

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F206317**

<b>THOMAS CROSBY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SOUTHEAST BUILDING CONCEPTS, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>AMERISURE COMPANIES, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JANUARY 7, 2004**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on December 12, 2003, at Little Rock, Pulaski County, Arkansas.

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

Respondents represented by the HONORABLE JOHN D. DAVIS, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury as defined by Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on May 2, 2002 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$425.00/\$319.00, in the event this claim is found to be compensable.

The claimant contends he injured his right shoulder in a lifting incident at work on May 2, 2002. He seeks payment of medical expenses, temporary total disability benefits and attorney's fees.

The respondents contend the claimant did not suffer a compensable injury on May 2, 2002. He did not report an injury until May 13, 2002 and worked during the interim with no complaints.

The following witnesses testified at the hearing: the claimant; co-worker Derry Webster, whose testimony corroborated the claimant's history of injury; and project manager, Michele Case who is the daughter of the company's owner.

The claimant, age 50 (D.O.B. June 16, 1953), has a high school education with some college courses. He began work for the respondent-employer in November, 2001 as the superintendent over a commercial construction site. On May 2, 2002, the claimant was working with Derry Webster and Mack Casey placing and removing large plywood structures used as concrete molds. The claimant experienced a pop in his right shoulder and told his crew he could not continue to help them.

The claimant thought he had a pulled muscle, but the symptoms worsened and he found he was unable to sleep on his right shoulder. He reported the incident to Michele Case approximately eight to ten days later. She declined to send him to a doctor so he went to the emergency room (ER) and was referred to Dr. Marty Siems and got an MRI scan. However, the respondents paid for these visits before the claim was controverted. The claimant remains symptomatic with a loss of range of motion and muscle spasms. He requests continuing medical treatment and payment of expenses.

On cross-examination, the claimant admitted that he had been in the construction business for fifteen-twenty years and understood the importance of reporting injuries. In fact, the claimant has had a previous workers' compensation claim for a knee injury. He confirmed that he had been provided with a packet of forms (including workers' compensation forms) to be used in his capacity as a supervisor.

The claimant's employment was terminated and he began working for a new employer in February 2003 where he is not required to perform manual labor. He collected unemployment benefits for a period of time after he left the respondents' employ. The claimant testified he was fired for a mistake made at the job site involving the electrical service for the loading dock and because he refused to share a motel room with a co-worker who was an ex-convict and drug user. The claimant recently purchased a duck stamp but he testified that he doesn't hunt, he just collects

the stamps. The claimant's present ability to hunt or work would have an impact on temporary total disability benefits, but not compensability.

There is a minor discrepancy about the time of the accident. In his deposition, the claimant indicated it happened prior to lunch; Mr. Webster thought it happened around lunch time; but the AR-N indicates 2:00 p.m.

Michele Case, the project manager, hired the claimant as the superintendent. Ms. Case testified the claimant reported the injury to her on May 13, 2002. She did not question his crew, Mr. Webster or Mr. Casey about the incident. Ms. Case showed the claimant a list of physicians and offered to make an appointment but the claimant said he would handle the arrangements. She was later contacted by the Hazen Clinic reminding him about his appointment. Ms. Case thought the claimant's employment was terminated for misconduct, but she was not present when Mr. Gladden fired the claimant and he remained eligible for unemployment benefits.

#### **DOCUMENTARY EVIDENCE**

The respondents provided a packet of information given to the superintendent in charge of the job site. The packet included administrative forms (including the AR-N and Workers' Compensation poster giving instructions) required for workers' compensation claims.

The claimant completed an AR-N "Notice of injury" form on May 24 showing a date of injury of May 2, 2002 at 2:00 p.m. The employer was notified on May 15, 2002 at 4:00 p.m. The claimant described the shoulder injury as "something popped while lifting a form."

#### **MEDICAL EVIDENCE**

The claimant was examined by Dr. Marty Siems on June 10, 2002. He gave a history of injury as "felt something pop while lifting at work." Dr. Siems also reviewed the x-rays done at the emergency room (ER) on June 2, 2002, and scheduled an MRI scan.

Thomas Crosby is a 48 yr old right-hand dominant male who is having right shoulder pain for the past month. He reports pain with overhead activities and at night. He was helping lift a concrete form when he felt and heard a "pop" in his shoulder and has had persistent pain since. He has been taking Motrin without relief and has been off work since May 22, 2002.

...His MRI has shown a superior labral anterior/posterior tear and some biceps tenopathy in this area as well. This fits his mechanism of pain and pop while lifting... I... have recommended arthroscopic repair of his biceps anchor.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
  - 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
  - 3) proof establishing the injury by objective medical evidence
  - 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence
- or
- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

The evidence of record shows the claimant injured his right shoulder while lifting concrete forms at work. This history is corroborated by a member of his crew, Mr. Webster, and is consistent with the reports he gave to his manager, Ms. Case and to his physician, Dr. Siems. The incident occurred within the time and space boundaries of the employment while carrying out the employer’s purpose or advancing the employer’s interests. Pilgrims Pride Corporation v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996). Therefore, the claimant has met his burden of proving that the injury arose out of and in the course of his employment.

The evidence of record also shows the claimant has a labral tear confirmed by an MRI scan, and symptoms consistent with his history of injury. Therefore, the claimant has met his burden of proving internal physical harm by objective medical evidence.

The claimant injured his shoulder in May 2002, while lifting concrete forms at the job site where they were building a loading dock. Although there are some minor inconsistencies about the timing of the incident the description of injury is specific enough to meet the burden of proving an incident identifiable by time and place of occurrence. The claimant is not required to supply a precise time or numerical date as long as he presents sufficient evidence establishing the occurrence. Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001).

The respondents controverted this claim because of the delay in reporting the injury. The claimant was conciliatory on this point, admitting that he knew the reporting procedures but misjudged the seriousness of the injury. Delay in reporting is excusable under Ark. Code Ann. §11-9-701(b). The respondents also seem to be controverting this claim based on the claimant's lack of credibility. I find the discrepancies in the testimony minor and the claimant's explanations plausible.

After reviewing the lay testimony and medical evidence, I find the claimant has met his burden of proving a compensable injury by a preponderance of the credible evidence of record.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed on May 2, 2002 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$425.00/\$319.00.
2. The claimant has proved by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. Respondents are liable for all reasonable and necessary medical expenses to be paid within thirty days of receipt pursuant to Rule 30.

4. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

#### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge