

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F301343

SHERRIE PERDEW, Employee	CLAIMANT
NEWS GROUP, Employer	RESPONDENT
AMERICAN CASUALTY COMPANY, Carrier	RESPONDENT

OPINION FILED OCTOBER 2, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 4, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on April 16, 2003, and a pre-hearing order was filed on April 17, 2003. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant earned a sufficient average weekly wage to entitle her to compensation at the rate of \$184.00 per week for temporary total disability benefits and \$154.00 per week for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of right shoulder injury.
2. Temporary total disability benefits.
3. Medical.
4. Attorney fee.

During the hearing, based upon testimony presented claimant modified her request for temporary total disability benefits to include the period November 7, 2002 through July 14, 2003.

The claimant's contentions as set forth in her pre-hearing questionnaire are as follows: "Claimant was injured as set forth above [an injury that occurred on the Monday in July following the return of Bob Baker, the warehouse supervisor to whom she reported this injury on or about 11:00 that day] and finally went to the doctor after her continued inability to perform her job on or around August 20<sup>th</sup>. She maintains that she suffered a specific injury when she was pulling on a conveyor belt on the day in question. However, if this Commission finds that she did not suffer an injury that is specific as far as being identifiable in time and place of occurrence, she maintains that the injury was a result of rapid, repetitive work that she was doing at her place of employment as a scanner. Her TTD should span from November 6, 2002, up to and including an indefinite date."

The respondents contend the claimant did not sustain a compensable injury. In the alternative, if claimant is determined to have sustained a compensable injury, the surgery proposed by Dr. Tomlinson does not constitute reasonably necessary medical care for her injury.

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 witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 16, 2003, and contained in a pre-hearing order filed April 17, 2003, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient average weekly wages to entitle her to compensation at the rate of \$184.00 per week for temporary total disability benefits and \$154.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by the respondent.

4. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's right shoulder injury. This includes surgery performed by Dr. Tomlinson.

5. Claimant has proven by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning January 9, 2003 and continuing through January 20, 2003, and again from February 17, 2003 through March 31, 2003.

6. Respondent has controverted claimant's entitlement to unpaid temporary total disability benefits.

### FACTUAL BACKGROUND

The claimant is a 43-year-old woman with a high school education and some college credit who began working for the respondent in July 2000. The respondent operates a warehouse for magazines which are distributed to various stores. The claimant primarily worked for the respondent as a scanner. This job required claimant to lift boxes filled with returned magazines, individually scan each magazine, and throw it on a conveyor belt.

The conveyor belt then took the magazines to a shredding machine. Claimant testified that on a Monday in July when her supervisor, Bob Baker, came back from vacation she and a co-employee were pulling on the conveyor belt which was bogged down with magazines. Claimant testified that the motor on the conveyor belt was not always strong enough to pull the magazines so it was necessary at times to pull on the belt to move the magazines to the shredder. Claimant testified that she injured her right shoulder while performing this activity and reported the incident to Bob Baker.

Claimant testified that she continued performing her job and that her symptoms gradually worsened. She testified that she had difficulty picking up the boxes of magazines and had to scan the magazines with her left arm. By August 23, 2002, her symptoms had worsened to the point that she requested medical treatment from Rhonda Pfeiffer. Pfeiffer sent claimant to the MediServe Clinic on August 23. Claimant was evaluated at the MediServe Clinic on three occasions and was diagnosed with an overuse injury or shoulder strain. As a result of claimant's continued complaints of pain she was referred to Dr. Tomlinson, an orthopaedic surgeon. Claimant's first evaluation with Dr. Tomlinson occurred on September 13, 2002. Dr. Tomlinson diagnosed the claimant as suffering from acute calcific tendinitis of the right shoulder with impingement syndrome, Type 3. Dr. Tomlinson gave the claimant an injection and prescribed three weeks of physical therapy. He also released the claimant to return to work with a lifting limitation of five pounds and no repetitive grasping, reaching, or pulling. Claimant continued under the care of Dr. Tomlinson and continued working after that initial visit until November 6, 2002. As a result of claimant's continued complaints of pain, Dr. Tomlinson eventually performed surgery on the claimant's right shoulder on January 9, 2003.

Claimant has filed this claim contending that she suffered a compensable injury to her right shoulder while working for respondent. She seeks payment of medical treatment and temporary total disability benefits beginning November 7, 2002 and continuing through

July 14, 2003.

### ADJUDICATION

Initially, I note that claimant contends that she suffered an injury to her shoulder which was caused by a specific incident identifiable by time and place of occurrence. Alternatively, it is claimant's contention that her shoulder injury is the result of a gradual onset injury caused by her work activities. Because I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered an injury caused by a specific incident identifiable by time and place of occurrence, it is not necessary to address claimant's alternate contention regarding a gradual onset injury.

Claimant contends that she suffered a compensable injury when she was pulling on a conveyor belt on a date in July 2002 which happened to be her supervisor's first day back from vacation. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his 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 findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (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.

Initially, I note that claimant does not know the specific calendar date the injury occurred, only that it was Bob Baker's first day back from vacation. However, a claimant does not have to identify the precise time and numerical date upon which an accidental

injury occurred; instead, the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified. A claimant's inability to identify the date may be considered when weighing the evidence. *Edens v. Superior Marble and Glass*, 346 Ark. 487, 58 S.W. 3d 369 (2001).

In consideration of this case, I note that claimant initially sought medical treatment on August 23, 2002 from MediServe. The history contained in the medical report of that date does not mention the incident with the conveyor belt, but merely mentions that claimant performs repetitive motion at work. Likewise, Dr. Tomlinson's initial medical report of September 13, 2003 also does not mention the conveyor belt incident but instead reflects claimant's job duties of scanning magazines. In addition, Dr. Tomlinson completed a statement after claimant's surgery indicating that her injury was a gradual onset injury. Respondent contends that this medical evidence does not support claimant's contention of a specific injury. While these medical reports admittedly do not contain a history of that specific incident, I do note that after his initial evaluation of claimant Dr. Tomlinson referred claimant to physical therapy. The physical therapist's notes of September 17, 2002 contain a history of the specific incident as described by claimant at the hearing. Specifically, the physical therapist's note of September 17, 2002 indicates that over a month ago claimant pulled on a conveyor belt and felt like she had pulled a muscle.

While this history of a specific injury is not contained in the medical reports until September 17, after claimant had been evaluated by MediServe and by Dr. Tomlinson, I believe it is also important to note that claimant testified at the hearing that she reported this specific incident immediately after it occurred to her supervisor, Bob Baker. Bob Baker was present at the hearing and did not testify to contradict claimant's testimony that she reported this specific incident to him. Based upon Baker's failure to testify and refute claimant's testimony that she reported a specific incident to him on this particular day, the claimant's testimony itself, which I find to be credible and entitled to great weight, and the

physical therapist's report of September 17 containing a history of a specific incident while pulling on a conveyor belt, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder which was caused by a specific incident and which is identifiable by time and place of occurrence. I also find based upon this same evidence that claimant has offered proof by a preponderance of the evidence that her injury arose out of and in the course of her employment with the respondent.

I also find that claimant has proven by a preponderance of the evidence that her injury caused internal physical harm to her body which required medical services and resulted in disability and that claimant has offered medical evidence supported by objective findings establishing an injury. While Dr. Tomlinson initially diagnosed claimant's condition as calcific tendinitis, Dr. Tomlinson's surgical report of January 9, 2003 indicates that during the surgical procedure he discovered a partial cuff tear and a labral tear, as well as impingement syndrome. These are objective findings which satisfy the remaining element of compensability.

Accordingly, for the foregoing reasons, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by respondent in August of 2002.

Having found that claimant suffered a compensable injury, respondent is liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable right shoulder injury. This includes the surgical treatment performed by Dr. Tomlinson. Respondent contends that the surgery performed on claimant's shoulder is related to a non-work related incident in November 2002. I find no credible evidence supporting a finding that claimant's right shoulder pain was the result of an independent intervening cause. Claimant testified that she continued working for respondent through November 13, 2002, and that her job continually aggravated her shoulder condition.

There is no indication that claimant suffered another injury to her shoulder other than the one in August 2002.

Further, to the extent that respondent relies upon a peer review analysis performed by a physician in Virginia, I have assigned no weight to that physician's opinion. This physician did not evaluate the claimant and has stated an opinion based entirely upon his review of medical records. On the other hand, Dr. Tomlinson has evaluated the claimant on numerous occasions and performed surgery in January 2003. Accordingly, I find that the opinion of Dr. Tomlinson is entitled to greater weight than the Virginia physician.

The last issue for consideration involves claimant's request for temporary total disability benefits beginning November 7, 2002 and continuing through July 14, 2003. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). In this particular case, even if one were to assume that claimant remained within her healing period throughout the requested period of time, I find that claimant did not suffer a total incapacity to earn wages for the requested period. While claimant last worked for the respondent on November 6, 2002, I note that claimant's treating physician at that time, Dr. Tomlinson, had indicated that claimant could continue working with restrictions. In fact, Dr. Tomlinson on October 7, 2002 had noted that claimant's condition was improving. Furthermore, even after November 6, 2002, when Dr. Tomlinson evaluated the claimant on November 13, 2002, Dr. Tomlinson again opined that claimant could return to work with restrictions. Claimant continued to be evaluated by Dr. Tomlinson and on January 3, 2003, Dr. Tomlinson authored a report recommending that claimant undergo a surgical procedure. Dr. Tomlinson addressed claimant's work status and indicated at that time that claimant could return to work as long as she did not use her right arm. Dr. Tomlinson opined that

claimant would be temporarily totally disabled at the time of her surgery. Claimant's surgery occurred on January 9, 2003. Thereafter, on January 20, 2003, Dr. Tomlinson released the claimant to return to work with limitations of no lifting or carrying more than 10 pounds and no work at or about the shoulder level with her right arm. On January 29, 2003, at claimant's request, Dr. Tomlinson released claimant to return to work without restrictions. Claimant apparently attempted to return to work for respondent and did so for two days before the pain became unbearable. Thereafter, claimant again returned to Dr. Tomlinson on February 17, 2003, at which time Dr. Tomlinson indicated that claimant could not return to her regular work without restrictions. On March 3, 2003, Dr. Tomlinson indicated that claimant was temporarily totally disabled with respect to her work status. On March 31, 2003, Dr. Tomlinson indicated that claimant could return to work with limitations of no lifting or carrying more than five pounds and no work at or above the shoulder level with her right arm. Dr. Tomlinson continued these same restrictions until he released claimant with no restrictions on July 14, 2003.

In short, the medical reports of Dr. Tomlinson indicate that for the most part he has released the claimant to return to work with limitations. The evidence does indicate that claimant suffered a total incapacity to earn wages beginning January 9, 2003, the date of her surgery, and continuing until she was released by Dr. Tomlinson on January 20, 2003. Accordingly, I find that claimant is entitled to temporary total disability benefits for this period of time.

I also find that claimant is entitled to temporary total disability benefits beginning February 17, 2003, the date she sought medical treatment from Dr. Tomlinson after attempting to return to work and continuing through March 31, 2003, the date Dr. Tomlinson again released claimant to return to work with limitations. I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages from February 17, 2003 through March 31, 2003.

It should be noted that in April 2003 the claimant began working for MovieTime, a video store, until it went out of business approximately one month later. Claimant testified that she would have continued working if the company had not gone out of business. Thus, claimant did not suffer a total incapacity to earn wages during this period of time.

Accordingly, claimant is entitled to temporary total disability benefits from January 9, 2003 through January 20, 2003, and again from February 17, 2003 through March 31, 2003.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

#### AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right shoulder injury. This includes surgery performed by Dr. Tomlinson. Claimant is entitled to temporary total disability benefits from January 9, 2003 through January 20, 2003, and again from February 17, 2003 through March 31, 2003.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is hereby awarded an attorney fee in the amount of 25% of the indemnity benefits payable to the claimant. This

fee is to be paid one-half by the carrier and one-half by the claimant. The respondents are to withhold the claimant's portion of the attorney's fee from the claimant's award and to pay the attorney's fee directly to the claimant's attorney.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE