

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F502368

MICAH D. BEATTY, EMPLOYEE	CLAIMANT
INTERNATIONAL PAPER COMPANY, EMPLOYER	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT, CARRIER	RESPONDENT

OPINION FILED OCTOBER 24, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 23, 2005, at Pine Bluff, Jefferson County, Arkansas.

Claimant represented by the HONORABLE KENNETH A. HARPER, Attorney at Law, Monticello, Arkansas.

Respondents represented by the HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses and attorney's fees.

At issue is whether or not this claim is barred by the Shipper's defense, Shipper's Transport of Georgia v. Stepp, 265 Ark. 365, 578 S.W.2d 232 (1979).

_____ 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 27, 2004 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$453.00/\$340.00, in the event this claim is found to be compensable.

The claimant contends he injured his shoulder at work on November 27, 2004 while reaching and pulling overhead. He seeks payment of medical expenses and attorney's fees.

The respondents contend this claim is barred by the Shipper's defense. The claimant completed a "Health History" form on August 30, 2002 indicating he had no work restrictions or physical limitations with his shoulder and had not had surgery nor lost time from work due to an

injury.

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

The claimant, age 33 (D.O.B. August 23, 1972) has work experience as a farm laborer and truck driver. His health history includes a 1995 cut over his left eye and a 2001 left shoulder injury requiring surgery by Dr. Clark. Both injuries were the result of motor vehicle accidents. After the 2001 injury, the claimant received a settlement of \$25,000.00.

The claimant worked for the respondent-employer for three years as a Process Specialist, requiring him to lift heavy cores overhead. On November 27, 2004, the claimant felt his left shoulder pop out of place. His foreman told him to put ice on it. Instead, the claimant went to the plant's First Aide station where the nurse called an ambulance. The claimant came under the care of general practitioner, Dr. Wilkins and surgeon Dr. Lytle. The carrier refused the claimant's request to return to Dr. Clark. After Dr. Lytle's predictable report, the claim was controverted. The claimant then sought treatment with Dr. Bowen. Disagreeing with Dr. Lytle, Dr. Bowen diagnosed a new shoulder injury unrelated to the 2001 incident.

Steve Estes, a human resource manager with the respondent-employer, testified they used a "post offer/pre-employment" job application. Mr. Estes testified that if the claimant had disclosed his prior shoulder surgery, he would have required an FCE or doctor's evaluation to make sure the claimant was in the right job position. It is possible that the claimant might not have been hired or might have been placed in a different job to avoid overhead lifting.

MEDICAL EVIDENCE

Not surprisingly, Dr. Lytle found the claimant's November 2004 injury was a recurrence of his 2001 injury. The claimant was released May 19, 2005 with 0% impairment.

In contrast, Dr. Scott Bowen opined that the claimant suffered a new injury based on an MRI scan and clinical examination:

Left shoulder instability – it is my opinion that this is consistent with a new injury to his shoulder since the previous anterior labrum had

been repaired. A superior labral tear can occur with an overhead abduction external rotation type injury that produces a peel back phenomenon of the biceps root as it attaches onto the superior labrum. The fact that he did have a traumatic event at work and did not have any problems to my knowledge in the interval between his original surgery and the injury would suggest that this is consistent with a new injury.

In response to questions posed by Attorney Harper, Dr. Bowen explained further:

Yes, the injury at work was the major cause of Mr. Beatty's injury. His previous shoulder injury was an anterior labral injury, but the most recent injury was a superior labral injury. (Emphasis Added)

EMPLOYMENT APPLICATION

The claimant answered in the negative all health questions on the form. However, he spontaneously wrote in a description of the cut over his left eye from 1995.

Of particular interest are the following questions:

- #2 concerning "work restrictions" from an injury
- #3 concerning restrictions from physical activity
- #10 joint, muscle, bone "disease"
- #45 strength/motion of shoulder
- #63 physical "disability"
- #64 "major" surgery or operation
- #67 "hospitalized" for a major injury

The claimant explained that his doctor performed an out-patient arthroscopic procedure in 2001 on his shoulder and assessed no work restrictions. Since then, the claimant had been able to perform his job with the respondent-employer for three years without any difficulty, without missing work and without medical treatment. He considered himself healthy with no "restrictions", "disease", "loss of strength or motion" or "disability" from his previous injury. He also considered Dr. Clark's treatment a minor procedure, rather than a major surgery since it was out-patient and arthroscopic rather than an open reduction. I agree with the claimant that Questions 2, 3, 10, 45, and 63 do not apply to his situation. Also, questions 64 and 67, lead the applicant to qualify his treatment.

On cross-examination, Attorney Dennis emphasized that Dr. Clark released the claimant January 24, 2002 with a 6% impairment rating, and noted restricted range of motion. Dr. Clark

assessed no specific work restrictions. The claimant responded that he never saw Dr. Clark's report and was unaware of the rating. However, it was the claimant's understanding that he had no work restrictions, and in fact, the 2001 injury had not been a hindrance until his new injury in 2004 with a tear in a different place in the shoulder.

Attorney Dennis also brought attention to the fact that the claimant disclosed a 1995 minor cut over his left eye without mentioning the more recent 2001 shoulder injury requiring surgery. He also noted that regardless of how the surgical procedure was categorized, the claimant was unconscious, under anesthesia, and in a hospital, when he received treatment.

FINDINGS AND CONCLUSIONS

The respondents have denied this claim based on the Shipper's, supra defense:

Public policy places an obligation on an employee to give truthful answers to a prospective employee's question. False representations made in an employment application will bar recovery if the following test is met by the employer:

- (1) the employee must have knowingly and willfully made a false representation as to his physical condition;
- (2) the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring;
and
- (3) there must have been a causal connection between the false representation and the injury.

Whether or not these factors exist are questions of fact to be decided by the Commission. Newsome v. Union 76 Truck Stop, 34 Ark. App. 35, 805 S.W.2d 98 (1991).

In a series of cases, the Court has ruled that the questions must be specific enough to elicit a "health history", see Sawyer v. Mtarrri ("physical condition"), 33 Ark. App. 125, 806 S.W.2d 7 (1991); Knight v. Industrial Electric, ("physical condition"), 28 Ark. App. 224, 771 S.W.2d 797 (1989); Stillman v. Multi-State Electrical, ("physical limitations"), 28 Ark. App. 193 (1989); College Club Dairy v. Carr, ("physical defects"), 25 Ark. App. 215, 756 S.W.2d 128 (1988).

However, with the advent of the American with Disabilities Act (ADA), hiring practices changed. The more detailed questions an employer asked of a prospective employee, the more the

employer risked a violation of the ADA. Under the ADA, the employer is expected to make “reasonable accommodations” to fit the employee’s work restrictions if possible. In response, employers made a distinction between “applicants” and “employees”, “offers” and “employment” and changed the format of their job applications. I would note, however, that as an extension of public policy, the employer should be able to rely on post-employment disclosures as well as the pre-employment interview.

The first prong of the Shipper’s test involves an element of credibility for assessment by the Commission. In the case at bar, the claimant answered in the negative almost all of the questions, specific or general. It should be noted that the employment application also has a medical release and the claimant did disclose his physician’s name.

In fairness to the claimant, there is indeed the perception among the public that procedures once considered risky are now routine; laproscopic and arthroscopic techniques have dramatically changed the invasiveness of the procedures and improved recovery time; and out-patient procedures are more common than long hospitalizations. I agree with the claimant that he did not have “joint disease”, but he did have surgery.

Therefore, the claimant’s decision to disclose a ten year old visible scar over his eye rather than a three year old shoulder injury indicates the claimant was being less than candid on the employment application. Accordingly, I find the claimant knowingly failed to disclose his physical condition.

The person who interviewed and hired the claimant was not called to testify. Human Resource policy at International Paper is to use the job application to match the applicant’s abilities to the plant’s job openings. I would note, however, that even if the claimant had disclosed his prior surgery, his medical records would have shown that he was released with no work restrictions and his ability to work at International Paper for two years indicates he probably would have passed a Functional Capacity Evaluation. Nevertheless, I find the employer relied on the misrepresentation not in hiring the claimant, but for purposes of job placement.

With regard to the third prong of the Shipper's test, I find no causal connection between the misrepresentation and the injury. This is not a recurrence or preexisting condition, but a new injury that could have occurred with or without the prior surgery. Accordingly, I find this claim is not barred by the Shipper's defense.

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on November 27, 2004 at which time the claimant earned sufficient wages to be entitled to a compensation rate of \$453.00./\$340.00.
2. The respondents have failed to prove a causal connection between the claimant's misrepresentation on the employment application and the injury to his shoulder. Therefore, this claim is not barred by the Shipper's defense.
3. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.
4. 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