

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F513631

ALBERT SISSON, EMPLOYEE	CLAIMANT
PETERSON FARMS INC., EMPLOYER	RESPONDENT
COMP CARE ADMINISTRATORS, TPA, INSURANCE CARRIER	RESPONDENT

OPINION FILED JANUARY 24, 2007

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

This case comes before the Commission on the respondents' appeal of a decision issued by an Administrative Law Judge on August 11, 2006. In that decision, the Administrative Law Judge found the claimant had sustained a compensable injury and awarded temporary total disability benefits for the time period of September 29, 2005, through November 14, 2005.

On appeal the respondents contend that the claimant's injury did not arise out of the course and

scope of employment. The claimant asserts that the injury was due to a specific incident in which he was jerked around in a forklift. The claimant further argues that he should be awarded temporary total disability benefits from September 29, 2005 until the time he returned to work on December 22, 2005.

After a de novo review of the record, we find the decision of the Administrative Law Judge is affirmed. However, we modify the decision to award the claimant temporary total disability benefits from September 29, 2005 to December 22, 2005. In our opinion, the claimant provided credible testimony regarding the occurrence of his injury. That testimony was corroborated by the testimony of Doug King, the respondents' witness. Finally, we find that the medical records are consistent with the claimant's testimony regarding how and when the injury occurred. Likewise, we find that the claimant should be entitled to the entire time period of requested temporary total disability benefits. The claimant provided unrefuted testimony that his job required the use of both hands and the medical records indicate that the claimant was not released to return to full duty on November 14, 2005. Likewise, there is no testimony the claimant was provided one-handed duty at that time. As such, we

modify the portion of the Administrative Law Judge's decision on temporary total disability benefits and award them until December 22, 2005.

_____The claimant testified that he has been working for the employer for almost 15 years. At the time of the accident in question, the claimant worked as a live-haul driver. His duties required him to drive a truck to various chicken farms where cages with live chickens were loaded onto the truck and then driven back to the respondents' processing plant. The claimant was also required to operate a forklift in order to take the cages in and out of the chicken houses.

The claimant testified that on March 28, 2005, he was operating the forklift and taking cages in and out of a chicken house which had a hole in front of the door. He described he was in an accident, and testified,

A. Well, I was loading some chickens at a house that had a great big hole in front of the end door and there was some - - a cement slab right at the end door and this had eroded off, and I was loading chickens and I took the forklift and got a cage and started into that house.

It was - - well, I had been in and out of there a few times, and if you leave the cage set too high, when the front wheels of the

forklift goes up onto that cement it would slap the end door - - the top of it - - and tear it up, so I was holding it low to keep from doing that. And when the front wheels went off in this hole, the front of the cage hit the cement and it just stopped the loader right there and it threw me forward up on that roll cage and then I fell on off to the side.

The claimant went on to testify that he hit his shoulder on the roll bar but did not think he needed medical attention at that time. As such, he returned to work and finished his shift.

The claimant said the next morning his back, right hip, and left shoulder were sore, but that he still did not believe he would need medical attention. Specifically, he indicated that he thought he could work through the soreness and that it would resolve over time.

The claimant initially sought medical treatment on May 6, 2005. He was treated by the respondents' physician, Dr. Rebecca C. Lewis. The doctor's report from that day indicates he reported with the primary complaint of left arm pain. The report provides that he was having pain in his forearm, his elbow, and into his upper arm and shoulder. It also provides, "His job is aggravating it quite a bit. He

thinks he has injured it at home possibly by doing something."

At the time of the hearing, the claimant indicated that when he reported to Dr. Lewis his pain was primarily in his forearm and elbow. He further testified that he did not associate the pain in that area of his arm to the forklift incident because the primary pain at the time of his visit was not in his shoulder.

On May 26, 2005, the claimant was treated by Dr. David J. Tucker. The nurse assessed the claimant with, "left shoulder pain secondary to injury 3 ½ weeks ago." The doctor's report further provides, "He had a jerking type of injury initially," and indicates the claimant was given a shot of Depo Medrol and Marcaine. On June 2, 2005, Dr. Tucker prescribed the claimant physical therapy, which the claimant declined.

The claimant returned to Dr. Tucker on August 18, 2005, with complaints of persistent shoulder pain. The report again provides the claimant was injured in a "jerking type maneuver." Dr. Tucker ordered an MRI which ultimately revealed a complete tear of the left rotator cuff. Based on these findings Dr. Tucker referred the claimant to Dr. R. Jacob Kaler.

On September 29, 2005, Dr. Kaler performed surgery on the claimant's left shoulder. The claimant returned to Dr. Kaler on November 14, 2005. At that time the claimant was released to perform one-handed duty for the next six weeks. At the time of the hearing, the claimant testified that to operate the forklift, he would use his right hand to shift gears and use his left hand to steer. He further testified that he did not return to work until December 22, 2005, because he was physically unable to perform his job.

The claimant contends that he sustained an injury arising out of the specific incident occurring on March 28, 2005. The respondents, on the other hand, argue that the claimant's torn rotator cuff did not arise out of the work-related incident on March 28, 2005.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external 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) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In this instance the parties do not dispute that the claimant was involved in a forklift accident on March 28, 2005. Rather, the only question is whether the claimant's torn rotator cuff was sustained during that incident. After reviewing the testimony of the claimant and Doug King, in conjunction with the medical reports, we find that the preponderance of the evidence shows the claimant sustained his rotator cuff tear on March 28, 2005.

This case largely revolves around the issue of credibility. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to

reconcile conflicting evidence and to determine the true facts. Id. The Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. Id.

At the time of the hearing, the claimant and Doug King, Livehaul Manager, both testified. The claimant essentially testified that he injured his shoulder during the March 28, 2005, incident, and that he initially did not believe his injury was sufficient to warrant medical attention. When it did not resolve, he sought medical attention from the respondents' physician, Dr. Lewis. He said he did not attribute his injury to the forklift incident because his pain was primarily in his elbow and forearm.

King testified that he was aware of the incident that occurred on March 28, 2005. King testified that he approached the claimant the day after the accident and asked if he needed medical assistance. The claimant declined the offer. The next conversation King had with the claimant was in the Fall. He testified that the claimant relayed his need for surgery. King then completed an accident report regarding the loader incident. King testified that the

accident report indicates the claimant was injured on March 28, 2005, "while he was loading his truck with cages his loader dropped off into a hole." He further indicated the report provide the accident caused the loader to "jerk to a stop, throwing Albert off and hurting his left arm." King testified that the claimant relayed that he hurt his shoulder when he fell off the loader or when he was at home. He also said the claimant said he might have injured it while changing a starter at home, but admitted the accident report did not reference such an injury. Finally, King placed great confidence in the claimant's credibility and work ethic. He testified as follows,

Q. What kind of employee is he?

A. A good one.

Q. Do you have any reason to believe that he would make up how he hurt his shoulder?

A. No.

Q. Have you found him to be trustworthy and reliable?

A. The best.

Q. And he's back at work for you now, isn't he?

A. Yes, sir, and he'll work for me until they run me off as far as I'm concerned. He's a good employee.

Though the respondents assert the claimant's injury occurred to some incident involving a starter, I note that the claimant denied having knowledge of any event other than the March 28, 2005, incident which would cause the injury. Though Dr. Lewis' report indicates the claimant believed he, "has injured it at home possibly by doing something," it is clear that the language of this report shows the claimant was unsure of the reason for his injury. In fact, since the claimant testified that he had done nothing at work to cause forearm or elbow pain, we find it is likely he simply associated his injury as one that had to have occurred at home since nothing traumatic had happened at work.

Additionally, King admits that the accident report fails to mention such an incident. However, all parties agree that the claimant was involved in an accident in which he was thrown from a forklift on March 28, 2005. Likewise, the medical report from May 26, 2005, specifically indicates the claimant was injured when he was in a "jerking injury", which would be consistent with an injury sustained in the forklift incident. Additionally, an almost identical description was provided in the accident report, which further corroborates the claimant's testimony that he was injured while operating the forklift. Finally, we note

that even the respondents' own witness, King, testified that the claimant was a credible, hardworking employee, and that he had no reason to doubt the claimant's testimony regarding how he was injured. As such, we find that the claimant has shown by a preponderance of the evidence that he was injured on March 28, 2005, while operating the forklift for the employer.

We also note the respondents' argument that the doctor's report from May 6, 2005, reports an onset of pain for a period of one week. However, we note that neither the nurse's assessment or the doctor's report indicate a specific event in which the claimant injured himself. This is completely consistent with the claimant's testimony that at that point he did not know the reason for his pain and did not attribute it to the forklift incident. Additionally, even though there is a notation on the May 26, 2005, note indicating the claimant had shoulder pain secondary to an injury three and one-half weeks ago, it is unknown whether the nurse simply drew that conclusion based on the claimant's description of when his pain worsened or based on some other assumption. Additionally, the nurse's assessment does not include any description of the event causing the injury. However, Dr. Tucker's notation on May 26, 2005, specifically indicates the claimant was injured in

a jerking type of injury. As the only jerking incident discussed in the hearing was the claimant's March 28, 2005, injury, we find the only logical explanation for the claimant's injury was due to the forklift incident.

The respondent appealed the decision of the Administrative Law Judge in its entirety. In his brief, the claimant contends that he is entitled to temporary total disability benefits until December 22, 2005. Though not specifically appealed by the claimant, since the respondent appealed the finding regarding temporary total disability benefits, we find the Commission has the authority to consider the claimant's request for modification. The claimant essentially argues that he was unable to work from September 29, 2005, until his return to work on December 22, 2005. The respondents are silent as to this argument.

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).

A claimant who has been released to light duty work but has not returned to work may be entitled temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274 (1984).

The Administrative Law Judge concluded the claimant was entitled to benefits from September 29, 2005, through November 14, 2005. In denying benefits from November 14, 2005, to December 22, 2005, the Administrative Law Judge on the basis that the claimant was released to return to one-handed duty on November 14, 2005. However, this fails to consider that the claimant's job required the use of both hands, thereby preventing him from being able to return to work or had the capacity to earn the same wages as earned at the time of the injury.

The claimant testified that he was required to operate a motor vehicle and that he was required to operate a forklift. The claimant explicitly indicated that to operate the forklift he would use his right hand to shift gears and would use his left hand to steer. Accordingly, there is no way the claimant would have been able to return to his prior job while on one-handed duty.

Additionally, we note that there is no evidence that the claimant was offered one-handed duty. Likewise, the claimant credibly testified that he was unable to return to work until December 22, 2005, and that he performed no work until that time. As this date consistent with the end of the six weeks of one-handed duty and there is no evidence to rebut the claimant's, we find that he remained in his healing period and unable to work until December 22, 2005. Therefore, we modify the decision of the Administrative Law Judge and award temporary total disability benefits from September 29, 2005, through December 21, 2005.

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 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

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

There is no dispute that the claimant had an incident with the forklift on March 28, 2005. However, the claimant did not make a formal report of injury at that time and did not seek any medical treatment until approximately six weeks later when he sought treatment from Dr. Lewis. As a courtesy to the employees, Dr. Lewis comes to the plant to examine employees. On May 6, 2005, the claimant related to Dr. Lewis that he had a history of

left arm and shoulder pain for approximately one week. Three and a half weeks later, the claimant sought treatment from his treating physician and he did not say anything to him about a work related injury either. The claimant continued to work up until the time that he had to have surgery. But it was not until the claimant had to undergo surgery that he recalled that the incident in March was the precipitating factor of why his shoulder hurts. The claimant sought treatment several times from Dr. Lewis and Dr. Tucker and did not relate to them that he had any sort of a work related injury. He told these doctors that he did not know how he hurt himself.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury to his shoulder on March 28, 2005. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner