

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F405347

SCHARNETT R. GINN, EMPLOYEE

CLAIMANT

GEORGIA PACIFIC,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED APRIL 14, 2005

Hearing held January 18, 2005, before the Honorable S. Dale Douthit, Administrative Law Judge, at Fordyce, Dallas County, Arkansas.

Claimant was represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents were represented by Mr. Andrew Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

_____A hearing was held in the above-styled claim on January 18, 2005 in Fordyce, AR. A prehearing conference was conducted in this case on November 3, 2004, and a prehearing order was filed November 4, 2004. At the hearing the parties announced that the stipulations, issues and their respective contentions were properly set out in the prehearing order subject to additional stipulations, contentions 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.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim, that the employee/employer/carrier relationship existed at all relevant times, including October 22, 2003. The parties further stipulated the claimant earned an average weekly wage of \$798.78, which would entitle her to a weekly TTD rate of \$440.00, and a weekly

PPD rate of \$330.00, and that the respondents have controverted this claim in its entirety.

By agreement of the parties, the issues to be litigated and resolved at the full hearing were limited to the following:

- 1) Whether the claimant sustained a compensable injury on October 22, 2003.
- 2) If compensability is overcome, whether claimant is entitled to associated TTD, PPD, medical benefits and/or attorney fees.

The claimant contended, in summary, that she sustained a compensable injury to her left shoulder on or about October 22, 2003 and that she is entitled to TTD benefits from May 4, 2004, to January 5, 2005. That she is entitled to compensation for an eight percent (8%) whole body impairment and for all medical treatment associated with her alleged compensable injury, and attorney fees.

The respondents contend the claimant cannot prove an accidental injury caused by a specific incident, or identifiable by time and place of occurrence, which caused internal or external physical harm to the claimant's left shoulder or elsewhere, arising out of and in the course of her employment with respondents, which required medical services, or resulted in disability and is established by medical evidence supported by objective findings. Respondents further contend that, because claimant's problems are not compensable injuries, she is not entitled to indemnity and medical benefits with respect to the alleged injuries.

DISCUSSION

In the case at hand, the claimant alleges she suffered a compensable injury to her left shoulder on October 22, 2003, while working for the respondent-employer. Specifically, the

claimant testified that at the time of the alleged injury on October 22, 2003, she was pulling wood veneer sheets off of a rolling conveyer and stacking (grading) the sheets in buggies. The claimant testified that once a buggy is fully stacked with the wood sheets, a forklift would come along and lift the wood up out of the buggy. The claimant testified that around 7:00 p.m. on the 22 of October, 2003, she had filled a buggy with the wood sheets, and when the forklift operator raised the boards and backed up, some of the wood sheets fell off and struck her on the left shoulder.

A. He went to back out and the wood fell. The wood just started sliding up off the forklift.

Q. Okay. Did the whole load fall or just part of it?

A. No, sir, just a few strips fell.

Q. Where did it fall?

A. It fell and hit me and hit the floor.

Q. Did all of it hit the floor or did some of it land back on the buggy?

A. No, I would imagine that as he backed out some more fell into the buggy.

Q. Where did this hit you? You may sit back down by the way.

A. It hit me on my shoulder at my back.

Q. Do you know how many of those strips hit you?

A. No, sir, I do not. (T. pg. 25, lines 9-24)

The claimant testified that due to the alleged injury she required surgery which took place on July 17, 2004.

Q. What did Dr. Clark's treatment consist of?

A. Injections - he started off with a lot of injections but it wasn't helping.

Prescription medication for pain and the inflammation that was coming into it. He just did as much conservative measures as he possibly could at that time and then he recommended the surgery.

Q. When did you have the surgery?

A. July 17th. (T. pg. 30, lines 13-21)

To prove the occurrence of a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: 1) that an injury occurred arising out of and in the scope of employment; 2) that the injury caused internal or external harm to the body which required medical services, or resulted in disability or death; 3) that the injury is established by medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16); and, 4) that the injury was caused by a specific incident and is identifiable by time and place of occurrence. **Mickel v. Engineered Specialty Plastics**, 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

The respondents controverted Ms. Ginn's claim in its entirety. Throughout the hearing it appeared their basis for controversion was the alleged eyewitness testimony of one Ron Askew. Mr. Askew was scheduled to testify at the full hearing; however, at the beginning of the hearing, the parties stipulated Mr. Askew could not make it so the record would be left open thirty (30) days to allow Mr. Askew's deposition to be taken. On February 3, 2005, this ALJ received a letter from the respondents' attorney stating Mr. Askew had also failed to show for his

deposition, and therefore the sworn testimony of Mr. Askew was never obtained or made a part of the record. No request for additional time to depose Mr. Askew was ever requested.

According to the record, Mr. Ronnie Erwin, plant manager at the time of the incident, interviewed Mr. Ron Askew concerning the October 22, 2003-incident. Mr. Erwin testified as follows:

Q. What did he tell you?

A. At that point in time he informed us that no part of that wood ever touched her.

Q. And he said he was in good enough view to see?

A. He said he was in the position - described to us the position and he would have been in plain view. (T. pg. 77, lines 14-21)

It seems clear to this examiner that this alleged statement from Mr. Askew was the major factor in respondents' decision to controvert this claim. However, when it came time for Mr. Askew to give his account under oath, he did not do so on two separate occasions. Even though Mr. Askew's hearsay statements came into this record; I give them little weight. It is uncontroverted that some wood did fall while the forklift operator, Mike Currier, was emptying Ms. Ginn's buggy, as he stated under oath:

A. I proceeded to back out. Put my foot on the back up, and as I backed up, I could tell the load wasn't going to ride. It was probably going to end up falling, so I didn't proceed to whip back and, you know, have it all fall. I just proceeded to back up, didn't get two inches and the wood fell. So I stopped then immediately, you know, seen

the wood fall, watch the wood - - which, again, I can't see - - my view is obstructed right here, because when you raise the load, when you're sitting on the lift and you raise the load up, your view is obstructed right here.

Wood fell off. I then proceeded to back up, lower my load safely to the ground. You know, put my lift in park, get off the lift, and go around the buggy to see what happened on the other side of the buggy and help pick up the wood that fell on the floor.

Q. How much of the wood was on the floor?

A. Between six and 10 pieces. (Joint Exhibit 2, pgs. 7 & 8, lines 24-25 & 1-16)

Immediately after the wood fell from his forklift, Mr. Currier lowered the load, turned off his forklift and got out to see what happened with the fallen wood. Mr. Currier testified the first thing out of Ms. Ginn's mouth was "Mike, you know that wood hit me." (JX 1, pg. 9, line 5) Mr. Currier also testified that Ms. Ginn told him she was going to report the incident to her direct supervisor, Mr. William Thomas. (JX 2, pg. 9, lines 16-19)

The claimant did, in fact, on October 22, 2003, report the incident to her supervisor, Mr. William Thomas. Mr. Thomas testified to such as follows:

Q. Were you working at Georgia-Pacific on the day of the alleged injury, October 22, 2003?

A. Yes.

Q. What were you doing that day as best you can recall?

A. I really can't - I don't know whether I was in the office or out in the mill.

Q. Were you doing your normal job functions?

A. Yes.

Q. What do those things involve? Just kind of generally go over what you do.

A. Well, you just kind of walk around and look and do paperwork and little bits of stuff.

Q. If an employee on your shift has an injury, do they report that to you?

A. Yes.

Q. Is that the policy there at Georgia-Pacific?

A. Yes, they report it.

Q. What was Ms. Ginn doing that day?

A. She was grading on - I guess she was grading, breaking out number two table.

Q. As a utility worker? Is that correct?

A. Right.

Q. At the time of the alleged incident, were you in any position to see Ms. Ginn?

A. No.

Q. When did you find out about her alleged injury?

A. Later on she told me.

Q. Later on that night?

A. Right.

Q. What did she tell you at that time?

A. She told me that some wood had fell on her shoulder.

Q. What did you do?

A. I did an accident and investigation report. (T. pgs. 51 & 52, lines 5 - 25 & 1-15)

Mr. Thomas testified he understood the claimant to state that the wood hit her on the left shoulder. (T. pg. 62, lines 16-17)

The claimant testified that upon impact from the falling wood, "it just stung." (T. pg. 28, line 23) The claimant continued to work after the wood falling incident on October 22, 2003. On November 5, 2003 the claimant testified she reported the injury to Dr. Don Howard in Fordyce, AR. Dr. Howard referred the claimant to Dr. Charles Clark.

On November 26, 2003, Dr. Howard had the following impression of claimant's MRI of her left shoulder: (CX 1, pg. 4)

"IMPRESSION: Prominent irregularity within the substances of the humeral head in the vicinity of the posterior anatomical neck best appreciated on T2 and gradient echo images. Findings suggest fracture contusion of the humeral head. Fracture extends to the vicinity of the insertion of the supraspinatus tendon, therefore associated partial tear of the supraspinatus muscle at its insertion cannot be completely excluded.

Dr. Clark examined the claimant on December 19, 2003 and tried injections. Dr. Clark made the following diagnosis:

"Impingement, L shoulder secondary to a contusion." (CX 1, pg. 8)

Dr. Clark saw the claimant again on March 1, 2004. He stated at that time her MRI was "normal except for impingement." He further opined he was going to try more injections, but that if she didn't get any response, "...then arthroscopic decompression of the L shoulder would be an

option.” (CX 1, pg. 9)

According to Dr. Clark, after being diagnosed with left shoulder impingement, the claimant developed bilateral pain in the shoulder. Dr. Clark examined the right shoulder and found her neurologically intact and no signs of impingement. (CX 1, pg. 11) On July 17, 2004, after not responding to injections, the claimant underwent arthroscopic surgery on her left shoulder with Dr. Clark. Dr. Clark found impingement during the surgery and performed decompression. (CX 1, pgs. 12 & 13)

Dr. Clark stated on August 16, 2004 the following:

“I have reviewed her records and her findings from her original report with Georgia-Pacific and find that, within a reasonable degree of medical certainty, the injury to her left shoulder was work-related.”

On August 8, 2004, Dr. Clark evaluated the claimant post-op and found her doing well and recommended her to return to work without any limitations on October 8, 2004. (CX 1, pg.17)

On November 1, 2004, Dr. Clark evaluated the claimant and changed her return to work date to November 8, 2004. (CX 1, pg.18) Dr. Clark examined the claimant on January 5, 2005 and reviewed the results of her FCE. With regard to her permanent partial impairment rating, Dr.

Clark stated the following:

“...based on her loss of strength in the L shoulder, which I believe is a permanent finding, according to the “Guides to the Evaluation of Permanent Impairment, “ 5th ed., based on table 16-35, the strength deficit is ~ 20% in all directions, especially flexion, abduction, and internal/external rotation. This equates to an overall rating in the R shoulder of 14%. This converts to an overall rating of 8%. This was within a reasonable degree of medical certainty.”

Also, at the January 5, 2005 exam, Dr. Clark again changed his return to work date for Ms. Ginn to Monday, January 10, 2005. (CX 1, pg. 19)

CONCLUSION

Throughout the pendency of this claim, the respondents have made reference to eyewitnesses who completely contradicted the claimant's report of injury on October 22, 2003. Even in the deposition of Dr. Charles Clark, the respondents attorney repeatedly questioned the doctor about these hypothetical eyewitnesses who will say no wood hit the claimant.

Q. If eyewitness statements from the scene of the alleged injury completely contradicted her report of injury to you and Dr. Howard, would you still be able to opine, within a reasonable degree of medical certainty that her left shoulder impingement was work-related? (RX 1. pgs. 16-17, lines 25 & 1-5)

As discussed earlier, no such eyewitness ever came forward. The undisputed fact is that Mike Currier dropped some sheets of wood off his forklift while lifting. The only question is whether the wood struck Ms. Ginn in the left shoulder. I find that it did. Within seconds of Mike Currier dropping the wood, the claimant told him the wood had hit her, and she subsequently reported it to her supervisor. A MRI was taken of her left shoulder and showed she had a bone bruise and contusion of the rotator cuff. (CX 1, pg. 15) She also had an impingement and conservative treatment proved unsuccessful. As a result, she underwent arthroscopic surgery for decompression of the left shoulder. Dr. Clark stated within a reasonable

degree of medical certainty, the injury to her left shoulder was work related.

Based on the testimony and documents, it is clear to this examiner that the claimant sustained a specific incident compensable injury and has satisfied the elements as outlined above in Mickel v. Engineered Specialty Plastics, by a preponderance of the evidence.

This examiner is aware of the bilateral problems the claimant developed after the accident; however, her right shoulder had no impingement and did not require surgery. Further, Dr. Clark did not feel the bilateral problems were related to the injury and that “these were separate entities. However, her shoulder injury is directly related to her workers’ compensation claim.” (C X 1, pg. 5).

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. **Hamilton v. Gregory Trucking**, ____ Ark. App. ____, ____ S. W. 3d ____, (March 16, 2005)

The claimant has met her burden of proving the compensable injury, and I also find the medical treatment she received from Drs. Clark & Howard regarding her left shoulder to be reasonable and necessary. The claimant may have received medical treatment for other areas from the doctors; however, any treatment from Dr. Clark & Dr. Howard concerning her left shoulder shall be the responsibility of the respondents. Including, but not limited to, the left shoulder scope of July 17, 2004. I find the respondents are liable for the left shoulder treatments from Dr. Clark and Dr. Howard from the date of the injury to January 5, 2005.

Pursuant to Dr. Clark's report, I find the claimant is entitled to TTD benefits from May 4, 2004 through May 11, 2005 and July 17, 2004 through January 10, 2005, with the following dates excluded for TTD purposes: August 29, 2004 through October 23, 2004. Those dates are excluded for TTD calculation purposes based on the parties' post-trial stipulations. (JX 2, pg. 11, lines 2-21)

I find that Dr. Clark's permanent impairment rating to the whole body of 8% is valid and as such the respondents are directed to pay the rating in lump sum, without discount. Claimant's attorney is entitled to the maximum attorney's fee allowed under Arkansas law for the benefits awarded herein.

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, and without giving the benefit of the doubt to either party, the following findings of fact and conclusion of law are made in accordance with A.C. A. §11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim .
- 2) The stipulations agreed to by the parties are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her left shoulder on October 22, 2003, supported by objective medical findings.
- 4) Claimant has proven by a preponderance of the evidence she is entitled to TTD benefits from May 4, 2004 through May 11, 2004; July 17, 2004 through August 28, 2004; and October 24, 2004 through January 10, 2005.
- 5) The claimant has proven by a preponderance of the evidence that respondents

should pay claimant the 8% permanent impairment rating pursuant to Dr. Clark's findings.

- 6) The claimant has proven by a preponderance of the evidence that respondents are responsible for all left shoulder medical treatment provided the claimant by Drs. Clark and Howard between October 22, 2003 through January 5, 2005.
- 7) That claimant is entitled to the maximum attorney's fee allowed by Arkansas law consistent with the findings herein.

AWARD

Respondents are herein directed and ordered to pay the claimant TTD benefits at the stipulated rate for the periods of May 4, 2004 through May 11, 2004; July 13, 2004 through August 28, 2004 and October 24, 2004 through January 10, 2005. Further, respondents are ordered to pay the claimant for her 8% permanent impairment. Said sums accrued shall be paid in lump sum without discount.

Further, respondents are to pay all reasonable related medical expenses for treatment to claimant's left shoulder administered between October 22, 2003 through January 10, 2005.

Maximum attorney fees are herein awarded to the claimant's attorney, the Honorable Ken Buckner, pursuant to A.C.A. §11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. §11-9-809 until paid.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge