

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F802705

SHIRLEY WIDMER	CLAIMANT
RIVER VALLEY HEALTH & REHABILITATION CENTER	RESPONDENT
WAUSAU INSURANCE COMPANIES, INSURANCE CARRIER	RESPONDENT

OPINION FILED **OCTOBER 1, 2008**

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

Claimant represented by MICHAEL HAMBY, Attorney, Greenwood, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on July 22, 2008, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on May 12, 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. Prior to the commencement of the hearing, a clerical error was corrected in the pre-hearing order. This error involved the first alleged injury date, which the pre-hearing order indicated to be January 12, 2008. The correct alleged injury date was January 2, 2008. A copy of this pre-hearing order with that amendment 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 all relevant dates, including January 2, 2008 and January 20, 2008, the relationship of employee-employer-carrier existed between the parties.
2. The appropriate weekly compensation benefits are \$235.00 for total disability and \$176.00 for permanent partial disability.
3. The claim is controverted in its 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 a compensable injury to her right shoulder on either or both January 2, 2008 and/or January 20, 2008.
2. The claimant's entitlement to medical services, temporary total disability from January 21, 2008 through a date yet to be determined, and attorney's fees.

In regard to these issues, the claimant contends:

"The claimant suffered an injury to her right shoulder on January 2, 2008, which was subsequently reaggavated and reinjured, or a new injury occurring, and a specific incident on January 20, 2008, while lifting a patient, Mary Moreland. The claim is compensable, as the same arose out of and in the course of her employment with the respondent employer and she is entitled to reasonable and necessary medical treatment associated therewith, mileage, TTD from January 21, 2008 through a date to be determined and a statutory attorney's fee."

In regard to these issues, the respondents contend:

"The respondents will contend that the claimant did not sustain a compensable injury to her right shoulder on January 2, 2008, January 20, 2008, or on any other date while she was employed by the respondent employer."

#### DISCUSSION

\_\_\_\_\_The central issue in this case is whether the claimant sustained a compensable injury to her right shoulder, as the result of a specific employment related incident or accident on either January 2, 2008 and/or January 20, 2008. The burden rests upon the claimant to prove all of the necessary facts to establish the occurrence of a "compensable injury".

The first of these required facts are contained in Ark. Code Ann. §11-9-102(4)(D). This subsection mandates that the claimant "establish" by medical evidence the actual existence of the physical injury or condition alleged to be compensable. This subsection further requires that the claimant prove that the actual existence of this physical injury is supported by "objective findings" as that term is defined in Ark. Code Ann. §11-9-102(16)(A)(i).

The medical evidence presented clearly “establishes” the actual existence of a physical injury or condition involving the claimant’s right shoulder. This injury or condition is in the form of a full thickness tear of the mid posterior portion of the insertion of the supraspinatus tendon, moderate fluid in the subdeltoid bursa (effusion), capsular hypertrophy of the AC joint, minimal arthropathy of the AC joint, and tendinopathy of the infraspinatus tendon, together with a probable anterior labral tear. Further, the medical evidence shows that the actual existence of these physical injuries or defects are supported by objective abnormalities noted on an MRI study of the claimant’s right shoulder. Therefore, the claimant has satisfied the statutory requirements for a compensable injury that are contained in Ark. Code Ann. §11-9-102(4)(D).

The claimant must next prove that these medically established and objectively documented physical injuries or defects satisfy the definitional requirements for a “compensable injury” that are contained in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The injury must arise out of and occur in the course of the employment;
- (2) The injury must be caused by a specific incident;
- (3) The injury must be identifiable by time and place of occurrence;
- (4) The injury must result in internal or external physical harm to the claimant’s body;
- (5) The injury must require medical services or result in disability.

In order to prove the first three of these requirements, the claimant must show the existence of a causal relationship between a specific employment related incident or accident and one or more of the medically established and objectively documented physical injuries or defects involving her right shoulder. In the present case, the only evidence the

claimant has presented to prove the existence of this causal relationship is her own testimony.

Although the testimony of a party is never considered uncontradicted, this does not mean that it can be arbitrarily disregarded. If such testimony is credible, it may be sufficient in and of itself to prove any fact that it is legally competent to address. There is no doubt that the claimant's testimony would be legally competent to prove the occurrence of a specific employment related incident or accident and to establish the existence of a close temporal relationship between such an event and the initial onset of symptoms indicative of the occurrence of a physical injury to her right shoulder.

The claimant testified, that on January 2, 2008, she was experiencing flu-like difficulties in the form of nausea, diarrhea, and generalized pain and aches, especially in the shoulders and arms. However, the physical exam performed upon the claimant by Dr. Mouhammad Sheikha on January 2, 2008, noted edema involving only the claimant's right shoulder joint. The claimant does not describe any employment related incident that occurred within a reasonably close time period prior to the onset of these difficulties. The claimant's testimony and the respondent's payroll records reveal that the claimant had not performed any work for the respondent since December 24, 2007.

