

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F110578

FENTON MOMAN	CLAIMANT
MCKEE FOODS CORP.	RESPONDENT
RISK MANAGEMENT RESOURCES INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 8, 2004

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

Claimant represented by KENNETH OSORNE, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held on February 24, 2004, 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 December 16, 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 July 30, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left shoulder on July 30, 2001.

4. Medical expenses have been paid.

5. The respondents have accepted an 8 percent impairment rating to the claimant's left shoulder.

6. The claimant is entitled to a weekly compensation rate of \$381.00 for temporary total disability and \$286.00 permanent partial disability.

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

1. Temporary total disability from August 2, 2003, to November 21, 2003.

2. Temporary partial disability from October 21, 2003, though January 19, 2004.

3. Attorney's fees.

In regard to the foregoing issues the claimant contends that McKee Baking took him off work on September 25, 2003, due to his work related injury. They will not let him come back to work until he is fully released. He is currently scheduled to have surgery by Dr. Park. The claimant contends he is entitled to TTD benefits while he is awaiting surgery and thereafter during his healing period. The claimant also will be seeking temporary partial disability benefits during the time he was allowed to come back to McKee in September 2003 at reduced hours and reduced pay. Finally, he contends he is entitled to attorney's fees for these controverted benefits.

In regard to the foregoing issues the respondents contend that they accepted this claim as compensable and contend that they have paid all benefits to which the claimant is currently due. The claimant has undergone two shoulder surgeries and was released by

Dr. Park on August 1, 2003. Dr. Park assessed the claimant with an 8 percent permanent anatomical impairment which has been accepted and is being paid by the respondents. The respondents contend that the claimant is not entitled to either TTD or TPD because Dr. Park has stated that the claimant is no longer in his healing period. In the alternative, the respondents contend that they provided suitable work to the claimant which has been refused and, therefore, the claimant is not entitled to any temporary benefits. Dr. Park has scheduled another surgery for December 19, 2003, which has been approved by the respondents and TTD will be reinstated on that date.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified and it has been stipulated that he sustained a left shoulder injury while working for the respondent on July 30, 2001. The stipulations also set forth that the respondents have accepted and paid out an 8 percent impairment for this claimant's left shoulder problems.

The claimant testified that following his compensable injury he underwent two shoulder surgeries, one on September 17, 2002, and the second one on October 15, 2002, for his compensable injury. The claimant testified that after his second surgery in October 2002 his problems improved but he was still sore. The claimant agreed that he continued with medical care for his shoulder and subsequently learned that his MRI showed another tear in his left shoulder. The

claimant testified that his doctor, Dr. Park, on July 2, 2003, recommended a third surgery to repair his tear but since he had already had two surgeries he wanted some time to think about it and wanted to try and go back to work to see if he could make it without this third surgery. The claimant agreed that he still was having some problems with his shoulders at this time in that any working chest or shoulder level was uncomfortable.

The claimant agreed that on August 1, 2003, Dr. Park gave him his impairment rating and that the claimant presented this to Carmon Brosco as well as a copy of this rating to the workers' compensation carrier. The claimant testified that the respondent at this time would not put him back to work but that on September 20, 2002, Ms. Brosco called him and put him back to work. The claimant testified that the job he was assigned caused him problems and that once when climbing a ladder he tried to pull himself up, his arm gave way and he could not pull his weight up so he fell. The claimant testified that he hung by his right arm and cut his head in two places. The claimant remembers that these injuries were treated at the respondent's plant by the plant nurse and he was put back to work. The claimant testified that something gave way in his left shoulder but at the time his head was hurting worse than his shoulder because of the cuts. The claimant agreed that his lifting restrictions were that of 90 pounds and that he weighed 220 pounds. The claimant testified that the respondent was aware of his restrictions when they placed him in a job of climbing the ladder. The claimant stated that it was his understanding that Carmon Brosco was the person in charge of making sure that he did not do a job that

violated his restrictions. The claimant testified on September 20 when he went back to work and had this injury, Ms. Brosco was off so he continued to work at the same job but when she returned on Wednesday the 23rd of September and she learned of his accident she put him on leave because he could not do the job. The claimant testified that during this period of time he was off work he decided to undergo the third surgery because his shoulder was really bothering him.

The claimant testified that he did return to work for the respondent on October 21, 2003, and worked up until his surgery which was on January 21, 2004. The claimant testified that from September 21, 2003, he worked in the service cage and was earning around \$12.30 an hour. The claimant testified that at the time of his injury he was earning \$13.50 per hour. The claimant testified that from the time he was released in August 2003 to return to work with restrictions he continued to have problems with lifting anything away from his body, anything heavy and he could not do anything high or above his head. The claimant testified that from around August 12 through September 21 his shoulder got gradually better and he felt he was ready to go back to work. The claimant agreed that there were activities which he still could not do but his problems were improving. The claimant testified that after he went back to work his symptoms progressive got worse and he noticed that he was taking more ibuprofen to ease the pain. The claimant testified that the respondent was aware that he had an injury and surgery was scheduled for him but they would not allow him to return to work after his release in August. The claimant testified that on

October 15 or 17 the respondent did offer him a job but because it was such a large pay cut he did not take that job. The claimant remembers that the next week the respondent offered him a job at a lesser rate of pay but not as big a pay cut and so he returned to work on October 21 and worked until his scheduled surgery in January 2004. The claimant testified that since his surgery on January 21, 2004, he has continued to receive temporary total disability payments.

On cross examination, the claimant agreed that it was his choice in late summer of 2003 not to undergo the recommended third surgery but to try and return to work. The claimant also agreed that the respondents have paid for his third surgery as well as his benefits following this surgery.

Carmon Nicole Brosco testified that she was the employee health service administrator for the respondent and had been in this position for approximately four years. Ms. Brosco testified that she works with injured employees and their workers' compensation benefits. This witness testified that she was fully aware that the claimant was off for a period of time because of his shoulder injury. Ms. Brosco testified that the claimant was released to return to return to work and they looked for jobs that would fit within his restrictions. Ms. Brosco testified that the claimant returned to work on September 20, 2003, earning \$14.39 per hour. This witness testified that the claimant worked at this position until September 25, 2003, as a lift truck operator/driver. Ms. Brosco testified that there was some concerns about the claimant's ability to do this lift truck operator job because of the getting in

and getting out of the forklift and that is why the respondent asked the claimant to come in and try the job to see if he would be able to perform this task. Ms. Brosco testified that she was unaware that at times the float on the forklift gets stuck and the driver had to climb up to take care of the problem. This witness stated that this was a problem for the claimant fulfilling this job as a forklift operator. Ms. Brosco testified that after September 25 the claimant was taken off work and put on a list to be called first for any opening that would fit within his restrictions. This witness testified that the claimant returned to work on October 28, 2003, working in the service cage and worked there until January 13, 2004. Ms. Brosco testified that the claimant was earning \$12.35 per hour at this job. Ms. Brosco testified that due to company policy the claimant is no longer an employee of the respondent's business but is eligible for rehire and once he has been released by his doctor at maximum medical improvement, he will be allowed to come back in and reapply subject to his physical restrictions.

On cross examination, Ms. Brosco testified that an employee who is off work on medical leave for either personal injury or workers' compensation injury for a period of more than eighteen months after they have been working for the respondent for a period of five years is considered a voluntary quit. Ms. Brosco testified that usually these people are also subject to rehire.

The medical records set forth that the claimant sustained a left shoulder injury on July 30, 2001, while working for the respondent. An MRI done on September 11, 2001, reveal that the claimant had a rotator cuff tear in his left shoulder and that on

September 17, 2001, Dr. Mark Allard operated on the claimant's left shoulder to repair his rotator cuff tear. The claimant continued with follow up treatment by Dr. Mark Allard for his shoulder problems throughout 2001 and 2002. Dr. John Park operated on the claimant on October 15, 2002, performing a rotator cuff repair with acromioplasty to the left shoulder. Again the claimant did follow up with Dr. Park with physical therapy and home exercises and due to continuing complaints of discomfort in his left shoulder, the claimant underwent a second MRI on May 14, 2003, which revealed that he has an eight millimeter small tear in the mid substance rotator cuff. Dr. Park recommended addressing this unusual problem with medications as well as passive stretching. Dr. Park writes on July 10, 2003, although the report was dictated on August 1, 2003, that the claimant has evidence of the full thickness tear in the cuff and reports that he is unable to undergo any operative intervention at this point and needs to get back to work. On the insistence of the claimant Dr. Park assessed the claimant with an 8 percent whole body impairment to his left shoulder in accordance with the A.M.A. Guidelines. On August 12, 2003, the claimant was released with the restriction of no heavy or repetitive lifting greater than 90 degrees at shoulder level.

After review of this complete record, I find that the claimant has shown by a preponderance of the evidence that he is entitled to temporary total disability from August 2, 2003, to September 20, 2003, and then again from September 23, 2003, to October 17, 2003. The claimant has testified and the medical records set forth that this claimant was released with restrictions to return to work on

August 1, 2003, and that the respondent did not place him back in a working position within his restrictions until September 20, 2003. Testimony from both the claimant and the respondent have indicated that the claimant was taken off work again on September 23, 2003, and was not offered employment until October 17, 2003. The claimant has testified that he was offered employment on October 17, 2003, but he turned down this job due to its low rate of pay. Therefore, the respondents should pay temporary total disability to this claimant for those periods of time which he was not allowed to return to work within his restrictions.

I further find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary partial disability from October 21, 2003, through January 13, 2004. The claimant has testified that on the date of his injury he was earning \$13.50 per hour and the testimony sets forth that during the period of time he worked from October 21, 2003, until January 13, 2004, he was earning \$12.35 per hour, he would be entitled to temporary partial disability during this period of time. Ark. Code Ann. §11-9-520 sets forth that;

In case of temporary partial disability resulting in the decrease of the injured employee's average weekly wage, there shall be paid to the employee 66 2/3 percent of the difference between the employee's average weekly wage prior to the accident and his wage earning capacity after the injury.

FINDINGS & CONCLUSIONS

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

2. On July 30, 2001, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left shoulder on July 30, 2001.

4. Medical expenses have been paid.

5. The respondents have accepted an 8 percent impairment rating to the claimant's left shoulder.

6. The claimant is entitled to a weekly compensation rate of \$381.00 for temporary total disability and \$286.00 permanent partial disability.

7. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 2, 2003, to September 20, 2003, then from September 23, 2003, to October 17, 2003. See discussion above.

8. The claimant has also proven by a preponderance of the evidence that he is entitled to temporary partial disability from October 21, 2003, through January 13, 2004. See discussion above. Also Ark. Code Ann. §11-9-520.

9. The respondents have controverted this claimant's entitlement to additional temporary total disability as well as temporary partial disability.

10. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from August 2, 2003, to

September 30, 2003, then from September 23, 2003, to October 17, 2003, which the respondents should pay.

The respondents should also pay temporary partial disability to this claimant from October 21, 2003, through January 13, 2004, in accordance with Ark. Code Ann. §11-9-520.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE