

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F610152

ROY ODOM, EMPLOYEE

CLAIMANT

CYPRESS PORK LLC, EMPLOYER/
COMPANION PROPERTY &
CASUALTY, CARRIER

RESPONDENTS #1

OPINION FILED AUGUST 4, 2008

Hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, in Conway, Faulkner County, Arkansas.

The claimant was represented by The Honorable M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondents #1 were represented by The Honorable William Byrd III, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on June 9, 2008, in Conway, Arkansas. A Prehearing Order was previously entered in this case on May 6, 2008. This Prehearing Order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

The following stipulations were submitted by the parties, either in the Prehearing Order or at the start of the hearing, and are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed at all relevant times, including June 27, 2006.

3. The claimant's temporary total disability rate is \$136.00, and his permanent partial disability rate is also \$136.00.

4. The claim has been controverted in its entirety.

By agreement of the parties, the issues to be presented at the hearing were as follows:

1. Compensability of the claimant's alleged left shoulder injury of June 27, 2006.

2. Medical benefits.

3. Temporary total disability from June 28, 2006, through to a date yet to be determined.

4. Attorney's fee.

Claimant contends that he sustained a compensable injury to his left shoulder on June 27, 2006. Claimant contends that he is entitled to temporary total disability from June 28, 2006, through to a date to be determined.

Respondents contend that they had no indication of any alleged injury until on or about September 15, 2006. Respondents contend that claimant was under the influence of cocaine at the time of the alleged injury. Respondents further contend that any shoulder problems alleged by the claimant are the result of a preexisting condition.

The documentary evidence submitted in this case consists of the Commission's Prehearing Order of May 6, 2008; the claimant's Response to Prehearing Filing; and respondents' Response to Prehearing Filing, these were all marked as Commission's Exhibit No. 1. The claimant's Medical Packet was marked as Claimant's Exhibit No. 1. The respondents' Medical Packet was marked as Respondents' Exhibit No. 1. The Lab Results were marked as Respondents' Exhibit No. 2. The deposition of Mr. Lawrence Williams was marked as Joint Exhibit No. 1.

The following witnesses testified at the hearing: Mr. Wade Lewis, the claimant, Dr. Kim Light, and Mr. Barry Tomlinson.

DISCUSSION

Mr. Donald Wade Lewis, gave testimony during the hearing. He admitted he worked for the employer-respondent moving hogs for them during the time of the claimant's alleged left shoulder injury of June 27, 2006. Mr. Lewis testified that on the morning of the incident, the claimant told him he had been run over by a sow. He explained his job duties:

A. Well, it's a breeding program for sows. And I bring in the heavy sows that's fixing to have pigs. They unload them and walk them in the barn, put them in gates.

Q. And how big are these sows?

A. Four and five hundred pounders, a lot of them.

Q. How tall are they?

A. Probably 36, 37 inches tall.

Q. And when you say bring them in, how do you bring bring them in?

A. My truck and trailer.

According to Mr. Lewis, it was his understanding that the claimant had hurt his leg, as he told him it was hurting. However, Mr. Lewis admitted that the claimant did not express to him what part of his body was hurting. He denied that the claimant appeared to be intoxicated or anything.

On cross examination, Mr. Lewis admitted he does not work for Cypress Pork, as he is self-employed. According to Mr. Lewis, he contracts moving their sows for them. As of the date of the hearing, he admitted that he continues to contract with Cypress Pork.

Mr. Lewis testified that he is not allowed to go in the barns or in the trailer to unload. He admitted that he did not see anything that happened with Mr. Odom. Mr. Lewis further admitted that his knowledge of what happened with the claimant is strictly based on what Mr. Odom told him, after the fact. According to Mr. Lewis, this was probably the first time that the claimant had ever unloaded a trailer because he works doing maintenance.

The claimant, age 73(2/27/35), admitted to being in the military from 1958 until 1960. The claimant also admitted to having used cocaine in 1992. Prior to the incident of June 27, 2006, the claimant maintains that it had been quite a while since

he used cocaine, but he could not recall the exact date he had last used. However, the claimant denied having used cocaine on the date of the alleged accident.

With respect to his job duties, the claimant testified that he did whatever they told him to do. According to the claimant, he loaded and unloaded pigs, and cleaned the barns. He testified he had worked for the respondent-employer since February of 2006.

A. Well, I was unloading hogs, 400 to 500 pound hogs, sows rather. And I was carrying out a group of hogs like four or five at a time. And somehow behind me a hog got away, and he ran up under me. And when he ran up under me it flipped me over on his back, and when I come off his back my shoulder hit the iron railing of the trailer.

Q. Now Roy, I think I read in your records, and I think you mentioned in your deposition that you've got a prosthetic leg. Is that right?

A. Oh yes.

Q. Which one is that?

A. The left leg.

Q. When the sow came up behind you, did he hit you dead on, or on your left or your right?

A. It seemed like it probably hit both of them. But I stayed on that back trying to come off on the good leg where I could spring. And when I sprang I turned and my shoulder hit the trailer. I didn't want to come off on the prosthetic leg. I come off on my right leg, then I spinned into it, the big iron railing of the trailer.

Q. Which shoulder are we talking about?

A. My left shoulder.

Q. Did you realize that you were hurt when that

happened?

A. It was numb. It was no feelings when it first happened. I couldn't, I could tell I was hurt, but it was numb. The feelings came back later on after I got off.

The claimant essentially testified that he may have told Wade, and that he told Lawrence about the incident immediately after it happened. The claimant testified that he talked to Barry again the next day, but he refused to do anything about it and kept denying the fact that he ever got hurt. The claimant specifically testified that immediately after the incident, he told Mr. Lewis and Mr. Williams about it. He testified to having talked to Barry (Tomlinson), his boss, on the day of the incident, but he suggested that he was going to be all right, it would work out. Although the claimant could not recall the exact time of the accident, he testified that it happened right after noon, maybe around 2:00.

He next testified that he told Barry about his incident that evening and the next morning. The claimant further testified that he told Barry the next morning, for the third time, and at that point, he was fired.

The claimant admitted to first seeking treatment on his own from the VA, at the emergency room. He agreed that he probably sought treatment on July 2, 2006, from the emergency room of the VA. The claimant admitted to undergoing therapy, and eventually surgery. He admitted his surgery was done on February 8, 2007.

He agreed that the presence of cocaine was found in his system after the accident. According to the claimant, he had not smoked cocaine, it was found to be present because he had been in an environment where it was being used.

The claimant admitted that since his surgery, he has been able to use his shoulder some, but is unable to raise it straight up. According to the claimant, he has does not believe he could return to his job for the respondent-employer.

On cross examination, the claimant admitted he worked full time hours, 10 to 12 hours a day. He admitted to having stated in his deposition, he never had any problems with Mr. Tomlinson until his injury.

The claimant did not recall having testified in his deposition that he did not recall where he was in trailer at the time of the incident. He denied having testified earlier that he was loading the trailer when his incident happened. The claimant testified:

Q. On your depo, in your deposition on page 22 I'm on 15. I said, do your [sic] recall that Wade and Lawrence saw what happened? You said, they said they did. They said that they, I asked you, they said that they saw you get knocked down and get knocked in the trailer? Your answer was, yes. Do you think Lawrence Williams saw you get knocked down?

A. Maybe I should retract that statement. I can't tell you what they saw. But I can tell you they was there. They could've seen. What they saw I can't tell you that.

Q. I understand. I'm just going on what you told me a

year ago when we talked about this. Mr. Lewis just testified - -

A. I don't remember telling you that a year ago. That don't even sound like me to tell you what another man saw. It don't sound like me.

The claimant testified he could not recall if he had testified during his deposition that he was terminated on July 7, 2006, nor could he recall the date of his firing. The claimant could not recall being told by Barry that "he needed to pick it up a little." According to the claimant, he does not remember him complaining until after he got hurt.

The claimant admitted to filing for unemployment benefits after being let go by the Cypress Park. According to the claimant, he did not qualify for these benefits because his other places of employment "did not take out unemployment and all of that."

The claimant testified:

Q. Is it your testimony today that everything in these records that you told the nurses on July 12th is incorrect? Is that your testimony.

A. Well, I don't really want to say that because going through what I go through we put it on records for different things to try to get money or get your check raised or whatever.

Q. Wait just a second.

A. What I'm saying I ain't used no cocaine-

Q. Okay. Let me go on with that.

A. Whatever they said I ain't got no control over that, but I know what I didn't do.

Q. Let me ask you about what you just said because you kind of hinted at this in your deposition. Are you telling me that you might have told them that, that you were using coke and that you were showing up at the ER, that you were trying to O.D. on crack, are you telling me that you might have told them that just to get disability benefits?

A. Possibly. That's what I'm telling you.

The claimant agreed that if he tested positive for cocaine on July 12, 2006, it was due to second hand smoke from someone he had been counseling. The claimant could not recall having reported to any doctor in January of 2008, or March 6, 2008, that his pain level was zero.

On recross examination, upon being questioned about any prior shoulder problems, the claimant denied having reported to his primary care physician, Dr. Mahmood, that the onset date for his shoulder problems was 2004.

Dr. Kim Light gave testimony during the hearing. He is a Professor in the Department of Pharmaceutical Sciences at the College of Pharmacy, at the University of Arkansas for Medical Sciences. He holds an Endowed Professorship on alcohol and drug abuse in the college pharmacy. Dr. Light has worked for UAMS for approximately 29 years. His expertise is pharmacology in general, central nervous system or neuro-pharmacology in particular.

He gave extensive testimony concerning how cocaine affects the body. Dr. Light testified that addictive cocaine use impairs

a person's decision making and it alters their ability to react. According to Dr. Light, sometimes in the acute phases, they have what is called an exaggerated startled response, and in many cases they overact to unusual circumstances during the acute phase. Dr. Light agreed that the use of cocaine is detectable 48 to 72 hours after its use.

With respect to outward indicators of someone smoking crack, Dr. Light testified that it is not always going to be evident to the people around that person to know that he or she is abusing cocaine because people have a very wide range of tolerance for behavior. According to Dr. Light, only the individual that is acutely over-stimulated from an extreme cocaine-like binge stands out in behavior as far enough from the general range of human behavior, as they stand out then because that level of cocaine use carries with it an intense level of paranoia, aggressiveness and fearfulness. He specifically testified that an individual that is in a maintenance type cocaine use or casual type use may go undetected by their peers mostly because their peers are not looking for its use.

Dr. Light testified that there is no scientific literature on casual exposure to cocaine from second hand smoke. More specifically, he testified that there are no scientific reports in the literature demonstrating failure of a cocaine urine, a urine drug test for cocaine due to being around somebody who was

smoking crack.

On cross examination, Dr. Light admitted he has no idea in Mr. Odom's case, how the use of cocaine may or may not affect him, as he has never talked to him.

Mr. Barry Tomlinson, the general manager of Cypress Pork, gave testimony during the hearing. He testified that he has worked for respondent-employer three years, as of April. According to Mr. Tomlinson, employees are asked to report their injuries immediately or within 24 hours. He testified that employees are supposed to report injuries to him. Mr. Tomlinson agreed that it would be his testimony that the claimant was aware of the policy of being drug tested if they are injured on the job.

Mr. Tomlinson testified that upon hire, the claimant ran a power washer and cleaned barns, and he next tried working the claimant at the main farm power washing, but he could not keep up with the pace. According to Mr. Tomlinson, he next created a part-time job for the claimant, which included keeping the farm clean, picking up trash, and keeping the laundry up. He recalled this taking place some time around early June, or mid June of that year.

Mr. Tomlinson denied that loading and unloading hogs onto the trailer as being part of the claimant's primary job responsibilities. However, he admitted that the claimant had

been told to step in and help for a few minutes if someone asked him to do so.

He agreed that the claimant was let go on July 7th , because the job he was doing was not getting done to his satisfaction. According to Tomlinson, he first found out about the claimant's alleged injury about two weeks after he discharged him. He denied that the claimant reported an injury to him on the day of the alleged incident. Mr. Tomlinson testified that the claimant first reported the injury to him on July 20, 2006, when he came in to pick up his last check. According to Mr. Tomlinson, he told the claimant he could not do anything because he did not report his injury while he was employed there. He explained that he told the claimant this, because he was under the impression from having worked for two large companies that a person has 24 hours to report the injury. Therefore, he assumed that there was nothing he could do.

The deposition of Lawrence Williams was taken on June 21, 2007. As of the date of his deposition, Mr. Williams worked for the Cypress Pork. According to Mr. Williams, he has worked there approximately four years. He admitted that he worked for the respondent-employer on the date of the alleged incident. Mr. Williams testified that his job duties for Cypress Pork included, moving the animals around, and feeding and taking care of them.

Mr. Williams testified:

Q. And if you will, just kind of tell me a little bit about what you guys were doing and kind of what happened leading up to that accident?

A. Moving the sows off the truck into a room that's been washed and ready to be loaded and I didn't actually see but from what I got was that one of the sows had penned (sic) him up against the truck. I was already in the room, putting the sows in the crates, that's what we do, bring them off the truck and put them in the crates. So he was on the truck by himself at the time but what I got was he got penned (sic) up against the truck. Mr. Lewis would know, probably, more about it than I would.

Q. Okay now you say a truck and I think Mr. Odom said a trailer and - -

A. Yeah.

Q. Just describe it for me?

A. It's a one ton truck with a trailer hitch on it.

Q. Now is the trailer divided into different compartments, different sections?

A. Oh, yes, uh-huh. It's got, let me see, three different sections, yeah, three different sections.

Q. So at the time that the accident occurred, you could not actually see where Mr. Odom was?

A. No, no.

Q. And you say you were inside the barn?

A. Inside the room.

He agreed that at the time the accident occurred, he could not actually see where the claimant was. According to Mr. Williams, he became aware that the claimant had gotten pinned in by one of the sows, by the claimant having told him so. He specifically testified that the claimant told him that one of the

sows pinned him in, as he was told this after he came back to the trailer to get more sows. He essentially testified that the claimant did mention to him that he was hurting until the next day.

Although Mr. Williams was not certain, he remembered the claimant having reported the incident to Mr. Lewis. He testified that on the day of the alleged incident, the claimant continued working the rest of the day. Mr. Williams only recalled the claimant having complained about his leg problems in following days.

On cross examination, Mr. Williams agreed that he did not actually see the claimant get pinned in. According to Mr. Williams, the claimant was behaving normally that day. He denied that the claimant's speech was slurred or that he looked bleary-eyed or anything. Although Mr. Williams was not sure that the claimant told Barry about his incident, he did recall hearing him complain that Barry did not believe him. He testified that he did not ever hear the claimant complaining about his shoulder prior to the alleged incident.

A review of the medical evidence shows that the claimant was seen at the emergency room of the Central Arkansas Veterans Health Care System on July 2, 2006, due to left shoulder pain. He reported having hit his shoulder on the bed of a truck about five days ago. The claimant was assessed with "possible rotator

cuff tear," for which he was prescribed pain medication and discharged home.

Medical notes from October 16, 2006, demonstrates that the claimant underwent evaluation by Dr. Aaliya Mahmood due to left shoulder pain. The onset date for the claimant's shoulder pain is "2004." The narrative reason for the referral reflects that the claimant has had pain and immobility of the shoulder for about two years.

On November 15, 2006, Dr. Timothy Bowlin assessed the claimant with, "left rotator tear," pursuant to an MRI dated September 27, 2006, which was read as full-thickness tear of the anterior fibers of supraspinatus tendon measuring 0.9 cm without tendon retraction or atrophy. Also a partial tear, involving the myotendinous tendon junction, as well as, a partial articular surface tear involving the infraspinatus tendon. After a long discussion of the risks associated with open rotator cuff diagnostic shoulder arthroscopy, the claimant requested surgical intervention.

A medical note dated January 5, 2007, shows that the claimant's surgery for that date was cancelled due to a positive drug screen for cocaine. On January 10, 2007, the claimant called to reschedule surgery, which had been planned. Therefore, the claimant's surgery was rescheduled for February 8, 2007.

The claimant underwent "left rotator cuff repair - open,"

on February 8, 2007, which was performed at the VA hospital.

ADJUDICATION

The claimant has asserted a compensable injury to his left shoulder as a result of a June 27, 2006 incident, wherein he was knocked off his feet by a sow.

"Compensable injury" means an accidental injury causing physical harm to the body, arising out of and in the course of employment and which requires medical services or results in disability or death. Ark. Code Ann. § 11-9-102(4)(A)(i). A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D). The claimant must prove by a preponderance of the evidence that he or she sustained a compensable injury. Ark. Code Ann. § 11-9-102(4)(E)(i).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury to his left shoulder, arising out of, and in the course of his employment with the respondent-employer.

The determination of the credibility of the witnesses and the weight to be given their testimony are matters exclusively within the province of the Commission. Cooper v. Hiland Dairy, 69 Ark. App. 200, 11 S.W.3d 5 (2000).

In the present matter, I find that the claimant was not a credible witness. Despite the claimant's assertion that he had no left shoulder problems prior to the alleged work-related incident of June 27, 2006, a medical report authored by Dr. Mahmood in October of 2006, clearly demonstrates that the claimant had suffered left shoulder problems since 2004. This report also demonstrates that the claimant had experienced pain and immobility of his left shoulder for about two years. These symptoms are identical to the symptoms described by the claimant following his alleged work incident.

Although the claimant maintains that he reported his injury to Mr. Tomlinson on the day of the alleged incident, Mr. Tomlinson testified that the claimant did not make mention of any injury to him until July 20, 2006, when he came in to pick up his last check, after having been discharged. The claimant has also given conflicting and confusing accounts as to how the alleged incident occurred and the witnesses to this alleged incident (see discussion above). Mr. Lewis and Mr. Williams both admitted that they did not witness the alleged incident. Instead, they were made aware of the matter strictly by what they had been told by the claimant, and they both appear to have been under the impression that the claimant had injured his leg, rather than his shoulder. The claimant essentially admitted to making false statements to the Veterans Administration in an attempt to obtain increased disability benefits.

In sum, when comparing the claimant's testimony to the

preponderance of the evidence, I find that the claimant was not a credible witness. Therefore, on the basis of the record as a whole, I further find that the claimant failed to prove that his need for treatment and disability for his left shoulder problems arose out of and during the course of his employment, and that his shoulder condition was the result of the alleged specific incident of June 27, 2006. As a result, this claim is hereby respectfully denied and dismissed in its entirety. All other issues in this matter are hereby rendered moot and have therefore not been addressed herein this Opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all other relevant times, including June 27, 2006.
3. The claimant's compensation rate for both temporary total disability and permanent partial disability is \$136.00.
4. This claim has been controverted in its entirety.
5. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable left shoulder injury, arising out of and in the course of his employment with the respondent-employer on June 27, 2006.

ORDER

For the reasons discussed herein this Opinion, this claim must be, and hereby is, respectfully denied.

IT IS SO ORDERED.

CHANDRA HICKS
Administrative Law Judge

CH/ml