

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212605

JAMES KELSEY

CLAIMANT

GEORGE'S, INC.
SELF INSURED

RESPONDENT

CROCKETT ADJUSTMENT

THIRD PARTY ADMINISTRATOR

OPINION FILED SEPTEMBER 19, 2003

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by JASON WATSON, Attorney, Fayetteville, Arkansas.

Respondents represented by DAVID WALL, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on June 23, 2003, in Springdale, Arkansas. A pre-hearing order was entered in this case on February 3, 2003. This pre-hearing order purported to set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the claimant withdrew his request to litigate temporary total disability benefits, at the present time. The respondents voiced no objection to the removal of this issue. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. I to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates, including July 15, 2002, the relationship of employee-self insured employer-third party carrier existed between the parties.
2. The appropriate weekly compensation rates are \$267.00 for total disability and \$200.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. Whether the claimant sustained a compensable injury to his right shoulder on July 15, 2002.
2. The claimant's entitlement to the payment of medical expenses.

In regard to these issues, the claimant contends:

"The claimant contends that he sustained a right shoulder injury which occurred on or about July 15, 2002. As a result of this injury, the claimant has required extensive medical services. This claim has been controverted in its entirety and the claimant's attorney is entitled to a controverted attorney's fee and medical benefits as related to the right shoulder injury."

In regard to these issues, the respondents contend:

"The respondent contends the claimant did not sustain a compensable injury on July 15, 2002, or at any other time. Under the circumstances, the respondent respectfully denies that the claimant is entitled to any workers' compensation benefits."

DISCUSSION

_____The central issue in this case is the question of whether the claimant sustained a "compensable injury" to his right shoulder on July 15, 2002. The burden rests upon the claimant to prove that he sustained a physical injury to his shoulder on that date that meets all of the requirements for a "compensable injury" imposed by the Act.

The first of these requirements is contained in Ark. Code Ann. §11-9-102(4)(D). This subsection requires that the claimant prove, by a preponderance of the medical evidence the actual existence of the physical injury or condition alleged to be compensable. It further requires the claimant to prove that the actual existence of this physical injury is supported by the independent observation of "objective findings," or findings beyond the claimant's voluntary control.

In the present claim, the medical evidence is sufficient to establish the existence of various physical injuries or conditions involving the claimant's right shoulder. The medical evidence further shows ample "objective findings" to support the actual existence of these

various physical injuries or conditions.

The initial report of Dr. Jamal Abdin, dated October 11, 2002, diagnoses the possible existence of a rotator cuff injury involving the supraspinatus muscle. In this report, Dr. Abdin states that the claimant's voiced symptoms and his findings on clinical examination (which are also essentially subjective) are consistent with a supraspinatus injury. An MRI study of the claimant's right shoulder was performed at the request of Dr. Abdin on October 22, 2002. This study revealed objective findings to substantiate an injury or condition involving the claimant's right supraspinatus muscle, specifically, a "right acromioclavicular joint arthropathy with a 4 mm. inferior projecting osteophyte (bone spur) impressing upon the superior surface of the distal right supraspinatus muscle near the myotendinous junction". Curiously, there is no indication in Dr. Abdin's report that the claimant voiced any symptoms indicative of or consistent with a biceps tendon injury or condition.

The MRI study of October 22, 2002, also ordered by Dr. Abdin revealed other objective defects involving the claimant's right shoulder. These were described as:

"There is a marked thickening and increased signal involving the right biceps tendon at the level of the proximal right humeral diaphysis. This is most consistent with either a partial tear or significant right biceps tendonosis. Clinical correlation is recommended.

Right rotator cuff tendonosis.

TYPE II Acromion with moderate lateral downsloping.

There are a few degenerative cysts involving the greater tuberosity of the right humerus.

Right shoulder effusion with a significant amount of fluid within the subcoracoid recess."

The claimant was subsequently referred to Dr. B. Raye Mitchell, an orthopaedic surgeon. At the time of his initial evaluation on November 11, 2002, Dr. Mitchell indicates that the claimant's symptoms and the findings on his physical examination suggested that

the claimant's problem was more likely in the form of biceps tendinitis, and possibly either the rotator cuff tendinitis or a tear of the rotator cuff. Clearly, these diagnoses made by Dr. Mitchell are also supported by the objectively documented abnormalities noted on the MRI study.

In order to rule out the possibility of a tear of the claimant's rotator cuff, Dr. Mitchell ordered an arthrogram of the claimant's right shoulder, which was subsequently performed on November 12, 2002. This test was interpreted by the radiologist as normal and showing no evidence of a rotator cuff tear.

Following the arthrogram, the claimant returned to Dr. Mitchell on November 19, 2002. At that time Dr. Mitchell diagnosed the claimant's difficulties as being attributable to a bout of tendinitis due to rotator cuff degeneration. Dr. Mitchell also noted that the Depo-Medrol injection given during the arthrogram had provided the claimant with substantial improvement of his symptoms and that he stated that he felt "a lot better". Dr. Mitchell released the claimant to return to work with some restrictions. However, he indicated that it was likely the claimant would continue to have significant bouts of tendinitis and might ultimately required surgical decompression of his shoulder, by removal of the impinging bone spurs.

On December 9, 2002, the claimant returned to Dr. Mitchell. At that time a complete rupture of his right biceps tendon was observed. Dr. Mitchell recorded that this had occurred a week and a half to two weeks prior when the claimant was lifting a chair at home. At that time, Dr. Mitchell again diagnosed a tear of the claimant's rotator cuff, based upon his "clinical suspicion" and contrary to the arthrogram and MRI results. He also apparently changed his opinion concerning the defect, involving the claimant's right biceps tendon, shown on the MRI study. He now opined that this defect demonstrated a partial tear of the biceps tendon, rather than significant biceps tendinitis. Finally, he indicated that surgery was going to be scheduled to correct these various problems. However, this

surgery has not yet taken place, due to the claimant's lack of finances.

The claimant must next prove that one or more of these medically established and objectively documented physical injuries or conditions satisfy the definitional requirements for a "compensable injury" found in Ark. Code Ann. §11-9-102(4)(A)(i). These definitional requirements are:

- (1) The physical injury or condition must arise out of or occur in the course employment;
- (2) The physical injury or condition must be causally related to a "specific incident";
- (3) The physical injury or condition must be identifiable by time and place of occurrence;
- (4) The physical injury or condition must result in internal or external physical harm to the claimant's body;
- (5) The physical injury or condition must be of such a nature or degree that it requires medical services or results in disability.

In order to meet his burden the claimant must prove that his alleged employment related injury satisfies all of the foregoing requirements. Should he fail to prove even one of these requirements, then he has failed to prove the occurrence of a "compensable injury", as that term is expressly defined by the Act.

The only direct evidence presented by the claimant to prove that his alleged employment related injury satisfies the first three requirements of Ark. Code Ann. §11-9-102(4)(A)(i), is his own testimony. It is his testimony, alone, that is offered to prove both the occurrence of a specific employment related incident and the existence of a close temporal relationship between this incident and the onset of right shoulder symptoms, which would be indicative of the occurrence of a physical injury to this portion of his body.

It is well recognized that the testimony of a party is never considered uncontradicted. However, this rule does not mean that the testimony of a party may simply be disregarded. If the testimony of a party is credible, it may be sufficient, in and of itself, to prove any fact

it is legally competent to address. Clearly, the claimant's testimony would be legally competent to prove both the occurrence of a specific employment related incident and the existence of a close temporal relationship between this incident and the onset of right shoulder symptoms, which would be indicative of a physical injury to this point of his body.

After consideration of all the evidence presented, it is simply my opinion that the claimant's testimony is not sufficiently credible to prove either the occurrence of a specific employment related incident or the existence of a close temporal relationship between this incident and the initial onset of symptoms with his right shoulder, which would be indicative of a physical injury to this portion of his anatomy. His testimony in regard to these matters is in conflict with his actions, and is contradicted by other more credible testimony presented.

The claimant testified that on the day of the alleged incident and the onset of his right shoulder difficulties, he immediately informed his supervisor, a Tom Harriman, of both the occurrence of the incident and the onset of his right shoulder complaints. However, in his testimony Mr. Harriman denied that the claimant ever reported any such incident or difficulties. The claimant testified that he also advised two co-employees of these matters. However, he has called neither of these co-employees to confirm his testimony.

The evidence unquestionably shows that the claimant continued to work his regular hours and perform his regular assigned employment tasks, some of which were strenuous in nature, from the time of the alleged incident in mid-July of 2002 through the date of his termination on October 7, 2002. He gives no indication that he was physically unable to perform any of his employment duties during this time. Mr. Harriman also testified that during this period he personally observed the claimant performing his assigned employment duties and that the claimant neither voiced or exhibited any problems with his right shoulder. The testimony of Mr. Harriman also indicates that when the claimant was terminated on October 7, 2002, he was given the alternative of accepting a different

position with the respondent. Although the claimant turned down these alternate positions, he made no mention of any physical difficulties or limitations as the reason for his action. He also failed to report or mention any employment related injury to his right shoulder.

It is extremely difficult to believe that the claimant could have continued to pursue his regular strenuous employment activities with this respondent, without any apparent difficulty or complaint, had he experienced a partial tear of his biceps tendon, a tear of his rotator cuff, or even a substantial bout of tendinitis in mid-July of 2002. Clearly, even repeated massaging of the claimant's shoulder with Bengay after work would not be reasonably expected to sufficiently reduce the symptoms resulting from these types of injuries or conditions to allow the claimant to continue working without complaint and without visible difficulty.

The claimant concedes that he took no action to seek medical treatment for any difficulties with his right shoulder from the time of the alleged incident in mid-July until the latter part of September. His failure to seek such medical treatment would appear to be illogical, in light of his testimony concerning the magnitude and persistence of his symptoms or even in light of the magnitude and persistence of the symptoms that would be reasonably expected from either a partial tear of the biceps tendon, a rotation cuff tear, or even a substantial bout of tendinitis.

The claimant also testified that when he finally decided to seek medical treatment, he advised Mr. Harriman of his continuing employment related right shoulder difficulties, and his decision that these difficulties now required medical treatment. Again, Mr. Harriman, in his testimony, denies such a conversation. The evidence also shows that when the claimant ultimately sought medical treatment, he did so through his group insurance policy with the respondent.

I would also note that most of the objectively documented defects and conditions

are clearly the result of longstanding degenerative arthritic changes, rather than any recent specific traumatic event. These degenerative extensive arthritic changes could, in and of themselves, produce any of the claimant's symptoms without a specific traumatic event. The only exception would be the complete tear of the claimant's biceps tendon, which clearly occurred subsequent to the termination of the claimant's employment with this respondent. Two of the diagnosed conditions could logically result from a specific traumatic event. These would be a tear of the claimant's right rotator cuff and a partial tear of his right biceps tendon. However, the diagnosed tear of the claimant's rotator cuff is clearly speculative and is contrary to all the objective testing performed. All of the tests directed toward concerning the existence of such a tear have shown the claimant's rotator cuff to be intact. The diagnosed partial tear of the biceps tendon is also somewhat speculative and is only equivocally supported by objective findings. Apparently, Dr. Mitchell only decided that this condition existed, because of the subsequent complete tear of this tendon.

I would note that the medical evidence presented also appears to show a change in the claimant's symptomology over the course of his treatment. When initially seen, the claimant complained of symptoms consistent with problems involving the area of his supraspinatus muscle. When subsequently seen by Dr. Mitchell, his symptoms had changed to where they were indicative of difficulties in the biceps area, and possibly the rotator cuff in general, rather than the supraspinatus tendon. When last seen by Dr. Mitchell, the claimant's symptoms were indicative of difficulties with his rotator cuff in general, as well as his obvious subsequent complete rupture of the biceps tendon. Except for the complete rupture of the biceps tendon, all of the other symptoms used to diagnose these various conditions could be logically attributable solely to the longstanding degenerative arthritic changes demonstrated on the MRI study.

In summary, I find that the claimant has failed to prove by the greater weight of the

credible evidence that on or about July 15, 2002, he sustained a physical injury to his right shoulder that arose out of and occurred in the course of his employment with this respondent, that was caused by a specific incident, and that is identifiable by time and place of occurrence. The claimant's failure to prove these three necessary definitional requirements of Ark. Code Ann. §11-9-102(4)(A)(i), prevents a finding that his subsequent right shoulder difficulties constitute a "compensable injury" within the meaning of this subsection. Thus, I have no alternative but to deny this claim.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant date, including July 15, 2002, the relationship of employee-employer-third party carrier existed between the parties.
3. On all relevant dates, including July 15, 2002, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$267.00 for total disability and \$200.00 for permanent partial disability, should such benefits have been appropriate.
4. The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his right shoulder on or about July 15, 2002. Specifically, he has failed to prove by the greater weight of the credible evidence the occurrence of a physical injury to his right shoulder that arose out of and occurred in the course of his employment, that was caused by a specific incident, and that is identifiable by time and place of occurrence.
5. The respondents have denied the occurrence of any compensable injury to the claimant's right shoulder and have controverted this claim in its entirety.

ORDER

_____Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge