

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F901627

HARLEY PROCELL, Employee	CLAIMANT
SHRED-IT, Employer	RESPONDENT
CINCINNATI INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED NOVEMBER 9, 2009

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

Claimant represented by JASON HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by WILLIAM C. FRYE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 7, 2009, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July 29, 2009, and a pre-hearing order was filed on July 30, 2009. 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. The employee/employer/carrier relationship existed among the parties on January 21, 2009, and at all pertinent times.
3. The claimant was earning an average weekly wage of \$568.75 which would entitle him to compensation at the weekly rates of \$378.00 for total disability benefits and \$284.00 for permanent partial disability benefits.
4. Respondent has controverted this claim in its entirety.

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

1. Compensability of injury to claimant's right shoulder and right elbow on January 21, 2009.

2. Temporary total disability from January 28, 2009 through a date yet to be determined.

3. Medical.

4. Attorney fee.

The claimant contends he sustained a compensable injury on or about January 21, 2009 when he injured his right shoulder and right elbow while lifting boxes. Claimant contends he is entitled to temporary total disability benefits, medical benefits, and a controverted attorney fee.

The respondents contend claimant is alleging an injury on January 21, 2009; however, claimant is required to report in every day with his work status and he never mentioned having an injury. Subsequently, respondent obtained claimant's medical records from the VA where he is being primarily treated. Claimant has a history of right shoulder problems. In fact, in December 2008, one month prior to his alleged injury, claimant reported to the VA physician that he had right shoulder pain so severe that he was unable to lift his arm. It is respondent's contention that claimant's current problems are related to his pre-existing problems and not due to a work related incident.

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 July 29, 2009, and contained in a pre-hearing order filed July 30, 2009, are hereby accepted as fact.

2. Claimant has met his burden of proving by a preponderance of the evidence that

he suffered a compensable injury to his right shoulder while employed by respondent on January 21, 2009.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right shoulder injury.

4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to temporary total disability benefits as a result of his compensable injury.

5. Respondent has controverted this claim.

FACTUAL BACKGROUND

_____The claimant previously worked for a company known as Shred-Max for one and a half years through Tech Staffing. On December 31, 2008, Shred-Max was purchased by the respondent, Shred-It.

Even though the company name changed, claimant testified that his job duties did not change significantly. Claimant's job duties primarily consisted of driving a truck which contained a shredder on board to various businesses and shredding paper documents. Claimant testified that some of these customers were regularly scheduled customers. On the other hand, the respondent also had customers who had jobs known as a "clean out". A "clean out" was not a regularly scheduled customer, but rather was a customer such as a doctor or a lawyer which had files that needed shredding. Claimant testified that in order to perform a clean out he would drive his truck to an office or storage facility where there would be anywhere from 30 to 300 boxes of paper to shred. Claimant testified that he had a plastic bin into which he would dump approximately five boxes of paper. Claimant would then wheel the bin to his truck which would mechanically dump the paper material and shred it.

On January 21, 2009, the claimant's last scheduled stop that day was a clean out at Auto Master. Claimant testified that Auto Master had approximately 250 to 300 boxes

of paper to be shredded. Claimant testified that while he was in the process of dumping the contents of the boxes into his bin he was lifting a particular box when he felt a popping sensation in his right shoulder. Claimant testified that he could not continue lifting the box, but instead wheeled his bin to the truck and shredded the paper which was already in it. Claimant then informed Auto Master that he would not be able to finish the job that day but would have to come back the next day. Claimant testified that his truck was full of shredded paper and needed to be dumped anyway.

Claimant testified that normally when his truck is full of shredded paper it is driven to a recycling plant in Fayetteville where it is dumped. While much of that procedure is mechanical in nature, claimant was also required to physically remove a portion of the shredded paper.

Claimant testified that after he left Auto Master he called his supervisor, Jordan Fowler, and informed him that his truck was full and that he was going to dump it. Claimant testified that Fowler informed him to just park the truck and dump it in the morning. Claimant testified that he then replied: "Thank God, because I wasn't - - I couldn't figure out how I was going to dump the truck one-handed." When Fowler asked claimant what he meant, claimant replied: "Well, I messed up my shoulder, but don't worry about it."

Claimant testified that after he parked his truck he went home, took some Motrin, and went to bed. When he woke up the next morning he could not lift his shoulder or arm. Claimant testified that he telephoned Fowler and told him he was not going to be at work that morning because he was going to the doctor.

Because the claimant is a veteran, he sought medical treatment from the emergency room at the Veteran's Administration Hospital on January 22, 2009. X-rays were taken of the claimant's shoulder which were read as unremarkable. The claimant was given medication and a sling to wear. Claimant was also taken off work for two days and then

informed that he should limit the use of his shoulder for possibly as long as two to three weeks. If claimant showed no significant improvement he was to receive an orthopaedic follow up.

Following the medical visit on January 22, 2009, the claimant returned to the respondent but was informed that light duty work was not available. Claimant has not worked for the respondent or any other employer since that time.

Claimant subsequently did undergo an orthopaedic evaluation at the VA Hospital and an MRI scan was ordered which revealed a SLAP tear of the right shoulder glenoid labrum. The medical records reflect that surgery to repair this type of tear is not performed at the VA Hospital in Fayetteville. As a result, claimant was referred to the VA Hospital in Little Rock and has since been referred to a VA Hospital in Houston which has surgery scheduled for November 12, 2009.

Claimant has filed this claim contending that he suffered a compensable injury to his right shoulder while employed by respondent on January 21, 2009. He seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____The claimant contends that he injured his right shoulder while lifting a box working for respondent on January 21, 2009. Thus, his claim is for an injury caused by 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 identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right shoulder.

First, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment with respondent and that the injury was caused by a specific incident identifiable by time and place of occurrence. With respect to this issue, respondent contends that claimant's current problems are the result of a pre-existing right shoulder condition. In support of that contention the respondent has introduced medical records from the VA Hospital reflecting prior complaints of right shoulder problems. In a report dated October 12, 2007, claimant is noted to have a history of degenerative joint disease of the shoulder. The report also indicates that claimant has had right shoulder pain for three days. More recently, the claimant underwent his annual physical examination by his primary care physician, Dr. Rhame, at the VA Hospital on December 2, 2008. Dr. Rhame's medical report of that date includes the following statement: "Limited range of motion in the right shoulder secondary to pain."

At his deposition the claimant denied any prior right shoulder problems and he also reported no prior right shoulder problems to the VA Hospital when he sought treatment on January 22, 2009. Clearly, this was an incorrect statement. However, I do not find that claimant has failed to meet his burden of proof based upon those pre-existing complaints.

Even though the claimant may have complained of some right shoulder problems prior to January 21, 2009, those complaints were relatively minor in nature as compared to the complaints after January 21, 2009 according to claimant's primary care physician, Dr. Rhame.

In a letter dated June 24, 2009, Dr. Rhame stated that he saw claimant in December 2008 for a routine physical and claimant was having some right shoulder pain consistent with bursitis at that time. However, he noted that claimant was still able to work after that date. Dr. Rhame went on to indicate that on January 21, 2009, the claimant felt a pop in his shoulder and had not been able to lift after that incident. Accordingly, Dr. Rhame stated: "It appears that this right shoulder problem did not exist prior to 10Jan2007."

Dr. Rhame also testified by deposition. First, with respect to the VA records from October 12, 2007 noting right shoulder pain, Dr. Rhame testified that his review of the records would indicate that claimant was having an episode of muscle spasms at that time and the medical records do not show any further evaluation. Furthermore, with respect to the diagnosis of degenerative disease of the shoulder which was mentioned in that report, Dr. Rhame noted that x-rays were negative for degenerative disease.

Turning to his examination of the claimant in December 2008 regarding right shoulder complaints, Dr. Rhame testified that claimant's right shoulder problems were not severe enough that claimant could not move his arm or severe enough for him to order an x-ray or an orthopaedic consult. In fact, Dr. Rhame testified that claimant's shoulder complaints were not severe enough that they even warranted treatment. Dr. Rhame acknowledged that in his assessment of claimant in December 2008 he wrote down ten items and none of those items included claimant's right shoulder. He significantly noted that he did not order an x-ray, an MRI scan, or even medication. Dr. Rhame testified that if he had thought the claimant's shoulder was a problem he would have treated it at that time. Finally, Dr. Rhame testified that if claimant had a torn labrum in December 2008 he

would not have been able to continually lift 50-pound boxes of paper at his job with the respondent. With respect to that particular testimony, I note that a review of the claimant's wage records indicates that claimant did not miss work after the examination in December 2008 until after the January 21, 2009 incident.

With respect to reporting the injury, Fowler testified that claimant did not mention injuring his shoulder on the job to him when he called on the afternoon of January 21. However, claimant testified that when he informed Fowler that he did not know how he was going to dump the truck one handed and Fowler asked what he meant, claimant simply said that he had messed up his shoulder.

Furthermore, claimant testified that after he went to the VA Hospital the next day, January 22, he returned to the respondent and provided a note wherein he was to be off work for two days. Fowler testified at the hearing that on that day he asked the claimant what he had done and claimant indicated that he was not sure how he had injured his shoulder and when he had done it. However, Fowler also later admitted during his testimony that either on January 22 or a few days later the claimant informed him that he thought he had injured his shoulder at work. Thus, even according to Fowler's testimony, it is possible that the claimant reported the injury the next day.

In summary, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered an injury which arose out of and in the course of his employment and that his injury was caused by a specific incident identifiable by time and place of occurrence. Based upon the testimony of Dr. Rhame, I do not find that claimant's current shoulder problems are the result of a pre-existing right shoulder condition. Instead, I find that claimant suffered a new injury which resulted in a tear of his right shoulder labrum while employed by respondent on January 21, 2009.

Furthermore, I find that the injury caused internal physical harm to claimant's body which required medical services and that he has offered medical evidence supported by

objective findings establishing an injury. As previously noted, an MRI scan revealed a tear of the right shoulder labrum.

Accordingly, for the foregoing reasons, I find that claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by respondent on January 21, 2009.

Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable right shoulder injury.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning January 28, 2009 and continuing through a date yet to be determined. The injury to claimant's right shoulder is an unscheduled injury. In order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, the evidence does indicate that claimant has remained within his healing period from the time of his injury with surgery currently scheduled for November 2009. However, in addition to proving by a preponderance of the evidence that he remains within his healing period, claimant must also prove by a preponderance of the evidence that he suffers a total incapacity to earn wages. Here, claimant initially sought medical treatment from the emergency room at the VA Hospital on January 22, 2009. Dr. Meyer evaluated the claimant on that date and took him off work for two days. Dr. Meyer then indicated that claimant should simply limit the use of his shoulder for possibly a period as long as two to three weeks. Other than this notation indicating that claimant should remain off work for two days, there is no other medical report indicating that claimant is totally incapacitated from working. While there is some notation in the medical reports that claimant is not working, those notations are merely factual in nature, not a medical opinion that claimant is incapable of working.

In summary, in order to be entitled to temporary total disability benefits, claimant has the burden of proving by a preponderance of the evidence that he remains within his healing period and that he suffers a total incapacity to earn wages. While claimant has remained within his healing period, he has failed to prove by a preponderance of the evidence that he suffers a total incapacity to earn wages. Other than the two days he was taken off work by Dr. Meyer on January 22, no treating physician has taken claimant off of work. Accordingly, I find insufficient credible evidence indicating that claimant has suffered a total incapacity to earn wages.

Furthermore, with respect to the two days that claimant has taken off work, pursuant to A.C.A. §11-9-501(a)(1), compensation to an injured employee is not paid for the first seven days of disability. In the event claimant is totally incapacitated from working following his surgery for more than five additional days he would be entitled to payment of temporary total disability benefits.

AWARD

Claimant has met his burden of proving by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by respondent on January 21, 2009. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with his compensable right shoulder injury. Claimant has failed to prove by a preponderance of the evidence that he is entitled to any temporary total disability benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B)(ii), attorney fees are awarded “only on the amount of compensation for indemnity benefits controverted and awarded.” Here, no indemnity benefits were controverted and awarded; therefore, no attorney fee has been awarded. Instead, claimant’s attorney is free to voluntarily contract with the medical providers pursuant to A.C.A. §11-9-715(a)(4).

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE