BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401992

LARRY D. MOSHER, EMPLOYEE	CLAIMANT
SUPERMARKET INVESTORS, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 17, 2004

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on August 13, 2004, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL HART, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits 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 and when he provided notice of injury pursuant to Ark. Code Ann. §11-9-701.

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 November 18, 2003 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of $417.00/$312.00, in the event this claim is found to be compensable. Some expenses and benefits have been paid by the claimant's group carriers, Coresource and United Health and group disability through Harvest Foods (Supermarket Investors).

The claimant contends he injured his left hip at work on November 18, 2003. He seeks payment of medical expenses, temporary total disability benefits from May 20, 2004 to a date yet to be determined and attorney's fees.

The respondents contend the claimant did not suffer an injury arising out of and in the course of his employment. His condition is caused by preexisting arthritis. He did not report an on-the-job

injury until two months later on January 13, 2004 when he realized he needed medical treatment. In the event of an award, respondents seek an offset against payments made by third parties.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The claimant and co-worker, Janet McElfresh were the only witnesses to testify at the hearing.

The claimant, age 59 (D.O.B. October 19, 1945), has a high school education and thirty-nine years of experience working as a butcher. Although the store at the Tanglewood location has had several different owners (Safeway, Affiliated, Harvest Foods) he has been the manager of the meat department since 1969. He supervises three employees and his job duties require him to unload boxes, lift meat, cut meat, place orders, and handle the invoices. The claimant's health history includes arthritis of the thumb and left ankle, bilateral rotator cuff tears (1999) with two surgeries and an amputated left index finger (1983). The finger and right shoulder injuries were accepted and paid by workers' compensation, however, the left shoulder claim was controverted.

The claimant explained that the right shoulder claim was precipitated by a specific event which he disclosed to Dr. David Collins. However, he waited three to four weeks before reporting the injury to his employer. After talking with Dr. Collins, the claimant realized he had developed a gradual tear in the left shoulder from lifting at work but he did not pursue the claim after it was controverted.

On November 18, 2003, the claimant injured his left hip when he slipped in the meat department and caught himself on a meat rack. He did not fall to the floor. The claimant testified that he thought he just pulled a groin muscle and did not realize the seriousness of his condition. He continued working but his symptoms progressively worsened over time, becoming more intense.

On December 4, 2003, the claimant saw Dr. Ken Rosenzweig seeking medication for the arthritis in his thumb and left ankle. While he was there, he mentioned the groin pull and asked for muscle relaxers. When the muscle relaxers failed to relieve the pain, the claimant realized he had

a serious medical problem.

On January 19, 2004, the claimant completed an accident report form, AR-N listing Janet McElfresh and Tommy Johnson as witnesses to the November 18, 2003 accident. Mr. Johnson no longer works for the respondent-employer. The claimant's medical expenses were paid by group carriers Coresource and United Health although he figures he spent some $800.00 in co-pays. Additionally, he drew four weeks of short term disability (about $400.00 per week). Harvest Foods is self-insured for the purposes of disability benefits.

Janet McElfresh, age 41, has worked at the Tanglewood store for the last two years as a meat clerk, but she has worked for Harvest Foods since 1998. She has a high school education with some college courses. The claimant is her immediate supervisor. She acknowledged that the floor of the meat department is often slippery with blood or meat.

Ms. McElfresh testified she saw the claimant's accident and they teased him about "doing the splits" when they were talking afterward in the break room in the presence of the store manager, Roger Russell. The claimant indicated he thought he pulled a groin muscle. The claimant testified this break room discussion took place about a week after the accident. Mr. Russell was not called to testify.

The claimant stated he suffered no hip problems prior to the incident in November, 2003 and Ms. McElfresh confirmed that the claimant had never missed work for hip problems nor voiced complaints, nor demonstrated impairment from his hip prior to November 2003.

Ms. McElfresh testified it was her understanding that the store's policy required reporting accidents to supervisors immediately. She made reference to an employee handbook but that was not introduced into evidence.

<u>THIRD PARTY PAYMENTS</u>

Both Coresource and United Health were given notice of these proceedings but neither company filed a lien in this case. Accordingly, I find they have waived any right to reimbursement.

MEDICAL EVIDENCE

Dr. Rosenzweig's initial report makes no mention of a work-related hip injury. It appears that the doctor did inquire about the onset of symptoms but the claimant could not specify any injury. The claimant disputes the accuracy of this report.

> Dr. Rosenzweig's Report of 12-4-03:
> Over the past month, he has developed some low back pain that radiates down into his left leg to his knee. It is more lateral thigh. He also has some groin pain. He does not recall any specific injuries per se.
>
> He is a little stiff and protecting his left hip... He is very irritable with hip range of motion and is unable to tolerate any rotation.
>
> Clinically, he has a groin pull... this is considered to be a hip joint process...
>
> Dr. Rosenzweig's Report of 1-13-04:
> Mr. Mosher returns for follow up of his back and hip pain, ongoing from a fall on 11/03... We talked about his injury again and he recalls specifically an incident that may have precipitated his hip pain. The back pain itself has improved with the medication. The hip pain that we were the most worried about, he remembers stepping to his left while at work and hitting a slick part of the floor. His left foot slid out and he started to do the splits, and he had a pulling sensation that stunned him. He was able to catch his fall.

Dr. Rosenzweig ordered an MR arthrogram which confirmed a labral tear "consistent with the mechanism of injury of a "split" from a twist and fall while at work," (see his report of January 19, 2004). Dr. Rosenzweig then referred the claimant to Dr. Tucker, an orthopaedic surgeon.

Dr. Tucker treated the claimant in April and May, 2004 with injections and arthroscopic labral resection of the left hip. X-rays also revealed osteoarthritic changes in the articular cartilage of the acetablum. Dr. Tucker released the claimant to return to work with no restrictions on June 28, 2004.

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.

Failure to prove any one of these elements defeats the claim.

“Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

The test for the course of employment requires that the injury occur within the time and space boundaries of the employment, while the employee is carrying out the employer’s purpose or advancing the employer’s interests. Pilgrims Pride Corp. v. Caldarera, 54 Ark. App. 92, 923 S.W.2d 290 (1996).

When there is a delay in reporting a claim and there is no mention of a specific injury in the doctor’s reports, it is only natural that questions would arise concerning compensability. I find in

this case, however, the claimant's history of injury is corroborated by a co-worker; the date of the injury is consistent with the onset of symptoms in the medical history and the beginning of medical attention; and the doctor confirms that this type of accident, slipping and doing the splits, is consistent with the injury, a labral tear of the hip.

Therefore, I find the claimant has proven a causal connection between his injury and his employment. The labral tear was objectively confirmed by MRI scan and required medical treatment for an internal injury. The lay testimony shows the claimant was performing his employment duties at the time of the accident which was a specific incident identifiable by time and place of occurrence.

I do not think that joking about an incident in the break room in the presence of the store manager is the equivalent of notifying your employer that you are injured, require medical treatment, will submit to a drug test, will fill out paperwork and will agree to see the company physician, particularly when the claimant has had prior workers' compensation claims and knows the procedure. Accordingly, I find the respondents are not liable for expenses incurred prior to January 19, 2004 when the claimant filled out an AR-N, notice of injury.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on November 18, 2003 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of $417.00/$312.00.

2. The claimant has proven 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. The respondents are directed to pay all reasonable and necessary medical expenses within thirty days of receipt pursuant to Rule 30 and subject to an offset against expenses paid by third parties. Liability begins January 19, 2004.

4. Coresource and United Health were provided with notice of these proceedings but did not file a lien, ask for a continuance, nor appear at the hearing. The third

parties have waived any right to reimbursement.

5. The respondents are directed to pay the claimant temporary total disability benefits from May 20, 2004 to June 28, 2004 as he remained in his healing period unable to work, subject to the offset.

6. 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.

ELIZABETH W. HOGAN
Administrative Law Judge