

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F510118/F613223/F801356

| | |
|--|---------------|
| JUAN GARCIA, Employee | CLAIMANT |
| CROSSLAND CONSTRUCTION, Employer | RESPONDENT #1 |
| ZURICH AMERICAN INSURANCE COMPANY, Carrier | RESPONDENT #1 |
| CNA INSURANCE COMPANY | RESPONDENT #2 |

OPINION FILED SEPTEMBER 9, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

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

Respondent #1 represented by DAVID JONES, Attorney, Little Rock, Arkansas.

Respondent #2 represented by FRANK NEWELL, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 30, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 28, 2008, and a pre-hearing order was filed on May 29, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Claimant suffered a compensable injury to his left hand and elbow on September 1, 2005 while respondent #1 was the workers' compensation carrier (F613223).
3. Claimant suffered a compensable injury in the form of bilateral carpal tunnel syndrome on or about February 22, 2005 while respondent #1 was the workers' compensation carrier (F510118).
4. Respondent #2 was the workers' compensation carrier on January 15, 2008.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injuries to claimant's left and right upper extremities and neck.
2. Liability between the compensation carriers for temporary total disability benefits subsequent to January 15, 2008.
3. Claimant's entitlement to medical treatment for his left and right upper extremities and neck injury.

At the time of the hearing claimant clarified his request for compensation benefits to indicate that he is not currently seeking benefits for an injury to his right hand. Instead, at this time claimant is only seeking benefits with respect to injuries to his left wrist, left shoulder, right shoulder, and neck. In addition, respondent #1 requests reimbursement from respondent #2 for temporary total disability benefits paid to the claimant subsequent to January 15, 2008.

The claimant contends that his left and right upper extremities and neck injuries are either a continuation of his prior compensable injuries which occurred while respondent #1 was the carrier or that the injuries are the result of an injury which occurred on January 15, 2008 while respondent #2 was the carrier. Claimant requests payment of medical benefits associated with his compensable injuries.

Respondent #1 contends that claimant's left and right upper extremity and neck injuries are the result of a new injury which occurred on January 15, 2008 while respondent #2 was the carrier; therefore, respondent #1 is not liable for payment of compensation benefits. Respondent #1 also contends that it has continued to pay claimant temporary total disability benefits subsequent to January 15, 2008. In the event respondent #2 is liable for a compensable injury, respondent #1 requests reimbursement for temporary total disability benefits after January 15, 2008 from respondent #2.

Respondent #2 contends that claimant did not suffer a compensable injury on or about January 15, 2008 while it was the workers' compensation carrier.

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 witness and to observe his demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 28, 2008, and contained in a pre-hearing order filed May 29, 2008, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder.

3. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to his left shoulder and neck on January 15, 2008. Respondent #2 is liable for payment of compensation benefits associated with this compensable injury.

4. There is insufficient evidence indicating that claimant suffered a new injury or an aggravation of a pre-existing condition to his left elbow and left wrist on January 15, 2008. Therefore, respondent #1 remains liable for compensation benefits attributable to those prior compensable injuries.

5. There is insufficient evidence indicating that claimant was taken off work as a result of his left shoulder and neck injuries which occurred on January 15, 2008; therefore, respondent #2 is not liable for payment of temporary total disability benefits and respondent #1 is not entitled to reimbursement of temporary total disability benefits paid to claimant subsequent to January 15, 2008.

FACTUAL BACKGROUND

_____The claimant is a 51-year-old man who began working for the respondent on

November 8, 2004, as a carpenter. Claimant performed various job duties for the respondent including building forms for concrete, tying rebar, pouring concrete, and welding.

At some point in time the claimant began having problems with his right hand and his right shoulder. Claimant was sent by respondent #1 to Max Beasley, a nurse practitioner, for treatment. In addition, claimant was also evaluated by Dr. Moffitt in that same clinic. Dr. Moffitt ordered nerve conduction studies which revealed bilateral carpal tunnel syndrome, worse on the right than the left. Claimant was referred by Dr. Moffitt to Dr. Sites for treatment of his bilateral carpal tunnel syndrome. Claimant eventually underwent a carpal tunnel release by Dr. Sites on April 20, 2005. Respondent #1 accepted as compensable claimant's bilateral carpal tunnel syndrome and paid compensation benefits.

Following claimant's surgery on April 20, 2005, he continued to have complaints of right wrist pain and he was sent by respondent #1 to Dr. Tang for an evaluation. Claimant underwent surgery by Dr. Tang on his right wrist on August 7, 2006 for a right ulnar impaction syndrome with ulnar-sided wrist pain. Subsequent to that surgical procedure the claimant continued to have complaints involving his right wrist for which he received medical treatment from Dr. Tang which included a brace, medication, and work restrictions.

Claimant was released by his treating physicians to return to work for the respondent primarily with restrictions of using his left arm only. As a result, claimant eventually complained of pain involving his left hand and elbow. These conditions were also accepted as compensable by respondent #1. Claimant was diagnosed as suffering from left lateral epicondylitis and left median neuropathy. Claimant was initially treated conservatively with a splint, injection, medications, and work restrictions. Claimant was eventually referred to Dr. Tang for treatment of the left lateral epicondylitis and in a report dated February 28, 2007, he noted that conservative treatment for the claimant's

epicondylitis had failed and that surgery was an option.

When claimant's complaints continued he was referred by respondent #1 to Dr. Kelly. In a report dated August 31, 2007, Dr. Kelly noted that testing revealed that claimant still suffered from carpal tunnel syndrome on the right side and a mild slowing in the left elbow over the cubital tunnel. Dr. Kelly performed surgery for left tennis elbow and left cubital tunnel syndrome on September 11, 2007. Claimant was released by Dr. Kelly to return to work for the respondent and did so.

On January 15, 2008 [while respondent #2 was the carrier], the claimant was working as a night watchman for his employer at Arvest Ballpark which was under construction in Springdale. Claimant testified that he was in the process of pulling himself into his truck by grabbing the steering wheel with his left hand and as he tried to step into the truck he missed a step causing his entire weight to be held up by his left arm. Claimant testified that he felt pain in his left arm and had a pulling sensation all the way to his neck. When his pain did not subside claimant sought medical treatment from the Washington Regional Medical Center emergency room. Emergency room records from that date indicate that claimant was complaining of pain in his left elbow and left shoulder with pain radiating into his neck. Claimant was given medications and diagnosed with a left arm pain/strain.

Claimant subsequently returned to Dr. Kelly who ordered an MRI of the claimant's cervical spine. Claimant also underwent an EMG nerve conduction study by Dr. Johnson on February 26, 2008 and his report of that date indicates that the study was consistent with right C6 or C6 radiculopathy and mild residual right median neuropathy at the level of the wrist. Dr. Johnson indicated that an MRI scan of the claimant's cervical spine might be necessary to rule out a herniated disc or spondylosis.

Following the incident on January 15, 2008 the claimant continued to work or to be paid his full salary by his employer through February 5, 2008. At that point, claimant was

informed that light duty work was no longer available. As a result, respondent #1 began paying claimant temporary total disability benefits.

Claimant has filed this claim seeking various compensation benefits. First, claimant contends that he suffered a compensable injury to his right shoulder as a result of the job activities he was performing while working for his employer in 2005 while respondent #1 was the compensation carrier. Claimant also contends that he is entitled to compensation benefits for injuries to his left wrist, left shoulder, and neck which are either the result of his prior compensable injuries or the result of a new injury which occurred on January 15, 2008. Both respondents contend that the other carrier is liable for compensation benefits if any are awarded. In addition, respondent #1 contends that respondent #2 should reimburse it for temporary total disability benefits paid to claimant subsequent to January 15, 2008.

ADJUDICATION

RIGHT SHOULDER.

Claimant does not contend that he suffered a new injury to his right shoulder as a result of the incident on January 15, 2008. In fact, claimant testified that his right upper extremity was not involved during the incident on that date. Instead, claimant contends that his right shoulder problems are attributable to the work he was performing for the respondent in 2005 as a carpenter preparing forms for concrete and tying rebar. Claimant does not allege that he suffered an injury to his right shoulder as a result of a specific injury identifiable by time and place of occurrence. Instead, claimant's claim for a right shoulder injury is a gradual onset injury attributable to the job duties he was performing in 2005.

The elements for establishing a compensable gradual onset injury as alleged by the claimant are codified at A.C.A. §11-9-102(4)(A)(ii), (D) and (E)(ii). Claimant must prove by a preponderance of the evidence (1) that the injury arose out of and in the course of his

employment; (2) the injury caused internal or external physical harm to the body that required medical services, or resulted in disability or death; (3) the injury was the major cause of the disability or need for treatment; (4) the nature and extent of the injury must be established by objective medical findings; and (5) the injury must be caused by rapid and repetitive motion. *Cottage Café, Inc. v. Collette*, 94 Ark. App. 72, 226 S.W. 3d 27 (2006).

In this particular case, I initially find that claimant has failed to offer objective measurable physical findings establishing an injury to his right shoulder as a result of his employment in 2005. Claimant did seek medical treatment from Dr. Moffitt complaining of pain in his right shoulder and arm. As a result of those complaints Dr. Moffitt ordered an MRI scan of the claimant's neck and shoulder and nerve conduction studies. An MRI scan of the claimant's right shoulder revealed mild degenerative changes and nerve conduction studies revealed bilateral carpal tunnel syndrome which was accepted by respondent #1 as compensable. In short, the objective testing performed on the claimant's right shoulder in 2005 revealed degenerative changes only, not objective findings of an injury.

Furthermore, in order to be compensable claimant must also prove by a preponderance of the evidence that the injury was caused by rapid repetitive motion. The courts have recognized that there is a two-part test for determining whether an injury is caused by rapid repetitive motion. First, the tasks must be repetitive and second, the repetitive motion must be rapid. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W. 2d 644 (1998). Here, claimant testified with regard to various duties he performed for the respondent as a carpenter preparing forms for concrete including the tying of rebar. Even if the claimant's job duties were considered to be repetitive, I do not find that these job duties were rapid.

In short, in order to prevail for a gradual onset injury to his right shoulder occurring

as a result of his job duties in 2005, claimant has the burden of proving various elements including proof that his job duties required rapid repetitive motion and medical evidence supported by objective findings establishing a compensable injury. Here, objective testing in the form of an MRI scan of the claimant's right shoulder revealed degenerative changes. Further, claimant's job duties with the respondent did not involve rapid repetitive motion of his right shoulder. Accordingly, I find that claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by the respondent.

LEFT SHOULDER AND NECK.

Claimant also contends that his problems involving his left shoulder and neck are compensable either as a result of his prior compensable injuries or as a result of the incident which occurred on January 15, 2008. After reviewing the evidence in this case, I find that claimant suffered a compensable injury to his left shoulder and neck on January 15, 2008; therefore, respondent #2 is liable for compensation benefits attributable to that injury. A claim involving the incident on January 15, 2008 is the result of a specific incident identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identi-

fiable by time and place of occurrence.

I find that claimant has met his burden of proving each of these elements of compensability. First, I find claimant's testimony regarding the incident on January 15, 2008 to be credible. Claimant testified that on that date he was attempting to pull himself into his pickup truck while working as a night watchman for his employer when he missed a step on his truck and fell causing his entire weight to be transferred to his left arm. According to claimant's testimony he felt immediate pain from his left elbow to his shoulder and his neck. After waiting a few minutes for the pain to subside claimant sought medical treatment from the emergency room. The emergency room records and subsequent medical records contain a history of injury consistent with claimant's testimony.

Based upon the foregoing evidence including claimant's testimony and the history contained in the medical records, I find that claimant has proven by a preponderance of the evidence that his injury arose out of and in the course of his employment with respondent #2 and that his injury was caused by a specific incident identifiable by time and place of occurrence.

I also find that claimant has proven by a preponderance of the evidence that the injury caused internal physical harm to his body which required medical services and that he has offered medical evidence supported by objective findings establishing an injury. At the time of claimant's visit to the emergency room on January 15, claimant was given medication and diagnosed as suffering from left arm pain/strain. Claimant subsequently sought medical treatment from Dr. Kelly on January 18, 2008 who indicated that an MRI scan of the claimant's cervical spine was necessary for further evaluation. Because of claimant's continued complaints of pain claimant sought medical treatment from the emergency room again on January 30, 2008. The treating physicians in the emergency room noted muscle spasm involving both claimant's neck and his left shoulder. As a result, claimant was given medication for muscle spasm at that time.

Based upon the foregoing evidence, I find that claimant has met his burden of proving by a preponderance of the evidence that he has suffered a compensable injury to his left shoulder and neck as a result of the incident which occurred on January 15, 2008. Respondent #2 is liable for payment of all compensation benefits attributable to claimant's left shoulder and neck injury. At this point in time, those compensation benefits include medical treatment. The medical records do not indicate that claimant has been taken off work by his treating physicians for the injury to his left shoulder and neck. While claimant may be off work as a result of other conditions, I find insufficient evidence that claimant has been taken off work as a result of his left shoulder and neck injury. Therefore, respondent #1 is not entitled to reimbursement from respondent #2 for any temporary total disability benefits paid to claimant subsequent to January 15, 2008. It is possible that respondent #2 may be liable for temporary total disability benefits subsequent to the date of the hearing should claimant's treating physicians take him off work for treatment of that particular compensable injury. Since no temporary total disability benefits are being awarded at this time from respondent #2, the issue of claimant's compensation rate at the time of the injury on January 15, 2008 is moot. Claimant may continue to receive temporary total disability benefits at the compensation rate in effect at the time of his prior injuries for which respondent #1 is currently paying compensation benefits.

LEFT ELBOW.

As previously noted, claimant had prior complaints involving his left elbow which had been diagnosed as epicondylitis and left cubital tunnel syndrome. As a result, claimant had undergone surgery for those conditions on September 11, 2007. Claimant testified that at the time of the incident on January 15, 2008, he still had some pain in his left elbow which he described as "light". However, claimant testified that the pain in his left elbow increased greatly after the incident on January 15, 2008.

After my review of the evidence, I find that respondent #1 remains liable for benefits

attributable to the claimant's left elbow injury. First, while claimant testified that he had additional pain in his left elbow after the incident on January 15, 2008, the evidence indicates that claimant's left elbow pain prior to January 15 was significant enough that he was continuing to take narcotic pain medication. Furthermore, in order to establish a new injury on January 15, 2008, there must be some objective measurable physical findings establishing a new injury or an aggravation of a pre-existing injury. The medical records do not contain any objective findings establishing a new injury or an aggravation of claimant's pre-existing left elbow injury subsequent to January 15, 2008. Therefore, even though the claimant may have additional pain, respondent #1 remains liable for compensation benefits attributable to the claimant's left elbow injury.

LEFT WRIST.

I also find that respondent #1 remains liable for any compensation benefits attributable to an injury to the claimant's left wrist. Respondent #1 stipulated to a compensable injury to the claimant's left hand on or about September 1, 2005 and to bilateral carpal tunnel syndrome on or about February 22, 2005. While the medical records do not indicate that claimant was receiving any significant medical treatment for his left wrist at the time of the incident on January 15, 2008, I also note that there are no objective findings of an injury to the claimant's wrist on that date. Absent objective findings of an injury to claimant's left wrist on January 15, 2008, respondent #2 is not liable for payment of compensation benefits. Therefore, respondent #1 remains liable for compensation benefits, if any, which are the result of the previously accepted compensable injuries in 2005.

AWARD

Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by the respondent. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury to

his left shoulder and neck while employed by respondent #2 on January 15, 2008. Respondent #2 is liable for payment of any compensation benefits attributable to this compensable injury including medical treatment. Respondent #1 remains liable for compensation benefits attributable to claimant's prior injuries to his left elbow and left wrist. Finally, respondent #1 is not entitled to reimbursement from respondent #2 for temporary total disability benefits paid to claimant subsequent to January 15, 2008.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript to be divided equally between respondents. Respondent #1 and respondent #2 are responsible for paying the sum of \$425.41 for the cost of transcription.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE