

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F513631

ALBERT SISSON, Employee	CLAIMANT
PETERSON FARMS, Employer	RESPONDENT
COMPCARE ADMINISTRATORS, Carrier	RESPONDENT

OPINION FILED AUGUST 11, 2006

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by CURTIS L. NEBBEN, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On July 12, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 17, 2006, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer relationship existed between the parties at all relevant times.
3. The respondent has controverted this claim in its entirety.

At the time of the hearing the parties agreed to stipulate that claimant would be entitled to the maximum compensation rate for 2005 of \$466.00 for temporary total disability benefits and \$350.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's left shoulder in late March or early April 2005.

2. Temporary total disability benefits from September 29, 2005 through December 22, 2005.

3. Medical.

4. Attorney fee.

The claimant contends he sustained a compensable injury to his left shoulder on March 28, 2005. He contends he is entitled to temporary total disability benefits from September 29, 2005 through December 22, 2005, reasonable and necessary medical treatment, and a controverted attorney fee.

The respondents contend the claimant did not sustain a compensable injury arising out of and in the course of his employment.

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, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 17, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant is entitled to the maximum compensation rate of \$466.00 for temporary total disability benefits and \$350.00 for permanent partial disability benefits is also hereby accepted as fact.

3. Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left shoulder while employed by the respondent.

4. Claimant is entitled to temporary total disability benefits beginning September 29, 2005 and continuing through November 14, 2005.

5. Respondent is liable for all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes surgery which was performed by Dr. Kaler.

6. Respondent has controverted claimant's entitlement to all temporary total disability benefits.

FACTUAL BACKGROUND

The claimant has been employed by the respondent for almost 15 years. Claimant worked for respondent as a live-haul driver. Claimant's job duties required him to drive a truck to various chicken farms where cages with live chickens were loaded onto the truck and then drive the truck back to respondent's processing plant. In addition to driving the truck, the claimant also operated a forklift device which was used to take cages in and out of the chicken houses. Claimant testified that on March 28, 2005 he was operating the forklift and taking cages in and out of a chicken house that had a hole in the ground just outside the door to the house. Claimant testified that he had his forks with the cage low in order to keep the cage from striking the top of the door. Claimant testified that when the wheels of the forklift hit the hole the cage struck the concrete slab of the house causing the loader to stop and he was thrown into a roll bar and fell off the side of the loader onto the ground. Claimant testified that his left shoulder struck the roll bar. Claimant testified that he did not think he needed medical attention at that time and finished the remainder of his shift.

Claimant testified that the next morning he had soreness in his left shoulder, back, and his hip which had struck the ground. Claimant testified that he still did not think he needed to see the doctor, he just thought he was sore.

Claimant did not seek any medical treatment until May 6, 2005, at which time he saw Dr. Lewis, the respondent's company doctor. Claimant testified that at that time his

primary complaint was in his left arm in the forearm and elbow area. Claimant testified that he did not associate pain in that area of his arm to the loader incident because the primary pain was not in his shoulder. As a result, he informed Dr. Lewis that he did not know how he had injured his arm.

Approximately three weeks later the claimant sought medical treatment from Dr. Tucker, his family physician. Dr. Tucker noted that the claimant had a history of left shoulder pain secondary to an injury approximately three and a half weeks ago which had been caused by a jerking type of injury. Dr. Tucker gave claimant an injection and medication for pain. Claimant saw Dr. Tucker again on June 2, 2005, at which time claimant indicated that he did not wish to proceed with physical therapy.

Claimant next returned to Dr. Tucker on August 18, 2005 with complaints of persistent shoulder pain. Claimant reported that although his shoulder condition had initially improved, it was now hurting with any activity. Dr. Tucker ordered an MRI scan which was performed and revealed a complete tear of the left rotator cuff. Based upon these findings Dr. Tucker referred claimant to Dr. Kaler who performed surgery to repair the rotator cuff tear on September 29, 2005.

Claimant has filed this claim contending that he suffered a compensable injury to his left shoulder while employed by the respondent. He seeks payment of temporary total disability benefits, related medical, and a controverted attorney fee.

ADJUDICATION

Claimant contends that he suffered a compensable injury to his left shoulder while working for respondent on March 28, 2005. Claimant's claim is for a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to

establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left shoulder while employed by the respondent.

In making this finding, I am aware that there is some evidence which would support a finding that claimant did not suffer a compensable injury. However, I find that claimant has met his burden of proof based primarily upon his credibility of a witness. After having had an opportunity to observe claimant and his demeanor during the hearing as well as consideration of the testimony of his supervisor, Doug King, I believe that claimant is a credible witness and that any discrepancies present in this claim do not outweigh claimant's testimony regarding the occurrence of this injury. With regard to claimant's credibility, I note that Doug King, his supervisor, testified that he believed claimant to be trustworthy and reliable.

Q. Do you have any reason to believe that he would make up how he hurt his shoulder?

A. No.

Q. Have you found him to be trustworthy and reliable?

A. The best.

Based upon the claimant's testimony which I find to be credible, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with the respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. Claimant testified that he had no prior injuries to his left shoulder before March 28, 2005. Claimant testified that on that date he injured his shoulder when his loader struck a concrete foundation, causing him to be thrown forward with his left shoulder striking a roll bar. Corroborating evidence that this incident occurred was offered by Doug King, the live-haul manager for the respondent and claimant's supervisor. King testified that on the night of March 28 he heard some employees in the respondent's break room talking about claimant's incident. King testified that when claimant arrived he asked claimant if he needed to see a doctor, but claimant informed him that he thought he would be okay.

Claimant continued working for the respondent and did seek medical treatment from Dr. Lewis, the respondent's company doctor, on May 6, 2005. At that point in time claimant's primary problem was in his forearm and elbow area. Claimant testified that he did not associate pain in that area of his arm to the loader incident. As a result, he did not relate his pain to the loader incident.

Claimant subsequently sought medical treatment from his family physician, Dr. Tucker, and his medical reports indicate that claimant's shoulder pain was the result of a jerking-type injury. Subsequent medical reports from Dr. Kaler dated September 16, 2005 contain a history of injury consistent with claimant's testimony.

In short, I find claimant's testimony to be credible based in part upon his demeanor at the hearing. Based upon claimant's testimony as well as the remaining evidence, I find

that claimant has met his burden of proving that he suffered an injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has satisfied the remaining elements of compensability. Specifically, I find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and that he has offered medical evidence supported by objective findings establishing an injury. Based upon claimant's continued complaints of pain, Dr. Tucker eventually ordered an MRI scan of the claimant's shoulder which revealed a complete tear of the rotator cuff. As a result, claimant was referred to Dr. Kaler who performed a surgical repair of the claimant's left shoulder on September 29, 2005. This evidence satisfies the remaining elements of compensability.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left shoulder while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's left shoulder injury. This includes the surgery which was performed by Dr. Kaler.

Claimant has requested temporary total disability benefits beginning September 29, 2005 through December 22, 2005. The injury to claimant's shoulder is an unscheduled injury. In order to be entitled to temporary total disability benefits for an unscheduled injury claimant has the burden of proving by a preponderance of the evidence that they remained within their healing period and that they suffer a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

In this particular case, claimant is requesting temporary total disability benefits beginning September 29, 2005, the date he underwent surgery, and continuing through

December 22, 2005, the date he returned to work for the respondent. I find that claimant remained within his healing period and that he suffered a total incapacity to earn wages beginning September 29, 2005, the date of his surgery, and continuing through November 14, 2005. November 14, 2005 is the date of the last medial record from Dr. Kaler. Dr. Kaler in his report of that date notes that claimant wants to return to work and Dr. Kaler goes on to indicate that he would release claimant to return to work for one-handed duty for six weeks. While claimant did not return to work for the respondent until December 22, 2005, I find insufficient evidence based upon Dr. Kaler's report of November 14, 2005 that claimant suffered a total incapacity to earn wages subsequent to that date.

Accordingly, I find that claimant is entitled to temporary total disability benefits beginning September 29, 2005 and continuing through November 14, 2005. Respondent has controverted claimant's entitlement to these unpaid indemnity benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his left shoulder while employed by the respondent. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes surgery performed by Dr. Kaler. Claimant is also entitled to temporary total disability benefits beginning September 29, 2005 and continuing through November 14, 2005. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the temporary total disability benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee

is not awarded on medical benefits.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE