

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213128

STANLEY KESNER	CLAIMANT
TEC, THE EMPLOYMENT COMPANY	RESPONDENT
LIBERTY MUTUAL INS. CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 17, 2003

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by KENNETH OSBORNE, Attorney, Fayetteville, Arkansas.

Respondents represented by JAMES ARNOLD, II, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 13, 2003, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on January 22, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. From July 29, 2002, to August 14, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$193.00 for temporary total disability and \$154.00 for permanent partial disability.

4. Some medical has been paid.

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

1. Compensability of the Claimant's right shoulder injury.
2. Related medical.
3. Temporary total disability from August 14, 2003, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that while he was separating frozen chicken boxes he tore his right rotator cuff.

In regard to the foregoing issues the respondents contend that the claimant did not sustain a compensable injury to his right shoulder which arose out of and in the course of his employment.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary medical records marked Claimant's Exhibit No. 1. The respondents submitted medical records marked Respondents' Exhibit No. 1, pay records marked Respondents' Exhibit No. 2 and the deposition of Dr. Terry J. Sites marked Respondents' Exhibit No. 3. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified that the respondent is a temporary agency and on August 14, 2002, they had sent him to Frez-N-Stor. The claimant testified that for the first couple of weeks he used a jack hammer which weighed approximately 80 to 100 pounds to free

up some units which the ice had built up on. The claimant testified that he had no problems with his shoulders with this work. The claimant testified that he was then sent out to weed eat around the building but on the last day he worked he was working trying to remove plastic inserts from between boxes that had gotten frozen together. The claimant testified that he was trying to pry these apart. The claimant testified that he was standing on a rail leaning over the boxes trying to pry the boxes apart in order to remove the inserts when he felt his foot slip. The claimant testified that he did not fall because he caught himself with his right arm and shoulder and immediately felt pain in his shoulder and arm.

The claimant testified that the jobs that he had prior to working for the respondent were physical manual labor type jobs primarily in the fast food or food industry. The claimant testified that he was required to unload trucks, put up stock as well as do paper work since in one of these jobs he was a manager in training. The claimant testified that there were lots of different duties involving cooking as well as management with these jobs. The claimant testified that he did not really have problems with his shoulder but he did have a bout with bursitis for which he received medical treatment. The claimant testified that his shoulder problems were nothing that kept him from doing his job nor did he have any restrictions.

The claimant testified that he has been seeing his family doctor, Dr. Stinnett, for the past twelve to fourteen years. The

claimant agreed that he has seen Dr. Stinnett for complaints of shoulder pain specifically remembering that he saw Dr. Stinnett following a fall he had while fishing and hurting his shoulder. The claimant testified that the last few times he has seen Dr. Stinnett before August 14, 2002, he had complaints of head congestion and ear and throat infection. The claimant agreed that he may have mentioned something about his shoulder when asked by Dr. Stinnett. The claimant testified that he does not remember having a conversation with Dr. Stinnett concerning being seen by an orthopedic surgeon for his shoulder.

The claimant testified that the respondents sent him to see Dr. Cooper for his shoulder problems and Dr. Cooper referred him to Dr. Sites. The claimant testified that after he underwent an MRI, shoulder surgery was recommended. The claimant testified that his shoulder joint is painful, it pops and makes grinding noises. The claimant testified that before August 14, 2002, he never had pain in his forearm which he now has.

The claimant testified that after August 14, 2002, the respondent put him to work at light duty at the Salvation Army.

On cross examination, the claimant agreed that he has seen Dr. Stinnett prior to April 1, 2002, for complaints of right shoulder pain and problems. The claimant testified that in 1991 he had been treated by Dr. Hoffman, a chiropractor, for pain in his shoulder between his neck and shoulder. The claimant testified that this pain did not go down into his arm or past the point of his shoulder. The claimant agreed that after his injury on August 14,

2002, the respondent sent him to work at the Salvation Army. The claimant agreed that he was earning at the same rate of pay and working forty hours per week at this new job up until September 17, 2002. The claimant testified that since November 17, 2002, he has sought employment through the respondent's temporary agency.

The medical records set forth that the claimant was seen by Dr. Craig Cooper on August 15, 2002. Dr. Cooper writes that the claimant has reported that he injured his right shoulder at work the day before while trying to separate frozen boxes. Dr. Cooper notes that the claimant has had similar problems with his arm in the past and has received care from Dr. Charles Stinnett for these problems. Dr. Cooper notes that the claimant reports that he had an injection in his shoulder about two months ago and his problem had resolved. Dr. Cooper also writes that the claimant reports that he and Dr. Stinnett had discussed a referral for an orthopedic evaluation. Dr. Cooper writes that the claimant's x-ray of his right shoulder did not have any significant boney abnormalities but that the claimant may have some narrowing of the subacromial space, compatible with impingement. Dr. Cooper diagnosed the claimant with right shoulder pain and injected his shoulder. The claimant was again seen by Dr. Cooper on August 29, 2000, where it is indicated that the claimant has had a lot of improvement but still has a little aching and a little bit of popping. Dr. Cooper notes that the claimant has some crepitus on circumduction of his right shoulder but has full circumduction. Dr. Cooper recommended that the claimant limit his lifting to twenty pounds, keeping his elbow

at his side with no lifting above mid chest height and continue his anti-inflammatories. The claimant, on September 13, 2002, reports to Dr. Cooper that he is about 80 percent better but at times has a dull ache in his shoulder, sometimes down the posterior aspect of his upper arm. Dr. Cooper writes that the claimant has crepitation on circumduction but he has full abduction of his shoulder. Physical therapy was recommended and the claimant was continued on medications. On October 11, 2002, Dr. Cooper writes that the claimant again reports that he is about 80 percent improved but still has noticed some popping and burning sensations in his right shoulder. Dr. Cooper recommended that the claimant be seen by Dr. Sites for an orthopedic evaluation.

The claimant was seen by Dr. Terry Sites on October 18, 2002, and Dr. Sites writes that the claimant reports that he injured his right shoulder on August 18, 2002, when he was separating frozen pallets. Dr. Sites writes that the claimant reports that he was seen by Dr. Charles Stinnett approximately five months ago when he fell while fishing and injured his shoulder. Dr. Sites notes that the claimant had an injection in his shoulder and his problems resolved, noting that he was asymptomatic at the time of his August 18, 2002, injury. Upon examination, Dr. Sites notes that there is mild crepitation with range of motion of the claimant's right shoulder and the claimant's x-ray of his right shoulder shows an anterior acromial osteophyte, Type 8 acromion, and some mild scholeosis at the AC joint with no significant glenohumeral degeneration. Dr. Sites diagnosed the claimant with right shoulder

rotator cuff tendinopathy, possible tear, and or additional intra articular pathology also with mild right AC joint arthrosis. Dr. Sites ordered an MRI and recommended that the claimant continue with light duties with no lifting over fifteen pounds and no lifting at or above shoulder level with his right arm. Dr. Sites writes that based on the objective findings above and within a reasonable degree of medical certainty, where it not for the injuries sustained on August 16, 2002, the claimant would not have his current right shoulder symptoms. The claimant's MRI performed on October 17, 2002, indicates that the findings are most consistent with a rotator cuff tear, evidence of adhesive capsulitis and the claimant has biceps long head tendinitis associated with a longitudinal tear which is also suspected.

Dr. Charles Stinnett saw the claimant on April 1, 2002, for complaints of pain in his right shoulder. Dr. Stinnett notes that the claimant reports that he has had pain in his right shoulder off and on for the last several months and it has gotten worse in the last few days. Dr. Stinnett diagnosed the claimant with bursitis of his shoulder and recommended exercises as well as medications. On May 17, 2002, Dr. Stinnett writes that the claimant has been doing exercises and taking medications which does not seem to have helped. Dr. Stinnett notes that the claimant appears to have persistent bursitis of his shoulder and injected the claimant's shoulder. Dr. Stinnett writes on June 28, 2002, that the claimant had an injection in his right shoulder in May which stopped his pain for several days but now this pain has come back. Dr.

Stinnett recommended medications, heat and exercise and an appointment with an orthopedist was recommended.

Dr. Terry Sites, in his deposition taken on April 11, 2003, stated that he first saw the claimant on October 16, 2002. Dr. Sites testified that the claimant had a positive impingement test and tenderness over his right AC joint. Dr. Sites was asked what a positive impingement test is and Dr. Sites explained,

"The test is performed by the examiner, elevating the shoulder as illustrated here (indicating) in what we call the scapula plain, and if they experience pain as they get, say, about shoulder level, that's considered a positive examination. It's a test to evaluate for pain in the rotator cuff."

Dr. Sites agreed that the results of this test are based upon the verbal or facial expressions of the claimant and at times a positive test may also be indicated by crepitation or a feeling of grinding. Dr. Sites testified that he did not make any notes concerning whether there was any grinding or crepitation. Dr. Sites testified that the claimant's MRI performed on October 17, 2002, was consistent with a rotator cuff tear and there was also some tendinitis with the possibility of a tear in the biceps tendon and evidence of adhesive capsulitis. Dr. Sites was asked if he or the radiologist could determine from the MRI film when the tears occurred and Dr. Sites responded no. Dr. Sites stated that the usual recommended option in a case such as the claimant's was that of surgical intervention. Dr. Sites was asked what the objective medical findings which he mentioned in his statement "based upon objective findings above and within a reasonable degree of medical

certainty, were it not for the injury sustained on August 16, 2002, the claimant would not have his current right shoulder symptoms", Dr. Sites replied, "the objective findings as revealed by MRI examination." Dr. Sites reviewed all of Dr. Stinnett's medical records concerning the treatment of the claimant's shoulder from April 2002 into June 2002. Dr. Sites stated that it was very interesting that the claimant did not go and see an orthopedist regarding his shoulder after seeing his family physician three times and that this would greatly influence his opinion that the claimant was asymptomatic some six weeks later. Dr. Sites stated that it was particularly interesting to him, after reviewing the claimant's MRI, that he has a tear of his bicep tendon in that the injury which the claimant explained to him, that of pulling or tearing apart frozen pallets, is the type of activity that would generally result or cause a tear of one's bicep tendon as opposed to taking a fall or as opposed to a general degenerative condition that tears one's rotator cuff. Dr. Sites stated that it was not uncommon for a person to have a small tear of their rotator cuff or some preexisting tendinitis and then an additional trauma which results in a complete tearing or an extension of the tearing that could cause a shoulder to become more painful.

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained an injury while working for the respondent on August 14, 2002. The claimant has testified to a specific incident that of prying apart frozen pallets when he felt an immediate pain in his right

shoulder. The claimant was seen by a physician the next day and in his history he associates his current problem with his work the day before. The claimant's MRI sets forth that the findings are consistent with a rotator cuff tear and that there also is a suspected tear of his bicep tendon. Dr. Sites stated that based on history as well as his MRI, it is his opinion, stated within a reasonable degree of medical certainty that the claimant's work activities on August 14, 2002, resulted in the claimant's shoulder injury. Therefore, this respondent should pay all related, reasonable and necessary medical costs for the treatment of the claimant's right shoulder problems. The claimant testified that he continued to work for the respondent from the date of his injury up until November 17, 2002, at his regular wage. The claimant has been given lifting restrictions for his right shoulder as well as no working above chest level with his right arm by Dr. Sites. The claimant has testified that he has approached the respondent for light duty work within his restrictions but none has been provided since November 17, 2002. I find, therefore, that the claimant is entitled to temporary total disability from November 17, 2002, to a date following his healing period after his shoulder surgery.

#### FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. From July 29, 2002, to August 14, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a weekly compensation rate of \$193.00 for temporary total disability and \$154.00 for permanent partial disability.

4. Some medical has been paid.

5. The claimant has proven by a preponderance of the evidence that he sustained a work related injury on August 14, 2002. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's right shoulder injury.

7. That the claimant is entitled to temporary total disability from November 17, 2002, to the end of his healing period following his shoulder surgery.

8. The respondents have controverted this claim in its entirety.

9. The respondents should pay the claimant's attorney the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury on August 14, 2002, while working for the respondent.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's right shoulder injury.

The respondents should pay temporary total disability to this claimant from November 17, 2002, to the end of his healing period following his shoulder surgery.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

---

ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE