

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512192

ERIC W. SULTZ, EMPLOYEE	CLAIMANT
COOPER TIRE & RUBBER COMPANY, SELF-INSURED EMPLOYER	RESPONDENT
CROCKETT ADJUSTMENT, TPA	RESPONDENT

**OPINION FILED JULY 6, 2006**

Hearing held before the HONORABLE S. DALE DOUTHIT, Administrative Law Judge, on April 11, 2006, at Texarkana, Miller County, Arkansas.

Claimant was represented by HON. NELSON V. SHAW, Attorney at Law, of Texarkana, Texas.

Respondent was represented by HON. WILLIAM G. BULLOCK, Attorney at Law, of Texarkana, Texas.

**STATEMENT OF THE CASE**

A hearing was conducted April 11, 2006, to determine whether the claimant sustained a compensable injury within the meaning of the Arkansas Workers' Compensation Laws.

A prehearing order was filed in this matter on January 23, 2006. At the hearing, the parties agreed the stipulations, issues, and their respective contentions were properly set forth in the prehearing order, subject to any modifications made on the record. A copy of the prehearing order was introduced as Commission Exhibit "1", and made a part of the record, without objection.

Shultz/F512192

The parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employer/employee/carrier relationship existed at all relevant times, including September 28, 2005.
- 3) The claimant's applicable compensation rates are \$466.00 and \$350.00 for TTD and PPD, respectively.
- 4) All issues related to permanent impairment shall be reserved.
- 5) The claimant's supervisor on September 28, 2005, was Frank Pearson.
- 6) The claimant timely notified the respondent of his injury.
- 7) Should the claimant prevail, respondents are entitled to an offset pursuant to A.C.A. §11-9-411(a).

The parties agreed the following issues would be presented for determination:

- 1) Compensability.
- 2) Temporary partial disability benefits from September 29, 2005 through December 30, 2005, and attorney's fees.
- 3) Associated medical benefits.

The claimant contended, in summary, that he sustained a compensable specific incident back injury on September 28, 2005, and as a result is entitled to associated medical

Shultz/F512192

benefits, attorney's fees and temporary partial disability benefits from September 29, 2005 through December 30, 2005.

Respondents contended the claimant cannot meet his burden of proof under Act 796 regarding accidental injury or disability, or regarding entitlement to any of the workers' compensation benefits that claimant seeks. Respondents additionally contended the following:

- 1) That the disability periods the claimant sustained, if any, were not incurred as a result of a compensable injury sustained on the job on September 28, 2005.
- 2) That claimant's low back complaints, treatments, and disabilities, if any, are the natural progression of the claimant's pre-existing injury.
- 3) That anything that happened to claimant's low back on-the-job at the time of his alleged accident or injury, does not constitute the major cause of any period of total or partial disability, or any permanent impairment with regard to which the claimant seeks to recover benefits.
- 4) That in the event an award is rendered in favor of the claimant, respondent is entitled to an offset against any disability benefits found to be owing the amount of money

Shultz/F512192

paid to the claimant by respondent pursuant to its group health plan, its Accident and Sickness (A&S) benefits plan, and any other employee benefit plan meeting the definition set forth in A.C.A. §11-9-411.

The record is composed of the transcript of the April 11, 2006 hearing containing numerous exhibits.

### **DISCUSSION**

The record reflects that the claimant timely reported a work related injury to his employer shortly following a work-related incident on September 28, 2005. The claimant's title for the employer was "sort & label", and the claimant described his duties as follows:

A. You have to grab tires off of lines and stack them, you have to sort them out and stack them on skids and on the very top tire you have to put that upside down and then label it up and pull the cart out and then you have to sit it on the line because it gets grabbed by a magnetic pull that pulls the pin down on the cart and then it proceeds to go around a tow conveyer line. Then you grab an empty skid or an empty cart and put it back where you pulled that full one out and then you go back to stacking and labeling. (T. pg. 13, lines 1-10)

The claimant testified as follows regarding his alleged compensable event of

Shultz/F512192

September 28, 2005:

A. I was on lane 5 when I had gotten a big tire that morning, it was a big mudder grip, and I sorted the right side - we have what we call a fast side and a slow side. I proceeded down the fast side and then I jumped over to the slower side and that's where that big mudder grip was. I had thrown the last tire on the nearest side and I flipped it over and that's - I felt something give then. Well, it was time to turn the skid around so I went ahead and turned the skid around and moved onto the next lane and ran my lines for about 30 to 45 minutes and it got to the point where I just - I had to go get my supervisor and inform him that I had done something to my back.

(T. pgs. 14 & 15, lines 17-25 & 1-4)

Q. And when you said that you realized that something happened when you lifted that mudder grip tire, what are you talking about? Be as specific as you can for the Commission.

A. I grabbed the tire and I kicked it up with my leg. Usually on the top tire you usually do that to help you not use so much of your arm or your back or whatever. I had twisted the tire with my left hand and threw it on top with the help of my knee

Shultz/F512192

and that's when I felt something give in my lower back on the right side. It's kind of hard to explain what I felt but it just gradually got worse. It felt like something had popped loose in there or something. But I proceeded to keep running the lines until it got to the point where I just couldn't handle it no more. (T. pgs. 15 & 16, lines 15-25 & 1-4).

The parties stipulated that the claimant timely notified his employer of the incident. On the same day of the incident, (Sept. 28, 2005) the claimant went to Dr. Craig Ditsch. Dr. Ditsch's report of September 28, 2005, indicates that the claimant reported severe low back pain while picking up a tire to flip it over on "today's shift." (CIX-1, pg. 6) Dr. Ditsch then recommended an MRI of the lumbar spine.

The claimant then underwent an MRI on the day after the alleged compensable injury. The results of the MRI of the lumbar spine contained the following impressions:

- 1) Small central disc protrusion at the L4-L5 level and left paracentral disc protrusion at the L5-S1 level without thecal sac or nerve root effacement identified.
- 2) Disc degeneration and volume loss, with a mild to moderate nature, from L1-L2 through L5-S1, sparing L3-L4. Associated annular disc bulges are seen. (CIX-1, pg. 7)

On October 3, 2005, the claimant followed up with Dr. Ditsch after his MRI. Upon reviewing the MRI, Dr. Ditsch placed the claimant on restricted duty and prescribed Medrol. Dr. Ditsch saw the claimant again on October 10, 2005, and stated "he is not ready

Shultz/F512192

to sort and label for 12 hours. He is allowed to return to restricted duty with no lifting, pulling or pushing over 5 lbs." (ClX-1, pg. 4) On October 17, 2005, Dr. Ditsch even seemed to opine on the reason for the claimant's back problems. "His workmen's compensation was denied and certainly not clear as to why as this certainly was a documented injury that occurred." (ClX-1, pg. 3)

The claimant continued to treat with Dr. Ditsch for his back through January 3, 2006, according to the medical records. Even on January 3, 2006, Dr. Ditsch continued to place the claimant on restricted duty. (RX-1, pg. 45)

Due to unrelated respiratory problems, the claimant testified he was no longer working at all. The claimant testified he did work on restricted duty from September 29, 2006, through December 30, 2006, due to his alleged compensable injuries at the rate of \$14.92 per hour versus the \$20.00 per hour the claimant testified he was making prior to September 28, 2005, while working "sort and label."

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. §11-9-102(4)(A)(i) must be established:

- 1) Proof by a preponderance of the evidence of an injury arising out of and in the course of employment.
- 2) Proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which

Shultz/F512192

required medical services or resulted in disability or death.

3) Medical evidence supported by objective medical findings as defined in A.C.A. §11-9-102(16), establishing the injury, and,

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.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, he fails to establish the compensability of the claim, and compensation must be denied. **Mickel v. Engineered Specialty Plastics**, 56 Ark. App. 126, 938 S.W. 2d 876 (1997)

The record reflects the claimant has established, by a preponderance of the evidence, all elements necessary to establish compensability of the injury alleged on September 28, 2005. The respondents have argued that since the claimant had previous complaints of back pain, that any condition the claimant now has is pre-existing or that it did not arise out of the claimant's employment on September 28, 2005.

It is true that the claimant had complaints of back pain, and was treated shortly before his September 28, 2005 incident. Evidently, the claimant even had an MRI of his back on May 24, 2005, approximately four months prior to his alleged compensable injury. Although neither party introduced the May 2005 MRI, Dr. Watson's August 24, 2005 report

Shultz/F512192

refers to it by stating:

"He brings with him an MRI report dated 5-24-05 that shows some mild degenerative disc disease with a small central disk protrusion. He also has degenerative disc disease at L1-2, L2-3 and L4-5." (RX-1, pg. 16)

The medical records clearly show the claimant was having back problems prior to the September 28, 2005 incident. However, the MRI conducted subsequent to September 28, 2005, shows additional objective findings of injury. Whether the incident of September 28, 2005, caused the claimant's other objective finding of injury evidenced in the September 29, 2005 MRI, (CIX-1, pg. 7), or merely aggravated his previous condition still leads to the ultimate finding that the September 28, 2005 accident was compensable.

Even though the claimant's testimony regarding the location of his back pain prior to September 28, 2005, lacked credibility; I still find the overwhelming evidence shows the claimant sustained a compensable back injury or, at the very least, aggravated his pre-existing condition on September 28, 2005. The claimant's timely report of his injury, and the medical records, prove by a preponderance of the evidence that the claimant sustained a compensable injury during the course and scope of his employment with the respondent on September 28, 2005. The medical records prove by a preponderance of the evidence that the claimant sustained an internal compensable injury which required medical services and which was supported by objective findings. Therefore, I find the claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on September 28, 2005.

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. A.C.A. §11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. The claimant has proven a compensable back injury occurred on September 28, 2005. My review of the medical records shows the back treatment received by the claimant from September 28, 2005 through December 30, 2005, to be reasonable, necessary, and related to his September 28, 2005, compensable injury. I use December 30, 2005 as an end date only because of the claimant's own testimony stating that he felt like his back got better by December 30, 2005.

Q. Now, as of the end of 2005, what was the condition of your back?

A. I felt like it had gotten better, you know, I was able to like trim my hedges and stuff like that without it badly irritating me and what have you, so I feel like it has gotten a lot better.

Q. And again, you feel that that ended on or about December 30, 2005?

A. Yes, sir.

Q. Did you go back to the doctor at all for your back other than what you have testified to?

A. No, sir. (T. pg. 24, lns. 2-13)

Therefore, I find the medical treatment contained in the record herein conducted

Shultz/F512192

on the claimant's back from the date of injury (Sept. 28, 2005) through December 30, 2005 to be the responsibility of the respondent.

The claimant has requested temporary partial disability benefits for the period September 29, 2005, through December 20, 2005. Temporary partial disability is that period within the healing period in which the employee suffers a decrease in his capacity to earn the wages he was receiving at the time of the injury. **Ark. State Highway & Transportation Dept. v. Breashers**, 272 Ark. 244, 613 S.W. 2d 392 (1981).

The claimant's testimony about his reduction in wages after his September 28, 2005 compensable injury was uncontradicted by the respondents. The claimant testified that when Dr. Ditsch placed him on restricted duty after his compensable injury, his hourly wage went from approximately \$20.00 per hour to \$14.92 per hour. The claimant testified his reduction in pay was because he was no longer able to perform "sort and label" and his "light duty" job after the injury paid a little over \$5.00 per hour less.

Q. So the entire time you are claiming disability for the back problem you were on light duty?

A. Yes, sir.

Q. What were you making initially as a sort and label worker?

A. A little over \$20.00 an hour I do believe was my average at that time.

Q. And how many hours were you working a week?

Shultz/F512192

A. Just standard shift, you know, 48 one week and 36 I think it is the short week.

Q. And do you alternate those weeks.

A. Yes, sir.

Q. What did you make on light duty?

A. \$14.92 I do believe, somewhere right around there, give or take a few pennies. (T. pg. 20, lines 7-21)

The medical records from Dr. Ditsch confirms the "light duty" restrictions to which the claimant testified. Before September 28, 2005, the claimant was performing his "sort and label" position and earning approximately \$20.00 per hour. After the compensable injury, the claimant's earning capacity was diminished due to the restrictions put on him by Dr. Ditsch. The evidence shows the claimant is currently not working; however, by his own testimony his work status after December 30, 2005, is due to an unrelated respiratory condition. The records clearly show that the claimant was still on restricted duty status through December 30, 2005. (RX-1, pg. 45)

Therefore, I find the claimant has proven by a preponderance of the evidence entitlement to temporary partial disability benefits from September 29, 2005 through December 30, 2005. The respondents shall pay to the claimant sixty-six and two-thirds percent (66  $\frac{2}{3}$ %) of the difference between the claimant's average weekly wage prior to September 28, 2005, and the claimant's weekly wage earning capacity after the injury between September 29, 2005 and December 30, 2005, plus associated attorney's fees.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing 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 claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. §11-9-704.

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
- 3) The claimant has proven by a preponderance of the evidence that he sustained a compensable back injury on September 28, 2005.
- 4) Respondents are responsible for all medical expenses reasonably necessary, and related to the claimant's September 28, 2005, compensable injury.
- 5) Claimant has proven by a preponderance of the evidence he is entitled to temporary partial disability benefits for the period September 29, 2005, through December 30, 2005.
- 6) Claimant is entitled to the maximum attorney's fee allowed by Arkansas Law consistent with the findings herein.

Shultz/F512192

- 7) Respondents are entitled to a dollar-for-dollar offset for any benefits paid pursuant to A.C.A. §11-9-411(a).

**AWARD**

Respondents are herein directed and ordered to pay the claimant temporary partial disability benefits pursuant to A.C.A. §11-9-520 for the period of September 29, 2005, through December 30, 2005, said sums accrued shall be paid in lump sum without discount. Further, respondents are to pay all reasonably related medical expenses for treatment to the claimant's back administered between September 29, 2005, through December 30, 2005.

Maximum attorney's fees are herein awarded to the claimant's attorney, the Hon. Nelson Shaw, pursuant to A.C.A. §11-9-715.

This award shall bear interest at the legal rate pursuant to A.C.A. §11-9-809 until paid.

IT IS SO ORDERED.

---

S. DALE DOUTHIT  
ADMINISTRATIVE LAW JUDGE

rb