

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F413236

TERRI MORGAN

CLAIMANT

WAL MART STORES, INC.
SELF INSURED

RESPONDENT

OPINION FILED NOVEMBER 10, 2005

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

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville,
Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville,
Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on August 15, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on June 6, 2005. 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. A copy of the pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

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

1. On December 14, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$248.00 for total disability and \$186.00 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 compensable injury to her left arm on December 14, 2004
2. The claimant's entitlement to the medical expenses, temporary total disability from February 17, 2005 through March 8, 2005 and from May 5, 2005 through May 17, 2004 and attorney's fees.

In regard to these issues, the claimant contends:

"Claimant was injured on December 14, 2004. Her left elbow and arm were injured as she was lifting milk gallons from high crates to the milk shelves."

In regard to these issues, the respondents contend:

"The claimant contends that she sustained an accidental injury at the respondent's place of business on December 14, 2004. The claimant alleges that she injured her left elbow and arm while lifting gallons of milk from high crates to the milk shelves.

Respondent denies that the claimant sustained a compensable accidental injury at his place of business on December 14, 2004, or on any other date for that matter. Among other things, respondent contends that there are no objective measurable findings to substantiate the existence of an injury."

DISCUSSION

I. COMPENSABILITY

The central issue in this case is the question of whether the claimant sustained a compensable injury to her left elbow or arm, as the result of a specific employment related incident on December 14, 2004. The burden rests upon the claimant to prove all of the

elements necessary to establish this alleged compensable injury. These elements can be found in Ark. Code Ann. §11-9-102(4)(A)(i) and (D).

Ark. Code Ann. §11-9-102(4)(D) requires the claimant to prove by medical evidence the actual existence of the physical injury or condition alleged to be compensable. It further requires that the actual existence of this physical injury or condition must be supported by “objective findings”, as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence clearly “establishes” the existence of a physical injury to the claimant’s left elbow. Such an injury was initially diagnosed by Dr. Konstantin Berestnev, the company physician. His diagnosis was left lateral epicondylitis. The claimant was subsequently seen by Dr. Ronald Schlabach, her family physician. Dr. Schlabach also diagnosed the presence of tendinitis of the left elbow. The claimant was ultimately seen by Dr. James Long, an orthopaedic surgeon. Dr. Long diagnosed the claimant as experiencing lateral epicondylitis of the left elbow with a partial rupture of the origin of the extensor carpi radialis brevis of the left elbow.

Although Dr. Berestnev and Dr. Schlabach noted no “objective findings” on their physical examinations, Dr. Long had subsequently noted the observation of various “objective findings” to support his diagnosis of the etiology of the claimant’s left elbow injury. On his initial examination, Dr. Long noted the visual observation of a “slight prominence” in the area of the lateral epicondyle that

was tender to palpitation. In the course of his treatment, he subsequently noted swelling and ecchymosis in this same area. I find these “objective findings” sufficient to support the existence of the injury diagnosed by Dr. Long (i.e. lateral epicondylitis from a partial tear of a tendon in the claimant’s elbow).

_____Therefore, the claimant has proven by medical evidence the actual existence of the injury or condition she alleges to be compensable and has further proven that the existence of this injury or condition is supported by “objective findings” or findings beyond her voluntary control. This satisfies the necessary for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(D).

Next, the claimant must prove that this medically established and objectively supported physical injury satisfies the definitional elements of Ark. Code Ann. §11-9-102(4)(A)(i). These elements are:

- (1) The physical injury must have arose out of and occurred in the course of the claimant’s employment;
- (2) The physical injury must have been caused by a specific incident;
- (3) The physical injury must be identifiable by time and place of occurrence;
- (4) The physical injury must have caused internal or external physical harm to the claimant’s body;
- (5) The physical injury must have required medical services or resulted in disability.

In order to satisfy the first three of these definitional

elements, the claimant must prove the existence of a causal relationship between a specific employment related incident and her medically established and objectively supported physical injury to her left elbow. The only direct evidence presented by the claimant to prove this causal relationship is her own testimony.

Although the testimony of a party is never considered uncontradicted, this does not mean it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient, in and of itself, to prove any fact that it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident, to describe the mechanics of this incident and to establish the existence of a close temporal relationship between the incident and the initial onset of difficulties indicative of the occurrence of the physical injury to her left elbow.

After consideration of all the evidence presented, I find the claimant's testimony to be credible, concerning the occurrence of a specific employment related incident on December 14, 2004, the nature of this incident, and the initial onset of her left elbow complaints contemporaneously with this incident. The evidence shows that the claimant immediately reported the incident and the onset of her difficulties to her employer. Her description of the incident, at the hearing coincides with the description of the incident that she related to all of her various treating physicians.

Clearly, the mechanics and trauma that would have resulted

from the incident described by the claimant could have reasonably caused the diagnosed injury to her left elbow (a partial tear of a tendon with resulting epicondylitis). Dr. Long, a highly competently orthopaedic surgeon, indicated that the type of injury sustained would be compatible with the mechanism of the trauma described by the claimant as occurring in the incident on December 14, 2004. Dr. Long is a highly competent orthopaedic surgeon with a great deal of expertise in the area of medicine associated with this type of injury. His opinion is entitled to considerable weight and credit.

The evidence reveals no other reasonable cause for the diagnosed injury. The medical evidence shows that the claimant had experienced a number of difficulties with other portions of her body, prior to the employment related incident. However, there is no evidence of any injury to or even any complaints or difficulties with her left elbow before the occurrence of this incident.

Dr. Long does note subsequent exacerbations of the claimant's symptoms with her left elbow after strenuous use of her left upper extremity (most, if not all, of these are also employment related). However, he also continued to attribute the claimant's complaints at least in part, to the initial damage in the form of a partial tear of the tendon that was caused by the incident on December 14, 2004.

Finally, it must be noted that the claimant's initial difficulties clearly occurred within a reasonable period of time following this incident (i.e. contemporaneously). The evidence

further shows that although the magnitude of her symptoms may have waxed and waned thereafter, some degree of difficulties have persisted, and the claimant's initial injury never totally resolved.

These factors are sufficient to prove the existence of a casual relationship between the employment related incident of December 14, 2004 and the subsequently medically established and objectively documented physical injury to her left elbow. Therefore, the claimant has proven that this injury arose out of and occurred in the course of her employment, was caused by a specific incident, and is identifiable by time and place of occurrence. This satisfies the first three definitional requirements for a "compensable injury" that are set out in Ark. Code Ann. §11-9-102(4)(A)(i).

The claimant's testimony concerning the magnitude of her pain and physical limitations in the area of her left elbow is also credible. This testimony is itself clear evidence of internal physical harm to this portion of her body. The presence of such internal physical harm is further supported by the objective findings noted by Dr. Long of a partial tendon tear. Thus, the claimant has proven the fourth definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

Medical treatment for the claimant's left elbow injury was recommended by Dr. Berestnev, Dr. Schlabach, and Dr. Long. Extensive medical services have been provided to the claimant for this injury by Dr. Long. It cannot be presumed that these medical

experts would have recommended and provided services that they believed to be unnecessary. Thus, the mere fact that these services were provided would lead to the reasonable inference that it was the expert medical opinion of these physicians that the compensable injury required such treatment.

The claimant's testimony and the records of Dr. Berestnev and Dr. Long also show that the compensable left elbow injury substantially restricted the claimant's potential employment activities. The evidence presented further shows that these physical restrictions and limitations have produced some, at least temporary degree of disability.

Therefore, I find the claimant has proven that her compensable elbow injury required medical services and resulted in disability. This would satisfy the fifth and final definitional requirement of Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, I find that the claimant has proven by the greater weight of the credible evidence that she sustained a "compensable injury" to her left elbow on December 14, 2004. Specifically, she has proven the occurrence of a physical injury to this portion of her body that is "established" by medical evidence, supported by "objective findings," arose out of and occurred in the course of her employment with this respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to her body, and required medical services, and resulted in disability.

II. BENEFITS

Next, it is necessary to address the nature and extent of benefits to which the claimant is entitled for her compensable left elbow injury at the present time. Clearly, she is entitled to reasonably necessary medical services under the provisions of Ark. Code Ann. §11-9-508. However, the burden still remains on the claimant to prove that the medical services that were actually provided represent “reasonably necessary medical services” under this subsection.

Medical services are “reasonably necessary” when they are necessitated by or connected with the compensable injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. The Act does not limit “reasonably necessary medical services” to those services directed solely toward the treatment of the actual physical damage caused by the compensable injury. “Reasonably necessary medical services” also extend to services reasonably appropriate to accurately diagnose the nature and extent of the injury and even those services that are only intended to provide symptomatic relief of symptoms caused by the injury.

Unquestionably, the medical services that were provided to the claimant by and at the direction of Dr. Berestnev were necessitated by and connected with the claimant’s compensable left elbow injury. The initial services provided by this physician appear to be of a type and nature generally recognized by the medical community as being appropriate to evaluate the nature and extent of the injury and to treat the complaints of the type exhibited by the claimant.

I find the services of Dr. Berestnev to constitute reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508.

The services provided to the claimant by and at the direction of Dr. Schlabach for her left elbow complaints are also shown to be of a type and nature generally recognized as being medically appropriate for the evaluation and treatment of elbow complaints, such as those exhibited by the claimant. The subsequent medical services provided to the claimant by Dr. Long for her left elbow complaints are also of a type and nature commonly employed to accurately diagnose the nature and extent of elbow injuries improve the actual physical damage from the injury diagnosed, which would, in turn, reduce or alleviate the claimant's symptoms and limitations with this portion of her body. It appears from the evidence presented that the services provided to the claimant by Dr. Long not only had a reasonable expectation of accomplishing their desired purposes or goals, but did in fact actually do so. It is my finding that the medical services rendered to the claimant by and at the direction of Dr. Schlabach and Dr. Long for her left elbow difficulties (including recommended physical therapy) also constitute reasonably necessary medical services within the meaning of Ark. Code Ann. §11-9-508.

However, I would note that Dr. Schlabach and Dr. Long have apparently also provided the claimant with medical services for various complaints involving other portions of her body. These other complaints or difficulties have not been proven to be

attributable to any compensable injury arising out of the accident on December 14, 2004. Therefore, any medical services the claimant received in connection with these other difficulties would not represent reasonably necessary medical services for her compensable injury of December 14, 2004, and the respondents would have no liability under this claim for the expense of these services.

The final matter concerns the claimant's entitlement to temporary total disability benefits from February 17, 2005 through March 8, 2005 and from May 5, 2005 through May 17, 2005. The burden rests upon the claimant to prove her entitlement to such benefits.

In order to meet this burden, the claimant must prove by the greater weight of the credible evidence that she continued within her healing period from the effects of her compensable left elbow injury during these periods. As the claimant's compensable injury was to a portion of her body that is "scheduled" under Ark. Code Ann. §11-9-521, the claimant need also prove that she had not "returned to work" during these periods.

The duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence present. The healing period from the effects of a compensable injury continues until the claimant has achieved the maximum benefit of time and medical treatment in regard to the improvement or resolution of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further

in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

In the present case, the medical evidence presented clearly shows that the claimant remained within her healing period from the effects of her compensable left elbow injury for the periods of February 17, 2005 through March 8, 2005 and May 5, 2005 through May 17, 2005. During these periods, the claimant was unquestionably under continuous active medical treatment for the compensable injury to her left elbow and any physical damage it had caused and not resolved or even stabilized.

The claimant's testimony shows that she was unable to work, as a result of her left elbow difficulties, during the periods in question. This testimony is substantiated by the medical records and reports of Dr. Long. I find this evidence to be sufficient to prove that, during the specific periods in question, the claimant had not "returned to work" within the meaning of Ark. Code Ann. §11-9-521(a).

Therefore, the claimant has proven that she was temporarily totally disabled due to her compensable left elbow injury for the periods of February 17, 2005 through March 8, 2005 and from May 5, 2005 through May 17, 2005. She would be entitled to temporary total disability benefits at the appropriate weekly rate during these two periods.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On December 14, 2004, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On December 14, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$248.00 for total disability and \$186.00 for permanent partial disability.
4. On December 14, 2004, the claimant sustained a compensable injury to her left elbow. Specifically, she has proven by the greater weight of the credible evidence the occurrence of a physical injury to this portion of her body that is "established" by medical evidence, is supported by "objective findings," arose out of and occurred in the course of her employment, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to her body, and required medical services and resulted in disability.
5. The medical services provided to the claimant for her left elbow injury and complaints by and at the direction of Dr. Konstantin Berestnev, Dr. Ronald D. Schlabach, and Dr. James Long constitute reasonably necessary medical services for the claimant's compensable left elbow injury. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services. This liability is subject to the medical fee schedule established by the Commission.

6. The claimant was rendered temporarily totally disabled by the effects of her compensable left shoulder injury for the periods of February 17, 2005 through March 8, 2005 and from May 5, 2005 through May 17, 2005. The claimant has proven that, during these periods she continued with in her healing period from the effects of her compensable left elbow injury and had not "returned to work."
7. The respondents have denied the occurrence of any compensable injury to the claimant's left elbow and have controverted this claim in its entirety.
8. A reasonable fee for the claimant's attorney is the maximum statutory attorney's fee on any controverted benefits herein and hereinafter awarded directly to the claimant.

ORDER

The respondents shall pay to the claimant temporary total disability benefits for the periods of February 17, 2005 through March 8, 2005, and from May 5, 2005 through May 17, 2005.

The respondents shall be liable for the expense of medical services provided to the claimant for her left elbow injury and complaints by and at the direction of Dr. Berestnev, Dr. Schlabach, and Dr. Long. This liability shall be subject to the medical fee schedule established by this Commission.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded to the claimant. One-half

of this fee is the obligation of the respondents in addition to such benefits. The remaining one-half of this fee is to be withheld by the respondents from such benefits.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge