NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401780

TERRY TACKETT, EMPLOYEE CLAIMANT

TRANE COMPANY, EMPLOYER RESPONDENT

TRAVELERS INSURANCE COMPANY, CARRIER RESPONDENT

OPINION FILED AUGUST 12, 2005

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE EDDIE WALKER, JR., Attorney at Law, Forth Smith, Arkansas.

Respondent represented by HONORABLE JAMES ARNOLD, II, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 17, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

> 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
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> 2. On March 7, 2003, the relationship of employee-employer-carrier existed between the parties.

3. On March 7, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of $405.00 for total disability and #304.00 for permanent partial disability.

4. The claimant has failed to prove that she sustained a “compensable injury” to her left shoulder, as the result of a specific employment related incident on March 7. 2003.

5. The respondents have denied the occurrence of any specific injury to the claimant’s left shoulder on March 7, 2003, and have controverted this claim in its entirety.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

The Majority is affirming and adopting an Administrative Law Judge's decision which denied and dismissed this claim. My de novo review of the record convinces me that the Judge's decision was in error and should be reversed. For that reason, I respectfully dissent from the Majority opinion.

In an Opinion dated September 17, 2004, an Administrative Law Judge ruled that the claimant did not establish a causal connection between her biceps tendon condition and her job related accident occurring on March 7, 2003 or at any other time. From that decision the claimant filed the present appeal.

I find myself in agreement with a substantial portion of the Administrative Law Judge’s decision. I find, as did the ALJ, that the claimant did have an onset of pain while using the torque wrench on March 7, 2003, as she reported to the employer on the following day. I also agree with the ALJ’s finding, which the Majority is adopting, that the shoulder injury the claimant is presently complaining of is a torn biceps tendon, which is substantially different than her past shoulder problems. However, I disagree with the Administrative Law Judge’s conclusion that the claimant did not establish a causal connection between her torn biceps tendon and the incident she report on March 7, 2003.

The claimant has an extensive past history of shoulder problems. The doctor who primarily treated the claimant for her prior injuries, as well as the condition we are currently concerned with, is Dr. Greg Jones, a Fort Smith orthopedic surgeon. Dr. Jones’ deposition was made part of the record. In that deposition, respondent’s counsel closely questioned Dr. Jones regarding the nature of the claimant’s injury. After summarizing the past surgeries he performed on the claimant, Dr. Jones definitively stated that the condition he treated the claimant for in

November 2003 was different from the problems he treated the claimant for prior to that time. According to Dr. Jones, the past surgeries had dealt directly with her shoulder joint and involved repair of soft tissue injuries and eventually reconstruction. However, the surgical procedure he performed in November 2003 was for repair of the biceps tendon, a different problem than what he had treated the claimant for in the past. He also opined that the injury the claimant reported as having happened on March 7, 2003 did result in the condition for which he had treated the claimant for beginning in September 2003.

Dr. Jones also extensively discussed problems he had faced in returning the claimant to work both for her shoulder problems prior to March 2003 and the condition which he treated her for after that time. One of Dr. Jones' difficulties was that the claimant's employer would only accept a return to work without restrictions. He stated that while he would have normally placed certain lifting and reaching restrictions on someone with the claimant's problems, she had a strong desire to return to work and was not willing to give up her employment, even though he advised her to do so. Dr. Jones was of the opinion that the

claimant’s work in a factory setting was too rigorous for someone with her shoulder conditions and that a chance of re-injury was high. Interestingly enough, one of the job activities that Dr. Jones stated the claimant should avoid was use of tools such as torque wrenches.

In denying the claim, the ALJ rejected Dr. Jones’ expert medical opinion in regard to the cause of the claimant’s biceps tendon injury. The first reason given by the Judge for not accepting Dr. Jones’ expert medical opinion was because of a group insurance form relating to the claimant’s receipt of group disability and medical benefits. The form asked whether the condition arose out of the patient’s employment. In response, the form is marked “no.” Later, when the form requests the date of treatment, the date “12-17-99" is given and the statement, “Original surgery, persistent problems, multiple surgeries 12-17-99 to present” is written in. However, even though the form has a blank for the health care provider to sign, the copy in the evidentiary record is unsigned.

I do not believe that this form should be used as a basis to refute Dr. Jones’ considered medical opinion for a number of reasons. As I have explained in past cases, I do

not attach any great significance to statements in these types of group insurance forms in which boxes are checked indicating that an injury is not job related. In situations where employers have controverted workers' compensation claims, claimants who have serious injuries are faced with the daunting dilemma of how to pay for expensive medical procedures and how to financially survive an extended period with no income. Injured workers such as the claimant find themselves with the choice of either enduring debilitating and painful medical conditions with little or no medical treatment and foregoing any meaningful income for a period of months, or possibly years, while their workers' compensation case is decided, or applying for medical and disability benefits through group health insurance policies. In such a situation, I doubt that many people would hesitate to indicate on the insurance forms that their injury was not job related if the alternative was financial ruin and destruction of their health.

I also have concerns about this particular form. As noted above, the form is not signed by Dr. Jones, or any other identifiable person. Nor does the form indicate who prepared it and who provided the information contained in

it. I also find it curious that the form is dated February 11, 2004. However, the attendance record provided in the respondent’s documentary evidence indicates that the claimant was receiving sick and accident benefits beginning in August 2003. February 11, 2004, is only a little over a month before the claimant returned to work. If the claimant was already receiving medical and disability benefits at this time, I am uncertain as to why this form was prepared. I also note that there was no testimony elicited from the claimant or Dr. Jones about the accuracy of the information supplied on it.

In raising these questions, I am not implying that the respondent, or anyone connected with them, has attempted any deception or misrepresentation. I simply am concerned that any weight should be to given a form of such doubtful provenance. I find that there is no basis for using this form to reach any factual conclusion.

Another factor cited by the Administrative Law Judge in rejecting Dr. Jones’ opinion was because the claimant stated in her initial accident report that injury occurred while “pushing” the torque wrench. The Judge concluded that pushing a torque wrench could not cause an

injury to the claimant’s biceps tendon. He described that Dr. Jones’ opinion that this type of activity that could have caused this injury as being “inaccurate.”

In the first place, I do not believe that the Administrative Law Judge was correct in his belief that the claimant could not have injured her shoulder while “pushing” the torque wrench. The Judge’s conclusion is apparently based upon his belief that pushing the torque wrench would have required her to extend her arm whereas the biceps muscle flexes when the arm is bent inward. However, the injury was not to her bicep muscle but to the tendon which attaches to it. As explained by Dr. Jones, the injury to the claimant’s shoulder was caused by stress placed upon it while extending the arm.

In his deposition, Dr. Jones stated as follows:

> “I think that she needs to be restricted from use of torquing objects and that’s, for example, the torque wrench that she was using. Wrenches, because of their lever capability, can increase even a small amount of force to the amount perceived at the shoulder to a great amount, so torquing activities, straining against mechanical resistance with the arm in an ***extended position,*** those would be very easy to restrict and protect this shoulder.” (Emphasis added).

I believe it is clear error for an Administrative Law Judge, or this Commission, to substitute their own medical knowledge for that of a physician. I do not see how Dr. Jones' opinion was in any way "inaccurate" since he was of the opinion that the claimant would injure her arm if it was extended. I believe that Dr. Jones fully understood the mechanics of the claimant's injury and his opinion should be given great weight in this regard.

Another basis the Administrative Law Judge gave for his conclusion was that Dr. Jones erroneously believed that the claimant had been disabled for "over a year and a half" prior to her onset of symptoms. Not only do I not see the relevance of that conclusion, I also note that it is not correct. In his deposition, Dr. Jones was extensively cross examined regarding his decision in returning the claimant work following her previous non-job related shoulder injuries. In that deposition, Dr. Jones specifically discussed having released the claimant to return to work in September 2002. Obviously, when he opined in his deposition that her onset of symptoms in March 7, 2003 was related to an accident on that date, he must have been aware that she had been released to return to work in September 2002. In

any event, there is no indication that the length of time the claimant had been back at work would have in any way effected Dr. Jones' opinion.

The Administrative Law Judge also comments on the claimant's continued working following her March 2003 injury. It is true that the claimant continued to work approximately five months following her injury in March 2003. However, the claimant testified that her shoulder continued to cause her problems during this time but that she attempted to persevere to maintain her employment. Significantly, a review of the claimant's past medical records, including treatment by Dr. Jones of her previous shoulder problems, suggests the claimant was always strongly motivated to return to work. Against her doctor's advice, she returned to work in a repetitive factory setting even though her physician had made clear that such work could cause an exacerbation of shoulder problems.

The implication of the Judge's discussion of the claimant's continued employment following her March 2003 injury is that the injury could have occurred somewhere besides her employment. However, there is no evidence of

this and to draw this conclusion requires speculation and conjecture.

Lastly, the Judge notes that when the claimant sought treatment from the Sparks Hospital emergency room and from Dr. Bishop in August 2003, the reports documenting those visits stated that she had not suffered any recent injury. The Judge attaches great weight to those reports and indicates that the medical providers must have gotten this information from the claimant. However, that reasoning overlooks the fact that the claimant saw these physicians several months following her March 2003 injury. A statement in August 2003 that there had been no recent injury to her arm would have been entirely accurate. The injury in question had happened over five months before and the claimant had been working despite the pain.

I find that the medical records in this case overwhelmingly support the claimant's contention that the injury treated by Dr. Jones beginning in September 2003 which caused her to become disabled and incur permanent impairment was the result of a job related accident on March 7, 2003. Any other conclusion is simply not reasonable given the evidence contained in this record. For that

reason, I find that the Administrative Law Judge’s decision should be reversed and the claimant should be awarded the requested benefits. On that basis, I respectfully dissent from the Majority opinion.

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SHELBY W. TURNER, Commissioner