

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F310298

CHRISTOPHER BALTZ

CLAIMANT

FRED'S, INC.

RESPONDENT EMPLOYER

FEDERAL INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED OCTOBER 12, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE M. KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on August 26, 2004. A prehearing conference was held on June 23, 2004 and a prehearing order was filed on June 24, 2004. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on September 12, 1002.
2. The compensation rate is \$149 per week.

The claimant contends that he sustained a compensable left shoulder injury on September 12, 2003 and is entitled to medical benefits and temporary total disability benefits from September 12, 2003 until May 4, 2004, as well as a 5% permanent anatomical rating and attorney's fees.

The respondents contend the claimant's current treatment is associated with a pre-existing condition unrelated to his work for the respondent employer. Alternatively, respondents initially accepted the claim and paid appropriate benefits through November 13, 2003, when claimant failed to keep a second opinion appointment scheduled with Dr. Pearce. Respondents deny responsibility of any benefits after November 13, 2003.

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 Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT
AND
CONCLUSIONS OF LAW**

1. There was an employer-employee relationship on September 12, 2003.
2. The compensation rate is \$149 per week.
3. The claimant sustained a compensable injury arising out of and in the course of his employment with the respondent employer on September 12, 2003.
4. The respondents are responsible for all reasonable and necessary medical the claimant has accrued following the September 12, 2003, incident.
5. The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from the last date he worked until October 9, 2003 and from January 6, 2004, through May 4, 2004.

6. The claimant has proven by a preponderance of the evidence that he is entitled to a 5% permanent anatomical impairment.

DISCUSSION

The claimant, 19 years old, testified that he previously had a right shoulder injury requiring surgery that was unrelated to his employment. According to the claimant, about July 30, 2003, he was going through the drive through at Taco Bell, when he reached to get his food, lightning struck, and he jerked his arm back inside the car and had immediate pain in his left shoulder. He went to the doctor and a couple days later he rolled over in bed and felt his arm pop and it felt like the arm popped back in place and he had no more problems.

The claimant began his employment with the respondent employer in early September 2003 and worked in stocking. The claimant testified that he lifted heavy items ranging from 20 to 80 pounds with no problems. According to the claimant, he unloaded a truck on September 11, 2003, with about 2,000 cases on it and had no problems. On September 12, 2003, as he was picking up a box with bleach or other chemicals, he felt immediate pain as if something had torn or was stretched. The claimant testified he felt dizzy and faint and reported the incident to his manager immediately. The claimant sought care at his family clinic and was referred to an orthopedic surgeon, Dr. John Yocum. Dr. Yocum ordered physical therapy for one month. The claimant was released to one-hand duty and he continued to stock with one hand. After having pain, he reported this to his supervisor and was sent home. Dr. Yocum performed shoulder surgery in January 2004. The claimant was released to

return to work on May 4, 2004 and has returned to work for another employer as a salesman making \$8 per hour for 35 to 40 hours per week.

Under cross examination, the claimant confirmed that he refused to seek a second opinion, as requested. The claimant proceeded ahead with surgery after learning the insurance company had denied his claim. The claimant confirmed that he had made a good recovery from his shoulder surgery and is not aware of any limitations.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, the claimant has proven by a preponderance of the evidence that he sustained a compensable injury in the course of and arising out of his employment. The claimant presented credible testimony about an injury to his left shoulder as he was moving a box while stocking supplies. He reported the injury to his

supervisor and then immediately sought medical treatment. The claimant underwent surgery on January 6, 2004, by Dr. John Yocum with a left shoulder arthroscopy with resection of posterior labral flap tear and open Bankart reconstruction. Dr. Yocum's September 22, 2003, report reveals the claimant injured his left shoulder at work while lifting boxes. A memo dated September 24, 2003, to Dr. Yocum from the insurance company's case manager asked Dr. Yocum's opinion about the work incident and the questions and Dr. Yocum's response are as follows:

Within a reasonable degree of medical certainty, did the reported September 12, 2003 incident cause a new injury or did it aggravate his old injury from July 30, 2003? New injury to left shoulder In your opinion, did the work duties described above cause the left shoulder strain you have assessed and diagnosed? _____ Currently, there is not a follow-up appointment scheduled. When is a follow-up recommended? After MRI [L] shldr (Cl. Exh. No. 1, p. 5.)

I find the claimant presented credible testimony about his work injury, it was properly reported, he sought immediate medical attention, there were objective findings and Dr. Yocum provided a medical opinion within a reasonable degree of medical certainty about the work injury. The respondents are responsible for the reasonable and necessary medical services the claimant has accrued. The prehearing order documents that the claim was controverted on September 26, 2003 and the AR-2 filing supports that controversion.

The claimant next contends that he is entitled to temporary total disability benefits from September 12, 2003 through May 4, 2004. In order for the claimant to be entitled to temporary total disability benefits, he must remain in his healing period and

unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

The claimant testified that he returned to work and worked one-handed for a time and then began having pain and did not return to work thereafter. He testified that he stocked with one hand and he was told there were no other jobs. The medical records indicate that Dr. Yocum took the claimant off work on September 22, 2003. Dr. Yocum confirmed that position on September 24, 2003, to the case manager. Dr. Yocum did release the claimant to light-duty work on October 9, 2003, with some restrictions: "No use LUE." Cl. Exh. No. 1, p. 10. The claimant ultimately had surgery in January 2004 and was released to full duty on May 4, 2004.

After a review of the medical records, the claimant was taken off work until October 9, 2003, when he was released to return to work with restrictions. There is no mention of work again except the records reveal the claimant had shoulder surgery on January 6, 2004 and finally released to full duty on May 4, 2004. After considering all the credible evidence, I find that the claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from the date he last worked until October 9, 2003 and from January 6, 2004 through May 4, 2004. The medical evidence provides the claimant was released to light-duty work on October 9, 2003, with no further mention until his surgery. The employer had previously provided light-duty work for the claimant and there was no indication otherwise.

The claimant next contends that he is entitled to a 5% permanent impairment rating as assigned by Dr. John Yocum, the surgeon. The medical evidence provides a

response from Dr. John Yocum that the claimant has a 5% permanent impairment rating utilizing the *Guides to the Evaluation of Permanent Impairments, 4th Ed.*

An injured worker must prove by a preponderance of the evidence that he is entitled to an award for a permanent physical impairment. Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4)(F)(ii)(a) (Supp. 2001), provides that “Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.” “Major cause” means more than fifty percent (50%) of the cause and a finding of major cause must be established according to the preponderance of the evidence. Ark. Code Ann. §11-9-102(14).

In addition, Ark. Code Ann. §11-9-102(16) provides:

(A)(i) ‘Objective findings’ are those findings which cannot come under the voluntary control of the patient.

(ii) When determining physical or anatomical impairment, neither a physician, any other medical provider, an administrative law judge, the Workers’ Compensation Commission, nor the courts may consider complaints of pain; for the purpose of making physical or anatomical impairment ratings to the spine, straight-leg-raising tests or range-of-motion tests shall not be considered objective findings.

(B) Medical opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty;

There is no requirement that a claimant show his work to be the major cause of his disability or need for treatment; rather, the claimant is required to show that his *injury* was the major cause of his disability or need for treatment. *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998); Ark. Code Ann. §11-9-102(4)(E)(ii). Nonetheless, the claimant must still prove a causal connection between

his employment and the injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000).

In the present case, the claimant has proven by a preponderance of the evidence that he is entitled to a 5% permanent impairment rating as assigned by Dr. Yocum. The claimant was working for the respondent employer without problems with the left shoulder when he sustained the September 12, 2003, work injury. With the claimant's problems with his left shoulder developing after the lifting incident at work, the claimant's problems with his left shoulder satisfies the major cause requirement.

ORDER

The claimant sustained a compensable injury arising out of and in the course of his employment with the respondent employer on September 12, 2003. Respondents are responsible for all reasonable and necessary medical the claimant has accrued following the September 12, 2003, incident. The claimant has proven by a preponderance of the evidence that he remained in his healing period and totally unable to earn wages from the last date he worked until October 9, 2003 and from January 6, 2004 through May 4, 2004. The claimant has proven by a preponderance of the evidence that he is entitled to a 5% permanent anatomical impairment.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**