neurological findings. These conditions were mainly due to subluxations with some minor muscle strain.

The injury of 9-13-02 consisted of moderate to severe limitation of motion, ligamentous instability, muscular instability, neurological findings and major subluxation complexes all due to traumas starting on this date.

On 10-11-02 Patient was involved in a rear end collision in which

her vehicle was rear ended but no damage was done to her vehicle.

Patient was reexamined for this accident but no additional injuries were evident, in fact patient stated the muscle spasms of the right shoulder area had improved and she was beginning to sleep better only waking up once during the night. This is why we have continued to treat this case as workmen's compensation.

On December 13, 2002, patient was referred for a CT scan of the cervical spine which ruled out a herniated disc.

Patient did tell us the M.D. examined her shoulder and didn't find any tears and to keep doing what she was doing as far as treatment was concerned.

Please call if you have questions concerning this patient. (Cl. Ex. B)

Again, respondents rely on the May 13, 2003, report of Dr. Ron Schechter in denying this claim. As previously pointed out, I did not find Dr. Schechter's report to be persuasive. His conclusions are based upon limited medical evidence and a one-time only examination. The fact that Dr. Schechter did not make any objective findings at the time of his examination is irrelevant to the issue of compensability. A claimant does not have to support a continuing need for medical treatment with objective findings. *Chamber Door Industries, Inc. vs. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (1997)

As an affirmative defense, respondents contend that its liability was severed by a second motor vehicle accident on October 11, 2002.

Suffice it to say that respondents' alternative defense is based upon

sheer speculation and conjecture rather than proof. It is well settled that conjecture and speculation, however plausible, cannot be permitted to supply the place of proof. *Dena Construction Co. vs. Herndon*, 264 Ark. 791, 575 S.W.2d 155 (1979); *Arkansas Methodist Hospital vs. Adams*, 43 Ark. App. 1, 858 S.W.2d 125 (1993). The Commission has held that this rule is not limited to claimants attempting to meet their burden of proof, but applies with equal force to respondents seeking to employ what amounts to an affirmative defense. In such cases, the Commission has held that if the only means of finding that some intervening cause is responsible for claimant's need for treatment is to resort to impermissible speculation and conjecture, or to allow respondents the benefit of the doubt which the Commission is, likewise, precluded from doing by Ark. Code Ann. §11-9-704(c)(4). *Johnson vs. Wal-Mart Stores, Inc.*, WCC #E612677, Full Commission Opinion filed February 5, 1998.

Compensability having been determined, claimant's entitlement to associated benefits must be addressed.

#### MEDICAL TREATMENT

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. §11-9-508; *American Greeting Corp. vs. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes

reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky vs. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. vs. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. vs. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The employer permitted the claimant to seek medical attention from a doctor of her own choosing. The claimant has obtained medical treatment from both Dr. Ungerank, as well as the St. Bernard's Medical Center and the Jonesboro Church Health Center. The claimant was, at one time referred to a specialist for additional medical treatment; however, respondents frustrated any efforts at the referral by controverting the claim in its entirety, necessitating the claimant's continued medical treatment by Dr. Ungerank. Apparently, the claimant's overall condition has improved significantly under Dr. Ungerank's treatment. Accordingly, I find that claimant has proven, by a preponderance of the evidence, that the treatment is reasonable and necessary, as well as related to her admitted injury. The claimant may continue under the care of Dr. Ungerank, so long as the treatment remains reasonably necessary or, alternatively, the claimant may seek to see her primary care physician and obtain a referral to a different specialist for further evaluation and treatment.

Admittedly, the record reflects that the claimant was seeking maintenance medical care from Dr. Ungerank for pre-existing and unrelated problems before September 13, 2002. Obviously, respondents are not responsible for any treatment related to the claimant's low back, legs or pre-existing cervical problems which require maintenance care, but only for the care related to the claimant's right shoulder and upper extremity.

#### TEMPORARY PARTIAL DISABILITY

Ark. Code Ann. §11-9-520 (Repl. 2002) provides:

In cases of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid to the employee sixty-six and two-thirds (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his earning capacity after the injury.

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages while temporary partial disability is that period within the healing period in which the employee suffers only a decrease in her capacity to earn the wages she was receiving at the time of injury. *Arkansas State Highway & Transportation Dept. vs. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The record reflects that the claimant has been placed on light-duty as the result of her shoulder injury. The employer has exercised good faith by providing the claimant with suitable work, however, as the result of claimant's physical limitations, she is earning approximately \$50.00 per week less than

she earned at the time of the injury. Accordingly, she is entitled to \$33.00 per week in temporary partial disability.

AWARD

Respondent, Zenith Insurance Company, is hereby directed and ordered to pay, to the claimant, temporary partial disability benefits at the rate of \$33.00 per week beginning October 1, 2002, and continuing through the date of the within hearing and until such date as claimant's healing period is determined to have ended.

Respondents are further directed and ordered to pay all outstanding medical and related expenses incurred, to date, for treatment of claimant's compensable injury, and respondents remain responsible for continued, reasonably necessary medical treatment. All medicals shall be paid in accordance with the medical cost guidelines established by Commission Rule 30.

This Award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

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DAVID GREENBAUM  
Chief Administrative Law Judge