

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F612191

AMANDA BERGANZA, Employee	CLAIMANT
SIMMONS FOODS, Employer	RESPONDENT
S.B. HOWARD & COMPANY, Carrier	RESPONDENT

OPINION FILED APRIL 9, 2007

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART 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

On March 15, 2007, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 10, 2007, and a pre-hearing order was filed on January 11, 2007. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties on February 1, 2006.

At the time of the hearing the parties also agreed to stipulate that claimant earned an average weekly wage of \$504.14 which would entitle her to compensation at the rate of \$336.00 for total disability benefits and \$252.00 per week for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injuries to claimant's shoulders and arms.

2. Medical.
3. Temporary total disability.
4. Attorney fee.

At the time of the hearing the respondent also raised as an issue its entitlement to a credit for long-term disability benefits paid to the claimant.

The claimant contends she was injured on approximately February 1, 2006. Both of her shoulders and arms were injured from moving heavy items to clean. She contends she is entitled to the payment of medical, temporary total disability, and an attorney fee.

The respondents contend the claimant is pursuing a gradual onset theory alleging bilateral injuries to her shoulders and arms from her general cleaning duties involving, but not limited to, the moving of some heavy items to clean. Respondent controverts the claim in its entirety on compensability. Among other things, the medical proof will show that claimant had been experiencing bilateral shoulder pain for at least three years prior to February 1, 2006. The proof will further show that the claimant's job duties were not rapid and repetitive in nature. Finally, there are no objective measurable findings to substantiate the existence of any injury to the claimant's shoulders. Solely in the alternative, should the Commission find in favor of the claimant on compensability, then in that event respondent pleads lack of timely notice of the alleged work injury. Claimant alleges an injury date of February 1, 2006, but the respondent's first notice was through the filing of the claimant's AR-C with the Commission. Respondent's TPA was advised of the AR-C filing on November 9, 2006. Consequently, respondent would not be responsible for the payment of any medical expenses that the claimant incurred between the date of her alleged injury and the date of the respondent's first notice of the alleged injury.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and

conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 10, 2007, and contained in a pre-hearing order filed January 11, 2007, are hereby accepted as fact.

2. The parties' stipulation that claimant earned an average weekly wage of \$504.14 which would entitle her to compensation at the rate of \$336.00 for total disability benefits and \$252.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her shoulders and arms while employed by the respondent.

FACTUAL BACKGROUND

_____The claimant is a 45-year-old woman who began working for the respondent in its sanitation department in January 2002. Claimant's job duties included cleaning various processing machines, tables, filters, and conveyor belts. In order to clean the machines it was necessary for claimant to take apart approximately 55 parts. In order to perform the cleaning, a high pressure hose was used and in addition a hose which released foam. Claimant testified that in order to perform her job she had to scrub some parts of the machine as well as climb a ladder to get to the top of the conveyor belt and she also had to get on her hands and knees to clean under the belt.

Claimant last worked for respondent in April 2006. She testified that approximately three months before she last worked for the respondent she complained of problems with her arms and shoulders to a supervisor named Raul. Claimant testified that approximately

three months before she complained to Raul her shoulder and arm pain had begun.

After receiving initial treatment at the JPA Clinic on April 10, 2006, the claimant was evaluated by Dr. Arnold for bilateral shoulder pain. Dr. Arnold recommended a shoulder program, prescribed anti-inflammatories, recommended that claimant avoid repetitive motion, and gave her an injection in both shoulders. The injection to claimant's right shoulder helped, but the left shoulder continued to be asymptomatic. As a result, Dr. Arnold ordered an MRI scan of the claimant's left shoulder which revealed no tears, but did reveal findings suggestive of possible rotator cuff strain, minimal trace effusion, and some evidence of mild impingement. Dr. Arnold subsequently gave the claimant a second injection in her left shoulder which provided some relief. When claimant's left shoulder problems continued, Dr. Arnold recommended that the claimant undergo a surgical procedure on her left shoulder. That procedure has not yet been performed.

For claimant's left elbow complaints she has been evaluated and treated by Dr. Tang. Dr. Tang has diagnosed claimant's condition as left lateral epicondylitis. Dr. Tang has provided claimant with a cortisone injection in her left elbow and has recommended a stretching exercise.

Claimant has filed this claim contending that she suffered a compensable injury to her bilateral shoulders and arms as a result of her employment with the respondent. She seeks payment of medical benefits, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

Claimant does not contend that she suffered a compensable injury to her bilateral shoulders and arms as a result of an injury which was identifiable by time and place of occurrence. Instead, claimant contends that she suffered a gradual onset injury. In order to prove a gradual onset injury the claimant must prove by a preponderance of the

evidence that she sustained an injury which caused internal or external harm to her body which arose out of and in the course of her employment and which required medical services or resulted in disability or death; that the injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and she must establish a compensable injury by medical evidence supported by objective findings. See, *Jerry D. Reed v. Con-Agra Frozen Foods*, Full Commission Opinion filed February 2, 1995 (E317744).

Initially, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that her injury arose out of and in the course of her employment with the respondent. As previously noted, claimant last worked for the respondent in April 2006. She testified that she complained to a supervisor named Raul about problems with her arms and shoulders approximately three months before she quit working for the respondent. Claimant testified that the problems with her arms and shoulders began approximately three months before she made the initial complaints to Raul. Thus, according to claimant's testimony, her problems began approximately six months before she last worked for respondent in April 2006. However, according to the medical reports, claimant's problems have existed for several years. Medical records from the JPA Clinic dated April 10, 2006 indicates that claimant's problems have existed for "Long-time several years". Furthermore, when claimant sought medical treatment from Dr. Arnold he recorded a history of claimant's bilateral shoulder pain having existed for three years. When claimant sought medical treatment from Dr. Tang he recorded a history of claimant's problems having existed for two years.

It should also be noted that while claimant has worked for the respondent for approximately five years, she also worked for other employers during this same period of time. Claimant testified that during the time she worked for the respondent she also worked at the same time for Tyson for six months and for Peterson for approximately three

months performing the same work she was performing for the respondent.

I also find that claimant has failed to prove by a preponderance of the evidence that her job involved rapid repetitive motion. In *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W. 2d 644 (1998), the Court established a two-prong test for rapid repetitive motion. First, the task itself must be repetitive, and second, the repetitive motion must be rapid. In this particular case there is no question that claimant had a job which required the extensive use of her hands. However, it is unclear from a review of claimant's testimony that her job duties required her to engage in tasks that were repetitive in nature and that any repetitive motion she performed was rapid. Claimant testified that her primary job activity during her work shift was the use of a power sprayer. Claimant testified that she used this sprayer with both arms, alternating back and forth between them. While this task may have been repetitive in nature, there is insufficient evidence that it was rapid. Absent evidence of rapid repetitive motion, claimant cannot prevail on a claim for a gradual onset injury to her arms and/or shoulders.

In summary, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury. While claimant initially testified that her problems began approximately six months prior to the date she last worked for respondent in April 2006, the medical records indicate that claimant's problems had begun two or three years earlier. Furthermore, during the time claimant worked for the respondent she also performed the same job duties for other employers. Finally, I find insufficient evidence that claimant's job duties required her to engage in rapid repetitive motion. While claimant's job duties did require the extensive use of her hands, there is insufficient evidence that those duties involved rapid repetitive motion. Therefore, she has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her bilateral shoulders and/or arms while employed by the respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE