

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407742

MARIA CONTRERAS

CLAIMANT

TYSON POULTRY, INC.  
SELF INSURED

RESPONDENT

OPINION FILED JULY 31, 2006

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 MELISSA LEE, Attorney, Springdale, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on May 23, 2006, in Fort Smith, Arkansas. A pre-hearing order had previously been entered in this claim on March 14, 2006. This pre-hearing 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, certain minor grammatical changes were made in regard to the third stipulation. A copy of the pre-hearing order with this amendment noted thereon was made Commission's Exhibit No. 1 to the hearing.

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

1. On June 6, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
2. On June 6, 2003, the claimant sustained a compensable injury to her left shoulder.

3. There is no dispute over liability for the medical expenses incurred for the claimant's left shoulder.
4. There is no dispute, at present, over temporary disability benefits.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The appropriate weekly compensation rates for June 6, 2003.
2. Whether the claimant also sustained a compensable injury to her neck in the employment related accident of June 6, 2003.
3. The claimant's entitlement to medical services, at the respondent's expense for her neck complaints on and after June 6, 2003.

In regard to these issues, the claimant contends that she is being paid at the wrong compensation rate because the respondents are paying permanent partial disability at \$163 per week which translates into an average weekly wage of \$326 per week. The claimant believes that her earnings were closer to \$400 per week and therefore contends that her compensation rate for permanent partial disability should be \$200 per week. The claimant contends that she is still having problems with her neck and that although an MRI was done on her cervical spine and she had a one time evaluation by Dr. Danks no additional treatment has been provided regarding her neck. The claimant contends that she is entitled to additional treatment regarding her cervical spine. The claimant

contends that permanent restrictions were placed on her in connection with her shoulder problem and that she has sustained permanent disability greatly in excess of her 6% impairment rating. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to these issues, the respondents contend that it has accepted the left shoulder injury claim as compensable, that all appropriate medical benefits have been paid to date, and that permanent partial disability payments for an awarded 6% body as a whole rating (\$4,401.00) have been paid. The respondents further contend the claimant is not entitled to wage loss benefits as claimant has been returned to work at a rate greater than her pre-injury wages. That the claimant is not entitled to additional treatment for an alleged cervical injury and that no attorney's fees are appropriate.

### DISCUSSION

#### I. APPROPRIATE WEEKLY COMPENSATION RATES

The first issue to be addressed concerns the claimant's average weekly wage at the time of her compensable injury and the appropriate weekly compensation rates that this average weekly wage would generate. The accepted methods for the calculation of the average weekly wage are set out in Ark. Code Ann. §11-9-518. Once this average weekly wage has been calculated, the appropriate weekly compensation rates are to be determined in accordance with Ark. Code Ann. §11-9-501.

It would appear that in calculating the claimant's average

weekly wage, the respondent has merely taken the average of her gross weekly pay over the 52 week preceding her employment related injury. While this is a fairly easy method to use, it does not exactly conform to the requirements of §11-9-518. This subsection mandates that the average weekly wage be based on the terms of the "contract of hire" that is in force at the exact time of the accident. The general averaging method employed by the respondent would not take into consideration any hourly wage increases the claimant had received during the 52 week period and would not be based on the claimant's hourly rate of pay at the exact time of the employment related injury. It is my opinion that Ark. Code Ann. §11-9-518 requires such specificity.

Thus, the appropriate method to be used to calculate the claimant's average weekly wage would be to first determine the average number of regular hours worked or credited to the claimant during the 52 week period preceding her compensable injury. However, any weeks during which work was not made available by the respondent must be excluded. The average over-time hours per week would be calculated in a similar manner. These average hours per week would then be multiplied by the hourly wage rate that was in effect at the time of the claimant's compensable injury.

The respondent's payroll records show that the claimant actually worked 41 weeks out of the 52 week period prior to her compensable injury. It appears during the remaining 11 weeks no work was made available to the claimant (this period of time covers

the weeks of January 9, 2003 through March 6, 2003). During this 41 week period the claimant was credited with 1,576.95 regular hours. This includes both the hours actually worked and all hours credited as holidays or vacation. During this same 41 week period, the claimant also worked a total of 19.79 over-time hours. Thus, the claimant averaged 38.46 hours of regular time per week and 0.48 hours of over-time per week. Multiplying these amounts by the hourly wage rate in effect at the time of her compensable injury \$9.05 and assuming that over-time is compensated at 1½ times the hourly rate would yield an average weekly wage of \$354.58. This average weekly wage would entitle the claimant to weekly compensation in the amount of \$236.00 for total disability and \$177.00 for permanent partial disability.

## II. COMPENSABILITY OF THE CLAIMANT'S ALLEGED CERVICAL OR NECK INJURY

The next issue to be addressed is the question of whether the claimant also sustained a compensable injury to her neck or cervical spine in the employment-related accident of June 6, 2003. The burden rests upon the claimant to prove this alleged compensable injury.

The claimant must first satisfy the requirements for compensable injury set out in Ark. Code Ann. §11-9-102(4)(D). This subsection mandates that the actual existence of the physical injury or condition, alleged to be compensable, must be proven by "medical" evidence and supported by "objective findings" (i.e. the independent observation of findings beyond the claimant's voluntary

control).

The medical evidence presented amply demonstrates the actual existence of various physical defects or damage involving the claimant's neck or cervical spine. Further, the medical record shows that this actual physical damage is supported by purely objective findings, including various radiographic studies and visual observations by physicians or medical personnel.

The MRI study of August 9, 2004 (performed at the direction of Dr. Tomlinson), showed multi-level central canal and neural exit foraminal stenosis due to a combination of end-plate osteophyte formation, annular bulges, and in the lower cervical spine ossification of the posterior longitudinal ligament with a mid-line disc protrusion seen at the C4-5 level without any free fragment. Based upon this study, Dr. Tomlinson diagnosed the presence of cervical spondylosis, but without any clear cut objective signs of a radiculopathy.

Muscle spasms had also been previously detected which involved various muscles of the claimant's upper back. Dr. Craig Cooper's office notation of January 7, 2004, shows that, on physical examination, he observed palpable muscle spasms in the claimant's left supraspinatus area, which he notes to be "close to the nape of the neck". In this notation he expressly states that these spasms are "still" present, which would be strong evidence that he had previously observed them on the December 11, 2003 visit, even though such observation is not specifically noted in his medical records of that date. On January 28, 2004, Dr. Cooper notes the

visual observation of muscle spasms involving the claimant's left rhomboid muscle, which he describes as being in the claimant's upper back, in the level of the fourth and fifth thoracic vertebra.

Next, the claimant must prove that these medically established and objectively documented physical defects or damage satisfy the definitional requirements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These requirements are:

- (1) That the physical damage or defect must arise out of and occur in the course of the employment;
- (2) That the physical damage or defect must be caused by a specific incident;
- (3) That the physical damage or defect must be identifiable by time and place of occurrence;
- (4) That the physical damage or defect must produce internal or external physical harm to the claimant's body;
- (5) That the physical damage or defect must require medical services or result in disability.

In order to prove the first three of these definitional requirements, the claimant must establish the existence of a causal relationship between the employment related incident of June 6, 2003, and one or more of these various physical defects or damage to her neck or cervical spine. She need not show that this employment related incident was the sole or even "major cause" of any of these defects or damage. The employment related incident

need only play some causal role which would include the aggravation of a pre-existing condition.

The only direct evidence presented by the claimant to prove a causal relationship between the incident in June of 2003, and any difficulties with her neck or cervical spine is her own testimony. Although the general rule is that the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient to establish any fact it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove the existence of a close temporal relationship between the incident during June of 2003, and the initial onset of any difficulties with her neck or cervical spine that would be indicative of the occurrence of a physical injury to this portion of her body.

However, in the present case I find the claimant's testimony at the hearing that she experienced a "kink" in the area of the left side of her neck while pushing a box down the processing line to be lacking in credibility. This testimony is inconsistent and contradictory to various previous statements made by the claimant in regard to her symptoms immediately following the accident of June 6, 2003.

There is no mention of any symptoms, whatsoever, in the area of the claimant's neck during her initial course of treatment by Dr. Moffitt, over the period of July 8, 2003 through July 21, 2003. It must also be noted that the complaints made to Dr. Moffitt were

not indicative of any injury to the claimant's neck or cervical spine and no such injury was diagnosed by Dr. Moffitt. The first mention of any symptoms involving the area of the claimant's neck do not appear until the records of Dr. Craig Cooper, some six months following the specific employment related incident.

This lack of a close temporal relationship between the employment related accident of June 6, 2003, and the first manifestation of any symptoms indicative of an injury to the claimant's neck must also be considered in light of the type or nature of the defects or physical damage shown on the subsequent MRI study. These defects or physical damage include the osteophyte or bone spur formation on the end-plates of various of the claimant's cervical vertebra, ossification or calcium deposits in the posterior longitudinal ligament, and degenerative annular bulging or loss of elasticity of various of the claimant's cervical intervertebral discs. All of these conditions are degenerative and progressive in nature and develop over long periods of time as the result of systemic changes and cumulative stress or micro-trauma.

The only objective defect, involving the claimant's cervical spine, that would normally be considered as being caused by a specific or singular traumatic incident or event would be the mid-line disc protrusion of the C4-5 intervertebral disc. However, the evidence presented fails to show the onset of symptoms indicative of this type of injury within a reasonably close period of time following the employment related accident of June 6, 2003. Clearly, no symptoms or complaints indicative of such an injury

were noted by Dr. Moffitt. Although Dr. Cooper did subsequently note some complaints or symptoms in the area of the claimant's neck or cervical spine, during his course of treatment from December 11, 2003 through February 27, 2004, the symptoms he observed were not particularly indicative of the occurrence of a C4-5 disc protrusion and he made no such diagnosis. Even the objective findings, first noted by Dr. Cooper, of muscle spasms involving the claimant's left supraspinatus muscle and left rhomboid would not be particularly diagnostic of such an injury, but would be more likely to represent only some type of muscular or soft tissue strain or sprain.

The first mention of any symptoms indicative of a C4-5 disc protrusion are not noted until Dr. Robert Tomlinson's evaluation on July 16, 2004. Curiously, this visit occurred after a subsequent fall experienced by the claimant, apparently in April of 2004. Dr. Tomlinson states:

"She fell about three months ago onto an outstretched left arm and since that time, her pain around the shoulder blade has flared up."

Both the reports of Dr. Cooper and Dr. Tomlinson indicative a significant improvement, if not resolution of all of the claimant's symptoms subsequent to her last visit with Dr. Cooper, on February 27, 2004, and her fall. Such a conclusion would be compatible with the claimant's failure to seek any type of medical treatment between her last visit with Dr. Cooper and her evaluation by Dr. Tomlinson. Clearly, the trauma of the fall described by Dr. Tomlinson could have, in and of itself, produced the subsequently observed disc protrusion at C4-5 and any symptoms it might have

generated.

The claimant was ultimately referred by Dr. Tomlinson to Dr. Kelly Danks, a neurosurgeon. Following his evaluation of the claimant, he indicated that it was his opinion that all of the claimant's shoulder and upper extremity difficulties were due to a shoulder arthropathy and unrelated to any injury to the claimant's neck or cervical spine. While he indicated that the claimant's neck pain could be attributable to her multi-level cervical degenerative disc disease, he indicated that he saw no evidence of any radiculopathy or cervical defect amenable to surgical intervention. He further stated:

"I am not sure if her present symptoms in her neck are related to her original injury."

After consideration of all the evidence presented, it is simply my opinion that the claimant has failed to prove that she sustained a compensable injury to her neck or cervical spine in the employment related incident or accident on June 6, 2003. Therefore, her claim for benefits attributable to such an injury must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On June 6, 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On June 6, 2003, the claimant earned wages sufficient to entitle her to a weekly compensation benefit of \$236.00

for total disability and \$177.00 for permanent partial disability.

4. On June 6, 2003, the claimant sustained a compensable injury to her left shoulder.
5. There is no dispute at the present time over the claimant's entitlement to workers' compensation benefits for her compensable left shoulder injury. Apparently, all such benefits have or are being paid.
6. 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 in the employment-related accident of June 6, 2003.
7. The respondents have denied that the claimant sustained a compensable injury to her neck or cervical spine on June 6, 2003, and have controverted her entitlement to any benefits attributable to such an injury.

#### ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss any and all claims herein made for benefits attributable to the claimant's alleged injury to her neck or cervical spine.

The respondents remain liable for all appropriate benefits under the Arkansas Workers' Compensation Act for the compensable injury to the claimant's shoulder, sustained in the employment-related accident on June 6, 2003.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
Administrative Law Judge