

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F204104

CHARLES WALLS, Employee	CLAIMANT
SUPERIOR INDUSTRIES, Employer	RESPONDENT
CROCKETT ADJUSTMENT, Carrier	RESPONDENT

OPINION FILED JULY 15, 2003

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On June 18, 2003, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on November 6, 2002, and a pre-hearing order was filed on the same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties at all relevant times.
3. The claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$356.00 for total disability benefits and \$260.00 for permanent partial disability benefits.
4. Respondent has controverted the within claim in its entirety.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's shoulder.
2. Related medical.

3. Temporary total disability benefits.
4. Notice.
5. Attorney fee.
6. Credit for short-term disability benefits paid to claimant.
7. Claimant's entitlement to permanent disability benefits.

At the time of the hearing the claimant agreed to limit his request for permanent partial disability benefits to include anatomical impairment only.

"The claimant contends he was injured in August 2001 and made it until February of 2002 before he was unable to work and underwent surgery. He contends he is entitled to related medical, temporary total disability benefits, permanent partial disability benefits, and an attorney fee."

"The respondents contend the claimant did not sustain an injury arising out of and in the course of his employment. In addition, respondents contend the claimant does not have measurable and objective findings to support an injury. In the event it should be determined that this is a compensable claim, the respondents contend that the claimant did not report his injury until February 21, 2002, and the claimant is not entitled to receive benefits until that date. Respondents further would seek credit for short-term disability benefits paid to claimant. Finally, respondents contend that this is a nonspecific accident."

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

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 6, 2002, and contained in a pre-hearing order filed that same

date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while working for the respondent.

FACTUAL BACKGROUND

The claimant is a 58-year-old man with a 10th grade education who began working for respondent on September 29, 1994. In August 2001, claimant's job duties required him to lift 45 pound wheels in order to "rework" them. Essentially, claimant was repairing defects in the wheels by using a palm or grinding sander. Claimant testified that it took approximately five minutes to "rework" each wheel. Claimant testified that on August 22, 2001, he was lifting a wheel when he pulled something in his right shoulder. Claimant testified that he reported this incident to his foreman, Will Barton, and sought medical treatment from his family physician, Dr. Thorn, after finishing his work shift that day. Claimant continued to be evaluated by Dr. Thorn for several months before he was eventually referred to Dr. B. Raye Mitchell, Jr., who diagnosed the claimant as suffering from a right rotator cuff tear and performed surgery on April 4, 2002.

Claimant has filed this claim contending that he suffered a compensable injury to his shoulder on August 22, 2001. He seeks payment of temporary total disability benefits, medical benefits, permanent partial disability benefits for permanent impairment, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his right shoulder while lifting a wheel on August 22, 2001. Therefore, claimant's claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that

pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury. In short, inconsistencies in the claimant's testimony and the medical reports lead me to conclude that claimant has simply failed to meet his burden of proof. During his direct examination, claimant testified that he had no problems with his shoulder prior to August 22, 2001.

Q. Okay. Before August 22nd, '01, did you ever have any trouble with your shoulder?

A. No, sir.

Q. Now, in that regard, did you ever have any problem before August 22nd?

A. No, sir.

However, on cross-examination, claimant testified that his shoulder problem came on gradually:

Q. Okay. Now, isn't it true that this came on gradually, this shoulder problem?

A. Yes, sir.

Q. You didn't have just one specific incident, did you?

A. It just started hurting gradually, yes.

Thus, on direct examination claimant testified that he had no shoulder problems prior to the incident on August 22, 2001. However, during cross-examination, claimant testified that his shoulder problems had come on gradually. I do note that claimant testified on cross-examination that although his shoulder problems came on gradually, that they worsened as a result of the specific incident on August 22, 2001. However, that does not change the fact that claimant had specifically testified on direct examination that he had no shoulder problems prior to August 22, 2001, while on cross-examination claimant acknowledged that his shoulder problems had gradually begun.

Also on direct examination claimant testified that he reported his shoulder pain to his foreman, Will Barton, on August 22, 2001. However, during cross-examination claimant testified that he saw Dr. Thorn for his shoulder two or three times before he reported shoulder problems to the respondent.

In addition to the inconsistencies present in claimant's testimony, I also note that the medical evidence does not support claimant's contention. For instance, claimant testified that he sought medical treatment from his family physician, Dr. Thorn, on the date he injured his shoulder while lifting a wheel. However, a review of Dr. Thorn's medical report of August 22, 2001 indicates that claimant gave Dr. Thorn a history of a painful right shoulder of approximately one month with pain worse at night. Dr. Thorn's medical report does not contain a history of a specific injury or a work-related injury even though claimant had allegedly injured his shoulder at work that day. At the time of that visit Dr. Thorn diagnosed the claimant as suffering from biceps tendinitis, he prescribed medication, ice, and returned the claimant to work at full duty.

Thereafter, claimant again saw Dr. Thorn on September 21, 2001, and again on

September 28, 2001 for other ailments including cough and congestion. The medical reports of Dr. Thorn of those visits do not mention any additional shoulder problems despite claimant's contention that his shoulder condition continued to worsen.

Claimant did not report any additional shoulder problems to Dr. Thorn until December 11, 2001. Again, Dr. Thorn's medical report does not mention work as the potential cause of claimant's shoulder problems. Dr. Thorn next evaluated claimant on February 22, 2002, and at that time gave claimant an injection, prescribed medications, and took him off work for three weeks. When claimant returned to Dr. Thorn for a check up in two weeks on March 8, 2002, Dr. Thorn noted that claimant was still sore despite being off work and noted that claimant's x-rays were negative. As a result of claimant's continued complaints of pain, Dr. Thorn referred claimant to Dr. Mitchell. Claimant was initially evaluated by Dr. Mitchell on March 13, 2002. Dr. Mitchell's medical report of that date reflects a history of claimant having injured his right shoulder while lifting a wheel at work in August. This medical report in March 2002 is the first medical report containing a history of a work-related injury or a specific incident lifting a wheel. This history was not noted by a treating physician until almost seven months after the alleged injury.

In summary, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right shoulder which arose out of and in the course of his employment with the respondent. First, claimant testified on direct examination that he had no shoulder problems prior to August 22, 2001. On cross-examination, claimant testified that his shoulder problems began gradually before August 22nd. On direct examination, claimant testified that he reported the injury on the date it occurred to his foreman, Will Barton. On cross-examination, claimant testified that he saw Dr. Thorn two or three times before he reported the injury to the respondent. Furthermore, the medical records of Dr. Thorn dated April 22, 2001, the date of claimant's alleged injury, do not support claimant's contention. Dr. Thorn's medical

report of that date indicates that claimant's shoulder problem had existed for approximately one month. Furthermore, the medical report does not mention a specific injury or a work-related injury. Subsequent visits to Dr. Thorn in September 2001 again fail to reveal any shoulder complaints or a history of a work-related injury. It was not until claimant saw Dr. Mitchell in March 2002, almost seven months after this incident, that a history of a potential work-related injury is noted. Given this evidence, I simply find that claimant has failed to meet his burden of proving a compensable injury by a preponderance of the evidence.

ORDER

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by respondent. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE