

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401780

TERRY TACKETT

CLAIMANT

TRANE COMPANY

RESPONDENT

TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 17, 2004

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 6, 2004, in Fort Smith , Arkansas. The deposition of Dr. Greg T. Jones was taken on May 18, 2004, and has been admitted as Joint Exhibit No. 1.

A pre-hearing order was entered in this case on April 14, 2004. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, the parties offered an additional stipulation concerning the effect of Ark. Code Ann. § 11-9-411. The parties also agreed to amend the second issue to reflect that the claimant was only seeking temporary total disability benefits through March 27, 2004, and to add the issue of the claimant's entitlement to permanent benefits for permanent physical impairment. A copy of this pre-hearing order with those various amendments noted thereon was made Commission' Exhibit No. 1 to the hearing.

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

1. On all relevant dates, including March 7, 2003, the relationship of employee-employer carrier existed between the parties.
2. The appropriate weekly compensation rates are \$405.00 for total disability and \$304.00 for permanent partial disability.

3. The claim is controverted in its entirety.
4. Should this claim be held compensable, the respondents are entitled to the offset provided by Ark. Code Ann. § 11-9-411.

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 left shoulder on March 7, 2003.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from August 26, 2003 through March 27, 2004, and attorney's fees.
3. The claimant's entitlement to permanent benefits for permanent physical impairment.

In regard to these issues, the claimant contends that she is entitled to temporary total disability benefits from on or about August 26, 2003 until a date yet to be determined and reasonable and necessary medical treatment. The claimant also contends that her attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend that the claimant did not sustain a compensable left shoulder injury on March 7, 2003.

DISCUSSION

The central issue in this case is the question of whether the claimant sustained a "compensable injury" to her left shoulder, as the result of a specific employment related incident on March 7, 2003. The burden rests upon the claimant to prove this alleged compensable injury.

In order to meet this burden, the claimant must first show that her alleged compensable left shoulder injury satisfies the requirements of Ark. Code Ann. § 11-9-102(4)(D). This subsection requires that the claimant prove by medical evidence, the actual existence of the physical injury or condition alleged to be compensable. Further, she must show that the actual existence of this physical injury or condition is supported by "objective findings." The Act defines "objective findings,"

as the independent observation of findings beyond the claimant's voluntarily control, Ark. Code Ann. §11-9-102(16)(A).

The operative report and deposition of Dr. Greg T. Jones, clearly "establishes" the actual existence of a physical injury to the claimant's left biceps tendon, in the area of the bicipital groove. Further, the operative report and deposition of Dr. Jones reveals that the existence of this physical injury was based upon his actual observation of tendinosis or "tearing" within the substance of the structure of the biceps tendon.

The reports and records of Dr. Jones also established the existence of various other physical injuries and conditions involving the claimant's left shoulder, which are also supported by objective findings (again, primarily in the form of visual observations of the defects during various surgical procedures). However, it is only the biceps tendinosis which the claimant alleges to be the result of the specific incident on March 7, 2003.

In summary, I find that the claimant has satisfied the statutory requirements for a "compensable injury," which are contained in Ark. Code Ann. §11-9-102(4)(D), in regard to the tendinosis of the biceps tendon of her left shoulder.

The claimant must next prove that this medically established and objectively documented physical injury satisfies the definitional requirements for a "compensable injury" which is set out in Ark. Code Ann. §11-9-102(4)(A)(i). These requirements are:

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

In order to prove that the tendinosis of her left biceps tendon satisfies the first three of these definitional requirements, the claimant must show the existence of a causal relationship

between this physical injury and an employment related “specific incident” on March 7, 2003. This is a difficult determination to make.

The evidence shows that the claimant has experienced difficulties with her left shoulder, since at least 1999. Various separate diagnoses have been made concerning the etiology of the claimant’s left shoulder complaints. Prior to March 7, 2003, the claimant had undergone four separate surgical procedures, which were intended to correct the diagnosed cause of her left shoulder complaints. All of these procedures were performed by Dr. Greg Jones, an orthopaedic surgeon. As noted by Dr. Jones, none of the claimant’s prior left shoulder complaints were compatible with any injury or damage to the body of the claimant’s left biceps tendon. In his deposition, Dr. Jones notes that during these surgical procedures, he observed no damage or defect involving this tendon.

The claimant testified that on March 7, 2003, she was performing her assigned employment duties. These duties required her to attach various pieces of copper pipe onto compressors by the use of a torque wrench. From her description, it is apparent that this was a ratchet type torque wrench that requires strenuous exertion in one direction and moves relatively freely in the opposite direction. Finally, she testified that while applying pressure to tighten one particular hex nut (to attach the pipe to the compressor), she felt a “tearing” pain in her shoulder.

The claimant conceded that she did not immediately report this incident and onset of difficulties on March 7, 2003. However, she testified that she immediately reported the incident and injury to the plant nurse, when she reported for work the following day (March 8, 2003). The claimant’s testimony in this regard is supported by “a report of occupational injury or illness,” which was completed by the plant nurse and is dated March 8, 2003. The information set out in this report essentially coincides with the description given by the claimant in her testimony. However, this report further indicates that the actual onset of symptoms occurred while the claimant was “pushing on the torque wrench.”

The claimant testified that she requested to be sent to a physician, but that this request was

denied. She stated that she was treated “in house” by the plant nurse and directed to return to work. She stated that she was told, by the plant nurse, that she would have to see her own physician. The information contained in the report of occupational injury or illness substantially coincides with this testimony.

The claimant testified that the difficulties with her left shoulder continued and progressively worsened. She stated that she attempted to return to her regular doctor, Dr. Jones, but was unable to see him because she still owed him money as a result of his prior treatment. The claimant’s testimony concerning the continuing nature of her left shoulder difficulties after March 7, 2003, is supported by the fact there was obviously an ongoing investigation by the respondent’s insurance carrier, in regard to her reported left shoulder injury on March 7, 2003. The documentary evidence shows that the claimant’s recorded statement was taken by agents of the respondent carrier on May 19, 2003.

The claimant ultimately sought medical treatment for her left shoulder difficulties on August 8, 2003. At that time, she went to the emergency room of Sparks Regional Medical Center. The emergency room record notes complaints of pain in the claimant’s left shoulder and that the claimant was to see Dr. Greg Jones on the following Monday, who had previously performed surgery four times on her left shoulder. Curiously, this report relates that the claimant specifically denied any injury to her shoulder (Respondent’s Exhibit No. 1, page 39).

There is no indication as to whether the claimant did, in fact, see Dr. Jones on the following Monday. However, the medical evidence shows that she next consulted Dr. Roger Bishop, her family physician, on August 11, 2003. Again, Dr. Bishop records in his progress notes that the claimant is complaining of difficulties with her left shoulder. He also expressly notes “chronic pain without specific precipitating activity or injury.”

The claimant next apparently returned to Dr. Jones sometime in August of 2003. In his deposition, Dr. Jones relates that on this return visit in August of 2003, the claimant related a history that her current left shoulder difficulties began while she was using a torque wrench at work.

In his deposition, Dr. Jones conceded that the tendinosis or tearing of the body of the left biceps tendon could result from either specific trauma or gradual and progressive wear and tear. Although he did not address the cause of the adhesions, which were also observed and corrected in the surgery of November 6, 2003, these defects would clearly represent scarring attributable to the claimant's prior multiple surgeries in the same general area.

In his deposition , Dr. Jones goes on to state that, in his expert medical opinion, the claimant's tendinosis or tearing of the left biceps tendon, was causally related to the specific employment related incident as described as occurring on March 7, 2003. He further goes on to set out the factors he considered and the basis for this conclusion. First, he states that there was no tendinosis or tearing of the body of the left biceps tendon noted at the time of the claimant's prior surgery in March of 2002. Thus, this defect must have resulted after that date and be of fairly recent origin. Secondly, he notes that the symptoms described by the claimant as following the incident on March 7, 2003, were indicative of the occurrence of the tear of the biceps tendon and that no similar symptoms had ever been previously voiced by the claimant.

Next, he states that the stress and trauma, that would result from the employment related activity described by the claimant, (i.e. the use of a torque wrench) could reasonably produce the tendinosis or tearing of the tissue in the body of the claimant's left biceps tendon that he observed during the corrective surgery in November of 2003. He also apparently considered the fact that the claimant became asymptomatic following her previous surgery in March of 2002, and that she "had been back to work for over a year and a half, basically not having problems until she had a sudden onset of pain in the anterior aspect of her shoulder in the biceps groove) presumably on March 7, 2003.

After consideration of all the evidence, I am simply unable to accept the expert medical opinion of Dr. Greg Jones, given in his deposition on the issue of causation. First, this opinion appears to be expressly contrary to a form generated by Dr. Jones' office in order to allow the claimant to receive group sick and accident benefits. This form, which is dated February 11, 2004,

notes the nature of the claimant's difficulties as left shoulder impingement, which is similar to some of the claimant's previous diagnoses. This report further expressly notes that this condition did not arise out of the claimant's employment. Finally, this form report relates that the initial treatment for the claimant's current condition began with the surgery on December 17, 1999 and that the claimant's difficulties represent the result of chronic persistent problems from the multiple surgeries since December 17, 1999 (Respondent's Exhibit No. 1, page 43).

Next, the report of occupational injury or illness completed on March 8, 2003, shows that the express offending activity being performed at the time of onset of the claimant's left shoulder difficulties involved "pushing" on the torque wrench. The activity of "pushing" should not place any particular stress or trauma on the claimant's biceps tendon, as this muscle is not employed in that type of activity. Thus, Dr. Jones appears to be inaccurate in his conclusion that the activity being performed by the claimant at the time of her activity was consistent with producing such an injury.

Dr. Jones also obviously considered the fact that the claimant had been "back to work " and was experiencing no problems with her left shoulder for "over a year and a half" prior to the "sudden onset" of her current symptoms. The record clearly shows that the claimant was not released to return to work by Dr. Jones, following her March 2002 surgery until September of 2002. Shortly after this release, the claimant was taken off work for psychological problems until some time in November of 2002. The attendance records of the respondent indicate that the claimant worked very little, if any, until December of 2002. Thus, the claimant had not been back to work, having no problems, for over a year and half prior to the alleged sudden onset of her current symptoms on March 7, 2003. In fact, the claimant had been back to work for only a little over two months prior to this alleged incident. In fact, the evidence shows that the claimant continued to work, in her regular position, for over five months following the alleged incident of March 7, 2003. Contrary to the claimant's testimony, she missed no days in March following March 7, 2003. She did miss over six and a half days in April of 2003, but the attendance records do not show that these absences were in any way attributable to physical difficulties. She only missed two

days in May of 2003, one day in June of 2003, and no days in July of 2003. Her absences began again on August 8, 2003, at which time it was specially noted these absences were attributable to physical difficulties.

Although the claimant testified that she had attempted to see Dr. Jones, prior to August of 2003, she gives no explanation for her failure to seek medical services for her alleged “new” injury from her family physician (Dr. Bishop) or from the emergency room. Although the claimant denies that she told the emergency room personnel at Sparks Regional Medical Center and Dr. Bishop, (when she consulted them in August of 2003), that her difficulties with her left shoulder were merely a continuation of her previous difficulties, it is difficult to conceive where else this information could have been obtained, particularly by the personnel at the emergency room of Sparks Regional Medical Center. It must also be noted that both the personnel at the emergency room of Sparks Regional Medical Center and Dr. Bishop not only failed to record any “new” injury to her left shoulder in March of 2003, but expressly stated that the claimant denied any type of new injury or precipitating event for her current difficulties. It is impossible to believe that both of these sources would have inaccurately recorded the exact same history.

There is absolutely no doubt that the claimant has experienced significant physical damage to various structural components of her left shoulder (including tendinosis of the left biceps tendon). There is also no doubt that some of the claimant’s regular employment activities for this respondent would require stressful use of her left shoulder. In fact some of the claimant’s regular employment activities may have had a detrimental effect on her severely damaged left shoulder. However, it is simply my opinion that the claimant has failed to prove that the alleged specific employment related incident on March 7, 2003, played a causal role in producing her diagnosed tendinosis of her left biceps tendon and her current episode of left shoulder difficulties. Thus, she has failed to prove this condition represents a “compensable injury,” as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). Her present claim for benefits attributable to such an injury 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 March 7, 2003, the relationship of employee-employer-carrier existed between the parties.
3. On March 7, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$405.00 for total disability and \$304.00 for permanent partial disability.
4. The claimant has failed to prove that she sustained a "compensable injury" to her left shoulder, as the result of a specific employment related incident on March 7, 2003.
5. The respondents have denied the occurrence of any specific injury to the claimant's left shoulder on March 7, 2003, 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