

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F412790 & F500883

DAVID L. REYNOLDS, EMPLOYEE	CLAIMANT
ASHLEY AIR SERVICE, EMPLOYER	RESPONDENT
TRAVELERS INSURANCE CO., CARRIER	RESPONDENT

OPINION FILED FEBRUARY 7, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on November 9, 2006, at Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE NEAL L. HART, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

ISSUES

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable injury pursuant to Ark. Code Ann. §11-9-102.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on July 15, 2003 and August 18, 2004 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$453.00/\$340.00, in the event this claim is found to be compensable. Medical expenses have been paid by the claimant's group carrier, Qual Choice.

The claimant contends he injured his arm (elbow) when he struck a control lever in the cockpit of his airplane. He contends this was a specific incident or alternatively, the result of a gradual onset. He seeks payment of medical expenses, temporary total disability benefits from January 15, 2006 to May 1, 2006 and attorney's fees.

The respondents contend the claimant did not suffer an injury arising out of and in the course of his employment.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript along with the claimant's February 15, 2006 deposition, incorporated by reference. Claimant's objection to respondents' attempt to raise a new issue at the hearing was sustained. The respondents did not identify "notice of injury", under Ark. Code Ann. §11-9-701, as an issue in their prehearing questionnaire. Even if the issue had been raised prior to the hearing, I would find the claimant's failure to promptly give notice to the carrier excusable under the circumstances of this case. It should be noted that it was the claimant's idea to buy workers' compensation coverage. He paid half of the premium and the owner, Philip Baugh, a farmer, paid the other half. The carrier never instructed the claimant how to file a claim and there was no personnel officer or supervisor to handle insurance claims.

The claimant was the only witness to testify at the hearing. He was an articulate witness who seemed an affable gentleman and a highly motivated employee. A written statement from co-worker, Lewis Gober, was also introduced corroborating the claimant's history of injury, however there are no specific dates of injury. The statement does mention that the second injury occurred in August, 2004.

The claimant, age 50 (D.O.B. October 29, 1956) is a pilot employed as a crop duster. He testified his job required him to work at a frantic pace during the flying season and he delayed seeking medical treatment until the off season.

The claimant provided photographs of the cockpit of the plane depicting a lever behind his chair at the level of his elbow. On July 15, 2003, the claimant struck his "funny bone" on the lever. He experienced an electrical sensation in his right arm and told a co-worker, Lewis Gober, about the incident. He developed tingling, numbness and loss of grip strength in his right hand. He thought the symptoms would abate and did not seek medical treatment. Mr. Gober installed a rubber hose

over the lever to act as a cushion.

The company obtained a new airplane with the same type of lever. On August 18, 2004 the claimant struck his elbow again on the lever and again told Lewis Gober about the incident. He developed cramping and shooting pains in his arm.

Three months later, the claimant contacted the insurance agent who sold him the workers' compensation policy in order to find out how to pursue a claim. The insurance agent notified the carrier in a letter dated November 23, 2004. The claimant reported the first injury happened on July 15, 2003.

In January, 2006 Dr. Siems performed ulnar nerve transposition surgery for the claimant's right arm. A second surgery was performed in December, 2006. The claimant has returned to work.

On cross-examination, counsel emphasized the fact that the claimant never notified his employer, Phil Baugh of the injury (Depo. p. 23, Tr. p. 33). Mr. Cuffman also noted that the claimant cannot recall the exact date of injury (Depo. p. 16, 26-31/Tr. p. 35-43). And there is some evidence that the claimant struck the lever on more than two occasions, however, no testimony was presented about the rapidity of his arm movements while flying (Depo. p. 14).

MEDICAL EVIDENCE

The claimant gave his physicians a history of injury consistent with his testimony. The medical records also confirm the claimant's decision to delay medical treatment until the off-season.

Diagnostic testing (EMG/NCV studies on October 20, 2004) confirmed cubital tunnel syndrome. The claimant did not respond to conservative treatment and surgery was performed on January 23, 2006. He was released to return to work on May 1, 2006, however, he remained symptomatic and Dr. Siems recommended repeat diagnostic testing.

FINDINGS AND CONCLUSIONS

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be strictly construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined by Ark. Code Ann. §11-9-102, by a preponderance of the

evidence of record, which means “evidence of greater convincing force,” Smith v. Magnet Cove Barium Corporation, 212 Ark 491, 206 S.W.2d 442 (1947):

- 1) proof that the injury arose out of and in the course of employment
- 2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- 3) proof establishing the injury by objective medical evidence
- 4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for medical treatment.

Compensation must be denied if the claimant fails to prove any one of these requirements. Mikel v. Engineering Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In considering the “specific incident” element of proof, the court has held that “the statute only requires that the claimant prove that the occurrence of the injury is capable of being identified”, Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001).

Based on the photographs, the credible testimony of the claimant (corroborated by a co-worker and the histories of injury given to his physicians), I find the claimant has sustained a compensable injury. Although the claimant stated he had trouble recollecting the exact date, the time period can be established by the sale of the airplanes and the need to fit the lever with a rubber hose to act as a cushion for his elbow. The time is also established by the date given to the insurance agent and the date mentioned in Mr. Gober’s written statement.

1. The Workers’ Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on July 15, 2003 (F412790) and August 18, 2004 (F500883) at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$453.00/\$340.00.

2. The claimant has proven by a preponderance of the credible evidence that he sustained compensable injuries, caused by specific incidents, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. The respondents are directed to pay all medical expenses within thirty days of receipt pursuant to Rule 30.
4. Respondents are directed to reimburse Qual Choice, claimant's group insurance carrier for all expenses paid on this claim.
5. The claimant has proven by a preponderance of the evidence of record that he is entitled to temporary total disability benefits from January 15, 2006 to May 1, 2006 as the claimant was in his healing period and had not yet returned to work.
6. The respondents are directed to pay the court reporter's fees and expenses associated with transcribing this hearing within thirty days pursuant to Commission Rule 20.
7. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21,1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. 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 A.C.A.

§11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge