

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G304931

SUMMER PUGH, Employee	CLAIMANT
STAFFMARK, Employer	RESPONDENT
CCMSI, Carrier/TPA	RESPONDENT

OPINION FILED FEBRUARY 12, 2014

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

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

Respondents represented by JOSEPH H. PURVIS, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 8, 2014, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on August 22, 2013, and a pre-hearing order was filed on that same date. 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 May 21, 2013 when claimant was assigned to work at Ozark Electronic, Inc.
3. Claimant was earning sufficient wages to entitle her to total disability benefits at the rate of \$267.00 per week.

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

1. Compensability of injury to claimant's right shoulder on May 21, 2013.
2. Medical treatment.

3. Temporary total disability benefits from May 21, 2013 through a date yet to be determined.

4. Attorney fee.

The claimant contends she sustained a compensable injury to her right shoulder while in the course and scope of her employment on May 21, 2013. Claimant was placed on a 2-pound lifting restriction by Dr. Clemens on June 25, 2013 and the respondents have failed to provide claimant with work to accommodate this restriction. An MRI of the right shoulder from June 12, 2013 documented a full-thickness tear in the supraspinous tendon near insertion to the humerus. Claimant contends she is entitled to medical treatment, temporary total disability benefits from May 21, 2013 through a date yet to be determined, and an attorney fee.

The respondents contend that the claimant's full thickness rotator cuff tear in her right shoulder is not the result of a compensable 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 August 22, 2013, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while working for respondent on May 21, 2013.

3. Respondent is liable for payment of all reasonable and necessary medical

treatment provided in connection with claimant's right shoulder injury.

4. Claimant is entitled to temporary total disability benefits beginning May 22, 2013 and continuing through a date yet to be determined.

5. Respondent has controverted claimant's entitlement to indemnity benefits.

FACTUAL BACKGROUND

_____The claimant is a 32-year-old woman who began working for respondent in May 2012 and was assigned by respondent to work at Ozark Electronics on September 24, 2012. Ozark Electronics refurbishes various small consumer appliances such as air conditioners, coffee pots, blenders, George Foreman grills, et cetera. Respondent assigned a number of employees to work at Ozark.

Claimant's initial job was working as an air conditioner detailer. Claimant was responsible for cleaning the inside and outside of air conditioners. Next, claimant worked as an air conditioner kitter. As a kitter, claimant was responsible for gathering parts for air conditioner units such as fins, screws, manuals, and placing them on top of the air conditioner unit.

Beginning in February 2013 the claimant worked as a line loader. This job required claimant to use a pallet jack to pull pallets loaded with product to the end of a line, unload the boxes, and place product on the line for testers. Claimant testified that these products were mostly food processors, blenders, and occasionally George Foreman grills. These products had been returned as defective and a tester would make sure the product is functional and then the product was cleaned, boxed, and shipped.

In late April or early May 2023 claimant began working as the line loader primarily for the George Foreman line and she worked there every day. Claimant testified that this job was the most physical job she performed at Ozark because the product was heavier. In addition to performing her job duties as a line loader, she also at times assisted Ella

Carter by carrying drip trays that went with the grills.

Claimant testified that on May 21, 2013 she placed a new pallet at the end of the George Foreman line with her pallet jack. As she was cutting plastic wrap from around the boxes another employee, Mikey Horvath, came through with an empty Gaylord on a pallet jack. In the process of him moving his pallet jack past hers, the pallet jack handle on her machine was pushed down and when released it popped up suddenly. It was claimant's testimony that the handle struck her in her right shoulder. Claimant testified that she jumped backwards when this occurred and noticed that her shoulder was hurting her where she had been struck. Claimant testified that the longer she worked the more her shoulder hurt. Claimant admitted that when Horvath initially asked her if she was okay she responded that she was, and that she later informed him that she thought she had been injured. Claimant also testified that she reported this incident later that morning to Rusty Wallace, her supervisor. Claimant testified that Wallace gave her some Ibuprofen and that as she continued to work it became more difficult for her to perform her job duties. As a result, claimant subsequently left work early that day and went home.

On May 22, 2013 claimant returned to Ozark and went to Wallace's office where she signed paperwork that Wallace had already prepared. Claimant then sought medical treatment from Dr. Clemens later that day.

Dr. Clemens' medical report of May 22, 2013 indicates that claimant reported a workers' compensation shoulder injury which had occurred the previous day as the result of a direct blow to the shoulder. Dr. Clemens diagnosed claimant as suffering from acute shoulder pain due to trauma and he prescribed medication. He also provided claimant with work restrictions. Respondent did not have work available within claimant's work restrictions and she has not returned to work for respondent or any other employer since May 21, 2013.

On May 28, 2013 claimant again returned to Dr. Clemens with complaints of the

pain being constant and worsening. Dr. Clemens again diagnosed acute shoulder pain and prescribed medication and recommended a physical therapy evaluation.

Subsequent to that evaluation the claimant underwent an MRI scan of her right shoulder on June 12, 2013 which revealed a small full-thickness tear in the supraspinous tendon. Claimant subsequently returned to Dr. Clemens on June 25, 2013 at which time he diagnosed claimant's condition as an acute supraspinous tendon rupture and recommended treatment in the form of medication, restrictions of no lifting more than two pounds, and physical therapy.

Respondent denied claimant's injury as compensable and as a result she has not received any additional medical treatment. Claimant has filed this claim contending that she suffered a compensable injury to her right shoulder while working for respondent on May 21, 2013. She seeks payment of related medical treatment, temporary total disability benefits, and a controverted attorney fee.

ADJUDICATION

_____ Claimant contends that she suffered a compensable injury to her right shoulder when she was struck in her right shoulder by a pallet jack which popped up while working for respondent on May 21, 2013. Claimant's claim is for a specific injury 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 her burden of proof.

First, it is claimant's contention that she was struck in the right shoulder when a pallet jack handle popped up on May 21, 2013. Respondent contends that while the handle did pop up, the handle did not strike the claimant in the shoulder, but at most startled her. This contention is supported by the testimony of Mikey Horvath who was pulling another pallet jack which in turn pulled down claimant's pallet jack handle. Horvath testified as follows:

Q. You saw the jack come up, did you not?

A. Yes.

Q. Did it strike Summer?

A. No, it did not.

Q. You're sure of that?

A. Yes.

Q. Okay. She just acted like she was startled?

A. Right.

In this particular case, the weight to be assigned to Horvath's testimony is dependent, in part, on the circumstances surrounding a video of this incident. The parties offered into evidence as Joint Exhibit D the deposition of Rusty Wallace. Wallace is the on-site supervisor for respondent's employees at Ozark. All of the respondent's employees at Ozark report to Wallace. Wallace testified at this deposition that a video of the incident

revealed that claimant's shoulder was not struck by the pallet jack handle. Wallace testified that he had reviewed this video and would provide it to claimant in accordance with discovery requests.

Q. You have surveillance of this incident?

A. Oh, yes. I had the plant manager sign off. We looked, gosh, several hours before, several hours after. I had my IT Department look over that and, yes, my plant manager signed off on it and there was no - - basically, no surveillance of Mikey - - I think Mikey was in three to four foot of Summer, but the surveillance showed nothing hitting her shoulder.

Q. Is there surveillance video of this incident?

A. Yes.

Q. I want a copy of the surveillance video of this incident.

A. Sure.

Q. Okay. In regard to the surveillance video, did you review video for Summer Pugh working the few hours before this incident?

A. I did. Of course, the incident happened mid-morning. I looked at it the start shift to the end of the day. Had the IT Manager go back - - and I was with him, as well watching him go through it. I got - - more or less, I had to go take care of couple more situations with other employees. So after he went through it a couple of times, he reported back to me and let me know. And, of course, keep in mind, I already watched it and did not notice two hours before, two hours after, nothing - - nothing striking Summer. And, of course, after all this went through - - we went through this process, talked to the IT Manager/ Supervisor, told me did not see anything. Plant manager, more or less, signed a document stating, as well, that there was no - -

MR. PURVIS: And you've got a copy of that?

MR. HATFIELD: Go ahead. Finish your answer.

A. But, yeah, plant managers signed off stating that, yes, there was no footage that would constitute an accident/incident.

Q. (Mr. Hatfield Continuing) Okay. Did you review - - is there footage of Summer working before the incident?

A. It's the whole day. It's 24 hours a day.

Q. Okay. And do you have that video, the whole day?

A. I have the whole day.

Q. Do you - - do you have it of Summer working?

A. Yes. It's - - the camera is right on her and Mikey - - you see Mikey walking up, but, yes, we have the whole footage at that particular line.

Q. So you have footage of Summer working the entire week?

A. Yeah, I've got - - can do the whole month, if you would like. (Emphasis added.)

Prior to the hearing claimant filed a motion to exclude any reference to video surveillance and an inference that the video would have been unfavorable to respondents. Claimant contended in that motion that the entire surveillance had been requested and that only approximately one hour of the day had been provided. Specifically, the motion indicated that no video of the incident was provided as testified to by Wallace. The respondent did not respond to this motion and did not introduce the video at the hearing or make any reference to the video.

In claimant's post-hearing brief claimant renews that part of the motion that the inference be drawn that the video was unfavorable to respondent. In support of the motion claimant cites the decision in *Goff v. Harold Ives Trucking Company*, 342 Ark. 143, 27 S.W. 3d 387 (2000). In that particular case, the Supreme Court of Arkansas was asked to

recognize an independent tort cause of action based upon an intentional spoliation of evidence. The Court did not adopt that cause of action and noted that there were other avenues of remedy. One of those remedies was that the aggrieved party can request that a jury be instructed to draw a negative inference against the spoliator. The Court also noted that a party can ask for discovery sanctions or have a criminal prosecution initiated against a party who destroyed relevant evidence.

While there is no evidence in this case that the respondent destroyed the evidence of a videotape, I note that it would certainly be difficult to imagine better evidence for the respondent to introduce in this case than a video of the incident showing that the claimant was not struck by the pallet handle as she now claims. Wallace testified that he had reviewed this videotape and that the video did not show claimant being struck by the pallet jack. Given that respondent did not offer this alleged video, it seems reasonable to infer that it was not favorable to Wallace's testimony that he had reviewed the video and it showed that claimant was not struck by the jack handle.

Under these circumstances, I have accorded Horvath's testimony little weight.

I also note that the respondent has introduced testimony of various individuals who stated that claimant complained of shoulder pain before May 21, 2013. Testifying at the hearing was Sheila Carter. Carter is employed by the respondent and has known claimant since claimant was eight years old. Carter testified that approximately a week to 10 days before claimant last worked for respondent the claimant approached her and they talked about claimant's shoulder hurting. Carter testified that claimant informed her that claimant's husband had gotten abusive with her and thrown her against a wall, grabbing her by the arm and throwing her on the ground.

Also testifying at the hearing was Beverly January. January testified that approximately one week before May 21 she observed the claimant rotating her shoulder. She testified that when she asked claimant what was wrong claimant "told me that her and

her old man had gotten into it and that she hurt her arm.” January went on to testify that she overheard the claimant having a conversation with Clark the day before May 21 indicating that she was still having problems with her arm.

Also testifying at the hearing was Stephanie Yeakley. Yeakley works for Ozark and was claimant’s supervisor on the production line. Yeakley testified that claimant indicated that her shoulder was bothering her some one to two weeks before May 21 and that she was permitted to go home early to seek medical treatment. Yeakley testified that the claimant never indicated how she had injured her shoulder.

Finally, Shane Olson testified that he works for the respondent in packing. Olson testified that approximately a week before May 21 claimant informed him that her boyfriend had put her in an arm bar over the weekend and had injured her arm.

In addition to their testimony, all of these witnesses have signed individual or collective statements regarding comments made to them by the claimant with regard to shoulder complaints prior to May 21, 2013.

There are some discrepancies with the written statements versus the witness’ testimony. For instance, there are discrepancies between the time periods contained in the written statements regarding when claimant reported problems versus the times the witnesses testified to at the hearing. For instance, Carter signed one statement indicating that claimant indicated her husband having been abusive to her 10 days before the work-related incident and in another statement Carter indicated that claimant made those complaints some two to three weeks before May 21. There was also conflicting testimony amongst the witnesses and Wallace as to whether all of them signed the statements at the same time or whether they were approached individually. Notably, the witnesses were unclear as to which shoulder claimant was allegedly making complaints about before May 21, 2013.

There was also testimony and evidence presented regarding claimant’s marriage

and her current boyfriend. Apparently, there was an incident at the end of April 2013 when the police were called to the residence of claimant and her husband regarding an altercation. However, there is no evidence that this was a physical altercation which resulted in an injury to claimant's shoulder. In fact, the parties took the deposition of the officer who responded to this call, Samuel Sanchez, Jr., and he testified that there were no threats of physical violence and he did not see any signs of physical violence.

Also offered into evidence was testimony regarding claimant's boyfriend, Curtis Harris. Harris participates in a martial arts discipline known as Muay Thai. Harris described Muay Thai as kick boxing and indicated that he has participated in some competitions. There was some evidence that at one point Harris and the claimant were wrestling with Harris accidentally striking claimant in her left arm and causing a bruise. However, there is no indication that this resulted in an injury to the claimant's right shoulder and Harris specifically testified that he did not place claimant in an arm bar or perform any other type of maneuver on her.

Irregardless of any statements made by witnesses in this case regarding shoulder complaints prior to May 21, 2013, it was the opinion of Dr. Clemens that an individual with the claimant's condition of a torn rotator cuff would not have been able to perform her job which required lifting more than two pounds and reaching and engaging in repetitive movements. Clemens testified at his deposition that performing those activities would be expected to cause pain and would be noticeable. Testimony of the witnesses at the hearing indicated that claimant performed her job and there were no complaints of her performance of job duties.

Testifying by deposition was Ella Carter. Carter works for Ozark, not respondent. Carter also worked on the George Foreman line with claimant. Ella Carter testified that claimant reported the injury to her on May 21, 2013 and indicated that the pallet jack handle had struck her shoulder and it was hurting. Carter testified that prior to that time

the claimant had helped her carry totes, some of which were heavy. Carter testified that she did not notice the claimant having any difficulty with the totes and claimant did not complain that her shoulder had been injured. Likewise, Yeakley also testified that she did not notice the claimant having any problems with her production work before May 21, 2013. Horvath also testified that he had not noticed the claimant ever having problems performing her job and that claimant was a good worker. Lastly, Wallace also testified that claimant was an exceptional worker and he had no problems with claimant's work performance and in fact indicated that claimant was capable of performing more physical job duties than any other female he supervised.

The only witness at the hearing who testified that they noticed claimant having problems performing her job prior to May 21 was Beverly January. January testified that about one week before May 21 claimant had informed her that she had gotten into it with her "old man" and that after that date claimant had trouble performing her job all that week. However, the week before May 21 claimant only worked one and a half days due to her own illness as well as the illness of her child.

In my opinion, the credible evidence of record indicates that even if the claimant did make some complaints involving her shoulder prior to May 21, 2013, there is insufficient evidence that those complaints involved her right shoulder as opposed to the bruising of her left arm which had occurred when she was wrestling with Harris. Furthermore, and more importantly, the credible evidence of record indicates that claimant was physically capable of performing her job up to and including the time before the injury on May 21, 2013. With the exception of January, the witnesses testified that claimant had no difficulty performing her physical job duties while working for the respondent. This evidence coupled with the opinion of Dr. Clemens that it would have been difficult for an individual suffering from a torn rotator cuff such as the claimant to physically perform her job without pain and it being noticed is significant.

Finally, with respect to Dr. Clemens' opinion, I note that he testified at his deposition that while his notes did not indicate any evidence of bruising, the presence of bruising would depend upon the severity of the blow. It was the opinion of Dr. Clemens that claimant's injury could have occurred exactly the way she described it when she was struck in the right shoulder by a pallet jack handle popping up.

In summary, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by respondent on May 21, 2013. First, I find that claimant has met her burden of proving by a preponderance of the evidence that the injury arose out of and in the course of her employment and that it was caused by a specific incident identifiable by time and place of occurrence. While respondent offered the testimony of Horvath that the claimant was not struck in the right shoulder by the pallet jack, for reasons previously discussed involving the video, I find that Horvath's opinion is entitled to little weight. Furthermore, the evidence indicates that even if the claimant did make complaints of right shoulder pain prior to May 21, 2013, she performed her job which required extensive physical activity without any problems and without any noticeable complaints according to the witnesses. It was the opinion of Dr. Clemens that claimant would not have been capable of performing that job without significant pain and it being noticeable.

I also find that claimant has met her burden of proving by a preponderance of the evidence that the injury caused internal physical harm to her body which required medical services and that she has offered medical evidence supported by objective findings. An MRI scan performed on the claimant's right shoulder revealed a torn rotator cuff for which she has received some medical treatment.

Accordingly, I find that claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

Respondent is liable for payment of all reasonable and necessary medical treatment

provided in connection with claimant's compensable injury. I also find that claimant is entitled to temporary total disability benefits beginning May 22, 2013 and continuing through a date yet to be determined. In order to be entitled to those benefits, claimant has the burden of proving by a preponderance of the evidence that she remains within her healing period and that she suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). Here, claimant clearly remains within her healing period in that she has been unable to obtain medical treatment due to the respondent's controversion of this case. I also find based upon the restrictions placed upon claimant by Dr. Clemens, including the two-pound lifting restriction and limiting her ability to reach and engage in repetitive movements with her right arm, her dominant arm, that claimant suffers a total incapacity to earn wages. Claimant is entitled to temporary total disability benefits beginning May 22, 2013 and continuing through a date yet to be determined.

AWARD

Claimant has met her burden of proving by a preponderance of the evidence that she suffered a compensable injury to her right shoulder while employed by respondent on May 21, 2013. Respondent is liable for payment of medical treatment related to claimant's compensable injury as well as temporary total disability benefits beginning May 22, 2013 and continuing through a date yet to be determined. Finally, respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded

on medical benefits.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$705.00.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE