

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H203628

WILLIAM W. HOLMES, Employee	CLAIMANT
CONAGRA FOODS, INC., Employer	RESPONDENT
ACE AMERICAN INSURANCE CO./BROADSPIRE, Carrier/TPA	RESPONDENT

OPINION FILED JANUARY 31, 2023

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Russellville, Pope County, Arkansas.

Claimant represented by LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondents represented by MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 3, 2022, the above captioned claim came on for a hearing at Russellville, Arkansas. A pre-hearing conference was conducted on August 30, 2022, and a Pre-Hearing Order was filed on September 13, 2022. A copy of the Pre-Hearing Order has been marked Commission's Exhibit No. 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 this claim.
2. The relationship of employee-employer-carrier existed between the parties on February 12, 2022.
3. The respondents have controverted the claim in its entirety.

4. The Claimant was earning sufficient wages to entitle him to compensation at the weekly rates of \$548.00 for temporary total disability benefits and \$411.00 for permanent partial disability benefits.

5. The parties stipulate that if Claimant is able to prove his left shoulder injury to be a compensable injury, the Respondent is entitled to a credit for short term disability benefits as provided in the Arkansas Workers' Compensation Act.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether the claimant sustained a compensable gradual onset injury to his left shoulder culminating on or about February 11, 2022; or, alternatively, whether he sustained a specific injury to his left shoulder on February 11, 2022.

2. Whether Claimant is entitled to medical treatment.

3. Whether Claimant is entitled to temporary total disability benefits from February 12, 2022 to August 3, 2022.

4. Whether Claimant's attorney is entitled to an attorney fee.

5. Respondents raise Lack of Notice as a defense to this claim.

Claimant's contentions are:

“On 2/11/2022, claimant was lifting several 50-lb. bags onto a table. He has done this for 17 years. On the day of the accident, he became unable to lift any more bags due to pain in his left shoulder. Claimant reported the injury to the nurse, but his claim was denied in its entirety. Claimant sought treatment on his own. He had an MRI to his left shoulder, and it revealed a tear. Claimant underwent surgery.

Claimant contends that he sustained a compensable injury in the scope and course of employment and that he is entitled to medical benefits, TTD and that his attorney is entitled to an attorney fee.

All other issues are reserved.”

Respondents' contentions are:

“Respondents contend that Claimant did not suffer a compensable gradual onset or specific incident injury on 2/11/22 while working for Respondent/Employer. The Claimant failed to provide notice of a claimed injury until 5/16/22. Respondents contend that in the event compensability is found, they would not be liable for benefits until receipt of actual notice of a claimed injury.”

The claimant in this matter is a 54-year old male that alleges he sustained a compensable gradual onset injury to his left shoulder culminating on or about February 11, 2022; or, alternatively, a compensable specific incident injury to his left shoulder on February 11, 2022. The claimant was employed by the respondent employer on February 11, 2022, and had been employed by the respondent employer for many years. The respondent employer is in the business of producing pre-made food or meals for consumers. The claimant worked in one of the respondent employer's production plants as a spice utility prep. In his job as a spice utility prep the claimant would insert large amounts of different types of spices into a blending machine that would mix or blend the spices together for the food products being produced in the respondent employer's plant. At the hearing in this matter the claimant gave a detailed description of the process he would go through in performing his job duties mixing spices. I will summarize the pertinent portions of that testimony. The claimant testified that he would arrive at work, clock in, and gather his needed supplies including Kevlar gloves, knife, hair net, smock, apron, and face mask. The claimant would also retrieve a boat paddle that he used to clean out the blender that the spices were poured into. After retrieving those supplies, the claimant would then use a forklift to retrieve a pallet that normally contained 1200 pounds of spices in 50-pound bags. This pallet of 24 50-pound bags equaling 1200 pounds is called a blend. Among those 50-

pound bags there is a variety of different spices to be mixed together, but all of the bags weighed 50 pounds. I note that sometimes the pallets or blends weighed 2000 pounds instead of 1200 pounds and contained 40 50-pound bags instead of 24 50-pound bags.

The claimant would use a forklift to move the pallet or blend to a room in the facility which contained a machine called a “river blender.” This is a large machine that mixes all of the spices together for use in food production. The claimant would place the pallet or blend on some sort of spring-loaded lift that would raise the pallet or blend up to the height of the table on a platform above the river blender. The claimant would then ascend steps to the platform and take the 50-pound bags off of the pallet or blend and place them on the table. When the 50-pound bag is on the table the claimant would use his knife to remove the outer bag from the spice, a process the claimant called stripping. The claimant would then throw the outer bag away in a receptacle underneath him and pour the contents of the sack which at that point were still contained in a secondary bag into a hopper of the river blender. The claimant would repeat this process until the pallet or blend was completed. The claimant testified that four to five times a day he would have to use the canoe paddle to clean out the river blender as this had to be done when the spice recipe changed for different food products. The claimant testified that he normally worked an eight-hour day, but often worked 10 or 12 hour days. The claimant also testified that he normally did 12 pallets or blends per day, but often did 16 or 18 pallets or blends per day.

On direct examination the claimant was asked about his left shoulder difficulties and his reporting to his employer about those difficulties as follows:

Q And so tell us what transpired in February of 2022.

A Well, I started noticing pain in my shoulder, right here,

the left shoulder I had the surgery on. I just thought, you know, it was just a pulled muscle or something, so I never went to the nurse or nothing. I just tolerated it. So it began to start burning and getting worse, so I went and told my supervisor Tyler that I was going to go see the nurse, which she is here right now. I went and seen Lisa.

Q Let me ask you this. Did you tell Tyler that your shoulder was hurting –

A Yes, ma'am, when I was –

Q Let me finish my question. I want to make sure you understand all of it. Okay?

Did you tell Tyler that your shoulder was hurting because of a work injury?

A No, I did not. I just told him I was going to see the nurse; that my shoulder was hurting.

Q And you mentioned that Lisa is in the courtroom with us today; correct?

A Yes, ma'am, she is.

Q Now, when you went to see Lisa, did you tell her your shoulder was hurting?

A Yeah. She sent me to my family doctor.

Q Now, what transpired on February 11th, 2022? Did your pain get better, get worse, or stay the same. What was different about February 11th?

A Can you rephrase the question again; please?

Q Sure. You mentioned that when your spice blend changed and they added more pallets, that's when your shoulder began to hurt. Is that correct?

A Yes, that's correct.

Q And do you know approximately how long it was before February 11th that they added those pallets?

A No, I do not.

Q Okay.

A They added more and it started hurting, and I should have reported it sooner but I didn't.

Q We're going to get to that. On February 11th, what were you doing that made you stop and tell Tyler you needed to get medical treatment?

A Because I couldn't lift the bag.

Q What were you doing?

A I was lifting the bag and putting the spices in the hole.

Q So you were lifting a bag –

A It started hurting worse.

Q And it got worse?

A (Witness nods.)

Q And you went to see Lisa?

A Uh-huh.

Q Is that a "yes?"

A Yes.

Q Did you tell Lisa at that time that you saw her, that first time, that this was a work injury?

A Yes, I believe I did.

Q Was some workers' comp paperwork offered to you that day?

A No.

Q What did Lisa tell you to do?

A She just told me to go see my family physician.

On cross-examination, the claimant was questioned about his reporting of his left shoulder difficulties as follows:

Q In your deposition, my law partner was asking you about when the pain started around February of '22, and you stated that your shoulder was hurting for several weeks, you ignored it, and didn't say anything. Is that right?

A You are correct.

Q But then on February 11th that's when you went to Tyler because the pain was more severe; is that right?

A Yes, it got worse. It was getting to where I couldn't take it.

Q And you told us today that you admit that you didn't tell Tyler that it was a work injury that led to that shoulder problem; is that correct?

A No, I just told him I was going to see Lisa, going to the nurse. I didn't say anything about that.

Q But you were asked earlier whether you told Lisa that it was a work injury, and you said that you thought you did. Is that right?

A I thought I did.

Q At the time of your deposition, though, you were asked about that, and I'm on page – starting at the bottom of page 22 you were talking about going to talk to a nurse, and you said her name was Lisa?

A Yeah, she's here.

Q And you were asked, "What did you tell Lisa?" Your response was, "I said have severe shoulder pain. I

think I need to see a doctor.”

A Yes, that’s what I told her.

Q And on page 23 it says, “Did you tell her it was work-related?” Your response was, “No, ma’am.” Is that correct?

A No, I didn’t tell her - I just told her I needed to see a doctor.

Q So you didn’t say at that time it was work-related?

A No.

The claimant was seen by his primary care physician, Dr. Allan Kirkland, on February 11, 2022. Following is a portion of that medical record found at Claimant’s Exhibit 1, page 2:

HPI

Nurse’s Note: 53 y/o male unaccompanied here with c/o left shoulder pain. states pain in left shoulder x1wk. pain radiates to deltoid area. pain is 10/10 when doing any activity or movement with left arm. heat helps with the pain. didn’t feel anything pop in shoulder, thinks it from over use of arm, no pain when resting. works at conagra and does repetitive lifting 50 lb. bags and uses left arm mostly when pouring the bags. has paperwork that needs to be completed before he can come back to work.

Provider’s Note: This 53-year-old male presents to clinic today complaining of left shoulder pain. Symptoms started about a week ago. He has a repetitive motion job as above and feels that it started at work. There was no acute injury. Pain is severe with forward flexion or abduction at the shoulder. He denies any crepitus or prior injury. The right shoulder is doing fine.

The claimant was taken off work by Dr. Kirkland until March 3, 2022, and given a follow-up appointment for February 25, 2022.

At the claimant's February 25, 2022 appointment with Dr. Kirkland the claimant was ordered to physical therapy and for a consultation with Dr. Jeff Cartwright who is an orthopedist. Dr. Cartwright ordered an MRI of the claimant's left shoulder which was performed at St. Mary's Regional Hospital in Russellville, Arkansas on April 7, 2022. Following is a portion of that diagnostic testing report authored by Dr. Jeffrey Hale found at Claimant's Exhibit 1, page 16:

FINDINGS:

Acromioclavicular joint and subacromial space: Hypertrophy and signal abnormality with some mild edema within the joint and a moderate size inferior osteophyte which contacts the supraspinatus around the musculotendinous junction area.

Glenohumeral joint and osseous structures: Edema on each side of the AC joint. Glenohumeral joint appears intact.

Rotator cuff: Mild signal abnormality within the distal infraspinatus tendon and at the insertion site. Moderate extensive intermediate intensity signal abnormalities in the distal half of the supraspinatus tendon with a positive fibers though there are intact fibers. Trace bit of fluid signal abnormality in the subacromial subdeltoid bursa. Mild diminished subacromial space distance. Subscapularis appears normal.

Long biceps tendon: Unremarkable.

Glenoid labrum: Unremarkable.

IMPRESSION: Subspinalus tendon partial thickness tear.

2. Infraspinatus tendinopathy.
3. Marked AC joint arthrosis

The claimant saw Dr. Cartwright on April 13, 2022. Following is a portion of that medical record found at Claimant's Exhibit 1, page 18:

William is a 53 year old gentleman referred by Dr. Kirkland for evaluation of his left shoulder. He reports left shoulder

pain. He denies neck pain. He denies left upper extremity paresthesias. He reports weakness in the left shoulder. He denies any history of dislocation. He reports subacromial crepitus in the left shoulder with motion of the left arm. He reports pain in the left shoulder with motion of the left arm overhead. He reports nocturnal left shoulder pain and rotator cuff nesting. He has difficulty carrying and lifting objects with the left upper extremity especially if the load is held away from the body. He reports a positive milk jug sign. He reports no significant improvement after physical therapy. He reports discomfort with overhead throwing type motions. He smokes daily but is not a diabetic. He is left-hand dominant. He denies any history of injury but feels that overuse ConAgra may have contributed. He was taken off work a month ago by Dr. Kirkland.

My impression clinically is that the patient's left shoulder suffers with a combination of issues which seem to include subacromial impingement, subacromial bursitis, bicipital tendinitis, high-grade partial thickness tearing of the supraspinatus, probable low grade partial thickness tearing of the subscapularis, arthritis of the acromioclavicular joint but I cannot rule out any labral pathology given the guarding on examination.

His MRI revealed per the report (JH), partial thickness tear of the supraspinatus, marked ACJ arthritis, and tendinopathy of the infraspinatus. My review of those images suggests prominent arthritis of the AC joint, subacromial impingement high grade partial thickness tearing of the supraspinatus, degenerative anterior labral tearing, biceps partial thickness tearing/tendinosis, partial thickness tearing of the subscapularis, and what appears to be a degenerative tear of the anterior aspect of the superior labrum extending into the anterior labrum. I would suggest he consider arthroscopy given that he has tried therapy with no benefit.

We completed pre-op for left shoulder arthroscopy. I do believe that some of his shoulder pain may be emanating from his neck and I stressed to the patient that he should return to see Dr. Kirkland about management of his neck

as this is not something I manage. Notwithstanding, he does have left shoulder pathology as well and I do think he will benefit substantially from left shoulder surgery. In all likelihood, however it will not result in complete relief of pain as the shoulder recovering will likely not improve whatever pain is emanating from his neck.

On April 28, 2022 the claimant underwent surgery on his left shoulder at the hands of Dr. Cartwright. Following is a portion of that operative report found at Claimant's Exhibit, pages 22-24:

PRE-OP DIAGNOSIS: LEFT shoulder internal derangement

POST-OP DIAGNOSIS:

Opioid Naïve – no opioid RX per PMP within the last 6 months

Subacromial impingement of the LEFT shoulder

High grade partial thickness tearing of the supraspinatus of the LEFT shoulder

Low grade partial thickness tearing of the subscapularis of the LEFT

Bicipital tendonitis without obvious tendinosis or tearing LEFT

PROCEDURE:

Arthroscopic anterior labral repair and capsulorrhaphy of the LEFT shoulder

Arthroscopic rotator cuff repair of the SUPRASPINATUS (superior rotator cuff) of the LEFT shoulder

Arthroscopic repair of a type 2 SLAP lesion of the LEFT Shoulder

Arthroscopic extensive debridement of synovium, posterior labrum, subscapularis, and subacromial bursa of the LEFT shoulder

Arthroscopic lysis of the adhesions and manipulation under Anesthesia of the LEFT shoulder

After the claimant's surgical intervention he was given aftercare including physical therapy. The claimant was released to return to work on August 3, 2022 and returned to work for the respondent employer in the same position. At the time of the hearing in this matter the claimant was still employed in that position with the respondent employer.

The claimant has alleged a compensable gradual onset injury to his left shoulder in this matter. In order to prove a compensable gradual onset injury to his left shoulder the claimant must prove (1) that the injury arose out of and in the course of his employment; (2) that the injury caused internal or external physical harm to his body, which required medical services or resulted in death or disability; (3) that the injury was caused by rapid repetitive motion; (4) that the injury was the major cause of the disability or need for treatment; and, (5) that the injury was established by medical evidence supported by objective findings.

Here, given the testimony of the claimant, it seems reasonable that the injury arose out of and in the course of his employment. The MRI and surgical records of the claimant display internal physical harm to the body, specifically the claimant's left shoulder, by objective medical evidence. However, I do not believe the claimant can meet the requirement in proving that the injury was caused by rapid repetitive motion. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 349-50, 969 S.W. 2d 644, 647 (1998); Ark. Code Ann. §11-9-102(5)(A)(ii)(a). In analyzing whether an injury is caused by rapid repetitive motion, the standard as set out in *Malone* is a two-pronged test: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. *Malone*, 333 Ark. at 350, 969 S.W. 2d at 647. As a threshold issue, the tasks must be repetitive, or the rapidity element is not reached. *Id.*, 969 S.W. 2d at 647. Arguably, even repetitive tasks and rapid work, standing alone, do not satisfy the definition; the repetitive tasks must be completed rapidly. *Id.*, 969 S.W. 2d at 647-48.

The claimant gave clear and consistent testimony that he was normally tasked with processing 12 pallets or blends on a normal work day and worked an eight-hour shift. However, the claimant also testified that he sometimes processed 16 or 18 pallets or blends during the work day, but would work 10 or 12-hour shifts. The pallets or blends would be made up of 50-pound bags of spices that would normally total 1200 pounds, meaning the pallet or blend would contain 24 50-pound bags. However, the claimant would process some pallets or blends that totaled 2000 pounds which contained 40 50-pound bags. It was the claimant's testimony that he did more 1200 pound pallets or blends than 2000 pound pallets or blends.

At the hearing in this matter the claimant gave direct examination testimony that he would usually process four pallets or blends per hour. Following is that direct examination testimony:

Q Now, approximately how many pallets do you deliver to your area each day?

A Well, we usually run – I can do four an hour.

Q Four pallets an hour?

A Yes.

Q And those pallets, do they range in weight from 1200 to 2000?

A Uh-huh, 2000 pounds.

Q And each one of the bags that you're lifting –

A Are 50 pound bags; correct.

Q Does it matter what the product is if the bag weighs more or less?

A No, none of them weigh less.

Q Do any of them weigh more?

A No.

Q So every bag all day long is 50 pounds?

A Fifty pounds; yes.

This Administrative Law Judge questioned the claimant about his job duties and the type and amount of pallets or blends he processes on a daily basis. In that exchange the claimant again asserted that he processes four pallets or blends per hour as follows:

Q How many pallets, and you may not know the answer to this; and if you don't, that's fine. I don't want you to make it up. I want you to tell me if you know or if you don't know. Roughly, how many pallets a day weigh 1200 pounds and how many pallets a day weigh 2000 pounds?

A I don't know the answer, Your Honor.

Q Do you do more 1200 pallets than 2000 pallets?

A Yes, sir. Usually when we do the 2000 pound batches, we do them all at once.

Q And so do you do 2000 pound pallets every day?

A Every other day.

Q So do you do fewer of those than you do of the 1200 pallets, 1200 pound pallets?

A Yes.

Q Now, I believe I heard your testimony right earlier that you could do four blends –

A An hour, yes, on that batch.

Q And how fast per –

A Four an hour. I can do four an hour.

Q You can do four blends an hour?

A (Witness nods.)

Q And by doing a blend, that means that you leave the spice room that you're in or leave the room where you mix, -

A Yeah, I go to get another one.

It appears from the whole of the claimant's testimony that he on more days than not processed 12 pallets or blends during an eight-hour shift. However, the claimant is also called upon to process 16 and 18 batches per day at times and can work 10 or 12-hour shifts. Given the claimant's testimony that he can process four pallets or blends per hour, that would calculate into processing 12 pallets or blends over the course of three hours in an eight-hour work day. The claimant would process 16 pallets or blends during a 10-hour work day in four hours and 18 pallets or blends in a 12-hour work day in 4.5 hours. It is certain that the claimant gave testimony that demonstrated he would be working at a rapid pace. However, the threshold issue is that the task must be repetitive. It is difficult to find it reasonable that some operation or movement of the body is repetitive when that operation or movement only occurs during well less than half of the workday.

Given a normal 12 pallet or blend processing day and a normal eight-hour shift, the claimant would only be performing those left shoulder operations or movements for 37.5% of the day. Even considering two 15-minute breaks and a 30-minute lunchtime the claimant would only be performing those left shoulder operations or movements for 42.8% of his work day. While the claimant's work was certainly rapid and intensive, I do not believe it to be repetitive under the Arkansas Workers' Compensation Act.

I am not certain what the claimant did for the remainder of his work day for the respondent employer, but I do believe some light can be shed on it by Respondent's Exhibit 3. Respondent's Exhibit 3 is the oral deposition of the claimant taken on August 29, 2022. In the exhibit to that deposition, a document titled "Work Smart Analysis" is found. This is a five-page document that describes the claimant's job duties. On the first page of that document it describes 12 essential functions, some of those functions were described by the claimant but many others were not. After review of that document it appears that the claimant's work activities did include what was described in his testimony, but also several other essential functions.

The claimant was questioned on cross-examination about that document as follows:

Q You were asked questions by my law partner about this paperwork when you were deposed. Does that sound correct?

A That is correct.

Q And some of this is documentation about your job description at Conagra; is that right?

A Yes, ma'am.

Q And all of that was accurate?

A Yes, ma'am.

Here, the claimant most certainly worked rapidly at times, but is unable to prove by a preponderance of the evidence that his work was repetitive which is the threshold issue in a determination of whether the injury was caused by rapid repetitive motion. As such, the claimant is unable to meet his burden and prove a gradual onset injury to his left shoulder that culminated on or about February 11, 2022.

The claimant also alternatively argued that his left shoulder difficulties were due to a specific incident that occurred on February 11, 2022. The claimant’s medical records submitted into evidence do not support any specific incident. The claimant’s left shoulder began to become painful well before February 11, 2022, and the claimant does not, to medical providers or in testimony in the Commission, relate his left shoulder problems to a specific event of any kind. In cross-examination the claimant gave the following testimony:

Q You were also asked by my law partner, “Was there any type of anything specific that happened in February?” Your response was, “No, it just started hurting” and you described it as a “throbbing hurting.” Is that right?

A Yeah, throbbing.

The claimant is unable to prove by a preponderance of the evidence that he sustained a compensable specific injury to his left shoulder on February 11, 2022.

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 30, 2022, and contained in a Pre-Hearing Order filed September 13, 2022, are hereby accepted as fact.

2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable gradual onset injury to his left shoulder culminating on or about February 11,

2022. The claimant has also failed to prove by a preponderance of the evidence that he alternatively sustained a compensable specific incident injury to his left shoulder on February 11, 2022.

3. The claimant has failed to prove his entitlement to medical treatment.

4. The claimant has failed to prove his entitlement to temporary total disability benefits from February 12, 2022 to August 3, 2022.

5. The claimant has failed to prove that his attorney is entitled to an attorney's fee in this matter.

6. The respondents' issue of lack of notice as a defense to this claim is moot as the claimant was unable to prove that he sustained a compensable gradual onset or compensable specific injury on or about February 11, 2022.

ORDER

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**