

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F500920

DARRELL HUMPHREY,
EMPLOYEE

CLAIMANT

GEORGIA PACIFIC CORP.,
EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED MAY 8, 2006

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

Claimant represented by the HONORABLE EMILY PAUL, Attorney
at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE SUSAN M. FOWLER,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the
Administrative Law Judge filed November 3, 2005. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim at which time the claimant was earning sufficient wages to entitle him to a compensation rate of \$453.00/\$340.00 in the event this claim is found to be compensable. Expenses have been paid by the claimant's group carrier.

2. The claimant has proven by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.
3. Respondents are directed to pay all reasonable and necessary medical expenses within thirty days pursuant to Rule 30.
4. The respondents are directed to pay temporary total disability benefits from February 28, 2005 to June 5, 2005 as the claimant remained in his healing period totally incapacitated from working.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the

Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the November 3, 2005 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

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. §11-9-715 (Repl. 1996) with Ark. Code Ann. §11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in

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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 respectfully dissent from the majority opinion finding, among other things, that pursuant to Ark. Code Ann. §11-9-102, the claimant has proven by a preponderance of the evidence that he sustained a accidental compensable injury during the course and scope of his employment with the respondent employer on November 25, 2004.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that he sustained a accidental compensable injury, specifically a torn rotator cuff, during the course and scope of his employment with the respondent employer.

The claimant, who had been employed by the respondent employer since 1987, claims to have slipped and fallen on the morning of November 25, 2004, while changing out a large paper wrapper reel at work. The claimant claims to have injured his head, right shoulder, and back when he fell across steel I-beams during this alleged incident. He now seeks benefits associated with a torn rotator cuff. Although it is undisputed that the claimant reported this incident to his supervisor, he did not seek immediate medical attention. Furthermore, the claimant proceeded to work another 7 hours after this incident, finishing his shift. In fact, it is undisputed that the claimant worked without interruption for the next two weeks following this incident, until such time as he took off work for previously scheduled hip replacement surgery.

On December 8, 2004, the claimant underwent hip replacement surgery, which was unrelated to his alleged compensable shoulder injury. While in the hospital following this surgery and apparently while under the influence of strong pain medications, the claimant admittedly fell in the doorway of his hospital room. Subsequent to this incident, the claimant began complaining of severe right shoulder pain. Although x-rays taken at the hospital were benign, an

MRI of the claimant's right shoulder taken on December 15, 2004, revealed full thickness rotator cuff tears of the supraspinatous and infraspinatous tendons with tendon retraction to the level of the glenohumeral joint. The claimant's surgeon, Dr. Scott Bowen, gave him a steroid injection, which was reported to have been of minimal benefit in alleviating the claimant's shoulder pain.

Dr. Bowen continued to see the claimant in follow-up for his hip surgery and his rotator cuff tear. On February 28, 2005, Dr. Bowen performed rotator cuff repair surgery on the claimant's right shoulder.

A compensable injury is statutorily defined as an accidental injury causing internal or external 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). An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15

Ark. App. 226, 691 S.W.2d 879 (1985). Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Moreover, medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. Ark. Code Ann. § 11-9-102(4) (E) (i); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

The claimant was deposed pursuant to this claim on May 17, 2005. During his deposition, the claimant testified that he was reaching across a new roll of paper, somewhat leaning on the roll, when the "roll moved a little bit", throwing him off balance, which caused him to fall backwards. The claimant stated that as he fell, he first hit the center part of his lower back on one I-beam; then his right shoulder and arm on a second; and finally, the back of his head on either the second, or possibly a third beam. The claimant stated that he did not fall straight backwards. Rather, as he was extending his left hand across the roll of

paper, the paper shifted causing him to fall backwards and twist, so that he landed on his right side. Although the claimant could not recall the exact mechanics of his impact with the I-beams, he remembered that he did not fall directly on his shoulder. Instead, he estimated that he initially hit the second I-beam with the back of his right arm just above the elbow area, then he may have slid down the beam along the back of his arm up to his shoulder. In addition, the claimant "guessed" that he put his right arm down as he was falling in an attempt to catch himself. However, when asked specifically whether he caught himself with his right arm he responded "No". There were no eyewitnesses to this alleged event.

The claimant stated that he felt pain in his right shoulder immediately following this incident and that he sustained bruising to his back and right arm. He further stated that he could not raise his right arm above his shoulder. The claimant testified that he reported this incident immediately after it happened; first to an employee in the nearby office area, then to his supervisor, Tommy McDougal, as soon as he arrived downstairs. The claimant admitted that he did not request to see a doctor the day of the incident because he did not perceive his injuries to be

serious. In this regard he stated, "I didn't really know that I had - I thought it was just going to be a real bad bruise and I would just get over it." Moreover, the claimant stated that he was concerned that his seeking medical attention might prevent the mill from receiving an anticipated safety award. Furthermore, the claimant testified that he could not afford to take a day of unpaid leave. The claimant ultimately attributed this accident to his limited mobility due to his pre-existing hip condition.

As previously mentioned, the claimant stated that he was working the day shift, which was from 7 a.m. to 3 p.m., on the date in question. The claimant further stated that this alleged incident occurred at approximately 8:00 a.m. that morning, after which he finished his shift. The claimant testified that he worked a full shift the day following this alleged incident, then had the following 3 days off. Over his 3 day weekend, the claimant testified that he made a trip to Fayetteville from his home in Crossett, with either he or his wife driving (he could not recall). The claimant further stated that he had to return on the 29th in order to attend a pre-surgery screening in Little Rock. The claimant agreed that, in the event it was his wife who drove them to Fayetteville, it would have been

his hip, not his shoulder, that would have prevented him from driving. The claimant returned to work on the 30th of November.

The claimant testified that the work he was doing on the day in question was not his "regular job". Rather, he was filling in as a "roll wrapper operator" for another employee at the time of this alleged incident. According to the claimant, his duties as a roll wrapper operator consisted of "maintaining the heads and maintaining the wrapper reels, maintaining the glue in the dispenser, maintaining the labels in the printers, and then actually, other than that, it's mostly watching and making sure something's not screwing up." The claimant testified that he had difficulty doing some of these tasks after the alleged incident of November 25, 2004; therefore, he compensated by "doing less".

When he returned from his 3 day weekend, the claimant stated that he went back to his regular duty of "roll clamp truck driver". The claimant explained that a roll clamp truck is similar to a forklift, with the exception of a hydraulically operated clamp, versus forks. The claimant testified that the job of a roll clamp truck driver entails operating levers located on the right-hand

side of the driver. The claimant stated that these levers are "very easy to operate". According to the claimant, steering the vehicle is almost exclusively done with the left hand. A videotape presented into evidence helps provide a general idea of the duties and activities of a roll clamp truck driver. A review of this video reveals that the claimant was accurate in his description of a roll clamp truck and the basic movements involved in operating this vehicle. However, this tape demonstrates that the physical activity associated with this job is high in that it requires constant movement of both arms.

The claimant testified that he worked full shifts prior to his hip replacement surgery, and that his last day to work was December 6, 2004. Although the claimant testified that he worked "in pain" prior to his surgery, he stated that he did not seek medical attention from the plant nurse during that time because he did not want to stay over after work in order to see her. "That's the reason." He further stated, "I was hurting too bad." The claimant admitted that his hip hurt more than his shoulder during the week prior to his surgery.

Following the claimant's hip replacement surgery, he admittedly fell while in the hospital recuperating. The claimant described this incident as follows:

I had the surgery on the 8th and I think it was that night. ... Anyhow, they were giving me something to keep me from having pain and they were also giving me something to help me sleep. And sometime during the night, I woke up and didn't know where I was. ... [describing his disorientation] I managed to get out of bed and I was - - I stood up and I was holding onto the - - I wasn't completely awake ... [describing his confusion] I was walking. I was trying to get to the door. And I - - I was holding onto the bed and kind of bouncing up against the wall. And I say bouncing. I mean, you know, just guiding myself with the bed frame and the wall.

Next, describing how he started to become oriented to his surroundings, and, realizing that he was physically weak, the claimant continued ...

And on the corridors, the hallways, they had some handrails that were - - that were about this wide and thin, you know, and padded and everything. And so I realized I was starting to go down, and I reached over to the left where this handrail was and I grabbed it with my left hand. And I eased myself down to the floor because I could feel that - - I was scared I was going to pass out.

Although the claimant insisted that he did not fall, *per se*, he admitted that he told a nurse that had come to his assistance "I don't remember any of it". The claimant further admitted that he twisted as he went down to the floor while holding onto the rail. Although the claimant denied sustaining injury from this incident, he stated that sometime afterwards he began experiencing right shoulder pain that prevented him from sleeping. In response to the claimant's symptoms, Dr. Bowen ordered an MRI of his shoulder, which he was unable to undergo due to his level of shoulder pain. Therefore, this study was rescheduled, and on the second attempt, the claimant was given pain medication. Although the claimant did not seek medical treatment for his shoulder until this time, he testified that he had discussed his shoulder problem with Dr. Bowen's associate, Dr. Sanderson, on November 29, 2004, while he was undergoing pre-screening for his hip surgery. The medical records, however, fail to corroborate that this discussion took place.

The deposition of Dr. Scott Bowen was taken on July 25, 2005. Dr. Bowen testified that he first became aware of the claimant's shoulder complaints on the date of the claimant's discharge from acute care, which was

December 13, 2004. It was at that time that Dr. Bowen ordered an MRI, which was conducted while the claimant was a patient in the step-down, or recuperative unit. As previously discussed, this MRI revealed a full thickness tear involving two of the claimant's right four rotator cuff tendons. Initially, Dr. Bowen treated the claimant conservatively with medication and steroid injections. On February 28, 2005, Dr. Bowen surgically repaired the claimant's tear. Dr. Bowen's post-operative diagnosis of the claimant's shoulder condition was large complex retracted rotator cuff tear, greater than five centimeters; biceps tendinitis; chronic external impingement; and acromioclavicular joint arthritis. When questioned about the typical mechanics of such a significant tear, Dr. Bowen stated:

With a fall I guess an outstretched arm or a stress overhead or a forced downward maneuver on an arm and that's out to the side, that can create tension on that muscle unit and pull it away. And it initially may be a smaller tear but then over time it can progress and pull away and stretch. And these - - because of the tension on the muscle, it continues to maintain tension across the surface area. It converts to typically a little crescent or U-shaped formation when it's a large tear like that.

Dr. Bowen agreed that a fall straight backwards, such as the claimant described having happened on November 25, 2004, could, under certain conditions, cause the type tear from which the claimant suffered. Dr. Bowen described the required mechanics of such a fall as follows:

If he fell back in position and caught himself and had a significant force and he resisted that and it pushed his arm down - - yeah. That's consistent with a traumatic injury like this.

Dr. Bowen admitted that he could not recall the claimant having given him specific details regarding his alleged fall at work on November 25, 2004. Further, Dr. Bowen admitted that the claimant's fall in the hospital could have, under the above described conditions, caused the claimant's rotator cuff tear. With regard to stating within a reasonable degree of medical certainty what caused the claimant's rotator cuff tear, Dr. Bowen testified:

You know, looking at the anatomy of the tear three months later I could not state that. It would really be based on the history and his consistency of complaints. Did his shoulder or pain all start December [November] 25th or was it minor and then it worsened on December 10 after the fall in the hospital? That's the issue, I believe.

Dr. Bowen agreed that it would have been difficult for the claimant to have performed his described work duties with his degree of rotator cuff tear. At the very least, Dr. Bowen opined that the claimant would have experienced significant pain had he worked in such a condition. Finally, with regard to the possible age of the claimant's rotator cuff tear, Dr. Bowen testified as follows:

A large retracted tear of that nature in most circumstances is due to some chronicity of a tear, something that happened and maybe progressed. And over time this is shown, this more retracted tear pattern. That doesn't mean that it can't do that acutely. But what I saw at surgery was more typical of little more of a chronic type of tear that maybe even predated the November 25th to some degree. It may have injured it and worsened it and extended the tear. And from there maybe worsened it possibly with the fall in the hospital. This is somewhat speculation.

At the hearing of August 5, 2005, the claimant testified that he made no real move to stop his fall on November 25, 2004, because "there was actually nothing I could do". In this regard, he stated:

There was nothing I could grab onto with my hands. There was nothing to catch, you know, and actually, when the roll moved, I tried to grab onto it, but the paper was slick and I couldn't - - of

course, there was nothing to grab on there.

Although the claimant stated that he hit his lower back, the back of his head, and his arm on steel I-beams when he fell, he denied having pain anywhere other than his right shoulder at the time. Moreover, the claimant stated that his right shoulder was badly bruised from the incident, yet he had "no idea it had done anything, a permanent type injury". By his own admission, the claimant did not realize he had injured his right shoulder, other than bruising, after his alleged fall on November 25, 2005. The claimant reported the incident to his supervisor. However, the claimant stated that he did not request immediate medical treatment for his shoulder because "... I actually didn't feel like I needed it". In addition, he continued to work for the following two weeks. Further, the claimant made a round trip to Fayetteville the weekend following the alleged incident.

In contrast to his fall of November 25th, the claimant insisted on medical treatment for his shoulder pain after his hospital fall of December 10, 2005. Furthermore, following this incident, the claimant's shoulder pain was unbearable to a degree that he could not undergo an MRI

without pain medication. Moreover, the claimant was unable to use his right arm until after his shoulder surgery in February of 2005.

I find that the evidence preponderates in favor of the claimant having fallen as reported on the morning of November 25, 2004. However, the credible evidence preponderates against the claimant having sustained a significant rotator cuff tear as a result of that incident. The mere mechanics of his fall, as described by the claimant, demonstrate that he did not catch himself with his right arm in such a manner as to create the type of stress and force necessary to cause such an injury to his shoulder. Rather, the claimant testified that there was nothing he could do to break his fall, thus indicating that he did not use his right arm to "shoulder" the brunt of the impact. In addition, the claimant did not display the immediate symptoms normally associated with a significant rotator cuff tear. According to Dr. Bowen, the claimant would have experienced a significant amount of pain had he worked with such an injury. However, the record reveals that the claimant not only finished the remainder of his shift following this incident, he worked for the following two weeks. Further, the claimant was in the hospital, under

constant medical care, for nearly a week before he began complaining of right shoulder symptoms. It was not until after his fall of December 10th that his shoulder pain became bothersome to the point that he reported it to his attending physician. Although the claimant insisted that he did not "fall" in the hospital, he admitted that he was "sleepwalking", and thus, so disoriented that he did not realize what he was doing. Even so, the claimant offered detailed testimony regarding the mechanics of this incident, insisting that he eased himself down to the floor while holding on to a hand rail with his left hand. The claimant initially denied using his right hand in any way during this incident. Apparently after reconsidering that not using his right arm to assist himself to the floor in such a manner as he described would have been virtually impossible, the claimant later changed his testimony to reflect that he may have, in fact, used his right arm during this incident.

Well, when I was letting myself down with the left arm, I out my hand, I'm not sure, I'm not - - I couldn't swear to this, but I am sure that I put my [right] hand down on the floor, because I do know I let myself down with my left arm on the handrail. And I am pretty that sure that I had my hand down to help ease off this hip.

Finally, the claimant testified that he asked for medication for his shoulder for the first time while he was in the hospital because that was the "first time that I was in a place where it was available that I could ask for it and that I needed it". However, the record demonstrates that at the time of the claimant's November 25th fall, he was under active medical care with the same physician who treated him for both his hip and shoulder conditions. Therefore, logic dictates that the claimant could have sought medical treatment for his shoulder from Dr. Bowen, or his associate, Dr. Stanford, at any time during the time in question. In addition, at all relevant times the plant nurse was readily available to the claimant, had he chosen to seek treatment from her. Further, the claimant admitted that had he asked for medical treatment while he was still working prior to his hip surgery, his employer would not have refused his request.

As Dr. Bowen stated during his deposition, the real issue in this claim is whether the claimant's shoulder pain started on November 25, 2004, or whether it was minor and then worsened on December 10, 2004, after the fall in the hospital. Clearly the claimant did not believe that he had injured himself to the extent that he needed to seek

medical treatment following the November 25th incident. Nor had he injured himself as a result of this incident to such a degree that he was physically incapacitated. Rather, it was after his fall in the hospital that the claimant first sought medical treatment for his right shoulder. And although it is plausible that the claimant sustained an injury to his shoulder in the form of bruising as a result of his November 25th fall, the record fails to support a finding that the claimant's rotator cuff tear was a direct result of that incident. Rather, the record reveals that the claimant's shoulder condition worsened to the point that he needed, and sought, medical treatment for this condition *after* his fall in the hospital. In addition, the claimant's surgeon, Dr. Bowen, could not state with a degree of medical certainty that the claimant's rotator cuff tear resulted from his work related fall of November 25, 2004.

Based upon the above and foregoing, I find that the compensability of the claimant's right shoulder injury should be denied; therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner