

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403939

PATRICIA VENABLE	CLAIMANT
MENA MEDICAL CENTER	RESPONDENT
RISK MANAGEMENT RESOURCES, TPA INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 30, 2006

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

Claimant represented by TIMOTHY CARR, Attorney, Little Rock, Arkansas.

Respondents represented by GUY WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on September 19, 2006, in Fort Smith, Arkansas. The deposition of Dr. David W. Sudbrink was taken on August 23, 2006, and has been admitted as Claimant's Exhibit No. 2. The deposition of Angela Cunningham was taken on November 18, 2005, and has been admitted as Claimant's Exhibit No. 3. The deposition of Claudine Embry was taken on November 18, 2005, and has been admitted as Claimant's Exhibit No. 4. The deposition of Kathy Hopper was taken on November 18, 2005, and has been admitted as Claimant's Exhibit No. 5.

A pre-hearing order was entered in this case on April 26, 2006. This pre-hearing order purported to set out the stipulations offered by the parties and to outline the issues to be litigated and resolved at the present time. Prior to the commencement of the hearing, both parties announced that they could now agree on the appropriate weekly compensation rates. A copy of this pre-hearing

order with that amendment noted thereon has been made Commission Exhibit No. 1 to the hearing,

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

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On or about November 5, 2003, the relationship of employee-self insured employer-TPA existed between the parties.
3. The appropriate weekly compensation rates are \$221.00 for total disability and \$166.00 for permanent partial disability.
4. 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 a compensable injury to her right shoulder on or about November 5, 2003.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability benefits from March 17, 2004 through August 1, 2004, permanent partial disability benefits for permanent physical impairment, and attorney's fees.
3. The effect of the notice provisions of the Act or any benefits accruing prior to April 28, 2004.

In regard to these issues, the claimant contends:

"Claimant contends that she sustained a compensable injury on or about November 4 or

5, 2003, after injuring her right rotator cuff while lifting a heavy patient in Room 119 at Mena Medical Center. The claimant contends that she is entitled to applicable benefits as a result of her injuries, including medical benefits, temporary total disability benefits, permanent partial disability benefits, mileage reimbursement, and attorney's fees based on respondent's controversion."

In regard to these issues, the respondents contend:

"Respondents contend that the claimant did not sustain a compensable injury in the course and scope of her employment in November of 2003. The claimant failed and/or refused to report any alleged injury within the course and scope of her employment until on or about April 28, 2004. Claimant's alleged shoulder injury occurred at a location other than work."

DISCUSSION

_____The central issue in this claim is whether the claimant sustained a "compensable injury" to her right shoulder while in the employ of the respondent. The burden rests upon the claimant to prove all of the elements necessary to establish a "compensable injury."

The first of these essential elements are found in 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, this subsection requires that the actual existence of such a 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).

After consideration of the evidence presented, it is apparent that the claimant has proven by medical evidence the actual existence of a physical injury or condition involving her right

shoulder. This injury or condition was in the form of a rotator cuff tear. Furthermore, the actual existence of this physical injury or condition is supported by purely objective findings, in the form of abnormalities observed in an MRI study and visually by Dr. David Sudbrink during the initial arthroscopic exploration of the claimant's right shoulder and the subsequent "open" surgical repair of the claimant's right rotator cuff tear.

In her contentions, the claimant maintains that this medically established injury or condition was caused by a specific employment incident in November of 2003. Therefore, she must prove that this medically established injury or condition further satisfies the definitional elements for a "compensable injury" that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional elements are:

- (1) The physical injury or condition must arise out of and occur in the course of the employment;
- (2) The physical injury or condition must be caused by a specific incident;
- (3) The physical injury or condition must be identifiable by time and place of occurrence;
- (4) The physical injury or condition must result in internal or external physical harm to the claimant's body;

- (5) The physical injury or condition must require medical services or result in disability.

The claimant's own testimony is the only direct evidence presented to prove both the occurrence of a specific employment incident or accident and to connect such an incident with the onset or right shoulder symptoms which would be indicative of the occurrence of the medically established injury or condition (i.e. rotator cuff tear). Although 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, 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 or accident. Such testimony would also be legally competent to establish the existence of a reasonably close temporal relationship between this incident and the initial onset of symptoms indicative of the occurrence of a right rotator cuff tear.

The claimant testified that she first experienced pain and difficulties with her right shoulder, when she and a co-employee, Angela Cunningham, were pulling a large patient up in his bed with the use of a draw sheet. The claimant's testimony concerning the actual occurrence of this activity is corroborated by the testimony of the co-employee, Angela Cunningham.

However, Ms. Cunningham testified that the claimant made no complaints at the time of this activity. Nor did she show any

visual indications that she was experiencing pain or difficulties with her right shoulder. Ms. Cunningham further testified that she recalled only one conversation with the claimant, which occurred weeks or months after this activity, wherein the claimant mentioned complaints with shoulder difficulties that kept her awake at night. Otherwise, the claimant made no complaints with her shoulder and appeared to have no difficulties performing her regular employment activities.

In her testimony, the claimant initially stated that this specific incident occurred on November 5, 2003. However, she conceded that on previous occasions she had indicated that this incident occurred on November 15, 2003. She ultimately conceded that she did not recall the exact date of this incident, but only knew that it occurred a Tuesday or Wednesday before Thanksgiving of 2003.

The claimant acknowledged that she was aware of the company policy that employment related injuries were to be immediately reported. She conceded that she did not formerly report an injury to her shoulder, until months later when she sought medical treatment at the respondent's emergency room. The claimant's explanation for her failure to timely report the incident and injury was that she believed that she had merely "pulled a muscle" in her shoulder and that it would resolve on its own. She further testified that she could not remember if she had previously "pulled" any muscles in her shoulder, but she felt that she probably had.

The claimant also acknowledged that she had not sought any medical treatment for any complaints or difficulties with her right shoulder, until she was seen at the respondent's emergency room on February 7, 2004. Again, her excuse for failure to seek medical treatment for these complaints for a period of months, was that she thought that she had only "pulled a muscle" in her shoulder and that this would resolve on its own.

All of the evidence presented, including the claimant's testimony, shows that the claimant continued to perform her regular job as a certified nursing assistant for the respondent hospital from the time of her alleged injury in November of 2003, through her visit at the respondent's emergency room, on February 7, 2004. In fact, the evidence indicates that the claimant continued to perform her regular employment duties up until shortly before her surgery in April of 2004. The testimony of all the claimant's co-employees reveals that with the one exception, the claimant made no complaints involving her shoulder and exhibited no difficulties in performing her regularly assigned employment activities, including those requiring the strenuous use of her right arm, between the alleged accident in November of 2003 and at least the time of her February 7, 2004 visit to the emergency room. The medical evidence also contains a history of the onset of the claimant's right shoulder difficulties that is inconsistent with the history related in the claimant's testimony. In the initial emergency room record of February 7, 2004, the following histories are recorded:

"Complains of right shoulder pain extending across shoulders, neck, and right arm. Pain

for one month with pain getting worse. States pain started after lifting a patient last night. Original pain started after transferring a patient.”

“Injured right shoulder one month ago lifting a patient-progressively worse pain now, especially when lifting arm. Also right arm numbness.”

In her testimony, the claimant admitted that she told the emergency room personnel or doctor that her symptoms started one month prior to her visit on February 7, 2005. She offered no explanation for this discrepancy.

In the initial report of Dr. Sudbrink, dated March 1, 2004, he recorded a history of pain since November of 2003, stating:

“She feels honestly that she hurt it at work. She is an aide and she does a lot of lifting, giving baths, etc. and she felt that this is where the problem began. She had a good shoulder prior to that and since then it has been a bad shoulder in the sense that she has pain with movements and activities during the day. She has had quite a bit of night pain and has not been able to get any type of relief.”

In his deposition, Dr. Sudbrink testified that he did not recall the claimant identifying any particular incident or event as precipitating her right shoulder difficulties.

The medical evidence is of no real help in identifying either the mechanism that caused the claimant’s rotator cuff tear or the time at which the tear occurred. Dr. Sudbrink testified, in his deposition, that the rotator cuff tear he observed could have been caused by either a single specific incident or it could have been the result of cumulative trauma over time. He stated that the bone spur, involving the claimant’s right shoulder, would have taken

more than 3 to 4 months to develop. However, based solely upon the appearance of the rotator cuff tear, itself, he could only say that its appearance was consistent with it being present for "months" prior to the surgery in April of 2004. The closest Dr. Sudbrink comes to giving an opinion concerning the actual cause of the claimant's rotator cuff tear is a statement, contained in his letter of April 26, 2004 that the claimant could have sustained this injury or condition at work.

However, Dr. Sudbrink makes several other curious comments in his various medical reports. In his initial report of March 1, 2004, Dr. Sudbrink stated:

"Her history suggests that there could have been an actual injury event, but there does seem to be an exostosis from the greater tuberosity which I really would not expect to form in the span of 3 to 4 months, so this process may have been going on for longer."

In his report of January 18, 2006, Dr. Sudbrink stated:

"The reason I submit more information is because we are held to the standards of a workmen's comp case despite that not truly being the case."

After consideration of all the evidence, I am convinced that the claimant, with the help of Angela Cunningham did lift a heavy patient up in his bed on some date in the latter part of 2003. However, I do not find sufficient credible evidence presented to establish a reasonably close temporal relationship between this specific employment related incident and the claimant's medically established and objectively documented injury or condition, in the form in the tear of her right rotator cuff. The claimant's

testimony that she initially experienced symptoms with her right shoulder contemporaneous with this incident is contradicted by other histories she gave her medical providers and by her actions following this incident. Her failure to timely report this incident and injury or seek medical services for a period of months following this incident can not be reasonably explained simply by her belief that this was merely a "pulled muscle." One would reasonably expect that when no improvement occurred and, in fact, her symptoms continued to increase the claimant would have reported this incident or sought medical services within a period of days or at least weeks following the initial onset of symptoms. In this regard, I would note that the claimant was employed in the medical field and her employer was a hospital. Even though she may have been only a certified nursing assistant, one would not reasonably expect that she would wait a period of months to report her progressively worsening symptoms or to fail to seek medical services that were readily available to her.

Clearly, the incident described by the claimant as occurring in November of 2003, could have been the cause of her right rotator cuff tear. However, any strenuous pulling activity could also have been the cause of this tear. In fact, it is also possible that this tear could have occurred gradually as the result of cumulative trauma. However, more than the mere possibility of a causal relationship is not sufficient the claimant must establish that this specific work related incident was the more likely or probable cause. In order to prove that the described specific employment

related incident was the more likely or probable cause of her right rotator cuff tear, the claimant must prove that this tear occurred within a reasonable period of time following this incident. This she has simply failed to do.

Therefore, I find that the claimant has failed to prove that the tear of her right rotator cuff was caused by a specific incident and is identifiable by time and place of occurrence. Thus, the tear of the claimant's right rotator cuff would not constitute a "compensable injury," as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). _____

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On all relevant dates in November of 2003, the relationship of employee-self insured employer-third party administrator existed between the parties.

3. On all relevant dates in November of 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$221.00 for total disability and \$166.00 for permanent partial disability.

4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a "compensable injury" to her right shoulder, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i). Specifically, she has failed to prove by the greater weight of the credible evidence that the medically established and Objectively documented physical injury or condition

involving her right shoulder, in the form of a tear of her right rotator cuff, was caused by a specific incident in November of 2003 or is identifiable by time and place of occurrence.

5. The respondents have denied the occurrence of any compensable injury to the claimant's right shoulder 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