

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F403004

DONALD ARNOLD, Employee	CLAIMANT
WASTE MANAGEMENT, Employer	RESPONDENT
AIG CLAIMS SERVICE, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 1, 2004

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

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

Respondents represented by CAROL LOCKARD WORLEY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 11, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on June 16, 2004, and a pre-hearing order was filed on June 17, 2004. 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 at all relevant times.
3. The claimant was earning an average weekly wage of \$475.00 which would entitle him to compensation at the weekly rates of \$317.00 for total disability benefits and \$238.00 for permanent partial disability benefits.
4. The claimant sustained a compensable injury to his right leg on March 18, 2003 (F311628). There are no unpaid compensation benefits relating to this injury at this time.

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

1. Compensability of left shoulder injury on September 17, 2003 (F403004).

2. Related medical.
3. Temporary total disability benefits.
4. Attorney fee.

Prior to the hearing the respondents also raised as an issue the statute of limitations.

The claimant's contentions as set forth in his pre-hearing questionnaire are as follows: "Claimant is a trash hauler and had been working on a second tenure of employment when he injured his shoulder on September 17, 2003. He is entitled to medical and TTD. He was seen by Dr. Hull, Dr. Cooper, the Lowell Clinic, and is now being cared for by Dr. Tom Coker. He requests TTD and medical."

The respondents contend the claimant did not suffer a compensable injury to his left shoulder. Respondents contend that this claim is barred by the statute of limitations.

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 June 16, 2004, and contained in a pre-hearing order filed June 17, 2004, 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 shoulder while employed by respondent on or about September 17, 2003.

### FACTUAL BACKGROUND

With the exception of an eight month period of time, the claimant has worked for the respondent since January 1994. Claimant worked for the respondent as a “thrower”, throwing bags of trash and emptying trash cans into a truck.

The medical evidence indicates that claimant first sought medical treatment for complaints of left shoulder pain in April 1998 from Dr. Hull. On July 30, 1998 claimant also sought medical treatment from Dr. Dickinson for left shoulder and neck pain. As a result of claimant’s complaints Dr. Dickinson gave claimant an injection in his left shoulder.

Although claimant initially testified that following medical treatment in 1998 he did not receive any additional medical treatment relating to his left shoulder until September 2003, the medical evidence indicates that claimant sought additional medical treatment for left shoulder complaints from Dr. Hull on February 27, 2003. Dr. Hull’s medical notes of that date indicate that claimant was complaining of a respiratory infection and left shoulder pain. Dr. Hull also noted that claimant gave a history of left shoulder problems existing for five to six years. Claimant apparently informed Dr. Hull that his shoulder problems were under control as long as he took Vioxx. As a result of his evaluation Dr. Hull referred claimant to an orthopaedist, Dr. Cooper. Claimant saw Dr. Cooper on March 31, 2003 and again on May 12, 2003 when he was given an injection in his left shoulder.

Claimant testified that on or about September 17, 2003 he was picking up trash bags and dumping trash cans when he felt pain in his left shoulder blade up into his neck area. As a result of these complaints claimant sought additional medical treatment from Dr. Hull on September 18, 2003. Dr. Hull injected claimant’s left shoulder at that time. Claimant was also evaluated by Dr. Coker, an orthopaedic surgeon, on September 25, 2003. Dr. Coker indicated that x-rays taken of the claimant’s shoulder revealed early degenerative joint disease. Dr. Coker also recommended and ordered an MRI scan.

According to Dr. Coker's report of September 30, 2003, the MRI scan revealed osteoarthritis, rotator cuff pathology, Hil Sach's lesion and labral pathology. Dr. Coker recommended physical therapy and anti-inflammatories.

Claimant has also been evaluated at respondent's request by Max Beasley, a nurse practitioner, in October 2003.

Claimant has filed this claim contending that he suffered a new injury or an aggravation of his pre-existing condition while working for respondent on or about September 17, 2003. Claimant seeks payment of medical benefits, temporary total disability benefits, and an attorney fee.

#### ADJUDICATION

Initially, I note that claimant's claim is not for a gradual onset injury but rather is a claim for a specific injury caused by a new injury or an aggravation of a pre-existing condition on or about September 17, 2003. Claimant contends that at that time he was "throwing" trash when he developed a severe pain in his left shoulder blade area. 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 failed to meet his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment that was caused by a specific incident identifiable by time and place of occurrence.

As previously noted, the claimant has a history of shoulder problems which began in 1998. As a result of those shoulder complaints claimant was given an injection in his shoulder by Dr. Dickinson. Although claimant initially testified that he did not seek any additional medical treatment relating to his left shoulder until after the incident in September 2003, the medical evidence indicates that claimant sought additional medical treatment for left shoulder complaints beginning in February 2003. The medical report from Dr. Hull dated February 27, 2003 indicates that claimant was complaining of a respiratory infection and left shoulder pain which had caused problems for some five to six years. According to the history given to him by the claimant he was able to tolerate his condition as long as he could take Vioxx. As a result of claimant's complaints Dr. Hull referred claimant to Dr. Cooper. Before claimant was seen by Dr. Cooper claimant called Dr. Hull's office on March 13, 2003, requesting a refill of Vioxx.

Claimant's initial evaluation with Dr. Cooper occurred on March 31, 2003, at which time the claimant was complaining of pain in both his right and left shoulders. As a result of those complaints Dr. Cooper gave claimant an injection in his left shoulder. Claimant was again evaluated by Dr. Cooper on May 12, 2003 for pain in both left and right shoulders. According to Dr. Cooper's medical reports he gave claimant a subacromial injection at that time.

The next medical report is dated September 18, 2003, the day after claimant's injury allegedly occurred. However, a review of Dr. Hull's medical report from September 18 reveals no history of an injury having occurred the day before. Instead, Dr. Hull's medical

report indicates that he was seeing claimant again after Dr. Cooper's evaluation.

The next medical report is from Dr. Coker dated September 25, 2003 which contains a history indicating that claimant's shoulder has been hurting since May. Dr. Coker's medical report does contain a history of the claimant reporting an injury after picking up a trash bag to throw it when he felt a pop in the shoulder. However, there is nothing in Dr. Coker's report to indicate that this incident had occurred only one week earlier. In fact, the tone of the history contained in Dr. Coker's report would lead one to conclude that this was not a recent incident.

It is interesting to note that claimant did not allege a work-related injury to the respondent until after he had been evaluated by both Dr. Hull and Dr. Coker. Testifying on behalf of the respondent was Jason Prince, the environmental health and safety manager for the respondent. Prince testified that his first notice of the claimant having any shoulder problems was after a safety meeting in March 2003. At that time claimant reported problems with his left shoulder, but indicated that it was from a personal injury in the past for which he was receiving medical treatment. Prince testified that based upon various conversations he questioned the claimant on several occasions subsequent to that date and claimant indicated that his shoulder condition was not work related. In fact, Prince testified that claimant did not attribute his left shoulder problems to his employment until September 2003 and even at that time claimant did not report a specific injury. Furthermore, this did not occur until after claimant had already seen Dr. Hull and Dr. Coker. Once respondent learned that claimant was alleging that his shoulder problems were related to his employment, respondent sent claimant to the Lowell Medical Clinic where he saw Max Beasley, a nurse practitioner. It was not until claimant's visit with Beasley on October 1, 2003 that claimant gave a history of injuring his shoulder while throwing trash on September 9, 2003.

Claimant has the burden of proving by a preponderance of the evidence that he

suffered a compensable injury to his left shoulder which 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. Here, the evidence indicates that claimant has a history of left shoulder problems going back to 1998. In addition, claimant sought additional medical treatment for left shoulder problems beginning in February 2003. While those medical reports all contain statements indicating that claimant was relating his left shoulder problems to his job with respondent, claimant did not file this claim contending that he suffered a gradual onset injury. Instead, claimant filed this claim contending that he suffered a specific injury to his left shoulder on or about September 17, 2003 in the form of a new injury or an aggravation of a pre-existing condition. The first medical report after September 17, 2003 is from Dr. Hull dated September 18. Dr. Hull's medical report does not indicate that claimant suffered any new injury or aggravation of his pre-existing shoulder condition on September 17 or any other day in September or August of 2003. To the contrary, Dr. Hull's report indicates that he is only seeing claimant on follow-up following claimant's receipt of medical treatment from Dr. Cooper in May of 2003. In addition, according to the testimony of Jason Prince, claimant repeatedly indicated that his shoulder problems were not related to his employment with respondent. It was not until after claimant had sought medical treatment from Dr. Hull and Dr. Coker in September 2003 that claimant first informed respondent that his shoulder problems were allegedly related to his job activities.

Given all of this evidence, I find that claimant has simply failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury in the form of a new injury or an aggravation of his pre-existing condition while employed by the respondent on or about September 17, 2003.

ORDER

\_\_\_\_\_ Claimant has failed to meet his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left shoulder while employed by respondent on or about September 17, 2003. Therefore, his claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE