

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F212239

DOYNE BIVENS, EMPLOYEE	CLAIMANT
CONAGRA POULTRY, EMPLOYER	RESPONDENT
GALLAGHER BASSETT SERVICES, INC., CARRIER	RESPONDENT

OPINION FILED MARCH 22, 2006

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE KENNETH OLSEN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE NORWOOD PHILLIPS, Attorney at Law, El Dorado, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals a decision of the Administrative Law Judge filed on August 5, 2005. After a de novo review of the record, we find that the claimant has proven by a preponderance of the evidence that he sustained a compensable right shoulder injury due to a specific incident in 2001. We further find that the claimant should be entitled to receive temporary total disability benefits from February 5 to February 19, 2002, as a result of that injury. We also find the respondents are entitled to a set-off pursuant to Ark. Code Ann. § 11-9-411(a).

The claimant worked as a "line thrower". His job required him to put chickens on a line, put crates on a line, and then to place the chickens in order to be priced and packed. The claimant testified that he was injured when a dolly that had chickens eight crates high fell on him. He said that usually the dollies had four wheels but that the dolly he was using was missing one wheel. The claimant further indicated that the dolly hit a hole in the concrete and that the rack overturned and fell on him.

The claimant testified that immediately after the accident he reported the incident to his supervisor, Rodney Henry, and then subsequently reported to the company nurse. The claimant said he believed the accident occurred in December 2001 but admitted he did not know the exact date of the accident.

The claimant testified that he returned to work the next day and reported to the nurse's station. He said the nurse told him she was going to let him see a doctor, but when he reported to her she indicated there was no appointment available. He indicated that when he asked about going to his own doctor, the nurse

said he would have to pay for it himself. The claimant said he was initially treated by Dr. Newsome and then was referred to Dr. Bryant. He testified that Dr. Bryant referred him to see Dr. Collins.

On January 22, 2002, Dr. D'Orsay D. Bryant III treated the claimant. The doctor's note from that visit provided that the claimant complained of a right shoulder injury that occurred in December 2001. The note indicated that the claimant was injured when a meat rack fell. The note recommended that the claimant have an MRI and diagnosed him with a right shoulder impingement syndrome with a possible rotator cuff tear.

A MRI was performed on January 28, 2002, and revealed that the claimant suffered from a chronic rotator cuff tear. The report indicated, "Evidence of chronic rotator cuff tear of most of the anterior rotator cuff. Posteriorly there is evidence of tendonitis and partial tearing."

The claimant applied for short-term disability through his employer. On the application he indicated that the injury occurred on December 15, 2001. He also reported that the accident occurred when the rack that

was missing its fourth wheel overturned and fell on him. On February 7, 2002, the claimant requested FMLA to have his shoulder repaired. He indicated that his last day to work was on February 5, 2002.

Dr. David N. Collins recommended the claimant undergo surgery on his shoulder. The surgery was performed on March 25, 2002. The claimant was on short term disability from February 5, 2002 to May 19, 2002, at which time he returned to work.

Spears Watson, former coworker, testified at the time of the hearing and indicated that he witnessed the incident where the rack fell on the claimant. Watson further indicated that the claimant had difficulty moving after the accident and that he advised the claimant to go to the nurse. Watson said he did not see the claimant go to the nurse, but did see him leave the work area. Watson also indicated that the incident occurred near the end of the year in 2001.

Suzie Hamilton, Night Shift Nurse, testified that there was a policy requiring that an incident report be completed when a workplace injury occurred. She testified that she was not employed by the

respondents until April 2003. She said she looked at the claimant's personnel file and the nurse's station file, but there was no record of the claimant reporting an incident in either 2001 or 2002. Hamilton testified she personally completed an incident report in 2003 for the claimant, but was largely unable to testify as to the circumstances surrounding the event.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002), must be established: (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 defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (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. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Arkansas Workers' Compensation Law further indicates that an employee does have to show an "identifiable" incident pursuant to Ark. Code Ann. §11-9-102(4)(A)(i). However, he does not have to identify an exact date of an injury. See, Edens v. Superior Marble and Glass, 346 Ark. 487, 58 S.W. 3d 369 (2001). Further, the Court of Appeals has ruled that a generic description of work is not sufficient, instead, there must be a particular incident. Hapney v. Rheem Manufacturing, 342 Ark. 11, 26 S.W. 3d 777 (2000).

The Administrative Law Judge found that the claimant was vague regarding when the incident occurred. He also discredited the claimant's testimony because a note from Dr. Bryant, dated January 22, 2002 had a notation indicating that the claimant went to the ER for treatment. He also pointed out that the doctor's note

from Dr. David Collins indicated the injury occurred on January 10, 2002.

In our opinion, the claimant provided sufficient information regarding when and how the injury occurred in order to show he sustained an injury that occurred a result of a specific incident occurring during the course and scope of employment. The claimant admitted that he did not know the exact date of the injury. However, the claimant was able to recall the exact, specific incident that caused him injury. Additionally, the claimant consistently indicated that the injury occurred near the end of December 2001 or the beginning of 2002. The medical records, in our opinion, corroborate this testimony. While they are not consistent as to the exact date the injury occurred, they are consistent as to the general time period in which the claimant says it occurred. Additionally, they are consistent in regard to how the accident occurred and are corroborated by the testimony of Watson.

Watson corroborated the claimant's testimony regarding the general time and chronology of the injury. Watson testified as follows,

Q. Do you recall an incident in that time period that I described to you where he was injured?

A. Yes, he was pulling product up to his line, and there was a hole in the floor and the product was on a bad dolly, it had a bad wheel, and it caught the crack that was in the floor and the bad wheel, and it flipped over on him. The product flipped over on him.

Q. Did you see that happen?

A. Yes.

Watson indicated that at the time of the incident the claimant was visibly injured and that, "He couldn't hardly get up, he couldn't hardly move."

Watson further indicated that the incident occurred in late 2001. He testified as follows:

Q. Do you have an opinion as to whether or not it was before the end of the year in 2001?

A. It wasn't at the end of the year, it was close to the end of the year.

The Administrative Law Judge preferred the testimony of Hamilton over that of Watson. However, we find the opinion of Watson to be more persuasive than

that of Hamilton. Watson worked for the employer at the time of the claimant's injury whereas Hamilton did not work for the employer until 2003. Accordingly, Watson had first hand knowledge and Hamilton did not.

No one disputes that Watson worked with the claimant. Likewise, there is absolutely no reason not to believe Watson's testimony. Since Watson's testimony is virtually identical to the claimant's account of how and when the accident occurred and he had first hand knowledge of the incident, we find the claimant has shown he sustained an injury identifiable by a specific incident that occurred during the course of employment.

The Administrative Law Judge also relied on the fact that the note from Dr. Bryant, dated January 22, 2002 referenced the claimant going to the emergency room. He indicated that the claimant's failure to testify as to that event and failure to include a medical record from that visit indicate he is not credible. First, we note that the claimant was never specifically asked if he went to the emergency room for treatment. Additionally, we note that the claimant testified that he was first treated by Dr. Newsome.

However, the medical records do not show he received treatment from anyone by that name. Accordingly, it is unknown whether Dr. Newsome or some other unnamed physician treated the claimant in the emergency room. Regardless, in our opinion, the claimant's failure to introduce records from such a visit should not diminish his credibility in any way. The respondent deposed the claimant and if the medical record showed anything that was damaging to the claimant, the respondents likely would have introduced it in the record. Additionally, we find that by virtue of the fact the record was not submitted, the Administrative Law Judge impermissibly speculated as to what the report may or may not have said.

The Administrative Law Judge also opined that the claimant gave two histories of the same accident—one in 2001 and one in September of 2003. However, we note that the description of the two accidents were not the same. The claimant's claim from the incident in 2001 indicates that the claimant was injured when the meat racks fell on him. However the report from September of 2003, indicates that the claimant injured his left

shoulder when **he** fell. In fact the second report indicates, "I was pushing some racks of meat then I slipd (sic) and fell on my left side". This indicates that the claimant was not claiming that the identical thing happened to him on two occasions. Instead the first report involved an accident where a rack of meat fell on him. The second report described an incident where the claimant fell. The report from 2003 in no way indicates the claimant was injured from "meat falling off a cart". Accordingly, we find that the Administrative Law Judge's assertion that the claimant gave two separate reports of incidents where a meat rack fell on him is erroneous.

The Administrative Law Judge noted that there was no record of the claimant reporting the incident as required by company policy. The claimant refuted that testimony, indicating he told his supervisor and the company nurse. The record shows the claimant applied for short term disability benefits and for FMLA leave shortly after the injury occurred. Further both applications noted when and how the incident occurred, indicating that the employer was aware of how and when

the incident occurred. The company nurse did not testify at the time of the hearing. Instead, a nurse that was not employed by the company at the time of the incident testified. She was able to provide no personal knowledge as to the incident or whether the claimant had completed a report. We also find it curious that none of the requests for disability pay or for FMLA leave were contained in the claimant's personnel file. The nurse also acknowledged that while a policy requiring completion of an incident form existed, she could not verify that policy was not broken by the nurse. Last, we note that Watson testified the claimant walked toward his supervisor after the incident, which corroborates the claimant's testimony that he reported the incident to his supervisor and then went to the nurse. Accordingly, we attach little weight to the opinion of Hamilton.

Ultimately, we find that the claimant provided a credible account of the accident and when it occurred. The record is devoid of any evidence indicating he had prior shoulder problems. While the claimant did not recall the exact date of the incident in question, he is

not required to do so - instead he is only required to relate it back to a specific incident that is generally identifiable by time and place. When his testimony and the medical records are considered in conjunction, we find that it is more probable than not his injury occurred during the course and scope of employment. We also note that Watson gave a virtually identical account of the time and order of events regarding the claimant's injury. There is no evidence to indicate that he has any interest in the outcome of this case. Accordingly, we attach great weight to his testimony.

We further find that the claimant is entitled to temporary total disability benefits for February 5 to February 19, 2002. Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App.

124, 628 S.W.2d 582 (1982).

On January 28, 2002, the claimant was diagnosed with having a torn rotator cuff. The claimant applied for and was granted short term disability for the time period fo February 5, 2002 to May 19, 2002. This corroborates the medical records indicating the claimant was restricted from working during the time period for which he is requesting benefits. Accordingly, we find the claimant was totally incapacitated from working during the time period in question. We find the evidence also shows the claimant remained in his healing period during that time period. The claimant continued to receive treatment for his injury and was referred to have surgery on March 25, 2002.

Therefore, we reverse the decision of the Administrative Law Judge and find that the claimant has shown he sustained a compensable injury to his shoulder. He has also shown he is entitled to temporary total disability benefits from February 5 to February 19, 2002. The respondents are entitled to a set-off pursuant to Ark. Code Ann. § 11-9-411(a).

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. §11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. §11-8-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code. Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant sustained a compensable injury on December 15, 2001, for which he is entitled to benefits. Based upon my de novo review of the entire record, I find that the claimant has failed to meet his burden of proof. The Administrative Law Judge did not find the claimant or his witness to be credible. Both these witnesses were very vague in identifying when the alleged injury occurred. Moreover, the medical records are not consistent with the claimant's history of when the injury supposedly occurred. While it is true that the exact date and time of injury is not required to prove a specific incident identifiable by time and place of occurrence, the lack of continuity between the claimant's testimony and the history found in the medical records makes one question the claimant's veracity even more. Next, as noted by the Administrative Law Judge, the AR-N completed by the claimant in September of 2003, alleges an injury from a meat rack falling just like the claimant alleges occurred in December of 2001. While the 2003 incident

supposedly injured the claimant opposite shoulder, the claimant admitted that he was not involved in two incidents with the rack of meat falling over. Finally, the claimant testified that he went to the nurse's station multiple times following the alleged injury in 2001, yet there is no record of the claimant ever visiting the nurse for an injury at that time.

When I consider all of the evidence of record, I, like the Administrative Law Judge am convinced that the claimant has failed to meet his burden of proof. Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner