

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F712860

TONY WALLACE, EMPLOYEE	CLAIMANT
RHEEM MANUFACTURING CO., EMPLOYER	RESPONDENT
OLD REPUBLIC INS. CO., CARRIER	RESPONDENT

OPINION FILED MARCH 16, 2009

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

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

Respondent represented by HONORABLE DIANE GRAHAM, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed June 19, 2008.

The Administrative Law Judge entered the following findings:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 24, 2008, and contained in a pre-hearing order filed January 28, 2008, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury as the result of a specific incident on August 21, 2007.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After a de novo review of the record, I must respectfully dissent from the majority opinion. I find that the claimant did prove that he suffered a compensable injury, that the claimant provided notice of his injury, that his treatment was reasonable and necessary and the responsibility of the respondents, that he is entitled to temporary total disability benefits from December 17, 2007 to a date yet to be determined, and that he is entitled to an attorney's fee.

For the claimant to establish a compensable injury as a result of a specific incident, 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(4)(D), 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. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The majority, in affirming and adopting the opinion of the Administrative Law Judge, found that the claimant failed to satisfy the specific incident requirement. In Cedar Chemical Co. v. Knight, 372 Ark. 233 (2008), the Supreme Court held that the claimant had established a specific incident injury, where he had described, in detail, his job duties and the events surrounding the onset of his pain. The Court placed

significance on the claimant's prompt reporting of the onset of pain to his employer and the consistent history of injury he provided to his treating physician. In Cedar Chemical, the claimant was descending a flight of stairs when he noticed pain in his left knee, around 11:00 a.m., although he could not identify any specific incident that caused the pain. As part of his job duties, the claimant was required to ascend and descend up to three flights of stairs five to eight times throughout the day. After first noticing pain, the claimant continued to work for three hours until a half-hour break, after which he could not put weight on his leg.

Mr. Wallace's injury is very similar to the injury in Cedar Chemical. Wallace testified that he was performing his job duties, lifting louver panels out of a basket and moving them to a second basket for delivery, when one panel caught on another. When he jerked on the panel to free it, he felt immediate pain in his arm. The pain subsided from sharp to dull, and he attributed it to the normal aches and pains of a physical job. He continued to work his complete shift. The next morning, he was unable to lift his arm.

In both Cedar Chemical and the current claim, the claimant credibly described the onset of pain during his work duties, which subsequently interfered with the use of that body part, even though there was no unusual event or accident. Subsequent medical testing revealed objective findings of injury requiring surgical intervention in both cases.

This claim can be distinguished from Weaver v. Nabors Drilling USA, 98 Ark. App. 161, ___ S.W.3d ___ (2007), where the claimant was performing his job duties when he started to feel his hands "tingling" or "burning." In Weaver, the claimant only proved that he had an injury and that he felt pain while at work, and he failed to show that a specific incident occurred at work. In the present case, the claimant identified the mechanism of injury, jerking on a louver panel to free it from the basket. As in Cedar Chemical, the claimant clearly explained his job duties and activities lifting the panels in detail "support[ing] a conclusion that his injuries were compensable as a specific-incident workplace injury." Importantly, the claimant described his injury on the Form

AR-N, dated September 24, 2007, as "right shoulder, pulling part from one basket to fill another." This specific reference to one instance, and not his general activities, supports the conclusion to be drawn from his testimony at hearing and his explanation to Dr. Bylak, that his injury occurred when he tried to lift a particular part which was stuck. This specific reference also undermines the validity of the majority's conclusion that the recorded statement shows that the claimant did not suffer a specific incident. The Form AR-N was prepared before that statement, and even in that statement, the claimant refers to lifting a particular part.

The respondents spent a great deal of effort at the hearing trying to show that the claimant failed to describe an "accident." However, the claimant reasonably and credibly explained that there was no mishap, such as falling down, which occurred. He was merely performing his job duties, and when he attempted to jerk one louver panel free, he felt a sharp pain that changed to a dull pain. This is a specific incident, and to argue that it is not is to split hairs. The claimant consistently described the work duties

he was performing at the time he felt the pain, and that the pain occurred with the jerking of one particular panel. Furthermore, he was not aware that he had done damage to his shoulder beyond regular workday aches and pains until the next day. To penalize the claimant for his understanding of the term "accident" in regular use is to place form over substance. I find that the claimant proved that he suffered a specific incident injury when he was lifting louver panels from baskets and jerked one panel to free it on August 20, 2007.

The claimant must also show that the injury arose out of and in the course of employment. The claimant credibly testified that he was pulling louver panel parts from baskets for delivery to the line, which was part of his regular duties at the time of his injury. There is no evidence that the claimant was not performing these duties or that there was any other mechanism of injury. The claimant and his wife credibly testified that he never had a problem of this kind before the date of injury, and there is no evidence of a prior problem or a different mechanism of

injury in the medical records. I find that the claimant was performing employment services at the time of injury.

The claimant must further show that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death, and must offer objective evidence of the injury. The claimant presented evidence, in the form of his testimony and his wife's, that the injury prevented him from using his arm beginning the morning after the injury and continuing until his surgery, and medical reports that he suffered a rotator cuff tear requiring surgical repair. The objective medical evidence of injury is found in the MRI from November 20, 2007 and in the surgeon's observations during surgery on December 17, 2007.

Based on the above, I find that the claimant has proven by a preponderance of the evidence all of the elements of a compensable specific incident injury.

An employer is not liable for any benefits accrued by the claimant prior to the time the respondent is given notice of the injury. Ark. Code Ann. Sec. 11-9-701. There is conflicting testimony on this issue. The claimant testified

that he sought treatment the day after the injury but was made to wait two weeks, and that he did not report that the injury was work-related at that time. The first date that the respondent employer states that it received notice was on September 10, 2007 when the claimant was seen by Dr. Loyd, the company doctor. Given the claimant's testimony that he did not tell the nurse that he had a work-related problem on August 22, I find that the first date of notice to the employer was September 10, 2007. The delay between the date of injury and the date of notice is explained by the claimant's initial underestimation of his injury and his willingness to work while in pain. There is no question that he provided effective notice of injury on September 10, 2007, and the respondents are therefore responsible for benefits from that date forward.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). There is no question that the medical treatment of the claimant's compensable rotator cuff tear was reasonable

and necessary. The claimant consistently described the mechanism of injury, relating his pain to his attempt to free a stuck louver panel from a basket, which was clearly work-related. The claimant has enjoyed relief from his pain and limitations after Dr. Bylak's surgical repair of his shoulder. I find that the treatment was reasonable and necessary and the responsibility of the respondents.

Temporary total disability is that period within the healing period in which claimant suffers a total incapacity to earn wages. *Ark. State Highway & Transp. 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). The claimant seeks temporary total disability benefits from December 17, 2007 to a date yet to be determined. Dr. Bylak excused the claimant from work on December 17, 2007, the date of his surgery, and he had not been released to work at the time of the hearing. The claimant has proven that he is

entitled to temporary total disability benefits from December 17, 2007 to a date yet to be determined.

The respondents have controverted this claim in its entirety, and the claimant required the assistance of counsel to pursue his rights under the Workers' Compensation Act. I find that the claimant's attorney is entitled to a controverted attorney's fee.

In conclusion, I find that the claimant has met his burden of proof by a preponderance of the evidence that he sustained a compensable injury on August 21, 2007, that he gave notice of his work-related injury on September 10, 2007, that the treatment he received for his right shoulder injury was reasonable and necessary and the responsibility of the respondents, that the claimant is entitled to temporary total disability benefits from December 17, 2007 to a date yet to be determined, and that the claimant's attorney is entitled to an attorney's fee. For the aforementioned reasons, I must respectfully dissent from the majority opinion.

Wallace - F712860

-13-

PHILIP A. HOOD, Commissioner