

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F604112

REGINALD ANDREWS, EMPLOYEE	CLAIMANT
ODOM'S TENNESSEE PRIDE SAUSAGE, EMPLOYER	RESPONDENT
SENTRY INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 6, 2007

Hearing before Administrative Law Judge Barbara Webb on June 11, 2007, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Philip M. Wilson, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on June 11, 2007. A Pre-hearing Order was entered in this case on April 17, 2007. The Pre-Hearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Pre-Hearing Order was made Commission Exhibit No. 1 to the hearing record. The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on December 29, 2005.

3. A compensation rate of \$309.00 for TTD and \$232.00 for PPD, based on an average weekly wage of \$463.20.
4. The claimant was terminated for cause on February 17, 2006.

By agreement of the parties, the issues to be presented at the hearing are as follows:

1. Claimant's entitlement to additional temporary total disability benefits and medical benefits in connection with the December 29, 2005 injury to his right shoulder.
2. Controversion and attorney's fees.
3. Whether or not claimant is responsible for costs associated with the attempted hearing on March 7, 2007.

The record consists of a one-volume transcript of the June 11, 2007 hearing, consisting of the testimony of Eddie Hughes, Tim Brown, Chester Perry, Ealkert Walker, Mike Eilers, and Reginald Andrews and contains all documentary evidence, including Commission's Exhibit No. 1 (Pre-hearing Order); Commission's Exhibit No. 2 (Transcript of March 7, 2007 Hearing); Claimant's Exhibit No. 1 (Medical Reports); Claimant's Exhibit No. 2 (Wilson letter of 5/9/07); Claimant's Exhibit No. 3 (Wilson's letter of 3/21/07 and undated letter); Respondents' Exhibit No. 1 (Medical records) and Respondents' Exhibit No. 2 (Employment Documents); Respondents' Exhibit No. 3 (Concentra letter of 3/20/06).

DISCUSSION

The claimant contends he sustained a compensable injury on December 29, 2005, and is entitled to temporary total disability benefits, medical benefits and attorney's fees.

The respondents contend that this claim was initially accepted as compensable, but based on further investigation contend that there was no work-related incident. Based upon an independent medical evaluation performed by Dr. David Collins on April 10, 2006, respondents contend the claimant's current need for medical treatment is not associated with any incident occurring on December 29, 2005 or any other incident that claimant alleges occurred at Odom's Tennessee Pride. Respondents contend that claimant was terminated on February 17, 2006, and is not entitled to any temporary total disability benefits. Respondents controvert further medical treatment or indemnity benefits. Respondents also contend that the claimant is responsible for the costs incurred as a result of the postponement of the hearing originally scheduled for March 7, 2007, as a result of claimant's nonappearance.

A. WITNESS TESTIMONY

Mr. Eddie Hughes was called to testify on behalf of the claimant. Hughes worked as a co-worker with the claimant at the boning table performing essentially the same job duties as the claimant. He explained that his job was cutting the shanks or front legs of the hog and catching them as they drop. He testified that he was working with the claimant when he told him that he pulled his shoulder "out of position" and he told him to notify his supervisor. He could not recall when the

incident occurred. He explained that Andrews, Perry and he would set the machines up and that it was Andrews' job to go up a ladder and put up a long pipe. He recalled the claimant telling him that his shoulder was hurting from reaching overhead. He explained that the equipment had to be taken down every night for cleaning and put back up every morning. He estimated the weight of the pipe to be 15-20 pounds. He estimated that it took Andrews approximately a half-hour to put the pipes up and the same amount of time to take them down. He said that Andrews complained of shoulder problems every day. On cross-examination, he explained that after telling him about his shoulder injury, the claimant reported the injury to Mr. Walker, his line leader, and to Mr. Eilers, and began receiving medical treatment. He testified that at the time he complained about his shoulder he was cutting meat and not doing the pipe job. He did not see the incident and could not tell whether the claimant hurt his shoulder putting up pipes or cutting meat. He explained that Andrews never identified a specific time or incident when he talked about his shoulder hurting when handling the pipes.

Tim Brown testified that he worked with Andrews at Tennessee Pride as a "boner". He explained that he was working side by side with Andrews when he injured his shoulder while cutting out shoulders from the hogs. He recalled that Andrews reported the incident to Mike Eilers. He could not recall when the incident occurred.

On cross-examination, Brown testified that he was Andrew's brother-in-law. He was not aware of any pipe situation. He testified that Andrews was cutting out

the shoulders when he injured his shoulder and that he reported the incident. He recalled that Andrews continued to work for a while after the incident and had not sought medical treatment for his shoulder before he complained on the day of the incident.

Chester Perry testified that he was a protocol operator with Tennessee Pride. He testified that he was aware that Andrews had hurt himself but could not testify if he got hurt from helping put machines together, handling the pipe, or cutting shanks. He witnessed a confrontation between Andrews and Mike Eiler because Andrews was complaining about his arm and Mike was wanting him to cut the shanks. He explained that he could not specify the date of when the injury occurred but that it was close in time to when Mike was told. He testified that Andrews told him that it was hurting his shoulder to pick up the meat with a hook after he cut it to put it on the conveyor belt. He could not identify which shoulder was hurt.

Ealkert Walker testified that he was the lead person in the boning department at Tennessee Pride. He said that Andrews told him that his shoulder was hurting and he took him to Mike and then to the safety office to fill out the paperwork. Andrews told him that he was throwing the shoulders and said "I don't know did I pull a muscle or what, but I'm hurting." He could not recall when the incident occurred but that the company took Andrews to the doctor on the day he complained. He explained that Andrews did not mention the pipes.

Mike Eilers testified that he was a supervisor at Tennessee Pride. He testified that the claimant would come in to work around 5:00 or 5:30 in the morning

and would work about two hours after the shift for a total of 10 to 12 hours a day. He testified that the claimant reported the injury to him on January 30. He said that Walker reported that Andrews was complaining about hurting and he immediately took him off the line and took him to the Safety Director.

Reginald Andrews testified that he was 49 years old with his date of birth of November 18, 1959. He completed the twelfth grade. He worked for Tennessee Pride for approximately four to five years. He worked 10-12 hours in the boning department cutting hog shoulders. He described the incident, as follows:

Well, I came in, it was about 4:30. I sat around until about 5:00. I started setting up pipes, setting up my pipes. After I finished my pipes, I went to the break room, you know, and drank me a little soda pop, came back, started my work. You know, I got dressed, you know, ready for, you know, my work, because, you know, I don't be dressed doing – setting up pipes. Then I have to have to get my knives and everything ready.

So once I go every, you know, fully dressed ready for work, then I started working and just cutting shoulders and blades, you know, just doing my job and just pulling and cutting.

And sometimes what I do is whenever I would cut, you know, a shoulder, I'd take my knife and just throw it, you know, just cut and then just take a blade and just throw it. Instead of taking my hook and sling it like that, I just cut it, drop it down, take it off and just throw it like that (Demonstrating). . . .

. . . I was cutting shoulders and I just had a sharp pain. And as soon as I had the pain I just, you know, just stopped, and then I just went and I reported it to Eddie Hughes . . .

. . . It was a worse pain than usual . . .

Claimant testified that he was sent to Concentra and subsequently referred to OrthoArkansas. He testified that he hurt his right shoulder. He continued to work

on light duty until he was fired for unrelated problems on the job. He continues to have problems with his shoulder.

In regard to the hearing on March 7, he received a letter from his attorney's office stating that the hearing was on March 17th, not the 7th. He contacted his attorney's office to verify the date and was told that it was on the 17th and that is why he did not appear on March 7. He explained that notwithstanding the March 21 letter from his attorney, he did not have a family emergency that prevented him from attending the hearing but rather contacted his attorney between the 7th and 17th to verify the hearing and learned that it had been the 7th.

He explained that he kept his knives sharp most of the time but that when the hogs came out fast, the knife dulls making it more difficult to cut. He was not doing pipes when he hurt himself so he did not mention the pipes when he reported the incident. He explained that he had soreness every day, but recalled "out-of-the-ordinary pain" when he was cutting shoulders. He did not hear any popping or clicking or observe any swelling or reddening.

Mike Eilers was called to testify for the respondents. He explained that January 30, 2006, the date the First Report of Injury was filed, was the first date that claimant had reported shoulder problems or pain. He explained that Andrews was fired when he showed up to work under the influence of alcohol and that he would have been able to continue to work at his job but for that misconduct. He explained that the workers were not supposed to drop and catch, but if there was dropping and catching, it would be done with the left hand and not the right.

B. MEDICAL EVIDENCE

The medical records in this case reveal that claimant sought medical treatment for pain in his right shoulder while “cutting the blade from the hog.” He was treated conservatively with pain medication and physical therapy. On February 8, 2006, he was assessed with a possible rotator cuff strain and tear and referred for an MRI. The MRI was performed on February 17, 2006, revealing a complete rotator cuff tear of the supraspinatus and infraspinatus tendon with contraction. On March 7, 2006, he was examined by Dr. Hudson with OrthoArkansas. Dr. Hudson recommended arthroscopy to attempt to repair the rotator cuff tear. On April 10, 2006, Andrews was examined by Dr. David Collins. In his report, Dr. Collins notes that he does not have records from Dr. Hudson. He further opines that he “cannot understand how he could sustain a 2 tendon tear of the rotator cuff in the process of raising his hand and drawing a knife through pork tissue in the manner that he describes and with the force that he describes.”

C. COMPENSABILITY

Claimant contends that he sustained a compensable injury that is governed by the Arkansas Workers’ Compensation Act, Ark. Code Ann. § 11-9-101 et seq. Act 796 of 1993, as codified at Ark. Code Ann. § 11-9-102(4)(A) defines “compensable injury”:

- (i) an accidental injury causing internal or external physical harm to the body or accidental injury to prosthetic appliances...arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is “accidental” only if it is caused by a specific incident and is identifiable by time and place of occurrence.

The employee must prove by a preponderance of the evidence that he sustained a compensable injury. In addition, a compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D). "Objective findings" are those findings which cannot come under voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A)(i).

In the instant case, it is not disputed that the claimant reported right shoulder pain in January of 2006 while working for the respondents. It is equally clear from the medical evidence that objective medical evidence establishes the claimant's need for surgical treatment to his right shoulder. The primary dispute is whether claimant has established a causal connection between his shoulder injury and his employment. Claimant contends that his shoulder problem occurred when he was cutting shoulders from hogs.

While medical evidence is not required to show a causal connection, claimant must show proof of a causal relationship by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 235 Ark. 104, 357 S.W.2d 263 (1962).

In the instant case, the claimant immediately reported the onset of an unusual pain in his shoulder and sought medical attention. He was released to light duty work and returned to work until he was terminated for unrelated misconduct on the job. There is no evidence of any prior reports of shoulder problems. When conservative treatment failed, the claimant underwent an MRI and was diagnosed with a rotator cuff tear that requires surgery. The witnesses offered by claimant corroborate the strenuous nature of the work involved and the lack of prior specific complaints of right shoulder pain by the claimant.

The only evidence offered by the respondents is the testimony of the claimant's supervisor and Dr. Collins. The supervisor, Mike Eiler, testified that the claimant reported the injury and sought medical attention immediately after the incident. While he attempted to explain that employees were not supposed to use certain "drop and catch" procedures, he admitted that such procedures had been used. Dr. Collins did not dispute the diagnosis but rather opined that he could not understand how claimant's activities at work could have caused the injury. However, Dr. Collins' report clearly acknowledges that he did not have the benefit of Dr. Hudson's records. Moreover, his report fails to take into account the overwhelming testimony that claimant's job duties entailed much more than slicing parts of a hog with a knife.

After review and consideration of the testimony and medical records, I find that the preponderance of the evidence demonstrates that claimant's need for medical treatment to his right shoulder was causally related to a work related

incident of January 30, 2006, while the claimant was engaged in the performance of employment services and that the recommended surgical procedures by Dr. Hudson are reasonable and necessary treatment.

D. ADDITIONAL TEMPORARY TOTAL DISABILITY

Claimant is contending that he is entitled to additional temporary total disability benefits. The claimant is entitled to temporary total benefits if he can satisfy a two-prong test: (1) claimant must be within his healing period; and (2) completely incapacitated from earning wages. *Ark. Highway & Trans. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 459 (1994). In this case, the claimant was released to return to light duty work and would be working but for his termination from his employment for other reasons. Based on the preponderance of the evidence, I find that the claimant is not entitled to additional temporary total disability. However, I would note that if the claimant elects to have the surgical procedures recommended by Dr. Hudson, he may re-enter a new healing period for which he may be entitled to additional temporary total disability.

E. CONTROVERSION AND ATTORNEY'S FEES

Based on my review of the evidence in this case, I find that respondents have fully controverted payment of all additional medical and temporary total benefits. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory

attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein and all previous indemnity benefits paid in connection with the compensable right shoulder injury, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

F. COSTS OF PROCEEDINGS

Respondents have requested that claimant be found responsible for costs associated with the attempted hearing on March 7, 2007, which was rescheduled due to the claimant's non-appearance. Claimant testified that in regard to the hearing on March 7, he received a letter from his attorney's office stating that the hearing was on March 17th, not the 7th. He contacted his attorney's office to verify the date and was told that it was on the 17th and that is why he did not appear on March 7. Based on his testimony, I find that claimant's failure to appear was not intentional but rather a result of confusion caused by a mistake for which he should not be sanctioned. Therefore the request for costs is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on December 29, 2005, and at all other relevant times, including January 30, 2006.

3. The claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his right shoulder on January 30, 2006.
4. The applicable compensation rate for claimant is \$309.00 for TTD and \$232.00 for PPD, based on an average weekly wage of \$463.20.
5. The claimant was terminated for cause on February 17, 2006.
6. Claimant has failed to prove that he is entitled to additional temporary total disability benefits since he has been released to return to work.
7. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits in connection with the compensable injury to his right shoulder.
8. Respondents have controverted the compensability of the claim. Claimant is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded herein including any indemnity benefits previously paid, one-half to be paid by the respondents and one-half to be withheld from the claimant's award of benefits.
9. Although claimant's nonappearance required a postponement of the hearing originally set for March 7, 2007, the evidence demonstrates that claimant reasonably relied on communications from his attorney. Therefore, the claim for costs associated with the attempted hearing on March 7, 2007, is hereby denied.

AWARD

The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See, *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge