

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603553 (01/15/06)

LINDSEY COWINS, EMPLOYEE

CLAIMANT

BOARS HEAD PROVISIONS CO., INC., EMPLOYER

RESPONDENT

ZURICH AMERICAN INS. CO., CARRIER

RESPONDENT

OPINION FILED DECEMBER 29, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on October 13, 2006, at Forrest City, St. Francis County, Arkansas.

Claimant appeared pro se.

Respondents represented by the HONORABLE ERIC NEWKIRK, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted in the above-style cause to determine the claimant's entitlement to workers's compensation benefits.

On August 15, 2006, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of August 17, 2006, was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to addressed during the course of the hearing, and the parties' contentions relative to the afore. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Lindsey Cowins, the claimant, and Schenell Leak, coupled with medical reports and other documents comprise the record in this claim.

DISCUSSION

Lindsey Cowins, the claimant, with a date of birth of April 29, 1949, is a high school graduate. Claimant testified that he has been employed by respondent-employer for approximately 7 ½ years. Claimant performed the duties of a forklift driver loading and unloading trucks. Claimant's work shift commences at 5:00 a.m. and concludes between 2:30 and 3:30 p.m.

Claimant asserts that he sustained an injury arising out of and in the course of his employment with respondent-employer as a result of a work accident. In describing the mechanics of the accident claimant's testimony reflects:

I was, we were loading a truck. We thought we had got through with the truck but we found out a couple of pallets were left off. And the clerk had already took the paperwork in, and realized there was two pallets left off the truck. As I was receiving it, we had taken some stuff off to re-stack the pallets on top of some other pallets. The truck pulled away from the dock, and I was, had backed back out and was on my way in. And I seen light, you know, leaving the dock. And by that time, I hit the brake. And the fork already was halfway over the dock, the ramp. And the forklift was hanging off of it by then. I exited off the forklift and the forklift fell on out. (T. 8-9).

Regarding his injuries growing out of the accident claimant testified that he hit his right shoulder on the guardrail of the forklift:

Yes. I told what had happened to the forklift and told them that, you know, that it hit my shoulder. But I was all right. You know, I wasn't bleeding. That's what I said to them, you know, told them I wasn't bleeding, I'd be all right. (T. 9).

Claimant asserts that the accident occurred at approximately 8:30 a.m. Claimant testified that he did not get a chance to go to the nurses station or get medical treatment on the day of the accident. Claimant's testimony reflects that he completed his shift on the day of the accident and

continued to work thereafter. In describing the onset of symptoms which he attributed to the forklift accident, claimant testified:

Just every night the pain started, you know going through my hand like numbness. That's when I realized, you know, something had to be wrong.(T. 13).

Claimant's testimony reflects that he suffered another work-related accident involving the same shoulder:

Later on, you know, a load had come in, a box had shifted. I was trying to straighten them up, and the box had fell on the same shoulder. And I told our supervisor that a box that, you know, the truck had came in to check the load. (T.10).

Claimant estimated that three or four months elapsed between the time of the forklift accident and the time the box fell on his shoulder. Claimant maintains that approximately two months following the incident with the box he started going to the doctor.

Claimant testimony reflects that the first time he went to the doctor was January and then February, during which time an MRI was obtained. Claimant asserts that he was later referred to Dr. Dickson in Jonesboro, where an MRI was performed on the right shoulder. The testimony of the claimant reflects that he underwent surgery on his right shoulder under the care of Dr. Dickson and was off work for six to seven weeks. Claimant testified that he last saw a doctor, Dr. Dickson, relative to his right shoulder in May 2006, at which time he was released to return to work. Claimant has returned to work and is performing his pre-injury job duties.

The testimony of the claimant reflects that he did not receive any workers' compensation indemnity benefits while he was off work recovering from his right shoulder surgery. Claimant acknowledged that some of his medical bills were submitted to his group healthcare provider,

however he denies that they have been paid.

Claimant denied that he ever had any problems with his right shoulder prior to the forklift accident. Further, claimant denied that he ever received medical treatment for either his right or left shoulder prior to the forklift accident. Claimant is right hand dominate.

Claimant's testimony reflects that the forklift accident occurred in 2003. Claimant presents testimony reflecting the date of the accident as December 11, 2003:

Yes, sir. That's the first, you know, accident when the forklift, you know, the first time. But there's been a couple more times that, you know, the truck has been pulled away from the dock. And it wasn't like the first one, you know, I was always, we was able, you know, to stop it. (T. 14).

Claimant's testimony reflects that as he continued to work following the box falling incident his symptoms progressively worsen to the point that his right arm would give way when picking up objects. Claimant added that he was unable to sleep half the time due to his symptoms.

Claimant was first seen by Dr. Kumar on December 23, 2005.

On cross-examination, claimant acknowledged that during his August 10, 2006, deposition he testified that the forklift incident occurred in January/February 2005. Claimant concedes that he is a poor historian. Nonetheless, the claimant asserts that the forklift accident which serves as the basis for his present claim occurred on December 11, 2003. Claimant reaffirmed his deposition testimony regarding the forklift accident as being very minor in which he bumped his right shoulder, however had no bruising or contusion and only slight pain for about an hour.

Claimant's testimony reflects that Ms. Schnell Leak looked at his shoulder and asked him if he was hurt, to which he responded that he was fine. Claimant maintains that Ms. Leak was in

the shipping department during the time of the accident. Claimant testified that he was fine and had no problems with his right shoulder until January 15, 2006.

Claimant's testimony reflects that on January 15, 2006, is when the boxes fell on his shoulder. It was at that time the claimant first felt symptoms in his right shoulder since the forklift accident. At the time of the January 15, 2006, incident the claimant's supervisor was Ms. Schnell Leak. Claimant testified that he discussed the incident with Ms. Leak and that he declined medical treatment. Claimant asserts that photographs were taken of the shifting load where the boxes fell. Claimant acknowledged that there are cameras which monitor loads in the event the load shifts. Regarding the monitors, claimant testified:

That's correct. Is supposed to be, you know, be able to see how the loads, you know and everything. You can't see all the way in the truck.

* * *

The monitor from how they got the cameras set up, it's setting directly at the scale. And you can see both - - the camera can pick up door one and door two. That's all, he can't zoom in all the way up in the truck. (T. 20).

Claimant testified that pictures are no longer taken since the monitors been in place. Claimant was unaware that the monitor was put in place on December 17, 2005.

Claimant's testimony reflects that following the January 15, 2006, incident involving the boxes, it was not until the end of March 2006, that he really started having any serious problems with his right shoulder. Claimant reported the right shoulder complaint as a workers' compensation claim and started going to the doctor for it. A report completed in connection with the claimant's filing reflects that respondent-employer was first notified on March 31, 2006.

Medical records of Dr. Kumar reflects that the claimant was seen on December 23, 2005, complaining of right shoulder pain for three week with no trauma. Claimant was again seen by Dr. Kumar on January 16, 2006, with complaints of pain and swelling in his left hand. A couple of months later claimant was seen by Dr. Kumar with complaints of pain in his right shoulder with no known trauma. Claimant was seen by the doctor on February 20, 2006, continuing to complain of right shoulder pain. Claimant also sought medical treatment at the VA hospital. On February 28, 2006, claimant came under the care and treatment of Dr. Dickson.

At the time of the February 28, 2006, visit to Dr. Dickson claimant did not provide a history of specific incident injury. Claimant testified, regarding the history he provided to Dr. Dickson:

I told him I hadn't recalled bumping my shoulder, you know. But it just all of a sudden just started hurting again. But I didn't mention to him, you know, what happened - -

No. You know, that accident that happened a couple of years before. (T. 24).

Claimant testified that he had pain in his right shoulder as far back as August 2005.

Ms. Schnell Leak testified that she has held the position of distribution supervisor for two and a half years for respondent-employer, while having been employed by same for a total of nine years. Ms. Leak's testimony reflect that during the entire time that she has held the supervisory position the claimant has worked under her supervision.

The testimony of Ms. Leaks reflects that prior to March 31,2006, she was not aware of the claimant having any right shoulder complaints. Ms. Leak testified that she sent the March 31, 2006, e-mail in response to an inquiry from Ms. Linda Long. Ms. Leak added:

No, sir. What it was is that he [the claimant] had, I guess, went and talked to her. I don't know exactly in any depth detail of how it happened. But she was describing to me that he had filed FMLA. (T. 30-31).

Ms. Leak described the claimant as a good employee. Regarding her knowledge of the December 11, 2003, forklift accident, Ms. Leak testified:

Yes. I did have knowledge of the forklift incident, but I don't know any detail or anything like that because I was a clerk in the office there, and doing the paperwork for the loads going out. (T. 26).

Ms. Leak denies that she either examined the claimant's shoulder or talked with him about the forklift incident.

The testimony of Ms. Leak reflects that she was the claimant's supervisor on January 15, 2006, however she has no knowledge of any boxes falling or striking the claimant's right shoulder. Regarding what her actions would have been had the claimant reported an incident to her with discomfort in his right shoulder, Ms. Leak testified:

Sir, I would have checked with Mr. Lindsey to make sure that he was okay at that time. And then we would have went up to the nurse's station to do the proper channels of doing what we need to do up there. (T. 27).

Ms. Leak testified that even had the claimant declined medical treatment after reporting such an incident to her an incident form/supervisor report would have been completed. No such document was completed relative to the claimant for January 15, 1006.

Ms. Leak testified that the monitor system was installed at respondent prior to Christmas 2005. Ms. Leak's testimony reflects regarding the use of the monitor system by respondent-employer:

What happened is if the trailer is backed in the door, the monitor is still there, but they do try to take pictures. If say for instance it's something that's real bad, and it's something that they don't want to try to mess

with or something like that at that time, then it will take a picture and actually try to send it over an email to the plant or the plant that signed it in to us. (T. 29).

Ms. Leak testified that was not aware of any such incident as the afore involving the claimant.

The medical in the record reflects that the claimant was seen by Dr. Sudhir Kumar on December 23, 2005, with a history of pain in his right shoulder for three weeks with no trauma. The report reflects an assessment of chronic right shoulder pain which could be bursitis, tendinitis versus a rotator cuff injury. (RX. #1, p.1). Claimant was again seen by Kumar on January 16, 2006, with complaints which included “lot of pain in the right shoulder for a couple of months, no trauma”. Dr. Kumar’s assessment of the claimant’s right shoulder complaint at the time of January 16, 2006, visit was that of bicipital tendinitis, right shoulder. (RX.. #1, p. 2). The claimant was seen by Dr. Kumar on February 20, 2006, after having been seen at the VA hospital. Claimant received an injection in the right shoulder from Dr. Kumar during the February 20, 2006, visit for the diagnosed bicipital tendinitis in the right shoulder. (RX. #1, p. 3).

Claimant was referred by Dr. Kumar to Dr. Brian G. Dickson, a Jonesboro orthopedic surgeon, relative to his right shoulder complaint. The medical reflects that the claimant was seen by Dr Dickson on February 28, 2006. The February 28, 2006, chart note of Dr. Dickson relative to the claimant reflects, in pertinent part:

This is a 57-year -old male who works at Boars Head in Forrest City. He has had pain in his right shoulder for about six months now. He knows of no specific injury. He is having difficulty with overhead activities and sleep. He drives a forklift at work so he doesn’t have to use his right shoulder a whole lot.

* * *

PHYSICAL EXAMINATION: He has a painful Hawkins and Neer.

Jobs is painful and a little bit weak. His AC joint is tender as well. Range of motion is pretty good with no instability.

X-RAY FINDINGS: X-rays show some mild AC joint arthritis and slight curve to the acromion but otherwise no obvious bony abnormalities.

MRI report shows a supraspinatus tendon tear.

ASSESSMENT: Right shoulder rotator cuff tear with AC joint arthritis. (RX #1, p. 4).

The record does reflect that the December 11, 2003, forklift incident was investigated by appropriate supervisory personnel of respondent-employer following its occurrence. (RX. #2, p. 3-6). The investigation concluded that no injury was sustained in the December 11, 2003, incident.

The First Report of Injury, Form 1A-1, completed in connection with the January 15, 2006, claim of the claimant reflects that respondent-employer was not notified until March 31, 2006. The report was completed after the claimant's complaint had been diagnosed by Dr. Dickson as a torn rotator cuff in the right shoulder. (RX. #2, p. 2).

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and other documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

FINDINGS

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On January 15, 2006, the relationship of employee-employer-carrier existed among the parties.
3. On January 15, 2006, the claimant earned wages sufficient to entitle him to

weekly compensation benefits of \$388.00/\$291/00, for temporary total/permanent partial disability.

4. On January 15, 2006, the claimant did not sustain an injury to his right shoulder arising out of and in the course of his employment.

CONCLUSIONS

The claimant maintains that he sustained two work-related incidents involving his right shoulder which ultimately required medical treatment and rendered him temporarily totally disabled for a period of time. Claimant seeks the afore corresponding workers' compensation benefits. Respondents deny that the claimant sustained a work-related injury to his right shoulder.

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant seek workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. In order to prove 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: an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102 (4)(A)(i). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied.

Mikel v. Engineered Specialty Plastic, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

While there is no dispute that an incident did occur on December 11, 2003, involving the claimant while operating a forklift in his employment with respondent-employer, there is no showing that the same resulted in an injury to the claimant's right shoulder requiring medical treatment. There is no evidence in the record to reflect that the claimant sought or required medical treatment relative to his right shoulder following the December 11, 2003, incident until December 2005. At the time the claimant received medical treatment on December 23, 2005, he relayed a history of right shoulder pain for three weeks without trauma.

Claimant identified the second incident causing injury to his right shoulder as having occurred on January 15, 2006, when boxes fell on it as he was addressing a load that had shifted. Claimant was seen on January 16, 2006, by his primary care physician, however did not relay a history of trauma to his right shoulder nor did he identify a work-related incident as the basis for the visit. There is no contemporaneous documentation of a work-related incident having occurred on January 15, 2006, involving the claimant. Claimant acknowledged that he did not notify respondent-employer of the January 15, 2006, incident/injury until March 31, 2006. The claimant has failed to sustain his burden of proof by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of and in the course of his employment with respondent. This claim is respectfully denied and dismissed.

IT IS SO ORDERED.

Andrew L. Blood, ADMINISTRATIVE LAW JUDGE