

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F707552

MONIECA S. LEMMONDS

CLAIMANT

KAWNEER CO., INC.

RESPONDENT EMPLOYER

INDEMNITY INSURANCE CO. OF NORTH AMERICA

RESPONDENT CARRIER

ORDER AND OPINION FILED MARCH 14, 2008

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

This case came on for a hearing in Springdale, Arkansas on January 29, 2008. A prehearing conference was held on September 11, 2007 and a prehearing order was filed on September 12, 2007. A copy of the prehearing order was marked as Commission Exhibit No. 1 and introduced into evidence without objection.

At the prehearing conference and prior to the hearing, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.
3. The alleged injury is gradual in onset.
4. The parties will agree to the compensation rate, if benefits are awarded.

The claimant contends that she sustained a gradual injury beginning in early 2007 and made a report to the company on March 23, 2007. The claimant contends she has compensable injuries to her neck, right shoulder and right arm and wrist and is entitled to medical benefits and temporary total disability benefits from July 17, 2007, to a date to be determined, and attorney's fees. All other issues are reserved.

Respondents contend the claimant did not sustain a work-related injury and she is not entitled to medical or temporary total disability benefits. The claim has been controverted in its entirety.

ISSUES TO BE LITIGATED

1. Compensability of gradual onset neck, shoulder and right extremity injuries.
2. Medical benefits.
3. Temporary total disability benefits.
4. Attorney's fees.

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:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. On all pertinent dates, the relationship of employee-employer-carrier existed between the parties.

3. The alleged injury is gradual in onset.

4. The parties will agree to the compensation rate, if benefits are awarded.

5. The claimant has proven by a preponderance of the evidence that she sustained a compensable cervical strain of a gradual nature in early 2007 arising out of and in the course of her employment.

6. The claimant has proven by a preponderance of the evidence that her right shoulder, right arm and wrist problems are compensable only to the extent that the problems are related to the cervical strain.

7. Respondents are responsible for the reasonable and necessary medical benefits the claimant has pursued.

8. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from July 20, 2007 through September 24, 2007.

9. The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 42 years old, began her employment with the respondent in 1997, where she worked on the window line. In 2005, the claimant worked in the purchasing department on Monday through Friday for eight hours. On Saturday and Sunday, she

worked in the shop on the packing line for eight hours per day. The claimant's packing job involved repetitive bending, lifting and packing pieces of metal called mullions to make windows. The pieces or mullions would range from tiny pieces up to 373 inches long. The purchasing job required considerable ten key use. In October 2006, the claimant went to the wall line permanently and this involved packing all the time. The claimant continued working the wall line until her last day on July 21, 2007. The claimant was asked how much of her day was spent packing parts and she replied:

Packing parts was probably at least half the day. The other half the day was doing repetitive moving of pallets. We'd have to consolidate pallets, which involved lifting up over your top of your head onto another pallet, and that was basically the rest of the day. (T., p. 12, lines 21-25.)

The claimant went on to describe that her job consisted of not only consolidating the pallets but also moving the pallets themselves. The pallets sometimes would weigh up to 3,000 pounds and were on steel wheels. Moving the pallets would require two people sometimes and this involved pulling and pushing to maneuver the pallets. The claimant divided the day's activities as 50% packing, 30% moving the pallets and maybe 20% involved book work.

The claimant described her problems beginning in early 2007, with a pain on both sides of her right wrist. This started with a dull ache at first and she reported this problem to the lead person, Mike, in January. The claimant was not sent to the doctor. She testified that she next reported the problem to Sue Woods, the safety director's secretary, and asked for a wrist brace. The claimant testified that she consistently told Mike that her wrist was hurting and she wore the wrist brace. She went to Ed's office, her supervisor, but he told her to come back some other time. Finally, at the toolbox

meeting in March, she reported her wrist hurting and a written report was made. The claimant testified that her problems at this time was a burning sensation in all the muscles on the top and bottom of the forearm with the burning sensation going into her shoulder. She stated she was having a hard time breathing.

The claimant first saw a chiropractor in May 2007. The treatment consisted of traction on her neck, acupuncture and heat therapy. This treatment helped until she returned to work. In June 2007, Dr. Weeks' office notes reflect palpable edema and palpable muscle spasms. The claimant continued her treatment with Dr. Weeks for two and one-half months and then went to her family clinic and saw Lucy Jones, APN. Ms. Jones placed the claimant on light duty on July 20, 2007; however, her employer did not have light duty so she was sent home. The claimant next had an MRI of her neck and was referred to Dr. Regan Gallaher. She had some cortisone injections with Dr. Brent Weilert. The claimant has not treated with a doctor since the cortisone injections, as she is without funds and insurance.

Under cross examination, the claimant confirmed that she had some surgery in 1995 to repair her collarbone on the left side. The claimant confirmed that she was diagnosed with fibromyalgia and she began taking potassium pills and has not had further problems. The claimant confirmed that she had an automobile wreck in May 2005 and she hurt her right foot but not her neck. The claimant testified that she treated with a chiropractor following the wreck but had no problems with her neck.

ADJUDICATION

Ark. Code Ann. §11-9-102(4)(A) defines "compensable injury":

(ii) An injury causing internal or external physical harm to the

body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, if the injury is:

(a) caused by rapid repetitive motion. Carpal tunnel syndrome is specifically categorized as a compensable injury falling within this definition;

(b) a back or neck injury which is not caused by a specific incident or which is not identifiable by time and place of occurrence.

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The burden of proof shall be a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4)(E)(ii).

The claimant has proven by a preponderance of the evidence that she sustained a compensable gradual onset neck injury arising out of and in the course of her employment; however, the right shoulder, arm and wrist pain are compensable only to the extent that the problems are related to the cervical strain. The neck injury was an aggravation of her preexisting degenerative cervical condition.

Regarding an aggravation, an employer takes the employee as he finds him, and employment circumstances that aggravate preexisting conditions are compensable. See, *Parker v. Atlantic Research Corp.*, 87 Ark. App. 145, 189 S.W.3d 449 (2004). A preexisting disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which workers' compensation is sought. *Actronix, Inc. v. Curtis*, ___ Ark. App. ___ S.W.3d ___ (Sept. 26, 2007). An aggravation is a new injury resulting from

an independent incident, and being a new injury with an independent cause, it must meet the definition of a compensable injury in order to establish compensability for the aggravation. *Id.* Claimant also has the burden of proving by a preponderance of the evidence that her condition is causally related to her employment. *Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 167 (2000). While the claimant testified that her problems began with her experiencing a burning pain in her right wrist in early 2007, she did not seek medical treatment until May 2007, when she sought chiropractic care. She treated with the chiropractic clinic until July 20, 2007 and had heat therapy, traction, manipulations, acupuncture and physical therapy with Dr. Weeks' notes reflecting palpable edema and muscle spasms. On July 20, 2007, the claimant went to her family clinic and saw Lucy Jones, APN, and was diagnosed with a cervical strain and given Skelaxin for muscle spasms, Vicodin for pain, and Lodine, as well as a shot of Decadron. An MRI was performed on August 9, 2007 and this revealed: "Broad-based right paracentral disk herniation at C5-6 associated with osteophytic spurs slightly indenting the anterior surface of the spinal cord." Cl. Exh. No. 1, p. 24. Dr. Robert Wilson's August 15, 2007, report reveals "MRI shows some spurs." Cl. Exh. No. 1, p. 25.

The claimant next sought an evaluation with Dr. Regan Gallaher, a neurosurgeon, and on August 27, 2007, he opined that surgery was not recommended. He did recommend physical therapy to work on neck strengthening and stretching and suggested she see a pain management physician for consideration of epidural steroid injections, facet blocks or trigger point injections. His report also indicates that the claimant's MRI reveals two-level degenerative disc disease. Dr. Gallaher did suggest

that the claimant's job was making the quality of life worse for the shoulder and neck pain and he thought it would be in her best interest to get into a non-manual labor job. The claimant next saw Dr. Brent Weilert, a pain management physician, and he proceeded with a cervical epidural steroid injection following his assessment of the claimant as being a 41 year old female with degenerative disc disease with some cervical radicular pain. The claimant has satisfied the major cause element since her pre-existing condition was asymptomatic until her compensable injury aggravated her condition to require treatment and to become symptomatic. *Pollard v. Meridian Aggregates*, 88 Ark. App. 193 S.W.3d 738 (2004).

After considering the medical evidence along with the claimant's testimony, I was persuaded that the claimant had proven by a preponderance of the evidence that her job duties were physical and repetitive and did gradually cause the cervical strain and muscle spasms and find that her condition was causally related to her employment. The medical evidence related the claimant's preexisting condition to degenerative disc problems and to osteophytic spurs; however, she was diagnosed with a cervical strain and was prescribed medication for pain and for muscle spasms and advised to limit overhead work and lifting over 5 to 10 pounds from July 20, 2007 - September 20, 2007. No surgery was recommended and conservative treatment in the form of steroid injections and physical therapy were recommended. I find the claimant's right shoulder, arm and wrist are compensable only to the extent that the problems are related to the cervical strain.

The employer shall promptly provide for an injured employee such medical treatment as may be reasonable necessary in connection with the injury received by the

employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that he is entitled to medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.2d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Engineering Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the instant case, the claimant sought conservative treatment for her cervical condition with pain going in her right arm and hand. She had conservative chiropractic care and some diagnostic testing and finally two steroid injections, physical therapy and medication. I find this conservative care is reasonable and necessary and the responsibility of respondents.

The claimant next contends she is entitled to temporary total disability benefits from July 17, 2007, to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in her healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant was given restrictions by Lucy Jones, APN, on July 20, 2007, to avoid overhead work and lifting over 5 to 10 pounds, as well as no repetitive activity that involves the shoulder and neck. She was prescribed Skelaxin for muscle spasms and Vicodin for pain. The claimant's restrictions were for one month and re-checked at that time. Ms. Jones documented the duration of the claimant's condition was July 20, 2007 through September 20, 2007. The claimant presented testimony that her employer sent her home because of the restrictions and medication.

The medical records further document that cervical steroid injections were given on August 27, 2007, and on September 24, 2007. After considering the medical evidence and the claimant's testimony, I find the claimant did remain in her healing period and unable to earn wages from July 20, 2007 through September 24, 2007. Respondents are responsible for appropriate benefits.

ORDER

The claimant has proven by a preponderance of the evidence that she sustained a compensable cervical strain of a gradual nature in early 2007 arising out of and in the course of her employment. The claimant has proven by a preponderance of the evidence that her right shoulder, right arm and wrist problems are compensable only to the extent that the problems are related to the cervical strain. Respondents are responsible for the reasonable and necessary medical benefits the claimant has pursued for her cervical injury. The claimant has proven by a preponderance of the evidence that she remained in her healing period and unable to earn wages from July 20, 2007 through September 24, 2007.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**