

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F304327

DANITA McENTIRE

CLAIMANT

GOODYEAR TIRE & RUBBER COMPANY

RESPONDENT

LIBERTY MUTUAL INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED MAY 19, 2004

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

Claimant represented by GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by DAVID JONES, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on March 2, 2004, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on November 25, 2003. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties agreed on the appropriate weekly compensation rates. A copy of the pre-hearing order with that amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing. A print out sheet, prepared by the respondent, that was referred to by several of the witnesses was made Commission's Exhibit No. 2 to the hearing.

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

1. On April 18, 2003, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation rates are \$321.00 for total disability and \$241.00 for permanent partial disability.
3. 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 neck and right shoulder on or about April 18, 2003, as the result of rapid repetitive motion.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from April 18, 2003 to October 15, 2003 and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant contends she is entitled to additional TTD benefits and medical treatment."

In regard to these issues, the respondents contend:

- "1. The respondents contend that the claimant's shoulder problems are not as a result of any work related activity or incident while working for the insured.
2. The respondents contend that the claimant's job duties relating to her shoulder were not rapid repetitive in nature. Therefore, the claimant cannot meet her burden of concerning the rapid repetitive issues.
3. The respondents contend that they are entitled to an offset for any group and disability payments made to or on behalf of the claimant.
4. If permanent partial disability became an issue, the respondents contend that the claimant is not entitled to any anatomical impairment rating, or wage loss benefits. In that regard, the claimant resigned her employment with the insured on January 2, 2004, and began work for a new employer at greater wages. Therefore, the claimant would not be entitled to any type of wage loss benefits, if that issue somehow arises."

DISCUSSION

_____ The central issue in this case is the question of whether on or about April 18, 2003, the claimant sustained "compensable injuries" to her neck and right shoulder, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). The burden rests upon the claimant to prove this alleged compensable injury.

In order to meet this burden, the claimant must present sufficient credible medical evidence, which is supported by "objective findings", to "establish" the actual existence of the physical injuries or conditions to her neck and right shoulder that she alleges to be "compensable", Ark. Code Ann. §11-9-102(4)(D), She must further prove that these

medically established and objectively documented physical injuries or conditions arose out of and occurred in the course of her employment with this respondent, caused internal or external physical harm to her body, and were caused by “rapid repetitive motion”, Ark. Code Ann. §11-9-102(4)(A)(ii)(a). Finally, she must prove by a preponderance of the credible evidence that her alleged compensable injuries are the “major cause” of any disability or need for medical treatment she has experienced, Ark. Code Ann. §11-9-102(4)(E)(ii).

The medical evidence presented is sufficient to “establish” the actual existence of physical injuries, conditions, or defects involving the claimant’s neck and right shoulder. Further, the medical evidence contained numerous “objective findings” to support the existence of these physical injuries, conditions, or defects. Dr. Roger Bullington, a chiropractic physician, has diagnosed the presence of cervical abnormalities with resulting neurological involvement. His diagnosis is supported by objective findings on his clinical examinations. These “objective findings” take the form of edema and paraspinal muscle hypertonicity. More importantly, his diagnosis is supported by objectively demonstrated abnormalities on a cervical MRI, which was performed on January 9, 2002. Dr. James Kelly (a plastic and reconstructive surgeon) has also diagnosed the existence of neurological abnormalities involving the claimant’s neck, right shoulder, and right arm. The actual existence of these abnormalities is supported by purely objective findings shown on electroneurological studies of the claimant’s right upper extremity. Finally, Dr. James Trusell, an orthopaedic surgeon, has diagnosed impingement syndrome and possible rotator cuff tear involving the claimant’s right shoulder. The existence of these abnormalities involving the claimant’s right shoulder are objectively supported by the findings shown on an MRI scan of the claimant’s right shoulder, which was performed on June 30, 2003. Thus, in regard to all of these diagnosed conditions, the claimant has satisfied the requirements of Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that one or more of these medically established and objectively documented physical injuries, conditions, or abnormalities, meet the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(a). In order to prove that these physical injuries, conditions, or abnormalities “arose out of and occurred in the course of her employment”, the claimant must prove that there exists a causal relationship between her employment and the particular physical injury, condition, or abnormality.

There is no medical evidence, which directly attributes any of these conditions to the employment activities described by the claimant. Clearly, expert medical opinion on the issue of causation is not absolutely necessary, in every case. However, it is certainly relevant and helpful in any case. Under the particular facts of the present case, expert medical opinion may, in fact, be necessary in order to prove the actual existence of a causal relationship between the objectively documented defects involving the claimant’s neck or cervical spine, the resulting neurological difficulties involving her right upper extremity, and her employment related activities for this respondent.

Clearly, the use for her right upper extremity as described by the claimant, would not logically produce sufficient trauma to result in a cervical disc herniation. In fact, the stress and trauma that would logically result from the employment related activity described by the claimant would not be sufficient to even produce a soft tissue or musculoskeletal strain or sprain of her neck or cervical spine. The cause of neurological dysfunction “across the erbs point in the neck” is also a matter that cannot be ascertained by the use of common knowledge and logic.

The evidence also fails to show a reasonably close temporal relationship between the initial onset of the claimant’s neck or cervical difficulties and her performance of any particular type of employment related activities. The evidence does show that immediately following a motor vehicle accident, in December of 2001, the claimant experienced an onset of significant difficulties and symptoms involving her neck, right shoulder, and right

arm. The claimant was treated for the injuries sustained in this motor vehicle accident by Dr. Bullington. A review of Dr. Bullington's reports and records reveal that the claimant's recorded complaints, symptoms, clinical findings, and diagnoses made during his treatment of the claimant for the injuries sustained in her motor vehicle accident on December of 2001 were essentially identical to those recorded after her alleged employment related injury. During this period of treatment for the motor vehicle accident, Dr. Bullington notes a number of events or activities that apparently exacerbated the claimant's symptoms. On February 1, 2002, he noted an increase in symptoms that followed the claimant "trying to work too much". On February 18, 2002, he noted another increase in the claimant's symptoms as a result of "too much shopping over the weekend". On March 11, 2002, he noted an increase in the claimant's symptoms after she "moved wrong". He also recorded that at the time of this last incident the claimant experienced a "pop" in her neck and experienced a sudden onset of severe pain.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove the existence of a causal relationship between her neck or cervical difficulties (including any neurological or radicular difficulties involving her right upper extremity) and her employment activities with this respondent. In fact, the greater weight of the credible evidence would indicate that these subsequent difficulties are merely a continuation or reoccurrence of a prior neck or cervical injury, caused by her motor vehicle accident in December of 2001.

Thus, the claimant has failed to prove the occurrence of any physical injury to her neck or cervical spine that "arose out her employment ". Her failure to prove this necessary definitional element of Ark. Code Ann. §11-9-102(4)(A)(ii)(a) prevents a finding of a "compensable injury" to this portion of her body.

The claimant's medically established and objectively documented physical injury, condition, or defect involving her right shoulder is a different matter. Again, there is no

expert medical evidence addressing the cause of the claimant's tendonopathy/tendonitis, bursitis, or possible partial or full thickness tear of the right distal supraspinatous tendon. However, cumulative minor trauma could logically result in a development of all of these diagnosed conditions. Partial or full thickness tears of the supraspinatous tendon can result from gradual wear from minor cumulative trauma, as well as from a single specific incident of major trauma.

Unlike the claimant's cervical difficulties, the evidence fails to show any other reasonable cause for the medically established and objectively documented physical injuries, conditions, or defects involving her right shoulder joint, particularly the supraspinatous tendon. There is no evidence that this portion of her anatomy was injured on the motor vehicle accident of December 2001. There is also no evidence of any other specific injury to this part of her body. There is no evidence of any express complaints involving the claimant's right shoulder joint prior to April of 2003. Although the claimant obviously was required to move her right shoulder joint to perform activities other than those involved in her employment, the evidence fails to show that she engaged in any type of activities, outside of her employment, that would have involved its use or movement to a degree approaching that involved in her employment related activities.

After consideration of all the evidence presented, it is my opinion that the claimant has proven the existence of a causal relationship between her medically established and objectively documented physical injuries, conditions, or defects which involved her right shoulder joint (particularly the supraspinotus tendon) and her employment activities with this respondent that required the use of her right arm in reaching forward, grasping, and pulling back. Although the evidence is in conflict whether these activities required the claimant to reach forward above shoulder level, at shoulder level, or below shoulder level, I see no real difference between these activities. Regardless of whether the claimant was required to reach at shoulder level, above shoulder level, or below shoulder level, she was

still required to extend her arm forward at the shoulder, grasp a document, and pull back on the document. All of these activities would require movement and rotation of her shoulder joint, regardless of the level.

Next, it becomes necessary to determine if these offending employment activities involved “rapid repetitive motion”, as that term is used in Ark. Code Ann. §11-9-102(4)(A)(ii)(a). The claimant testified that during her work day she would receive faxes from the various account locations she was managing. When these faxes were received, she would tear them off the fax machine, take them to her computer, and check the information against her sales records. She would then go to another computer, create the billing statement or PO, run it off on the printer, and tear it off or pull it out of the printer. It was pulling of the paper documents from the fax machine from the printer that she alleges to have caused her right shoulder difficulties.

According to the claimant’s testimony, she would create over 500 billing statements, or PO ‘s every week. This would equate to 12 every hour or one every five minutes. Thus, according to her testimony, she was required to perform the offending employment related activities with her right arm and shoulder twice every five minutes.

However, the records provided by the respondent show that the billing statement or PO’s created by the claimant were substantially less than she describes in her testimony. According to the respondent’s records (Commission’s Exhibit No.2) the most billing statements or PO”s created by the claimant in any single day was 63. Thus, on that particular date, the claimant generated one billing statement (PO) approximately every 7.6 minutes. During the eight month period reflected by the respondent’s records, the claimant’s average created only 34 PO’s per day or one every 14 minutes. If the claimant had performed the offending employment activity with her right shoulder and arm two times for every billing statement or PO that she created she would have averaged performing this offending employment related activity twice every 14 minutes.

The testimony of the respondent's witnesses indicate that the claimant may have averaged tearing off more faxes than is reflected by the number of billing statements or PO's that she created. This is based upon the knowledge that some of the initial faxes would have been incorrect. When the claimant's checking of the fax against her computer records so indicated, a new corrected fax would be sent. The respondent has assumed a 30% error rate in the initial faxes. Thus, according to the respondent's calculations the claimant would have received and been required to tear off an average of approximately 45 faxes per day, in order to generate the 34 PO average. Assuming the respondent's rationale to be accurate, the claimant would then have performed on the average the offending employment related activity one time every 14 minutes to tear the billing statement PO off the printer, and one time every 10 1/2 minutes to tear off the fax.

Even if the claimant's receipt of the faxes and preparation of the PO's was not spread evenly over her entire work date, the claimant's testimony indicates that she spent a significant portion of her work day performing these activities. Her description of the necessary activities required shows that there was a substantial period of time that would have had to elapse between her tearing the initial document off the fax machine and her tearing the completed billing statement or PO off the printer. As previously noted, the claimant testified that in order to perform the entire operation, she would pull the fax off the fax machine, then go to one computer and check the fax against the sales records, then go to another computer and make the necessary entries to complete the PO, run the PO off on the printer, and then ultimately pull the PO from the printer.

After consideration of all the evidence presented, I find that the employment related activities, which involved the motion and use of the claimant's right shoulder, may have been "repetitive", but have not been shown to be "rapid." Clearly, all of the evidence presented indicates a substantial period of time between each of these offending employment related activities. The various other activities, which were performed in the

interim, did not require any motion or place any particular stress on the claimant's right shoulder.

Applicable case law does not set out any express time frame or time limits, within which a motion or movement must occur, in order to be considered "rapid". However, I simply find that the alleged offending employment activity in this case was not performed with sufficient frequency to be considered "rapid" given that term its usual and customary meaning.

Thus, the claimant has failed to prove the occurrence of any employment related injury to her right shoulder that satisfies all of the definitional requirements for a "compensable injury", required by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). Specifically, she has failed to prove that any employment related causal element involved "rapid" movement and motion of the affected portion of her anatomy. The claimant's failure to prove this necessary definitional requirement prevents a finding of a "compensable injury" to her right shoulder during her employment with this respondent.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$321.00 for total disability and \$241.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a "compensable injury" to her neck or cervical spine that was caused by "rapid repetitive motion". Specifically, she has failed to prove by the greater weight of the credible evidence the existence

of any causal relationship between any physical injury or condition, involving her neck or cervical spine, and her employment activities or employment environment with this respondent. Thus, she has failed to prove the occurrence of a physical injury to this portion of her body that “arose out of” her employment with the respondent.

5. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a compensable injury to her right shoulder that was caused by “rapid repetitive motion”.
6. The respondents have denied any “compensable injuries” to the neck or cervical spine and right shoulder 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