

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407014

ZOELLA SMITH, EMPLOYEE	CLAIMANT
ELECTROLUX HOME PRODUCTS, SELF-INSURED EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, TPA	RESPONDENT

OPINION FILED MARCH 2, 2005

Hearing held December 10, 2004 before the Honorable Dale Douthit, Administrative Law Judge, at Hope, Hempstead County, Arkansas.

Claimant was represented by Mr. Nelson V. Shaw, Attorney at Law, Texarkana, Texas.

Respondents were represented by Mr. Edward W. McCorkle, Attorney at Law, Arkadelphia, Arkansas.

STATEMENT OF THE CASE

_____ On December 10, 2004, the above-captioned claim came on for a hearing in Hope, Arkansas. A prehearing conference was conducted on October 27, 2004, and a prehearing order was entered that same date. A copy of the October 27, 2004, Prehearing Conference Order has been marked as Commission Exhibit #1 and made a part of the record herein, without objection. At the hearing, the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order, subject to additional stipulations, contentions and issues agreed to at the hearing.

The parties stipulated the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/self-insured employer relationship existed at all relevant times, including May, 2004, and that the claimant earned an average weekly wage of \$368.00, entitling

her to a temporary total disability rate of \$246.00 per week.

The parties agreed that the issues to be presented for determination were:

- 1) Whether the claimant sustained a compensable gradual-onset injury to her left shoulder;
- 2) If she sustained such an injury, whether the medical treatment received by the claimant has been reasonably necessary in connection with the compensable injury;
- 3) Whether claimant is entitled to TTD benefits for the period between June 23, 2004 and November 17, 2004;
- 4) Whether respondents should receive an off-set pursuant to A. C. A. §11-9-411.

The claimant reserves the issue of permanent benefits.

The claimant contended that she suffered a compensable injury to her left shoulder while performing her tasks of picking up weed-eaters off the assembly line, and that as such she is entitled to associated medical benefits and temporary total disability benefits from June 23, 2004 to November 17, 2004.

The respondents contended the claimant suffers from Osteoarthritis and has not suffered a compensable injury arising out of and in the scope of her employment; that the claimant did not sustain any specific injury, and that they are entitled to an offset for disability and medical benefits received by the claimant pursuant to A.C.A. §11-9-411.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code. Anno. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this

claim.

- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that her alleged compensable injury was the major cause of her disability or need for treatment pursuant to A.C.A. §11-9-102(4)(E)(ii).

DISCUSSION

1. History

The claimant has been employed by the respondent for the last nineteen (19) years. Her job at Electrolux Home Products for the last thirteen (13) of those nineteen (19) years has been that of a weed-eater tester on an assembly line. As a tester, she would pull a weed-eater off the assembly line every three minutes (for 35 or 40 hours per week) set the carburetor, and then replaced the unit back on the assembly line.

The claimant testified she is right handed, and that as such would use her non-dominant hand (left) to retrieve and replace the units while using her dominant hand (right) to start the engine and calibrate the carburetors. It is the lifting and replacing the weed-eater claimant contends caused her gradual-onset injury to the left shoulder.

The medical records introduced show the claimant first complained about her left shoulder on September 8, 2000 (JX 1, Pg. 1); however, her testimony reflected problems sometime in January of 1999. (T. Pg. 26, Ln. 1-6). In any event, the claimant testified her left shoulder pain became noticeably worse in May, 2004 (T. Pg. 13, Ln. 2-25 & Pg. 14, Ln 1-10). After the increased pain in May, 2004, the claimant reported the problem to her supervisor and she stated she was denied any workers' compensation benefits because she waited too long to

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report the problem. (T. Pg. 16, Ln 2-3). On June 24, 2004, the claimant stated her left shoulder pain was so bad she had to go to the emergency room; however, no medical record was submitted evidencing treatment at the E. R. on June 24, 2004.

According to the claimant's testimony, she then went to see Dr. Soeller on June 30, 2004 about her injury; however, Dr. Soeller's report indicates he first saw her on July 6, 2004 with complaints of left shoulder pain. (JX 1, Pg. 16). Dr. Soeller saw her again on July 12, 2004 and assessed her subacromial impingement causing her left shoulder pain, and then scheduled for arthroscopy surgery on July 14, 2004. (JX 1, Pg. 17). Dr. Soeller's operative report (JX 1, Pgs. 18 & 19) indicated no tears and indicated the surgery consisted solely of the debridement of soft tissue. Following surgery, Dr. Soeller recommended physical therapy and released her without restrictions on November 17, 2004.

COMPENSABILITY

I. Elements of a gradual onset injury.

In the case at hand, the claimant has alleged a gradual onset injury to her left shoulder. To prove such is compensable, the claimant had to prove by a preponderance of the evidence that the injury 1) arose out of and in the course of her employment; 2) caused internal or external physical harm to the body requiring medical service; 3) was caused by rapid repetitive motion; 4) was the major cause of the disability or need for treatment, and 5) was established by medical evidence supported by objective findings. See A.C.A §11-9-102(4)(A) & (E) It is element number four, as listed above, that I find the claimant failed to prove by a preponderance of the evidence. The Code clearly states the claimant's "resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment." (Emphasis

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added.)

The medical records introduced at the hearing at no point state, by any physician, the causation link necessary to satisfy § 11-9-102(4)(E), with regard to medical opinions.

Medical opinions addressing causation are not the only evidence that can establish a causal connection and satisfy the major cause requirement. Crudup v. Regalware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). In Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W. 2d 522 (1999), the court specifically held “that objective medical evidence was not essential to establish a causal relationship between the injury and the work-related accident in all cases.” The court in Crudup v. Regalware, Inc. went on to say if the claimant relies on medical evidence to establish causation, the medical opinions must be stated within a reasonable degree of medical certainty. In the case at hand, it is unclear whether the claimant sought to prove the major cause requirement by medical opinion or otherwise. I will address both instances. However, it is this examiner’s findings that the claimant failed to prove by a preponderance of the evidence that her alleged compensable injury was the major cause of the disability or need for treatment by objective medical findings or otherwise.

First, should we look at this from a medical evidence standpoint to determine causation, we must look at claimant’s contention pursuant to the transcript (Pg. 45, Ln 16-24)

In fact, Dr. Soeller’s first office visit notes, in the history it seems to indicate that too. It says she works on an assembly line, she performs repetitive motions everyday, and she has worked there for 19 years. I think the testimony, the facts, the type of job, the type of work, it all points perfectly to the injury that would have occurred to her left shoulder.

Certainly no physician stated within a reasonable degree of medical certainty that her compensable injury was the major cause of the disability or need for treatment.

Claimant's attorney, in his closing statement above, seems to indicate Dr. Soeller made a causal connection between the injury and treatment. However, the report from Dr. Soeller referred to by claimant's attorney (JX 1, Pg. 16) is merely a summary of what was self reported by the claimant. Nowhere in any of the medical evidence submitted is there any causal relationship every mentioned.

Since the major cause factor can be proven without medical evidence, I now look to the other evidence presented to determine whether the claimant proved by a preponderance of the evidence that the alleged compensable injury was the major cause of the disability or the need for treatment. The "alleged compensable injury" must be the major cause of the disability or need for treatment. In this case, the "alleged compensable injury" is a gradual onset injury to the left shoulder. Through natural progression, an element of the "alleged compensable injury" is rapid repetitive motion. So, the question is begged "did the rapid repetitive movement of the left shoulder cause the need for treatment or disability?" Without any medical evidence connecting the two, the claimant leaves the issue open for speculation.

At first look, it seems logical that the claimant's work caused the condition in the left shoulder; however, evidence was submitted that claimant, years before, had a similar surgery to the right shoulder. It was undisputed claimant's motions of her left shoulder are different than that of her right (dominant) shoulder. If one is to assume the rapid repetitive motion of the left shoulder caused the need for surgery, then why did she need surgery for her right shoulder? The respondents allege it was due to her osteoarthritis and degenerative changes rather than a gradual onset injury. (T, Pg. 24, Ln 6-35 & Pg. 25, Ln 1-6)

Q. You've had some arthritic problems for some time, have you not, ma'am?

- A. Yes, Uh, arthritis you talking about?
- Q. Arthritis, yes ma'am.
- A. I had a little arthritis, yes.
- Q. In fact, you've had orthoscopic surgery on your right shoulder at one time back in about 1999 or 2000, have you not?
- A. Yes, sir.
- Q. And you have also been to a Dr. Smolarz for arthritic problems with your back, have you not?
- A. Yes, sir.
- Q. And he did a MRI, did he not, that found some mild degenerative changes in your lumbar spine. Is that correct?
- A. Yes, sir, I guess.
- Q. You had a problem with your hips and things at one time, had you not?
- A. Yes, sir.
- Q. So you have had hip problems, both shoulder problems, and I believe you had some problem with one of your wrists, did you not?
- A. Yes, sir.
- Q. Which one was that?
- A. I've had problems with both of my wrists, right and left.

To prove "major cause" the claimant has the burden to prove beyond a preponderance of the evidence that the alleged compensable injury is more than 50% of the need for treatment or disability. A.C.A. §11-9-102(14)(A). By not proving the major cause factor with medical evidence, this examiner is left to speculate and is constrained to find that she has not overcome her burden to prove major cause by a preponderance of the evidence.

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Dr. Soeller, in his 7/12/04 report, (JX 1, Pg. 17) made a note that the claimant had previously had an arthroscopic decompression of her right shoulder. Even though the claimant is not seeking compensability of her right shoulder, the previous bilateral problems arising from the admittedly different motions causes this examiner to fall in the middle of the major cause requirement. Claimant had the burden of proving it by more than 50%, and has fallen short. In my opinion the medical evidence is suspect as to causation, and the bilateral symptoms do not square with claimant's contention that rapid repetitive motion of the left should caused the need for treatment, in light of the fact she had the same ailment in the right shoulder without the same rapid repetitive motion. (T. Pg, 26, Ln 1-7)

ORDER

Claimant has failed to prove by a preponderance of the evidence that her alleged gradual onset compensable injury was the major cause of her disability or need for treatment, therefore, the claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Dale Douthit
Administrative Law Judge

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