In her testimony, the claimant described in some detail, a specific employment related incident or accident on either January 19 or January 20, 2008. She stated that on one of these dates, when she was working with Amanda Loudermilk. They were lifting a rather heavy patient, and she experienced sudden severe pain in her right shoulder and arm. She further testifies that, at that time, she told Ms. Loudermilk that her bursitis was acting up. She further testified that immediately thereafter she called Dr. Sheikha and he arranged for an MRI to be performed on her right shoulder.

However, no reports or records from Dr. Sheikha was introduced concerning this call. A record of the MRI of the claimant's right shoulder was introduced, but fails to

record any history of a recent precipitating event. This report merely states that the MRI was performed for complaints of right shoulder pain.

Following the MRI, Dr. Sheikha referred the claimant to Dr. Stephen Heim, an orthopaedic surgeon. The claimant was initially seen by Dr. Heim on February 6, 2008. A patient history form completed for Dr. Heim, on that date, noted only complaints of right shoulder pain of two months duration. No specific precipitating event was described. In response to a direct inquiry, as to whether the difficulties were to be treated as workers' compensation, the claimant responded "no". In response to another inquiry, concerning the "date of injury", "time of injury", and whether this was a work related injury, the response given was "?". In his narrative report of that date, Dr. Heim recorded:

"She (the claimant) is a nursing assistant. She states she does not remember hurting her shoulder."

Amanda Loudermilk testified that she did not recall assisting the claimant in moving the large patient described by the claimant (a Mary Moreland) in January of 2008. She further testified that in January during 2008, she was pregnant with twins and was medically restricted from engaging in any heavy lifting. Ms. Loudermilk did recall the claimant mentioning that her bursitis in her shoulder was "acting up" but Ms. Loudermilk described this conversation as occurring when they were taking out some trash. However, she did not recall in what month this conversation occurred.

The payroll records of the respondent reveal that the only time in January of 2008, when both the claimant and Ms. Loudermilk worked, was January 19, 2008. Although the claimant worked on January 20, 2008, Ms. Loudermilk did not. The assignment sheets for January 19, 2008 do show that the claimant and Ms. Loudermilk were assigned to the same wing, on January 19, 2008.

Suzy Shaw, the nursing home administrator for the respondent testified for the respondent. It was her testimony that the claimant has never directly reported any employment related accident or injury to her. She stated that the first she was aware that

the claimant was experiencing any difficulties with her right shoulder was in early February of 2008. At that time, the claimant brought in a doctor's note that restricted her employment activities, as a result of difficulties with her right shoulder. This would appear to be the note from Dr. Heim, which is dated February 6, 2008. Ms. Shaw further testified that at that time she specifically inquired of the claimant as to how her shoulder problems happened and whether they had happened on the job. She further stated that the claimant responded that she did not know how her shoulder difficulties came about but specifically denied that they were employment related.

After consideration of the evidence presented, it is my opinion that the claimant's testimony is not sufficiently credible to prove the existence of a causal relationship between any specific employment related incident in January of 2008, or any other date, and her medically established and objectively documented difficulties with her right shoulder. It is difficult to accept that the claimant could have had a "sudden and immediate onset of severe pain" in her right shoulder and arm, while lifting a heavy patient, and yet neglect to mention this event to any of her treating physicians. It is also difficult to conceive that the claimant would have timely reported such an incident and injury to her employer. It is impossible to reconcile the claimant's detailed description of the onset of her right shoulder difficulties on January 19 or January 20, 2008 and her responses on Dr. Heim's patient questionnaire of February 6, 2008, the history she gave to Dr. Heim that "she does not remember hurting her shoulder", and her statement to her supervisor that she did not recall how her shoulder difficulties occurred and her express denial that they were employment related.

In summary, I find that the claimant has failed to prove that her medically established and objectively documented physical injuries or defects involving her right shoulder arose out of and occurred in the course of her employment with this respondent on January 19, 2008 or any other date, were caused by a specific incident, and are

identifiable by time and place of occurrence. Therefore, the claimant has failed to prove the first three definitional requirements for a “compensable injury”, under Ark. Code Ann. §11-9-102(4)(A)(i). This failure is fatal to her claim. This claim must be denied and dismissed in its entirety.

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, during January of 2008, the relationship of employee-employer-carrier existed between the parties.
3. On all relevant dates, during January of 2008, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$235.00 for total disability and \$176.00 for permanent partial disability, should this claim have been compensable.
4. The claimant has failed to prove by the greater weight of the credible evidence that she sustained a “compensable injury” to her right shoulder during January of 2008. Specifically, she has failed to prove the occurrence of a physical injury to this portion of her body during this time, that arose out of and occurred in the course of her employment with the respondent, was caused by a specific incident, and is identifiable by time and place of occurrence.
5. The respondents have denied the occurrence of any compensable injury to the claimant’s right shoulder and have controverted this claim in its entirety.

#### ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

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MICHAEL L. ELLIG  
ADMINISTRATIVE LAW JUDGE