

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510022/F611954

TERESA MCFARLAND		CLAIMANT
ARKANSAS FOUNDATION FOR MEDICAL CARE		RESPONDENT
FEDERAL INSURANCE COMPANY, INSURANCE CARRIER	NO. 1	RESPONDENT
CONTINENTAL WESTERN INSURANCE COMPANY, INSURANCE CARRIER	NO. 2	RESPONDENT

OPINION FILED MARCH 12, 2008

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

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

Respondents No. 1 represented by DAVID JONES, Attorney, Little Rock, Arkansas.

Respondents No. 2 represented by GUY WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 4, 2007, in Fort Smith, Arkansas.

A pre-hearing order was entered in this case on September 10, 2007. Prior to the commencement of the hearing, certain changes were made in the pre-hearing order. The first of these changes involved an additional stipulation that the claimant sustained a compensable injury to her right elbow prior to August 1, 2006. This stipulation resulted in a modification of the first issue to delete reference to the right elbow in this issue. This stipulation also resulted in the third issue becoming moot. A copy of the pre-hearing order with these 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 dates prior to August 1, 2006, the relationship of employee-employer-carrier existed between the claimant, Arkansas Foundation for Medical Care, and Federal Insurance Company.
2. The appropriate weekly compensation rates are \$466.00 for total disability and \$350.00 for permanent partial disability for any compensable injury prior to August 1, 2006 and \$488.00 for total disability and \$366.00 for permanent partial disability for any compensable injury after August 1, 2006.
3. On all relevant dates after August 1, 2006, the relationship of employee-employer-carrier existed between the claimant, Arkansas Foundation for Medical Care, and Continental Western Insurance Company.
4. Both respondent carriers deny the occurrence of any compensable injury to the claimant's right shoulder and controvert any claims for benefits attributable to such an injury.
5. The claimant sustained a compensable injury to her right elbow prior to August 1, 2006 that required medical services and resulted in a 5 percent permanent physical impairment to the arm.

6. The respondent carrier #1 has paid all medical expense for the claimant's right shoulder difficulties through September 10, 2007.

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 as the result of cumulative employment related trauma either before or after August 1, 2006 or both before and after August 1, 2006.
2. The claimant's entitlement to the payment of the expenses of recommended medical services for the claimant's shoulder.
3. Appropriate attorney's fees.
4. whether the respondent carrier #1 is now estopped from denying compensability of the claimant's right shoulder by voluntarily providing medical services and thereby depriving the claimant of her right to choose her treating physician.

In regard to these issues, the claimant contends:

"a. The claimant contends that she sustained a compensable injury to her right shoulder and right upper extremity on or about May 3, 2005. She contends that she either sustained a recurrence of a new injury as a result of job activities in October and November of 2006.

b. The claimant contends that she is entitled to reasonably necessary medical treatment including but necessarily limited to surgery that has been recommended by Dr. Greg Jones.

c. The claimant contends that she is entitled to permanent disability regarding a 5%

impairment rating to her right upper extremity.

d. The claimant contends that her attorney is entitled to an appropriate attorney's fee on the 5% permanent impairment plus any disability benefits that may become payable regarding the shoulder."

In regard to these issues, the respondent-carrier #1 contends:

"1. Respondents #1 contend that the claimant did not sustain compensable gradual onset injuries to her shoulder in the course and scope of her employment in May of 2005. In particular, respondent #1 contends that the claimant's job duties concerning her shoulder were not rapid and repetitive in nature.

2. The respondent carrier #1 contends that the "major cause" of the claimant's need for treatment (of her shoulder) was a result of her pre-existing degenerative condition and not a result of her work related activities for the respondent/employer herein.

3. If the claimant meets her burden of proof concerning compensability, whether the claimant sustained an aggravation of her injuries after respondent carrier #2 assumed coverage on August 1, 2006. In particular, it appears that the claimant's job duties changed sometime in the fall of 2006, resulting in further complaints and her need for additional treatment. Therefore, respondent carrier #1 contends that respondent carrier #2 should be held liable for the additional benefits and treatment after they assumed coverage.

4. The respondent carrier #1 contends that they would be entitled to an offset for any group health and/or disability carrier payments made in regard to this claim, should any have been made."

In regard to these issues, respondent carrier #2 contends:

"Respondent carrier #2 contends that the present complaints are a recurrence of claimant's prior complaints when respondent #1

provided coverage and benefits to and/or behalf of the claimant. The claimant did not sustain a new injury and/or an aggravation of her prior injury when respondent carrier #2 was the carrier. Therefore, respondent carrier #1 is the party responsible for payments.”

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a “compensable injury” to her right shoulder, during her employment with Arkansas Foundation for Medical Care between November of 2006. The burden rests upon the claimant to prove all of the facts necessary to establish such a “compensable injury”.

The claimant concedes that her right shoulder difficulties were not caused by any specific employment related incident or accident. Thus, the claimant must prove that her right shoulder difficulties satisfy the definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(ii)(a). These definitional requirements are:

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

Historically, all employment related injuries (i.e. injuries that arose out of and occurred in the course of the employment) were “compensable”. However, in Act 796 of 1993, the legislature established additional requirements for an injury to be considered “compensable”. The definitional requirements of Ark. Code Ann.

§11-9-102(4)(A) were part of Act 796 of 1993. Thus, even if the evidence presented in the present case, is sufficient to prove that the claimant's difficulties with her right shoulder were causally related to her employment with the respondent employer, it must also prove that this employment related cause involved rapid repetitive motion of the right shoulder.

All of the witnesses that testified (including the claimant) stated that almost all of the claimant's work day involved key boarding and moving a mouse. Periodically, the claimant was also required to obtain file folders from covered cabinets and carry them to her job station. In order to get the files out of the cabinets, the claimant was required to lift a door that covered each shelf of the metal file cabinets. The top door of each cabinet was hinged above shoulder level.

The testimony is in dispute in regard to how many case files the claimant would be required to remove from the file cabinets, transport to her desk, and return to the file cabinets, over the course of her work day. The claimant testified that she would handle 60 to 70 files daily. Melody Lewis, a co-employee of the claimant, testified that she performed the same job as the claimant and handled at most, 20 to 25 charts a day. Amy Carson, the claimant's direct supervisor, testified that the claimant's statistics showed that she processed only 15 to 20 files per shift. She also testified that the covered file cabinets only came into use in 2006.

Clearly, the key boarding and mouse manipulation to make the data entry on the files, which compromised the vast majority of the claimant's 7½ hour shift would not be reasonably expected to involve rapid repetitive motion of her right shoulder. I do not find the claimant's testimony that she had to move her right shoulder 50 times a minute to manipulate her mouse to be credible. According to the claimant's testimony, the mouse was used only to change from screen to screen and that her job primarily involved key boarding or typing in various information from the paper files onto a screen and then changing to another screen and typing in more information. Clearly, if the claimant was changing screens almost one time per second, she would have very little time to read the information from the file and type it into the computer. In fact, the claimant's entire testimony about the use of her right arm in manipulating the mouse is not entirely logical or credible. I simply find that the greater weight of the credible evidence fails to prove that the claimant's key boarding and mouse manipulation entailed rapid repetitive motion of her shoulder joint.

In regard to the transfer of files from the closed cabinets to her work station, the greater weight of the evidence shows that the claimant at most performed these activities 40 times during a 7½ hour shift (one time to return the file), and this would assume that she removed and replaced only one file at a time. Thus, the claimant would only perform this activity on an average of one time every 11.25 minutes. Clearly, the motion of the claimant's

shoulder required to perform this activity would not be logically considered to be "rapid".

The claimant's failure to prove that any possible employment related cause of any physical harm she may have experienced to her right shoulder involved "rapid repetitive motion", would prevent this physical harm from meeting the requirements for a "compensable injury" under Ark. Code Ann. §11-9-102(4)(A)(ii)(a). This failure to prove a "compensable injury" to this portion of her body would prevent her from being entitled to any benefits under the Act from either of the respondents for her right shoulder difficulties.

II. ESTOPPEL

The next issue requiring discussion is the question of whether respondent carrier #1 is somehow estopped from denying compensability of the claimant's right shoulder difficulties. The claimant contends that this estoppel arose out of the actions of respondent carrier #1 in voluntarily providing the claimant with medical services for her right shoulder difficulties through September 10, 2007. The burden rests upon the claimant to prove all of the necessary elements for invoking the doctrine of estoppel.

The general rule is that the voluntary payment of benefits by a respondent does not estop that respondent from subsequently denying compensability. The basis for this rule is twofold. First, it is intended to encourage a respondent to immediately commence the payment of benefits, even though an investigation may continue and a final decision on compensability has not been reached.

Secondly, the claimant generally experiences no harm or damage as a result of the initial payment of benefits (i.e. detrimental reliance). To insure that the claimant is not harmed by this conduct, applicable case law also provides that a respondent is liable for the expense of any medical services that it expressly authorizes or directs the claimant to receive, even if the injury or condition for which the services were provided is ultimately found not be compensable.

In the present case, the claimant contends that the detrimental reliance requirement necessary to invoke the doctrine of estoppel is met, because the respondents' actions in providing her with initial medical treatment somewhat prevented her from selecting a physician of her own choosing. I find no merit to this argument.

First, the claimant's testimony indicates that she essentially chose Dr. Jeffrey Evans to be her initial primary treating physician for her shoulder difficulties. There is no evidence presented to indicate that the claimant would have selected anyone other than Dr. Evans to provide her treatment, had the respondents refused to provide her with medical services. The Act also afforded the claimant the right to change physicians, during the period the respondents were providing her with medical services, if she were unsatisfied with the services of Dr. Evans.

Most importantly, the evidence fails to show that the claimant has in any way been damaged by the services she received from Dr. Evans. In fact, the greater weight of the credible evidence shows

that the claimant experienced significant relief of her right shoulder difficulties, as a result of the services of Dr. Evans. In particular, the medical evidence (including both the reports of Dr. Evans and Dr. Greg Jones), reveals that the claimant's shoulder symptoms resolved or at least dramatically improved following the surgery by Dr. Evans and did not resurface until almost a year following this surgery.

After consideration of all the evidence presented, it is my opinion that the claimant has failed to prove that she relied to her detriment on the actions of respondent carrier #1 in volunteering to provide her with medical services for her right shoulder difficulties through September 10, 2007. Thus, this action on the part of respondent carrier #1 would not estop it from subsequently denying that the claimant sustained a "compensable injury" to her right shoulder while employed by Arkansas Foundation for Medical Care and while respondent carrier #1 provided this employer with workers' compensation coverage. However, respondent carrier #1 would be liable for the expense of the medical services that it voluntarily authorized for the claimant's non compensable right shoulder difficulties (subject to the Commission's medical fee schedule).

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, prior to August 1, 2006, the relationship of employee-employer-carrier existed between the

claimant, Arkansas Foundation for Medical Care, and Federal Insurance company.

3. On all relevant dates, prior to August 1, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$466.00 for total disability and \$350.00 for permanent partial disability.

4. On all relevant dates, after August 1, 2006, the relationship of employee-employer-carrier existed between the claimant, Arkansas Foundation for Medical Care, and Continental Western Insurance Company.

5. On all relevant dates, after August 1, 2006, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$488.00 for total disability and \$366.00 for permanent partial disability.

6. Prior to August 1, 2006, the claimant sustained a cumulative trauma compensable injury to her right elbow or arm that required medical services and resulted in a 5 percent permanent physical impairment to the arm.

7. Medical services were provided to the claimant for her right shoulder difficulties by respondent carrier #1 through September 10, 2007.

8. Respondent carrier #1 is not estopped from denying compensability of the claimant's right shoulder difficulties by its voluntary providing of medical services for such difficulties. Specifically, the claimant has failed to prove that she relied to her detriment on respondent carrier #1's actions in voluntarily

providing her with medical services for her right shoulder difficulties through September 10, 2007.

9. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a cumulative trauma compensable injury to her right shoulder, either before or after August 1, 2006. Specifically, the claimant has failed to prove the occurrence of any injury to her right shoulder that was caused by employment related rapid repetitive motion of this portion of her body.

10. The claimant would not be entitled to any benefits from either respondent carrier for her right shoulder difficulties, except that respondent carrier #1 is liable for the expense of any medical services for her right shoulder difficulties that it voluntarily authorized.

11. Respondent carrier #1 has now denied the occurrence of any compensable injury to the claimant's right shoulder while respondent carrier #1 provided workers' compensation coverage for Arkansas Foundation for Medical Care and has controverted her entitlement to any benefits attributable to her right shoulder difficulties, except the medical expenses which it has previously voluntarily paid.

12. Respondent carrier #2 has denied the occurrence of any compensable injury, while it provided workers' compensation coverage for Arkansas Foundation for Medical Care, and has controverted the claimant's entitlement to any benefits.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss all claims for benefits attributable to the alleged employment related injury to the claimant's right shoulder.

However, respondent carrier #1 is obligated to pay any and all medical expenses for the claimant's right shoulder difficulties, which it voluntarily authorized. This liability is subject to the medical fee schedule established by this Commission.

IT IS SO ORDERED.

MICHAEL L. ELLIG
ADMINISTRATIVE LAW JUDGE