

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712860

TONY WALLACE	CLAIMANT
RHEEM MANUFACTURING CO.	RESPONDENT
OLD REPUBLIC INS. CO. CARRIER	RESPONDENT

OPINION FILED JUNE 19, 2008

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Fort Smith, Sebastian County, Arkansas.

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by DIANE GRAHAM, Attorney, Fort Smith, Arkansas.

STATEMENT OF THE CASE

On March 27, 2008, the above captioned claim came on for a hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on January 24, 2008, and a pre-hearing order was filed on January 28, 2008. A copy of the pre-hearing order has been marked Commission's Exhibit No. 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 over this claim.
2. The employee/employer/carrier relationship existed on August 21, 2007.
3. Respondents have controverted this claim in its entirety.

4. The parties will be prepared to stipulate to the applicable compensation rate at the hearing.

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

1. whether Claimant sustained a compensable claim.
2. whether Claimant is entitled to reasonable and necessary medical treatment.
3. whether Claimant provided notice of this claim to Respondents.
4. whether Claimant is entitled to temporary disability benefits from December 17, 2007 to a date yet to be determined.
5. whether Claimant is entitled to a controverted attorney's fee.

The claimant contends:

“Claimant contends that he sustained a compensable injury to his right shoulder on or about August 21, 2007 when he was pulling parts out of a basket. Claimant contends that he is entitled to reasonable and necessary medical treatment, including surgery that has been recommended regarding his shoulder. Claimant contends that once he undergoes surgery, there will be a period of temporary disability and that the Respondents will be liable for payment of temporary total disability benefits and appropriate attorney's fees.”

The respondents contend:

“Respondents deny Claimant's right shoulder condition is a result of a compensable injury with the Respondent employer. Claimant had a gradual onset injury and his job with Respondent Rheem was not rapid and repetitive. Claimant simply woke up one day and his right

shoulder was hurting. Respondents were not provided with notice of the claim.”

#### DISCUSSION

The claimant contends that he suffered a compensable injury to his right shoulder while removing a part from a basket while at work for the respondent on August 21, 2006. The claimant’s claim is for a specific incident identifiable by time and place of occurrence. The Commission 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 a compensable 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 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 identified 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 identifiable by time and place of occurrence.

The central issue in this case was whether the claimant can prove by a preponderance of the evidence that the injury he suffered was caused by a specific incident identifiable by time and place of occurrence. The claimant sustained a right shoulder

rotator cuff tear that was repaired in an operation done by Dr. Joseph A. Bylak. The date of the operation was December 17, 2007. In testimony through direct examination by the claimant's attorney the following exchange occurred.

Q. Did you have some kind of problem at work on or about August?

A. Yes.

Q. Twenty-first of 2007? What?

A. I was pulling parts out of a basket. It was louver panels?

Q. Uh-huh. Uh-huh.

A. And the way they are packed in there in a stack, the louvers were hung up and when I pulled on a part, it jerked my arm down and I felt a pain in my arm--or in my shoulder.

The claimant further testified that he went home from work that day and upon waking the next morning he was unable to move his arm and found his shoulder to be in great pain. The claimant stated that he went to see the on site doctor at Rheem and was told by the nurse that he would be unable to see the doctor for a period of two weeks. Although the nurse at Rheem, Sarah Jane Smith, testified that the first date she had any conversation with Mr. Wallace regarding his right shoulder was September 10, 2007. In fact, Mr. Wallace was seen by Dr. Greg Loyd on September 10, 2007, and the medical records indicate he complained of right shoulder pain for three weeks with "no specific injury." At that time, Dr. Loyd gave the claimant an injection in his shoulder and asked him to return for a recheck in two weeks.

The claimant again saw Dr. Loyd on September 24, 2007, for his right shoulder pain but did not show much improvement at that time according to medical records. Dr. Loyd referred the claimant to River Valley Musculoskeletal Center for an MRI. The medical record also indicates that at that time a workers' compensation claim had been requested by the claimant. Testimony and exhibits reflect that a Form AR-N was completed and signed by the claimant and dated September 24, 2007.

On October 24, 2007, the claimant reports to the River Valley Musculoskeletal Center and when giving a patient history was asked, "How did injury occur?" The claimant responded, "Work." The patient history also reflects a date of injury of August 21, 2007, and that it occurred at Rheem.

A patient history from River Valley Musculoskeletal Center dated November 20, 2007, indicated that the claimant, when asked how the injury occur, stated, "Pulling parts out of a basket and they got caught and jerked my shoulder." He indicates the date of injury was August 2007 and he then states it occurred at work. X-rays were done with four views of the right shoulder. The impressions were one possible rotator cuff tear versus strain to chronic impingement. The evaluation also calls for an MRI study to evaluate the integrity of the claimant's rotator cuff which was performed by Dr. Joseph Bylak.

In a progress note done by Dr. Bylak on November 29, 2007, the doctor states that he has the following impressions after reviewing the MRI; "Right shoulder full thickness rotator cuff tear with

supraspinatus tendon and at least partial full thickness tear of superior fibers, subscapularis tendon, possible long head of biceps tear versus subluxation.” At that time the surgical option was presented to the claimant which he agreed to and was given an informed consent form for that surgery.

On December 17, 2007, the claimant underwent surgery at the Summit Medical Center performed by Dr. Joseph A. Bylak. The operative report from that surgery sets out the preoperative diagnosis as:

1. Right shoulder rotator cuff tear.
2. Chronic impingement.
3. Acromioclavicular joint arthritis.
4. Gouty arthritis.

The postoperative diagnosis is:

1. Right shoulder rotator cuff tear repair, full thickness of the posterior 1 cm of the supraspinatus tendon and the anterior 1 cm of the infraspinatus tendon.
2. Chronic subacromial impingement.
3. Gouty arthritis with bursitis.
4. Acromioclavicular joint arthritis.

A progress note from River Valley Rehab Center done on February 19, 2008, electronically signed by Jennifer-Lynn Cauthen, PT states that, “Patient reports no pain in his shoulder.” The progress report also reports a goal assessment of “range of motion goal has been met. Other goals are ongoing.”

#### ADJUDICATION

The claimant contends that he sustained a compensable injury that was caused by a specific incident identifiable by time and place of occurrence to his right shoulder on August 21, 2006. During his testimony the claimant indicated that “I pulled on a

part, it jerked my arm down I felt pain in my arm--or in my shoulder." However, the claimant through his own testimony did not report this injury to anyone at Rheem Manufacturing on the day of the injury. The claimant explains this when questioned by his attorney on redirect examination as follows:

Q. ...Does it ask you when your pain started in your shoulder or does it ask you when you started having a problem in your shoulder?

A. When I first realized I was having a problem with my shoulder.

Q. Did you consider the brief, sharp pain that you had at work a problem with your shoulder?

A. No. I mean, I get pains and sore muscles all the time at work.

On direct examination of the claimant by his attorney the following exchange occurred:

Q. Tell me what happened I mean as far as--as far as the actual injury. How'd you--how'd you get--what kind of problem did you develop?

A. What kind of problem? It was just--well, at first, I didn't know what the problem was. I just knew I couldn't lift my arm up. I got up one morning and I couldn't lift my arm up.

It is quite clear that the claimant knew he had a problem with his right shoulder and/or arm the morning after the alleged specific incident of August 21, 2006. Although the claimant did not report that injury to anyone at Rheem until at least two weeks after the alleged work related injury occurred. The claimant did state that he went to see the company doctor the following day; however, was unable to see him because the nurse at Rheem informed him that it would be two weeks before he could see the doctor.

That testimony was in direct contradiction of testimony given by the company nurse at Rheem who stated the first time she knew of any type of injury sustained by the claimant was on September 10, 2007, when the claimant came to see the company doctor complaining of right shoulder pain. During cross examination of the claimant by the respondents' attorney it was revealed that the following exchange occurred between the respondents' attorney and the claimant during a deposition.

Q. Okay, then would it be fair to say, then, that two weeks after--two weeks after August 22, 2007, is the first time that you told somebody that your problems was a work related problem?

A. Yes.

The September 10, 2007, medical records of Dr. Loyd from Rheem Manufacturing also noted that the claimant's right shoulder difficulties were the result of a nonspecific injury. It is not until the evaluation of September 28, 2007, that Dr. Loyd recorded a history that the claimant believed his right shoulder difficulties to be a work related injury.

A recorded interview taken on October 1, 2007, between Julie Blankenship and the claimant was admitted into evidence. During this interview, the following exchange occurred:

Q. Now, we're going to talk about your injury. With regard to this injury, they tell me it's your right shoulder?

A. Yes.

Q. Did you have an accident?

A. No.

Q. NO. Okay. If you didn't have an accident, can you tell me when your symptoms first occurred? What's the first time you remember your right shoulder bothering you?

A. It was about--oh, it's been a little over a month ago.

Q. So, it was back in August?

A. Yeah.

Q. Okay. And where were you when you first realized you were having a problem with your shoulder?

A. At work. I came in one morning and--well, actually, I woke up one morning, so I guess I was home and my shoulder was hurting real bad, but it was like after a day where I'd been pulling parts all day long.

Q. Okay, so you woke up that way.

A. Yeah.

Q. And you were pulling parts all day long the day before.

A. Yeah.

Q. And that was just a regular part of your job, not any different than any other day.

A. Yeah. Yeah. See, there's times whenever you're trying to pull them parts out of the baskets and they've got them packed in there and you'll pull on it and it'll just hang in there and it pulls you real hard.

Q. So, in your best interest--okay--

A. Yeah.

Q. --I'm asking you if you can remember the day before you woke up, do you remember anything that happened specifically? Do you know that a part hung up that day? Do you know what made you wake up that next morning hurting other than--other than--

A. Well, I know that day I was-I mean I had like big huge parts that are like louver panels that I'm pulling this basket and I mean they're always hanging up. Every time I try to take them out, they hang up.

I believe the recorded interview is telling in that the claimant never points to some specific incident where he believes this injury occurred. He never discusses or talks about a specific incident but talks about generally pulling parts out of a basket versus his testimony before this Commission that he remembers his shoulder being jerked and pain occurring in his arm or shoulder. With the lack of reporting of this injury by the claimant, the testimony of the nurse that September 10, 2007, was the first time she knew of any problems with the claimant's shoulder, a lack of evidence that he reported this injury as work related to a supervisor until September 28, 2007, and the delay of the claimant's belief that he was injured. I simply find that the claimant has not met his burden to prove beyond a preponderance of the evidence that this injury was caused by a specific work related incident on August 21, 2007. It is certain and uncontested that the claimant sustained a tear to his right rotator cuff; however, he has failed to prove that it was due to a specific work related injury on August 21, 2007, which is fatal to his case.

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 witnesses and to observe their 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 January 24, 2008, and contained in a pre-hearing order filed January 28, 2008, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury as the result of a specific incident on August 21, 2007.

ORDER

Based upon my foregoing findings and conclusions, I have no alternative but to deny and dismiss this claim in its entirety.  
IT IS SO ORDERED.

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ERIC PAUL WELLS  
ADMINISTRATIVE LAW JUDGE