

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406110

CHARLES DAVIDSON	CLAIMANT
AE STALEY MFG. CO.	RESPONDENT
ACE AMERICAN INSURANCE CO. INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 28, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELISABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by DEAN GARRETT, Attorney, Fort Smith, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

A hearing was held on January 13, 2005, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on November 2, 2004. 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 May 6, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a temporary total disability rate of \$347.00 and a permanent partial disability rate of \$250.00.

4. The claimant last worked on May 6, 2004.

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

1. Compensability of the claimant's right upper extremity problems.

2. Related medical.

3. Temporary total disability from May 7, 2004, to a date to be determined.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained an injury to his right arm and hand while operating a pressure hose on May 6, 2004, with only his right hand because of a prior compensable injury to his left arm and hand preventing him from using both hands.

In regard to the foregoing issues the respondents contend that the claimant claims that he sustained a gradual onset injury to his right upper extremity. Respondents contend that the claimant did not sustain a compensable injury as defined by the Arkansas workers' Compensation Act which requires the alleged injury be caused by rapid, repetitive motion. Further, claimant did not report the alleged injury until May 20, 2004. Respondents raise Ark. Code Ann. §11-9-411 as it is believed that claimant has received certain benefits to which that section applies. Therefore, respondents are entitled to a credit for the amount of said benefits should this claim ultimately be determined compensable.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted documentary evidence marked Claimant's Exhibit No. 1 and a letter from Randall Cook to the claimant marked Claimant's Exhibit No. 2. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he began working for the respondent on December 16, 2002. The claimant testified that he injured his left upper extremity on June 11, 2003, while working for the respondent and that this injury was accepted as compensable and medical benefits have been paid. The claimant agreed that on September 10, 2003, he underwent surgery on his left upper extremity and was off work until on November 4, 2003. The claimant testified that when he returned to work he had restrictions of no lifting or pushing more than five to ten pounds and no pushing or pulling more than thirty-five to forty pounds. The claimant testified that the respondent put him back to work but at a different job that was within his restrictions. The claimant testified that basically he was doing clean up, painting, pressure washing, scrapping, taking out trash, picking up bolts and just basic clean up. The claimant agreed that due to complications he underwent a second surgery on his left upper extremity on January 16, 2004, for which he was off work for two and a half weeks. The claimant testified that when he returned to work on February 2,

2004, he again had restrictions of no lifting more than five to ten pounds and no pushing more than thirty-five pounds. The claimant testified that again his job was primarily cleaning. The claimant testified that these activities were within his restrictions with a few exceptions such as the repetitive scrubbing. The claimant testified that some of this work was hard on his injured left arm but that he just used his right arm instead. The claimant stated, "I had to use my right arm for everything because I wasn't supposed to be gripping more than five to ten pounds." The claimant further stated, "So basically what happened was is all that use of my right arm lead up to the problems I'm having now." The claimant testified that from approximately December 2003 to May 2004 the problems with his right upper extremity continued to get worse and in May it just had had enough and would not work anymore.

The claimant testified that the work with the pressure washer was particularly difficult for him and increased his problems due to the constant gripping, pulling and releasing the trigger on the power washer. The claimant testified that on May 6, 2004, the pain became so intense in his right arm that he just could not do the work anymore. The claimant agreed that he had to repetitively grip the handle of the power washer with his right hand. The claimant further explained that working with the power washer he was not constantly holding the trigger the whole time but because there were times when he had to spray a little bit and then let it go so it is repetitive, meaning that when you are spraying you could spray a certain area then you would have to move around to go to

another area to clean. The claimant testified that on May 6, 2004, he was working with Jim Vaught cleaning the clogged holes in the chillers. The claimant explained that he was operating the gun mechanism of the power washer and that Jim was operating the nozzle end of the power washer. The claimant testified that at that time his right arm had been bothering him quite a bit. The claimant testified that he works an eight-hour shift and he and Mr. Vaught had been working on one of the chillers all morning but when they took their lunch break they had about finished the first chiller. The claimant testified that during the lunch hour he was complaining about his arm hurting a little bit but did not think anyone was paying any attention to him. The claimant testified that after lunch he was again working the power washer and Mr. Vaught was using the nozzle end to clean the chillers and it got to the point where he really could not pull on the trigger because there was just a lot of pressure on his arm. The claimant testified that by 4:00, the end of his shift, his arm was hurting but he really did not think anything about it because it had already been hurting. The claimant remembered that he had an appointment with the occupational therapist for therapy on his left arm and he had been telling her for some time that he was beginning to have problems with his right arm. The claimant testified that he did not report his problems with his right arm to a supervisor that day because none of them were present in the plant by the time he left. The claimant testified that the sixth of May is on a Thursday and he was to report back to work on Friday. The claimant

testified that he tried to call into the respondent to report that he would not be able to come into work but never could get anyone to talk with him so he left a voice mail message for Randy Cook, the plant manager. The claimant testified that he tried several time within the next few days to contact his supervisor but never was able to talk with him although he did leave messages. The claimant testified that by wednesday of the following week after he had tried to call in several times he received a call from Randy asking where he had been and how come he had not called in. The claimant testified that he told Randy that he had been trying to call.

The claimant testified that he had an appointment with Dr. Hixson on May 13 and that because of information she had received from the occupational therapist, the doctor checked out his right arm. The claimant testified that he received a letter from Randy Cook on July 9, 2004, notifying him to return to work. The claimant agreed that on November 11, 2004, Dr. Hixson did return him to work on light duty as it related to his left arm. The claimant testified that Dr. Hixson has continued to see him as to his right arm and has scheduled him for surgery on January 26, 2005.

On cross examination, the claimant agreed that Dr. Hixson had been treating him following his initial left arm injury and saw him on May 13, 2004, after his May 6, 2004, injury. The claimant agreed that he did not report any injury to Randy Cook on May 6, 2004, because Mr. Cook was not at the plant nor did he report to

Bruce, his other supervisor, because he did not see Bruce that day. The claimant agreed that he has had permanent restrictions that relate to both of his arms for some period of time. The claimant further agreed that the medical bills for the treatment of his right upper extremity problems have been paid by his group carrier, further noting that he has surgery scheduled for January 26, 2005, for tennis elbow. The claimant testified that he also has been receiving short term disability benefits since May 6, 2004, and when they terminated he started receiving long term disability.

Jim Vaught testified that he is an employee of the respondent and was working with the claimant on May 6, 2004. Mr. Vaught testified that he and the claimant were operating a pressure washer doing a cleaning project. Mr. Vaught demonstrated and explained that the apparatus which he and the claimant used to clean the chiller was a spray gun with a piece of flexible blue tubing coming out of the handle of the spray gun and that this tubing had a spray nozzle attached to the end of it. Mr. Vaught testified that the claimant operated the spray gun portion of this device and that he held the nozzle end of the tubing to clean out the holes. Mr. Vaught testified that he would place the nozzle end of the tubing into the area or tube that needed to be cleaned out and he would nod for the claimant to pull the trigger on the spray gun. Mr. Vaught testified that as he was pulling the tubing out of the hole that was being cleaned, the claimant was supposed to let go of the trigger. Mr. Vaught testified that it would take approximately one minute to push the spray nozzle all the way into the tube in

order to clean it out and then pull the tubing back out. This witness agreed that it took the claimant approximately one minute to perform the function of holding the trigger and then letting it go. Mr. Vaught testified that the claimant did not say anything to him on May 6, 2004, about his right arm hurting.

On cross examination Mr. Vaught testified that the pressure comes through the valve in the grip portion of the spray gun when the valve is released and agreed that it actually puts pressure on both he and the claimant when the water comes through. Mr. Vaught testified that there were approximately one hundred holes in each chiller agreeing that if it takes a minute to clean each one of the holes, the claimant was having to grip and re-grip every minute approximately one hundred times. Mr. Vaught testified that on May 6, 2004, he and the claimant cleaned one and a part of another chiller.

Charles Bossarte testified that he was the plant coordinator for the respondent and that on May 6, 2004, because Randy Cook was away from the facility, he was in charge of the respondent's plant. This witness testified that he was aware that the claimant was working under restrictions as a result of a June 2003 left arm injury. This witness testified that late on May 6, 2004, he saw the claimant working with Jim Vaught unplugging a reboiler cooler. This witness agreed that the claimant and Mr. Vaught were using a pressure washer to accomplish their goal and that the claimant was operating the gun portion and that Mr. Vaught was feeding the hose in and out of the tubes. This witness testified that operating the

trigger portion of the pressure washer involved squeezing the trigger and then when pressure was not needed just simple letting the trigger go. Mr. Bossarte was asked if the claimant had said anything to him that day about his job causing him problems with his right arm and this witness responded, "No, he did not."

On cross examination, Mr. Bossarte testified that it was very possible that he had already gone home by the time the claimant finished his shift. This witness testified that each hole being cleaned would take approximately one minute to unclog depending on the severity of the pluggage, further noting that it could take a lot longer to clean a hole if it was more severely clogged.

Randall Cook testified that he worked for the respondent as their plant manager and was in that position on May 6, 2004. Mr. Cook testified that the claimant did sustain a compensable injury in June 2003 after which he had work restrictions. This witness testified that the respondent accommodated the claimant's restrictions and agreed with the claimant's testimony that his working responsibilities were mainly cleaning. This witness was asked if the claimant had complained about problems with his right hand before May 6, 2004, and this witness responded, "No." Mr. Cook testified that on May 6, 2004, he was not at the plant. Mr. Cook testified that the claimant did not have any restrictions for his right arm and hand and that the pressure washing job put most of the pressure and the shock on his right arm. This witness testified that he asked the claimant if he thought he could do the pressure washing job and the claimant indicated that he would try

and see what happens. Mr. Cook testified that he asked the claimant a couple of times between the time he started doing pressure washing and May 6, 2004, if he had any problems or if it was hurting him and he never did indicate one way or the other whether he was having a problem. Mr. Cook testified that by Tuesday the following week it was noted that the claimant had missed work on Friday, Monday and Tuesday and that he asked Bruce Bossarte about the claimant. This witness testified that he knew that the claimant had physical therapy for his left arm on Friday mornings but that typically he would return to the plant after his therapy. Mr. Cook testified that Bruce told him that the claimant did not return to work after his physical therapy on Friday and that at that point he telephoned the claimant. Mr. Cook was asked if he had received any voice mails on his telephone from the claimant and this witness responded, "No, Ma'am." This witness testified that he regularly checks his voice mails four or five times a day. Mr. Cook testified that when he reached the claimant by telephone the claimant reported that his right arm was sore from pressure washing and that he had talked with the physical therapist about this and he was trying to see a doctor. This witness testified that he did not conduct an investigation at that time because he was not sure if the claimant was reporting a work related injury. Mr. Cook testified that on May 20 the claimant reported a work related injury and it was then that this witness learned that the claimant had been pressure washing on May 6 and not painting as he had been instructed to do. Mr. Cook testified

that it was about a day and a half later that they were able to get instructions from their corporate headquarters to go forward with the first report of injury. This witness testified that he could not find anyone at the plant who worked with the claimant on May 6 who could corroborate that the claimant had told them that his right arm was hurting. Mr. Cook testified that the respondent has work available for the claimant within whatever restrictions the doctor might put on him. This witness testified that the claimant never did appear at work with a release stating that he could now work with restrictions. This witness was shown Claimant's Exhibit No. 2 which is a letter dated July 9, 2004, from this witness to the claimant. Mr. Cook testified that the claimant had not made any effort or had any conversations with him between May 11 and the date of the letter as to coming back to work with restrictions. Mr. Cook testified that he was aware that the claimant had filed for short term disability benefits sometime between May 6 and May 30. Mr. Cook agreed that in his letter he notes that the claimant had been released to return to work with restrictions for his left wrist injury and that his restrictions would be accommodated. This witness agreed that his letter to the claimant further sets forth that the short term disability claim that the claimant had filed with Hartford has to do with your right arm and we do not have any information concerning a release on this arm. It was further agreed that the letter set forth that, "In order to return to work, you have got to have a release from your doctor on the right arm." Mr. Cook testified that he did not tell the claimant that he had to

have a release without any restrictions. Mr. Cook testified that all they needed was a release setting forth what restrictions the claimant might have and they would have accommodated them. Mr. Cook testified that the claimant never contacted him indicating that he had any kind of permanent restrictions and asking if he could come back to work. When asked about long and short term disability benefits, Mr. Cook testified that this is a fringe benefit provided by the respondent to their employees free of charge to the employees. Mr. Cook was read a portion of a medical report introduced by the claimant dated December 15, 2004, where it sets forth that the claimant is not working because light duty cannot be accommodated at his job. This witness testified that this was not true.

On cross examination, Mr. Cook testified that the claimant had been pressure washing for the respondent most of the month of April. Mr. Cook testified that on May 20 after he was aware that the claimant was alleging that he had a work related injury, he conducted an investigation a couple days later. Mr. Cook testified that he visited with different employees who the claimant had referred to in his first report of injury. On redirect examination, Mr. Cook was asked if the claimant, on May 4 or May 5 or anytime before May 6, had told him that his right arm was giving him problems. Mr. Cook responded, "No."

The medical records set forth that Dr. Marcia Hixson saw the claimant on July 29, 2003, for his left wrist hyper extension injury occurring when he slipped and fell at work. Dr. Hixson

writes that the claimant is right hand dominant and after examination and x-rays, scheduled him for a surgical repair of his wrist. These medical records set forth that the claimant underwent surgery on his left wrist on September 10, 2003, and was followed up after his surgery by Dr. Hixson throughout the remainder of 2003. These doctor's notes released the claimant to return to work for right handed duty only. On December 23, 2003, Dr. Hixson writes that the claimant has a rupture of his TFCC repair in the left wrist and scheduled a second surgery on his left wrist. The claimant underwent left wrist surgery on January 16, 2004. On January 27, 2004, Dr. Hixson writes that she has seen the claimant following his osteotomy with repair of the triangular fibrocartilage complex in his left wrist. Dr. Hixson released the claimant to light duty as of February 2, 2004, with the restriction that he should not use his left upper extremity at all. Dr. Hixson continued to follow up with the claimant in February and March, noting that he is to continue with light duty work using his right hand only. On April 15, 2004, Dr. Hixson notes that the claimant's grip strength in his left hand is thirty-five pounds and on the right he has 135 pounds. Dr. Hixson again released the claimant to return to light duty work, noting that he should not lift over five pounds or push pull over ten pounds using his left hand.

The medical records set forth that on May 13, 2004, the claimant was seen by Dr. Marcia Hixson for follow up for his left wrist problems. Dr. Hixson also notes that the claimant reports an injury to his right upper extremity on May 6, 2004, and that his

right upper extremity is painful and swollen. Dr. Hixson notes that the claimant's right hand is slightly swollen. Dr. Hixson notes that the claimant still has limited use of his left wrist and has a recent strain in the right upper extremity, possibly from repetitive flexing and gripping and took the claimant off work for a three week period of time and prescribed medication. Dr. Hixson writes on May 18, 2004, that in her opinion the claimant's right arm pain was a new injury caused by manning a pressure hose at work on May 6, 2004. Dr. Hixson notes that this was a separate injury from that of his left upper extremity but nonetheless a work related injury. Dr. Hixson writes on May 27, 2004, that if the claimant's left wrist continues to improve they can start some other modalities for his right upper extremity. The doctor notes that at this time the claimant can do very light work not pushing or pulling more than ten pounds and not lifting over three to five pounds with either hand, noting further that he cannot do any work that requires repetitive gripping. On September 2, 2004, Dr. Hixson writes that she has examined the claimant's right upper extremity and it is not swollen and that his right wrist range of motion shows a click in the ulnar aspect of the wrist at the TFCC ligament. X-rays of the claimant's right wrist are normal as well as were the nerve conduction and EMG studies conducted on the claimant's right upper extremity. Dr. Hixson diagnosed the claimant with having epicondylitis of the right elbow and mild right cubital tunnel syndrome. Dr. Hixson administered an injection into the claimant's right lateral epicondyle, recommended

that he continue to wear his tennis elbow brace, noting that he is not working at this time and that he has permanent restrictions and should not lift more than forty pounds with both hands, forty-five pounds with the right hand alone and 15 pounds with the left hand alone. Dr. Reginald Rutherford writes on September 2, 2004, that the nerve conduction study and needle examination of the claimant's right upper extremity are normal and there is no evidence to suggest cervical radiculopathy, brachial plexopathy ulnar neuropathy or median neuropathy right upper extremity. On November 11, 2004, Dr. Hixson again diagnosed the claimant with right cubital tunnel syndrome, prescribed medications and noted that he might ultimately require surgery to release his right cubital tunnel. Dr. Hixson writes on December 15, 2004, that the claimant continues to be followed for pain in his right elbow and forearm. The doctor notes that the claimant is still not working because light duty cannot be accommodated at his job. Dr. Hixson again diagnoses the claimant with having right lateral epicondylitis and that he also has right cubital tunnel syndrome. The doctor notes that the next step would be a tennis elbow release surgically and this surgery has been scheduled for January 26, 2005, noting further that he is to continue with his permanent restrictions. There is a return to work note from Dr. Hixson indicating that the claimant's surgery is scheduled for January 26, 2005, and that he can work with no pushing over five to ten pounds and no lifting over five pounds and no repetitive motion with gripping of his right or left.

In Respondents' Exhibit No. 1, Page 5, there is a return to work physician's slip dated November 11, 2004, indicating that the claimant can return to work with no pushing and pulling over five to ten pounds, no lifting over five pounds and no repetitive motion with gripping or lifting with his right or left, noting that these are permanent restrictions.

Arkansas law requires that a compensable injury must be established by objective medical findings, further defining objective findings as not to include complaints of pain. After review of this entire case, I find that the claimant has not established a compensable injury which can be substantiated by objective medical findings. All the various tests which this claimant has undergone are normal or show no indication of injury. It is not questioned that this claimant may have experienced an over use event while power washing with Mr. Vaught on May 6, 2004, but there is nothing in this record to indicate that this claimant has any type of injury to his right upper extremity that can be established or verified by objective medical findings. It is also noted that Dr. Hixson indicated that the claimant could do very light work setting out his restrictions as set forth in her letter dated May 27, 2004. Dr. Hixson continued these restrictions throughout his treatment program with her. Therefore, even if compensability had been found, the claimant would not be entitled to temporary total disability except for perhaps a three week period of time as initially suggested by Dr. Hixson in her note of May 13, 2004. Since compensability has not been found due to the

lack of objective findings, this claim for benefits should be denied in its entirety.

FINDINGS & CONCLUSIONS

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

2. On May 6, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a temporary total disability rate of \$347.00 and a permanent partial disability rate of \$250.00.

4. The claimant last worked on May 6, 2004.

5. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on May 6, 2004, due to the lack of objective medical findings of injury.

ORDER

The claimant has failed to prove in accordance with Arkansas law that he sustained a compensable injury to his right upper extremity on May 6, 2004, while working for the respondent. Therefore, this claim for benefits should be denied in its entirety.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE