

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F605210

KERON D. WINFREY, EMPLOYEE

CLAIMANT

**QUALITY TEMPORARY SERVICES, INC., EMPLOYER,
and COMPANION PROPERTY & CASUALTY, CARRIER**

RESPONDENTS NO. 1

**PILGRIM'S PRIDE, EMPLOYER
and SENTRY INSURANCE CO., CARRIER**

RESPONDENTS NO. 2

OPINION FILED AUGUST 15, 2007

Hearing conducted before Administrative Law Judge Dale Douthit on May 22, 2007, in Little Rock, Pulaski County, Arkansas.

The claimant was appeared *pro se*.

Respondents No. 1 were represented by Mr. Andy Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 were represented by Mr. Frank Newell, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on May 22, 2007 in Little Rock, Arkansas. A prehearing conference was conducted in this matter on January 10, 2007, and a Prehearing Order was filed on January 11, 2007. A copy of the Prehearing Order was introduced into the record, without objection, as Commission Exhibit No. 1, subject to any modifications made at the full hearing.

At the full hearing, the parties stipulated to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The claimant sustained no cervical injuries while employed by either of the respondents.

3. The claimant began working for Odom's Tennessee Pride on January 4, 2006.

At the full hearing, the parties agreed the following issues would be presented for determination:

1. Whether claimant sustained a compensable gradual onset left shoulder injury while working for either Respondent No. 1 or Respondent No. 2.

2. If compensability is overcome, whether claimant is entitled to temporary total disability benefits from approximately June 5, 2006 through September 5, 2006 and all associated medical expenses.

3. If compensability is overcome, which respondent-employer was on the risk at the time of the compensable injury.

4. Determination of claimant's average weekly wage and applicable compensation rates.

5. Notice defense.

At the full hearing, claimant contended that she sustained a compensable gradual onset left shoulder injury while under the respondent's employ, and that as a result, is entitled to temporary total disability benefits from approximately June 5, 2006 through September 5, 2006. The claimant contended she had worked for Quality Temporary Services, Inc. from approximately November 16, 2005 through January 3, 2006. The claimant contended that since January 4, 2006, she has been an employee

of Odom's Tennessee Pride and remains employed with Odom's. Claimant contended her gross average weekly wage at the time of her compensable injury was approximately \$320.00 per week.

Respondents No. 1 contended that the claimant did not sustain a compensable injury while employed by Quality Temporary Services, Inc., and as such is not entitled to temporary total disability, permanent partial disability, or medical benefits.

Respondents No. 1 affirmatively raised the notice defense, and contended they had no notice of an alleged injury until April 4, 2006.

Respondents No. 2 contended the claimant did not sustain a compensable left shoulder injury while employed by the respondent Odom's, and as such is not entitled to an award of temporary total disability benefits or medical benefits.

DISCUSSION

The central issue in this case is whether the claimant sustained a "compensable" injury to her left shoulder, as the result of gradual or cumulative trauma to her left shoulder by her day-to-day employment-related activities with the respondents. The burden rests upon the claimant to prove that her left shoulder difficulties satisfy all of the relevant requirements for a "compensable injury" that are set out in the Act. For the type of injury the claimant alleges, the controlling sections of the Act are found in Ark. Code Ann. § 11-9-102(4)(A)(ii)(a), 11-9-102(4)(D), and 11-9-102(4)(E)(ii).

The claimant must first prove that her left shoulder difficulties satisfy the requirements for a "compensable injury" which are contained in Ark. Code Ann. § 11-9-102(4)(D). This subsection mandates: "A compensable injury must be established by

medical evidence, supported by objective findings as outlined in subdivision (16) of this section.” Thus, the claimant must prove by medical evidence the actual existence of physical injury or damage to her left shoulder that is supported by the presence of physical findings which are beyond the claimant’s voluntary control.

Next, the claimant must prove that her left shoulder difficulties satisfy the definitional requirements for a “compensable injury” which are contained in Ark. Code Ann. § 11-9-102(4)(A)(ii)(a). These definitional requirements are:

- (1) That the physical injury or damage must arise out of and occur in the course of the claimant’s employment;
- (2) That the physical injury or damage must cause internal or external physical harm to the claimant’s body;
- (3) The physical injury or damage must be caused by “rapid repetitive motion” (unless, the physical injury is in the form of carpal tunnel syndrome).

Finally, the claimant must prove that the employment-related aspect of her left shoulder injury was the “major cause” of either her “need for medical treatment” for her left shoulder difficulties or of any “disability” that her left shoulder difficulties have occasioned. Ark. Code Ann. § 11-9-102(4)(E)(ii). This subsection does not require the employment-related aspect or contribution to a total “resultant condition” to be the “major cause” of the “resultant condition” itself. This section only requires that the employment-related aspect or contribution to the total “resultant condition” be the “major cause” of either the resultant condition’s need for medical services or of any disability the resultant condition may have produced.

It is the requirement of rapid repetitive motion contained at Ark. Code Ann. § 11-9-102(4)(A)(ii)(a) that the claimant has failed to prove. The Arkansas Supreme Court has established a two-part test for interpreting “rapid repetitive motion”: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. See, Malone v. Texarkana Public Schools, 333 Ark. 343, 969 S.W.2d 644 (1998).

The claimant has failed to prove that she sustained an injury to her shoulder that was caused by rapid repetitive motion. The claimant’s testimony at the full hearing was the only probative evidence introduced that would shed any light on whether her shoulder was engaged in rapid repetitive movements while performing her job duties. The claimant testified as follows regarding the movements she attributed to her injury:

Q And these boxes you were carrying, is that what you are saying caused your left shoulder --

A Yes, sir, carrying --

Q Okay.

A I’m sorry.

Q Now, you first said once a day. And then you said “all these boxes,” so, I mean, how many times a day were you carrying boxes?

A Okay. The caramel box -- the box with the caramel is a powder form that they put on the sausages. I carried that to the cook area. That was just a one-shot deal for that day usage. Now, I had to set up the front, which that’s three lines, five, six, and seven. You know, I – you had to get the 27-inch liner box, and I had to get the 23-inch liner box. They was smaller, and they not heavy. But the 27-inch boxes are very heavy. I would come in. I would set up the whole line, all three of them. I’d get every -- and I had to get the labels. I got everything ready every day.

Q These 27-inch boxes, how many of those were you moving a day?

A Two.

Q Two of those?

A Yes, sir.

The claimant's own testimony shows that she was lifting three boxes per day. The claimant alleges that the lifting of those three boxes per day over the course of her employment with both respondents caused her gradual onset left shoulder injury. Although possible, the claimant's allegations simply do not meet the requirements under Arkansas Workers' Compensation Laws to prove a gradual onset shoulder injury. As stated herein, the threshold requirement is that the claimant's tasks be repetitive. Lifting three boxes per day does not meet the threshold requirement of repetitive, and certainly the evidence contained in the record is void of any rapid tasks. The claimant has failed to prove by a preponderance of the evidence that any of her work activities was of such rapid and repetitive movement so as to result in injury to her shoulder in accordance with Act 796 of 1993. As such, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset left shoulder injury while employed by either of the respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.

3. The claimant has failed to prove by a preponderance of the evidence that any of her work activities for the respondents required rapid repetitive motion.

4. Therefore, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable gradual onset left shoulder injury while in the employ of either of the respondents.

5. Since the claimant has failed to prove compensability, issues two through five outlined herein are rendered moot.

ORDER

Based on the reasons outlined herein and recited in the Findings of Fact and Conclusions of Law, this claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

HONORABLE DALE DOUTHIT
Administrative Law Judge