

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F604170**

<b>KEVIN D. STEWART, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>GEORGIA PACIFIC CORPORATION, EMPLOYER</b>	<b>RESPONDENT</b>
<b>SEDGWICK CLAIMS MANAGEMENT, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 11, 2007**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on April 13, 2007 at Monticello, Drew County, Arkansas.

Claimant represented by the HONORABLE BILLY HUBBELL, Attorney at Law, Crossett, Arkansas.

Respondents represented by the HONORABLE SUSAN M. FOWLER, 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. All other issues are reserved.

At issue is whether or not the claimant sustained a compensable injury as defined by 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 January 12, 2006 at which time the claimant was earning sufficient wages to entitle him to the maximum compensation rate in the event this claim is found to be compensable. The claimant received FMLA benefits as well as short term disability benefits and credit disability insurance.

The claimant contends he injured his left shoulder at work on January 12, 2006 in a specific incident resulting in rotator cuff surgery on February 27, 2006 by Dr. Charles Pearce. He seeks payment of medical expenses, temporary total disability from February 25, 2006 to June 10, 2006 and attorney's fees.

The respondents have controverted this claim in its entirety. The respondents contend the claimant cannot meet his burden of proving he sustained a compensable injury arising out of and in the course of his employment, caused by a specific incident identifiable by time and place of occurrence pursuant to Ark. Code Ann. §11-9-102(4)(A)(I) and §11-9-102(4A)(ii).

The following were submitted without objection and comprise the evidence of record: The parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant and his wife, Nancy, and Roy Coulter, the claimant's supervisor. I did not find Mr. Coulter to be a credible witness.

The claimant, age 42 (D.O.B. June 26, 1964) has worked for the respondent-employer since 1989. He injured his left shoulder on January 12, 2006 while performing his job as a debarker operator, (Tr. p. 6-9). The claimant admitted that he did not report an injury that day, assuming that he had just strained a muscle. The claimant finished his shift and was scheduled to be off work the next two days. The shoulder injury remained painful and caused sleep disturbance. When the claimant returned to work, he reported the injury to his supervisor, Roy Coulter. Mr. Coulter told him he didn't know how to "write it up." The claimant spoke with another supervisor and was told the same thing, (Tr. p. 10-11).

At his own expense, the claimant saw Dr. Charles Pearce. An MRI scan showed a torn rotator cuff injury.

The Georgia-Pacific safety manager, John Tappen, then sent the claimant to Dr. Walsh on February 20, but Dr. Walsh couldn't make any diagnosis without the MRI results. The claimant then filed a grievance through his union on March 9, 2006 against his employer. The complaint was characterized as a failure to send an employee to the doctor for an on-the-job injury. The grievance was denied since the employer sent the claimant to Dr. Walsh, the company physician.

The claimant returned to Dr. Pearce who performed rotator cuff surgery. Although the claimant was released to return to work on June 5, 2006, the employer waited for Dr. Pearce's records before allowing him to return to work on July 10, 2006, (Tr. p. 17).

On cross-examination, counsel emphasized that the claimant had shoulder problems prior to 2006. The claimant explained that the incident at work was different in that it caused unrelenting pain and adversely affected his range of motion, (Tr. p. 28). Counsel also pointed out that the claimant was unsure of the date of injury in his deposition testimony. Although he thought the accident happened before Christmas, the claimant explained that the date of injury and doctor appointments were written on a home calendar kept by his wife (Tr. p. 19-22/28-33). The claimant conceded that his employer's policy was to report injuries immediately and that he did not ask his supervisor to send him to a doctor, (Tr. p. 18/24-25).

Nancy Stewart, a school teacher, testified that she maintains a household calendar to keep up with family activities for their three sons. She recorded the date of injury as January 12, 2006 and kept the claimant's doctor's appointments on the home calendar. Mrs. Stewart also filled out any paperwork in connection with this injury (doctor's questionnaire, FMLA, short term disability). Mrs. Stewart explained that their group carrier, Blue Cross Blue Shield refused to pay any medical expenses on this claim.

Roy Coulter has worked for the respondent-employer for seven years. He became woodyard supervisor three years ago. Mr. Coulter testified the claimant never reported a specific work-related injury. The claimant told him in January that he was going to the doctor because he injured himself "over-time" pulling on logs. An incident report was not generated until the claimant filed a grievance on March 9, 2006. Mr. Coulter used an injury date of February 11, 2006, however, he was unsure when the claimant reported an injury. The report indicates, "employ (sic) stated he hurt his shoalder (sic) over time pulling on logs." Mr. Coulter did not know who sent the claimant to the company physician, Dr. Walsh.

The safety manager who sent the claimant to the company doctor was not called to testify.

### **MEDICAL EVIDENCE**

The claimant saw orthopaedic surgeon, Dr. Charles Pearce on January 26, 2006. His report shows a history of shoulder pain "over the last year or so without injury" with "weakness when using

a hook when the wood becomes stuck in the debarking machine.” In his report of February 14, 2006, Dr. Pearce indicated the MRI scan revealed a rotator cuff tear. Dr. Pearce excused the claimant from work February 13 and February 14, 2006 and allowed him to return to work on February 15, 2006 with no restrictions. On February 17, 2006 Dr. Pearce recommended light duty (one arm duty) until his surgery was performed on February 27, 2006. Dr. Pearce excused the claimant from work February 27, 2006 to March 7, 2006 following surgery.

Dr. Pearce’s Operative Report of 2-27-06:

Mr. Stewart is a 41-year-old right-handed man who has had left shoulder pain off and on for almost a year. There was not a definite history of injury, although he apparently at one point told one of his supervisors at his place of employment which is Georgia-Pacific that he had the onset of left shoulder pain after a possible injury. The pain has persisted over the past year... An MRI scan has been done and showed a near complete tear of his rotator cuff supraspinatus...

The claimant was allowed to return to work at light duty from March 8, 2006. In follow-up reports, Dr. Pearce prescribed physical therapy exercises and released the claimant to return to work at regular duties on June 5, 2006.

**DOCUMENTARY EVIDENCE**

Dr. Pearce signed forms on February 27, 2006 to enable the claimant to draw short term disability benefits (The Nelson Trust) and answered questions about the history of injury.

Question:  
Is condition due to injury or illness arising out of employment?

Answer:  
Unknown

Question:  
Date symptoms first appeared or accident happened.

Answer:  
(Illegible) 2005

Dr. Pearce excused the claimant from February 14, 2006 to May 27, 2006.

### **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.

The respondents contend the claimant cannot prove he sustained a compensable injury arising out of and in the course of his employment.

“Arising out of the employment” refers to the origin or cause of the accident and the phrase “in the course of employment” refers to the time, place and circumstances under which the injury occurred. Gerber Products v. McDonald, 15 Ark. App. 226, 692 S.W.2d 879 (1985).

The test for arising out of the employment requires that a causal connection exist between the injury and the employment. The injury must be a natural or probable consequence or incident of the employment and a natural result of one of its risks. J & G Cabinets v. Hennington, 269 Ark. 789, 600 S.W.2d 916 (Ark. App. 1980).

The claimant testified his work on the debarking machine caused pain in his left shoulder as he held a hook in his non-dominant left hand to dislodge lumber stuck in the machine. This history of injury is also found in the claimant's medical records and there is no evidence showing the claimant injured his shoulder in any other accident. Accordingly, I find the claimant has proven by a preponderance of the evidence that his injury arose out of and in the course of his employment.

The claimant has also met the second and third elements of proof as the MRI scan showed objective evidence of a rotator cuff tear. The claimant testified that his shoulder pain became severe in January, 2006, causing sleep disturbance and loss of range of motion, resulting in disability and the need for medical treatment. The claimant has worked for the respondent-employer for the last eighteen years and there is no evidence that the claimant missed time from work or required medical attention for a shoulder injury prior to January, 2006.

Finally, I find the claimant has met his burden of proving that the injury was caused by a specific incident in January, 2006. The claimant is not required to identify the exact time and date of the accident Edens v. Superior Marble & Glass, 346 Ark. 487, 58 S.W.3d 369 (2001). In this case, the employer refused to allow the claimant to complete an accident report form or AR-N pursuant to Ark. Code Ann. §11-9-701, for either a gradual or a specific injury. As I interpret the evidence, the incident in January 2006 was either a new injury or an aggravation of a pre-existing condition.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on January 12, 2006 at which time the claimant was earning sufficient wages to be entitled to a compensation rate of \$488.00/\$366.00.
2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, 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 as he was not performing employment services at the time of injury.

3. The respondents are directed to pay all medical expenses incurred through Dr. Pearce's treatment within thirty days of receipt pursuant to Rule 30.
4. The respondents are directed to pay temporary total disability benefits from February 25, 2006 to June 10, 2006 as the claimant remained in his healing period, unable to earn wages.
5. Respondents are directed to pay the court reporter's fees and expenses pursuant to Commission Rule 20.
6. 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