

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F403937

WILLIAM ANDERSON, Employee	CLAIMANT
JM SUPPLY, INC., Employer	RESPONDENT
GALLAGHER BASSETT SERVICES, Carrier	RESPONDENT

OPINION FILED DECEMBER 2, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Fort Smith, Sebastian County, Arkansas.

Claimant represented by FRED CADDELL, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 8, 2004, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on August 5, 2004, and a pre-hearing order was filed on that 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 relationship of employee-employer-carrier existed among the parties on January 19, 2004.
3. The claimant was earning an average weekly wage of \$320.00 which would entitle him to compensation at the weekly rates of \$213.00 for total disability benefits and \$159.00 for permanent partial disability benefits.

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

1. Compensability of injuries to lumbar spine, cervical spine, shoulders, sternum-chest, cuts on the back, and internal injury/pain.
2. Additional medical treatment.

3. Temporary total disability benefits from March 22, 2004 through a date yet to be determined.

4. Attorney fee.

The claimant contends he suffered multiple compensable injuries on January 19, 2004 and is entitled to additional medical treatment and temporary total disability from March 22, 2004 through a date yet to be determined, as well as an attorney fee.

The respondents contend "The claimant had an incident on January 19, 2004, but was uninjured. The claimant indicated he was fine and continued working. Two days later claimant asked for a promotion, which was denied. Claimant then began asking to go to the doctor for his injury. On January 23, 2004 claimant went to see Dr. Carson who indicated that the claimant appeared to be malingering. Claimant was released to regular duty on March 11. Subsequent to this, Dr. Bolyard indicated that the claimant picked up something at home and developed additional shoulder problems. The last medical report the respondents have is from Dr. Carson dated April 28, 2004. He noted the claimant was able to move around better than he was performing during the range of motion test. It is the respondents' contention that no further benefits are due."

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 witnesses and to observe their 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 August 5, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence

that he suffered a compensable injury in the form of abrasions to his back and rib area. These injuries had resolved as of March 11, 2004.

3. Claimant has failed to prove by a preponderance of the evidence that he suffered any other injury as a result of the accident on January 19, 2004.

4. Respondent is liable for payment of all unpaid reasonable and necessary medical treatment provided in connection with claimant's compensable abrasion injuries.

5. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any temporary total disability benefits subsequent to March 11, 2004.

#### FACTUAL BACKGROUND

The claimant is a 61-year-old man who began working for respondent on September 3, 2003. Prior to working for respondent claimant had previously worked for Whirlpool and for the Arkansas Air National Guard.

Claimant suffered a prior back injury while working for Whirlpool in 1987. The medical records reflect that following that injury the claimant was complaining of low back pain radiating into his left leg. A myelogram of the claimant's lumbar spine was unremarkable and x-rays revealed degenerative changes. Claimant was treated conservatively and no impairment rating was assigned.

Following claimant's release he went to work full time at the Arkansas Air National Guard. Claimant suffered a work-related injury while working for the Guard in March 1993 when he fell and struck his right elbow on concrete. The medical records also indicate that claimant was complaining of pain in both of his shoulders at that time. Claimant was diagnosed as suffering from bursitis of both shoulders.

Claimant went to work for respondent in September 2003. Claimant testified that on January 19, 2004 he and other individuals were in the process of unloading supplies from a truck. Claimant was using a pallet jack to unload supplies when a forklift operator

ran his forks under the same pallet. According to claimant's testimony this caused his pallet jack to go backwards and shove him against another pallet of furnace pipe. Claimant testified that he did not believe that he was badly injured, but that his clothes were torn and he had abrasions on his back. January 19 was a Monday and claimant testified that by Friday, January 23, his back was hurting enough that he thought he needed medical treatment. As a result, he sought medical treatment from Dr. Randall Carson, his family physician. Dr. Carson noted claimant's history of injury and diagnosed claimant as suffering from a contusion of the back and ribs. Dr. Carson also indicated in his medical report that no bruising was present and he confirmed during his deposition testimony that his diagnosis of contusion referred to the abrasions themselves, not bruising. Dr. Carson placed claimant on work restrictions and prescribed medication.

Because of claimant's continued complaints of pain Dr. Carson subsequently ordered physical therapy. At the time of claimant's visit with Dr. Carson on February 13, 2004, claimant made a complaint that his shoulder felt as if it was jammed. Dr. Carson's medical reports of that date indicate that he suspected malingering based upon his examination of the claimant's back complaints.

Because of claimant's continued complaints involving his abdomen and chest area, Dr. Carson ordered x-rays. The x-rays of claimant's abdomen and chest were negative. On February 27, 2004, Dr. Carson noted that claimant was some better but indicated that claimant was still having back pain radiating to his thigh. Dr. Carson again questioned whether claimant was malingering.

On March 11, 2004 Dr. Carson noted that claimant's condition had improved and indicated that claimant's injuries had resolved. As a result, he released the claimant to return to full duty as of March 12, 2004.

Eight days after his release by Dr. Carson claimant returned for additional medical treatment relating to his right shoulder. Dr. Carson diagnosed claimant's condition as

bursitis/tendinitis and referred claimant to Dr. Bolyard for additional medical treatment.

Claimant was initially evaluated by Dr. Bolyard on March 24, 2004. Dr. Bolyard's progress report does include a history of claimant's injury at work with the pallet jack. However, Dr. Bolyard's report also indicates that claimant's shoulder pain had improved until he was lifting things at his home last week. Dr. Bolyard gave claimant an injection in his shoulder and prescribed physical therapy.

Subsequent to that date claimant continued to be treated by both Drs. Bolyard and Carson. Based upon claimant's continued complaints of pain Dr. Carson ordered an ultrasound of the claimant's gall bladder. Dr. Carson testified that this ultrasound was negative. On April 28, 2004, claimant was evaluated by Dr. Carson on a follow-up appointment and he again noted that he suspected some malingering on the claimant's part.

Finally, claimant on his own sought medical treatment from Dr. Guyer who ordered an MRI scan of the claimant's thoracic and lumbar spine. The MRI scan of the claimant's thoracic spine was negative and the scan of the claimant's lumbar spine revealed only degenerative changes with no disc herniations.

Claimant has filed this claim contending that he suffered compensable injuries to his lumbar spine, cervical spine, shoulders, sternum/chest, cuts on the back, and internal injuries/pain. Claimant seeks payment for additional medical treatment, temporary total disability benefits beginning March 22, 2004 and continuing through a date yet to be determined, as well as an attorney fee.

#### ADJUDICATION

\_\_\_\_\_ Claimant contends that he suffered multiple injuries to his body as a result of an incident which occurred when he was using a pallet jack to unload a truck on January 19, 2004. Claimant's claim is for a specific injury, identifiable by time and place of occurrence.

The Commission has stated in *Henry Weaver 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 met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of abrasions to his rib and back area. However, I find that these injuries had resolved by the time of his release from Dr. Carson on March 11, 2004. I also find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered any other injuries as a result of the incident on January 19, 2004.

Initially, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of abrasions to his back and rib area as a result of the accident on January 19, 2004. As previously noted, claimant testified that on that date he was in the process of using a pallet jack to unload a truck when the forklift driver ran his forks under the same pallet. This caused claimant's pallet jack to go backwards and shove him against another pallet of furnace pipe. According to claimant's testimony he had to squeeze through a narrow space to extricate himself. This

resulted in claimant tearing his clothes and suffering abrasions to his back and rib area. Testifying at the hearing was Zachary Taylor, the forklift driver. Taylor's testimony confirmed that claimant had scratches on his back following this incident.

As previously noted, claimant initially sought medical treatment from Dr. Carson, his family physician of 15 years, on January 23, 2004, four days after this accident. Dr. Carson testified in his deposition that his examination of the claimant on that date revealed abrasions on the left side of claimant's back stretching from the rib area down into the flank area. Based upon those abrasions Dr. Carson diagnosed claimant as suffering from contusions of the back and rib area.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of abrasions to his back and rib area. The testimony of claimant and Taylor satisfies claimant's burden of proving by a preponderance of the evidence that the injury arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. In addition, claimant has met his burden of proving by a preponderance of the evidence that the injury caused physical harm to his body which required medical services and he has offered medical evidence supported by objective findings establishing an injury. In addition to Taylor's testimony that claimant had scratches on his back, Dr. Carson also testified that abrasions were present in the claimant's back area. As a result, Dr. Carson prescribed medication for the claimant's condition. Accordingly, I find that claimant has met his burden of proof.

I find that claimant has failed to prove by a preponderance of the evidence that any back problems subsequent to March 11, 2004 are compensable or causally related to the compensable abrasion injury. On March 11, 2004 Dr. Carson released the claimant to return to work with his injuries described as resolved. According to Dr. Carson's deposition testimony his examination of the claimant on that date was normal with the

exception of his hamstring. In addition, I note that Dr. Carson on three separate occasions indicated that his examination of the claimant led him to suspect that claimant was malingering. At his deposition Dr. Carson testified that his suspicion of claimant malingering was raised when claimant was able to perform more movements than one would expect if claimant's condition were as painful as he contended. In addition, I believe it is important to note that claimant subsequently sought medical treatment from Dr. Guyer who ordered an MRI scan of the claimant's thoracic and lumbar spine. That MRI scan revealed no disc herniation but instead revealed only mild degenerative disc disease. This degenerative disc disease had been present on x-rays taken in March 1987 following a work-related injury at Whirlpool. According to Dr. Carson, these findings are normal for a man of claimant's age.

In summary, by March 11, 2004, Dr. Carson was of the opinion that claimant's back injury had resolved. Furthermore, Dr. Carson's medical reports reflect that he suspected that claimant was malingering with respect to his back condition. Finally, other than the objective findings of abrasions on claimant's back, there are no other objective findings of an injury to claimant's back. The MRI scan of claimant's lumbar spine revealed no disc herniation but instead revealed only degenerative disc disease which had been present on x-rays in 1987. For these reasons, I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered any injury to his back other than the abrasions which had resolved as of March 11, 2004.

I also find that claimant has failed to prove by a preponderance of the evidence that he suffered any compensable injury to his cervical spine on January 19. According to claimant's own testimony he did not develop any neck pain until April or May of 2004 after he was no longer working for respondent. This was at least three or four months after claimant's accident. In addition, Dr. Carson testified that he did not recall the claimant complaining of any neck pain during his examinations. Given this evidence, 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 cervical spine.

I also find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered any compensable injury to his sternum/chest or internal injuries/pain. Although claimant complained of pain in those areas to Dr. Carson, objective testing was negative. Dr. Carson ordered x-rays of the claimant's abdomen and chest on February 13, 2004. Those x-rays revealed no evidence of any acute process. Dr. Carson subsequently ordered an ultrasound of the claimant's gall bladder in April 2004. According to Dr. Carson's testimony that test was likewise negative. According, based upon the lack of medical evidence supported by objective findings establishing an injury, 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 sternum/chest or an internal injury/pain.

I also find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his shoulders as a result of the incident on January 19. First, I note that claimant was diagnosed as suffering from bursitis in both shoulders following a work-related injury in 1993.

Following the incident on January 19 there was no mention of any shoulder complaints in the medical reports until February 13, 2004, almost one month later. Even then there is no indication that claimant related his shoulder condition to his accident. Instead, Dr. Carson's medical report simply states that claimant informed him that his shoulder felt like it was jammed. Apparently, claimant's complaint of shoulder pain at that time was not significant enough for Dr. Carson to offer any medical treatment.

Furthermore, as previously noted, claimant was released by Dr. Carson with his injuries fully resolved as of March 11, 2004. Dr. Carson's medical report of that date does not indicate that claimant was making any continued complaints of shoulder pain. To the contrary, Dr. Carson testified that his examination of the claimant on that date was normal.

The next mention of any problems with claimant's shoulder occurred on March 19, 2004. Dr. Carson's medical report of that date indicates that claimant's right shoulder pain had begun that week and that claimant's right shoulder had been bothering him even before the injury on January 19, 2004. At his deposition Dr. Carson reaffirmed claimant's history that he had shoulder problems prior to January 19.

As a result of claimant's shoulder complaints Dr. Carson referred claimant to Dr. Bolyard for further evaluation. Dr. Bolyard's medical report from March 24, 2004 does indicate that claimant initially related his shoulder complaints to the incident at work. However, Dr. Bolyard's medical report also relates claimant's most recent shoulder condition to an incident which occurred at home.

He said he did have some achiness up and about his shoulders with that, but last Wednesday I guess it was, it would be a week ago, he was picking up some stuff at the house after work and has had some incredible discomfort in his right shoulder since then. He was having some troubles with it prior to this from the incident at work, but the best I could tell is that it got to bothering him really bad after this lifting thing at home.

To the extent that claimant did attribute his shoulder problems to the incident at work, I note that there are no objective findings establishing an injury to the claimant's shoulder prior to this incident at home. Furthermore, while Dr. Bolyard has diagnosed the claimant as suffering from a possible rotator cuff tear, I note that there is no objective medical evidence establishing this diagnosis.

Accordingly, for the foregoing reasons, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his shoulder as a result of the accident on January 19, 2004. The medical reports indicate that claimant did not even mention any alleged shoulder pain until February 13, 2004, more than one month after the accident. Furthermore, claimant's complaints of shoulder pain apparently

was not sufficient enough for Dr. Carson to offer any medical treatment. To the contrary, Dr. Carson indicated that claimant's condition had resolved as of March 11, 2004. When claimant did seek additional medical treatment for his shoulder condition, it was the result of an incident which had occurred at home. Prior to this incident at home, there were no objective findings establishing an injury to claimant's shoulder as a result of the accident on January 19.

Having found that claimant met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of abrasions to his rib and back area, respondent is liable for all unpaid reasonable and necessary medical treatment provided in connection with that compensable injury.

I find that claimant has failed to prove by a preponderance of the evidence that he is entitled to any temporary total disability benefits subsequent to March 11, 2004. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, as previously discussed, claimant was released by Dr. Carson with his injuries having resolved as of March 11, 2004. I find that claimant has failed to meet his burden of proving by a preponderance of the evidence that he remained within his healing period or that he suffered a total incapacity to earn wages subsequent to that date as a result of his compensable injury.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been

awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

#### AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of abrasions to his rib and back area while working for respondent on January 19, 2004. Claimant has failed to prove by a preponderance of the evidence that he suffered any other injuries as a result of that accident. Respondent is liable for all unpaid reasonable and necessary medical treatment provided in connection with claimant's compensable injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits for his compensable injury subsequent to March 11, 2004.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded "only on the amount of compensation for indemnity benefits controverted and awarded." Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant's attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

---

GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE