

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306739

EDWARD FOREMAN	CLAIMANT
MCKEE FOODS CORP.	RESPONDENT
RISK MANAGEMENT SERVICES INSURANCE CARRIER	RESPONDENT

OPINION FILED FEBRUARY 24, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by MARK VELASQUEZ, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on November 25, 2003, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on September 23, 2003. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On November 1, 2001, and in June 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant's entitled to the maximum compensation rate for 2002.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's left shoulder injury.
2. Related medical.
3. Temporary total disability from November 1, 2001, to July 8, 2002, and then from July 27, 2002, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that in late October, early November of 2001, the claimant was working as a truck driver for the respondent. While he was on at a stop in Lake Forest, Minnesota he fractured his left distal clavicle and tore his left rotator cuff when his shoulder "popped" while unloading a box of product. The injury eventually resulted in surgical repair of his left rotator cuff in February 2002. Upon information and belief, in July 2002, after a period of rehabilitation, the claimant was released to return to full duty work with no permanent impairment or employment restrictions. He re-injured his left rotator cuff shortly after his return to work in July 2002 at which time he was restricted from work. He underwent two more rotator cuff repair surgeries; one in November 2002 and the last in March 2003. The claimant is currently under the care of John Park, M.D.

In regard to the foregoing issues the respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment with McKee Foods.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and a letter from Danny Hebert marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1 and the deposition of Rexcy Delara marked Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he had been employed by the respondent for twelve years, one month and twenty-seven days beginning in April 1991. The claimant testified that while working for the respondent which he believes was in Lake Forest, Minnesota, in October 2001, he was stacking boxes of Little Debbie's over his head when he heard his shoulder pop. The claimant testified that he told his co-employee to wait a minute and they took about a ten to fifteen minute break for his shoulder to work itself out so they could finish unloading. The claimant testified that after this delivery he and his partner came back to Arkansas. The claimant testified that for about a year prior to this event he had been having problems with his shoulder and thought if he could just get home and rested over the weekend he would be alright. The claimant testified that he did not report to the respondent anything about his shoulder at this time. The claimant testified that he returned to work on Monday and continued working for the respondent. The claimant remembers that he had asked for time off work for the

Thanksgiving holidays and during the holidays he reinjured his shoulder. The claimant testified that he had taken a couple of small bags of trash to the dumpsters at the respondent's business and after he had thrown a couple of bags in there was a very small bag which he flipped over his shoulder and at that time he felt a pop. The claimant was asked, "This wasn't work related, right?" The claimant responded, "No. I had brought the trash from the house, but it was going--I went to the dumpsters." The claimant again testified that this was personal trash and not something he was doing for the respondent. The claimant testified that on his own he went to see Dr. Stinnett who took x-rays of his shoulder. The claimant agreed that these x-rays revealed that he had a broken collar bone. The claimant testified that, not at that time but later, Dr. Stinnett had him undergo an MRI which, according to the claimant's understanding, revealed a problem in his shoulder. The claimant testified that Dr. Stinnett then referred him to Dr. Allard. The claimant testified that Dr. Allard operated on his shoulder on February 19, 2002, to repair a rotator cuff problem. The claimant testified that he had been off work since first seeing Dr. Stinnett and then continued to be off work following his surgery. The claimant agreed that he was released to return to work with no restrictions on July 8, 2002. The claimant testified that his shoulder was feeling fine and he returned to his old job with the respondent.

The claimant testified that he was in Raytown, Missouri, where the respondent has five warehouses and he was helping unload 755

cases of product into one of the small warehouses. The claimant testified that he lifted his arms up to stack some cases above his head and he felt pain in his shoulder again testifying that, "Ripped it again." The claimant testified that after the event in Missouri he reported this accident to Johnny Taylor and told him that he was going to go see a doctor. The claimant explained that Mr. Taylor was his senior dispatcher. The claimant remembers that he did not fill out any papers as a result of this report but does believe that he also reported this event to Debbie Selby. The claimant testified that as a result of his conversations with Debbie and Mr. Taylor, after he was seen by Dr. Stinnett or Dr. Allard, he took his slip setting forth his restrictions. The claimant testified that he returned to see Dr. Stinnett and again was sent to Dr. Allard. The claimant agreed that when he saw Dr. Allard in August 2002 he reported to him that he felt a pop in his shoulder. The claimant agreed that when he saw Dr. Stinnett on July 23, 2002, the doctor sent him back to work with restrictions but the respondent would not put him back to work and accommodate his restrictions. The claimant agreed that it was his understanding that he could only return to work if he was 100 percent released. The claimant testified that when he underwent his second surgery, Dr. Allard took him completely off work. The claimant testified that following his surgery he was referred to Dr. Park and he is still under the active care of Dr. Park.

On cross examination, the claimant agreed that since May or June 2003 he has been attempting to get his real estate licence so

he can begin work with Bob Knight Reality. The claimant testified that he has taken the test four times and has yet to pass. The claimant also agreed that he has not worked since he left the respondent's business and that his group health has paid a lot of his medical expenses up until June 15, 2003. The claimant also agreed that he has drawn short term disability benefits from back in 2001 until January 2002. The claimant testified that he drew four weeks of short term disability in the amount of \$540 per week. The claimant testified that he then drew long term disability from February 2002 until July 8, 2002, and then he was picked back up on long term disability in September 2002 to present. The claimant testified that after taxes and social security he receives \$2,431 a month on long term disability. The claimant agreed that he had had left shoulder problems before the incident in Minnesota. The claimant testified that he worked his regular duties from sometime in October when he had experienced the event in Minnesota up until the Thanksgiving vacation when he threw the bag of trash into the dumpster. The claimant agreed that after the event in Minnesota he did not report to the respondents that he had injured himself while working. The claimant also agreed that it was not until he was terminated by the respondent that he filed a claim for workers' compensation. The claimant also agreed that due to the company policy he was terminated because he could not get a full release to return to work within an eighteen-month period of time. The claimant agreed that it was not until after he had received short term disability, long term disability and group health had paid on

his medical as well as him being off work for a period of eighteen months without a full release and his termination that he filed his workers' compensation claim. The claimant testified that during his orientation with the respondent when he first started work, he was instructed on how to file a report of a work injury. The claimant agreed that he did not fill out paperwork on this October 2001 incident nor did he report a work related injury to the respondents after he was seen by Dr. Stinnett in November 2001. The claimant testified that he did not report a work related injury after he was seen by Dr. Stinnett or Dr. Allard after his July 2002 reinjury of his shoulder. The claimant agreed that he did not make a claim for workers' compensation benefits until his attorney filed a claim on his behalf. The claimant testified that he is currently able to drive a car and does some yard work as well as light house work.

On redirect examination, the claimant testified that the reason he filed a compensation claim was because at the time of his termination he was aware that he would lose all of his benefits and he needed to have his medical bills paid.

The respondents called Mark Jensen to testify on their behalf. Mr. Jensen stated that he was the operations coordinator for the respondent's transportation division and had been for over two years. Mr. Jensen testified that prior to being operations coordinator he was a long haul driver for the respondent. This witness testified that he worked with the claimant on at least one occasion in October 2001. Mr. Jensen testified that on October 14,

2001, he and the claimant made a trip to Dumas, Arkansas, at which time they unloaded their trailer. Mr. Jensen remembered that the claimant did mention that he had some problems with his shoulder and he was currently having some problems. When the time came to unload the truck this witness testified that the claimant requested that he be the person in the warehouse stacking the cases of product rather than in the trailer putting the product on the conveyor belt since the stacker does not have to do as much high reaching. Mr. Jensen testified that it is the respondent's policy that if an employee is injured while at work they are to report it immediately to their supervisor or to someone in the office or to someone who is on duty. This witness testified that he believes that in October 2001 they had cell phones so that they could stay in contact with the respondent.

The respondent then called Johnny Taylor who stated that he was a scheduler for the respondent. Mr. Taylor explained that his job entailed scheduling the trips for all the drivers in order to deliver the product. Mr. Taylor testified that he was a supervisor over the dispatch but that each driver has his own coordinator. Mr. Taylor testified that he does not remember receiving a report of an on the job injury from the claimant. This witness testified that he has in fact received injury complaints from employees and when this happens these employees are referred immediately to the company nurse. Mr. Taylor testified that he was not in charge of filling out paper work for on the job injuries but that again this is a part of health services which the nurses perform.

On cross examination, Mr. Taylor testified that a coordinator works in dispatch and would have thirty to forty drivers who he is responsible for staying in contact with and he is technically their supervisor. Mr. Taylor explained that his job is to schedule the trips and this information is given to the coordinators and they make arrangements for the drivers and all of their needs. Mr. Taylor testified that the proper chain of command if a driver has been injured would be to contact the dispatcher or his coordinator.

Debra Selby testified on the behalf of the respondents stating that she has been employed with the respondent for the past twenty-three years. Ms. Selby testified that she is benefits coordinator and payroll supervisor and has been in this position since 1987. Ms. Selby testified that prior to November 2002, it was in her preview to work with their short term disability benefits. Ms. Selby testified that she and the claimant had a conversation concerning his short term and long term disability and group health benefits. Ms. Selby remembers that the claimant came in to pay his insurance premiums which were due while he was on leave and to keep them updated as to the status of his leave. This witness testified that it is the respondent's practice to inquire of an employee who has been injured or is off work if the injury or physical condition is related to their job. This witness explained that it makes a difference in whether and what kind of paper work is filled out and the paper work has two places on the form asking if the condition they are seeking a leave for is related to their job. Ms. Selby explained that an employee cannot file for short term or long term

disability benefits if the injury is in fact a workers' compensation claim. Ms. Selby testified that she has reviewed the claimant's forms which he filled out for benefits and he had checked no that his problem was not related to his work and that also the claimant's doctor had marked that it was not related to his work.

Rexcy Delara testified by deposition that she had worked for the respondent since December 2000 as a registered nurse. Ms. Delara testified that she is not personally acquainted with the claimant but is aware that he was one of the drivers for the respondent. Ms. Delara was asked if she recalled anytime between November 2001 up to the present date of getting a report of a work related injury from the claimant and Ms. Delara stated, "No." This witness testified that she does recall receiving a telephone call from the claimant on July 29, 2002, concerning his taking a day off because of his shoulder. This witness testified that when an employee calls in she always asks if it is work related or not because if it is work related workers' compensation paperwork needs to be filled out and if it is not work related then they will have to have to release from the doctor saying that they can come back to work with no restrictions. Ms. Delara was asked what the claimant said when he called in July 2002 and this witness testified that the claimant had asked for two days off and that she had asked, "What for?" This witness testified that the claimant told her that he had problems with his shoulders at which time she asked if it was work related or not and he told her it was not.

Ms. Delara testified, "Well, he told me something about his collar bone, breaking his collar bones, doing honey dos." Ms. Delara testified that the information she receives from employees is typed into her computer and at that time Ms. Delara identified a printout note which was introduced into the deposition. On cross examination of Ms. Delara, she was asked if the claimant had said how he had hurt his shoulder and this witness testified that, "He just said, well, he would like to have several days off to rest his shoulder." Ms. Delara was asked, "How did he say he hurt his shoulder?" This witness responded, "Well, he didn't say. He just said it pops."

Exhibit No. 1, Rexey Delara's deposition, sets forth that on July 29, 2002, there was a phone call from the claimant where it is indicated that he asked if he could have a couple of days off to rest his shoulder. It is noted that the claimant reported that his shoulder pops every time he raises it over his head and he injured his shoulder in the past, that it was not work related, he had surgery on his left shoulder January 8, 2002, and that he took personal leave at that time and was returned to work with no restrictions on July 8, 2002, according to his papers on file. These notes set forth that the claimant also reported that he broke his collar bone in November doing "honey dos."

The medical records set forth that the claimant was seen by Dr. Gary Moffitt on February 24, 1999, with complaints of left shoulder pain. These notes set forth that the claimant reports that at work on the 22nd of February he fell and landed on his left

arm, jammed his left shoulder and now has pain along the posterior aspect of this shoulder. The claimant was examined and x-rays were obtained. The claimant was diagnosed with minimal osteoarthritis as well as a shoulder strain. Work restrictions were set forth and he was to return in a week. On March 3, 1999, Dr. Moffitt writes that he has seen the claimant for his recheck of his left shoulder strain noting that the claimant is much better. The claimant was again examined and this time he was released but to continue to work with the same restrictions and to return to full duties on March 8, 1999.

The medical records set forth that the claimant was seen by Dr. Scott Stinnett on November 27, 2001, with complaints of pain in his left shoulder reporting that he was throwing some trash and had a sensation in his shoulder. An x-ray taken at this time demonstrated that the claimant had a fracture of the distal clavicle. Dr. Stinnett recommended that he avoid lifting, prescribed medications and to return in a couple of weeks. The claimant was seen by Dr. Stinnett on December 3, 2001, where it is noted that he is some better as to his shoulder complaints and he was continued on his medications. On December 14, 2001, the claimant was seen for complaints of his left shoulder as well as some numbness in his fingers and both hands, index and thumb. An MRI was scheduled of the claimant's left shoulder to assess what was going on and the results of the MRI showed no evidence of cervical pathology but he does have a rotator cuff on the left. Dr. Stinnett writes on December 17, 2001, that the claimant is

going to be referred to Dr. Allard and that the symptoms relating to the claimant's cervical neuropathy type symptoms are improving. Dr. Mark Allard writes on December 27, 2001, that he has seen the claimant for his complaints of shoulder pain noting that the claimant has had this pain off and on for maybe a year but has had severe pain since the middle of November. The doctor notes that the claimant cannot think of any specific incident that could have caused his problems noting that he drives a truck for the respondent and does have to load and unload his truck and certainly has a lot of overhead heavy lifting. Dr. Allard examined the claimant as well as his x-rays and MRI. Dr. Allard notes that the claimant's MRI of his shoulder shows a complete tear with some retraction of the supraspinatus tendon with marked osteoarthritic changes and large inferior spurs at the AC joint. Dr. Allard assessed the claimant with left rotator cuff tear with acromioclavicular osteoarthritis and recommended a rotator cuff repair with distal clavicle resection. Dr. Allard writes that the claimant will be off for at least four months for this operation. The medical records set forth that the claimant was scheduled for left shoulder surgery on February 8, 2002, but due to an elevated blood sugar and other problems this surgery was canceled. The claimant underwent left shoulder surgery on February 14, 2002, to repair his left rotator cuff and to have a left shoulder subacromial decompression with distal clavicle resection. Dr. Allard writes on February 27, 2002, that the claimant is doing very well recovering from his shoulder surgery. Exercises were

discussed and the claimant was to stay in the immobilizer another five weeks before he starts more aggressive exercises. On April 3, 2002, the claimant was seen by Dr. Allard for his follow up of his left shoulder surgery where it is noted that the claimant should be off work four months after his surgery noting that so far he is doing well noting that the claimant has regained his last bit of terminal extension and external rotation and he can actively move his arm. Dr. Allard recommended that the claimant be seen in six weeks at which time they will start a strengthening rehab program. On May 15, 2002, Dr. Allard started the claimant on a strengthening program noting that the claimant would like to try and return to work in July and the doctor had written him a note to that affect. On May 16, 2002, Dr. Allard issued a return to work slip for the claimant to return to work on July 8, 2002, and there is another release to work note dated June 27, 2002, releasing the claimant to his regular job with no restrictions as of July 8, 2002. Dr. Stinnett writes on July 29, 2002, that he has seen the claimant for complaints for his left shoulder and he will need therapy due to the shoulder inflammation. Dr. Stinnett recommended no lifting over seventy-five pounds and no overhead work for fourteen days. Dr. Allard writes on August 21 that the claimant reports pain in his left shoulder after stacking boxes overhead while working. After examination and x-rays, the claimant was assessed with having a painful left shoulder six months post rotator cuff repair and distal clavicle resection. Anti-inflammatory medications and physical therapy as well as exercising were recommended and he was

to limit his heavy lifting. Dr. Stinnett writes on September 12, 2002, that the claimant is feeling better but does not think that he will be able to return the claimant to work with lifting boxes overhead of the size and weight he normally handles. Dr. Stinnett writes a note on September 12 that the claimant will not be able to return to his usual work due to persistent shoulder problems. On October 2, 2002, Dr. Allard writes that the claimant continues to be miserable with pain and is having trouble sleeping. The possibility of a second surgery was discussed. Dr. Allard writes that the claimant certainly has a recurrent rotator cuff tear and an exploratory surgery of the claimant's left rotator cuff was scheduled for a few weeks in advance. On November 12, 2002, Dr. Allard operated on the claimant a second time to repair a recurrent left rotator cuff tear. Dr. Allard continued with the claimant's follow up care after the second surgery.

After a complete review of this entire record, I find that the claimant has failed to prove by a preponderance of the evidence that he sustained a left shoulder injury while working for the respondent. The medical records as well as the claimant's testimony indicate that he has had ongoing left shoulder problems prior to his alleged date of injury and the claimant as well as the respondent have indicated that the claimant did not report any type of work related injury or re-injury during the period of time the claimant is contending he sustained a compensable injury to his left shoulder. It is not questioned that this claimant has left shoulder problems for which he has needed surgery but I find that

based on the evidence presented in this record, the claimant has failed to prove that he sustained a left shoulder injury in late October or early November 2001 while he was working for the respondent which resulted in his need for medical treatment. The claimant was aware of how to report a workers' compensation injury and from his testimony as well as the documents which he filled out for short term and long term disability indicate that he did not even associate his left shoulder problems with a work related injury. Therefore, all benefits for his alleged left shoulder injury will be denied.

FINDINGS & CONCLUSIONS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On November 1, 2001, and in June 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant's entitled to the maximum compensation rate for 2002.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a left shoulder injury while working for the respondent. The claimant has testified that he did not report any type of work related injury in October or November 2001 nor any injury in July 2002 and it was not until he had been terminated by the respondent that his attorney filed a claim on his behalf. The claimant has testified that during his orientation he was instructed on how to fill out a workers' compensation claim and the evidence has further set forth that when he began drawing his short

term and long term disability benefits he did not consider his left shoulder problems work related at these times. Also see discussion above.

ORDER

The claimant has failed to prove by a preponderance of the evidence that he sustained a left shoulder injury while working for the respondent. Therefore, this claim for benefits should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE