

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513253/F513254

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| JOHN MCGEE | CLAIMANT |
| KRAFT FOODS, INC. | RESPONDENT |
| ESIS INSURANCE CARRIER | RESPONDENT |

OPINION FILED JULY 13, 2006

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

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

STATEMENT OF THE CASE

A hearing was held on April 18, 2006, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on February 15, 2006. 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. At all relevant times, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a workers' compensation rate of \$136.00 for both temporary total disability and permanent partial disability.

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

1. Compensability of the claimant's left shoulder problems.
2. Related medical.
3. Temporary partial disability from January 28, 2006, to a date to be determined.
4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he was injured in January of 2004 and again in August of 2005. In January of 2004 he pulled a piece of machinery and hurt his left shoulder. In August of 2005 he pulled a pipe and felt something in his left shoulder give.

In regard to the foregoing issues the respondents contend that they deny that the claimant sustained a compensable injury in 2003 or January 2004, or August 2005.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1. The claimant submitted medical information marked Claimant's Exhibit No. 1. The respondents submitted medical information marked Respondents' Exhibit No. 1 and non medical documentation marked Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he was 53 years old and began working for the respondent in January 1998. The claimant testified that he was hired to be an off the line operator on the weekends

and doing part time work. The claimant testified that he normally works sixteen hours per week but during the summer and on his vacations, he might work up to forty or more hours within a week. The claimant explained that he came in at nights at odd times so it was not always sixteen but often times it was sixteen hours and up. The claimant testified that besides working for the respondent, he was a school teacher at the Pea Ridge Elementary School teaching art. The claimant testified that he works for the school approximately thirty-five to forty hours per week. The claimant testified that he is still teaching school and that he has not missed any time from work as a school teacher due to any injuries he has received while working for the respondent.

The claimant testified that on December 31, 2003, he was helping clean out a fifty-five gallon drum of cheese which had congealed. The claimant testified that he and two other men were using a scoop to take the cheese out of the barrel, explaining that he was standing by the barrel and bending over and reaching down in order to scoop out the cheese. The claimant testified that as he was reaching down with his left hand into the barrel to scrap out some of the hardened cheese, he felt a kind of tingling in his left arm and it hurt a little bit. The claimant testified or pointed to his left shoulder describing it as an electrical type of shock. The claimant testified that he reported this injury and filled out paperwork as to the injury. The claimant testified that the respondents sent him to the Lowell Medical Clinic and he was seen by Dr. Berestnev. The claimant testified that the doctor had x-

rays taken but no treatment was recommended and no medications prescribed but he was instructed not to lift anything heavy for a while.

The claimant testified that in 2001 he was helping pull some barrels by hand within the factory and that his sleeve got caught on one of the bolt threads and pulled a barrel over on top of him which cut his left shoulder. The claimant testified that this drew some blood and he had a bruise on his left shoulder. The claimant testified that he did not see a doctor for this injury and did not have any lasting affects but he did report it because it was required.

The claimant testified that on August 28, 2005, he was working putting pipe together in order to be able to carry out the cleaning process within the plant. The claimant explained that this was a new process and the shift had not been trained on exactly how to reassemble the pipe. The claimant testified that the process required standing on a ladder and putting metal pipes together with clamps in a certain pattern so the chemicals could run through the parts and clean everything. The claimant testified that he was having problems getting the pipe to fit together and he used his left shoulder to jam the pipes together so he could put the clamp around to hold it. The claimant testified that he was pushing the steel pipe with his shoulder in order to hold it in place so that he could put a clamp on it. The claimant testified that when he was finished and was getting down off the ladder, he felt a kind of numb feeling. The claimant testified that he continued working and

that his left arm began to hurt and that it hurt constantly from that moment on. The claimant testified that he reported this to John Wilkins that night but he was not sent to the doctor at that time. The claimant testified that two weeks later he was in another cleaning process and he could not reach up and could hardly do anything. The claimant testified that his arm was very limited on how he could reach. The claimant testified that he realized that he could not raise his arm or shoulder as high as he once could. The claimant testified that between August 28 and this second event his shoulder continued to hurt all of the time. The claimant testified that he again reported his problems to Mr. Watkins and a doctor's appointment was made for him at the Lowell Clinic. The claimant testified that again his shoulder was x-rayed and then an MRI was recommended. The claimant testified that there was a delay from September to December as to him getting an MRI because he had difficulty in making contact with the insurance adjuster. The claimant testified that he continued to work during this period of time. The claimant testified that he remembers that Dr. Moffitt recommended that he not do any heavy lifting during this period of time. The claimant testified that after his MRI he returned to see the doctor and he was instructed to avoid heavy lifting. The claimant was asked if he was able to work normally until January and he responded that he had to avoid some tasks because they were too painful or he was unable to do them. The claimant testified that he continued to work his sixteen hour weeks until January. The claimant testified that in January 2006 his

hours were changed to four hours a day two days a week. The claimant testified that Troy Cook got mad at him because he got an attorney and changed his hours. The claimant testified that he had always worked at least sixteen hours a week and had for the past eight years and he did not know of anyone at the plant who ever worked a four-hour shift. The claimant testified that he often was sent home before the jobs he was assigned were finished. The claimant testified that during this period of time he was not seeing a doctor because he could not afford it. The claimant testified that the last time he went to the doctor it was his understanding that he needed to have a scope done but has not been able to do this because he cannot afford it. The claimant testified that his shoulder still hurts causing him to have problems sleeping and he has a hard time holding anything heavy in his left hand nor can he move it higher than his shoulder.

On cross examination, the claimant testified that he learned about his reduced hours by reading it on the schedule which was posted. The claimant testified that he talked to his supervisor, John Watkins, and Mr. Watkins indicated that he did not know why his hours had been cut. The claimant testified that he talked to a man in Springfield about a week later. The claimant testified that it was his understanding that the gentleman he spoke to had taken Troy Cook's place. The claimant testified that the man he talked to on the phone told him that he had no rights to any hours. The claimant testified that there were no written guarantees by the respondent as to the amount of hours a person would work. The

claimant identified a letter which he had written to the respondents dated October 5, 2005, setting forth that he had been having recurrent shoulder pain over the past couple of years. The claimant, in this letter, indicated that in early 2002 he was injured by a falling barrel. The claimant was then asked to read from a recorded statement that he gave to Frances Brown as follows;

“He said, well, its not going to hurt it to work with initial pain, but I might risk getting it worse--wasn't hurt before last month--wasn't that I hurt it then. Its that I felt it then. And now--and it feels now change of something growing in there--maybe some kind of tumor possibly, inaudible, I think so. But probably arthritis and the damage a few years ago. Should have seen it two years ago--seen it two years and last year should have seen it and had something done about then. They didn't catch it. And the old x-rays shows that damage that the previous doctor missed.”

The claimant testified by reading again from his recorded statement that he hurt his shoulder two years ago in 2003 when the barrel fell on his shoulder noting that the metal hit the top of his shoulder bone which is what caused it to happen and it has been growing ever since that he has been aware of. The claimant was asked if he in fact was talking about the barrel incident which he had earlier testified to which occurred in 2001 or 2002 and the claimant indicated that this was a telephone conversation and he could not remember the dates accurately. The claimant testified that the barrel incident he felt as though his problems resolved but that the 2003 incident of scraping cheese out of the barrel did stick with him for a while. The claimant read from his letter dated October 5, 2005, as follows;

“In early 2002, very cold weather, I was injured by a falling barrel which landed rim down on the upper edge of my shoulder. I don't remember the exact date, but there was a follow up meeting with Randy. And I was examined by the clinic.”

The claimant was asked if he was aware of the diagnosis given by the doctor in January 2004 and the claimant responded that the doctor did not give any specifics, he just indicated that he needed to have his shoulder scoped.

On redirect examination, the claimant was asked about a medical report penned by Nurse Beasley at the Lowell Clinic dated January 2004. The claimant testified that would have been the leaning over the barrel digging out the cheese event. The claimant testified that it was his understanding that he had suffered no permanent impairment as a result of this event. The claimant testified that it was in 2004 that he noticed some electrical feeling in his shoulder when he would move a certain way and his arm would just feel funny/odd. The claimant testified that it did not hurt enough to stop and do anything about it. The claimant testified that between the date of him being hit by the barrel and the date that he was digging cheese out of a barrel he had not been taking any medications for his shoulder nor had he been seeing any doctors or specialist or receiving any treatment for his shoulder. The claimant testified that between January 2004 and September 2005 when he was working with the pipes, he had no restrictions and could do anything he wanted to do although he did have some off and on pains just walking around but did not have any pain doing any lifting at work. The claimant testified that before the pipe

incident in 2005 he was able to do any type of lifting that he needed without problems but after August 28, 2005, he could not lift anything past his throat and if he tried he would drop it. The claimant testified that even though he continued to work after August 28, 2005, he could not reach overhead or do any kind of lifting of the barrels on the line. The claimant testified that he would have to do work one handed or have someone help him. The claimant testified that if any work required lifting over his shoulder he just could not do it noting further that he could not reach outside the car and push the buttons on a pay phone.

On recross examination, the claimant agreed that no doctor has limited his work to four hours a day and that he has continued to work full time at his teaching job. The claimant testified that he also has continued to volunteer his time working with the elementary track and basketball teams.

The medical records set forth that the claimant was seen on December 2, 2002, at the Lowell Medical Clinic by Dr. Constantine Berestnev for an injury he sustained on November 30, 2002, while he was pulling barrels and injured his left wrist. The doctor reports that the claimant complains of pain when he flexes his wrist and also when he is abducting his left elbow at the same time. X-rays of the claimant's wrist and elbow reveal no fractures or dislocations and it was recommended that he avoid hyper flexing his left wrist and no lifting more than three pounds. Also Dr. Berestnev prescribed medication and warm compresses. On a follow up visit for his left wrist on December 19, 2002, Dr. Berestnev

writes that the claimant has no complaints and he was assessed with having left wrist sprain resolved and was released to regular duties. Physician's assistant Max Beasley writes on January 15, 2004, that he has seen the claimant with complaints of left shoulder pain and electrical shocks in his left upper arm. Nurse Beasley reports that the claimant states that on December 30, 2003, he was reaching down into a barrel, digging out cheese when he began having anterior shoulder pain and since that time has noticed that he has had a few electrical shock sensations down his left upper arm. X-rays taken of the claimant's left shoulder and cervical spine reveals no fractures or dislocations and the claimant was prescribed medications and given some samples. Nurse Beasley recommended that the claimant return to work but was advised to avoid lifting more than ten pounds with his left arm and avoid reaching and working above waist level with his left arm. Nurse Beasley writes on January 22, 2004, that he has seen the claimant that day for his left shoulder and neck pain and the claimant reports he is much better after taking Celebrex as well as performing his neck and shoulder exercises. Nurse Beasley writes that the claimant says that he has had no episodes of pain or discomfort in his neck or shoulder since this past weekend. Nurse Beasley released the claimant but recommended that he continue with his home exercises for an additional week noting that he can return to his usual job without restrictions further noting that he suffered no permanent impairment.

Dr. Moffitt writes on September 28, 2005, that he has seen the claimant for his complaints of left shoulder pain stating that while at work on August 28 he was putting pipes together overhead and felt pain occur in his left shoulder. Dr. Moffitt notes that the claimant has had problems with his left shoulder in 2003 and was seen at this clinic and has continued to have pain in that shoulder since that time. X-rays were obtained and revealed either cystic, arthritic or a combination of both changes in the inferior portion of the glenoid fossa. Dr. Moffitt notes that he reviewed the claimant's previous x-rays and that these changes were present on the previous films, however, they were not as noticeable. Dr. Moffitt recommended an MRI of the claimant's left shoulder and recommended that he continue to work without restrictions. An AR-C dated December 9, 2005, indicates that the claimant injured his left shoulder on August 28, 2005. Dr. Moffitt writes on December 9, 2005, that the claimant reports that the pain in his shoulder is getting worse and he is having difficulty abducting it. Dr. Moffitt scheduled an MRI and advised the claimant not to work above waist level and not to lift more than ten pounds. Dr. Moffitt writes on December 15, 2005, that he has seen the claimant for his complaints of pain in his shoulder and loss of motion. Dr. Moffitt notes that the claimant's MRI showed no definite evidence of a full thickness rotator cuff tear but there was a little bit of fluid in the subdeltoid space which could be associated with a tear but it is not definite. Dr. Moffitt notes that the radiologist noted cystic changes of the glenoid which is probably related to old

trauma. Dr. Moffitt writes that the claimant needs to be seen by an orthopedic surgeon and recommended that the claimant continue with the same restrictions. Dr. Moffitt writes on February 24, 2006, in response to the respondent's attorney's inquiry set forth in a letter dated February 13, 2006. Dr. Moffitt writes that he has reviewed the claimant's chart and in response to the inquiries of whether or not cystic or arthritic changes if they occurred as a result of the incident on December 30, 2003, would have shown up sixteen days later on an x-ray, Dr. Moffitt responded, "The answer is no."

After a review of this entire record, I find that the claimant has proven by a preponderance of the evidence that he sustained a compensable injury while working for the respondent on August 28, 2005, when he was pushing metal pipes up with his left shoulder. It is not questioned that the claimant had preexisting problems with his shoulder but these problems as to symptoms had pretty much resolved after some short period of treatment. It was only until after August 28, 2005, that the claimant's left shoulder problems have continued to be a problem for him and required treatment. The MRI of the claimant's left shoulder taken in December 2005 did reveal fluid in the sub deltoid space as well as cystic and arthritic changes. Even though some of these findings may be from old trauma, they were not symptomatic to the point of requiring treatment until the claimant's event on August 28, 2005. Therefore, the respondents should pay for all reasonable and necessary medical care for this claimant's left shoulder injury.

I further find after review of this record, that the claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from January 28, 2006, to a date to be determined. The claimant has testified that he worked up to January 28, 2006, and it was only because his hours were reduced that he quit his job. The claimant has testified that he had no guarantee for any certain amount of hours to be worked and that no doctor has taken him off due to his medical problems.

FINDINGS & CONCLUSIONS

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

2. At all relevant times, the relationship of employee-employer-carrier existed between the parties.

3. The claimant is entitled to a workers' compensation rate of \$136.00 for both temporary total disability and permanent partial disability.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left shoulder on August 28, 2005, while working for the respondent. See discussion above.

5. The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from January 28, 2006, to a date to be determined. See discussion above.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left shoulder on August 28, 2005, while working for the respondent.

The respondents should pay for all reasonable and necessary medical care for this claimant's left shoulder treatment.

The claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability from January 28, 2006, to a date to be determined.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE