

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212239

DOYNE A. BIVENS, EMPLOYEE	CLAIMANT
CONAGRA POULTRY COMPANY, SELF-INSURED EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., TPA	RESPONDENT

OPINION FILED AUGUST 5, 2005

Hearing held on May 10, 2005, before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge at El Dorado, Union County, Arkansas.

Claimant represented by HONORABLE KENNETH A. OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE NORWOOD PHILLIPS, Attorney at Law, El Dorado, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held in the above-captioned claim on May 10, 2005, in El Dorado, Arkansas, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Law.

A prehearing telephone conference was conducted on April 6, 2005, and a Prehearing Order was filed on April 7, 2005. At the hearing the parties announced that

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the stipulations, issues, and the respective contentions were properly set out in the Prehearing Order, subject to the additional stipulations, and issues agreed to at the hearing. A copy of the Prehearing Order was introduced into evidence as Commission Exhibit #1, and made a part of the record, without objection.

It was stipulated by the parties that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, and that the employee/employer/carrier relationship existed at all relevant times, including December 15, 2001. The parties further stipulated the claimant's applicable weekly compensation rates were \$331.00 and \$249.00, for temporary total disability and permanent partial disability, respectively.

By agreement of the parties, the primary issue concerns compensability. If overcome, the claimant's entitlement to associated medical benefits, indemnity benefits, and attorney fees must be determined.

The claimant contends he suffered a compensable shoulder injury on December 15, 2001, and is entitled to temporary total disability benefits from February 5, 2002 through February 19, 2002, associated medical expenses and attorney fees. The claimant reserved any issues regarding permanent impairment.

The respondents contended the claimant did not sustain a compensable injury while in its employ; however, in the alternative, respondents contend that should the

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Commission find the claimant did sustain a compensable injury, that the respondents are entitled to §11-9-411 offsets.

### DISCUSSION

The claimant alleges he injured his right shoulder around December 15, 2001, while in the respondents' employ, and testified as follows with regard to the alleged incident:

Q. Now, if you would explain how you believe you got hurt?

A. Well, the chickens come in on the dollies, like eight crates high, and the dolly has got four wheels, you pull them around to the line, and to the machine, and push the machine up in the, I mean, put the chickens up in the machine, and it just takes them off one at a time. But this particular one only had three, and it had a hole in the floor and I was pulling with (sic) the wheel broke. And when it hit that hole, it overturned and turned on me.

Q. You said this particular one had three wheels, do you mean the dolly?

A. Right, the dolly.

Q. The dolly on which you transported the crates of chicken?

A. Correct.

Q. And you feel like it hit a hole in the concrete and turned over on you?

A. I know that is what happened.

Q. Did you take any action to try to protect yourself?

A. That is how my shoulder got hurt, trying to keep it from turning over, you know. If it fall, you know, you are going to have to pick all that stuff up, so I was trying to, but I couldn't keep it, it was a little too heavy for me, and so I tried to get away and that is when it caught my shoulder. (T. pgs. 14 & 15, lines 14-25 & 1-16.)

The main issue in this claim is the question of whether the claimant sustained a compensable injury to his right shoulder as a result of a specific incident on or about December 15, 2001. The burden rests upon the claimant to prove all of the elements necessary for such a compensable injury.

For the claimant to establish a compensable injury as a result of a specific incident, which is identifiable by time and place of occurrence, the following requirements of A.C.A. §11-9-102(4)(A)(i) must be established:

- 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 physical harm to the body which required medical services, or

resulted in disability or death.

- 3) Medical evidence supported by objective medical findings, as defined in A.C.A. §11-9-102(16), establishing the injury; and
- 4) Proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability of the injury alleged, he fails to establish compensability of the claim, and compensation must be denied. C. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S. W. 2d 876 (1997). The claimant must prove that his injury was "...the result of an accidental injury that arose in the course of employment, and that it grew out of or resulted from, the employment." Cook v. Aluminum Co. of America, 35 Ark. App. 16, 21, 811 S.W. 2d 329, 332 (1991).

In the present case, the claimant has failed to prove by a preponderance of the evidence that his injury arose out of an in the course of his employment with the respondent. Also, the claimant has failed to prove by a preponderance of the credible evidence that his injury was caused by a specific incident, which is identifiable by time and place of occurrence.

There are several pieces of evidence that cast grave doubt about the time and place of occurrence of the alleged specific incident. First, the claimant's own testimony

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was vague about the date of the injury.

Q. And you are telling us about December 15, 2001?

A. It was around that time, I just don't remember exactly what date it was.

Q. Well, how did you come up with that date?

A. I really don't know. (T. pg. 29, lines 17-22)

Dr. Bryant submitted a report January 22, 2002. (CX-1, pg. 1) In that report Dr. Bryant states the claimant told him he sustained the injury in December of 2001, and "...went to the ER where he was treated and released." (Emphasis added.) The claimant never testified at the full hearing about going to the emergency room, and nowhere in the medical records does it show an ER visit in December of 2001. A report submitted by Dr. David Collins states the claimant sustained the injury on January 10, 2002. (CX-1, pg. 12).

Most disturbing about the allegation is the claimant's statement in Respondents' Exhibit #1. Respondents' Exhibit #1 is an AWCC Form N, wherein the claimant alleges he was pushing a rack of meat and fell and injured his left shoulder on September 2, 2003. Ironically, the rack of meat falling in September of 2003, as alleged in RX-1, is nearly identical to what the claimant says happened in December of 2001. However, when questioned about the two incidents, the claimant admitted that a "rack

of meat falling off a cart” incident didn’t happen twice.

Q. And you didn’t injure you shoulder on September 2, 2003?

A. I don’t remember, I may have but I don’t remember.

Q. Well, do you remember two different times your dolly hitting the hole and you trying to catch it and hurting your shoulder, that didn’t happen twice, dit it?

A. No, it didn’t.

Ms. Suzie Hamilton credibly testified she had access to all reports of injury ever filed or reported by the claimant. She credibly testified the claimant never reported an injury in either 2001 or 2002. I do not arbitrarily disregard the testimony of Spears Watson. Mr. Watson testified he saw a rack of meal fall on the claimant; however, Mr. Watson could not be very specific as to when the incident happened. Further, I found the testimony of Ms. Hamilton to be more compelling. In the case of Hapney v. Rheem Manufacturing Co., 67 Ark. App. 8, 992 S.W. 2d 151 (1999), where appellant testified that she did not know when she was injured and did not report a work-related injury to her employer on the purported day of the injury, nor provide a history of a specific incident to any of her treating physicians, the Workers’ Compensation Commission’s conclusion that her injury was not the result of a “specific incident” under A.C.A. §11-9-102 (4)(A)(i) was support by substantial evidence. This

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examiner finds the lack of recollection by the witnesses, the absence of an emergency room report, even though the claimant told a treating physician he went, and no record of an incident in 2001 or 2002 with the employer too much for the claimant to overcome to establish a compensable injury. As such, he has failed to meet his burden by a preponderance of the evidence

As stated, it is the claimant's burden to prove all elements of compensability, and in this case, the claimant has failed to prove by a preponderance of the evidence that his right shoulder injury was in any way caused or aggravated by a specific employment related incident that occurred on December 15, 2001. Thus, the claimant has failed to prove he sustained a compensable injury to his right shoulder on December 15, 2001. His claim for benefits attributable to such an injury must be denied and dismissed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) On December 15, 2001, the relationship of employee/employer/carrier existed between the parties.
- 3) On December 15, 2002, the claimant earned sufficient wages to entitle him

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to weekly compensation benefits of \$331.00 and \$249.00 for temporary total disability and permanent partial disability, respectively.

- 4) The claimant has failed to prove by the greater weight of the credible evidence that he sustained a compensable injury to his right shoulder as a result of a specific incident on December 15, 2001. Specifically, the claimant has failed to prove the occurrence of a physical injury to his right shoulder on December 5, 2001, that arose out of and in the course of his employment with the respondent, and was caused by a specific incident, that is identifiable by time and place of occurrence.
- 5) The respondents have controverted this claim in its entirety.

**ORDER**

Based upon my forgoing findings and conclusion, this claim is hereby, respectively denied and dismissed in its entirety.

IT IS SO ORDERED.

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DALE DOUTHIT  
Administrative Law Judge

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