

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401823

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| GREG DEES, EMPLOYEE | CLAIMANT |
| PACE INDUSTRIES, INC., EMPLOYER | RESPONDENT |
| LUMBERMAN MUTUAL, INSURANCE CARRIER | RESPONDENT |

OPINION FILED DECEMBER 8, 2004

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Harrison, Boone County, Arkansas.

The claimant was represented by HONORABLE THOMAS W. MICKEL, Attorney at Law, Conway, Arkansas.

The respondents were represented by HONORABLE JAMES D. SPROTT, Attorney at Law, Harrison, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on September 21, 2004 in Harrison, Arkansas. A prehearing order was entered in this case on July 2, 2004. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Joint Exhibit No. 2 to the hearing record.

The following stipulations were submitted by the parties either in the prehearing order or in a post-hearing letter provided by Mr. Sprott on October 28, 2004 and are hereby accepted:

1. Jurisdiction of the Commission.
2. Employee-employer-carrier relationship, January 29, 2004, and at all pertinent times.
3. That this claim is controverted in its entirety.
4. The claimant's average weekly wage was \$528.80 on the effective date of this claim, which gives the claimant the compensation rate of \$353.00 for TTD and \$265.00 for PPD, should this claim be found compensable.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. Compensability of a right shoulder injury allegedly sustained by specific incident or gradual onset on or about January 29, 2004 with payment of medical expenses and TTD from 01/29/04 to a date yet to be determined.
2. Controversion and attorneys' fees.
3. Unauthorized medical treatment.

The record consists of the September 21, 2004 hearing transcript and the exhibits contained therein. In addition, I have supplemented the record by "blue-backing" from the Commission file Mr. Sprott's October 28, 2004 letter

containing the wage and compensation rate stipulations of the parties.

DISCUSSION

Mr. Dees began having non-work related right shoulder problems in approximately May of 2003. After a period of conservative treatment, Dr. Terry Sites performed arthroscopy, joint debridement, and anterolateral acromioplasty with release of CA ligament/subacromial decompression of Mr. Dees' shoulder on November 13, 2003. Dr. Sikes released Mr. Dees to return to work on approximately December 22, 2003, and Mr. Dees did in fact return to work for Pace Industries until January 29, 2004. Mr. Dees filed a claim for workers' compensation benefits asserting that he sustained a work related right shoulder injury by either a specific incident that occurred on January 29, 2004, or by a gradual onset attributable to his work duties during the period that he returned to work between approximately December 22, 2003 and January 29, 2004 at Pace Industries.

In order to receive benefits for a gradual onset or a cumulative trauma injury, a claimant must prove by a preponderance of the evidence (1) that he sustained an injury arising out of and in the course of his employment;

(2) that the injury caused external or internal physical harm to the body; (3) that the injury is supported by objective medical finding; (4) that the injury was caused by rapid repetitive motion; and (5) that the injury was the major cause of any disability or need for treatment.

Stevenson v. Frolick Footwear, 70 Ark. App. 383, 20 S.W.3d 413 (2000).

In the alternative, to prove the occurrence of a compensable injury as a result of a specific incident or incidents which are identifiable by time or place of occurrence, the claimant must establish by a preponderance of the evidence: (1) that an injury occurred arising out of and in the scope of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16); and (4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

With regard to the objective findings requirement, Ark. Code Ann. § 11-9-102(4) (D) (Repl. 2002) provides that "A

compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section." In this regard, Ark. Code Ann. § 11-9-102(16)(A)(i) provides that "'objective findings' are those findings which cannot come under the voluntary control of the patient." Objective medical evidence is necessary to establish the existence and extent of an injury, but is not essential to establish the causal relationship between the injury and a work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

In the present case, I find that the claimant has failed to establish by a preponderance of the evidence the existence of any new shoulder injury which is established by medical evidence supported by objective findings. At the hearing, the claimant's attorney cited me to an MRI in the record performed on February 10, 2004 and to Dr. Sites' clinical report of March 3, 2004. The claimant's attorney has suggested that these documents indicate that Mr. Dees experienced some new fraying of the rotator cuff subsequent to Mr. Dees' 2003 injury and surgery.

However, Dr. Sites' March 3, 2004 report interprets the MRI abnormality from the February 2004 MRI as "likely representing the small area of fraying seen at the time of

his surgery." In light of Dr. Sites' conclusion that the area of fraying was present at the time of the 2003 surgery, and therefore pre-existed any alleged work related shoulder injury thereafter, and absent any other new objective shoulder abnormality indicated in the 2004 MRI or in the 2004 medical reports indicative of any possible new shoulder injury, I find that the claimant has failed to establish the existence and extent of his alleged work related shoulder injury with medical evidence supported by objective findings as required by law.

Because the claimant has failed to establish the compensability of his alleged work related shoulder injury, the remaining issues of attorneys fees, alleged unauthorized medical treatment, and offset for payments of benefits by a group carrier are all moot issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Jurisdiction of the Commission.
2. Employee-employer-carrier relationship, January 29, 2004, and at all pertinent times.
3. That this claim is controverted in its entirety.
4. The claimant's average weekly wage was \$528.80 on the effective date of this claim, which gives the claimant the compensation rate of \$353.00 for TTD

and \$265.00 for PPD, should this claim be found compensable.

5. The claimant has failed to prove by a preponderance of the evidence that he has sustained a compensable right shoulder injury. Specifically, the claimant has failed to establish the existence and extent of any alleged work related right shoulder injury with medical evidence supported by objective findings.

ORDER

For the reasons discussed herein, this claim must be and hereby is denied and dismissed.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge