

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F509040

TERESA A. THOMPSON, EMPLOYEE	CLAIMANT
ROBERT BOSCH TOOL CORPORATION, EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 20, 2007

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

Claimant represented by the HONORABLE JOHN C. BARTTELT, Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE DAVID LANDIS, Attorney at Law, Jonesboro, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed December 13, 2006. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.

3. The claimant has proven, by a preponderance of the evidence, that she sustained a gradual onset, right shoulder injury which arose out of and during the course of her employment with Robert Bosch Tool Corporation, specifically, the same rapid repetitive work activities which caused the claimant's admitted right carpal tunnel injury and which has been confirmed by medical evidence supported by objective findings.
4. The healing period for the claimant's right carpal tunnel injury ended September 26, 2005. Respondents have paid appropriate temporary total disability, to date, related to the right carpal tunnel injury.
5. The claimant has proven, by a preponderance of the evidence, that she is entitled to temporary total disability benefits for the right shoulder injury beginning March 30, 2006, and continuing through, at least, the date of the within hearing and until an undetermined date when her healing period can be determined.
6. The claimant's healing period for the right shoulder injury had not ended as of November 3, 2006.
7. The claimant has failed to prove, by a preponderance of the evidence, that she is entitled to either additional temporary total disability or temporary partial disability benefits before March 30, 2006.
8. Respondents are responsible for all outstanding medical expenses related to the diagnosis and treatment of the claimant's right shoulder injury, and respondents remain responsible for continued, reasonably necessary medical related to the treatment of claimant's right shoulder injury.

9. All additional issues not addressed herein, including, but not limited to claimant's entitlement to permanent impairment benefits, if any, related to the admitted right carpal tunnel injury, are specifically reserved.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the December 13, 2006 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed

by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that she sustained a gradual onset injury to her right shoulder. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant began working for the respondent employer beginning in 1996. The claimant worked for the employer until the plant shut down on or about June 10, 2005. During the entire period of the claimant's employment, she worked on an assembly line. During the first eight (8) years of the claimant's employment, she worked on the Skil jigsaw line. After the Skil jigsaw line shut down, the claimant was moved to the Bosch jigsaw. After that line shut down, the claimant began working on the belt sander line. The claimant testified that during the Spring of 2005, she noticed that her hands began developing numbness which would radiate into her arms. She first reported her physical problems to Glenda Staton in the Human Resource Department in April, 2005. The claimant was referred to the Pocahontas Family Medical Center where she was examined by Dr. Tracy Buxton, part of the Corning Health Care, Inc. which was the company doctors. The record reflects that the claimant was first examined and treated on April 6, 2005. The claimant was diagnosed with carpal tunnel syndrome. The claimant lost her job on June of 2005 when the respondent employer shut down. The record reflects that the claimant continued working at all times until the plant shut down on June 10, 2005, and received unemployment compensation following the plant shut down.

Dr. Buxton referred the claimant to Dr. Terence Braden, for evaluation on April 22, 2005. Dr. Braden ordered nerve conduction studies on May 3, 2005, while noting that the claimant had developed bilateral hand paresthesias from the hand into the elbow.

The claimant was subsequently referred to Dr. James L. Schrantz, an orthopedic surgeon in Jonesboro, Arkansas, and was seen on June 29, 2005. The claimant was diagnosed as having both carpal tunnel syndrome on the right, as well as lateral epicondylitis in the elbows.

The claimant continued to receive conservative treatment from Dr. Schrantz until August 11, 2005, at which time the claimant underwent a carpal tunnel release on the right. The respondents accepted and paid all medical related to the claimant's carpal tunnel release. In addition, the respondents paid temporary total disability benefits following the surgery on August 11, 2005, and continuing through September 26, 2005, at which point Dr. Schrantz released the claimant to return to work.

The claimant testified that the right carpal tunnel release relieved the problems in her right hand. She stated that her left upper extremity problems

improved without requiring surgery. Following the claimant's release by Dr. Schrantz for the right carpal tunnel injury on September 26, 2005, she went to work for the Jonesboro Country Club. The claimant began working at the Jonesboro Country Club in October, 2005. The claimant was hired as a part-time employee for the Country Club, working two (2) to three (3) days per week. No evidence was offered concerning the claimant's hourly wages. Further, there is no credible evidence that the claimant was unable to work full-time, but, rather, only that she was hired to work part-time.

The claimant continued working at the Jonesboro Country Club from October, 2005, until on or about March 31, 2006, at which time she voluntarily terminated her employment because of increased problems involving the right shoulder. The claimant testified that after going to work at the Country Club, she returned to Dr. Schrantz in December, 2005, at which time Dr. Schrantz referred her to Dr. Henry Stroope, an orthopedic surgeon in Jonesboro, Arkansas, for treatment of the shoulder. The claimant stated that she contacted Kathy Sandeville, a representative for the respondent-insurance carrier, for approval of the treatment by Dr. Stroope, but that the insurance carrier refused to

authorize any additional treatment because the claimant had worked for a different employer.

The respondent accepted responsibility for the claimant's carpal tunnel syndrome and all benefits associated therewith. However, at this time, the claimant is contending that she sustained a compensable injury in the form of a shoulder injury while working for the respondent employer. In my opinion, the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable shoulder injury.

In order to establish compensability of an injury, the claimant must satisfy all the requirements set forth in Ark. Code Ann. §11-9-102 (Repl. 2002). See, Jerry D. Reed v. ConAgra Frozen Foods, Full Commission Opinion filed Feb. 2, 1995 (E317744). See also, Hapney v. Rheem Mfg. Co., 342 Ark. 11, 26 S.W.3d 777 (2002). The claimant does not contend that the injury is identifiable by time and place of occurrence, but that the injury is a rapid repetition motion injury. In order to prevail on a rapid, repetitive motion claim, the claimant must prove by a preponderance of the evidence that she sustained an injury causing internal or external harm to the body which arose out of and in the course of their employment and which required medical services or resulted in disability or death; that the

injury was caused by rapid repetitive motion; that the injury was the major cause of the disability or need for treatment; and must establish a compensable injury "by medical evidence supported by "objective findings".

Hapney, supra.

However, in addition to these requirements, if the injury falls under one of the exceptions enumerated under Ark. Code Ann. § 11-9-102(5)(A)(ii), 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)(Repl. 2002).

If an employee fails to establish by a preponderance of the credible evidence any of these requirements for establishing the compensability of the alleged injury, she fails to establish the compensability of the claim and the claim must be denied. Reed v. ConAgra, supra.

My review of the evidence demonstrates that the claimant did not seek treatment for her shoulder pain until December 12, 2005. This was three months after she started working for the Jonesboro Country Club. The claimant sought treatment on that date from Dr. Henry Stroope who diagnosed the claimant with subacromial bursitis. Ultimately, the claimant quit

working for the Jonesboro Country Club after being placed off work on March 16, 2006.

I find that the claimant has failed to sustain her burden of proof. The claimant presented only two items of evidence to support her claim. The first is her own self-serving testimony that she was suffering from shoulder pain while she was still employed at Robert Bosch Tools. The second is the testimony of her physician, Dr. Stroope who first saw the claimant on December 12, 2005. The claimant failed to inform Dr. Stroope of her employment by Jonesboro Country Club and her admittedly considerable increase in shoulder pain during her employment at the Jonesboro Country Club.

The claimant's testimony that she was suffering from shoulder pain is significantly undermined by the silence of her medical records between April 6, 2005, and July 20, 2005. During that time, the claimant was evaluated and treated on six different occasions by three different physicians, and yet none of the medical records indicate any shoulder pain. It was not until Dr. Schrantz's medical record of July 20, 2005, that the claimant's subjective complaints of shoulder pain were recorded in a medical record. The claimant's allegation that she reported her shoulder pain to the physicians, but they forgot to record her complaints on all six

visits is suspect at best. The medical treatment received between April 2005 and July 2005 was for the claimant's carpal tunnel syndrome only and there was absolutely no treatment received for a shoulder problem. In my opinion, if the claimant had made consistent complaints of shoulder pain, these complaints would not go undocumented or untreated. This requires conjecture and speculation to conclude the claimant complained of shoulder problems. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993).

Although Dr. Stroope concluded that he believed the shoulder pain was likely a result of her employment at the respondent employer, this conclusion was made in the complete absence of any information of the admitted deterioration of the claimant's shoulder condition during her employment at the Jonesboro Country Club. Dr. Stroope admitted that his conclusions were based upon the claimant's history. A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible

evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion January 22, 1996 (Claim No. E417617). Moreover, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is not sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983). Further, Dr. Stroope admitted that he was not aware of the claimant's employment by Jonesboro Country Club. In his deposition, he stated:

Q. Well, assuming then - - going back, that she stopped work at Bosch on June 10, 2005, is the first arm pain noted - - or subjective complaint would have been roughly over five weeks later?

A. That's - - according to the records, yes.

Q. Do you have anything else that would indicate to you anything different than that?

A. Only the patient's testimony to me.

Q. What did she tell you?

A. The first time I saw her she said essentially that her arm and shoulder had been hurting her the entire time she began seeing the Corning Healthcare group.

Q. Doctor - - excuse me. Go ahead, Doctor.

A. I'm done.

Q. I apologize. Doctor, does the story - - or history she gave you correlate with the medical records from the Corning Clinic?

A. Well, she made no reference at the Corning clinic about her shoulder, but she did to me.

Q. Right. Well, all I'm getting to is, in the history that she gave you, she said that she had this problem since the inception of her care back fairly - - in April, I gather, of 2005?

A. Yes, sir, that was my understanding.

Q. In any of the records of the Corning clinic, or Dr. Schrantz, after July 20, 2005, is there any reference to a subjective complaint of any finding, objectively, or anything else, in regard to her right shoulder?

A. Not according to the records; you're correct.

Q. Would it not be, in your experience, if somebody, during that period of time - - if you were treating them and they had a shoulder problem, they'd tell you about it?

A. In general, I think that's true.

Q. Okay. Very good. Doctor, when you first saw this lady, did she give you a history of employment with anyone besides Bosch, ending on, I see here, June 10th?

A. I don't believe so.

After Dr. Stroope was informed of the claimant's job duties and the deterioration of her shoulder condition to the point that she ceased employment at the Jonesboro Country Club, he admitted that those job activities could cause or aggravate the claimant's shoulder pain, tendinitis or rotator cuff disease. He testified:

Q. Doctor, I'll be happy - - and if I get an objection, I'll go page by page - - please assume that this lady began work with the country club on October - - I think it was October or something like that, of '05, that her duties as a housekeeper included mopping, sweeping, cleaning windows, vacuuming, things of this type that normally go with housekeeping. Would this be consistent with the history this lady gave you?

A. No, because she never told me she was employed by that facility.

Q. Doctor, at this point would you be so kind - - and I apologize - - to go ahead and give me the history she gave you, and then I have another couple of questions on that.

A. Yes, she came in to see me March the 6th - - March 16th of '06 and told me that she had been to see Dr. Schrantz for her wrist pain but did state that she had been having arm pain for the entire time. And that even despite treatments by Dr. Schrantz for her carpal tunnel syndrome, she continued to have right shoulder pain; and after she began complaining of right shoulder pain to Dr. Schrantz then he

referred her to me, and essentially that was her history.

Q. Doctor, I'll ask you to make an assumption - - and you're welcome to look at this lady's deposition if you desire. And looking at the deposition this lady gave, she testified that her condition from the time she started in October of '05 at the country club, until she left in March of '06 at the country club, that her condition had worsened to where - - when she first went to work at the country club, she could do her job. After March of '06, she got to where she could not do her job because of shoulder pain.

Assuming that that is accurate, and you're more than welcome to look at her deposition, would that indicate to you the etiology of her - - the condition for which you saw her came as a result of that, predated that, or do you have any idea, sir?

A. Assuming that that is an accurate statement and is true, then it could be that she had developed some sort of shoulder pain or tendinitis or disease of the rotator cuff from those job activities as well. That's entirely possible.

Dr. Stroope then admitted that the claimant's shoulder condition could be a result of her employment with the Jonesboro Country Club or her employment with the respondent employer, and he could not state which job caused the shoulder condition. In his deposition, he stated:

Q. Doctor, in reviewing that, do you disagree with the conclusion of Dr. Peeples in that report, sir?

A. I don't disagree with it completely. I think its entirely possible that either her country club employment or her job at Bosch could have created the problem.

Q. You just don't know which?

A. I don't know which, necessarily. However, if I got back and review my own notes, and relying on the patient's history that was given to me, then I would again make the same assumption or conclusion that I did the first time.

Q. Assuming that the medical records that Dr. Peeples has gone through are accurate, then the history this lady gave you would apparently not be accurate; is that correct? Or incomplete?

A. Incomplete would be probably a better word.

Q. I'm trying to be as polite as I know how. In any event, the report that you're looking at, I gather you're saying that it could have been from the country club, it could have been from Bosch; you don't know. You're just simply going on the history the patient gave you?

A. That's exactly correct.

Q. And the conclusions that Dr. Peeples arrived at there could very well be accurate?

A. It could be, yes, sir.

Q. Do you have any medical evidence of any form that would indicate that

his conclusion, or his four-page report, is inaccurate, sir?

A. No, I don't.

Dr. Stroope does not completely disagree with Dr. Peeples report, which concluded the claimant's shoulder problem was not caused by her job with the respondent employer under the accurate hypothetical circumstances set forth in his deposition.

Regardless, it is clear that all or at least the majority of the claimant's shoulder problems are the result of her employment with the Jonesboro Country Club and not her employment with the respondent employer. Although the claimant reported some shoulder pain, some five weeks after she ceased working for the respondent employer, it was not enough to be a cause of concern in any of her medical records. In my opinion, her pain was so insignificant prior to her employment at the Jonesboro Country Club, it did not prevent her from returning to work without any restrictions. While working at Jonesboro Country Club, her condition worsened significantly by the claimant's own admission. In my opinion, it is patently clear that her shoulder condition is a result of her employment with the Jonesboro Country Club and not the respondent employer.

The respondents offered the independent medical evaluation report of Dr. Earl Peeples. Dr. Peeples reviewed the claimant's deposition testimony and all of the relevant medical records. Dr. Peeples accurately noted that the claimant's medical records from April 6, 2005, until July 20, 2005, made no reference whatsoever to any shoulder pain. Dr. Peeples concluded:

The objective data in this record does not support consistent complaints of shoulder symptoms to the initial treating physician, Dr. Schrantz. They are not noted in his records. Abnormality of impingement is later identified on MRI. Impingement is a developmental/degenerative condition and not a specific trauma related disorder. The record is not consistent with a traumatic incident at Bosch creating a rotator cuff tear. It is consistent with a small attrition abnormality in the rotator cuff approximately one year following her employment at Bosch and after her employment at the country club. It is noted that symptoms of shoulder discomfort correlate with the employment and activity at the time of employment from discharge from Bosch.

The opinions stated in this report are based on the medical information in the form of medical records provided to me. ... Medicine is an inexact science, however, the opinions stated above are based on a reasonable degree of medical certainty.

Based upon the conclusions of Dr. Peeples, it is my opinion that the claimant's rotator cuff injury was not a result of her employment for the respondent employer. Accordingly, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner