

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F105088

TERESA JOHNSON	CLAIMANT
SOUTHERN STEEL & WIRE	RESPONDENT
ATLANTIC MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 23, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondents represented by DAVID WALL, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 1, 2003, in Fort Smith, Arkansas. A pre-hearing order had been entered in this case on May 22, 2003. This pre-hearing order purported to set out the stipulations offered by the parties and to outline the issues to be litigated and resolved at the present time. Immediately prior to the hearing, stipulation #5, concerning the payment of temporary total disability benefits, was withdrawn by agreement of the parties. A copy of the pre-hearing order with that 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 October 25, 2000, the relationship of employee-employer-carrier existed between the parties.
2. On October 25, 2000, the claimant earned an average weekly wage of \$315.00 which would provide weekly benefits of \$210.00 for total disability and \$158.00 for permanent partial disability.
3. On October 25, 2000, the claimant sustained a compensable injury to her left hand and wrist.

4. There is no dispute, at present, over the payment of medical expenses incurred prior to November 27, 2002.
5. The claimant's healing period ended on or before April 17, 2002.
6. The respondents have accepted liability for and paid permanent partial disability benefits attributable to a permanent physical impairment of 34% to the arm below the elbow.

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 also sustained a compensable injury to her left shoulder in the incident on October 25, 2000.
2. The claimant's entitlement to the payment of expenses incurred for medical services on and after November 27, 2002.
3. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a) beginning on October 18, 2002.
4. Controversion and appropriate attorney's fees.

In regard to these issues, the claimant contends:

- a. Respondent refused to return claimant to work by terminating her on 10/17/02 in violation of Ark. Code Ann. §11-9-505(a).
- b. Respondent refused to reimburse claimant for emergency medical expenses incurred on 11/27/02.
- c. Respondent's agent, Ronald A. Scott with Crockett Adjustment refused to allow claimant to see company doctor Holder for continued medical treatment as recommended by Sparks Regional Medical Center.
- d. Respondent refused to allow claimant to see Dr. Jones for reassessment of shoulder pain(sic) as recommended by Dr. James E. Kelly, III, in

office note 7/8/02.

- e. Respondent refused to provide suitable employment with claimant's limitations and restrictions."

In regard to these issues, the respondents contend:

"Claimant returned to her work duties after her surgery. Respondent provided work duties within her restrictions. Claimant was terminated for cause.

DISCUSSION

I. LEFT SHOULDER

The first issue to be addressed is the question of whether the claimant also sustained a "compensable injury" to her left shoulder in the employment related incident of October 25, 2000 (the incident giving rise to her admittedly compensable left hand and wrist injury). The burden rests upon the claimant to prove the occurrence of this alleged compensable injury.

In order to meet this burden, the claimant must prove by the greater weight of the credible evidence the occurrence of a physical injury that meets all of the requirements for a "compensable injury" set out in the Act. Under the facts of the present case, these requirements are contained in Ark. Code Ann. §11-9-102(4)(A)(i) and §11-9-102(4)(D).

I find Ark. Code Ann. §11-9-102(4)(D) to be dispositive of this claim. This subsection requires that the claimant "establish" by medical evidence the actual existence of the physical injury or condition alleged to be compensable. It further requires that the claimant prove by the greater weight of the credible evidence that the actual existence of this physical injury or condition is supported by "objective findings" or findings beyond the claimant's voluntary control.

In the present case, the claimant has failed to "establish" by medical evidence the actual existence of any physical injury involving her left shoulder. Although certain medical reports and records mention complaints of difficulties in this area, no injury or condition has

been diagnosed as being the etiology of these complaints. More importantly, there is absolutely no evidence of any “objective findings” to support the presence or existence of this alleged injury.

For the sake of completeness, the requirements imposed by Ark. Code Ann. §11-9-102(4)(A)(i) will also be addressed. This subsection requires the claimant to prove by the greater weight of the credible evidence that the alleged physical injury to her left shoulder meets the five following requirements:

- (1) The injury arose out of and occurred in the course of her employment
- (2) The injury was caused by a specific incident;
- (3) The injury is identifiable by time and place of occurrence;
- (4) The injury caused internal or external physical harm to her body;
- (5) The injury required medical services or resulted in disability.

In order to prove that this alleged injury arose out of and occurred in the course of her employment, the claimant must first show the existence of a causal relationship between this physical injury and her employment. In order to prove the second requirement, the claimant must show that this employment related cause was a “specific incident”. In order to prove the third of these requirements, the claimant must show that this employment related accident and resulting injury is identifiable by time and place of occurrence.

The only direct evidence presented by the claimant to prove these first three requirements is her own testimony. It is well recognized that the testimony of a party is never considered uncontradicted. However, this does not mean that it can be arbitrarily disregarded. If the testimony of a party is credible, it may be sufficient, in and of itself, to prove any fact it is legally competent to address. Clearly, the claimant’s testimony would be legally competent to prove the existence of a close temporal relationship between the specific employment related incident on October 25, 2000, and the onset of difficulties with

her left shoulder that would be indicative of a physical injury to this portion of her body. However, after consideration of all the evidence presented, it is my opinion that the claimant's testimony in this regard is not credible.

The claimant testified that she first experienced difficulties with her left shoulder when she got home after the employment related incident on October 25, 2000. She further testified that she continuously experienced difficulties with her left shoulder after that time. She stated that she did not think that she reported any difficulties with her shoulder to Dr. Bylak, but did report her continuing left shoulder difficulties to Dr. Kelly on the third or fourth visit after her surgery (the surgery was apparently performed in July of 2001).

The medical evidence shows that the claimant did not complain of any difficulties with her left shoulder when evaluated or treated by Dr. Holder, Dr. Wolfe, Dr. Raben, and Dr. Bylak. More importantly, the reports and records of Dr. Kelly failed to note any complaints involving the claimant's left shoulder, until after the claimant was released and rated by Dr. Kelly for her compensable left wrist and hand injury (April 8, 2002). In his report to the claimant's attorney, dated May 10, 2002, Dr. Kelly expressly denies knowledge of any complaints or injuries involving the claimant's left shoulder.

The claimant's only excuse for not complaining of her left shoulder difficulties sooner, was that her left wrist and hand difficulties were far more severe. Even assuming that the claimant's testimony is accurate (in regard to complaining to Dr. Kelly about her shoulder difficulties on the third or fourth visit after surgery, which would have been in October of 2001), I find it rather difficult to believe that the claimant could have experienced such persistent difficulties for almost a year, seen a multitude of physicians, and not once mention that she was experiencing persistent complaints in her shoulder area. Assuming that Dr. Kelly's records are correct and that the claimant never mentioned any shoulder difficulties to him, prior to May 10, 2002, it is impossible to believe that the claimant would

have failed to report such persistent complaints over the eighteen month course of treatment for her compensable left hand and wrist injury by a multitude of physicians. I would also note that the claimant, herself, made no mention of any difficulties with her shoulder in the AR-C she completed on October 8, 2001 (Claimant's Exhibit No. 1, page 45).

The first mention of any shoulder difficulties is contained in the functional capacity evaluation performed on March 19, 2002. At that time, the examiner noted that the claimant was apparently complaining that both shoulders became sore when performing the overhead work portion of the study. However, no mention was made that she attributed any difficulties with her left shoulder to the employment related incident of October 25, 2000.

In summary, I find that the claimant has failed to prove by the greater weight of the credible evidence the existence of a causal relationship between the specific employment related incident or accident on October 25, 2000, and any subsequent difficulties she may have experienced with her left shoulder. Thus, she has failed to prove that these difficulties represent an injury which arose out of and occurred in the course of her employment on October 25, 2000, which were caused by a specific incident on that date, and which is identifiable by time and place of occurrence. I would also note that the claimant has failed to present sufficient evidence to prove that on October 25, 2000, she sustained a physical injury to her left shoulder that caused internal or external physical harm to this portion of her body and that was sufficient to require medical services or result in disability. She has simply failed to prove by the greater weight of the credible evidence that her alleged shoulder injury meets any of the necessary requirements of Ark. Code Ann. §11-9-102(4)(A)(i).

As the claimant has failed to prove the occurrence of a "compensable injury" to her left shoulder in these specific employment related incident on October 25, 2000, she

cannot be awarded any benefits which would be attributable to her left shoulder difficulties or complaints. This would include both the payment of medical expenses and indemnity benefits. Her claim for any benefits for her left shoulder complaints must be denied in its entirety.

II. ADDITIONAL MEDICAL SERVICES ON AND AFTER NOVEMBER 27, 2002

The next issue concerns the claimant's entitlement to the payment of expenses incurred for medical services on and after November 27, 2002. In order to be entitled to these benefits, the claimant must prove by the greater weight of the credible evidence that these medical services represent "reasonably necessary medical services" for her "compensable injury."

As previously noted in this Opinion, any medical services provided or required for complaints with her left shoulder would not be necessitated by or connected with a "compensable injury" and would not represent "reasonably necessary medical services", within the meaning of the Act. Liability for any expenses incurred for such services cannot be imposed upon the respondent herein.

Clearly, the claimant would remain entitled to "reasonably necessary medical services" for her admittedly compensable left hand/wrist injury. However, the claimant has failed to prove that any medical services have been provided or recommended for this injury, on and after November 27, 2002. When no medical services have been provided or, at least, recommended, it is impossible to determine whether the services would be "reasonably necessary" within the meaning of Ark. Code Ann. §11-9-508.

In summary, I find that the claimant has failed to prove that any reasonably medical services for her compensable injury have been rendered or recommended, on and after November 27, 2002. Thus, her request that the respondents be held liable for the expenses of these services must be also denied.

III. BENEFITS PURSUANT TO ARK. CODE ANN. §11-9-505(a)

The remaining issue in this case concerns the claimant's entitlement to benefits provided by Ark. Code Ann. §11-9-505(a). Again, the burden rests upon the claimant to prove her entitlement of this benefits.

Ark. Code Ann. §11-9-505(a) provides:

“Any employer who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitations upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wage lost during the period of the refusal, for a period not to exceed one (1) year.”

Thus, in order to be entitled to benefits under this subsection, the claimant must prove three facts. First, she must prove that the respondent had “suitable employment” available. Secondly, she must prove that this employment was within her physical and mental limitations. Finally, she must prove that the respondent refused to provide her with such employment “without reasonable cause”.

The evidence shows that the respondent provided the claimant with a limited employment after her compensable injury. The claimant continued to be regularly employed by the respondent through October 17, 2002. During this time, the respondent made available to the claimant employment that was within the physical restrictions and limitations produced by her compensable injury. On October 17, 2002, the claimant was terminated for excessive absenteeism. This termination was made pursuant to establish company policy and was in accord with the provisions of the union contract.

Clearly, an employer's refusal to provide an injured employee with suitable employment based upon a bona fide termination for good reason unassociated with the compensable injury, would not constitute a refusal “without reasonable cause” within the meaning of Ark. Code Ann. §11-9-505(a). Thus such a terminated injured employee would

not be entitled to benefits under this subsection.

The claimant contends that her termination on October 17, 2002, was not reasonable or appropriate. She contends that one of the absences, which resulted in her termination, should not have been counted as unexcused. This absence occurred on October 4, 2002. The claimant argues that this should have been counted as an excused absence, either under medical leave or personal leave (and possibly even under the Federal Family Medical Leave Act). She also argues that she was not aware that this was counted as an unexcused absence, until after her termination. At that time, she attempted to clarify or change this absence from unexcused to excused, but was improperly not allowed to do so. I find no merit to any of these arguments.

The evidence shows that on October 4, 2002, the claimant actually went into the respondent's place of business with a note from a nurse at the emergency room of Sparks Regional Medical Center dated October 3, 2002. This note indicated that the claimant was unable to work from October 3, 2002 "to October 4, 2002". At that time, the claimant personally completed a form, in which she requested personal leave only for October 3, 2002. On this form, she expressly stated that she would return to work on October 4, 2002. Clearly, she was aware that she was not being granted leave for October 4, as she did not request it. Apparently, she simply did not show up for her shift later that day. Even though she had no reason to believe that her absence on October 4, 2002, would be treated as any thing other than "unexcused", the claimant made no attempt to correct this matter within the period of time provided by the respondent's established policy and the union contract (5:00 p. m. on October 5, 2002). Clearly, the respondent's policy in this regard would not appear unreasonable. Nor would the respondents refusal to allow the claimant to attempt to change the nature of this absence some two weeks later be unreasonable.

After consideration of all the evidence presented, it is my finding that the respondent's were justified in the termination of the claimant on October 17, 2002, and that

their subsequent refusal to provide the claimant with suitable employment does not represent a refusal “without reasonable cause” within the meaning of Ark. Code Ann. §11-9-505(a). Thus, the claimant has failed to prove that she is entitled to benefits under this subsection.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On October 25, 2000, the relationship of employee-employer-carrier existed between the parties.
3. On October 25, 2000, the claimant earned an average weekly wage of \$315.00, which would entitle her to weekly compensation benefits of \$210.00 for total disability and \$158.00 for permanent partial disability.
4. On October 25, 2000, the claimant sustained a compensable injury to her left hand and wrist.
5. The claimant has failed to prove by the greater weight of the credible evidence that she also sustained a compensable injury to her left shoulder on October 25, 2000. Specifically, she has failed to establish by medical evidence, supported by objective findings, the actual existence of any physical injury to her left shoulder, as required by Ark. Code Ann. §11-9-102(4)(D). She has further failed to prove that on October 25, 2000, she sustained any physical injury to her left shoulder that arose out of and occurred in the course of her employment, that was caused by a specific incident, that is identifiable by time and place of occurrence, that resulted in internal or external physical harm to the body, and that required medical services or resulted in disability, as required by Ark. Code Ann. §11-9-102(4)(A)(i).

6. The claimant would not be entitled to any benefits under the Act for any left shoulder difficulties, including medical services.
7. The claimant has failed to prove by the greater weight of the credible evidence that she has received or had recommended any reasonably necessary medical services for her compensable left hand and wrist injury on and after November 27, 2002. There is no dispute over the payment of any expenses incurred for medical services for the claimant's compensable injury incurred prior to November 27, 2002.
8. The issue of the claimant's entitlement to temporary total disability benefits for her compensable left hand and wrist injury is not before the Commission at the present time.
9. The claimant's healing period from the effects of her compensable left hand and wrist injury ended on April 17, 2002.
10. The respondents have accepted liability for and have paid permanent partial disability benefits equivalent to a permanent physical impairment of 34% to the arm below the elbow.
11. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to any benefits under the provisions of Ark. Code Ann. §11-9-505(a). Specifically, she has failed to prove that the respondent's refusal to provide her with continued suitable employment after October 17, 2002, was without "reasonable cause".
12. The respondents have denied the occurrence of any compensable injury to the claimant's left shoulder and have controverted her entitlement to any benefits attributable to this alleged injury. The respondents have also controverted the claimant's entitlement to any benefits under Ark. Code Ann. §11-9-505(a).

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss any and all claims for benefits attributable to an alleged compensable injury to the claimant's left shoulder.

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss any claim for benefits provided by Ark. Code Ann. §11-9-505(a).

Based upon my foregoing findings and conclusions, no award of any additional medical services for the claimant's compensable left hand and wrist injury can be made at the present time, as no such services have been provided or recommended. However, the respondents remain liable for any "reasonably necessary medical services" that the claimant may require for this compensable injury.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge