

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F700296

DONESON HARRINGTON, EMPLOYEE	CLAIMANT
STAFFMARK, INVESTMENTS, EMPLOYER	RESPONDENT NO. 1
AIG CLAIM SERVICES, CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED FEBRUARY 8, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN on November 14, 2007.

Claimant represented by the HONORABLE KENNETH A. OLSEN, Attorney at Law, Bryant, Arkansas.

Respondents No. 1 represented by the HONORABLE CAROL WORLEY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas. The Fund did not participate in this hearing.

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 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 does not preponderate in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship during October/November 2006, at which time the claimant sustained a compensable left shoulder injury

at a compensation rate of \$190.00/\$154.00. The respondents paid medical expenses until January 9, 2007 when this claim was controverted.

The claimant contends he injured his left shoulder on October 22, 2006 loading and unloading trucks. He remained symptomatic after the respondents controverted the claim and went to Dr. Stephen Hudson at his own expense. The claimant seeks payment of medical expenses, continuing treatment with Dr. Hudson, temporary total disability benefits from October 23, 2006 to June 1, 2007 and attorney's fees.

The respondents contend the claimant's present condition is the result of a preexisting condition. The December 20, 2006 MRI showed no objective evidence of a recent traumatic injury. Alternatively, in the event this claim is found to be compensable, the respondents would not be liable for temporary total disability benefits as the claimant refused light duty work.

The Second Injury Fund, Respondent No.2, was joined after the hearing in this case; did not participate in the prehearing conference; and is not a party to the stipulations entered into by the claimant and Respondent No. 1, Staffmark.

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

The following witnesses testified at the hearing: the claimant and Dana Troutman, the claimant's supervisor. Ms. Troutman was an impressive witness, knowledgeable about the case and company policy, and professional in her handling of the claim.

The claimant, age 40 (D.O.B. September 4, 1966) has a high school education. He worked for Staffmark, an employment agency, off and on for a couple of years before they sent him to work loading flooring at Hogan Hardwood. On the first day of work, the claimant injured his left shoulder

pulling on the curtains in the delivery truck (Tr. p. 9-20, 30).

The claimant thought he just wasn't used to the work environment and did not report the injury to Staffmark until three or four days later when his arm became painful and swollen, producing a clicking noise. The claimant was unsure of the date of injury (Tr. p. 8 10-11, 13, 30-34).

Staffmark sent the claimant to Concentra on November 8, 2006 and he was treated conservatively with medication and physical therapy. The doctor recommended light duty and the claimant worked for Staffmark, cleaning their office for 1-1/2 - 2 months, until November 24, 2006.

The claimant did not completely follow the advice of his physicians. He felt physical therapy made his condition worse; he refused an injection; and he did not take his medication as prescribed (Tr. p. 15-17, 37). Once he refused the injection on November 17, 2006, Concentra released him. The claimant reported back to Staffmark where he was informed that he would no longer be provided with light duty (Tr. p. 17-18).

Staffmark assigned the claimant to work at Sharper Image loading merchandise on trucks. The claimant stated it was difficult for him to lift heavy boxes particularly above chest height and he relied on the assistance of co-workers. This job began sometime after Thanksgiving and lasted until December 22, 2006, (Tr. p. 18-21). The claimant then worked at Magna IV Color Imaging through the end of the year (Tr. p.37).

The claimant did not work for two months, giving his arm a chance to rest. Around the middle of February, 2007, the claimant began calling Staffmark, trying to find employment but they did not assign him any work (TR. p. 21-23).

At his own expense, the claimant saw orthopaedic surgeon, Dr. Stephen Hudson on February 2, 2007. Dr. Hudson recommended an injection and the claimant complied, however, pain relief was

only temporary, (TR. p. 22-26).

Since June 1, 2007, the claimant has been working full time at Horticare, performing gardening work (raking leaves, trimming hedges, weeding flower beds). The claimant stated that his arm still remains symptomatic.

On cross-examination, the claimant admitted that he was familiar with Staffmark's policy on reporting injuries (Tr. p. 35-36). But he denied refusing a job offer when Staffmark required a drug test (Tr. p. 37-39). He stated he did not take the test due to a family emergency. The claimant also admitted that he began treatment with Dr. Hudson in February before he requested a change of physician in June 2007 with the Commission (Tr. p. 39-40).

Respondents counsel also pointed out that the claimant continued to receive medical care from Concentra in November and December 2007, even after he was released to full duty. The claimant never reported a clicking noise as one of his symptoms. This care included an injection. The claimant disputed the accuracy of these reports, (Tr. p. 41-13). The claimant did concede that no doctor has excused him from work since he was released by Drs. Carle and Warren at Concentra (Tr. p. 43-44).

On re-direct, the claimant denied any shoulder symptoms or physical limitations prior to his job at Hogan Hardwood.

Dana Troutman, a staffing specialist with Staffmark for 14 years, testified the claimant reported an injury to her on November 7, 2006. Paperwork was completed and filed with their workers' compensation carrier. The claimant told her he strained a muscle a week or two earlier and it had not improved.

The next day the claimant was sent to Concentra for medical treatment and provided with light duty work cleaning the office until November 24, 2006. He was released to full duty on November 27, 2006. The claimant was assigned to Sharper Image/UPS on November 28, 2006 and worked until December 22, 2006. He then worked four days for Magna IV Printing Company.

Ms. Troutman explained that when job applicants call in for a work assignment, their names and Social Security numbers are documented not only for Staffmark's records but also for Employment Security Division (ESD) purposes. If questioned, Staffmark is able to provide ESD with proof that an applicant is looking for work. Staffmark's records show the claimant did not ask for a job until April 2007, when he came by the office. He was scheduled to take a drug test in preparation for a job at George Fisher Sloan. When the claimant did not return, he was terminated on April 19, 2007, as mandated by company policy.

Ms. Troutman explained the company's policy regarding the reporting of injuries (Tr. p. 48); drug testing (Tr. p. 54); termination (Tr. p. 55-64), and light duty employment (Tr. p. 55).

She stated that the claimant had worked for Staffmark on assignment off and on for about two years since November 19, 2004. The claimant was well liked by the Staffmark office employees and they had no trouble with the claimant taking drug tests in the past. There is no mention of any family emergency preventing him from taking a drug test in April, but if he had called after termination, the receptionist might not have recorded the call.

MEDICAL EVIDENCE

The Concentra medical records begin on November 8, 2006, showing a history of a left shoulder injury on October 22, 2006 at 6:30 p.m. while loading and unloading trucks. The claimant

was diagnosed with shoulder impingement after an unremarkable physical exam and negative x-ray. Pain and tenderness was noted in the report but the claimant denied swelling, popping, or clicking. Range of motion was normal. The claimant was treated conservatively and assessed work restrictions.

Concentra's report of November 14, 2006 indicates the claimant was non-compliant with physical therapy. He also told the doctor that light-duty was not available.

A follow-up report on November 17, 2006 indicates "marked weakness in active range of motion." The claimant complained of "diffuse shoulder pain and popping with limited ROM." By the time of this report, the claimant was participating in physical therapy and reported he was working. Dr. Carle diagnosed "probable bursitis, left shoulder and activity, intolerance." The claimant declined an intra-articular shoulder injection.

Another record dated November 27, 2006 shows the claimant reported improvement, however, the doctor still noted tenderness and pain. The claimant was released and advised to "avoid overloading while lifting."

In a December 5, 2006 return appointment, the doctor recorded sleep disturbance, pain, clicking and popping. Dr. Carle diagnosed subacromial bursitis, impingement of the shoulder and rotator tendinitis. During this visit, Dr. Carle administered the injection that the claimant previously declined.

The claimant returned on December 18, 2006, complaining that he was still symptomatic but declined additional physical therapy.

On December 28, 2006, the claimant reported improvement. Range of motion was normal. Dr. Warren diagnosed left A-C arthritis and advised the claimant to consult his personal physician

for a non-work-related condition.

Physical therapy records dated November 15, 2006 show the claimant missed two appointments but was otherwise compliant with treatment. His condition continued to improve and new exercises were added to his exercise program.

An MRI scan, conducted December 20, 2006 at the request of Dr. Warren, showed arthritic changes of the AC joint.

The claimant saw Dr. Stephen Hudson on February 2, 2007. He reviewed the MRI scan and diagnosed AC arthropathy and inflammation of the shoulder. Dr. Hudson administered another injection commenting, “it sounds like his previous injection was in the subacromial space, so it may not have reached the AC joint and that is why he is still having symptoms.” The claimant testified Dr. Hudson’s treatment provided only temporary relief.

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).

Based on the MRI scan showing preexisting arthritis, I find the claimant has failed to prove objective medical evidence of a specific, traumatic injury, causing internal physical harm. Therefore, I find this claim is not compensable.

Assuming, arguendo, that the claim was compensable, the claimant's failure to comply with medical treatment and the absence of any physician excusing him from work would negate an award of benefits.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during October and November, 2006. Initially, the claim was accepted and the claimant was treated conservatively for bursitis/tendinitis of the left shoulder until January 9, 2007 when compensability of the claim was controverted.
2. The claimant has failed to prove 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 claimant was non-compliant with the recommended medical treatment.
4. Since the claimant's release from Concentra, no other physician has excused the claimant from work.
5. 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.

This case is respectfully denied and dismissed.

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge