

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H000368

MARIA CASTILLO-PAZ, Employee	CLAIMANT
TYSON MEXICAN ORIGINAL, Employer	RESPONDENT
TYNET CORPORATION, Carrier	RESPONDENT

OPINION FILED FEBRUARY 11, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by R. SCOTT ZUERKER, Attorney at Law, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On November 17, 2020, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on March 17, 2020, and a Pre-hearing Order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on September 13, 2019.
3. The compensation rates are \$441.00 for temporary total disability and \$331.00 for permanent partial disability.

By agreement of the parties, the issues to be litigated and resolved at the forthcoming hearing were limited to the following:

1. Whether claimant sustained a gradual onset compensable injury on September 13, 2019 to her right shoulder, neck, right hand and right wrist.
2. Whether claimant is entitled to medical treatment.

3. Whether claimant is entitled to temporary total disability benefits from September 14, 2019 to April 13, 2020.

4. Attorney fees.

The claimant contends that she had gradual onset injuries to her right shoulder, neck and right hand and wrist while working, culminating on or about September 13, 2019. She contends she is entitled to medical treatment and temporary total disability. The claimant reserves all other issues.

The respondents contend that claimant did not sustain a compensable injury as that term is defined by Act 796 of 1993. In addition, respondents raise the Statute of Limitation and Lack of Notice as affirmative defenses.

The claimant in this matter is a 56-year-old female who is employed by the respondent to operate a “sheeter machine.” The claimant operated a sheeter machine, moved pallets and carried ingredients that weighed between 15 and 50 pounds all in the process of making taco shells. The claimant describes her daily physical work activities on pages 9 through 13 of the hearing transcript during direct examination testimony. The claimant has asked the Commission to determine whether she sustained a gradual onset compensable injury on or about September 13, 2019 to her right shoulder, neck, right hand and right wrist. I note that September 13, 2019 is the date that the claimant underwent right shoulder surgical intervention at the hands of Dr. Chris Arnold at Physician’s Specialty Hospital. Following is a portion of that operative report found at Claimant’s Exhibit 1, Page 14:

PREOPERATIVE DIAGNOSES:

1. Right shoulder massive rotator cuff tear.
2. Right shoulder biceps tendon tear, high-grade partial.
3. Right shoulder acromioclavicular arthropathy.
4. Right shoulder anterior acromial spur – impingement syndrome.

POSTOPERATIVE DIAGNOSES:

1. Right shoulder massive rotator cuff tear, retracted.
2. Right shoulder high-grade partial tear of long head of the biceps with unstable anchor.
3. Right shoulder acromioclavicular arthropathy.
4. Right shoulder anterior acromial spur – impingement syndrome.

PROCEDURE:

1. Right shoulder arthroscopic rotator cuff repair using a double row technique (this will be billed as Modifier 22 secondary to the massive size of this, marked retraction, and poor tissue quality. This required significant soft tissue mobilization and multiple suture repair).
2. Right shoulder open subpectoral biceps tenodesis.
3. Right shoulder arthroscopic acromioplasty.
4. Right shoulder arthroscopic distal clavicle resection.

An MRI of the claimant's right shoulder was performed on August 22, 2019, prior to her surgical intervention. Following is a portion of that diagnostic report from that MRI found at Claimant's Exhibit 1,

Page 7:

IMPRESSION:

1. Complete tears of the supraspinatus and infraspinatus with retraction to the glenohumeral joint. There is moderate atrophy of these muscles.
2. Tendinosis and high-grade partial tearing of the mid and distal subscapularis.
3. Tendinosis long head biceps tendon.

While the claimant alleges a right shoulder, neck, right hand, and right wrist injury, she fails to provide objective medical findings regarding her neck, right hand and right wrist. In fact, the claimant fails to even address those alleged compensable injuries during direct examination questioning. Certainly, there is objective medical evidence regarding her right shoulder through both the MRI of the claimant's right shoulder on August 22, 2019 and the operative report authored by Dr. Arnold on September 13, 2019.

The claimant in this matter has previously filed a workers' compensation claim on May 8, 2017. Following is a portion of her cross-examination testimony about her previously filed workers' compensation claim:

Q Ms. Castillo, did you actually have a workers' compensation claim in regard to your right shoulder back in May of 2017?

A Did you say May of 2017?

Q Yes.

A No.

Q Do you remember signing a Form N on May 8th of 2017?

A Just the one given to me at the nurses office so I could show them where it was hurting, and they could take me to the occupational clinic.

MR. ZUERKER: May I approach?

THE COURT: You may.

Q [BY MR. ZUERKER]: Ms. Castillo, I am going to show you Page 2 of Respondents' Exhibit 2 and ask you if that is your signature at the bottom of this page?

A Yes.

Q And one of the questions says, "What part of your body was injured?"

A Yes.

Q Can you read me what your response was.

A My shoulder and part of my arms.

Q Okay. And then it says, "Briefly describe the cause of injury." Could you read for me your response to that question.

A Some movements, but more if they are very repetitive.

Q Okay. And then I am going to show you Page 4 of -- I'm sorry, Page 3 of Respondents' Exhibit 2 and ask you if that is your signature on the bottom of this document?

A Yes.

Q And that was signed by you on May 8th of 2017?

A Yes.

Q And one of the things on this document is there is a little diagram of a person where you draw where you are having pain.

A Yes.

Q Would you agree with me that you have indicated that you were having pain in both shoulders and both arms?

A Yes.

Q Could you read for me Question No. 2 and your answer.

A The question says, "Describe in detail the work that you were doing at the time of injury or what is causing you the injury or problem."

"It caused me more pain than the one I already had when I was moving the pallet."

Q And could you read me Question 3 and your response.

A "Describe completely how did the injury happen or what is your pain or problem." "At the time of using the sheeter machine for the taco lines, C-6," that is the name of the machine, "usually you have to use a pail."

MR. ZUERKER: A pail?

THE INTERPRETER: I am sorry, I mean a shovel. I'm sorry.

Q [BY MR. ZUERKER]: And we talked about the shovel in your deposition. It is really kind of more like a paddle?

A Yes. It is a big one, like a paddle, like a big one that you have to use with both arms.

Q And when you reported that you were having a problem working on the sheeter machine in May of 2017, you were having problems with both of your shoulders and both of your arms; correct?

A Yes.

Q Basically, you were having the same problems from doing the same job as what you are talking about in 2019; correct?

A Yes. It is just that in 2017, I was learning. I was in training. And before that I worked in packaging and the movements were very repetitive.

Q And, actually, in your deposition, you told me that the problems with your shoulders and arms started in March of 2017; correct?

A Did you say March of 2017?

Q Yes.

A Yes, because like I told you, that is when I was working in packaging.

The claimant also gave direct examination testimony about her right shoulder difficulties in 2017 and 2019 as follows:

Q Can you compare the symptoms that you had in your right shoulder before the spring of 2019 with those symptoms you had right before you saw Dr. Arnold?

A Yes. Before I saw him in 2017, I had lots of pain and that pain lasted for a while, but I received therapy, I had medication and it helped. And I also rest, so it would help. Now, in May of 2019, it was different. Something changed. The pain was different and sometimes when I felt that kind of pain, I would go to the nurses office.

Q And can you describe how the pain was different in the spring of 2019?

A You mean to compare it to the pain that I had in 2017; right?

Q Yes.

A In 2017, I was in pain, but that pain I could tolerate. It was kind of superficial I would say. Now in 2019, nothing helped, no medication or rest or anything like that. And the pain was different. It was just deep, penetrating, piercing pain that affected my muscles, my tendons, and my bones. It was something like I have never felt before. I would even say it was insufferable. I couldn't even sleep.

Q And before you saw Dr. Arnold, in the past in 2017 and 2018, had you ever seen a specialist for your shoulder before?

A No. Just when the company took me to the occupational clinic and that was 2017. But they said and the studies that they made; I think they said it was just arthritis.

The respondent introduced several medical records dating from March 2017 to July 2017 that primarily relate to the claimant's right shoulder difficulties. It appears that the claimant's complaints are nearly identical to the difficulties the claimant continues to complain of in the prosecution of her current workers' compensation claim. The claimant was also participating in nearly identical job functions as stated in her direct examination testimony as follows:

Q Are you at the same sheeter machine you were at before your surgery?

A Yes. I just wanted to, you know, make clear in 2017, the machine was different. They are similar, but they are different.

Q Okay. In what way are they different?

A The mechanism changed a little bit.

In Dr. Arnold's medical report dated August 16, 2019, he in part states the following found at Claimant's Exhibit 1, Page 4:

ASSESSMENT/PLAN:

1. Assessment Patient Plan:

Pain in left shoulder (M25.512).

55 yo F presents as New Patient with Bilateral Shoulder Pain secondary to Bilateral Rotator Cuff Tendinitis and Shoulder Impingement – Patient notes that she has pain with her shoulder for over a year but notes that her shoulder issues have worsened over the last several weeks without injury. She has been treating her shoulder pain with cortisone injection in the past on the right shoulder that only helped temporarily and has done physical therapy about 2 years ago. She notes that she is currently taking Naproxen, and this is not helping a lot.

A medical report authored by Dr. Arnold on August 27, 2019 in part states the following found at Claimant's Exhibit 1, Pages 11-12:

ASSESSMENT/PLAN:

Patient Plan: 55yo F present for recheck of right shoulder pain MRI follow up. Patient notes that she has pain with her shoulders for over a year but notes that her shoulder issues have worsened over the last several weeks without injury. She has been treating her shoulder pain with cortisone injection in the past on the right shoulder that only helped temporarily and has done physical therapy about 2 years ago. She notes that she is currently taking Naproxen, and this is not helping a lot.

MRI reviewed by Dr. Arnold with patient which shows complete tear of RC with atrophy.

She has tried and failed: 1) rest; 2) CSI; 3) NSAIDs; and 4) formal PT.

Options discussed: 1) do nothing; 2) formal pt; 3) CSI; and 4) Surgery.

Patient is young and active and would like to move forward with right shoulder surgery.

The claimant's deposition was introduced in this matter. During that deposition, the claimant was asked by the respondent's attorney about her condition between her treatment in 2017 and 2019 as follows:

Q So between the time you saw Dr. Turner and you saw Dr. Arnold, did your shoulders and neck and arms ever stop hurting?

A No. What's more, I felt worse each time.

Q Back when you saw Dr. Turner, did he take you off work?

A Yes.

Q How long were you off work?

A One week.

Q Between March 2017 until you saw Dr. Arnold in 2019, did you miss more than that one week of work?

A Yes.

It is the claimant's burden to prove that she sustained compensable gradual onset injuries on or about September 13, 2019 to her right shoulder, neck, right hand, and right wrist. The claimant is unable to prove the existence of objective medical findings involving her neck, right hand and right wrist. As such, the claimant is unable to prove by a preponderance of the evidence that she suffered compensable gradual onset injuries to those body parts.

Both the claimant's August 22, 2019 MRI report and September 13, 2019 operative report show objective medical findings involving the claimant's right shoulder. However, the claimant must also show a causal connection between those objective medical findings and the gradual onset right shoulder injury she alleges. Here, the claimant's difficulties began back in 2017 and have continued into 2019 regarding her right shoulder. Dr. Arnold's decision to perform surgery on the claimant was at least in part based on the failed treatment the claimant received due to her right shoulder complaints in 2017, not 2019.

The claimant has failed to prove by a preponderance of the evidence that she suffered a compensable gradual onset right shoulder injury on or about September 13, 2019.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on March 17, 2020 and contained in a Pre-hearing Order filed that same date are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that she sustained gradual onset compensable injuries on or about September 13, 2019 to her right shoulder, neck, right hand and right wrist.

3. The claimant has failed to prove by a preponderance of the evidence that she is entitled to medical treatment in this matter.

4. The claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 13, 2019 to April 13, 2020.

5. The claimant has failed to prove by a preponderance of the evidence that her attorney is entitled to an attorney's fee in this matter.

ORDER

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

IT IS SO ORDERED.

ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE