

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F400932

DEL EADS	CLAIMANT
ROGERS GROUP, INC.	RESPONDENT
HARTFORD INSURANCE INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 11, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Springdale, Washington County, Arkansas.

Claimant represented by AARON MARTIN, Attorney, Fayetteville, Arkansas.

Respondents represented by MICHAEL RYBURN, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on October 17, 2005, in Springdale, Arkansas. A pre-hearing order was entered in this case on July 26, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, a change was made by the parties in regard to the stipulation concerning the appropriate weekly compensation rate. A copy of the pre-hearing order with this amendment noted thereon, was made Commission's Exhibit No. 1 to the hearing.

The following stipulations were offered by the parties and are hereby accepted:

1. On all relevant dates in 2003, the relationship of employee-self insured employer-TPA existed between the parties.

2. The appropriate weekly compensation rates are \$314.00 for total disability and \$236.00 for permanent partial disability.
3. The claim is controverted in its entirety.

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

1. whether the claimant sustained a "compensable" gradual or cumulative trauma injury to his left shoulder during his employment with the respondent in 2003.
2. The claimant's entitlement to the payment of medical expenses.

In regard to these issues, the claimant contends that:

"He suffered a compensable injury to his left shoulder, neck, and cervical spine, which manifested on May 5, 2003. The claimant's job duties required repetitive reaching, which caused a gradual onset injury to his left shoulder, his neck and his cervical spine. The claimant is entitled to medical treatment for these injuries, and will reserved his right to indemnity benefits for these injuries."

In regard to these issues, the respondents contend that

"A. The claimant was not injured in the course and scope of his employment. He is alleging a gradual shoulder injury and his job does not involve rapid and repetitive shoulder movement. He denied any injury in the history he gave to his doctor. There are no objective medical findings.

B. No attorney's fees are due."

DISCUSSION

_____The central issue in this case is whether the claimant sustained a "compensable" injury to his left shoulder, as the

result of gradual or cumulative trauma to this portion of his body by his day to day employment related activities for this respondent. The burden rests upon the claimant to prove that his left shoulder difficulties satisfy all of the relevant requirements for a “compensable injury” that are set out in the Act. For the type of injury the claimant alleges, the controlling sections of the Act are found in Ark. Code Ann. §§11-9-102(4)(A)(ii)(a), 11-9-102(4)(D) and 11-9-102(4)(E)(ii).

The claimant must first prove that his left shoulder difficulties satisfy the requirements for a “compensable injury” which are contained in Ark. Code Ann. §11-9-102(4)(D). This subsection mandates:

“A compensable injury must be established by medical evidence, supported by objective findings as defined in subdivision (16) of this section.”

Thus, the claimant must prove by medical evidence the actual existence of physical injury or damage to his left shoulder that is supported by the presence of physical findings which are beyond the claimant’s voluntary control.

The current medical record clearly “establishes” the actual existence of a physical injury or damage to the claimant’s left shoulder. All of the physicians, who have seen the claimant, have diagnosed some type of injury to his left shoulder. Further, the existence of this physical injury or damage is amply supported by objective findings in the form of abnormalities noted on an MRI scan of the claimant’s left shoulder. Therefore, the claimant has satisfied the requirements for a “compensable injury,” as set out

in Ark. Code Ann. §11-9-102(4)(D). Next, the claimant must prove that his left shoulder difficulties satisfy the definitional requirements for a “compensable injury” which are contained in Ark. Code Ann. §11-9-102(4)(A)(ii)(a). These definitional requirements are:

- (1) That the physical injury or damage must arise out of and occur in the course of the claimant’s employment;
- (2) That the physical injury or damage must cause internal or external physical harm to the claimant’s body;
- (3) The physical injury or damage must be caused by “rapid repetitive motion”(unless, the physical injury is in the form of carpal tunnel syndrome).

In order to “arise out and occur in the course of the employment,” the claimant’s left shoulder difficulties must be causally related to the employment. Therefore, the claimant must prove by the greater weight of the credible evidence the existence of a causal relationship between his left shoulder difficulties and his employment with this respondent. However, he need not prove the existence of such a causal relationship to an absolute or mathematical certainty. There is no evidence that the claimant had sustained any injury or damage to his left shoulder or was experiencing any difficulties with his left shoulder, prior to his employment with this respondent. The claimant’s difficulties with his left shoulder first began after the claimant was assigned to driving an oversized dump truck in the respondent’s “stripping” operations. This is a large vehicle used in mining and quarrying operations. It far exceeds the size of regular dump trucks and is not “street legal”.

The claimant testified that his difficulties first began after he had been assigned to drive an older model "truck", which did not have an automatic transmission. His testimony indicated that the operation of this vehicle required him to use his left arm and shoulder in a strenuous manner to steer the vehicle for some 12 to 14 hours a day 5 days a week. The claimant's testimony, in this regard, is consistent with the description of the onset of his left shoulder difficulties that he gave to the respondents and to all of his various physicians. I find this testimony to be credible.

The medical evidence shows that the MRI study revealed objective defects that were compatible with and indicative of damage caused by overuse or over exertion of the left shoulder joint. Specifically, these tests showed defects that were consistent with chronic tendinitis, a small but complete tear of the supraspinatous muscle or tendon, and edema or swelling that was "suspicious" for a repetitive injury.

In his report of August 11, 2005, Dr. Mark Powell (the claimant's primary treating physician and a highly competent orthopaedic surgeon) opined:

"I discussed with him (the claimant) that more likely than not he has an acute exacerbation of his previous work related injury sustained in May, 2003, and it is within a reasonable degree of medical certainty that his left shoulder is work related."

The evidence presented clearly shows that the claimant's employment related use of his left arm and shoulder could have reasonably caused the medically established and objectively documented physical injuries or damage to this portion of his body.

The claimant's difficulties with this portion of his body first appeared within a reasonable period of time after his employment related activities for this respondent demanded essentially constant strenuous use of his left arm and shoulder. The evidence also fails to show any other reasonable explanation for the occurrence of the medically established and objectively documented physical injuries or defects to the claimant's left shoulder. Thus, under the rule set out in Hall v. Pittman Construction Company, 235 Ark. 104, 357 S.W. 2nd 263 (1962), the claimant has proven the existence of a causal relationship between his left shoulder difficulties and his employment with this respondent. This causal relationship satisfies the statutory requirement that the claimant's left shoulder difficulties "must arise out of and occur in the course of the claimant's employment."

The evidence presented further proves that this employment related injury caused internal physical harm to the claimant's body, specifically in the area of his left shoulder joint. The MRI scan of this portion of his body unquestionably establishes the presence of physical damage to various components of the claimant's left shoulder joint. Thus, the claimant has satisfied the second element of "compensability" that is required by Ark. Code Ann. §11-9-102(4)(A)(ii)(a).

The final requirement of this subsection is that the employment related cause of the claimant's left shoulder difficulties must be in the form of "rapid repetitive motion." The Act does not expressly define the term "rapid repetitive motion."

Under the mandate of strict interpretation of all of the provisions of the Act, any phrases or terms not defined by the Act, itself, are to be given their usual and customary meaning.

In his testimony, the claimant described in detail the employment activities he was performing for the respondent at the time of the onset of his left shoulder difficulties. He stated that he was assigned to operate an older model oversized truck to haul rock and debris from one part of the respondent's operation to another, a distance of approximately a quarter mile. He testified that each trip involved the filling of his truck at one location, driving it to another location, turning the truck around, backing the truck into the designated spot, dumping the load, driving back to the loading site, turning the truck around, and backing it in to be reloaded. He stated that he would make 50 to 100 such round trips during a 12 to 14 hour work day. The only evidence presented by the respondent that would in any way refute the claimant's description of his required employment activities is an indication by the claimant's supervisor (in the respondent's injury/accident report of September 2, 2003), that the claimant normally only worked 10 hours a day.

Regardless of whether the claimant worked 10, 12, or 14 hours a day, it is apparent that, during the majority of his work day, he was required to constantly use his left arm and shoulder to hold and turn the steering wheel on his oversized dump truck. It is my opinion that such activity would involve the claimant's left arm and shoulder that would be considered both "rapid" and "repetitive"

given the usual and customary meaning of those words. Thus, I find that the claimant has met the final requirement for a “compensable injury,” under Ark. Code Ann. §11-9-102(4)(A)(ii)(a).

Finally, the claimant must prove that the employment related aspect of his left shoulder injury was the “major cause” of either his “need for medical treatment” for his left shoulder difficulties or of any “disability” that his left shoulder difficulties have occasioned, Ark. Code Ann. §11-9-102(4)(E)(ii). This subsection does not require the employment related aspect or contribution to a total “resultant condition” to be the “major cause” of the “resultant condition”, itself. This section only requires that the employment related aspect or contribution to the total “resultant condition” be the “major cause” of either the resultant condition’s need for medical services or of any disability the resultant condition may have produced. Such an employment related injury may still be compensable, even if it is merely the straw that broke the camel’s back, if it was the “major cause” that the total resultant condition now required medical treatment or began to cause disability.

In the present case, the MRI study of the claimant’s left shoulder was interpreted as also showing degenerative osteoarthritic changes (osteophytes) involving the left shoulder joint. Although these defects may have pre-existed the claimant’s employment with this respondent, there is no evidence that, prior to the claimant’s employment with this respondent, these osteoarthritic defects required any medical services or produced

any disability. In fact, the medical evidence even fails to show that these particular osteoarthritic defects are, even at the present time, playing any causal role in the claimant's current need for medical services or current disability.

Rather, the medical evidence shows that the claimant's current difficulties with his left shoulder, which are requiring medical services and resulting in disability, are the result of the documented defects in the form of a possible complete tear of the supraspinatous muscle or tendon, edema and tendinitis at the base of the greater tuberosity of the rotator cuff tendon, and/or chronic tendinitis or bursitis of the left shoulder joint. It is these particular defects that the greater weight of the evidence presented shows to have likely been caused by the claimant's employment activities with this respondent that required "rapid repetitive motion" of his left arm and shoulder. Thus, the claimant's employment related activities for this respondent were the "major cause" for his need for medical services for his current left shoulder difficulties. Thus, the claimant has satisfied the statutory requirement for a "compensable injury" that is contained in Ark. Code Ann. §11-9-102(4)(E)(ii).

In summary, I find that the claimant has proven that during his employment with this respondent, he has sustained a "compensable injury" to his left shoulder, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). He has further proven that this left shoulder injury satisfies all of the necessary requirements for a "compensable injury" contained in the Act. He

is therefore entitled to appropriate benefits, under the Act, for this compensable injury.

Ark. Code Ann. §11-9-508 entitles the claimant to “reasonably necessary medical services” for this compensable injury. Reasonably necessary medical services are those services medically appropriate for and necessitated by the compensable injury, which have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Such purposes or goals include the accurate diagnosis of the nature and extent of the injury, the resolution or improvement of the actual physical damage caused by the injury, and the reduction or resolution of symptoms and complaints produced by the injury.

The evidence presented in this case shows that the medical services provided the claimant by and at the direction of Dr. Robert B. Wilson, Jr., Dr. Shane McAlister, and Dr. Mark Powell, all represent reasonably necessary medical services for the claimant’s compensable left shoulder injury. All of these services were necessitated by or connected with the claimant’s compensable left shoulder injury and resulting difficulties. Further, these services are of a type generally recognized by the medical community as being appropriate to accurately diagnose the nature and extent of the injuries to the shoulder, to actively treat such injuries, and to reduce the symptoms produced by such injuries.

I further find that the evidence establishes that the additional medical services that have been recommended by Dr. Powell (a diagnostic and possibly corrective arthroscopy of the

left shoulder) also represents reasonably necessary medical services for the claimant's compensable left shoulder injury. Again, this type of procedure is widely recognized as being appropriate to accurately diagnose and treat injuries and difficulties such as those experienced by the claimant. Clearly, Dr. Powell is of the opinion that such a procedure is appropriate. As a board certified and orthopaedic surgeon with particular expertise in the area of medicine associated with the diagnosis and treatment of shoulder injuries, Dr. Powell's opinion in this regard is entitled to great weight and credit.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On all relevant dates, the relationship of employee-self insured employer-third party administrator existed between the parties.
3. On all relevant dates, the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$314.00 for total disability and \$236.00 for permanent partial disability, when and if such benefits should become appropriate.
4. During his employment with this respondent in 2003, the claimant sustained a "compensable injury" to his left shoulder, as that term is defined by Ark. Code Ann. §11-9-102(4)(A)(ii)(a). Specifically, the claimant has proven by the greater weight of the credible evidence

that he sustained a physical injury to his left shoulder that arose out of and occurred in the course of his employment with this respondent, that was not caused by a specific incident, that caused internal physical harm to his body, and that was caused by rapid repetitive motion necessitated by his work. The claimant has further proven by the greater weight of the medical evidence the actual existence of the physical injury alleged to be compensable and the existence of this physical injury is amply supported by "objective findings" (i.e. findings beyond the claimant's voluntary control). Finally, the greater weight of the credible evidence shows that the employment related aspect or contribution to the claimant's left shoulder difficulties were the "major cause" of his need for medical services.

5. The medical services provided to the claimant by and at the direction of Dr. Wilson, Dr. McAlister, and Dr. Powell for the claimant's left shoulder difficulties represent "reasonably necessary medical services" within the meaning of Ark. Code Ann. §11-9-508. The medical services recommended by Dr. Powell for the claimant's left shoulder difficulties, in the form of a diagnostic and possibly corrective arthroscopic procedure, also represents reasonably necessary medical services, within the meaning for Ark. Code Ann. §11-9-508. Specifically, all of these medical services were all necessitated by or

connected with the claimant's compensable left shoulder injury and have a reasonable expectation of accomplishing the purpose or goal for which they are intended. Pursuant to Ark. Code Ann. §11-9-508, the respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

6. The respondents have denied the occurrence of any compensable injury to the claimant's left shoulder and have controverted this claim in its entirety.
7. As no controverted benefits have herein been awarded to the claimant, no controverted attorney's fee can be awarded to the claimant's attorney at the present time.

ORDER

The respondents shall be liable for the expense of the medical services provided to the claimant for his left shoulder difficulties by and at the direction of Dr. Wilson, Dr. McAlister, and Dr. Powell. The respondents shall also be liable for the expense of the additional medical services recommended for the claimant's left shoulder difficulties by Dr. Powell (i.e. a diagnostic and possible corrective arthroscopy). This liability is subject to the medical fee schedule established by this Commission.

For the reasons heretofore set forth in this Opinion, no attorney's fee can be awarded to the claimant's attorney, at this time.

All benefits herein awarded, which have heretofore accrued, are payable in a lump sum without discount.

Eads -F400932

14

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge