

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F708300/F708302

SUONG NGUYEN

CLAIMANT

TYSON POULTRY, INC.  
SELF INSURED

RESPONDENT

OPINION FILED **SEPTEMBER 4, 2008**

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

Claimant represented by GARY UDOUJ, Attorney, Fort Smith, Arkansas.

Respondent represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 10, 2008, in Fort Smith, Arkansas.

A pre-hearing order had previously been filed in this case on April 16, 2008. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this pre-hearing order was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, the relationship of employee-self insured employer-TPA existed between the parties.
2. The appropriate weekly compensation benefits are \$289.00 for total disability and \$217.00 for permanent partial disability.
3. The claimant sustained a compensable injury in the form of bilateral carpal tunnel syndrome.
4. There is no dispute over benefits accruing on and after August 20, 2007, and all benefits have or are being paid.
5. The respondents are entitled to the set off provided by Ark. Code Ann. §11-9-411 on any group benefits.

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 is barred from receiving workers compensation benefits for her compensable injuries prior to August 20, 2007 by the provisions of Ark. Code Ann. §11-9-701 specifically medical services incurred prior to August 20, 2007 and temporary total disability from April 17, 2007 through August 19, 2007.
2. Appropriate attorney's fee.

In regard to these issues, the claimant contends:

- “(a) Claimant reported symptoms of her condition to the right hand to the company nurse on or about January 5, 2007.
- (b) Claimant suffered bilateral carpal tunnel syndrome and obtained a surgical release of the left wrist on May 16, 2007 and a surgical release of the right wrist on April 18, 2007.
- (c) Dr. Jeffery Evans opined that claimant's work contributed to more than 50 percent of her symptoms of carpal tunnel syndrome in her hands and were work related.
- (d) The employer had actual knowledge in January of 2007 that the employee had been diagnosed with carpal tunnel syndrome and was prohibited from repetitive motion with bilateral arm pain.
- (e) Claimant was informed by the employer's nurse representative that her injuries to her fingers, hands, wrists, lower arm and shoulder were personal injuries, due to arthritis, not work related, and was advised to seek her own personal doctor.
- (f) Claimant needs the services of an interpreter at the respondent's expense.
- (g) Respondent is responsible for appropriate statutory and other attorney's fees, costs associated with this action, medical and other related expenses, not previously paid for by the respondent in connection with the bilateral carpal tunnel treatment and release.”

In regard to these issues, the respondent contends:

“Respondent contends that the claimant has failed to give it notice of her work related injuries as required by the Workers’ Compensation Act until August 20, 2007. Claimant did report to the company nurse on January 5, 2007 that she had pain in her thumb/wrist area of the right hand. She never returned to the company nurse or reported her bilateral carpal tunnel syndrome at any time until August 20, 2007 after she had already had bilateral carpal tunnel releases. She represented the condition as non work related and received STD. Respondent is not responsible for medical expenses or indemnity benefits prior to receiving notice of the work related injury on August 20, 2007, it has paid any medical expenses incurred after that date and has accepted and paid permanent partial impairment to each hand/wrist assigned by Dr. Evans November 14, 2007. Further, Tyson is self insured for Workers’ Compensation and for group health insurance. Thus, Tyson does not wish to be reimbursed for any group health insurance payments made should it be responsible for said payments pursuant to Workers’ Compensation. It is entitled to a credit.”

#### DISCUSSION

There appears no dispute that the claimant continued within her healing period from the effects of her subsequently admitted compensable bilateral carpal tunnel syndrome from April 17, 2007 through August 19, 2007. There also appears no dispute that she was rendered totally disabled, during this period, by her compensable bilateral carpal tunnel syndrome. Thus, the claimant would meet all of the statutory requirements for entitlement to temporary total disability benefits during this period.

There also appears no dispute that the medical services that were provided the claimant for her hand and wrist difficulties by Dr. Brian Rodgers, Dr. Donald Samms, and Dr. Jeffrey Evans on and after January 9, 2007, were necessitated by or connected with her compensable bilateral carpal tunnel syndrome. Finally, there is no dispute that the medical services provided by these physicians were medically appropriate and had a reasonable expectation of successfully accomplishing their intended purpose or goal, at the time they were rendered. Thus, these medical services would meet the statutory criteria for “reasonably necessary medical services”, under Ark. Code Ann. §11-9-508.

The actual issue in dispute is whether the respondent is relieved of liability for these benefits by the provisions of Ark. Code Ann. §11-9-701. This subsection relieves a respondent of liability for benefits, to which an injured worker would otherwise be qualified, until the injury has been reported in the manner prescribed by the employer. However, such reporting procedure must be reasonable and the employee must be afforded reasonable notice of the reporting requirements.

There is no evidence presented to show that the claimant was provided reasonable notice of the respondent's reporting requirements. Although the claimant was a long-term employee of the respondent, there is no indication that she had ever previously experienced an employment related injury or had a workers' compensation claim. The record further shows the claimant is unable to speak or read English, a fact which complicates many aspects of this claim.

It is even impossible from the evidence presented to ascertain the exact reporting procedures required by the respondent. The evidence only shows that the respondent employed a form AR-N and that the Nursing Department had access to these forms (Respondent's Exhibit No. 2, page 17 and T.95).

Mary Lewis, one of the respondent's plant nurses, testified that simply because an employee came into the nurse's station and complained of difficulties with part of their body, they were not necessarily given a form AR-N to complete. In response to a query as to when the form was given, Ms. Lewis testified:

"I wait until I am informed."

However, it would appear that another of the respondent's nurses, Valerie Carter, was somehow "informed" that the claimant was experiencing employment related difficulties with at least one of her hands on January 5, 2007. On a form, which is entitled "Team Member Health Record" bearing that date, Nurse Carter indicated that the claimant's

complaints with her right thumb and wrist area were work related. Yet, no form AR-N was provided to the claimant.

Ark. Code Ann. §11-9-701(b)(1) also provides various exceptions that would prevent it from acting as a bar to the receipt of benefits for lack of notice. Failure to give notice is excused, if the employer had knowledge of the injury or death; if the employee had no knowledge that the condition or disease arose out of and in the course of the employment; or if the Commission excuses the failure on the grounds that for some satisfactory reason the notice could not be given.

In examining these various exceptions, consideration must be given to the fact that the claimant cannot speak, read, or write the English language. Consideration must also be given to the fact that the claimant does not appear to be particularly educated or intellectually sophisticated.

The evidence shows that in January of 2007, the claimant was aware that she was experiencing pain, swelling, and numbness or tingling in her lower arms and hands. These problems had been present for some time, but had significantly worsened in the latter part of December of 2006. She was also aware that she was performing employment activities that required strenuous repetitious use of her hands. However, she had been performing hand intensive employment activities for a considerable number of years. The claimant was further aware that her difficulties appeared to worsen at work. However, she was aware that her symptoms also worsened at night, when she was asleep. On April 9, 2007, the claimant was made aware, that as a result of her arm/wrist/hand difficulties, she should not perform certain employment activities at work.

The evidence presented shows that by January 5, 2007, the respondent clearly had actual knowledge of essentially these same facts. By that date, the respondent was aware that the claimant was experiencing difficulties with at least one of her hands/wrist. The respondent was also aware that these difficulties were at least exacerbated by her

employment activities. On January 9, 2007, the respondent was made aware that as a result of her difficulties with her arms/hands/wrists, the claimant was medically restricted from engaging in certain employment activities. On that date, the respondent's personnel office was provided by the claimant with the restricted duty note from Dr. Rodgers. Apparently no such work was available and the claimant was placed on a paid leave of absence.

The evidence presented shows that the claimant was not aware that her difficulties with her arms/wrists/hands were the result of a condition or disease that arose out of and occurred in the course of her employment with the respondent, until July 13, 2007. Based upon the evidence presented, the claimant's failure to recognize such a causal relationship is reasonable. There was no unusual employment related event or activity that coincided with the onset of her complaints. She experienced exacerbations of her difficulties both at work and off work, even while she was sleeping. The medical records fail to show that the claimant was advised by any physician that her difficulties were or could be employment related until the report of Dr. Evans on July 13, 2007. In fact, the initial records of Dr. Brian Rodgers specifically indicate that the claimant is not being treated for a workers' compensation condition (Claimant's Exhibit No. 1, page 2 and page 5). Even the initial reports of Dr. Evans, in support of the claimant's leave of absence, expressly failed to indicate whether the claimant's difficulties were due to the claimant's employment (Respondent's Exhibit No. 1, page 6). Apparently, the respondent did not bother to inquire further into this matter with Dr. Evans.

The evidence reveals that on July 12, 2007, the claimant provided the respondent with a return to work slip from Dr. Evans that released her to return to work on July 16, 2007, with a restriction against the use of scissors. Again, no employment position was available within these restrictions, and the claimant was sent home. The respondent's records indicate that on July 15, 2007, the claimant's leave of absence was extended. On

July 16, 2007, Dr. Evans released the claimant to return to work without restrictions, effective August 20, 2007.

The claimant apparently retained the services of an attorney and executed a form AR-C on August 2, 2007. However, this form was not filed with this Commission until August 15, 2007. There is no indication whether the respondent was sent a copy of this AR-C, prior to its filing. However, the respondent would have been notified shortly after the filing of the claim.

On August 16, 2007, Dr. Evans completed a questionnaire, which was apparently sent to him by claimant's counsel. In this questionnaire, Dr. Evans again indicated that the claimant's difficulties with her arms/wrists/hands are in his opinion work related. I cannot imagine why the claimant would fail to report this fact, as she had already formally filed a claim with this Commission. In fact, by that date the respondent should have already received notice of this filing from the Commission.

On August 20, 2007, the claimant reported to work. Before being allowed to return to work, a "health assessment" was performed on the claimant by Nurse Lewis. It was the testimony of Nurse Lewis that she received only the full release from Dr. Evans, but was not made aware at that time, that the claimant's difficulties were work related.

Again, it is important to mention the difficulty in communication between the claimant and the respondent that arises from the claimant's inability to speak or read English and the lack of any designated and trained interpreter. Neither the claimant nor the respondent's witnesses can testify to what they were actually "told" by the other party.

All they can testify to, with any degree of accuracy, is what they were "told" by the interpreter. In the present case, it appears that there may have even been a number of interpreters. However, none appear to be trained or experienced in verbatim translation. Such amateur interpreters are often inclined to paraphrase or summarize the statements they are interpreting or translating. They are also inclined to leave out matters that they

do not feel are particularly relevant. Finally, even the most conscientious untrained interpreter may unintentionally leave out or forget pertinent information during the translation process. This is particularly true when the interpreter is required to listen to a rather long statement by one of the parties, then go through the mental gymnastics required to translate that conversation from one language to another, and finally recite from memory the entire statement in the new language to the other party.

Another stumbling block to communication in this case is the fact that the claimant was dealing with different departments or divisions of the respondent. She clearly had some exchanges with the Nursing Department and also exchanges with what would appear to be the Human Resources Department. From the evidence presented, it would seem that there was very little exchange of communications between these two departments, as medical reports and records provided to the HR Department were according to the nurse's testimony unknown to the Nursing Department. The claimant cannot be penalized because of any lack of communication between these two departments. This is particularly true in light of the fact that the evidence fails to show that the claimant was ever informed of any designated or specific entity for the reporting of either employment related or non employment related difficulties.

The respondent has had since January 5, 2008, essentially the same actual knowledge of the claimant's condition as that possessed by the claimant. By January 5, 2007, the respondent was aware that the claimant was having difficulties performing her employment activities, as the result of pain and numbness involving her hand. At that time, the respondent was also aware that the claimant's employment activities required rapid repetitive use of both her hands. By January 9, 2007, the respondent was aware that the claimant was experiencing difficulties with both her forearms/wrists/hands and that these difficulties were sufficient to require medical services and caused her to be unable to work. On or about April 17, 2007, the respondent had information that the claimant was

experiencing difficulties in the form of bilateral carpal syndrome, that this condition required medical services, and that this condition prevented the claimant from performing her employment activities.

Unlike the claimant, from experience the respondent should have reasonably recognized the potential likelihood of a causal connection between these complaints and the claimant's hand intensive employment activities. However, within a reasonable period of time following the claimant's discovery of the likelihood of such a causal relationship, the claimant's current claim was filed and the respondent was promptly notified of this fact.

In summary, I find that the claimant is not barred from receiving benefits for medical services and temporary total disability, prior to August 20, 2007, by the provisions of Ark. Code Ann. §11-9-701. Specifically, the claimant was not provided with reasonable notice of the required reporting procedure, and any delay in timely reporting her compensable injury is excused by her lack of knowledge that her condition arose out of and occurred in the course of her employment and on all dates prior to August 20, 2007, that the respondent possessed essentially the same actual knowledge of the facts surrounding the claimant's condition as that possessed by the claimant.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-self insured employer existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$289.00 for total disability and \$217.00 for payment partial disability.
4. The claimant sustained a compensable injury, during her employment with this respondent, which was in the form of bilateral carpal tunnel syndrome.

5. There is no dispute over the claimant's entitlement to benefits that accrued on and after August 20, 2007. All such benefits have or are being paid.

6. The medical services provided to the claimant for her bilateral hands/wrists difficulties by and at the direction of Dr. Brian Rodgers, Dr. Donald Samms, and Dr. Jeffrey Evans prior to August 20, 2007, represent reasonably necessary medical services for the claimant's compensable bilateral carpal tunnel syndrome. Pursuant to the provisions of Ark. Code Ann. §11-9-508, the respondent is liable for the expenses incurred as a result of these services.

7. The claimant was rendered temporarily totally disabled by her compensable bilateral carpal tunnel syndrome for the period beginning April 17, 2007 and continuing through August 19, 2007. Specifically, during this period she remained within her healing period from the effects of her compensable injury and was rendered unable to perform gainful employment for the result of this injury.

8. The claimant is not barred from receiving workers' compensation benefits, prior to August 20, 2007 by the provisions of Ark. Code Ann. §11-9-701. First, the evidence shows that the claimant was not given reasonable notice of the required reporting procedures for a compensable injury. Secondly, the evidence shows that the respondent possessed initially the same actual knowledge of the claimant's condition, prior to August 20, 2007, as that possessed by the claimant. Finally, the evidence shows that the claimant was unaware that her difficulties with her forearms/wrists/hands represented a disease or condition that arose out of and occurred in the course of her employment with the respondent prior to July 13, 2007, and the respondent was properly notified of this information shortly thereafter.

9. The respondent is entitled to a set off or credit for any similar benefits which have been paid under a group policy insurance, in the manner provided by Ark. Code Ann. §11-9-411.

10. The respondent has controverted the claimant's entitlement to the payment of any medical expenses incurred for her compensable bilateral carpal tunnel syndrome and any temporary total disability benefits accruing prior to August 20, 2007.

11. The claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted temporary total disability benefits herein awarded.

ORDER

The respondent is liable for all reasonably necessary medical services provided to the claimant for her compensable bilateral carpal tunnel syndrome by and at the direction of Dr. Brian Rodgers, Dr. Donald Samms, and Dr. Jeffrey Evans, including such medical services provided on August 20, 2007. This liability is subject to the medical fee schedule established by this Commission.

The respondent is liable for the claimant for additional temporary total disability benefits for the period beginning April 17, 2007 and continuing through August 19, 2007.

The respondent is entitled to a set off or credit against the foregoing benefits for any similar group benefits paid to or on behalf of the claimant.

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

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

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

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE