

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H206773

ENNELIDA ZAPET, Employee	CLAIMANT
TYSON POULTRY, Employer	RESPONDENT
TYNET, Carrier	RESPONDENT

OPINION FILED JULY 10, 2023

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 JEREMY SWEARINGEN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 11, 2023, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 28, 2022, and a Pre-hearing Order was filed on November 29, 2022. 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 relationship of employee-employer-carrier existed between the parties on October 1, 2021.
3. The respondents have controverted the claim in its entirety.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant sustained a compensable injury to her bilateral hands and wrists on or about October 1, 2021.

2. Whether Claimant is entitled to medical treatment for her bilateral hand and wrist injury.

3. Respondents raise lack of notice as a defense in that the September 20, 2022, AR-C was the first notice of any alleged work-related injury.

Claimant's contentions are:

“Claimant contends she is entitled to treatment for her hands and wrists.”

Respondents' contentions are:

“A. Respondent contends that the Claimant has offered no proof at all of her alleged bilateral CTS condition, or that such alleged condition was caused by her work. The Claimant has offered no objective medical findings of bilateral CTS, and the Claimant has not shared any medical records with Respondent which support such a diagnosis.

B. Respondent has no notice of any alleged bilateral CTS condition being claimed as work-related until the Claimant's counsel submitted a prehearing filing and AR-C on 9-20-22, not received by Respondent until 9-23-22 or 9-26-22. Thus, even if the claim were somehow found to be compensable, Respondent would not be liable for any benefits incurred or accrued before the date such notice was received.”

The claimant in this matter is a 50-year-old female who alleges to have sustained bilateral hand and wrist injuries in the form of carpal tunnel syndrome on or about October 1, 2021. The claimant was at the time of her alleged injuries, a production line worker for the respondent in one of its chicken processing facilities. The claimant had worked for the respondent processing chickens for multiple years. At the hearing the claimant gave direct examination testimony about her alleged injuries and her reporting of those injuries as follows:

Q And in October of 2021, what problems did you start having with your hands?

A I couldn't keep pulling and cutting with a knife. It was like the strength in my hands was gone.

Q And did you have any other symptoms in your hands at that time other than the loss of strength?

A My hands were numb, going to sleep.

Q Did you report those problems to the Tyson nurse?

A Yes.

Q And did you also report problems having pain in your arms and shoulders?

A Yes.

Q Did the nurse do anything for you to help your problems with your hands?

A She just put a bag of cold water on me.

Q So how often would you go in for the treatment, the cold treatment?

A They told me that I could come in every day for that until I saw a doctor.

Q And did they ever send you to a doctor?

A No.

Q So what did you do?

A They just kept me working on the same line.

Q And what did you do about seeing a doctor when Tyson did not send you?

A I kept asking them. I insisted and they just kept saying that they couldn't get an appointment; that the doctor wasn't answering.

Q So at some point did you go to a doctor on your own?

A Yes.

Q And where did you first go for treatment?

A The hospital in Berryville in February of 2022.

The respondent in this matter introduced a document found at Respondents' Exhibit 2, page 4 that is titled "Team Member Statement of Injury/Illness." That statement was signed by the claimant and provides information about her reporting of an injury on October 2, 2021. The questions on the form are typed, but the responses are filled out in handwriting. I note that the handwriting is in English, and that the claimant does not write or speak English fluently. It was her testimony that she did not write the words on this statement. One of the questions asked states, "Describe fully how the injury happened (or what your pain or problem is)?" The handwritten response is, "As I was pulling breasts I got pain in both shoulders but especially the left shoulder." Another question on the form asks, "What part of your body was injured?" The handwritten portion states, "Left shoulder/right shoulder." There are two images of the human form addressing the locations of the claimant's pain or problems. There are marks over what I would term as the shoulder and a portion of the neck area of the claimant. That report also indicates the injury was reported on October 2, 2021, and that the claimant reported it to a supervisor. On that same day, October 2, 2021, a Form AR-N was at least partially filled in. I'll note that on this Form AR-N the questions are printed in English, however, the responses to two of the questions are answered in Spanish. Following is a portion of the hearing transcript at which time the interpreter in this matter interprets those English questions and Spanish answers on this AR-N found at Respondents Exhibit 2, page 2, as follows:

THE INTERPRETER: This section right here?

THE COURT: Yes, ma'am.

THE INTERPRETER: Okay. The question is, "What part of your body was injured?" And the handwritten response is, "Both shoulders, right and left."

And then the form asks, "Briefly discuss the cause of injury." And again, the handwritten response is, "When I pull down the breasts."

Nursing notes from the respondent/employer were also introduced into evidence. Some nursing notes were introduced into evidence by the respondent, others by the claimant. At Claimant's Exhibit 2, page 1, there is a nursing note from October 5, 2021. That note states:

TM to OHS for bilateral shoulder pain. Pain level today is 4/10. Cold applied to both shoulders for 15 minutes with pain level now 2/10. TM returned to full duty and will return 10/6/21 @ 0900 or sooner if needed. TM denies need of biofreeze or oral meds at this time.

The respondent also introduced a Team Member Statement dated January 12, 2022. That Team Member Statement is found at Respondents' Exhibit 2, page 3. Again, all the questions that are printed are asked in English and the responses are handwritten in English. A question on the form asks, "Describe in detail the job you were doing at the time of the injury (or what is causing your pain or problem)?" The handwritten response is, "Pulling breast." Another question asks, "Describe fully how the injury happened (or what your pain or problem is)?" The handwritten response is, "The line is very fast." Another question asks, "What machines, tools, substances and/or objects were involved in the injury (or in your pain or problem)?" The handwritten response is, "Pulls with hands." There are also two images of the human form addressing the locations of the claimant's pain or problems. On this form there are Xs made on the claimant's shoulders. This document was signed by the claimant in this matter. A Form AR-

N was also completed on January 12, 2022. That form is an English form. The printed questions are in English, and the handwritten responses are in English, as well. This form was signed by the claimant. It appears that the claimant's signature is dated January 13, 2022, while the date the employer was notified of the accident is January 12, 2022. Questions indicate, "What part of your body was injured?" The handwritten response, "Both shoulders." Another question, "Briefly discuss the cause of injury." The handwritten response, "Pulling breast, strained shoulders." A nursing note is also found at Claimant's Exhibit 2, page 1, regarding that same January 12, 2022, date. Following is a portion of that report:

Subjective: TM reports to OHS complaining of pain in bilateral shoulders. Pain level 9/10.

Objective: TM arrives to OHS with SV Ken Kerner complaining of bilateral shoulder pain.

Assessment: No swelling, redness or discoloration noted. TM exhibits full range of motion.

Plan: Cold application x 15 minutes 2-3 times daily; return to regular duties; return to OHS 12/13/2022 at start of shift for follow up.

Intervention: Cold application x 15 minutes to bilateral shoulders.

Evaluation: TM returns to regular duties. TM to return to OHS 12/13/22 prior to shift start.

It appears from those nursing notes that the claimant continued to return to the nursing station on January 18, 2022, January 20, 2022, and then on January 24, 2022, the nursing note states, "The claimant is no longer having shoulder pain." The claimant was released to return as needed. On February 22, 2022, the claimant is again seen at the respondent's nursing station. Following is a portion of that record, found at Claimant's Exhibit 2, page 1, and continued onto page 2:

Subjective: TM to OHS with SV K. Kerner with complaint of pain in her upper back while pulling breasts. TM Has had problems with her upper back and left shoulder before since 2019. TM reports that it started hurting when she had to cover her co worker while she was on break. Pain level 4/10. TM wishes to sign Declination of treatment and go to her own Dr.

Objective: Pain from the base of the neck down to mid back. Pain moves to left shoulder at times.

Assessment: TM with full ROM.

Plan: TM to return as needed.

Intervention: No intervention.

Evaluation: TM signed Statement of declination and left in care of SV K. Kerner.

It is the claimant's testimony that she was unable to get the treatment she needed from the respondent and that the claimant sought treatment on her own. Apparently, the claimant was seen at the Berryville Hospital Emergency Department on February 23, 2022. I note that there is no medical record regarding that visit other than a work restriction note found at Claimant's Exhibit 1, page 2. That note does not indicate what body part was injured or restricted. It does say, in a portion of that report, "Work restrictions (if applicable); left, right." That restriction document also limits the claimant to 5 lbs. of lifting in her upper extremities for one week and the claimant was released to return to work on February 28, 2022.

The first medical record that we have, other than the respondent's nursing notes and the restriction note from the Berryville Hospital Emergency Department, is a Mercy Clinic of Berryville medical record at which time the claimant was seen by Dr. Jonathan Fausett. Following is a portion of that medical record:

48 y.o. female
A/P

Neck pain with carpal tunnel symptoms
-Hxn of breast cancer with almost a year since PET scan and poor compliance with tamoxifen concerning for bone met. Will do MRI.
-Consider EMG
-provided with wrist splints
-tamoxifen used inconsistently but can contribute to numbness
-encouraged to consider nerve health based vitamins like B vitamins and folate
-has had an abnormal TSH in past, will repeat
-cbc to check for anemia
-nerve impingement most likely diagnosis due to manner of work but at risk of other physiological causes

HPI

48 y.o. female presenting for follow up ER visit for neck pain. Subjective weakness reported at the time but normal strength on exam. No red flag symptoms noted at the time. Overall symptoms progressing since October. “Fire and numbness” in hands. Worse when pulling downward at work. Right hand dominant.

Continues to be obese with weight similar to previous. Does have hxn of breast cancer. Last PET early last year. Still on tamoxifen. No chemo txn. Periodic use of tamoxifen, symptoms predate most recent resuming of meds.

Denies fever, chills, bowel/bladder incontinence.

The claimant had previously dealt with breast cancer. However, Dr. Fausett’s medical record does indicate neck pain with carpal tunnel symptoms at this time. It should be noted that later in the medical records it is determined that the claimant’s current symptomology does not involve a recurrence or the existence of cancer. However, medical records indicate that was of great concern when the claimant was originally being diagnosed.

The claimant is again seen by Dr. Fausett on May 5, 2022. Following is a portion of that medical record:

A/P
48 y.o. female

Neck pain with radiation to hands

-MRI pending. Biggest concern is potential for bone metastasis since hxn of breast cancer and poor compliance with tamoxifen.

-didn't respond to wrist splints

-consider EMG if MRI equivocal

-gabapentin for "burning" type pain

HPI:

48 y.o. female

CC

Chronic neck pain

-does have active job requiring bending over and craning neck.

Hxn of breast cancer with poor compliance with tamoxifen, MRI pending to eval for spinal stenosis or bone mets. Seen for exacerbation by ARPN and given tramadol at that time. Some benefit noted from txn. Continues to have "Burning" in shoulders and hands and pain in neck. Some subjective fever and chills.

The claimant during this period of time had been restricted from work and Dr. Fausett completed a Disability and FMLA Medical Certification for the claimant. Those certifications are found at Claimant's Exhibit 1, pages 3-8. I will note that all of these documents are very similar in nature and appear just to extend timeframes out. Looking at the document at Claimant's Exhibit 1, page 3, it appears that the doctor has indicated both illness and injury, and unknown as to whether work-related in answer to "Which of the following describes your patient's medical condition (please check all that apply)." I'll also note that the treatment plan provided on this form is "advanced imaging, wrists splints, TSH/CBC/CMP." Some places where you would expect answers, such as "What are your patient's restrictions?" are left blank, and the question as to "What is the medical condition that is causing your patient not to be able to work?" is also left blank. Diagnostic codes are available on this document, but it in and of itself, does not explain what the claimant's condition is.

The claimant was seen by Dr. Miles Johnson at Northwest Arkansas EMG Clinic to undergo a neurological evaluation regarding her complaints of neck pain, bilateral hand pain, numbness, and tingling. Following is a portion of that medical record:

HISTORY OF PRESENT ILLNESS: Patient is a 48-year-old right-handed female with a 5-month history of neck pain that radiates into the bilateral upper extremities. She has pain, numbness and tingling in the hands and first through fifth digits bilaterally. There is some grip weakness. Symptoms are often worse at night or with repetitive activity. Some improvement with shaking the extremities. Patient has been seen by Dr. Fausett and is referred for electrodiagnostic testing of the bilateral upper extremities.

SUMMARY: Median motor distal latencies are prolonged bilaterally, right worse than left. Amplitudes decreased on the right. Ulnar motor study is normal bilaterally. Right medial orthodromic latency difference is abnormal. Median amplitude is decreased. Radial sensory response is normal bilaterally. EMG examination of the bilateral upper extremities revealed reduced recruitment in the APB bilaterally.

ASSESSMENT: Bilateral carpal tunnel syndrome. This is severe on the right and moderately severe on the left. There is no electrodiagnostic evidence of radiculopathy, plexopathy, generalized peripheral neuropathy or other peripheral nerve entrapment syndromes.

PLAN: Patient has been counseled regarding the above findings and has been instructed to schedule a followup appointment in your office for further evaluation in order to utilize these results in the treatment/management of their condition. Would recommend evaluation for bilateral carpal tunnel releases beginning on the right.

The claimant is eventually seen on February 22, 2023, by Dr. Andreas Chen at Mercy Clinic Northwest Arkansas. Following is a portion of that medical record.

CHIEF COMPLAINT: Bilateral hand numbness and tingling.

HISTORY OF PRESENT ILLNESS: A 49-year old right-hand dominant female, who works at Tyson, who presents today for

evaluation of her bilateral upper extremities. She states that she has previously seen Dr. Sidani in Harrison and was told that she needed to be on workman's comp for her bilateral upper extremity tingling. She states that it has been tingling for greater than 1 year. It bothers her when she is at work. She does not sleep very well because of her tingling. It worsens whenever she drives. She states that it happens in her whole hand. It gets worse whenever she is doing laundry and her dishes.

She initially states that she had a workman's compensation application open for this; however, today's visit is not under workmen's compensation. I told her that if she wants, we can put it under workmen's compensation, but she would have to make another visit. If she wishes to proceed without workmen's compensation, we will even charge her private insurance. We will be unable to get her from private insurance to workmen's comp if she has not rescheduled her visit today. She wishes to do this under private insurance since it has been bothering her.

ASSESSMENT: A 49-year-old female with bilateral carpal tunnel syndrome.

PLAN: This was confirmed under physical examination electrodiagnostic testing. She has worn braces and it has not been successful to get rid of the carpal tunnel completely. At this point, I would recommend carpal tunnel releases. Risks and benefits of the surgery were discussed with the patient in great detail. The patient has agreed with written informed consent. We will do it at the next available date under general anesthesia.

On March 1, 2023, the claimant underwent bilateral carpal tunnel release. The operative report is found at Claimant's Exhibit 1, pages 55-56.

It is the claimant's burden to prove that she sustained compensable bilateral hand and wrist injuries in the form of carpal tunnel syndrome. In order to do so she must be able to prove the existence of objective medical findings. The claimant is able to do so from her June 9, 2022, EMG report by Dr. Johnson which found bilateral carpal tunnel syndrome, and Dr. Chen's March 1, 2023, operative report.

The claimant must also prove a causal connection between those objective medical findings and the injuries she alleges at work. The claimant was certainly using her bilateral upper extremities vigorously in her work using her hands to remove chicken breasts from bone in a line production. The claimant's Team Member Statement of Injury/Illness, AR-N forms and respondent's nursing notes are of concern as it appears the claimant's complaints were consistently in her bilateral upper extremities but focused only on her shoulders bilaterally. However, they also indicate that injury occurred "while pulling breasts." The claimant was asked on cross examination about her complaints being of her bilateral shoulders and not her hands and wrists bilaterally as follows:

Q When you reported your problems to Tyson in October of 2021, did you indicate to them only that you had problems with your shoulders and not your hands?

A Well, they don't have anyone there to translate, so I could just make signals like this (indicating).

MR. SWEARINGEN: May I approach, Judge?

THE COURT: You may.

Q [BY MR. SWEARINGEN]: Ma'am, I am showing you a document which is a Team Member Statement of Injury or Illness. Is that your signature down on the bottom of this document?

A Yes, but my supervisor was the one that filled all of that out.

Q Did you draw on the figure here where your symptoms were located in both shoulders?

A They are the ones that did that. I was the one that was making a sign like this (indicating), meaning my hands.

Q When you signed the document, if you felt like you had symptoms in your hands, would you not indicate, even on the drawing, some kind of problems in either hand?

A Well, the thing was that my supervisor was trying to hurry me back to the line. They were trying to do this very quickly and hurry me back, so I didn't have time to really look at it. Plus, I was in pain. I just wanted to go to the doctor.

Q Ma'am, I am showing you another document dated it looks like January 12th of 2022. Is this your signature on this document?

A Yes.

Q And this indicates that you reported the problems January the 12th of 2022?

A Yes.

MS. BROOKS: Excuse me, Jeremy, is this in evidence?

MR. SWEARINGEN: No, I didn't introduce this document. It was exchanged in discovery.

MS. BROOKS: I didn't know you were going to be questioning her off of that. I have nothing to reference.

MR. SWEARINGEN: I can give you a copy of it. You have a copy, though.

Q [BY MR. SWEARINGEN]: Ma'am, on this document dated January the 12th of 2022, did you mark that your problems were in both shoulders, but not in your hands?

A Well, I was in pain. My whole body was in pain, this whole area (indicating). You just don't know how much pain I was in. And I told them that, but they just marked that.

Q But yet you still signed it?

A Yes, because they always said, "Just sign it quickly. Be quick about it so we can get back to the line."

Q I am showing you another document which is a Form N dated October 2, 2021. And is this your handwriting?

A Yes.

Q And I don't speak Spanish but it looks like the – and the form is in Spanish; is that correct?

A Yes.

Q And where it asks about what body part was injured, it looks like it says, “Los ombros derecho y izquierdo,” which in my broken Spanish sounds like the shoulders, right and left. Is that correct?

A Yes, but for me shoulders means the whole arm.

Q [BY MR. SWEARINGEN:] So, ma'am, is it your testimony that when you wrote shoulders, you meant to include your entire arms on both sides?

A Yes, the whole arm.

The claimant's first actual medical record that recounts symptomology and possible diagnosis is the claimant's visit with Dr. Fausett, who speaks Spanish, on March 16, 2022, and that record reflects “neck pain with carpal tunnel symptoms.” It appears that when the claimant made complaints to the respondent something was lost in translation or understanding of her complaints. The claimant was “pulling breasts” when she was injured, which was communicated but her complaints were not understood or simply ignored. Dr. Fausett, at his first visit with the claimant, was able to understand and document the claimant's bilateral carpal tunnel symptoms that were later proven correct through diagnostic testing and surgical intervention. Here, the claimant is able to prove a causal connection between her work “pulling breasts” and her objective medical findings. The claimant able to prove by a preponderance of the evidence that she sustained compensable bilateral carpal tunnel syndrome to her hands and wrists.

The respondent in this matter has raised the Notice Defense in that the September 20, 2022, AR-C filed by the claimant was the first notice of any alleged work-related injury. The

claimant clearly alleged in documents the respondent provided to her that she was injured at work “pulling breasts” as early as October 2, 2021. As stated above in the discussion of causation, the claimant’s lack of English speaking and writing ability caused confusion in the understanding of the claimant’s complaints. When paired with a Spanish speaking medical provider, the claimant in her first visit described bilateral carpal tunnel syndrome symptoms. I find that the respondent was put on notice at that time, in October 2021, when the claimant alleged injury “pulling breasts.” While diagnosis of bilateral carpal tunnel syndrome took time, which was lengthened and complicated by the claimant’s previous breast cancer diagnosis, it did immediately get underway when communication was clear. The respondent was placed in a position to have reasonable notice when the claimant explained or communicated in the only manner she could. I find the claimant’s testimony credible that she did as much.

The claimant has asked the Commission to determine if she is entitled to medical treatment for her bilateral carpal tunnel syndrome. The claimant is entitled to reasonable and necessary medical treatment for her compensable bilateral carpal tunnel syndrome and its diagnosis. The claimant is also entitled to reimbursement of out-of-pocket expenses for that reasonable and necessary medical treatment.

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 November 28, 2022, and contained in a Pre-hearing Order filed November 29, 2022, are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her bilateral hands and wrists on or about October 1, 2021; that injury specifically being in the form of bilateral carpal tunnel syndrome.

3. The claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment for her compensable bilateral carpal tunnel syndrome.

4. The respondent is unable to prove the lack of notice defense in this matter.

ORDER

The respondents shall pay for the reasonable and necessary medical treatment regarding the claimant's compensable bilateral carpal tunnel syndrome. The respondents shall also reimburse the claimant for any out-of-pocket medical expenses regarding that reasonable and necessary medical treatment.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**