

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F701304/F702946

JANICE GEHRT

CLAIMANT

DOLLAR GENERAL STORE
SELF INSURED

RESPONDENT

OPINION FILED OCTOBER 8, 2007

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

Claimant represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondent represented by BETTY HARDY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on in the above styled claim on July 31, 2007, in Fort Smith, Arkansas. The deposition of Rebecca Johnson was taken on August 14, 2007, and was submitted as Respondent's Exhibit No. 1, subsequent to the hearing.

A pre-hearing order was entered in this case on June 12, 2007. This pre-hearing order was subsequently amended to reflect that the second alleged injury occurred on January 29, 2007 (rather than January 28, 2007) and to indicate that the appropriate weekly compensation rates for any injury occurring on January 29, 2007, would be \$63.00 for both total disability and permanent partial disability. A copy of this pre-hearing with those amendments 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 November 20, 2005 and January 29, 2007, the relationship of employee-self insured employer existed between the parties.
2. The appropriate weekly compensation benefits are \$90.00 for both total and permanent partial disability for November 20, 2005.
3. The appropriate weekly compensation rates are \$63.00 for both total disability and permanent partial disability for January 29, 2007.
4. The claims are controverted in their 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 compensable injuries to her left shoulder on November 20, 2005 and/or January 29, 2007.
2. The claimant's entitlement to the payment of medical expenses, temporary total disability from April 2, 2007 through May 2, 2007 and temporary partial disability from May 3, 2007 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

- a. The claimant contends that on November 20, 2005 she sustained injury to her left shoulder while lifting a case of Christmas wrapping paper. She contends that on January 28, 2007, she sustained additional injury to her left shoulder while moving a rolltainer.

- b. The claimant contends that she is entitled to temporary total disability benefits for the period of time she has been under active medical treatment and unable to work. She further contends that she is entitled to reasonable and necessary medical treatment.
- c. The claimant contends that her attorney is entitled to an appropriate attorney's fee.

In regard to the issues, the respondent contends:

"It is the contention of the respondent that the claimant did not sustain an injury arising out of and in the course and scope of her employment with Dollar General Corporation. It is respondent's position that any complaints the claimant has regarding her left shoulder are due to a pre-existing condition or from an accident that occurred outside the claimant's employment at Dollar General Corporation."

DISCUSSION

I. COMPENSABILITY

The central issue in this case is the question of whether the claimant sustained a compensable injury to her left shoulder on either or both November 20, 2005, and January 29, 2007. The burden rests upon the claimant to prove all of the elements necessary to establish a compensable injury on either or both these dates.

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, which is alleged to be compensable. Further, the claimant must show that the actual existence of this physical

injury or condition is supported by “objective findings” as that term is defined by Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence shows that the claimant has been diagnosed as experiencing difficulties with her left shoulder in the form of inflammation, bursitis with adhesive capsulitis, a possible tear or inflammation of the teres minor muscle, and arthritis with spurring involving the acromioclavicular joint. The medical record further shows that the actual existence of these diagnosed injuries or conditions is supported by purely objective findings noted on the MRI study of March 6, 2007 and the visual observations made by Dr. Owen Kelly during the surgical procedure of April 3, 2007. Therefore, in regard to these diagnosed conditions the claimant has satisfied the statutory elements for a compensable injury that is set out in Ark. Code Ann. §11-9-102(4)(D).

Next, the claimant must prove that these medically established and objectively documented physical injuries or conditions satisfy 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) That the injury or condition arose out or occurred in the course of the employment;
- (2) That the injury or condition was caused by a specific incident;
- (3) That the injury or condition is identifiable by time or place of occurrence;

- (4) That the injury or condition caused internal or external physical harm to the claimant's body and
- (5) That the physical injury or condition required medical services or resulted in disability.

In order to prove the first three of these definitional elements, the claimant must show a causal relationship between a specific employment incident, on either November 20, 2005 or January 29, 2007, and the medically established and objectively documented physical injuries or defects involving her left shoulder. However, such a causal relationship need not be proven to a mathematical or absolute certainty. It is only necessary that one or both of these incidents are a probable or likely cause. It is also not required that the claimant prove that one or both of these employment related incidents were the "major cause" of her complaints.

To prove this causal relationship, the claimant offers her own testimony. At the hearing, the claimant testified that, on November 20, 2005, she was picking up a package of wrapping paper and felt a sudden sharp pain in her left shoulder. She stated that she reported this incident and resulting difficulties to Brenda Sexton, the general manager of the store, and Jody Parmenter, the "third key" or submanager. However, she admitted that she did not request medical treatment and continued to perform her regular employment. She stated that although the pain and difficulties in her left shoulder improved, they never completely went away and her shoulder never returned to normal or its preinjury state.

The record reveals that the claimant continued to work for the respondent until July of 2006. At that time, she resigned her position with the respondent to vacation in California. After her return from this vacation, she did not seek any employment, until October 2, 2006. On that date, she was re-employed by the respondent, but at a different store. The claimant testified that throughout this entire period, she continued to experience some degree of chronic pain and difficulties in the use and movement of her left shoulder.

When the claimant returned to employment with the respondent, Jody Parmenter was the manager of the new store to which she was assigned. The claimant testified that, when she returned to employment with the respondent, her left shoulder difficulties began to worsen. She testified that on January 29, 2007, she was moving merchandise by the use of a "rolltainer" and experienced another sudden sharp pain in her left shoulder that was similar to the one which had occurred on November 20, 2005. She stated that she again reported this second incident and onset of difficulties to her supervisor, Ms. Parmenter. At that time, accident and incident reports were completed for both the incident of November 20, 2005 and the incident of January 29, 2007.

The claimant's testimony, in regard to the occurrence of these two separate employment related incidents and her immediate reporting of the contemporaneous onset of shoulder difficulties, is supported by the testimony of Jody Parmenter. Ms. Parmenter testified that she was present at the incident on November 20, 2005

and the incident on January 29, 2007. She further stated that at that time of the incident, on November 20, 2005, she actually heard the claimant's shoulder "pop." She testified that on both of these occasions she observed the claimant to exhibit actions indicative of sudden left shoulder pain. It was her testimony that, on January 29, 2007, she assisted the claimant in the completion of the accident or incident reports for both the November 20, 2005 incident and the January 29, 2007 incident. She stated that upon the completion of these reports, she simply "placed them in the claimant's file." It was her testimony that it was the claimant, who reported the injuries directly to the respondent's claim office on January 29, 2007.

The claimant's testimony is somewhat contradicted by the testimony of Brenda Sexton, who was the claimant's store manager at the time of the November 20, 2005 accident or incident. Ms. Sexton testified that she did not recall the occurrence of any incident involving the claimant on November 20, 2005. Nor did she recall the claimant or any one else reporting such an incident or injury to her on that date. She stated that during the period of the claimant's employment in her store, the claimant did exhibit difficulties with her left shoulder but that she assumed that these difficulties were the result of a motor vehicle accident that had occurred in January of 2005. She did not state a basis for this assumption.

The claimant denied that she experienced any injury to her left shoulder in the motor vehicle accident in January of 2005. In

fact, the claimant denied any difficulties with her left shoulder prior to November 20, 2005. There is no medical evidence or direct evidence of any kind which would show that the claimant experienced an injury to her left shoulder in the motor vehicle accident in January of 2005. There is also no direct evidence to indicate, in any way, that the claimant was experiencing any difficulties with her left shoulder prior to November 20, 2005.

Curiously, the testimony of the claimant and Ms. Parmenter, concerning the occurrence of a second specific incident or accident on January 29, 2007, is inconsistent with the statements made by the claimant to the respondent's claims personnel, particularly Rebecca Robinson. The same is true in regard to the claimant's statements to her initial treating physician, Dr. Michael Hillis.

The testimony of Ms. Robinson shows that when the claimant initially called in her claim (on or about January 29, 2007), she only reported an incident and injury that occurred on November 20, 2005. Ms. Robinson further testified that when she took the claimant's recorded statement, the claimant still made no mention of any second incident or injury in January of 2007. In her testimony, the claimant concedes that she only reported the November 2005 incident and did not mention any second or new incident on January 29, 2007.

In his initial and subsequent records, Dr. Hillis noted a history that the claimant's left shoulder difficulties began as the result of an employment related injury in November of 2005, and that it progressively worsened to the point that it had become

severe by December of 2006. He does not note a history of any incident or new injury in January of 2007. Again, the claimant, in her testimony, conceded that she did not report the occurrence of any second employment related incident or injury on January 29, 2007 to Dr. Hillis. It is certainly puzzling that the claimant felt compelled to fill out an accident or incident report for a separate injury on January 29, 2007, but did not feel it important enough to mention this when she phoned in her claim on that same day or when she initially saw the doctor, less than a week later. In fact, I am simply not convinced that anything of consequence occurred on January 29, 2007, in regard to the claimant's left shoulder.

However, after consideration of all the evidence presented, I do find the testimony of the claimant and Ms. Parmenter to be sufficiently credible to prove the occurrence of a specific employment related incident on November 20, 2005. I find the claimant's testimony sufficiently credible and corroborated to prove that the initial onset of her left shoulder difficulties, which would be indicative of an occurrence of a physical injury to this portion of her body, occurred contemporaneously with the described employment related incident on November 20, 2005. I also find the claimant's testimony sufficiently credible and corroborated to prove that these difficulties continued after November 20, 2005, with periods of lessened and periods of increased symptoms, but that these difficulties never resolved or stabilized through July 23, 2007.

The incident described by the claimant as occurring on November 20, 2005, could reasonably and logically cause the medically established and objectively documented physical injuries to her left shoulder and her resulting difficulties occurred simultaneously with this incident. The evidence presented fails to show any other equally reasonable or probable cause of these medically established and objectively documented injuries. Under the longstanding rule announced in Hall v. Pittman Construction, 235 Ark. 104, 357 S.W. 2nd 263 (1962), it is my opinion that the claimant has sufficiently proven the existence of a causal relationship between the specific employment related incident of November 20, 2005 and the medically established and objectively documented physical injuries to her left shoulder. Thus, she has satisfied the first three definitional requirements for a "compensable injury", as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(i).

The medical evidence presented is sufficient to show that this employment related injury produced internal physical harm to the claimant's left shoulder and that this harm was of such nature and magnitude as to reasonably require medical services and ultimately result in disability. Thus, the claimant has proven the final two definitional requirements for a "compensable injury," Ark. Code Ann. §11-9-102(4)(A)(i).

In summary, the claimant has proven by the greater weight of the credible evidence that she sustained a "compensable injury" to her left shoulder on November 20, 2005. The greater weight of the

credible evidence further proves that the difficulties with the claimant's left shoulder on and after January 29, 2007 are merely a continuation of this initial compensable injury. However, since the respondent was self insured for this entire period it actually becomes irrelevant whether or not any subsequent employment activities for this respondent may have contributed to or aggravated the initial compensable injury.

II. BENEFITS

Clearly, the claimant would be entitled to "reasonably necessary medical services" for her compensable left shoulder injury. However, the burden still rests upon the claimant to prove that the actual medical services provided were, in fact, "reasonably necessary medical services".

In order to represent "reasonably necessary medical services" the medical services must be necessitated by or connected with the compensable injury. Further, the medical services must have a reasonable expectation of accomplishing the purpose or goal for which they are intended at the time they are provided. However, it is not necessary that these medical services are actually successful.

The medical evidence shows that the services that were provided to the claimant by and at the direction of Dr. Hillis and Dr. Owen Kelly were all necessitated by or connected with her compensable left shoulder injury. These services were all of a type and duration generally accepted by the medical community as being appropriate for the diagnosis and treatment of injuries such as that experienced by the claimant. Further, the evidence shows

that these medical services did, in fact, accomplish their intended purposes or goals of accurately diagnosing the nature and extent of the compensable injury, resolving or reducing the physical damage caused by this injury, and alleviating the symptoms and restrictions resulting from this injury.

I find that the medical services rendered to the claimant by and at the direction of Dr. Hillis and Dr. Kelly for her compensable left shoulder injuries represent "reasonably necessary medical services", as that term is used in Ark. Code Ann. §11-9-508. Thus, the respondent is liable for the expense of these services, subject to the Commission's medical fee.

Next, there is the matter of the claimant's entitlement to temporary disability benefits, both total and partial. The burden rests upon the claimant to prove her entitlement to these benefits.

In order to meet this burden, the claimant must first prove that she continued within her healing period from the effects of her compensable injury for the entire time she seeks the benefits. Secondly, she must prove that during this period she has been rendered totally disabled from performing regular gainful employment by her compensable injury (temporary total disability) or has had her wages reduced by her compensable injury (temporary partial disability).

The issue of the healing period is a medical question and must be resolved on the basis of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment in the resolution or

stabilization of the actual physical damage caused by the compensable injury. Once this underlying physical damage has resolved or at least stabilized, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended and the mere continuation of symptoms is not sufficient to extend it.

In the present case, the medical evidence shows that the claimant was under active medical treatment for her compensable left shoulder injury from February 6, 2007 through July 23, 2007. During the course of this treatment she underwent a surgical repair of her left shoulder by Dr. Kelly on April 3, 2007. After this surgery, the claimant began to experience a significant and progressive improvement in her left shoulder difficulties. By May 14, 2007, Dr. Kelly discontinued the formal physical therapy that the claimant had been receiving, but indicated that the claimant was to continue to perform these exercises and movements on her own at her home. In his last report, Dr. Kelly discharged the claimant from further medical active care and instructed her to return only on an as needed basis. However, he noted that the claimant should continue to improve for several more months.

It is my opinion that the medical evidence presented establishes that the claimant continued within her healing period from the effects of her compensable left shoulder injury through July 23, 2007 and for a brief, but indefinite period, thereafter. Thus, the claimant has proven the first element for her entitlement to temporary disability benefits during this period.

However, to be entitled to the temporary total disability benefits that she now seeks, the claimant must prove that her compensable left shoulder injury rendered her totally disabled from performing regular gainful employment during the period beginning April 3, 2007, and ending May 2, 2007. This is not a medical question and must be considered in light of the record as a whole.

The medical record shows that the claimant underwent both arthroscopic and open surgery on her left shoulder on April 3, 2007. In his reports, Dr. Kelly noted that the claimant exhibited the worse case of adhesive capsulitis of the shoulder that he had ever dealt with. Following her surgery, she received extensive physical therapy on range of motion of the shoulder. However, strenuous exertion or lifting would clearly have been contraindicated. The records of Dr. Kelly do not indicate that he had released the claimant to return to any type of employment, at the time of his visit on April 16, 2007. In fact, there is no mention in any of the reports and records of Dr. Kelly as to when the claimant could return to employment.

The claimant testified that she was unable to work for "about a month altogether", following her surgery. On cross examination she indicated that in order to remain on the payroll, she could not miss more than three continuous weeks of work. To avoid this, she worked one day during the three weeks following her surgery for approximately four hours. She testified that for this four hour period she was required to do only one handed relatively light work.

Clearly, a reasonable period of recuperation would be expected following the type of surgery that was performed on the claimant on April 3, 2007. This period of recuperation would logically preclude any significant or strenuous use of her left arm and shoulder. Her required attendance at physical therapy would also interfere with scheduling and maintaining of regular working hours. Except for four hours on one day, there is no evidence that the respondent offered the claimant suitable one handed employment during the four weeks following her surgery. The chance of the claimant obtaining such employment in the open job market, during this period, would be negligible.

After consideration of all the evidence presented, it is my opinion that the claimant has proven by the greater weight of the credible evidence that she was rendered totally disabled from performing regular gainful employment by the effects of her compensable left shoulder injury for three weeks and six days following April 2, 2007. She is entitled to temporary total disability benefits for this period.

In order to be entitled to temporary partial disability benefits after this time the claimant must prove that she experienced a decrease in her wages as the direct result of the effects of her compensable injury. In this regard, the claimant testified that when she returned to work in May of 2007, she worked less hours than she had worked prior to her surgery. However, the evidence presented shows that following the commencement of the claimant's second period of employment with this respondent (on

October 2, 2006), she worked less hours than she had worked prior to her voluntary termination in July of 2006. The claimant's testimony further indicated that her wages, during her entire period of employment with the respondent, varied greatly and were significantly affected by the actual store sales, seasonal fluctuations, her lack of seniority, and the necessity for her caring for her disabled child. Any determination in the possible reduction of the claimant's wages, from whatever source, is complicated by the fact that neither party has seen fit to introduce the claimant's actual payroll records (even though these were repeatedly referred to during the hearing).

Obviously, at the time of the claimant's compensable injury, on November 20, 2005, she was earning an average weekly wage of approximately \$135.00 (this is computed from the stipulated workers' compensation rate of \$190.00). After the claimant's return to employment at a different store and with a loss of seniority, the claimant was only earning an average weekly wage of approximately \$94.50 (this is also computed from the stipulated compensation rate for January 29, 2007). There is no definitive evidence offered from to indicate what the claimant's average weekly wages has been, since her return to employment with this respondent in May of 2007. Thus, it becomes impossible to determine the degree of any reduction in the claimant's wages, irregardless of the cause.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that she has

experienced any temporary reduction in her average weekly wage, as the result of the effects of her compensable injury, after the end of her period of temporary total disability in May of 2007. Therefore, I find that the claimant has failed to prove her entitlement to temporary partial disability benefits for this period.

FINDINGS OF FACT & CONCLUSIONS OF LAW

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

2. On November 20, 2005 and January 29, 2007, the relationship of employee-self insured employer existed between the parties.

3. On November 20, 2005, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$90.00 for both total disability and permanent partial disability.

4. On January 29, 2007, the appropriate weekly compensation rates were \$63.00 for both total and permanent partial disability.

5. On November 20, 2005, the claimant sustained a compensable injury to her left shoulder. Specifically, the claimant has proven by medical evidence, which is supported by objective findings, the actual existence of the alleged physical injury. She has further proven by the greater weight of the credible evidence that this physical injury to her left shoulder arose out of and occurred in the course of her employment with the respondent, was caused by a specific incident, is identifiable by time and place of occurrence, caused internal physical harm to her body, required medical services, and resulted in disability.

6. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a “new” or separate compensable injury to her shoulder on January 29, 2007.

7. The medical services rendered to the claimant for her left shoulder difficulties by and at the direction of Dr. Michael Hillis and Dr. Owen Kelly represent reasonably necessary medical services for the claimant’s compensable left shoulder injury. Pursuant to Ark. Code Ann. §11-9-508, the expense of these services is the liability of the respondent herein. However, such liability is controlled by the medical fee schedule established by this Commission.

8. The claimant was rendered temporally totally disabled, as a result of the effects of her compensable left shoulder injury, for a period of three weeks and six days following April 2, 2007.

9. The claimant has failed to prove by the greater weight of the credible evidence that she has been rendered temporarily partially disabled, as the result of the effects of her compensable left shoulder injury. Specifically, she has failed to prove by the greater weight of the credible evidence that she experienced a temporary decrease in her wages, after her return to employment in May of 2007, that was due to the effects of her compensable injury.

10. The respondent has denied the occurrence of any compensable injuries to the claimant’s left shoulder and have controverted these claims in their entirety.

11. A reasonable fee for the claimant’s attorney is the maximum statutory attorney’s fee on the controverted temporary

total disability benefits herein awarded and on any additional benefits which may hereinafter become due and payable to the claimant.

ORDER

The respondent shall pay to the claimant temporary total disability benefits for a period of three weeks and six days.

The respondent is liable for the medical expenses incurred by the claimant for treatment rendered her for her compensable left shoulder injury by and at the direction of Dr. Michael Hillis and Dr. Owen Kelly. This liability is subject to the medical fee schedule established by this Commission.

The respondent shall pay to the claimant's attorney the maximum statutory attorney's fee on the controverted temporary total disability benefits awarded herein. One half of this fee is the obligation of the respondent in addition to such benefits. The remaining one half of this fee is to be withheld by the respondent from such benefits.

All benefits herein awarded have heretofore accrued and are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

Any claim for benefits attributable to an alleged compensable injury to the claimant's left shoulder, occurring on January 29, 2007, should be and hereby is denied and dismissed for the reasons heretofore set out in this Opinion.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE