

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F506554

**BESSIE MAY HENDERSON,
EMPLOYEE**

CLAIMANT

**CATERING FOR YOU, INC.,
EMPLOYER**

RESPONDENT

**ST. PAUL FIRE &
MARINE INS. CO.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JULY 6, 2006,

Pursuant to a hearing conducted June 22, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James W. Stanley, Jr., Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Phillip P. Cuffman, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to address the issue of compensability of shoulder and wrist injuries alleged by the claimant.

The claimant contended that on March 3, 2005, she sustained compensable rotator cuff injuries to both shoulders, by specific incident, or as the result of rapid repetitive motion at work, and that she should be awarded benefits, including reasonably necessary medical and related expenses, temporary total disability benefits from May 16, 2005, until November 3, 2005, as well as benefits for anatomical impairment of 9% to the body as a whole as a result of the left shoulder injury.

She further contended that during this time she also suffered compensable bilateral carpal tunnel syndrome and should be awarded related benefits, including reasonably necessary medical

and related expenses. An attorney's fee for controversion was requested as to both injuries. Other possible issues were reserved.

The respondents contended that the claimant did not sustain compensable injuries as alleged. As to her shoulders, they contended that the alleged injuries did not occur by specific incident, and could not have developed as a result of rapid repetitive motion at work because the work activity, although repetitive, was not rapid. As to her wrists, they contended that the claimant's job activities were not capable of causing bilateral carpal tunnel syndrome. Alternatively, they contended that benefits otherwise accruing prior to June 1, 2005, when notice was first given, are barred pursuant to Ark. Code Ann. §11-9-701.

The record, which included documentary evidence, the deposition of the claimant, and the claimant's testimony at the hearing, was closed at the conclusion of the hearing.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employee-employer-insurance carrier relationship existed at all pertinent times and the claimant's average weekly wage was \$270.00.
3. The preponderance of the evidence fails to show that the claimant suffered compensable injuries to her shoulders as the result of either a specific incident of injury or rapid repetitive motion at work.

4. The preponderance of the evidence shows that the claimant sustained compensable bilateral carpal tunnel syndrome, arising out of and in the course of her employment, for which she is entitled to benefits, specifically including reasonably necessary medical and related care.

5. The respondents have controverted the payment of benefits resulting from the claimant's bilateral carpal tunnel syndrome. However, the record fails to show proof of a contract between the medical providers and the claimant's attorney to recover disputed bills and, consequently, no attorney's fee is authorized for claimant's counsel under Ark. Code Ann. §11-9-715 for payment of medical expenses. Thus, on this record, claimant's counsel is not entitled to an attorney's fee under the Act from the claimant, the respondents, the medical providers, or from any other source.

DISCUSSION

The claimant's employment with the respondent employer began in the summer of 1992. She testified that she developed bilateral carpal tunnel syndrome and injuries to her shoulders in early 2005 but had no such medical problems or treatment prior to these injuries.

Her job duties included making pies, desserts, and dessert bars "from scratch," which required physical activity, such as lifting large metal mixing bowls and pots and pans. She stated that, after pies were made, she was required to lift a sheet pan, laden with four pies and weighing about 12 pounds, from waist level; to place the sheet pan on a rack in an oven at a level below her chin; and later to remove the pan and place it on a rack which had various levels, some of which were slightly above her head.

The claimant went through a similar process with other desserts. Her employment also involved slicing dessert bars with a knife. She said that on some occasions she might cut dessert bars

from 7:00 a.m. until 10:00 a.m. and, although she did not work at a fast pace, she did have a deadline and she did perform the same activity over and over.

She testified that she normally put two pans with four pies into the oven each day but, sometimes, she was required to handle more sheet pans, as in the case of holidays. She also stated that she handled five to ten sheet pans per day if pans of dessert bars were also counted.

On direct examination, she testified that she had problems with her shoulders beginning in February, 2005, and consulted her family physician, Dr. Daniel Dillard who later referred her to Dr. W. Scott Bowen. However, she also confirmed that she had first seen Dr. Dillard for discomfort in both shoulders in January of 2004, a year before she next consulted him about shoulder problems January 5, 2005.

Dr. Bowen saw the claimant January 19, 2005, when he wrote that she had bilateral shoulder pain over the last year or two and was seen two years ago for the right shoulder and given medication. He stated that the claimant had a fairly vigorous job in a catering service where she has to lift heavy pans and move items on a regular basis, although he did not refer to a specific incident of injury at work. His impression was that the claimant had possible primary rotator cuff pathology versus myofascial syndrome and he suggested MRI scans of the claimant's shoulders, as well as physical therapy and Ibuprofen. In an addendum, he noted that the claimant also complained of intermittent numbness and tingling in her thumb and index finger at night and also with certain activities, which implied mild carpal tunnel syndrome, and that she may require some diagnostic studies and that night splints may help as well.

On March 24, 2005, Dr. Bowen wrote that the claimant had experienced increasing neck pain, as well as bilateral shoulder pain and right hand numbness; was a caterer who did a lot of

overhead activity; and in the past three or four weeks, her neck has become more symptomatic. However, once again, he did not mention a specific incident of injury, even though the claimant had allegedly suffered a specific incident of injury on or about March 5, 2005. Dr. Bowen stated that previous right shoulder films were normal for a type 2 acromion and that MRI scans done in March, 2005, indicated small focal insertional tears of the supraspinatus, no more than a cm. tear without retraction and the exact same finding on her opposite left shoulder. It was his impression that the claimant had discogenic cervical pain and radicular pain with possible disc; bilateral rotator cuff tears, small; and probable right carpal tunnel syndrome. He recommended EMG and upper conduction studies of the upper extremities to rule out central or peripheral nerve lesion, as well as an additional MRI scan of the cervical spine, a neurosurgical consultation, physical therapy, Aleve, possible arthroscopic surgery, if not better with physical therapy, and that the claimant consider a different line of work.

On April 14, 2005, Dr. Bowen wrote that the MRI indicated mild degenerative disc disease, with disc bulging of the cervical spine, but no obvious herniated disc and some minimal partial tearing of the rotator cuff at its insertion, but he thought the claimant was experiencing mainly neck with cervicothoracic symptoms. His impression was cervicothoracic strain and mild bilateral rotator cuff tendinitis and synovitis. The claimant received a steroid injection in the left shoulder, was scheduled to see Dr. Reginald Rutherford, and advised to continue physical therapy. Again, Dr. Bowen did not mention a specific incident of injury occurring March 5, 2005.

Similarly, there was no mention of a specific injury in Dr. Bowen's May 12, 2005, report. In his June 9, 2005, report, he stated that the claimant had a small focal rotator cuff tear in the left shoulder and he believed this was consistent with her aggressive overhead activity and lifting that

she does at Catering For You on a regular basis secondary to repetitive activity. Earlier in that report, he had stated that the claimant had no injuries at home or falls or other activities that may have caused this. Thus, once more, there was no mention of a specific incident of injury at work on March 5 or any other occasion.

On July 20, 2005, Dr. Bowen performed arthroscopic surgery on the claimant's left shoulder. Thereafter, none of his regular notes indicated a specific incident of injury. However, in a December 6, 2005, letter responding to claimant's counsel, Dr. Bowen wrote that the claimant sustained an injury on March 3, 2005, and had symptoms prior to this event, but with heavy lifting overhead, she described diffuse radiating pain down her elbow to her hand that worsened on March 3. He stated that it was his opinion that this certainly aggravated her condition. However, he also went on to say that the injury was due to repetitive activity overhead as a result of her catering job. He also concluded that he believed that this work-related injury is responsible for greater than 50% of her symptoms that required surgery. However, given the failure of his records to describe a specific incident of injury until he wrote the letter in December, 2005, it is unlikely that a specific incident of injury was described to him prior to that time.

Interestingly, before Dr. Bowen's letter in December, the claimant's deposition had been taken on September 28, 2005. In her deposition, the claimant testified that when she asked Dr. Bowen how you get a torn rotator cuff, he asked what type of work she did, and she told him that she did a lot of overhead lifting. Dep. at 17. She also was asked at the deposition if it was fair to say that there was no specific thing that happened to her shoulder, and was it an all-at-once thing or something that happened over time, to which she responded that it probably happened over time. When asked if it worsened over time, she replied, "Worsened over time." She was then asked did

it finally get to the point with your shoulder where you just could not lift, and she said yes. Dep. at 28. In short, her testimony at the deposition did not mention a specific incident of injury to her shoulders and, in that regard, was consistent with the medical record, at that time.

Thus, the regular medical record (with the possible exception of the December, 2005, letter) and the claimant's deposition testimony do not mention a specific incident of injury concerning her shoulders, but show that her shoulder pathology developed over time. Similarly, at the hearing the claimant's initial testimony did not mention a specific incident of injury. In response to a question, she agreed that, as the years went by, she started to notice some problems. She stated that she first noticed problems in February, 2005, which she thought was arthritis. Tr. at 13. She stated that when she went to bed at night she had pain running up and down her shoulder, throbbing and that she also had those pains when she was working during the day and it got to the point where she could not lift her hands. When asked if there was a specific incident, the claimant said whenever she lifted the sheet pan with apple pies, or picked up the big mixing bowls. Tr. at 14. When pressed again about a specific incident on March 5, 2005, the claimant, with some hesitation, said that she thought as she picked up something too heavy and she thought it was the sheet pan with apple pies. Tr. at 15. She also testified that she kept hurting but kept working until June, 2005. Claimant's counsel introduced a report from respondents indicating a date of loss of March 3, 2005.

A consideration of the record, including the medical record, the claimant's deposition, and the claimant's manner of testifying at the hearing, makes less credible the contention that she injured her shoulders as the result of a specific lifting incident. This is particularly so in light of her deposition testimony and the contemporaneous medical record, both of which failed to reflect a history of such an injury. The fact that the report of the insurance carrier states a date of loss is

hardly persuasive that the claimant suffered a specific incident of injury, since stating a date of loss or injury is a matter of routine and can represent merely an estimate, rather than a precise declaration of fact. Dr. Bowen's letter in response to claimant's counsel in December, 2005, is somewhat unclear and not persuasive on the point.

Thus, the claimant's condition appears to have had a gradual onset. In that case, the Act requires proof that the alleged injury was caused by rapid repetitive motion at work and was the major cause of her disability and need for treatment. Ark. Code Ann. §11-9-102(4). Here, there is simply no indication that the claimant engaged in rapid repetitive motion at work. Thus, even though her work activity may have gradually contributed to her shoulder problems, which may well have developed before March, 2005, the contribution of such activity was not of a nature sufficient to satisfy the requirements of the Act.

On the other hand, the claimant's burden for carpal tunnel syndrome is less demanding. See, e.g., Kildow v. Baldwin Piano & Organ, 333 Ark. 335 (1998). The record reflects, and the parties do not dispute, that claimant's objective diagnostic studies were positive for carpal tunnel syndrome. Her testimony concerning the use of her hands is consistent with a causal connection between work activity and the condition. There is no contention that her medical care, including her treatment by Dr. Kevin J. Collins, was inappropriate and the record tends to show that her treatment was reasonably necessary in connection with her carpal tunnel syndrome. The claimant's injury also appears to be the major cause for her need for treatment. There has been no assertion by the claimant that she suffered any disability as the result of her carpal tunnel syndrome.

Thus, the claimant's request for benefits, based upon bilateral rotator cuff injuries to her shoulders should be, and it is hereby, respectfully denied and dismissed, although the claim based upon bilateral carpal tunnel syndrome should be awarded.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted, as stated above, but no attorney's fee is permitted claimant's counsel, on this record at this time, from either the claimant, the respondents, the medical providers, or any other source, pursuant to Ark. Code Ann. §11-9-715.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge