

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F500920**

<b>DARREL HUMPHREY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GEORGIA PACIFIC CORP., EMPLOYER</b>	<b>RESPONDENT</b>
<b>SEDGWICK CLAIMS MANAGEMENT, CARRIER/TPA</b>	<b>RESPONDENT</b>

**OPINION FILED NOVEMBER 3, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on August 5, 2005, at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE EMILY PAUL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE SUSAN M. FOWLER, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits, and attorney's fees. All other issues are reserved.

At issue is the compensability of a right shoulder claim as defined by Ark. Code Ann. §11-9-102.

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 25, 2004 at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$453.00/\$340.00 in the event this claim is found to be compensable. Expenses have been paid by the claimant's group carrier.

The claimant contends he injured his right shoulder changing out a wrapper reel. The roll shifted, causing him to fall on a support beam. The claimant seeks payment of medical expenses, temporary total disability benefits from February 28, 2005 to June 5, 2005, and attorney's fees.

The respondents contend the claimant's shoulder injury did not arise out of and in the course of his employment.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the deposition of the claimant and Dr. Scott Bowen and a videotape incorporated by reference.

The following witnesses testified at the hearing: the claimant, and supervisors, Tommy McDougal, Bobby McAdams, Eddie McMurphy, and Michael Outlaw. The supervisors basically corroborated the claimant's testimony: although the claimant reported an injury, he declined medical care and was able to work with a "sore" arm.

The claimant, age 65 (D.O.B. September 23, 1939) has worked for the respondent-employer since 1987. His health history includes a right total knee replacement in 1998 and osteoarthritis of the right hip.

The claimant was scheduled to undergo right hip surgery with Dr. Scott Bowen when he injured his head, right shoulder and back in a fall across I beams on Thursday, November 25, 2004. At the time, the claimant was temporarily assigned to work as a roll wrapper operator (see videotape) filling in for an employee on vacation. The claimant's shoulder was bruised and sore and he reported the incident to his supervisor but did not ask for medical treatment.

The claimant finished his shift and used the long Thanksgiving holiday weekend to drive to Fayetteville to pick up his wife. He testified he made frequent rest stops during the drive because his arm was sore. The next week, the claimant returned to his regular job operating a roll-clamp truck and worked from Tuesday through Saturday. The claimant explained that he was able to perform this job because he could steer with his left hand and operate levers with his right hand. The levers are located on his right side around knee level and do not require him to raise his arm above shoulder level which was painful.

On December 8, 2004, the claimant had the scheduled hip surgery. He is still recuperating from that surgery and uses a cane to walk. On February 28, 2005, Dr. Bowen performed surgery on the claimant's shoulder which was beneficial although his grip strength remains weak. The claimant returned to work for the respondent-employer on June 5, 2005.

The claimant testified that while he was recuperating from hip surgery, he walked to the door of his hospital room, and grabbed the handrail in the hallway with his left hand to ease himself down to the floor until the nurse could assist him back to bed. He maintains that he was trying to protect his right hip and did not fall or injure his shoulder in this incident.

On cross-examination, respondents' counsel suggested that the claimant did fall in the hospital and was confused by the morphine given to him for his hip surgery. Counsel also suggested the claimant had some motive to defraud the employer because he was mad about truck maintenance and the lack of benefits provided by the group carrier. The claimant explained that problems with truck maintenance led to a foot injury and he was frustrated with Blue Cross Blue Shield because policy changes delayed his hip surgery and denied his recommended physical therapy.

The claimant conceded that he did not complete any accident report form for his shoulder until after he got out of the hospital following his hip surgery.

### **VIDEOTAPE**

Mr. Outlaw testified the videotape depicts the job duties, equipment and personnel in effect

at the time of the claimant's injury. The tape shows employees working in an extremely hot and noisy environment.

The first segment shows the claimant's regular job of driving a roll-clamp truck. The equipment resembles a large forklift but instead of a lift, the front of the truck is equipped with a rotating hydraulic clamp that picks up large rolls of paper. The operator is shown using the clamp to pick up two rolls of paper in a horizontal position, rotating the clamp so the rolls are in a vertical position thereby blocking his view and requiring him to drive backward. It was not explained why the truck couldn't be driven forward with the two rolls in a horizontal position or one roll in a vertical position. The tape corroborates the claimant's testimony that he steers with his left hand and operates control levers with his right hand. Both feet are required to operate foot pedals. The operator in the video also indicated the truck jarred his back.

The second segment depicts the roll wrapper job which consists of changing out the large rolls of paper using a hoist operated by hand controls, feeding headers into slots, loading a label printer with ribbon and paper and feeding glue into the label maker. The boxes of paper weigh 30-31 pounds while the glue boxes weigh 20-21 pounds. This job requires extensive walking with some lifting and bending, and use of hands. The video does not show an actual roll being changed out nor is there any indication where the claimant fell. The large roll of paper does, however, unexpectedly shift positions in its holding rack, not once but twice during the filming.

#### **MEDICAL EVIDENCE**

Dr. Scott Bowen is not only the claimant's treating physician but he had the opportunity to review the written job descriptions and watch the videotape of the jobs before his deposition was taken. He was also read passages from the claimant's deposition.

The claimant told Dr. Bowen that he had fallen at work on Thanksgiving landing on his outstretched arm and injuring his shoulder. According to Dr. Bowen's notes, he first became aware of this injury on December 13, 2004 after the hip surgery on December 8, 2004. The claimant complained of "pain with elevation and some weakness and difficulty moving about in the bed."

An MRI scan was performed which revealed a “significant full thickness rotator cuff tear involving two of the four rotator cuff tendons. And the retractor had pulled way from the bony insertion...” “I also noted that there was a so-called partial tear of the subscapular ... and then some arthritis.”

Dr. Bowen recommended conservative treatment with cortisone injections and medication. Because the injury affected the claimant’s dominant arm and considering his occupation and extent of discomfort, Dr. Bowen performed surgery to the right shoulder on February 28, 2005. The size of the tear in the rotator cuff was significant and consistent with the claimant’s history of injury. Dr. Bowen opined that it was possible the accident caused a partial tear that progressed over time to become a complete tear or a “full thickness” tear.

Dr. Bowen was also aware of the incident in the hospital on December 10, 2004, which he described as “minor” and as a “slump to the floor”. If the claimant tried to catch himself with his right hand, as he stated in his deposition, that action was also consistent with his injuries.

ATTORNEY FOWLER:

...Would you be able to state knowing that these two incidents (at work and at the hospital) occurred – which of these incidents or if either of these incidents were within a reasonable degree of medical certainty that were within a degree of medical certainty that were the cause of the injury that you treated?

DR. BOWEN:

You know, looking at the anatomy of the tear three months later I could not state that. It would really be based on the history and his consistency of complaints. Did his shoulder or pain all start December 25<sup>th</sup> (sic - the work accident was in November) or was it minor and then it worsened on December 10<sup>th</sup> after the fall in the hospital?

(Emphasis added)

Dr. Bowen opined that a severe rotator cuff tear would have made it difficult to perform the roll wrapper operator job but he thought the claimant could have handled the roll-clamp truck driver job. The doctor pointed out that over head lifting would be the most painful activity.

Attorney Fowler pointed out that the claimant had been unable to position his arm in the MRI scanner without pain medication and the test set for December 13 was postponed until December 14, 2004.

ATTORNEY FOWLER:

Knowing that he was having – you know – that the MRI was as difficult as it was for him only – well, less than a month later. But he was able to perform these types of jobs for almost a week full-shift, seven days, almost nine days basically. Based on that information, would you be able to state that the 11-25-02 – I mean ‘04 fall was the cause of his tear, rotator cuff tear?

DR. BOWEN:

I couldn't say for sure.

ATTORNEY FOWLER:

...would it make more sense that it might have happened on December 10<sup>th</sup>...

DR. BOWEN:

That's possible.

\* \* \*

ATTORNEY PAUL:

Is there any way you can tell from looking (at an MRI scan) whether

a tear is fresh or old...

DR. BOWEN:

...what I saw at surgery was more typical of little more of a chronic type of tear that maybe even predated the November 25<sup>th</sup> to some degree. It may have injured it and worsened it and extended the tear. And from there maybe worsened it possible with the fall in the hospital. This is somewhat speculation. My recollection is that he stated that his pain started after that fall at work to the point where he could not function well and was limited. (Emphasis added)

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ATTORNEY FOWLER:

Would there really have been that much time for it to have worsened to the degree you saw in the MRI in just that short period of time (working for nine days after the accident at work)?

DR. BOWEN:

I would expect that to take a little longer, more in the range of – I don't know – two to three months.

ATTORNEY FOWLER:

But it's certainly possible, as well, that on the 10<sup>th</sup> all of that occurred on the 10<sup>th</sup>. Would that also be true?

DR. BOWEN:

It's possible.

### **FINDINGS AND CONCLUSIONS**

“Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

The evidence of record shows the claimant injured his right shoulder at work, noting bruising and soreness but he did not request medical attention. This injury was confirmed by his supervisors. The claimant continued working, performing his regular job duties and was able to drive out-of-town. The claimant was then admitted to the hospital for previously scheduled hip surgery. During

his recuperation, he “sleepwalked” to the door of his room, realized he shouldn’t bear weight on his hip, and slumped to the floor holding on to the guardrail in the hall until the nurses could reach him. His shoulder pain became a problem again when he tried to lift his arms over his head to fit into an MRI scanner. Ultimately, he was diagnosed with a severe rotator cuff injury.

Although I was impressed with the thoroughness of Attorney Fowler’s presentation, I find the claimant to be a credible witness who has met his burden of proof.

The claimant is physically a large man with a high pain threshold and motivated employee. He was after all, continuing to work while awaiting hip surgery.

There is no dispute that the claimant fell at work, bruising his shoulder, an objective indicator of injury. He complained of soreness as verified by his supervisors. The lay testimony establishes the compensability of the claim.

The respondents argue that the claimant couldn’t have performed his job duties with a torn rotator cuff but it has been my experience that people can and do work with cuff tears, provided they don’t have to do overhead lifting. From what I saw on the videotape, I believe the claimant could have worked with an injury, especially knowing that he planned to take off for hip surgery the next week.

There is the possibility that the event at the hospital worsened the injury which may affect other issues such as the major cause of the impairment rating, but it does not affect compensability.

1. The Workers’ Compensation Commission has jurisdiction of this claim at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$453.00/\$340.00 in the event this claim is found to be compensable. Expenses have been paid by the claimant’s group carrier.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. Respondents are directed to pay all reasonable and

necessary medical expenses within thirty days pursuant to Rule 30.

4. The respondents are directed to pay temporary total disability benefits from February 28, 2005 to June 5, 2005 as the claimant remained in his healing period totally incapacitated from working.
5. 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.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

#### **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.

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ELIZABETH W. HOGAN  
Administrative Law Judge