

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F603370

FRANCISCO PEREZ

CLAIMANT

KEITH SMITH CO., INC.

RESPONDENT EMPLOYER

UNION STANDARD GROUP

RESPONDENT CARRIER

ORDER AND OPINION FILED MARCH 16, 2007

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE SHERRI ARMAN MCDONOUGH, Attorney at Law, Hot Springs, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing in Hot Springs, Arkansas on February 9, 2007. A prehearing conference was held on December 12, 2006 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable injury on January 17, 2006.
2. The temporary total disability rate is \$390.

The claimant contends that he sustained a right shoulder injury on January 17, 2006, while in the course and scope of his employment. The claimant contends some medical benefits and some temporary total disability benefits were paid. The claimant contends that he is entitled to additional medical benefits and temporary total disability

benefits from March 21, 2006 through June 15, 2006, and attorney's fees.

Respondents contend that medical benefits have been paid or are being paid. A payout of benefits was to be sent to the claimant's counsel. Respondents contend that it has no off-work slips from treating physicians taking the claimant off work from March 21, 2006, forward. Respondents contend that both full duty and light duty work was available but the claimant did not return to work and he was subsequently discharged.

ISSUES TO BE LITIGATED

1. Temporary total disability benefits.
2. Attorney's fees.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable injury on January 17, 2006.
2. The temporary total disability rate is \$390.
3. The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from March 21, 2006 through June 15, 2006.
4. The claimant's attorney is entitled to the maximum statutory attorney's fee on

benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

DISCUSSION

The claimant, 50 years of age, worked as a rancher on a farm with chickens. The claimant was a tractor driver and had six farms under his responsibility. The claimant had been employed with the respondent for one year and three months. He was also provided housing and his wife worked for the respondent as well. The claimant was provided a handbook written in English when he began his employment and he does not speak or read English.

According to the claimant, he caught his right foot in a chain as he was coming out of Tent #1, where the chickens were housed and he fell, hurting his arm, hand and shoulder. Chalky, one of the supervisors, came by shortly after the fall and the claimant advised him he was going to the hospital. The claimant was told which hospital to go to by the employer. The claimant spoke with Donna from the employer's office about his medical bills and he was advised to file his bills with AFLAC, his supplemental insurance policy. The claimant continued to work with one hand and his children helped him perform his job.

The claimant sought treatment with Dr. Carlos Rivas, as he speaks Spanish. The claimant eventually saw Dr. Kevin Rudder and he performed surgery. The claimant testified that he continues to have problems with his shoulder and has not been released to return to work.

The claimant testified he was fired from his employment about the middle of

March after being gone to Mexico for one week. According to the claimant, Donna from the employer's office told him he had one week of vacation and told him what week to take off. The claimant testified that he also told Chalky that he would be off. The claimant's wife and children handled his chores while he was gone. Curtis, the pullet manager for the respondent employer, fired the claimant upon his return for taking time off.

Arvis Neighbors, known as Chalky, is a service tech for the respondent employer. Mr. Neighbors goes out to visit the farmers one to three times per week and tells them what they need to do and he was the claimant's immediate supervisor. Mr. Neighbors' stay at the farms depended on what was going on with the chickens. Mr. Neighbors was not aware of any problems with the claimant getting his work done following his fall at work and also testified that the claimant did not tell him he was taking a week off and going to Mexico. Mr. Neighbors confirmed the claimant's wife and children performed the claimant's normal tasks; however, the children were not supposed to be working. Mr. Neighbors confirmed that Donna was the human resource person in the office and is no longer employed for the respondent. Mr. Neighbors testified that the claimant would have to apply for vacation through either him or Curtis and Donna would have to go through Curtis before allowing vacation.

Curtis Abernathy, pullet manager for the respondent, testified that he learned of the claimant's injury three or four days after he had gone to the emergency room. The claimant returned to work one-handed and there was no reduction in his workload, since he had no restrictions identified on his work release. Mr. Abernathy went to the farm and learned the claimant had gone to Mexico without clearing that leave with his

supervisors. The claimant was fired for being gone eight days without notifying management. Mr. Abernathy verified that Donna, the human resource person, would have to consult him before allowing vacation.

The claimant had asked for additional medical benefits but the parties agreed that issue could be worked out and no determination was actually needed at this time. Respondents were providing a payout of benefits and the claimant was also going to provide any outstanding bills to respondent.

The central issue is whether the claimant is entitled to temporary total disability benefits from March 21, 2006 through June 15, 2006. Respondents began paying temporary total disability benefits on June 16, 2006 and are continuing to pay those benefits.

In order to be entitled to temporary total disability benefits, the claimant must remain in his healing period and be totally unable to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In the present case, I find the claimant has proven by a preponderance of the evidence that he remained in his healing period and unable to earn wages from March 21, 2006 through June 15, 2006. The claimant had only seen a general practitioner by March 21, 2006 and he was trying to work one-handed. It was only after he found an attorney to represent him that he was able to be referred to an orthopedic specialist, Dr. Kevin Rudder. Dr. Rudder ordered a MRI and a rotator cuff tear was revealed. Dr. Rudder also ordered nerve conduction studies and an arthroscopic rotator cuff repair was scheduled. The claimant underwent a rotator cuff repair on September 11, 2006.

Dr. Rudder was asked his opinion about the claimant's ability to work for the

period of March 20, 2006 through June 16, 2006, and he opined:

Although I first saw Francisco Perez on June 16, 2006, from my examination of Mr. Perez on that date and from my review of his x-ray and MRI films, it is my opinion with a reasonable degree of medical certainty that Mr. Perez was not able to work for the time period March 20, 2006 until June 16, 2006 due to the rotator cuff tear in his right shoulder. (Cl.'s Exh. No. 1, p. 11.)

I give Dr. Rudder's opinion great weight since he is the specialist who has seen, treated and operated on the claimant now. Dr. Perez, a general practitioner, had returned the claimant to work on January 26, 2006, but had not discovered the extent of the claimant's problems. The claimant testified that he returned to work in January but was working with one arm and a splint and his medical records support his testimony that he was continuing to have pain. The claimant was a Spanish speaking individual and presented a plausible account of his understanding from the human resource person of respondent, Donna, that he was allowed a week's vacation after working for over one year. I simply was not persuaded that he left his employment without permission. I find that the credible testimony of the claimant and the medical opinion of Dr. Kevin Rudder were persuasive in establishing that the claimant remained in his healing period and was unable to work from March 21, 2006 through June 15, 2006.

ORDER

The claimant has proven by a preponderance of the evidence that he remained in his healing period and was unable to earn wages from March 21, 2006 through June 15, 2006.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be

paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

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.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**