

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F307184

NANCY ANDREASEN		CLAIMANT
PINNACLE COUNTRY CLUB		RESPONDENT
CINCINNATI INSURANCE COMPANY INSURANCE CARRIER	NO. 1	RESPONDENT
Safeco/AMERICAN	NO. 2	RESPONDENT

OPINION FILED JANUARY 22, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington Country, Arkansas.

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

Respondents No. 1 represented by WILLIAM FRYE, Attorney, Little Rock, Arkansas.

Respondents No. 2 represented by GUY WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 15, 2003, in Springdale, Arkansas. The deposition of Dr. Robert Tomlinson, Jr., was taken on December 1, 2003, and has been admitted as Joint Exhibit No. 2. The deposition of the claimant was also taken on December 1, 2003, and has been admitted as Respondent No. 1, Exhibit No. 1.

A pre-hearing order was initially entered in this case on September 9, 2003. However, a second carrier was subsequently added. As a result, extensive modifications and amendments were made in regard to the pre-hearing order. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. From October 1, 2002, through at least March 21, 2003, the relationship of employee-employer-carrier existed between the claimant, Pinnacle Country Club, and Cincinnati Insurance Company.
2. The appropriate weekly compensation rates during this period are \$186.00

for total disability and \$154.00 for permanent partial disability.

3. From September of 2001 through September 2002, the relationship of employee-carrier existed between the claimant, Pinnacle Country Club, and Safeco.
4. The appropriate weekly compensation rates during this period were \$175.00 for total disability and \$154.00 for permanent partial disability.
5. The claim is controverted in its entirety.

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 sustained a compensable injury to her right arm/shoulder during her employment with the respondent.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from July 24, 2003 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant started having problems with right arm the second week of January, 2003. When it wasn't any better in April 2003, she reported it to her supervisor, Jolynn (sic) Watson. She was seen by Dr. Hull, who recommended she see an orthopedist."

In regard to these issues, Cincinnati Insurance Company (carrier #1) contends:

"The respondents contend that the claimant developed problems in her shoulder. She was also suffering from problems in the hip and other parts of her body including her neck due to arthritis. Throughout her treatment, the claimant did not have any objective measurable findings due to the shoulder related to any compensable injury. Also, the claimant is maintaining that she sustained a gradual onset injury while working for the respondents/employer. The respondents would note that there is no evidence of major cause, no objective findings, and no evidence that the claimant's duties were rapid and repetitive as required under the Act."

In regard to these issues, Safeco/American States (carrier #2) contends:

“The claimant did not sustain a compensable injury while Safeco/American States was on the coverage and the claim is controverted in its entirety.’

DISCUSSION

I. COMPENSABILITY

The central issue in this case is the question of whether the claimant sustained a “compensable injury” to her right shoulder and arm, while she was employed by Pinnacle Country Club. The burden rests upon the claimant to prove the occurrence of the alleged compensable injury.

The contentions and, in fact, the evidence shows that this alleged compensable injury is not attributed to a “specific incident”. Thus, this alleged compensable injury would fall under the category of “compensable injuries” established by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). In order to meet her burden, the claimant must prove by the greater weight of the credible evidence that her alleged employment related injuries satisfies all of the definitional requirements of the foregoing subsection. She must further prove that her alleged employment related injuries satisfies the requirements of Ark. Code Ann. §11-9-102(4)(D). Finally, the claimant must prove that her alleged employment related injury satisfy the provisions of Ark. Code Ann. §11-9-102(4)(E)(ii).

The first of these statutory requirements to be discussed are contained in Ark. Code Ann. §11-9-102(4)(D). This subsection mandates that all compensable injuries must be:

“Established by medical evidence supported by objective findings as defined in subdivision (16) of this section.”

Applicable case law has interpreted this subsection as requiring that the actual existence of the physical injury or condition, alleged to be compensable must be proven by medical evidence that is based upon or supported by the independent observation of findings beyond the claimant’s voluntary control.

All of the medical evidence presented supports the existence of a physical injury or damage to the claimant's right shoulder. This injury or damage is diagnosed to be in the form of bursitis of the right shoulder joint, which includes the possibility of a partial thickness tear of the rotator cuff. This diagnosis has been made by Dr. Robert Hull (a general practitioner and the claimant's family physician), Dr. Konstantin Berestnev (a physician at the Arkansas Occupational Health Clinic to whom the claimant was sent by the respondents), and Dr. Robert Tomlinson (an orthopaedic surgeon). It is apparent from the reports and deposition of Dr. Tomlinson that his diagnosis is based not only on the claimant's subjective symptoms and subjective abnormalities noted on clinical examination, but is also based upon and supported by "objective findings" in the form of abnormalities noted on passive range of motion testing, Hays v. Wal Mart Stores, Inc., 71 Ark. App. 207, 29 S.W. 3rd 751 (2000).

Therefore, I find that the claimant has satisfied the requirements for a "compensable injury" contained in Ark. Code Ann. §11-9-102(4)(D). Thus, it becomes necessary to determine if she has further satisfied the requirements of the remaining sections.

In order to satisfy the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(a), the claimant must prove that the medically established and objectively documented physical injury or defect involving her right shoulder:

- (1) arose out of and occurred in the course of her employment,
- (2) caused internal or external or physical harm to her body, and
- (3) was caused by rapid repetitive motion.

In order to satisfy the first of these requirements, the claimant must prove the existence of a causal relationship between the medically established and objectively documented physical injury or condition involving her right shoulder, and her employment for this respondent. In this regard, the claimant testified that she had never experienced any prior problems with this portion of her anatomy and that her right shoulder symptoms

began shortly after she was required to operate a heavy vacuum cleaner for an extended period of time which was a part of her assigned employment activities for this respondent. She further testified that the continued performance of these activities appeared to cause her symptoms to progress and increase in magnitude. She stated that she ultimately reached the point where the performance of almost any activities with her right arm were painful.

I would note the claimant's testimony concerning the reasonably close temporal relationship between the employment related use of a vacuum cleaner and the onset and progression of her right shoulder difficulties is consistent with all the histories recorded by her various treating physicians. Such a causal relationship is further indirectly supported by other evidence. Jo Ann Watson, the claimant's supervisor and head of housekeeping for the respondent, testified that the claimant made complaints to her whenever she was required to vacuum for extended periods of time. She also testified that everyone on her crew complained about difficulties following extended periods of vacuuming. In his deposition, Dr. Tomlinson states that the nature of the claimant's injury or damage to her right shoulder would be consistent with using her right arm to operate a vacuum cleaner for extended periods of time.

After consideration of the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence, the existence of a causal relationship between her required employment activities of vacuuming and the subsequently diagnosed physical injury to her right shoulder. This satisfies the first definitional element of Ark. Code Ann. §11-9-102(4)(A)(ii)(a). It next becomes necessary to determine if this employment related cause involved "rapid repetitive motion". Clearly, operating a vacuum cleaner for extended periods of time would place stress on the entire arm, including the shoulder. In the present case, no description or demonstration was elicited from the claimant (or any other witness) as to how the claimant moved (if any) her

shoulder in operating the particular vacuum cleaner used. Thus, I can only rely on my experience in operating and observing the operation of vacuum cleaners. In this regard, I would note that the operation of a vacuum cleaner is not a highly technical or uncommon activity. From personal experience and observation, it is apparent that the operation of a vacuum cleaner requires some repetitive movement of the arm. However, from the same source, I cannot say that that movement would be considered “rapid”, as that term is generally defined.

Therefore, I am compelled to find that the claimant has failed to prove by the greater weight of the credible evidence that the employment related cause of her right shoulder injury or difficulties involved “rapid repetitive movement” of the injured portion of her anatomy. The claimant’s failure to prove this necessary definitional element of Ark. Code Ann. §11-9-102(4)(A)(ii)(a), prevents a finding that it represents a “compensable injury” within the meaning of this subsection.

The claimant also contends in January of 2002, she was required to use her right hand to work overhead for extended periods of time, in order to dust or clean wood work and chandeliers. She formally alleges that this activity also played a causal role in producing her right shoulder injury or condition. This allegation would appear to be somewhat supported by the reports and deposition of Dr. Tomlinson. Clearly, holding one’s arm over their head for extended periods of time would place stress on the shoulder joint.

However, the claimant’s testimony fails to support any causal relationship between her right shoulder difficulties and the overhead work she performed in January of 2002. She testified that she experienced no difficulties with her right shoulder while performing these employment activities. She stated that she only noticed a significant increase in her difficulties with her right shoulder a week or so after the cleaning or dusting and after an intervening period of extended vacuuming.

Based upon the evidence presented, it is my finding that the claimant has failed to prove that her employment activities in January of 2002, which required her to “work overhead” with her right arm for an extended period of time, played any causal role in producing her medically established and objectively documented right shoulder injury or condition. Even if the claimant had proven the existence of such a causal relationship she would have again failed to prove that this employment activity involved “rapid repetitive motion”, as required by Ark. Code Ann. §11-9-102(4)(A)(ii)(a).

In summary, the claimant has failed to prove by the greater weight of the credible evidence that she sustained a “compensable injury” to her right shoulder within the meaning of Ark. Code Ann. §11-9-102(4)(A)(ii)(a), during the period of her employment with the Pinnacle Country Club. Thus, the other issues raised in this claim are rendered moot. This claim, in regard to all respondents, must be denied and dismissed in its entirety.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers’ Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, between October 1, 2002 and March 21, 2003, the relationship of employee-employer-carrier existed between the claimant, Pinnacle Country Club, and Cincinnati Insurance Company.
3. On all relevant dates, during the period of March of 2002 through September of 2002, the relationship of employee-employer-carrier existed between the claimant with Pinnacle Country Club, and Safeco/American States Insurance Company.
4. The appropriate weekly compensation rates for any compensable injury, which occurred while Cincinnati Insurance Company provided workers’ compensation coverage is \$186.00 for total disability and \$154.00 for

permanent partial disability. The appropriate weekly compensation rates for any compensable injury, which occurred while Safeco/American States Insurance Company provided workers' compensation coverage is \$175.00 for total disability and \$154.00 for permanent partial disability.

5. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a "compensable injury" to her right arm or shoulder within the meaning of Ark. Code Ann. §11-9-102(4)(A)(ii)(a), during her period of employment with Pinnacle Country Club. Specifically, the claimant has failed to prove the occurrence of any physical injury to this portion of her body that was caused by "rapid repetitive motion".
6. All the respondents have denied the occurrence of any compensable injury to the claimant's right shoulder or arm, and have controverted this claim in its entirety.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge