

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F400944

PATRICIA COLLETTE, Employee	CLAIMANT
COTTAGE CAFÉ, INC., Employer	RESPONDENT
FARMERS INSURANCE GROUP, Carrier	RESPONDENT #1
SOUTHERN GUARANTY INSURANCE CO., Carrier	RESPONDENT #2

OPINION FILED OCTOBER 19, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by J. RANDOLPH SHOCK, Attorney, Fort Smith, Arkansas.

Respondent #1 represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

Respondent #2 represented by ANDREW IVEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 27, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on June 9, 2004, and a pre-hearing order was filed on the same date. 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 existed between the parties at all relevant times.
3. Farmers Insurance Group became the workers' compensation carrier on September 23, 2003.

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

1. Compensability of bilateral carpal tunnel syndrome.
2. Medical.
3. Temporary total disability or temporary partial disability benefits.
4. Attorney fee.
5. Whether respondent #1 or respondent #2 is liable for compensation benefits.

Prior to the hearing the claimant indicated that rather than litigate compensability of bilateral carpal tunnel syndrome that claimant was instead contending that she suffered an injury to her right wrist and right elbow. Claimant also raised as an issue the compensation rate.

Claimant contends that she suffered a gradual onset injury to her right wrist and right elbow due to repetitive use and overuse of her hands which resulted in the need for medical treatment on September 29, 2003. Claimant contends that she is entitled to medical benefits, temporary total or temporary partial disability benefits, and an attorney fee.

Respondent #1 contends that it did not become the employer's compensation carrier until September 23, 2003 after claimant had already suffered a compensable injury. Respondent #1 contends that in the event the claim is compensable it is entitled to a credit for unemployment compensation benefits claimant received between January 6, 2004 and June 9, 2004. In addition, respondent #1 also requests credit for wages claimant earned for a period of time she was working. Respondent #1 also contends that respondent #2's coverage was in effect until November 5, 2003.

Respondent #2 agrees that it was the employer's compensation carrier until September 23, 2003. However, respondent #2 contends that claimant's injury did not manifest itself until after respondent #1 was on the risk. Respondent #2 adopted the same position as respondent #1 with respect to claimant's request for temporary total disability benefits.

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 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 June 9, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant suffered a compensable gradual onset injury to her right wrist and right elbow while employed by Cottage Café when respondent #2 was its compensation carrier. Therefore, respondent #2 is liable for payment of all compensation benefits.

3. Respondent #2 is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right wrist and right elbow injury.

4. As a result of her compensable injury claimant is entitled to temporary total disability benefits beginning September 30, 2003 and continuing through November 10, 2003.

5. At the time of her compensable injury while respondent #2 was the compensation carrier, claimant earned an average weekly wage of \$508.50 which would entitle her to compensation at the rate of \$339.00 per week for temporary total disability benefits and \$254.00 per week for permanent partial disability benefits.

6. Respondent #2 has controverted claimant's entitlement to all indemnity benefits.

#### FACTUAL BACKGROUND

The claimant is a 45-year-old woman who has been working for the respondent

since 1994 as a grill cook. Claimant worked approximately five days per week cooking breakfast an average of three mornings per week and cooking dinner an average of two times per week. Claimant testified that over a period of approximately three to four months prior to September 2003 she developed what she believed to be a pulled muscle in her right arm. Claimant testified that her condition gradually worsened over this period of time and she began to have difficulty holding things in her hands such as her spatula. During this period of time employees of the respondent helped claimant carry heavy items.

On September 12, 2003, Leonard Cernak purchased the café from Christy Badeaux. Shortly after this purchase Cernak obtained workers' compensation insurance coverage through respondent #1 which went into effect on September 23, 2003.

On September 29, 2003, the claimant was in the process of cooking breakfast when she dropped the spatula because the pain in her hand was so severe. As a result of this incident the claimant left work and sought medical treatment from Dr. Sills, her family physician. Dr. Sills diagnosed claimant's condition as epichondylitis of the right elbow and carpal tunnel syndrome. Dr. Sills took claimant off work until she could undergo a re-evaluation on October 13, 2003. On the date of that second evaluation Dr. Sills noted that the pain in claimant's right elbow is getting worse. As a result he ordered an MRI of claimant's right elbow and shoulder and an EMG/NCV. While the MRI of the claimant's right shoulder and elbow returned normal, the nerve condition study revealed moderate carpal tunnel on the right side and a tardy ulnar palsy. As a result of those findings claimant was referred to Dr. Kelly who stated that the nerve conduction study was compatible with physical findings of carpal tunnel and cubital tunnel syndrome. Dr. Kelly recommended surgery to alleviate those condition. Dr. Kelly also released claimant to return to work with restrictions.

After approximately one week the claimant returned to work for the respondent and she continued working until she terminated her employment in January 2004. Claimant

subsequently worked approximately one and a half days for a gift shop before returning to work for the respondent in June 2004 where she currently works.

Claimant has filed this claim contending that she suffered a compensable injury while working for respondent. She seeks payment of medical benefits, temporary total or temporary partial disability benefits, and a controverted attorney fee.

### ADJUDICATION

\_\_\_\_\_ The initial issue for consideration is whether claimant suffered a compensable injury and if so which party is liable for compensation benefits. While respondent #2 contends that claimant did not suffer a compensable injury which manifested itself until respondent #1 was the workers' compensation carrier on September 23, 2003, I disagree. Instead, I find that claimant suffered a compensable gradual onset injury which occurred while respondent #2 was the workers' compensation carrier. While there was an incident on September 29, 2003 which caused her to drop her spatula and seek medical treatment, this incident was simply the result of an injury which had developed over the last three or four months. As previously noted, claimant testified that her symptoms had occurred over the course of three or four months prior to September 2003. Claimant testified that she initially thought she had pulled a muscle but that her condition gradually worsened. As a result, claimant testified that employees of the respondent carried and lifted things for her during this period of time.

Testifying at the hearing was Josie Akins. Akins was the mother of Christy Badeaux, the owner of the Cottage Café before September 12, 2003. Akins testified that she had been working for the respondent since 2001 and worked with claimant on a daily basis. Significantly, Akins testified that before September 2003 the claimant had been complaining of problems with her right wrist for several months. In fact, Akins testified that she noticed swelling of the claimant's elbow and wrist area.

In addition, I also note that the medical history contained in Dr. Sills' report of September 29, 2003 indicates that claimant's complaints had been present for eight weeks and/or three months.

Accordingly, while claimant had an incident on September 29, 2003 wherein she dropped a spatula due to severe pain in her hand which led to her seeking medical treatment, I find that the preponderance of the evidence indicates that claimant's injury was the result of a gradual onset injury which had occurred several months prior to September 2003 and certainly before respondent #1 became the workers' compensation carrier on September 23, 2003. I find insufficient evidence that claimant's job activities on September 29 resulted in a specific injury while respondent #1 was the compensation carrier.

In order to prove a gradual onset injury the claimant must prove by a preponderance of the evidence (1) that she suffered an injury which arose out of and in the course of her employment; (2) that caused internal or external physical harm to the body which resulted in disability or the need for medical treatment; (3) that the injury was caused by rapid repetitive motion; (4) that the injury was the major cause of the disability or need for medical treatment; and (5) that the injury be established by medical evidence supported by objective findings. With respect to her diagnosis of carpal tunnel syndrome in her right wrist, claimant is not required to prove rapid, repetitive motion. *Kildow v. Baldwin Piano*, 333 Ark. 335, 969 S.W. 2d 190 (1998).

I find after my review of the evidence that claimant has met her burden of proving by a preponderance of the evidence that she suffered a gradual onset injury while working for respondent while respondent #2 was the compensation carrier. Initially, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered an injury which arose out of and in the course of her employment and that this injury was the major cause of her disability or need for medical treatment. Furthermore,

with respect to the tardy ulnar palsy and the diagnosis of cubital tunnel syndrome, I find that claimant's job duties required rapid, repetitive motion. This particular finding is not necessary with respect to the diagnosis of carpal tunnel syndrome.

As previously noted, the claimant worked as a grill cook for the respondent cooking breakfast three times per week and dinner two times per week. Claimant's job duties as a grill cook required her to cook various foods on the grill which required flipping food with a spatula. This included eggs, omelets, hash browns, ham, sausage, bacon, and home fries. In addition, claimant was also responsible for preparing grits and biscuits. For dinner, claimant was required to cook various items including pinto beans, green beans, mashed potatoes, pies, chicken, fries, and roast beef. In addition, she also testified that she was required to "pinch" rolls. Claimant testified that her symptoms began after she developed what she believed to be a pulled muscle while at work. Claimant testified that her condition gradually worsened after that date and resulted in her having difficulty holding on to items.

Claimant's testimony was confirmed by Akins who testified that claimant complained of problems with her right wrist area for several months. Akins also testified that she noticed swelling of the claimant's elbow and wrist area. Akins testified that claimant's job required a lot of lifting and a lot of spatula use. Finally, Akins testified that there was no doubt in her mind that claimant suffered an injury to her right arm as a result of her job duties with respondent. I find Akins testimony to be significant given the fact that she worked with claimant on a daily basis and was the mother of the owner of the respondent.

While other witnesses were called by the parties, I do not find their testimony as significant as that of the claimant and Akins.

I also note that Dr. Kelly opined that claimant's condition was causally related to her repetitive job duties with the respondent. In his report of November 10, 2003, Dr. Kelly stated, "This [nerve conduction study] is compatible with the physical findings of carpal

tunnel and cubital tunnel syndrome. I think this is obviously related to her repetitive use on her job...”.

Given this evidence, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered an injury in the form of carpal tunnel syndrome which arose out of and in the course of her employment with respondent, and that the injury was the major cause of the disability or need for medical treatment. With respect to the cubital tunnel syndrome I find that claimant has satisfied these elements of proof along with the requirement of rapid, repetitive motion.

In addition, I find that claimant’s injury caused internal physical harm to her body which resulted in disability or the need for medical treatment and that she has established her injury by medical evidence supported by objective findings. As previously noted, a nerve conduction study revealed right-sided carpal tunnel syndrome and a tardy ulnar palsy of the ulnar nerve in the elbow. Based upon those findings Dr. Kelly opined that claimant suffered from carpal tunnel and cubital tunnel syndrome. It was Dr. Kelly’s opinion that as a result of those conditions claimant needed surgical treatment. Based upon this evidence which I find to be credible, I find that claimant has satisfied the remaining elements of compensability.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable gradual onset injury to her right wrist [carpal tunnel] and right elbow [cubital tunnel] while working for the respondent while respondent #2 was the compensation carrier. The evidence indicates that claimant suffered a gradual onset injury which began approximately three or four months prior to September 2003 and gradually worsened until she was forced to seek treatment on September 29, 2003.

Having found that claimant suffered a compensable injury, I find that respondent #2 is liable for payment of all reasonable and necessary medical treatment provided in

connection with that compensable injury.

I also find that claimant is entitled to temporary total disability benefits beginning September 30, 2003 and continuing through November 10, 2003. The injury to claimant's wrist and right elbow constitutes a scheduled injury. An employee who suffers a scheduled injury is entitled to receive temporary total disability benefits or temporary partial disability benefits during their healing period or until they return to work, whichever occurs first. *Wheeler Construction Company v. Armstrong*, 73 Ark. App. 146, 41 S.W. 3d 822 (2001). When claimant originally sought medical treatment from Dr. Sills on September 29, 2003, he completed an off-work slip indicating that claimant could return to work after she underwent a second evaluation on October 13, 2003. However, on October 13, 2003 claimant's condition was worse and as a result Dr. Sills ordered an MRI scan and nerve conduction test. Based upon those test results Dr. Sills referred claimant to Dr. Kelly. Although Dr. Kelly opined that claimant needed to undergo surgery, he nevertheless completed a form indicating that claimant could return to work as of November 10, 2003 with a lifting restriction of 20 pounds maximum and a frequent lifting or carrying restriction of 10 pounds or less. Claimant testified that she was unable to return to work on November 10, 2003; however, that was not due to her compensable injury. Instead, claimant did not return to work for the respondent until approximately one week later due to personal health problems. After that week the claimant did return to work for the respondent and according to claimant's testimony the respondent provided her work within her physical limitations. Claimant continued performing this work until she terminated her employment with respondent on January 6, 2004. When claimant was initially questioned as to why she terminated her employment she indicated that she quit because business was slow and she was not getting to work enough hours. In fact, this was confirmed by Leonard Cernak who testified that he had to cut all employees' hours due to slow business. Claimant also contended that she terminated her employment in part because her job

duties caused additional pain. The second contention seems somewhat inconsistent with claimant's original testimony that she terminated her employment because she was not getting to work more hours, not fewer. Nevertheless, the evidence indicates that claimant had returned to work for respondent which was providing claimant work within her physical limitations and that claimant voluntarily terminated her employment with the respondent.

Following that termination the claimant worked approximately one and a half days for another employer preparing artificial flowers. Due to non-work related physical problems claimant was terminated by that employer. According to claimant's testimony she would have continued to work for that employer had she not been terminated. Claimant subsequently returned to work for respondent in June 2004 and was working for respondent at the time of the hearing.

I find based upon the evidence presented that claimant is entitled to temporary total disability benefits beginning September 30, 2003, the day after she sought medical treatment, and continuing through November 10, 2003, the date she was released to return to work by Dr. Kelly. Although claimant did not return to work until one week later, this was due to personal problems, not the claimant's compensable injury. Claimant was provided work within her physical limitations by the respondent and claimant continued to perform that work until she voluntarily terminated her employment in January 2004. There is no evidence that claimant was taken off work by any treating physician subsequent to November 10, 2003. Accordingly, I find that claimant is entitled to temporary total disability benefits from September 30, 2003 through November 10, 2003. Respondent #2's request for credit for unemployment benefits paid after this date is moot given this finding.

Also at issue is the claimant's compensation rate. Having found that claimant's compensable injury occurred while she was employed by respondent when respondent #2 was the workers' compensation carrier, wages claimant earned subsequent to the purchase of respondent by Leonard Cernak are irrelevant. According to claimant's

testimony she worked anywhere from 40 to 50 hours per week for Christy Badeaux. In support of claimant's testimony she submitted into evidence a check stub for the last week she worked for Badeaux. This check stub indicates that claimant was paid at the rate of \$9.00 per hour. This stub also indicates that claimant worked 40 hours and an additional 11 hours of overtime. As a result, the claimant earned a wage that week of \$508.50.

Based upon claimant's testimony that she worked 40 to 50 hours per week and the check stub indicating that claimant worked 51 hours per week, I find that claimant earned an average weekly wage of \$508.50 as reflected on the check stub. This translates to a compensation rate of \$339.00 per week for temporary total disability benefits and \$254.00 per week for permanent partial disability benefits. Other than claimant's testimony and the check stub, no other credible evidence was offered with regard to claimant's average weekly wage for the period of time she was employed by respondent while respondent #2 was the compensation carrier. Given the limited evidence presented on this issue, particularly the check stub which is credible evidence, I find that it is entitled to great weight and serves as the basis for calculating claimant's compensation rate. Perhaps the check stub represents an unusual week during claimant's employment; however, there is no other evidence of record.

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 gradual onset injury to her right wrist and elbow while employed by respondent while respondent #2 was the compensation carrier. Respondent #2 is liable for all compensation benefits including all reasonable and necessary medical treatment; temporary total disability benefits from September 30, 2003 through November 10, 2003; and a controverted attorney fee. Finally, claimant earned an average weekly wage of \$508.50 which translates to a compensation rate of \$339.00 for temporary total disability benefits and \$254.00 for permanent partial disability benefits.

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