

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F313557

DOUG N. TOSH

CLAIMANT

**SAIA MOTOR FREIGHT LINE
(SELF-INSURED)**

RESPONDENT EMPLOYER

ORDER AND OPINION FILED OCTOBER 27, 2004

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE ANDY L. CALDWELL, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Little Rock, Arkansas on August 26, 2004. A prehearing conference was held on June 23, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was an employer-employee relationship on September 19, 2003.
2. The compensation rates are \$440/330.

Claimant contends he sustained a compensable left shoulder and left hand injury on September 19, 2003, and is entitled to medical benefits and temporary total disability benefits from February 2, 2004, to a date to be determined and attorney's fees.

Respondent contends the claimant did not sustain a compensable injury in the

course and scope of his employment. Respondent contends the claimant had a pre-existing condition and the current problems are a recurrence. Respondent further asserts the notice defense with September 23, 2003, being the first notice. Some initial benefits were paid but the claim was controverted as of February 2, 2004.

ISSUES TO BE LITIGATED

1. Compensability for a hand injury and left shoulder.
2. Additional medical benefits for a left shoulder injury, as well as medical benefits for a hand injury.
3. Temporary total disability benefits from February 2, 2004, to a date to be determined.
4. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was an employer-employee relationship on September 19, 2003.
2. The compensation rates are \$440/330.
3. The claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury in the course of and arising out of his

employment.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a left hand injury, which was supported by objective findings.

5. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages pertaining to his left shoulder injury from February 19, 2004 through May 19, 2004.

DISCUSSION

The claimant, 56 years old, worked as a line driver for the respondent employer where he makes day trips out of the Little Rock terminal. The claimant contacts central dispatch in Duluth, Georgia, for his orders. According to the claimant, on September 19, 2003, he had two trailers and, as he detached the trailer, he swung a portable nose stand under the trailer and he lost his balance and fell. The claimant testified he threw his arm out to catch himself and was able to catch himself on the back of the truck but he immediately experienced a sharp pain in his left shoulder and hand. This happened on a Friday night. The claimant testified about a vehicle accident in April 2003, where he was rear ended. He experienced stiffness of the neck and shoulder and upper back and neck and the shoulder hurt from the seat belt but this resolved. The claimant sought medical attention and had a MRI of the left shoulder and was off work about three and one-half to four weeks. According to the claimant, he had no problems performing his job until September 19, 2003.

According to the claimant, he called his central dispatcher, Carol Anne Barnes and reported the September 19, 2003, incident. The claimant testified that he called the terminal manager, Joe Boykin, on Saturday morning about 8:30 or 9:00 and left a

telephone message to call him. The claimant had a scheduled camping trip set for one week starting the following Monday; however, the claimant again called Joe Boykin and reported his injury. The claimant first saw a doctor on Tuesday and x-rays were ordered and he was referred to Dr. William Hefley. The claimant underwent shoulder surgery on October 16, 2003, and shortly thereafter started physical therapy. On October 31, 2003, as the claimant was getting into his vehicle, he had another sharp pain in his shoulder. The claimant had a second shoulder surgery by Dr. Hefley.

The claimant contends that he injured his left hand at the same time as he injured his left shoulder. The claimant contends his left hand was outstretched and when he landed on the truck frame, his thumb was bent back. The claimant testified that he thought he reported his hand problems to Dr. William Warren when he saw him for the first time. The claimant told Dr. Hefley's physician assistant but the records were lost. According to the claimant, he was experiencing a lot of hand pain and finally started getting treatment when Dr. Hefley referred him to Dr. Michael Moore the first of February 2004.

The claimant returned to work for three days before his surgery on October 16, 2003, doing light-duty work and returned to work the first of November 2003, doing light-duty security work at the terminal until the end of January 2004.

Under cross examination, the claimant verified that he had previously had some arthritis pain in his left thumb with complaints of motor strength and numbness back in 2001. The claimant was reminded that he stated during his deposition that he stepped in a hole and fell and the claimant contends he lost his balance after stepping in a hole. The claimant also verified that he did not report his injury to Ms. Jackson, an employee

at the terminal. The claimant reiterated that he clocked in and completed his paperwork and then went back out to break down his trailers and that is when he fell. The claimant verified that the first doctor's visit was with Dr. Warren on September 23, 2003 and there was no mention in his records of an injury to the left hand, arm, wrist and thumb. The first medical report with left shoulder and hand injuries noted was October 15, 2003.

Charlotte Jackson, an employee of the respondent employer, works the night shift handling billing. Ms. Jackson testified that she saw the claimant on September 19, 2003 and he was completing his paperwork and he did not show any signs of an injury. Ms. Jackson verified that when she saw the claimant she did not know if he had broken down his trailers at that time. Ms. Jackson verified that the claimant's first contact or supervisor is in Atlanta and he can report to the terminal manager.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876

(1997).

The claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury arising out of and in the course of his employment on September 19, 2003. The claimant presented a credible account of losing his balance and falling while trying to catch with his left hand and arm. The claimant testified that he timely reported the incident to central dispatch and also reported his injury to the terminal manager the Monday following his Friday incident. Also, the contemporaneous medical reports document the claimant's account of falling. On September 24, 2003, the claimant underwent a MRI of the left shoulder with the following impression:

The previous left shoulder MR of 4-9-03 revealed moderate outlet stenosis and mild impingement change upon the supraspinatus tendon without evidence of cuff tear. The recent episode of trauma has resulted in a small, focal, full thickness, non-retracted tear of the anterior margin of the supraspinatus tendon, with accompanying peritendinous inflammation and fluid distension of the overlying subacromial-subdeltoid bursa. (Cl. Exh. No. 1, p. 12.)

This diagnosis satisfies the objective findings requirement of Ark. Code Ann. §11-9-102(16). Dr. Hefley performed shoulder surgery on October 16, 2003 and his operative report reveals that he found rotator cuff tear and he did a repair. Dr. Hefley's deposition testimony provided an opinion within a reasonable degree of medical certainty that the claimant's left shoulder problems were consistent with a fall at work. The claimant further sustained a re-injury to the left shoulder when he was getting into his vehicle from physical therapy. This necessitated a second surgery to repair the re-torn rotator cuff on February 19, 2004. Dr. Hefley opined the need for the second

surgery was a natural and probable consequence of the first surgery. Respondents remain responsible for all reasonable and necessary medical treatment the claimant has pursued for treatment of his left shoulder condition.

The claimant also contends that he sustained a left hand injury on September 19, 2003, when he fell and injured his shoulder. The medical report from Dr. William Warren first mentions the claimant's left hand problem on October 20, 2003, when he describes in the assessment section that there is hand contusion with closed fracture of metacarpal bone. The report indicates that a bone scan was ordered and this was positive and a referral was made to Dr. Michael Moore. On October 30, 2003, Dr. Moore opined: ". . . I suspect her [sic] had pre-existing degenerative arthritis of the left thumb basilar joint. The injury that occurred on September 19, 2003, has exacerbated the left thumb symptoms related to degenerative arthritis and is responsible for greater than 51% of his current symptoms." Cl. Exh. No. 1, p. 36. Dr. Moore opined that the October 16, 2003, bone scan documented arthritis of the thumb. Dr. Moore further stated that the October 30, 2003, x-rays showed advanced degenerative arthritis in the thumb, suggesting a pre-existing problem which was exacerbated by the injury. There was no medical evidence to suggest Dr. Moore had any x-rays or bone scans of the claimant's hand before October 16, 2003, in order to provide a contrast in his condition. While Dr. Moore has indicated that the diagnostic testing reveals arthritis, I was not persuaded that these findings were the objective findings that the statute requires. Ark. Code Ann. §11-9-102(16). After considering all the credible evidence, I find the claimant has failed to prove by a preponderance of the evidence that he has sustained a compensable hand injury supported with objective findings.

The claimant next contends that he is entitled to temporary total disability benefits from February 2, 2004, to a date to be determined. In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In the present case, the claimant has proven by a preponderance of the evidence that he remained in his healing period from his left shoulder problem and was totally unable to earn wages from February 19, 2004 through May 19, 2004. Dr. Hefley stated in his April 19, 2004, report that he would give the claimant the full three months to heal following his second left shoulder surgery before giving him a full release. Relying on Dr. Hefley's report, I find that the claimant reached the end of his healing period for his left shoulder on May 19, 2004.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury in the course of and arising out of his employment. The claimant has failed to prove by a preponderance of the evidence that he sustained a left hand injury, which was supported by objective findings. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was totally unable to earn wages pertaining to his left shoulder injury from February 19, 2004 through May 19, 2004.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be

paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**