

2006

Rivers West Apparel and/or Workers Compensation Fund v. Utah Labor Commission and/or Darla Basso : Brief of Petitioner

Utah Court of Appeals

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Hans M. Scheffler; attorney for petitioners.

Dori Petersen, Alan Hennebold, Darla Basso; attorney for respondent.

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IN THE UTAH COURT OF APPEALS

RIVERS WEST APPAREL and/or,)
WORKERS COMPENSATION FUND,)
)
Petitioners,)
)
v)
)
UTAH LABOR COMMISSION and/or)
DARLA BASSO,)
)
Respondents.)
)

Case No. 20060103-CA

BRIEF OF PETITIONER

PETITION FOR REVIEW OF AN ORDER OF THE UTAH LABOR COMMISSION

Hans M. Scheffler
Workers Compensation Fund
392 East 6400 South
Salt Lake City, Utah 84107
Attorney for Petitioners

Dori Petersen, Esq.
257 East 200 South, Suite 800
Salt Lake City, Utah 84111-2048
Attorney for Koret of California/
Liberty Mutual

Alan Hennebold, Esq.
Utah Labor Commission
160 East 300 South
Salt Lake City, Utah 84111

Darla Basso
550 So. Rose Avenue
Price, Utah 84501

TABLE OF AUTHORITIES

Cases

Adams v. Board of Review of Industrial Commission, 821 P.2d 1 (Ut App. 1991)..... 4, 22

King v. Industrial Commission, 850 P.2d 1281 (Ut. App. 1993)..... 4

Stoker v. Workers Compensation Fund, 889 P.2d 409 (Utah 1994)..... 17

Torrey Pines Bank v. Superior Court of San Diego County, 216 Cal. App. 3d 813 (1989).... 17

Statutes

Utah Code Annotated § 34A-2-801(8) (a) 4

Utah Code Annotated § 34A-3-108 4, 5, 9, 10, 18, 19, 20

Utah Code Annotated § 63-46b-16 4

Utah Code Annotated § 78-2a-3(2) (a) 4

Utah Code Annotated §34A-2-420 17

JURISDICTION OF THE COURT OF APPEALS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Annotated § 34A-2-801(8) (a), Utah Code Annotated § 63-46b-16 and Utah Code Annotated § 78-2a-3(2) (a).

ISSUES AND STANDARD OF REVIEW

The issues presented and the applicable standard for review in this matter are as follows:

a. Did the Labor Commission have jurisdiction to enter the January 5, 2006, Order? This is a question of law which is reviewed for correctness. *King v. Industrial Commission*, 850 P.2d 1281 (Ut. App. 1993).

b. Were Basso's claims against the Petitioners barred by Utah Code Annotated § 34A-3-108? The resolution of this issue requires the application of law which is reviewed for correctness. *King v. Industrial Commission*, 850 P.2d 1281 (Ut. App. 1993).

c. Was the Labor Commission's award of benefits to Basso an arbitrary and capricious abuse of discretion? In resolving this issue, no deference is given to the Labor Commission. *Adams v. Board of Review of Industrial Commission*, 821 P.2d 1 (Ut App. 1991).

DETERMINATIVE LAW

Utah Code Ann. § 34A-3-108:

- (1) Any employee sustaining an occupational disease, as defined in this chapter, arising out of and in the course of employment shall provide notification to the employee's

employer promptly of the occupational disease. If the employee is unable to provide notification, the employee's next-of-kin or attorney may provide notification of the occupational disease to the employee's employer.

(2)(a) Any employee who fails to notify the employee's employer or the division within 180 days after the cause of action arises is barred from any claim of benefits arising from the occupational disease.

(b) The cause of action is considered to arise on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known, that the occupational disease was caused by employment.

STATEMENT OF THE CASE

The above-captioned claim came on for hearing on December 13, 2001. (R.105). With respect to the claims being asserted against these Petitioners, Basso was alleging entitlement to certain benefits arising out of her employment with Rivers West for whom she worked from March 13, 1999, through February 26, 2000, and again from May 1, 2000, through October 20, 2000. (R.63). At the time, the Petitioners denied liability based upon the fact that the Application for Hearing filed by the Basso on August 9, 2001, was the first notice they had received of this claim. (R.66). Thus, the Petitioners argue that the claim asserted against them by Basso was barred under Utah Code Annotated §34A-3-108. (R.72-73). On April 5, 2002, Judge Hann entered her Findings of Fact and Interim Order wherein she rejected the Petitioners' assertion that the claim was barred by Utah Code Annotated §34A-3-108 and referred the matter to a medical panel. (R.105-111).

The medical panel report was issued on July 5, 2002. (R.119-126). In its report, the medical panel concluded that there was no medically demonstrable causal connection between Basso's current diagnosis and her work at Rivers West from March 1999 through October 2000. (R.119). The medical panel stated that the alleged industrial exposure at Rivers West did not significantly contribute to Basso's medical condition. (R.120). The medical panel noted that Basso had virtually all symptoms, including the left upper extremity symptoms, prior to her employment with Rivers West. (R.120). In other words, the medical panel concluded that Basso's employment at Rivers West did not contribute to her ongoing medical problems.

On February 12, 2003, Judge Hann issued her Findings of Fact, Conclusions of Law and Order. (R.207-213). In her discussion and analysis (on page 5 of the February 12, 2003, Findings), Judge Hann properly noted that, "[t]here is not a preponderance of medical evidence to support a finding that a medical cause connection exists between the claimant's condition and her work activities at Rivers West." (R.211). Judge Hann continued by stating that, "The evidence supporting this claim was thin at best when referred to the medical panel for evaluation. ... The panel and the preponderance of the medical evidence of the record did not support a finding that Basso's activity at Rivers West had any contribution to the claimant's condition, therefore, that claim is dismissed." (R.211). Accordingly, Judge Hann dismissed Basso's claim against the Petitioners with prejudice.

Basso, through her attorney, filed a Motion for Review. (R.236-242). In her Motion for Review, Basso did not challenge the dismissal with prejudice of her claim

against the Petitioners. Instead, Basso challenged Judge Hann's award of temporary total disability compensation benefits against Koret of California and Liberty Mutual. (R.242). Koret of California and Liberty Mutual also filed a Motion for Review. (R.218-231). Their Motion for Review was based upon a belief that the medical panel made findings which were improper and that Judge Hann should have rejected the report of the medical panel. (R.230). Koret of California and Liberty Mutual did not challenge the medical panel's conclusion that there was not a medical causal relationship between the Petitioner's condition and her employment at Rivers West. (R.230).

On September 30, 2003, Commissioner Ellertson entered an order granting the Motion of Koret of California and Liberty Mutual, and remanding the matter to Judge Hann for further proceedings. (R.293-294). Specifically, Judge Hann was directed to make additional findings concerning the awkward neck position which Basso alleged to have assumed in performing her work at Koret of California. (R.294). The Order Granting Motion for Review did not remand or overrule Judge Hann's dismissal with prejudice of the claims asserted by Basso against the Petitioners.

On November 17, 2003, the Petitioners filed a Motion to Dismiss. (R.340-342). That Motion to Dismiss was based upon the fact that Judge Hann's dismissal with prejudice of Basso's claims against the Petitioners had not been challenged nor reversed by the Commissioner. The Motion to Dismiss was also based upon the fact that Basso was not asserting any new claim against the Petitioners nor did Basso present any new medical evidence that might support a claim against the Petitioners. (R.342).

The Petitioners' Motion to Dismiss was denied by Judge Hann and a second hearing was held on January 8, 2004. (R.353-355). At the conclusion of the second hearing, the matter was referred back to the medical panel for clarification. (R.355). Dr. Holmes, the Chairman of the Medical Panel, issued his second report on September 16, 2004. The medical panel was asked whether the evidence received at the second hearing altered its opinion expressed in its July 5, 2002, report. (R.119-126), (R.357-358). In response to that question, the medical panel wrote, "[t]his evidence does not significantly change my overall opinion." (R.362). The medical panel was also asked specific questions concerning Basso's neck posture. (R.358). In response to that, the medical panel stated, "[i]t is my opinion, based upon reasonable medical probability, that the neck posture and hand/arm repetitive movements she described are partially contributory to her neck and upper extremity complaints that occurred beginning in 1996 or 1997 and which continued while working." (R.362). In other words, the genesis of Basso's problems related back to her employment with Koret of California. The medical panel was also asked to address specific questions relating Basso's current symptoms to awkward neck posture versus the injuries sustained in February 1997, while working with Koret of California. (R.362). In response to that question, the medical panel stated, "[o]ther than temporary symptom exacerbation, I do not believe either the February 24, 1997 or February 28, 1997 incidents caused any significant portion of her ongoing/current problems." (R.362). The medical panel in its discussion of this claim again affirmed its prior conclusion when it stated, "[a]s was stated in my previous report of July 5, 2002, it was and still is my opinion that essentially all of this pathology relating

to the various symptoms of which Basso was complaining, and essentially all these symptoms had developed prior to her work at Rivers West.” (R.364). At no time in the original medical panel report nor the September 16, 2004, report does the medical panel attribute or apportion any of Basso’s medical problems or conditions to her employment at Rivers West. Furthermore, the medical panel in its September 16, 2004, report does not indicate that Basso was temporarily disabled from January 26, 2000, through February 27, 2000, and from October 20, 2000, through December 20, 2000. Nonetheless, Judge Hann ordered Rivers West to pay temporary total disability compensation benefits to Basso for those periods. (R.375).

STATEMENT OF FACTS

1. Basso was employed by Rivers West from March 13, 1999, through February 26, 2000, and from May 1, 2000, through October 20, 2000. (R.207).

2. Basso voluntarily terminated her employment with Rivers West on or about October 20, 2000. (R.209).

3. The Petitioners did not receive notice of Basso’s claim until she filed her “Amended Occupational Disease Claim” on August 9, 2001, wherein she asserted entitlement to benefits under the Utah Occupational Disease Act. (R.72).

4. Basso failed to provide the Petitioners notice in accordance with Utah Code Annotated §34A-3-108. (R.72).

5. The medical panel found no medical causal relationship between Basso’s employment at Rivers West and her ongoing complaints. (R.120 & 364).

6. No party to this claim, (Basso, Koret of California and/or Liberty Mutual) challenged the February 12, 2003, dismissal with prejudice of the occupational disease claim against the Petitioners. (R.218 & 278).

7. The Motion to Dismiss filed on or about November 17, 2003, should have been granted and that the Petitioners should not have remained a party in this claim after the February 12, 2003, Order of Dismissal with Prejudice was entered. (R.340-342).

8. The above-captioned claim came on for hearing on December 13, 2001. (R.105).

9. With respect to the claims being asserted against the Petitioners, Basso was alleging entitlement to certain benefits arising out of her employment with Rivers West for whom she worked from March 13, 1999, through February 26, 2000, and again from May 1, 2000, through October 20, 2000. (RR.119).

10. The Petitioners denied liability based upon the fact that the Application for Hearing filed by Basso was the first notice they had received of her claims. Thus, these Petitioners argue that the claims asserted against them were barred under Utah Code Annotated §34A-3-108. (R.72-73).

11. On April 5, 2002, Judge Hann entered her Findings of Fact and Interim Order wherein she rejected the Petitioners' assertion that the claims were barred by Utah Code Annotated §34A-3-108 and referred the matter to a medical panel. (R.109).

12. The medical panel report was issued on July 5, 2002. In its report, the medical panel concluded that there was not a medically demonstrable causal connection

between Basso's current diagnosis and her work at Rivers West from March, 1999, through October 2000. (R.119).

13. The medical panel stated that the industrial exposure at Rivers West did not significantly contribute to Basso's medical condition. The medical panel noted that Basso had virtually all symptoms, including the left upper extremity symptoms, prior to her employment with Rivers West. (R.120).

14. On February 12, 2003, Judge Hann issued her Findings of Fact, Conclusions of Law and Order. In her discussion and analysis, Judge Hann properly noted that, "[t]here is not a preponderance of medical evidence to support a finding that medical causal connection exists between [Basso's] condition and her work activities at Rivers West." Judge Hann continued by stating that, "The evidence supporting this claim was thin at best when referred to the medical panel for evaluation. ... the panel and the preponderance of the medical evidence of the record did not support a finding that the claimant's activity at Rivers West had any contribution to the claimant's condition, therefore, that claim is dismissed." Accordingly, Judge Hann dismissed Basso's claim against the Petitioners with prejudice. (R.211).

15. After considering several motions for review, the Labor Commission remanded this matter to Judge Hann on September 30, 2003. The Order Granting Motion for Review did not remand or overrule Judge Hann's dismissal with prejudice of the claims Basso was asserting against the Petitioners. (R .293-294).

16. On November 14, 2003, the Petitioners filed a Motion to Dismiss. That Motion to Dismiss was based upon the fact that Judge Hann's dismissal with prejudice of

the Basso's claims against the Petitioners had not been challenged nor reversed by the Commissioner. The Motion to Dismiss was also based upon the fact that Basso was not asserting new claims against the Petitioners nor did Basso present any new medical evidence that might support any claim against the Petitioners. (R.342). The Petitioner's Motion to Dismiss was denied by Judge Hann and a second hearing was held on January 8, 2004. (R.353-355).

17. At the conclusion of the second hearing, the matter was referred back to the medical panel for clarification. Dr. Holmes, the Chairman of the Medical Panel, issued his second report on September 16, 2004. In his second report, Dr. Holmes wrote, "[t]his evidence does not significantly change my overall opinion." Dr. Holmes also noted, "[i]t is my opinion, based upon reasonable medical probability, that the neck posture and hand/arm repetitive movements she described are partially contributory to her neck and upper extremity complaints that occurred beginning in 1996 or 1997 and which continued while working." (R.362). In other words, the genesis of Basso's problems related back to her employment at Koret of California.

18. The medical panel was also asked to address the contribution of awkward neck posture versus the February 24, 1997, injury (with Koret of California) or the February 28, 1997, repetitive motion injury (with Koret of California). In response to that question, the medical panel stated, "[o]ther than temporary symptoms exacerbation, I do not believe either the February 24, 1997 or February 18, 1997 incidents caused any significant portion of her ongoing/current problems." (R.362). The medical panel in its discussion of this claim, affirmed its prior conclusion when it stated, "[a]s was stated in

my previous report of July 5, 2002, it was and still is my opinion that essentially all of this pathology relating to the various symptoms of which Basso was complaining, and essentially all these symptoms had developed prior to her work at Rivers West.” (R.364).

19. At no time in the original medical panel report nor the September 6, 2004, report does the medical panel attribute or apportion any of Basso’s medical problems or conditions to her employment at Rivers West. The medical panel in its September 16, 2004, report does not indicate that Basso was temporarily disabled from the January 26, 2000, through February 27, 2000, or from October 20, 2000, through December 20, 2000. (R.362-368). Nonetheless, Judge Hann ordered the Petitioners to pay temporary total disability compensation benefits to Basso for those periods.

20. Judge Hann’s award of temporary total disability benefits to Basso is not supported by any medical evidence and is contrary to the two reports issued by the medical panel. (R.375).

SUMMARY OF ARGUMENT

The Utah Labor Commission improperly assumed jurisdiction over this claim by entering an Order requiring the Petitioners to pay certain benefits to Basso. When Judge Hann issued her original Findings of Fact, Conclusions of Law and Order on February 12, 2003, dismissing the claims against the Petitioners with prejudice, no party to these proceedings appealed that dismissal. While Koret of California/Liberty Mutual and Basso filed their respective Motions for Review, neither challenged the dismissal with prejudice of claims being asserted against the Petitioners. When Commissioner Ellertson

issued an Order remanding the matter to Judge Hann for further proceedings on September 30, 2003, he directed Judge Hann to make specific inquiries concerning Basso's awkward neck position during her employment with Koret of California.

Even if the Labor Commission retained jurisdiction to address claims being asserted by Basso against the Petitioners, an Order requiring the Petitioners to pay any benefits is not supported by any medical evidence. It remains undisputed, as Judge Hann noted in her original Findings of Fact, Conclusions of Law and Order, that there was not a preponderance of medical evidence to support a finding that a medical causal connection exists between Basso's condition and her employment with Rivers West. That medical evidence never changed. Basso, during the second proceeding, did not present additional medical evidence to support a claim against the Petitioners. Furthermore, the medical panel remained consistent in its conclusion that there was no medical connection between Basso's condition and her work activities at Rivers West. Furthermore, there was no medical evidence presented that Basso was temporarily and totally disabled as a result of an occupational exposure caused by her employment at Rivers West from January 26, 2000, through February 27, 2000, or from October 20, 2000, through December 20, 2000. Nonetheless, the Labor Commission ordered the Petitioners to pay temporary total disability benefits to Basso for those times. Ordering the Petitioners to pay benefits to Basso, when there is no medical evidence presented that would justify such an award, is a clear abuse of discretion by the Labor Commission.

ARGUMENT

I.

THE LABOR COMMISSION LACKED JURISDICTION TO ENTER THE APRIL 7, 2005, ORDER DIRECTING THE PETITIONERS TO PAY BENEFITS TO BASSO.

On February 12, 2003, Judge Hann entered an Order dismissing the claims against these Respondents with prejudice. Neither Basso nor Koret of California and/or Liberty Mutual challenged that dismissal. The September 30, 2003, Order Granting Motion for Review and Order of Remand noted that “Koret’s Motion for Review now pending before the Commission restates Koret’s objection to Dr. Holmes’ report” (which was based upon Dr. Holmes making findings regarding Basso’s awkward neck position). Basso’s Motion for Review requested additional temporary total disability compensation.

The Labor Commission dismissed the Petitioners’ argument concerning its lack of jurisdiction by stating that, “These claims arise from complex and interrelated facts regarding Ms. Basso’s medical condition, as well as the nature and duration of her work at Koret and Rivers West. Consequently, all of Ms. Basso’s claims have remained open throughout these adjudicative proceedings.” That is how the Labor Commission articulated and justified its conclusion that it did retain jurisdiction, even though Judge Hann had entered an Order that was not challenged on review dismissing the claims against the Petitioners with prejudice. While it can be acknowledged that Basso did present a complex medical, as well as employment history to simply state that the claims are complex and interrelated facts is an over simplification by the Labor Commission. Basso had filed a unique and distinct claim against Koret of California. In that claim, Basso was asserting entitlement to certain benefits under the Occupational Disease Act

arising out of her employment with Koret of California. Basso then filed a separate and distinct claim for benefits arising out of her employment with Rivers West.

To resolve these distinct and separate claims, the Labor Commission had to evaluate the medical evidence which was presented in support of each of these claims. With respect to the medical evidence presented by Basso in support of her claim for benefits arising out of her employment with Rivers West, there was no such evidence. Judge Hann, nonetheless, referred the matter to a medical panel for review. After the medical panel came back and concluded that Basso's employment at Rivers West did not contribute to her condition, Basso's claim was properly dismissed. In fact, Judge Hann in her February 12, 2003, Order noted, "There is not a preponderance of medical evidence to support a finding that a medical connection exists between [Basso's] condition and her work activities at Rivers West." (R.211). Judge Hann continued in her Order by observing, "The evidence supporting [Basso's] claim was thin at best when referred to the medical panel for evaluation. ... The Panel and the preponderance of the medical evidence of the record did not support a finding that [Basso's] activities at Rivers West had any contribution to [Basso's] condition, therefore, that claim is dismissed." (R.211).

As noted by the Labor Commission in its January 5, 2006, Order denying Motions for Review, Koret filed a Motion for Commission Review of Judge Hann's decision. Specifically, Koret challenged the medical panel's determination that Basso's work at Koret had required awkward neck posture. The Commission then granted Koret's Motion for Review and specifically remanded the matter to Judge Hann for determination of whether Basso's work at Koret, in fact, required awkward neck posture.

Thus, the complexity and interrelated facts which caused the Labor Commission such concern, really were not a concern at all. The Labor Commission in its own Order remanded the case with specific instructions to Judge Hann to make a determination of whether or not Basso's work at Koret required an awkward neck posture. Judge Hann was not instructed by the Labor Commission to revisit Basso's claim against the Petitioners.

Unfortunately, the Utah Appellate courts have not expressly addressed this issue. However, this court can certainly take judicial notice of the fact that a dismissal with prejudice bars any future action on the same subject matter. See *Torrey Pines Bank v. Superior Court of San Diego County*, 216 Cal. App. 3d 813, 818 (1989). In that case, the California Court recognized what presumably is understood by all that a final judgment on the merits in a prior action is conclusive between the same parties in the subsequent action involving the same subject matter. *Res judicata* bars not only the re-opening of the original controversy, but also subsequent litigation of all issues which were or could have been raised in the original suit. The instant case is different from the scenarios addressed by the Utah Supreme Court in *Stoker v. Workers Compensation Fund*, 889 P.2d 409 (Utah 1994). In that case, the injured worker had filed an application with the Labor Commission, had been awarded benefits and then at some future date filed an Application for Hearing with the Utah Labor Commission seeking additional benefits. The court recognized that Utah Code Annotated §34A-2-420 vests the Labor Commission with ongoing jurisdiction to modify or change a former finding or order. That provision, however, applies to cases in which the Labor Commission awards benefits to an injured

worker. Under those circumstances, an injured worker, if able to satisfy the burden of proof, can return and request the Labor Commission to amend or modify its order by awarding additional benefits. However, once a case has been fully litigated by all of the parties, an order has been entered and such an order has become final, the injured worker cannot then return to the Labor Commission asking it to revisit its denial of benefits.

Once a claim has been dismissed with prejudice, the parties as well as the Labor Commission should be able to rely upon such a dismissal without having to address an attempt to relitigate the same issues. A dismissal with prejudice is entered after adjudication on the merits, and the final disposition of all issues, barring the right to bring or maintain an action on the same claim. It is *res judicata* to every matter litigated. As such, the Labor Commission lacked jurisdiction to enter the April 7, 2005, Order directing Petitioners to pay benefits to Basso.

II.

BASSO'S CLAIM IS BARRED BY UTAH CODE ANNOTATED §34A-3-108.

Basso filed a claim against the Respondents seeking entitlement to certain benefits under the Utah Occupational Disease Act. Utah Code Annotated §34A-3-108 requires that an employee sustaining an occupational disease notify the employer or the division within 180 days after cause of action arises. A cause of action arises “on the date the employee first suffered disability from the occupational disease and knew, or in the exercise of reasonable diligence should have known that the occupational disease was caused by employment.”

The Utah Labor Commission concluded that Basso's cause of action arose on October 20, 2000, and denied the Petitioner's Motion to Dismiss as a result. (R.425). Thus, in accordance with Utah Code Annotated §34A-3-108(2), Basso had 180 days from that date to notify Rivers West or the division of her occupational disease. The Labor Commission further concluded that Basso satisfied the notice requirements set forth in §34A-3-108 by notifying the division of her occupational disease claim on November 15, 2000. (R.466, Medical Records Exhibit, Volume I, pg. 56).

Although the Labor Commission does not identify to what document it was referring, Volume I, page 56 of the Medical Records Exhibit is a Physician's Initial Report of Work Injury or Occupational Disease. That form was signed by Dr. Mortensen on November 15, 2000. However, that form identifies Liberty Mutual as the insurance company and identifies Koret of California as Basso's employer. Thus, while the Labor Commission is technically correct that it received notice of a claim on November 15, 2000, that notice relates back to Basso's original March, 1997, claim which arose out of her employment with Koret of California. In other words, neither the division nor the Petitioners received notice of Basso's claim against the Petitioners until Basso filed her Amended Application for Hearing with the Utah Labor Commission on August 9, 2001, (R.66) 297 days after the date of her claim arose. Basso's failure to provide timely notice to the Petitioners or the division was another reason Petitioners denied Basso's claim.

While the Labor Commission was technically accurate in concluding that an injured worker can satisfy the notice requirement by notifying the employer or the division, it is argued that in this case, the injured worker notified the division of an

unrelated claim, with a different employer. Utah Code Annotated §34A-3-108 requires that “Any employee sustained an occupational disease...arising out of and in the course of employment shall provide notification to the employee’s employer.” Stretching the Labor Commission’s interpretation of Section 108 to its logical limit, any employee sustaining an injury as a result of an occupational exposure can give notice concerning one claim against one employer with the division and, thereby, give constructive notice to every other employer with whom such an injured employee might have suffered an injury as a result of an occupational exposure. Clearly, that is an illogical, impractical and probably unconstitutional interpretation. The fact of the matter is that Basso did not notify Rivers West or the division of any occupational exposure arising out of her employment with Rivers West. Basso notified the division of her occupational disease claim arising out of her employment with Koret of California. Regardless of the lack of medical evidence to support Basso’s claim, her failure to notify the Petitioners or the division within 180 days bars any claims she may have against Rivers West.

III.

LABOR COMMISSION ERRED IN AWARDING BASSO TEMPORARY TOTAL DISABILITY BENEFITS.

The Labor Commission erred when it ordered the Petitioners to pay Basso temporary total disability compensation benefits. Quite simply, there is no medical evidence which supports the award of such benefits. In support of its conclusion that Basso is entitled to temporary total disability compensation benefits, the Labor Commission relied upon a comment contained in the second medical panel report. That

comment was, “I conclude that in this unique and particular case, it is medically reasonable to conclude that some neck/shoulder symptomology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurred during the course of her work and a few months thereafter.” (R.368). The Labor Commission’s reliance upon this quote from the second medical panel report is misleading.

The Labor Commission cites the second medical panel report, even though in that report, the medical panel specifically concluded that Basso’s work activities at Rivers West did not aggravate or exacerbate her underlying degenerative condition. The Labor Commission’s reliance upon this portion of the second medical panel report simply ignores what the medical panel had concluded. The medical panel unequivocally concluded that the “new evidence” which was submitted to it did not significantly change its overall opinion. (R.362). In the second medical panel report, Dr. Holmes stated, “As was stated in my previous report of July 5, 2002, it was and still is my opinion that essentially all of this pathology (Basso’s complaints) and essentially all of the symptoms had developed prior to her employment at Rivers West.” (R.364). Dr. Holmes went on to state that, “The concurrent development of symptoms while working at a particular job, in and of itself, does not establish causation.” (R.364).

Nowhere in the supplemental medical panel report dated September 16, 2004, does Dr. Holmes find or conclude that there is a medical causal relationship between Basso’s employment at Rivers West and her current physical problems. It is important to remember that the Labor Commission initially remanded the matter to Judge Hann for

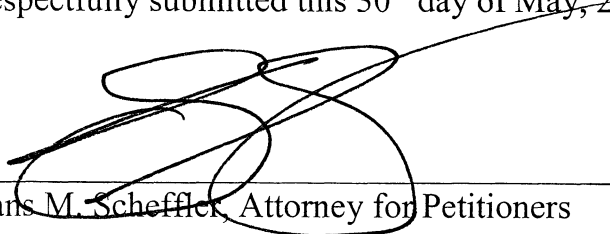
further consideration on September 30, 2003, for the purpose of allowing Koret of California and Basso to respond to the medical panel's initial report. Thus, the Supplemental Medical Panel Report dated September 16, 2004, addresses the awkward neck position Basso complained of while employed by Koret of California.

There is no medical documentation contained in the medical panel report that justifies ordering the Petitioners to pay temporary total disability benefits. Notwithstanding the lack of medical evidence or support from the medical panel, the Labor Commission nonetheless concluded that Basso was entitled to temporary total disability benefits as a result of her employment at Rivers West. There is not a scintilla, much less a preponderance of evidence, which would justify an award of these benefits. In light of the absence of medical documentation, it is respectfully submitted that the Labor Commission abused its discretion by ordering the Petitioners to pay temporary total disability compensation benefits to Basso. *Adams v. Board of Review of Industrial Commission*, 821 P.2d 1 (Ut App. 1991).

CONCLUSION

Based upon the foregoing, the Petitioners respectfully ask this Court to reverse the Utah Labor Commission's Order and Basso's claim for benefits.

Respectfully submitted this 30th day of May, 2006.



Hans M. Scheffler, Attorney for Petitioners

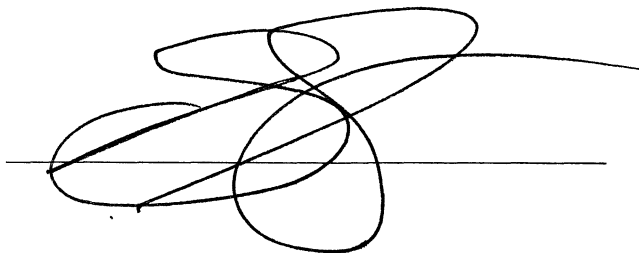
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May 2006, I mailed two true and correct copies of the foregoing Brief of Petitioners, first class, postage prepaid to the following:

Darla Basso
505 So. Rose Avenue
Price, Utah 84501

Dori Peterson, Esq.
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

Alan Hennebold, Esq.
Labor Commission of Utah
160 East 300 South, 3rd Floor
Salt Lake City, Utah 84114

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ADDEDUM

Section 1

February 12, 2003, Findings of Fact, Conclusion of
Law and Order

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
P. O. Box 146615
Salt Lake City, Utah 84114-6615
Telephone: 801-530-6800

DARLA BASSO,	*	FINDINGS OF FACT, CONCLUSIONS OF
Petitioner,	*	LAW & ORDER
	*	
vs.	*	CASE NO. 200117, 20011243, 2001952
	*	
KORET OF CALIFORNIA and/or LIBERTY	*	
MUTUAL INSURANCE; RIVERS WEST	*	Judge Debbie L. Hann
and/or WORKERS COMPENSATION FUND,	*	
Respondents.	*	
	*	
	*	

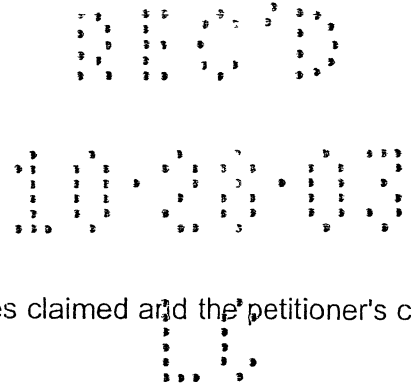
The above entitled matter came on for hearing before Debbie L. Hann, Administrative Law Judge, Utah Labor Commission, on December 13, 2001. Richard Burke, Attorney at Law, represented the petitioner. Dori K. Petersen, Attorney at Law, a represented the respondents Koret of California and Liberty Mutual Insurance. Hans Scheffler, Attorney at Law, represented the respondents, Rivers West and Workers Compensation Fund.

STATEMENT OF THE CASE

On January 8, 2001, the petitioner filed an Application for Hearing alleging a right shoulder, right elbow and neck injury as the result of a February 28, 1997 repetitive motion injury and claiming entitlement to medical expenses, temporary partial compensation, permanent partial compensation, travel expenses and interest. The respondents filed an answer admitting the petitioner suffered an industrial injury via repetitive motion on February 28, 1997 and that temporary total compensation was paid from March 1, 1997 through March 14, 1997 and again from April 16, 1997 through May 11, 1997. The respondents denied the petitioner's current symptoms were medically caused by the 1997 injury and denied that any neck injury was reported in 1997.

On August 9, 2001, the petitioner filed an "Amended Occupational Disease Claim" against Rivers West and Workers Compensation Fund alleging an occupational disease of the neck and upper extremity while employed at River's West from March 13, 1999 through February 26, 2000 and again May 1, 2000 through October 20, 2000. The respondents denied liability for the claim based on Utah Code § 34A-3-108 because the application for hearing was the first notice of the claim. The respondents also requested dismissal because the petitioner filed no supporting medical documentation.

On November 16, 2001, the petitioner filed an amended Application for Hearing alleging a February 14, 1997 injury to her right shoulder, right elbow and neck caused by pulling materials off the conveyor belt while employed by a Koret of California. The respondents again denied liability



because of a lack of medical causation between the injuries claimed and the petitioner's current condition.

Findings of Fact and Interim Order was issued on April 5, 2002 sending the medical aspects of this case to a medical panel. Dr. Edward B. Holmes, M.D., M.P.H. was appointed chairman of the medical panel. Dr. Holmes issued his report on July 5, 2002. The report was forwarded to the parties via certified mail on July 11, 2002. Both the petitioner and the respondent, Koret of California, filed objections to the panel report.

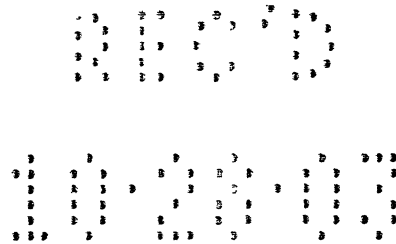
FINDINGS OF FACT

The petitioner worked as a seamstress for Koret of California sewing pockets on to pants using a single and double needle sewing machine. A conveyor belt went past the petitioner's right side with totes containing 20 to 24 pairs of pants and the pockets to be sewn on them. The tote was a plastic box with a handle that the petitioner reached over and took off the conveyor belt using her right arm. The totes came from behind her so as it came into her peripheral vision she would reach across and take it off the belt. The tote weighed 20-40 pounds depending on the size of the pants in the tote.

Sometimes the petitioner's right arm was jerked when taking the tote from the conveyor belt. The conveyor belt was operated by a person who watched the sewing machine operators work and sent the totes to them on the belt operated manually. The conveyor belt slowed so the workers could grab the tote from the line. If an operator missed the tote as it went by then they had to get up and go to the end of the conveyor belt to get it causing a slow down to the individual's work. Because the operators were paid by the piece, having to walk to the end of the belt cost the operator money in lost work. Sometimes, the belt operator would start the belt running again faster before an operator had the chance to get the tote fully off the belt causing the operator's right arm to be jerked hard while holding the tote. The petitioner used her right index and middle finger to grab the totes off of the conveyor although she sometimes used per whole right hand. On February 14, 1997, the petitioner's arm was jerked as she was getting a tote off the conveyor belt.

The petitioner used to her right hand with her palm downward to hold a pocket onto the pant and rotated the pant with her right arm 180 degrees clockwise as she sewed the pocket. She then used her left hand in the same way to sew the left pocket. The petitioner worked 8 hours per days 5 days per week sewing 320 to 360 pairs of pants per day.

On February 28, 1997, the petitioner reported to Castleview Hospital emergency room complaining of right elbow pain from continuous work and was diagnosed as having right lateral epicondylitis. Medical exhibit page 5. On March 1, 1997, the petitioner had a follow-up on her right elbow and shoulder pain and the medical history documents that petitioner has had pain off and on for the last year but now the pain radiates into the petitioner's shoulder at times. Medical exhibit 6-7. The petitioner's pain level was significantly increased over what it had been after February 14, 1997. The petitioner described the pain as more intense than it had been before.



On March 12, 1997, the petitioner followed up with Dr. Mantes and reported a one-year history of discomfort involved in her right elbow and shoulder. Dr. Mantes believed that the petitioner was suffering from muscle strain, not lateral epicondylitis. Medical exhibit 32. After physical therapy, the petitioner reported feeling remarkably better and was returned to full duty on April 9, 1997. Medical exhibit 36. By April 16, 1997, after returning to full duty, the petitioner reported an increase in pain. Dr. Mantes referred her to physical therapy took her off work for 4 weeks. Medical exhibit 37-38. On May 7, 1997, the petitioner returned to light duty work using only her left arm. Medical exhibit 39. On June 11, 1997, the petitioner was released to full duty for half-days for 2 weeks to increase to full duty if she had no problems. Medical exhibit 43.

On April 1, 1998, the petitioner returned to Dr. Mantes complaining of pain in her shoulder and elbow that Dr. Mantes found to be consistent with lateral epicondylitis. As he was giving her an injection, he found a mass in her shoulder muscle and referred her for an MRI. Medical exhibit 44.

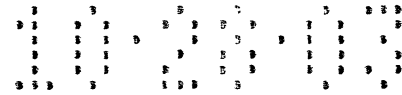
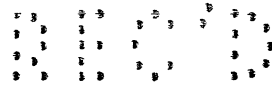
In August 1998, the plant closed and petitioner stopped working for Koret to California.

On February 4, 1999, the petitioner sought chiropractor treatment for pain and numbness in her left shoulder and hand. Medical exhibit 77-80. In March 1999, the plant reopened under new ownership, Rivers West. The petitioner's job duties were to use a single needle machine to sew labels into baby pajamas, zippers and cover stitch, using both hands to manipulate the materials as she sewed, using her right hand to pull the material and her left hand to guide. She also sewed some round patches in a movement similar to the movement used on the pants pockets she sewed at Koret. She also trained other employees.

The petitioner took off 1 week in August 1999 because of pain in her upper extremities but did not tell her employer why she took the time off.

In September 1999, the petitioner complained of pain in her left shoulder when she moved her right arm. The petitioner was given a couple of samples of Celebrex. Medical exhibit 62. The petitioner followed up in January 2000 for pain in her right shoulder and noted the Celebrex helped and requested a refill. Medical exhibit 66. The petitioner was also taken off work from January 26, 2000 through February 27, 2000 on unpaid leave. Medical exhibit 66A. The petitioner was also laid off for 2-3 months beginning in February 2000.

The petitioner stopped working at Rivers West on October 20, 2000 because she was in too much pain in her right shoulder and neck to continue working and she was also getting headaches. The petitioner sought authorization through Liberty Mutual, the insurer for the 1997 injury at Koret of California, for additional treatment and on October 26, 2000, the petitioner saw Dr. Mantes with complaints of achy regions in her body including shoulders, neck and elbow. Dr. Mantes noted the symptoms were to be more radicular in nature and he believed it was the same problem he previously treated. Medical exhibit 46. The petitioner sought a second opinion from Dr. Mortensen in November 2000 who believed the petitioner's problems of cervical degenerative disc disease and cervical radiculopathy were as a result of overuse activities and he was unsure whether not her



current symptoms related to the 1997 injury. On November 28, 2000, Dr. Mortensen concluded the petitioner's over-use symptoms related to her work environment. Medical exhibit 57.

The petitioner was evaluated by Dr. Barry on November 30, 2000 who diagnosed chronic cervical pain with significant radicular component and mild stenosis secondary to repetitive flexion of the neck and reach on the conveyer belt for the three years. Dr. Barry believed that the petitioner's current symptoms were related to the original 1997 event and recommended the petitioner have surgery. Medical exhibit 20.

Dr. Gerald Moress conducted an independent medical evaluation of the petitioner on May 23, 2001. Dr. Moress diagnosed the petitioner as having an ill defined pain complex involving the right shoulder, right extremity and neck, multilevel cervical spondylosis and degenerative disc disease with chronic depression and anger. Dr. Moress found no medical causal connection between the petitioner's current complaints and her work exposure at Koret of California. He also recommended against surgery. Medical exhibit 53-54.

On October 25, 2001 the petitioner sought treatment with Dr. Reichman whose impression was cervical stenosis and three level disc disease with radiculopathy and a mild myopathy cervical radiculopathy as a result of herniated cervical disks at C4-5, C5-6, and C6-7. Dr. Reichman recommended a C4-5, C5-6, C6-7 discectomy and fusion and believes the petitioner's condition is the result of "that incident of pulling material off of the belt." Medical exhibit 72-76.

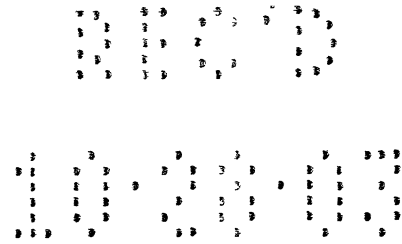
Edward B. Holmes, M.D., MPH, submitted his report as medical panel chairman on July 5, 2002. Dr. Holmes found no medical evidence to supporting any medical causal connection between the claimant's condition and her work activities at Rivers West as her condition was present at the time she began work for Rivers West and the work, although similar in nature to that done for Koret, added nothing to the already existing pathology. Dr. Holmes found that the petitioner's work over the years at Koret, including the 2 accidents in February 1997, is the cause of her cervical condition. Dr. Holmes' opinion is that both the repetitive work over time at Koret and the two accidents in February 1997 are the cause of the petitioner's cervical condition, along with some degenerative changes. Dr. Holmes found the claimant to medically stable as of March 1, 1999.

In February 1997, the petitioner's average weekly wage was \$423.00 and she was not married and had no dependent children. The petitioner's compensation rate is \$282.00 per week.

PRINCIPLES OF LAW

Utah Code Ann. § 34A-2-401 requires compensation be paid only for those injuries arising out of and in the course of employment. Temporary total and partial disability are payable until the healing period has ended and the petitioner's condition has stabilized. "Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve. Once healing has ended, the permanent nature of the claimant's disability can be assessed and benefits awarded accordingly." Booms v. Rapp Construction Co., 720 P.2d 1363, 1366 (Utah 1986).

Basso v. Koret of California & Rivers West
Case No. 200117, 20011243, 2001952
Findings of Fact, Conclusions of Law & Order
Page 5



For an injury to be compensable under the Act, a petitioner must show by evidence, opinion or otherwise that the stress, strain or exertion required by his or her occupation led to the resulting injury or disability and in the event a petitioner cannot show a medical causal connection, compensation should be denied. *Allen v. Industrial Commission*, 729 P.2d 15 (Utah 1986).

The Workers Compensation Act should be construed in favor of compensation when the statutory terms reasonably allow such compensation. *Park Utah Consol. Mines v. Industrial Commission*, 36 P.2d 979, 981 (Utah 1934); also *Heaton v. Second Injury Fund*, 796 P.2d, 676, 679 (Utah 1990).

CONCLUSIONS OF LAW

The claimant suffered compensable industrial injuries on February 14, 1997 and February 28, 1997 while employed by the respondent, Koret of California.

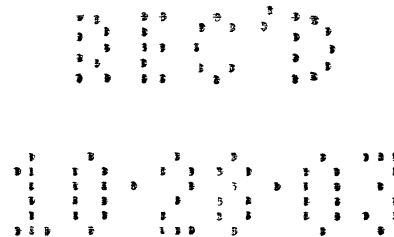
The respondents, Koret of California and/or Liberty Mutual Insurance, are liable to the claimant for temporary total disability compensation for 3.86 weeks covering the period January 26 – February 21, 2000 in the amount of \$1,088.52.

The respondents, Koret of California and/or Liberty Mutual Insurance, are liable to the claimant for reasonable and necessary medical care related to the February 14, 1997 and February 28, 1997 industrial injuries.

DISCUSSION AND ANALYSIS

There is not a preponderance of medical evidence to support a finding that a medical causal connection exists between the claimant's condition and her work activities at Rivers West. The evidence supporting this claim was thin at best when referred to the panel for evaluation. The occupational disease statute in effect at the time this claim arose required a referral to a medical panel and did not give discretion to the ALJ. Further, Dr. Moretenson's statements could have been read to support such a claim so it was under those circumstances that the ALJ requested the medical panel to evaluate this claim. The panel, and a preponderance of the medical evidence of record, did not support a finding that the claimant's activities at Rivers West had any contribution to the claimant's condition therefore that claim is dismissed.

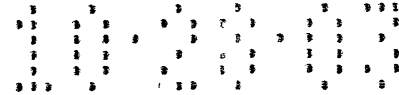
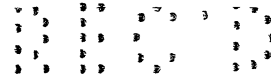
The claimant's cervical condition was not initially diagnosed as such in 1997 when she began complaining of severe shoulder and arm pain. The physician at Castleview Hospital where she initially went to the emergency room, diagnosed lateral epicondylitis, and Dr. Mantes, who she saw in followup, diagnosed muscular strain. Dr. Mantes noted improvement with light duty but whenever the claimant returned to her regular work activities, her condition deteriorated and she was again placed on light duty and then the plant closed so she was no longer engaged in activity that exacerbated her condition. At that time, treatment, which had been through the industrial carrier, ended and it was not until the plant reopened and the claimant began working again as a seamstress that her symptoms flared to the point where she again had to seek medical treatment.



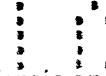
The preponderance of medical evidence, including the panel's report, supports a finding that the claimant's work activities, including the February 1997 accidents, are the cause of the claimant's cervical condition. Although the medical panel discounts the 1997 accidents in the overall contribution to the claimant's condition and instead focuses more on repetitive trauma at Koret over a longer period, Dr. Holmes notes the February 1997 events are "...two more events in the cumulative trauma that occurred over the years prior to February 1997..." and that "...she developed this problem over a long period of time with cumulative trauma (including 2 events in February 1997)...". Although Dr. Holmes apportioned part of the claimant's condition to non-industrial factors, there is no provision for apportionment of accident claims. Dr. Reichman also believed the claimant's work activities at Koret and the February 1997 events are the cause of her cervical spine condition with the jerking incidents of February 1997 causing the onset of severe symptoms requiring medical intervention. Dr. Barry, in his evaluation following results of the cervical MRI, noted that "...it is clear in retrospect that this patient's symptoms that she has been complaining about for approximately three years are radicular in nature and stem from her original complaint in 1997." As such, the claimant has proven by a preponderance of medical evidence there exists a medical causal connection between the February 1997 accidents at Koret and her current cervical condition.

Both Dr. Reichman and Dr. Barry recommend surgery as reasonable and necessary to treat the claimant's cervical condition. Although Dr. Holmes expressed some reservation, noting the claimant is at risk for "less than an ideal result from any surgical procedure" he also notes that conservative treatment has not resolved her condition leaving the decision to the claimant as to whether to pursue surgery noting that it will likely not resolve her condition completely. Thus, Dr. Holmes did not find the recommended surgery to not be reasonable and necessary but only cautions that it may not resolve completely all the claimant's pain. Given that both Dr. Reichman, a neurologist, and Dr. Barry, an orthopedic surgeon, are of the opinion that is reasonable and necessary to treat the claimant's condition and that Dr. Holmes did not rule out surgery as a treatment option, the preponderance of evidence supports a finding that the proposed surgery is reasonable and necessary to treat the claimant's condition should she choose to undergo that procedure.

Drs. Reichman, Barry and Mortensen have given no opinions as to medical stability during the period from February 1997 through the present. Dr. Reichman only gives an opinion as to an estimate of time the claimant will be unable to work as the result of the proposed surgery. The claimant was paid temporary total disability benefits for the periods immediately after the 1997 accidents and was working light duty and eventually released to full duty in the summer of 1997. The claimant had returned to Dr. Mantes in April 1998 because of the increase in pain and was being evaluated when the plant closed in August 1998. Dr. Mantes had not released the claimant from work during this time. Dr. Holmes did not find there to be any period of medical instability related to the February 1997 accidents. Jeannee Olsen, P.A.-C. took the claimant off work for the period January 26, 2000 through February 21, 2000 stating as the reason "because she is ill" although from the notes made that day, it is clear the treatment was for the claimant's ongoing cervical condition that had not yet been correctly diagnosed. Thus, this is the only period of time the claimant was off work that is supported by the medical evidence after the initial period in 1997.



ORDER



IT IS HEREWITH ORDERED that the respondents, Koret of California and/or Liberty Mutual Insurance, pay the claimant \$1,088.22 for temporary total disability compensation covering the period January 26 – February 21, 2000. This amount is accrued and due and payable in a lump sum, plus interest pursuant to Rule R612-1-5.2 less attorneys fees of \$217.04 which respondents are ordered to deduct from the award and pay directly to Richard Burke, attorney for the petitioner, plus 20% of the interest payable on the award per Rule R602-2-4.

IT IS FURTHER ORDERED that the respondents, Koret of California and/or Liberty Mutual Insurance, pay the claimant's reasonable and necessary medical expenses resulting from the February 14, 1997 and February 28, 1997 accidents pursuant to Labor Commission medical and surgical fee schedule.

IT IS FURTHER ORDERED that occupational disease claim against Rivers West and/or Workers Compensation Fund, is dismissed with prejudice.

Dated this 12th day of February, 2003.

LABOR COMMISSION

Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

MAILING of Findings, Conclusions of Law, and Order

I certify that I have mailed the attached document in the case of DARLA BASSO, Case No. 200117, to the following parties by first class prepaid postage on February 12, 2003.

DARLA BASSO
505 SO ROSE AVE
PRICE UT 84501

KORET OF CALIFORNIA
PO BOX 730
PRICE UT 84501

RICHARD R BURKE, Atty,
648 E 100 S #200
SALT LAKE CITY UT 84102

DORI K PETERSEN, Atty,
77 W 200 S #400
SLC UT 84101



Rosalee Oakeson

ADDEDUM

Section 2

September 30, 2003, Order Granting Motion for
Review and Order of Remand

RECEIVED

SEP 01 2003

UTAH LABOR COMMISSION

UTAH LABOR COMMISSION
COURT REPORTER

DARLA BASSO,

Applicant,

v.

KORET OF CALIFORNIA and
LIBERTY MUTUAL INSURANCE;
RIVERS WEST and WORKERS
COMPENSATION FUND,

Defendants.

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ORDER GRANTING
MOTION FOR REVIEW

ORDER OF REMAND

Case Nos. 01-0017
01-1243 & 01-0952

Koret of California and its workers compensation insurance carrier, Liberty Mutual (referred to jointly as "Koret"), and Darla Basso have each asked the Utah Labor Commission to review Administrative Law Judge Hann's decision regarding Ms. Basso's claim for benefits under the Utah Workers' Compensation Act (Title 34A, Chapter 2, Utah Code Ann.) and the Utah Occupational Disease Act (Title 34A, Chapter 3, Utah Code Ann.).

The Labor Commission exercises jurisdiction over these motions for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

Ms. Basso has filed a series of Applications For Hearing to compel her previous employers, Koret and Rivers West, to pay workers' compensation or occupational disease benefits for Ms. Basso's cervical and right arm problems. Ms. Basso's claim is based on the alternative theories that her injuries are the result of accidents on February 14 and/or February 28, 1997, or long-term overuse of her right arm, or some combination of the foregoing factors.

After conducting an evidentiary hearing in this matter, Judge Hann appointed Dr. Holmes to serve as an impartial medical panel to consider the medical aspects of Ms. Basso's claim. Consistent with Ms. Basso's testimony and the other evidence of record, Judge Hann provided Dr. Holmes with a description of Ms. Basso's work-related exertions, including the events of February, 1997.

Dr. Holmes ultimately concluded that Ms. Basso suffered from degenerative cervical disc disease and myofascial pain syndrome which had been aggravated by her work at Koret. Specifically, Dr. Holmes found that it was "several years of **awkward neck posturing** in her work" (emphasis added) that constituted the work-related component of her problems. Dr. Holmes' report was the

**ORDER GRANTING MOTION FOR REVIEW/REMAND
DARLA BASSO
PAGE 2**

first time that this mechanism of injury had been suggested.

Koret objected to Dr. Holmes' report on the grounds its conclusions were based on a factual determination—Ms. Basso's awkward neck posturing—that had neither been identified by any of the parties nor included in the ALJ's charge to Dr. Holmes. Judge Hann rejected Koret's objection, adopted Dr. Holmes' report and awarded benefits accordingly.

Koret's motion for review now pending before the Commission restates Koret's objections to Dr. Holmes' report. Ms. Basso's motion for review to the Commission seeks additional temporary total disability compensation.

DISCUSSION

Koret contends that Dr. Holmes has inserted a new factual issue into this proceeding by attributing Ms. Basso's cervical problems, in part, to her previously undisclosed "awkward neck positioning." Koret argues it is entitled to investigate and, perhaps, rebut this new factual basis for Ms. Basso's claim.

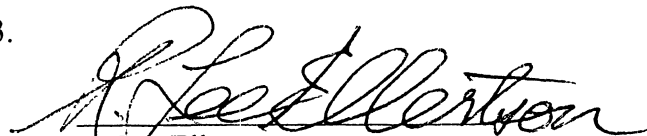
The Commission has carefully reviewed the record and concludes, on balance, that Koret has not had a sufficient opportunity to address whether Ms. Basso's alleged "awkward neck positioning" is, in fact, a contributing cause of her current problems. The Commission therefore remands this matter to Judge Hann to take such action as she considers reasonable and appropriate to allow Koret and Ms. Basso to respond to Dr. Holmes' opinion.

Because a final determination of Ms. Basso's right to benefits depends upon the additional proceedings to be conducted by Judge Hann, the Commission does not address Ms. Basso's argument that she is entitled to additional temporary total disability compensation. On remand, Judge Hann may consider and act upon that issue as she considers proper.

ORDER

The Commission grants Koret's motion for review and remands this matter to Judge Hann for further proceedings consistent with this decision. It is so ordered.

Dated this 30th day of September, 2003.



R. Lee Ellertson
Utah Labor Commissioner

**ORDER GRANTING MOTION FOR REVIEW/REMAND
DARLA BASSO
PAGE 3**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Granting Motion For Review/Remand in the matter of Darla Basso, Case Nos. 01-0017, 01-1243 & 01-0952, was mailed first class postage prepaid this 30th day of September, 2003, to the following:

DARLA BASSO
505 SOUTH ROSE AVENUE
PRICE UT 84501

KORET OF CALIFORNIA
P O BOX 730
PRICE UT 84501

LIBERTY MUTUAL INSURANCE COMPANY
P O BOX 989000
WEST SACRAMENTO CA 95798-9000

RIVERS WEST
1130 S CARBON AVE
PRICE UT 84501

HANS SCHEFFLER, ATTORNEY
WORKERS COMPENSATION FUND
392 EAST 6400 SOUTH
SALT LAKE CITY UT 84107

RICHARD R BURKE, ATTORNEY
KING BURKE & SCHAPP PC
648 EAST 100 SOUTH #200
SALT LAKE CITY UT 84102

DORI K PETERSEN, ATTORNEY
BLACKBURN & STOLL
77 WEST 200 SOUTH #400
SALT LAKE CITY UT 84101



Sara Danielson
Support Specialist

ADDEDUM

Section 3

April 7, 2006, Findings of Fact, Conclusions of Law
and Order on Remand

200149801

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
P. O. Box 146615
Salt Lake City, Utah 84114-6615
Telephone: 801-530-6800

RECEIVED

APR 8 2005

**Workers Compensation Fund
Legal Department**

DARLA BASSO,	*	FINDINGS OF FACT, CONCLUSIONS OF
Petitioner,	*	LAW & ORDER ON REMAND
	*	
vs.	*	CASE NO. 200117, 20011243, 2001952
	*	
KORET OF CALIFORNIA and/or LIBERTY	*	
MUTUAL INSURANCE; RIVERS WEST	*	Judge Debbie L. Hann
and/or WORKERS COMPENSATION FUND,	*	
Respondents.	*	
	*	
	*	

STATEMENT OF THE CASE

On January 8, 2001, the petitioner filed an Application for Hearing alleging a right shoulder, right elbow and neck injury as the result of a February 28, 1997 repetitive motion injury and claiming entitlement to medical expenses, temporary partial compensation, permanent partial compensation, travel expenses and interest. The respondents filed an answer admitting the petitioner suffered an industrial injury via repetitive motion on February 28, 1997 and that temporary total compensation was paid from March 1, 1997 through March 14, 1997 and again from April 16, 1997 through May 11, 1997. The respondents denied the petitioner's current symptoms were medically caused by the 1997 injury and denied that any neck injury was reported in 1997.

On August 9, 2001, the petitioner filed an "Amended Occupational Disease Claim" against Rivers West and Workers Compensation Fund alleging an occupational disease of the neck and upper extremity while employed at River's West from March 13, 1999 through February 26, 2000 and again May 1, 2000 through October 20, 2000. The respondents denied liability for the claim based on Utah Code § 34A-3-108 because the application for hearing was the first notice of the claim. The respondents also requested dismissal because the petitioner filed no supporting medical documentation.

On November 16, 2001, the petitioner filed an amended Application for Hearing alleging a February 14, 1997 injury to her right shoulder, right elbow and neck caused by pulling materials off the conveyor belt while employed by a Koret of California. The respondents again denied liability because of a lack of medical causation between the injuries claimed and the petitioner's current condition.

The case was heard on December 13, 2001. Richard Burke, Attorney at Law, represented the petitioner. Dori K. Petersen, Attorney at Law, a represented the respondents Koret of California and Liberty Mutual Insurance. Hans Scheffler, Attorney at Law, represented the respondents, Rivers

West and Workers Compensation Fund. Findings of Fact and Interim Order was issued on April 5, 2002 sending the medical aspects of this case to a medical panel. Dr. Edward B. Holmes, M.D., M.P.H. was appointed chairman of the medical panel. Dr. Holmes issued his report on July 5, 2002.

The report was forwarded to the parties via certified mail on July 11, 2002. Both the petitioner and the respondent, Koret of California, filed objections to the panel report. Findings of Fact, Conclusions of Law & Order was issued on February 12, 2003. Both the petitioner and the respondents, Koret and Liberty Mutual Insurance filed motions for review with the Commission. On September 30, 2003, the Commission issued an Order Granting Motion for Review and Order of Remand, remanding the case for further proceedings to address the issue of "awkward neck posturing" found by Dr. Holmes as part of his medical panel evaluation.

On October 2, 2003, Notice of Hearing was sent to the parties scheduling the matter for hearing on remand for January 8, 2004. The petitioner appeared and parties were represented by the same counsel as had appeared at the prior hearing. At the hearing, the parties submitted the petitioner's video deposition and an updated medical records exhibit. Dr. Clyde's opinion, offered by the respondents Koret and Liberty Mutual was excluded as untimely. The matter was then referred back to Dr. Holmes, chairman of the medical panel in this case. Dr. Holmes issued his report on September 17, 2004 and it was forwarded to the parties via certified mail. No objections to the report's entry into the evidentiary record were filed therefore it is admitted pursuant to Utah Code § 34A-2-601.

FINDINGS OF FACT

The findings of fact contained in the February 12, 2003 Findings of Fact, Conclusions of Law & Order are hereby incorporated by reference.

The petitioner's deposition was taken on videotape on December 18, 2003 to address in more detail the petitioner's neck position and work station set up. The parties stipulated to the facts contained in the petitioner's December 18, 2003 video deposition. The parties also stipulated that while the petitioner was sewing at both Koret and Rivers West she was not holding her head completely still and had to move it somewhat to see the sewing needle. They also stipulated that the thread the petitioner used was often the same color as the material it was sewed upon.

On December 26, 2003, Dr. Moress performed a supplementary record review on the petitioner and reviewed the medical panel report and the video deposition. Dr. Moress' opinion is that awkward neck position did not contribute to the degeneration of the petitioner's cervical spine. Medical exhibit 112.

Pages 85 and 100-101 were removed from the supplemental medical records exhibit as they are not medical records. Page 85 is an employer's first report of injury, not a physician's first report as noted on the exhibit. The Labor Commission records at pages 100-101 are not medical records. The pages are re-marked as respondent's exhibits 2 & 3.

Dr. Holmes reviewed the video taped deposition and the updated medical records. Although Dr. Holmes states that the evidence does not change his overall opinion, he provided significant

clarification of his prior opinion and reviewed the medical literature and National Institute for Occupational Safety and Health studies related to "...the development of neck/shoulder symptoms and repetitive hand arm movements..." to further clarify his analysis of causation in this case. Dr. Holmes clarifies that in his opinion and based upon the medical literature, the petitioner did not develop degenerative disc disease or degenerative joint disease as a result of her work activities at Koret. Dr. Holmes is of the opinion the petitioner's pain symptoms (described as neck/shoulder symptomology) were caused by her work activities and that this was an exacerbation of underlying degenerative conditions. The exacerbation as the result of her work activities occurred during the course of her work and "...a few months thereafter."

The preponderance of evidence is that the petitioner's repetitive trauma in and around 1997 at Koret contributed to her pain and symptomology in her neck and upper extremity however the evidence that her condition, specifically degenerative disc disease, was medically caused by her repetitive work activities is less clear. A close review of the medical evidence does not support by a preponderance, that the petitioner's repetitive trauma in and around 1997 at Koret or her work activities at Rivers West are the medical cause of her degenerative disc disease. Dr. Mortensen's opinion, given on November 28, 2000, is that the petitioner's "overuse symptoms" are related to her work environment. Dr. Reichman states that, "I would think that it is probably related to that incident of pulling the material off the belt." Dr. Barry does state unequivocally that in his opinion the degenerative disc disease was caused by her work activities. However, Dr. Holmes, in his clarifying opinion, outlines medical studies that show degenerative disc disease is multifactorial in origin and it is incorrect to assume that a temporal connection to work activities and evidence of degenerative changes on an MRI are related. Dr. Holmes also notes that just because degenerative disc disease is present, it cannot be assumed to be the source of pain, noting that the petitioner has alternatively been diagnosed with myofascial pain and muscle tension pain syndrome. Dr. Moress also makes note that the petitioner's pain symptoms do not correlate with cervical radicular pain. Dr. Holmes notes there is "little good research for or against such postures causing DDD of the cervical spine." Thus, while the petitioner has proven that her repetitive work activities at Koret caused her pain and discomfort in her neck and shoulder, the preponderance of evidence does not support the finding that such activities are the medical cause of her degenerative disc disease for which she currently seeks treatment.

The petitioner has been paid compensation for the periods of time her condition was exacerbated by repetitive activities at Koret thus no further compensation is due from Koret. However, because there is a preponderance of evidence that the petitioner's neck posturing caused her underlying condition to be aggravated and painful, the respondent, Rivers West is liable for a temporary aggravation of her underlying degenerative disc condition for the period January 26, 2000 through February 27, 2000 and for the period October 20, 2000 through December 20, 2000, when her temporary aggravation would have resolved per Dr. Holmes' opinion.

PRINCIPLES OF LAW

A compensable occupational disease is "... any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." Utah Code Ann. § 34A-3-103.

CONCLUSIONS OF LAW

The petitioner suffered a compensable occupational disease while employed by Rivers West in the form of an aggravation of her underlying degenerative disc disease.

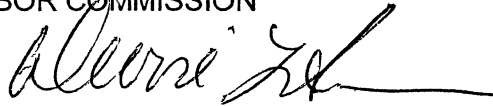
The respondents, Rivers West and Workers Compensation Fund, are liable to the petitioner for temporary total compensation for the period January 26, 2000 through February 27, 2000 and October 20, 2000 through December 20, 2000 at the rate of \$282.00 per week. (3.86 + 8.85 weeks x \$282.00).

ORDER

IT IS HEREWITH ORDERED THAT the respondents, Rivers West and Workers Compensation Fund are liable to the petitioner for temporary total compensation in the amount of \$3,584.22. This amount is accrued and due and payable plus interest at the rate of 8% per annum less attorneys fees payable directly to Richard Burke, Attorney at Law, in the amount of \$716.84 plus 20% of the interest payable.

Dated this 7th day of April, 2005.

LABOR COMMISSION



Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER ON REMAND, was mailed by prepaid U.S. postage on April 7, 2005, to the persons/parties at the following addresses:

Darla Basso
505 S Rose Ave
Price UT 84501

Rivers West Apparel
1130 S Carbon Ave
Price UT 84501

Richard Burke Esq
648 E 100 S Ste 200
Salt Lake City UT 84102

Hans Scheffler Esq
P O Box 57929
Salt Lake City UT 84107

UTAH LABOR COMMISSION



Clerk
Adjudication Division

ADDEDUM

Section 4

January 6, 2006, Order Denying Motions for Review

200149801

RECEIVED

UTAH LABOR COMMISSION

JAN 6 2006

Workers Compensation Fund
Legal Department

DARLA BASSO,

Petitioner,

vs.

KORET OF CALIFORNIA; LIBERTY
MUTUAL INSURANCE; RIVERS WEST;
and WORKERS COMPENSATION FUND,

Respondents.

ORDER DENYING
MOTIONS FOR REVIEW

Case Nos. 01-0017, 01-0952
and 01-1243

Darla Basso, the petitioner, and Rivers West, one of the respondents¹, have each asked the Utah Labor Commission to review Administrative Law Judge Hann's decision regarding Ms. Basso's claims for benefits under the Utah Occupational Disease Act (Title 34A, Chapter 3, Utah Code Annotated) and the Utah Workers' Compensation Act (Title 34A, Chapter 2, Utah Code Annotated).

The Labor Commission exercises jurisdiction over these motions for review pursuant to Utah Code Ann. §63-46b-12, Utah Code 34A-3-107 and Utah Code Ann. §34A-2-801(3).

BACKGROUND AND ISSUES PRESENTED

During 2001, Ms. Basso filed a series of applications to compel her previous employers, Koret and Rivers West, to pay workers' compensation or occupational disease benefits for Ms. Basso's cervical and right arm problems. In her applications, Ms. Basso alleged her medical problems were caused by: 1) accidents on February 14 and February 28, 1997, while employed by Koret; and 2) overuse of her right arm while employed first by Koret and later by Rivers West.

Judge Hann held an evidentiary hearing on December 13, 2001, and then issued her first order on April 5, 2002. Among other things, Judge Hann's first order rejected Rivers West's argument that Ms. Basso's occupational disease claim should be dismissed because she had failed to provide timely notice. The first order also concluded that Ms. Basso's claim should be referred to a medical panel for review.

Judge Hann subsequently appointed Dr. Holmes to serve as the medical panel. After examining Ms. Basso and reviewing her medical history, Dr. Holmes submitted a report to Judge Hann that diagnosed Ms. Basso with degenerative cervical disc disease, myofascial pain syndrome, and depression. The report found no medical causal connection between Ms. Basso's work at Rivers

1 There are two respondents in the matter: 1) Koret of California and its insurance carrier, Liberty Mutual Insurance (jointly referred to as "Koret"); and 2) Rivers West and its insurance carrier, Workers Compensation Fund (jointly referred to as "Rivers West").

ORDER DENYING MOTION FOR REVIEW

Darla Basso

PAGE 2

West and her medical problems. However, Dr. Holmes found that Ms. Basso had been subject to “awkward neck posturing” for many years while working at Koret. In Dr. Holmes’ view, this awkward neck posture at Koret constituted one/half the medical cause of her degenerative cervical disc disease and myofascial pain syndrome.

After receiving Dr. Holmes’ report, Judge Hann issued her second order on February 12, 2003. In this second order, Judge Hann adopted Dr. Holmes’ medical opinions and dismissed Ms. Basso’s claim against Rivers West with prejudice. Judge Hann also ordered Koret to pay Ms. Basso’s work-related medical expenses and temporary total disability compensation.

Koret then filed a motion for Commission review of Judge Hann’s second decision. Specifically, Koret challenged Dr. Holmes’ determination that Ms. Basso’s work at Koret had required awkward neck posture. Ms. Basso likewise submitted her own motion for review in which she argued she was entitled to temporary disability compensation for a longer period of time than had been awarded by Judge Hann.

The Commission granted Koret’s motion for review and remanded this matter to Judge Hann to determine whether Ms. Basso’s work at Koret had, in fact, required awkward neck posture. The Commission also instructed Judge Hann to reconsider Ms. Basso’s right to temporary total disability compensation in light of the additional information that might be adduced on remand.

Judge Hann conducted additional evidentiary proceedings and obtained detailed evidence about the conditions of Ms. Basso’s work for Koret. Judge Hann provided this additional information to Dr. Holmes and asked him to review and update his previous report. Dr. Holmes responded with a substantial explanation of the basis for his medical opinions, but with no significant change to his original opinion.

Judge Hann issued her third decision on April 7, 2005. Judge Hann again relied on Dr. Holmes’ opinions, which she understood as establishing that Ms. Basso’s work at Koret and Rivers West did not cause her underlying medical problems, but did temporarily exacerbate those problems. On that basis, Judge Hann concluded that Koret and Rivers West were each liable to pay temporary disability compensation to Ms. Basso for the periods of time she was unable to work as a result of such exacerbation.

In seeking review of Judge Hann’s third decision, Ms. Basso argues that her work for Koret and Rivers West caused her cervical disc disease and myofascial pain, and that she should continue to receive temporary total disability compensation because she is not yet medically stable from those problems. Rivers West’s motion for review contends that: 1) Judge Hann lacked jurisdiction to consider Ms. Basso’s claim against Rivers West; 2) Ms. Basso’s claim against Rivers West was barred by her failure to provide timely notice; and 3) the medical evidence does not support an award of temporary total disability compensation from Rivers West to Ms. Basso.

ORDER DENYING MOTION FOR REVIEW

Darla Basso

PAGE 3

DISCUSSION

The Commission affirms and adopts Judge Hann's findings of fact, as modified and extended in the discussion that follows. The Commission will first address Ms. Basso's motion for review, and will then consider the issues raised by Rivers West.

Although Ms. Basso contends that her work for Koret and Rivers West caused her ongoing cervical disc disease and myofascial pain, the preponderance of medical evidence does not support her position. To the contrary, while her work temporarily exacerbated those medical problems, any such work-related exacerbation had ended by March 1, 1999. Consequently, Ms. Basso is not entitled to temporary total disability compensation after that date.

Turning to Rivers West's motion for review, its first argument is that, because Judge Hann's second decision dismissed Ms. Basso's claims against Rivers West "with prejudice," and none of the parties appealed that dismissal, Judge Hann erred in revisiting such claims in her subsequent decision. The Commission disagrees with this argument. All of Ms. Basso's claims have been consolidated in this proceeding. These claims arise from complex and interrelated facts regarding Ms. Basso's medical condition, as well as the nature and duration of her work at Koret and Rivers West. Consequently, all of Ms. Basso's claims have remained open throughout these adjudicative proceedings.

Next, Rivers West argues that Ms. Basso's occupational disease claim is barred because Ms. Basso failed to provide timely notice of that claim as required by § 34A-3-108(2) of the Utah Occupational Disease Act. In summary, § 34A-3-108(2)(a) required Ms. Basso to notify either her employer or the Commission's Industrial Accidents Division of her occupational disease within 180 days from the date her "cause of action" arises. Section 34A-3-108(2)(b) provides that a cause of action arises on the date the employee 1) suffers disability from the occupational disease **and** 2) knows or should have known that the disease was caused by employment.

The Commission accepts, for purposes of discussion, Rivers West's contention that Ms. Basso's cause of action arose on October 20, 2000. Therefore, pursuant to § 34A-3-108(2), she had 180 days after that date to notify **either** Rivers West **or** the Industrial Accidents Division of her occupational disease. The record in this matter establishes that Ms. Basso took the second of these options and notified the Industrial Accidents Division of her occupational disease on November 15, 2000, well within the 180-day period allowed for such notice. For this reason, the Commission concurs with Judge Hann's determination that Ms. Basso's claim is not barred by § 34A-3-108(2)'s notice requirement.

Rivers West's last objection to Judge Hann's decision is that the medical evidence does not support an award of temporary total disability compensation from Rivers West to Ms. Basso. However, Dr. Holmes summed up his evaluation of Ms. Basso's situation as follows:

ORDER DENYING MOTION FOR REVIEW

Darla Basso

PAGE 4


. . . I conclude that in this unique and particular case, it is medically reasonable to conclude that some neck/shoulder symptomatology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurred during the course of her work and a few months thereafter.

In reaching this conclusion that Ms. Basso's work activity temporarily aggravated her neck and shoulder problems, Dr. Holmes did not exempt Ms. Basso's work activities at Rivers West. Likewise, Dr. Mortensen, Ms. Basso's treating physician at the time she quit work at Rivers West, expressed the opinion that "this is an overuse condition that is related to repetitive activities she does at work." The Commission accepts the views of these physicians and concludes that Ms. Basso's work at Rivers West temporarily exacerbated her underlying neck and shoulder conditions.

ORDER

In light of the foregoing, the Commission denies the parties' motions for review and affirms Judge Hann's decision of April 7, 2005. It is so ordered.

Dated this 5th day of January, 2006.


R. Lee Ellertson
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

ORDER DENYING MOTION FOR REVIEW

Darla Basso

PAGE 5

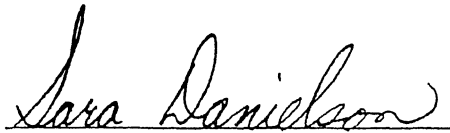
CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motion For Review in the matter of Darla Basso, Case No. 2001952, was mailed first class postage prepaid this 5th day of January, 2006, to the following:

Darla Basso
505 S Rose Ave
Price UT 84501

Rivers West Apparel
1130 S Carbon Ave
Price UT 84501

Hans Scheffler Esq
P O Box 57929
Salt Lake City UT 84107



Sara Danielson
Utah Labor Commission

ADDEDUM

Section 5

July 4, 2002, Medical Panel Report

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302
Sandy, Utah 84094
801-576-8988

July 4, 2002

Judge Debbie L. Hann
Labor Commission
Division of Adjudication
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, Utah 84114-6615

Re: Darla Basso, Case #200117, 2001952, 20011243

Dear Judge Hann,

The following represents the report of the medical panel evaluation of Darla Basso and the examination performed in my office on June 26, 2002.

1. What is the petitioner's current medical diagnosis?

- Degenerative disc and joint disease in the cervical spine
- Non specific myofacial pain syndrome
- Probable depressive disorder

2. Is there a medically demonstrable causal connection between the petitioner's current medical diagnosis and her work at Rivers West from March 1999 through October 2000? If yes, please apportion the medical causal contribution, if any, from each employer and/or non-industrial source.

- a. There is no medically demonstrable causal connection between the petitioner's current medical diagnosis and her work at Rivers West from March 1999 through October 2000.

3. Is there a medically demonstrable causal connection between the petitioner's current medical diagnosis and her industrial accidents of either February 14, 1997 or February 28, 1997?

- a. There is little demonstrable connection between the specific February 1997 incidents mentioned and her current condition. There is no medical record to substantiate any substantive injury on 2/14/97 that would be associated with her current

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

condition. There is no medical record to substantiate more than a minor incident on February 28, 1997. However, the records, and her history reported at this examination, are more consistent with a chronic, cumulative trauma type problem occurring over at least one year leading up to the 2/28/97 treatment. In other words, it is the panel's observation that she had pain in the right upper extremity long before the pain led her to seek treatment on February 28, 1997 (at least one year prior). Although she reports suffering some soft tissue strain on the above February dates, it is not felt that this was a substantial contribution to her overall problem but just two more events in the cumulative trauma that occurred over the years prior to February 1997. The effect of cumulative trauma at work over the years ultimately contributed to her report of unbearable pain on February 28, 1997. In this sense, her work over the year prior to February 28, 1997 was a partial cause of her current medical condition. It is estimated that approximately 50% of her current condition is related to her work through February 28, 1997.

4. *When, if at all, did the petitioner's condition stabilize as the result of the industrial exposure at Rivers West?*

a. It is not felt that the industrial exposure at Rivers West significantly contributed to her medical condition. She had virtually all symptoms, including the left upper extremity symptoms prior to her employment with Rivers West.

5. *When, if at all, did the petitioner's condition stabilize as the result of the February 14, 1997 injury?*

a. There is no documentation of any substantial injury on February 14, 1997 that would have had any lasting effect and therefore stabilization would have occurred immediately. Also see #6 below.

6. *When, if at all, did the petitioner's condition stabilize as the result of the February 28, 1997 injury?*

a. See answer to #5 above. She apparently had problems of muscle discomfort long before February 1997, which led to the ultimate reporting of the growing pain by the end of February

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

1997. Since no specific medical condition developed on February 28, 1997, stabilization would need to consider the overall condition caused by repetitive trauma. She appears to have stabilized somewhere around March 1, 1999 from the cumulative trauma to the neck and upper extremities that occurred prior to that date (including the February 28, 1997 incident).

7. *Has the medical care that the petitioner received since October 2000 been necessitated by the petitioner's February 14, 1997 injury, her February 28, 1997 injury and/or her industrial exposure at Rivers West?*
 - a. The medical care since October 2000 has been reasonable in attempting to diagnose her degenerative neck condition. This evaluation and treatment was necessitated by the culmination of her cumulative trauma to the neck up to 1997 and the continued aggravation thereafter until she stabilized in about March 1999. Therefore, treatment after October 2000 would have been 50% due to her cumulative trauma through and including the February 1997 events and 50% due to non-industrial factors.
8. *What future medical treatment, if any, including surgery, will be reasonably required to treat the petitioner's February 14, 1997 and/or February 28, 1997 industrial injury?*
 - a. See question #3 above. Treatment for her degenerative spine condition will require continued home exercises, anti-inflammatory medication, occasional physician visits, occasional physical therapy visits, and possibly cervical spine decompression and fusion. The treatment would be necessitated by the combination of industrial and non-industrial factors previously apportioned in #7 above. Please see the discussion below for cautions regarding surgery in this case.
9. *What future medical treatment, if any, including surgery, will be reasonably required to treat the petitioner's industrial exposure at Rivers West?*
 - a. It is not felt that any substantial injury or aggravation has occurred from the work at Rivers West. Clearly, most of the degeneration and virtually all of the symptoms had been

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

reported by 3/1/99. Although it is possible some minimal amount of aggravation could have continued to occur after 3/1/99, overall, the damage was already done by the time she started working for Rivers West.

Chief Complaint

“Pain like a knife stuck in back of my throat”. She has neck pain, headache, ear pain, and left shoulder pain when she moves the right arm. Episodic finger tingling in various fingers bilaterally and pain in the head when she moves the index and middle fingers.

History of Present Illness

She reports that on or about 2/14/97 she pulled on a tote at work to remove it from the conveyor, like she always did, and felt pain and soreness in the muscles of her right shoulder blade region (this was not unusual for her). This soreness was similar to the pain she had almost every day after work. She continued her regular work activity and began to have more and more severe pain in the right shoulder blade and right elbow “like the muscle was ripped off the bone”. On 2/28/97 she finally couldn’t stand it anymore and went to the ER. X-rays were reportedly performed and were normal. She was seen by an MD and had PT and medication as well as modified duty, and improved. As soon as she went back to work after the improvement she felt an increase in her pain. This pain continued for about a year and never completely went away. In August of 1998 she was doing pocket work when the company was shut down. Later that summer she noted the left upper extremity began to hurt. During the year after 2/97 her piecework went from \$10/hr to \$6/hr due to her pain. At one point she went to school but couldn’t do the chronic sitting due to neck pain and therefore she quit. In March of 1999 a new plant opened in the same place so she went back to work. She says she never went to a doctor while the first plant was shut down because she didn’t know they would pay for it. The pain continued but she needed to work so she took a week off in August of 1999 without telling her employer it was due to pain. The pain improved while off work. In February of 2000 she was laid off and didn’t return to work until May 2000. She went back to easier work and had less pain. Finally, she couldn’t take the pain any longer and quit her work in October of 2000. She has not worked since that time. She eventually went back to Dr. Mantas who told her she had fibromyalgia syndrome. She demanded a second opinion and was sent to Dr. Mortensen. Dr. Mortensen felt she had a neck problem. MRI was ordered and she was sent to Dr. Barry. Dr. Barry told her that the neck was the problem from the very beginning (1997). Surgery was recommended on the neck about February 2001. She reports that Workers compensation denied the surgery since it was for the neck and they

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

were responsible for her shoulder and elbow. In June 2001 she saw Dr. Reichman who agreed she needed surgery. Surgery was scheduled for 12/01 but cancelled due to insurance reasons.

Past Medical History

She denies any prior neck injuries, trauma, motor vehicle accidents or head injuries. She had female related surgeries only.

Social History

She drinks 6-7 drinks per month. She smokes ½ pack per day and has done so for 20 years. She is divorced and has one child.

Family History

Non-contributory

Occupational History

1985-1990 Carbon county school district

1990 to 8/31/98 Korets of California/ seamstress

3/13/99 to 2/00 and 5/2000 to 10/2000 Rivers West/ seamstress

Examination

Height 4'11", Weight 102#, BP 112/64, HR 56, Temp 99.5, RR 12

General: No acute distress, pleasant and cooperative with occasional bursts of obvious anger and frustration.

HEENT: WNL

Cervical Spine: No focal area of tenderness. No muscle spasm or nodularity is noted. She has FF to 45 deg, Ext 30 deg with neck pain. LF, Rotation are WNL bilat. During rotation she stated that she hears popping in her head and neck but the examiner did not hear this.

Right supraspinatus region is tender with a 2cm diameter, mildly tender muscle knot noted. Shoulder, elbow, wrist and hand range of motion is normal throughout. There is no atrophy, fasciculation or weakness. There is no focal elbow or lateral epicondyle tenderness. Both hands have a normal grip and no muscle wasting. She has a normal sensory and motor examination throughout. Gait is normal.

Reflexes are normal and symmetric throughout the upper and lower extremities. Cervical movement did not cause any specific radiation of pain to the upper extremities.

Medical Record Review

The entire record was reviewed with the following important notations:

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

2/28/97 Visit for right elbow pain that had been present for 1 year. Diagnosis was lateral epicondylitis.

3/1/97 off work 2 wks for right lateral epicondylitis of one year duration.

3/10/97 lat epicondylitis improved.

3/12/97 Dr. Mantas notes a 1 year history of right shoulder and elbow discomfort-not lateral epicondylitis. Pain is more in the trapezius and tricep regions. Diagnosis was muscle strain. PT and LD prescribed.

4/9/97 Feeling 100% better. RTW.

4/16/97 Much worse in right trapezius region since returning to work.

5/14/97 Some elbow and shoulder discomfort-strain

6/11/97 Much better, slowly increase work activity.

4/1/98 Pain started again. Lateral epicondylitis diagnosed and elbow injected. Mass the size of a pea in right trapezius noted so MRI ordered.

4/6/98 troubles at home, depressed, has lost 12# is down to 83#.

4/9/98 Elbow resolved, MRI normal and mass no longer palpable.

4/28/98 86#, positive changes in home life, on St. Johns wart.

2/4/99 Chiropractic for the neck and shoulders.

3/1/99 Chiropractic for pain in left shoulder and numbness in left hand.

9/3/99 Pain in left shoulder when moves right arm. This was described as an old problem.

1/26/00 Pain in the right shoulder. Celebrex had helped.

1/27/00 MRI spine shows advanced multilevel DDD and degenerative uncovertebral joint disease with bilateral foraminal stenosis and moderate canal stenosis. Bilateral foraminal stenosis at C 5-6 and C 6-7. Left foraminal stenosis at C 4-5.

2/21/00 released to full duty.

10/26/00 Not seen for 2 years. Has aches in neck, shoulders, elbow and symptoms suggestive of radicular pain. Neck had decreased ROM and left rotation reproduced her pain. C-spine x-ray was described as normal in the disc spaces and foramina.

11/13/00 Dr. Mortensen described index and long finger numbness on the right. X-rays showed DDD C4-7 and a diagnosis of cervical radiculopathy was diagnosed.

11/28/00 Cervical DDD and radiculopathy diagnosed with no intrinsic upper extremity problem.

11/30/00 Dr. Berry: Onset of pain started in 3/97 from lifting, twisting and pulling. Pain is noted in the occiput, right posterior cervical, right trapezius, right heel, right posterior elbow and right hand. Diagnosis was radicular pain with mild stenosis. Discectomy C4-7 recommended. He relates this problem to her original complaints of 1997.

3/20/01 EMG and NCV totally normal. No evidence of nerve root compromise.

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

3/24/01 Neck and right arm pain. Weak right wrist flexion and extension and decreased ROM of wrist in all directions. No atrophy noted.

5/23/01 Dr. Moress IME: 1990 to 1997 worked for Koret as a seamstress.

Developed right shoulder and elbow pain. He did not feel this was radicular in nature, felt it was vague and non-specific and felt surgery was not indicated. He did not find the current diffuse pain complaints related to her remote exposure at Koret in 1997.

Assessment

1. Degenerative disc and joint disease in the cervical spine, work aggravated.
2. Non-specific myofascial pain syndrome, work aggravated.
3. Probable depressive disorder, non-industrial.

Discussion

This unfortunate woman has suffered many years from myofascial pain as she worked as a seamstress. The pain was associated with work activity. She has also developed significant degenerative disc and joint disease in her neck. She did report chronic pain and several years of awkward neck posturing in her work from 1990 to 1997. She chronically had pain after her work shift for many years but it became much more noticeable in 1997. She had used sports creams at night and had relief while off shift. She describes a more slowly progressive problem that seemed to culminate in severe symptoms on February 28, 1997. The condition from which she suffers in the cervical spine is one also associated with the natural process of aging. Some individuals who have never worked develop degenerative disc and joint disease as she has. Repetitive and cumulative activity such as repeated neck bending (as in sewing) can theoretically accelerate or aggravate this condition. In her case, it is medically probable that approximately 50% of her cervical degenerative disc and joint condition is relatable to cumulative trauma at work through February 1997. The remaining 50% is relatable to natural degenerative processes due to aging. Interestingly, most of her symptoms have been on the right side but the foraminal stenosis is bilateral on the MRI and in fact in some respects worse on the left. Left sided symptoms weren't reported until 3/1/99 at the chiropractors office after having chiropractic treatment for her neck. Although there is no evidence of such in this case, chiropractic manipulation of the neck has been associated with worsening disc disease in some individuals. No electrodiagnostic evidence of radiculopathy has ever been found in her. Her complaints are atypical pain complaints and she has some non-physiologic radiation of pain. For example, moving her fingers causes pain in her head and moving her right arm causes left shoulder pain, etc. These findings lead to the conclusion that this condition is a complex pain syndrome in this patient. She has degenerative spine disease but

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

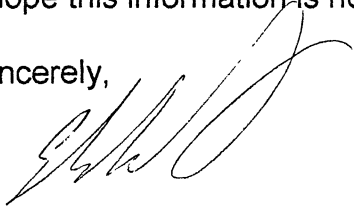
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801-576-8988

there is a strong myofacial component with non-physiologic complaints. Future treatment will need to consider her risk for less than an ideal result from any surgical procedure based upon these complicating factors. Conservative treatment has not been successful in relieving all of her complaints. It is likely that surgical treatment will also not resolve all of her complaints. Given the lack of strong evidence for a true nerve irritation or lesion, successful surgical treatment is somewhat less likely. On the other hand, she has not found relief so far and will need to weigh the risks and benefits before deciding to proceed with surgery. Since she developed this problem over a long period of time with cumulative trauma (including 2 events in February 1997) it is very difficult to accurately establish an onset date and appropriate apportionment. It is medically probable that 50% of her current problems (the degenerative spine disease and the myofacial pain disorder) are due to the type of work she did over the years and the remaining 50% is due to natural degenerative processes. The bulk of all of her symptoms had occurred by 3/1/99 and it is felt that there is little evidence to support substantial worsening since that date. She clearly had significantly advanced degenerative disease on MRI by 1/2000 and this obviously had been present for many months before the MRI scan was performed.

I hope this information is helpful in adjudicating this claim.

Sincerely,



Edward B. Holmes, MD, MPH

Medical Panel Chairman

Occupational Medicine

ADDEDUM

Section 6

September 16, 2004, Supplemental Medical Panel
Report

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302

Sandy, Utah 84094

801-576-8988

Date: September 16, 2004

Judge Debbie L. Hann
Labor Commission
Division of Adjudication
160 East 300 South, 3rd Floor
PO Box 146615
Salt Lake City, Utah 84114-6615

Re: Supplemental Panel Review on Darla Basso

Dear Judge Hann,

The following represents the report of the supplemental medical panel evaluation on the above named patient. I have reviewed the video taped deposition of 12/18/03 as well as the updated medical records from Dr. Reichman and Dr. Moress. I was asked to address whether this new evidence changed my prior opinion from my medical panel report of July 5, 2002. The following represents my additional report and clarification.

1. *Address if this changes your opinion in any way and if so, how.*
 - a. This evidence does not significantly change my overall opinion however please see the discussion section below for comments and clarification on the specific percentage apportioned to work vs. non industrial factors in my original report.
2. *If it does not change your opinion, please clarify how her neck posture as set forth in the evidence submitted contributed to the petitioner's condition.*
 - a. It is my opinion, based upon reasonable medical probability that the neck postures and hand/arm repetitive movements she described are partially contributory to her neck and upper extremity complaints that occurred beginning in 1996 or 1997 and which continued while working.
 - b. Please see the detailed discussion below for further clarification.
3. *Please also address more fully the contribution of awkward neck posture versus the February 24, 1997 injury and the February 28, 1997 repetitive motion injury*
 - a. Other than temporary symptom exacerbations, I don't believe either the February 24, 1997 or February 28, 1997 incidents caused any significant portion of her ongoing/current problems.
 - b. Please see the detailed discussion below for further clarification.

Edward B. Holmes, M.D., MPH

9829 South 1300 East, Suite 302
Sandy, Utah 84094
801-576-8988

Record Review Highlights

3/20/01 EMG report Dr. Duerhsen: No evidence of right cervical motor radiculopathy or brachiplexopathy. No TOS. No entrapment of ulnar nerve. No right pronator syndrome. No right carpal tunnel syndrome. No generalized axonal or demyelinating neuropathy right upper limb. Normal.

3/11/03 Dr. Reichman: Decreased range of motion of the cervical spine. Very impaired. 4/5 weakness in the deltoids, biceps, wrist extensors. Recommends C4-5, C5-6, C6-7 fusion and discectomy. Repeat MRI ordered.

12/4/03 Dr. Reichman: Neck pain, trapezius pain down into arms to her elbow. Numbness in 1st and 2nd digits. Cervical stenosis C4-7 with increased radiculopathy.

12/18/03 Video taped deposition: Reviewed in its entirety. Matter of record.

12/26/03 Dr. Moress file review: Does not feel her work postures were awkward as evidenced in the video. Does not feel work postures contributed to her DDD. He comments that the work postures may have contributed to tension myalgia early on but not to ongoing symptoms at this late date.

12/30/03 Dr. Reichman: No change in the MRI currently compared to the 11/01 MRI. Progressive symptoms necessitate surgery before further atrophy and nerve damage.

12/30/03 MRI cervical spine: C4-5 disc herniation into left foramina likely C5 root encroachment. Degenerative spondylotic disease bilateral C5-6 foraminal stenosis with likely C6 root impingement. Degenerative spondylotic disease C6-7 bilaterally with likely C7 root impingement bilaterally.

Discussion

To clarify my thinking on this case I offer the following explanation. She has had Degenerative Disc Disease (DDD) as well as ongoing myofascial pain in the neck. Even though I estimated a percentage contribution from work and other factors in the original report, based upon reasonable medical probability, there is no way to exactly determine the causal contribution of any particular minor injury event or factor based upon currently available evidence and research. However, using sound scientific principles and reasoning I can explain my prior conclusions as follows.

This case involves a woman who worked as a sewer, frequently and on a sustained basis, bending her neck forward at work as well as repetitively moving her arms and shoulders. Concurrent with this type of work activity she developed neck, shoulder and upper extremity pain symptoms that appear to have been due to a combination of factors including muscle tension syndrome/myofascial pain syndrome, degenerative joint disease in the cervical spine, degenerative disc

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disease and possibly upper extremity tendonitis (epicondylitis). In addition she has many non physiologic complaints and some psychosocial issues that are likely contributory to her ongoing report of symptoms.

Early on she exhibited symptoms suggestive of epicondylitis and tendonitis however the symptoms of epicondylitis later resolved leaving only the neck, shoulder and arm discomfort. As was stated in my previous report of 7/5/02, it was and still is my opinion that essentially all of this pathology and essentially all of these symptoms had developed prior to her work at Rivers West.

On the other hand, her symptoms all became evident and magnified concurrent with her work activity at Koret of California. The history and details of the onset are well documented in the record and in my 7/5/02 report. There is no other history presented of any other confounding neck trauma at home or in other activities outside of work in the record. The concurrent development of symptoms while working at a particular job, in and of itself, does not establish causation. In fact, a temporal association between a potential cause and the development of disease is only one of many factors utilized in determining causation.

There are some small studies that suggest an association between neck and back posture and neck and upper extremity symptoms in school children and dentists among others. I am not aware of any really large, well designed studies to clearly establish a causal association between neck postures and the development of cervical DDD. However, just because this hasn't been well studied doesn't mean it cannot occur. In fact, there is not a lot of really good research evidence either way on this issue to date, although some is in progress at the University of Utah, Rocky Mountain Center for Occupational and Environmental Health.

In addition, I have begun to compile data on Drywall workers who install drywall, mud, tape and do sanding on the ceiling requiring extensive neck bending. This data is nowhere near the stage of analysis yet, however, the purpose for compiling this data is a clinical observation based upon many years of experience with injured workers wherein I have noted a relatively high degree of cervical DDD and herniations in relatively strong, healthy and young drywall workers. Only time and further scientific study will tell if there truly is a causal association between this type of frequent and sustained neck bending and DDD or neck pain. Although Drywall work is clearly of a different character than sewing, based upon reasonable medical probability, I believe there may be a propensity for development of DDD and/or neck pain with such extreme posturing and lessons can be learned from this mechanism. As further evidence

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of my conclusion, the national institute for occupational safety and health (NIOSH) has concluded:

*“There is **strong evidence** that working groups with high levels of static contraction, prolonged static loads, or extreme working postures involving the neck/shoulder muscles are at increased risk for neck/shoulder MSDs. Consistently high ORs were found (twelve statistically significant studies with ORs over 3.0) providing evidence linking tension-neck syndrome with static postures or static loads.”¹*

NIOSH further reported that in their conclusions on posture and neck symptoms,

“Twenty-seven studies that considered extreme or static posture found a statistically significant positive association between posture and neck or neck/shoulder MSDs; three had non-significant findings (Table 2-1. Overall, in terms of magnitude of the association, looking at both significant and non-significant findings, 13 studies had estimations of risk (ORs or PRRs) greater than 3.0, 9 had risk estimates between 1 and 3, and none had an estimate less than 1.0. Eleven studies did not report their results in terms of ORs or PRRs; of these, all but one found a significant relationship.”¹

Although not clearly stated in my original report, there is also significant scientific evidence regarding the development of neck/shoulder symptoms and repetitive hand arm movements like those performed by the petitioner as a sewer. NIOSH concluded:

*“There is **evidence** for a causal relationship between highly repetitive work and neck and neck/shoulder MSDs. Most of the epidemiologic studies reviewed defined “repetitive work” for the neck as work activities which involve continuous arm or hand movements which affect the neck/shoulder musculature and generate loads on the neck/shoulder area; fewer studies examined relationships based on actual repetitive neck movements. The two studies which measured repetitive neck movements by measuring head position (using frequency and duration of movements) fulfilled the most stringent epidemiologic criteria, showing strong associations with neck/shoulder MSDs. In those studies defining repetitive work involving continuous arm or hand movements affecting the neck/shoulder, nine studies were statistically significant and had odds ratios (ORs) greater than 3.0.; eight studies fulfilled all the epidemiologic criteria except the exposure criteria, and measured repetition for the hand/wrist and not for the neck. Of these, three were statistically*

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significant and had ORs greater than 3, five had nonsignificant ORs, all under 2.0."

The above studies cited by NIOSH are not all individually referenced here but can be obtained by reviewing the NIOSH publication. These studies vary in quality and character. Many do not deal with specific diagnoses but rather deal with associations found between neck/shoulder postures, hand/arm repetition and "pain" or other symptoms. This symptom association may be significantly different than a factor that may cause DDD in the cervical spine. Based upon the above, I think it is medically reasonable to conclude that sustained neck postures in flexion along with repetitive hand/arm movements as described by the petitioner could be a risk factor for neck/shoulder symptoms in some individuals.

The development of DDD is a process that is clearly multifactorial and NOT solely due to trauma, cumulative trauma, or work activity. In fact, absent substantial trauma, the majority of factors leading to development of DDD and disc herniations in the spine may in fact be non work related. For example, natural aging, biochemical and physiologic factors, smoking, hobbies, sports, and work stressors have all been implicated. DDD is noted, even with herniations, in asymptomatic individuals that have been studied by MRI. As a result, one cannot assume that just because DDD is present or a herniated disc is present on an MRI that this is evidence of work trauma or indeed is even the cause of alleged symptoms. Symptoms may be due to some other factor (muscle tension syndrome) and just happen to be in the same body part (neck) as the DDD which was found on MRI. Furthermore, Degenerative Joint Disease (DJD) in the spine joints can cause arthritic pain that may only become evident when the joints are stressed (posture, use, cold, trauma, etc) or inflamed.

With regard to myofascial pain or muscle tension syndrome, this is a very difficult but common problem. Most people by age 40 at some time or another have experienced varying degrees of myofascial pain from "sleeping wrong" or getting a "kink" in the neck. Such pain can be quite severe and even relatively long lasting. Continued aggravation or exacerbation by work or hobby activities may prolong symptomatology. In addition, depression and psychosocial factors are strongly associated with prolonged symptomatology.

It is not just medically conceivable but medically reasonable to conclude, in this particular case, that the DDD (regardless of the underlying cause) was partially symptomatically aggravated by the sustained work postures she described and this contributed to her onset of symptomatic DDD and along with the myofascial pain. These types of aggravations and symptom exacerbations are usually of a temporary nature as evidenced by her history of having severe symptoms, then

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relief when off work, then worsening symptoms when back at work, etc. Therefore, I find it difficult to conclude that all of her current symptoms are attributable to work activity at Koret or Rivers West, since so much time has passed since leaving those exacerbating activities. In fact, it is more likely that her current ongoing symptoms are attributable to her underlying severe DDD and DJD in combination with psychosocial factors leading to prolonged non physiologic and atypical myofascial pain symptoms. Even though she has some documented structural abnormalities on her cervical spine MRI, with the other psychosocial factors and myofascial pain problems, surgical intervention may not be the best treatment choice and she may not have a fully favorable outcome, although it is possible.

NIOSH criteria for causationⁱⁱ: Approach to Decision-Making

Evidence of Disease

1. She has had chronic symptomatology suggestive of myofascial pain or muscle tension syndrome diffusely in her neck and shoulders. Since there is no objective criteria for this, this is subjective evidence but nevertheless consistent across many examiners who have evaluated this patient.
2. MRI evidence showing: C4-5 disc herniation into left foramina likely C5 root encroachment. Degenerative spondylosis bilateral C5-6 foraminal stenosis with likely C6 root impingement. Degenerative spondylosis C6-7 bilaterally with likely C7 root impingement bilaterally. All of the above could be associated with neck pain and even radiation to the upper extremity.
3. Temporally, her symptoms developed and progressed with particular neck/shoulder posturing/activity at work.

Epidemiology

1. There is fairly good epidemiologic evidence of neck/shoulder discomfort in people with extreme, awkward or sustained neck postures as well as in those with repetitive hand/arm movements, as noted above in the NIOSH document.
2. There is little good research for or against such postures causing DDD of the cervical spine.

Evidence of Exposure

1. The description of her sewing activity is such that her spinal flexion (lumbar, thoracic and cervical) are all sustained in a non neutral position at work. Although not an "extreme" posture, NIOSH has noted

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that some studies of similar postures have been associated with neck/shoulder pain.

2. The work described involved repetitive hand/arm movement.
3. She performed this work for several years at Koret, and similar work later at Rivers West.

Aggravation of Preexisting Conditions/other relevant factors

1. She does have DDD and DJD in her cervical spine. These types of conditions only enhance the probability of her having worsening neck and upper extremity symptoms with exacerbating postures or activities, whether at work or at home.

Conclusions

In summary, she has vague, diffuse and sometimes non-physiologic neck/shoulder symptomatology suggestive of myofascial pain or muscle tension syndrome. She has some findings suggestive of symptom magnification. She may also have axial spine pain from DDD and DJD as well as a slight possibility of a radiculopathy (although not clearly evident on electrodiagnostics or exam). Utilizing NIOSH causation criteria, I conclude that in this unique and particular case, it is medically reasonable to conclude that some neck/shoulder symptomatology was associated with her work activity, if nothing else, at a level of aggravation and exacerbation of underlying degenerative conditions. This exacerbation occurred during the course of her work and a few months thereafter.

Sincerely,



Edward B. Holmes, MD, MPH
Medical Panel Chairman

References:

ⁱMusculoskeletal Disorders (MSDs) and Workplace Factors A Critical Review of Epidemiologic Evidence for Work-Related Musculoskeletal Disorders of the Neck, Upper Extremity, and Low Back, NIOSH, 1997, Chapter 2.

ⁱⁱ A GUIDE TO THE WORK-RELATEDNESS OF DISEASE, NIOSH, January, 1979, DHHS (NIOSH) Publication No. 79-116