

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F703269

DAMON WILSON	CLAIMANT
WAL-MART ASSOCIATES, INC.	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 5, 2007

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN BROOKS, Attorney, Fayetteville, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on September 11, 2007, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on June 13, 2007. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On June 14, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The AR-C was signed by the claimant on March 27, 2007, received at the Commission on April 2, 2007, and a letter from Carl Bayne was sent to the parties on April 3, 2007.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's left shoulder injury.
2. Related medical.
3. Lack of notice until the filing of the AR-C on March 27, 2007.

In regard to the foregoing issues the claimant contends that he was injured on June 14, 2006. His left shoulder was injured when he was forced to overuse it as a result of his right shoulder injury.

In regard to the foregoing issues the respondents contend that the claimant did not sustain an injury arising out of and in the course of his employment as defined by the Arkansas Workers' Compensation Act. The respondents also contend that the first notice they have of his alleged injury is the filing of the Form AR-C.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No. 1 and the prior opinion dated May 17, 2007, marked Commission's Exhibit No. 2. The claimant submitted medical records marked Claimant's Exhibit No. 1. The claimant requested that the prior transcript in case number F409384 be incorporated by reference.

DISCUSSION

The claimant testified that he began working for the respondent on September 3, 1996. The claimant testified and a hearing has previously been held as to his right shoulder injury

which occurred on June 1, 2004, while working for the respondent. The claimant agreed that he had surgery on his right shoulder performed by Dr. Park. The claimant testified that Dr. Park operated on his right shoulder on October 28, 2005. The claimant testified that between June 1, 2004, the date of his injury and his surgery he continued to work for the respondent. The claimant testified that at the time of his right shoulder injury he was working as an order filler and routinely lifted up to seventy-five pounds or more during his shift. The claimant testified that after his right shoulder injury and he was seen by the company doctor he was placed on light duty for a three-week period of time and then returned to his regular order filler job. The claimant testified that due to his right shoulder problems he had to overcompensate by using his left arm and shoulder more to do the required lifting. The claimant testified that he worked approximately thirteen months after his right shoulder injury doing the order filler job. The claimant testified that about two months prior to his right shoulder surgery he was switched to being a PR driver on the receiving dock.

The claimant testified that a PR is a battery operated forklift which he operated with his right hand on a throttle and his left hand he used to steer. The claimant testified that following his right shoulder surgery he was off for approximately three months but then returned to work for the respondent as a PR driver. The claimant testified that upon his return to work his right shoulder was still recovering and he was continuing to see

Dr. Park for follow up. The claimant testified that after his right shoulder injury he started using his left shoulder and arm more in order to do his work for the respondent. The claimant testified that his left shoulder began to be sore and he thought it was just temporary since it was not his dominate arm. The claimant testified that the soreness and discomfort in his left shoulder would not go away and at one of his appointments with Dr. Park he mentioned that his left shoulder was also hurting. The claimant testified that his left shoulder started hurting six or seven months after he hurt his right shoulder. The claimant testified that Dr. Park operated on his left shoulder on November 7, 2006. The claimant testified that he had never had problems with his left shoulder prior to his right shoulder injury. The claimant testified that he is still working for the respondent as a PR driver. The claimant testified that he has never had any accidents or injuries outside work to his left shoulder.

On cross examination, the claimant agreed that on June 1, 2004, when he injured his right shoulder it was a specific incident of picking up some oil and placing it on the line. The claimant testified that as an order filler which was the job he had when he injured his right shoulder he handled and lifted all sorts of merchandise. The claimant agreed that he was not constantly throwing things onto the conveyor belt while he was filling orders because he would have to go from one slot to the other to get the merchandise to put on the conveyor belt. The claimant was asked about driving the electric forklift and the claimant explained that

he would steer with his left hand. The claimant testified that there is not a steering wheel but it is more like an arm with a ball at the end that would maneuver the forklift. The claimant testified that once he was assigned to the PR driver job he did minimal lifting. The claimant testified that while doing the order filler job he would be lifting about six hours a day out of an eight-hour shift. The claimant was asked about Dr. Parks' medical note dated June 14, 2006, and agreed that this was the first time that there was any mention of a left shoulder problem. The claimant testified that there was not a specific injury to his left shoulder it was just something that developed over time. The claimant was asked if he ever reported his left shoulder problem to his supervisor and the claimant responded, "No." The claimant agreed that he did not fill out any forms when he first began to develop left shoulder problems. The claimant also agreed that prior to his right shoulder surgery he would use his left hand and arm doing personal things as well as his work requirements. The claimant testified that after he developed his right shoulder problems and he had to use his left arm more he would use his right arm and shoulder to balance items because they were bulky and heavy. The claimant testified that although he might on occasion use both arms he used his left arm more. The claimant testified that except for the time he has missed due to his surgery he had not missed any time from work.

On redirect examination, the claimant was asked why he would mow his lawn with his left hand and the claimant responded that it

was because his right shoulder hurt too bad. The claimant testified that he did a lot of things with his left hand because his right shoulder was injured after his injury. The claimant testified that he had initially been placed on light duty but then it was determined that he did not have a work injury, therefore he was returned to regular duty. The claimant testified that he has not required or asked for modifications on his PR driving job because the respondent has contended that his left shoulder problems are not job related, therefore they are not compelled to have to provide modifications if he requested them. The claimant testified that at the time he was being treated for his right shoulder the respondents had denied benefits for him even though he had reported his right shoulder injury to his supervisor. The claimant agreed that a hearing was held on the compensability of his right shoulder on March 27, 2007, and at that time no benefits were being paid to him by the respondents for his right shoulder problems. The claimant explained that driving the PR with his left hand required quick motions because he would have to weave in and out of trucks and sometimes it would jar his machine. The claimant agreed that driving the PR involved movement in his left shoulder. The claimant was asked about his lifting requirements while driving the PR and the claimant explained that there would be times when a case would be on top of a pallet and he would have to go pull the case off and pull the pallet off so he could pick it up. The claimant testified that this did not happen often although it seems

to be happening more now with the new changes at the respondent's warehouse.

On recross examination, the claimant was asked if his left shoulder problems felt the same as his right shoulder problems and the claimant responded, "No, because this one (indicating to his right) was a single incident." The claimant testified that he experienced throbbing with both shoulders.

The medical records set forth that the claimant began being treated by Dr. Park on September 29, 2004, for his complaints of right shoulder pain. As testified to, the claimant underwent right shoulder surgery performed by Dr. John Park on October 28, 2005. Prior to the claimant's surgery Dr. Park had opined in a note dated September 7, 2005, that if the claimant had to undergo right shoulder surgery he would estimate that he would be off work for approximately two weeks and then return to one arm duty status noting that it would take a number of months to rehabilitate the claimant's right shoulder. Following the claimant's right shoulder surgery Dr. Park followed him for monitoring and then on January 20, 2006, Dr. Park released the claimant to return to work with no restrictions. On June 14, 2006, the claimant was seen by Dr. Park for follow up for his right shoulder reconstruction surgery. The claimant reports and the doctor notes that the claimant's left shoulder is becoming more symptomatic and painful. Dr. Park writes that upon examination the claimant has some increased translation anteriorly and inferiorly with a positive apprehension sign. Dr. Park opines that the use of the claimant's left arm while having to

withhold the right side pre and post operatively he has progressed to gradual instability on this side. Dr. Park writes that the claimant's shoulder may have to be considered for reconstruction if his problem continues noting that the claimant reports that his left shoulder feels almost identical to his right shoulder and actually hurts worse. Dr. Park writes on September 13, 2006, that the claimant's symptoms are increasing as to his left shoulder and he has multiple subluxation episodes and a significant amount of soreness. Upon examination, Dr. Park notes that the claimant has a definite anterior inferior slippage with his left shoulder. The doctor notes that since the claimant has had such a good result from his right shoulder he is desirous of proceeding with reconstruction surgery for his left side. Dr. Park operated on the claimant's left shoulder to repair his anterior instability of his left shoulder. On November 28, 2006, Dr. Park writes that the claimant has been seen following his left shoulder reconstruction surgery and it is noted that he is healing well and the claimant was instructed to begin range of motion passively and actively for a three-week period then to begin physical therapy. Dr. Park recommended that the claimant do no heavy repetitive lifting but can do light duty work. On January 12, 2007, Dr. Park returned the claimant to full duty work except no heavy lifting. In a note dated January 17, 2007, Dr. Park returned the claimant to full duty with no restrictions. The medical records set forth that the claimant was seen by Dr. Park on February 16, 2007, and April 6, 2007, for follow up after his left shoulder surgery.

After a complete review of the evidence presented in this matter, I find that the claimant has proven by a preponderance of the evidence that he sustained a gradual onset overuse injury to his left shoulder while working for the respondent. The claimant has testified and it has been previously found that the claimant sustained a sudden onset type injury to his right shoulder while working for the respondent (see Commission's Exhibit No. 2). In the prior transcript which has been incorporated by reference as well as in the opinion dated May 17, 2007, the medical records set forth that the claimant began being seen for his right shoulder problems at the Lowell Clinic and was placed on restrictions which severely limited the use of his right arm and shoulder. It is also noted that after the claimant's right shoulder surgery on October 28, 2004, when he was returned to work it was with one armed duty only with a note that would take several months to completely rehab his right shoulder. The claimant has testified that due to the limitations of his right shoulder he had to overcompensate and use his non dominate left arm and shoulder to carry out the work that he was performing for the respondent. The claimant has testified that the filler job which he was originally hired to perform for the respondent required lifting up to seventy-five pounds or more on a regular basis during his shift. The claimant estimated that during his shift he would be lifting approximately 80 percent of the time and with limited use of his right arm he had to put more effort in with his left arm and shoulder to perform his work. The claimant testified that even after he was transferred to the PR

driver job approximately two months prior to his right shoulder surgery on October 28, 2005, he had been performing the filler job for approximately thirteen months using mainly his left arm and shoulder. The claimant testified that his left arm gradually began to become symptomatic and initially he thought it was just sore since it was not his dominate arm. The medical records set forth and the claimant testified that he first mentioned his left arm problems to Dr. Park at a visit when he was being seen for his right shoulder on June 14, 2006. The claimant's left arm problems did not resolve, therefore, after examination Dr. Park recommended left shoulder surgery since the claimant's right shoulder surgery had been so successful. Dr. Park in his September 13, 2006, office note indicates that the claimant has anterior inferior slippage in his left shoulder and surgery was recommended. Dr. Park performed left shoulder reconstruction surgery on November 28, 2006. The respondents, therefore, should pay for all reasonable and necessary medical for this claimant's left shoulder compensable injury. The claimant has testified and the records set forth that the claimant did not report to his supervisor or to anyone at the respondent's business that he had a left shoulder problem. The claimant has testified that he did not ask for any accommodation at his work place for his left shoulder and he did not talk to his supervisors about having left shoulder problems. The records set forth that an AR-C was signed by the claimant on March 27, 2007, and a letter was sent out to the respondent notifying them of the claimant's left shoulder claim on April 3, 2007. I find, therefore, that the

respondents did not have notice of the claimant's claim for a left shoulder injury until April 3, 2007. Therefore, the respondents will not be liable for any benefits prior to April 3, 2007, for this claimant's compensable left shoulder injury.

FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.

2. On June 14, 2006, the relationship of employee-employer-carrier existed between the parties.

3. The AR-C was signed by the claimant on March 27, 2007, received at the Commission on April 2, 2007, and a letter from Carl Bayne was sent to the parties on April 3, 2007.

4. The claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury while working for the respondent. See discussion above.

5. The respondents did not get notice of the claimant's left shoulder claim until April 3, 2007. See discussion above.

6. The respondents should pay for all reasonable and necessary medical treatment for this claimant's compensable left shoulder injury subsequent to April 3, 2007.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable left shoulder injury.

The respondents should pay for all reasonable and necessary medical treatment for this claimant's left shoulder injury subsequent to April 3, 2007.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE