

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F305575

DENNIS BATES, EMPLOYEE

CLAIMANT

S T & T CONSTRUCTION CO., EMPLOYER

RESPONDENT

THE ZENITH INSURANCE CO., CARRIER

RESPONDENT

OPINION FILED JANUARY 6, 2004

Hearing before Administrative Law Judge J. Mark White on November 13, 2003, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Jeremy Swearingen, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On November 13, 2003, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on September 8, 2003, and a Prehearing Conference Order was entered that same day. A copy of the September 8, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed between the parties on October 15, 2001; that the claimant sustained a compensable injury to his shoulder on October 15, 2001; and that the claimant earned sufficient wages to entitle him to a compensation rate of \$347 for total disability benefits and \$260 for permanent partial disability benefits.

At the hearing, the parties agreed that the issues to be presented were whether there is an independent intervening cause; whether additional medical treatment, including the claimant's surgery, was reasonable and necessary in connection with the compensable injury; and whether the claimant is entitled to temporary total disability benefits.

The claimant contends that the medical treatment he has received from November 25, 2002, to the present, including surgery by Dr. Frank Hamlin, has been reasonably necessary in connection with his compensable injury; and that he is entitled to temporary total disability benefits from September 8, 2003, to a date yet to be determined.

Respondents contend that additional medical treatment was not reasonably necessary in connection with the compensable injury of October 15, 2001; that the claimant has sustained numerous subsequent, work- and non-work related dislocations of his shoulder, which are individually or collectively the cause of the claimant's current disability and need for treatment; and that these subsequent

dislocations are an independent intervening cause.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, deposition transcripts, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with ARK. CODE ANN. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence a causal connection between his original injury and his eventual disability, need for treatment, and surgery.
4. The claimant has proven by a preponderance of the evidence that his eventual disability and need for treatment was the natural consequence of his original, compensable injury, and not the result of any independent intervening cause.

5. The claimant has proven by a preponderance of the evidence that the additional medical treatment he has received, including the surgery performed by Dr. Hamlin and subsequent follow-up treatment, has been reasonably necessary in connection with the compensable injury.
6. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date of his surgery, October 21, 2003, until he reaches the end of his healing period or he regains the capacity to earn wages, whichever occurs first.
7. The respondents have controverted all the benefits considered herein.

DISCUSSION

I. History

On October 15, 2001, the claimant sustained a compensable injury arising out of and in the course of his employment with the respondent-employer when he dislocated his right shoulder while jumping down from a piece of equipment to avoid a broken hydraulic line. Several hours later in the emergency room his shoulder rotated back into place on its own. He was diagnosed by the attending physician with an acute anterior dislocation of the right shoulder and treated with medication, ice and a shoulder immobilizer. He was released with no restrictions

and returned to work the next day.

At some point in January or February of 2002 the claimant sustained a repeat dislocation of his shoulder while attempting to lasso a horse. He testified that he began to twirl the lariat above his head, and before he could make a complete rotation his shoulder dislocated. He was able to “pop” his shoulder back into its socket.

The claimant continued to work for the respondent-employer until sometime between February and April of 2002, when he was terminated for unrelated reasons. He collected unemployment benefits, and in November or December of 2002 he went to work for Cleve Batte Construction.

The claimant testified that between his original injury and November, 2002, he sustained six to eight repeat dislocations of his shoulder. The dislocations occurred in varying circumstances, and he did not seek medical treatment for them until November 25, 2002. On that date he went to the emergency room, complaining of a shoulder dislocation that occurred when he was throwing a Nintendo game cartridge into the trash. He saw Dr. H.G. Weems two days later, and Dr. Weems recommended a therapy program. Dr. Weems noted, however, “If things are not improved and he is having a lot of problems we [sic] consider an MRI to rule out a labral tear. Most likely he is going to end up with a shoulder reconstruction.” The

claimant attended one physical therapy session two days later, but he discontinued the therapy because he could not afford it.

In February, 2003, the claimant went to work for Piping Equipment Company as a warehouse driver. On May 23, 2003, the claimant saw Dr. Frank Hamlin. Dr. Hamlin noted that the claimant had sustained repeat dislocations “fifteen or twenty times since the initial episode.” The most recent dislocation prior to this visit occurred when the claimant was pulling on a ratchet strap at his job with Piping Equipment Company. The claimant told Dr. Hamlin he was interested in surgery, and Dr. Hamlin recommended an anterior shoulder reconstruction. The respondents denied the procedure.

The claimant was laid off from his job with Piping Equipment Company on September 5, 2003. The claimant initially testified to a date in 2002, but his subsequent testimony made clear that he was actually laid off in 2003.

On September 8, 2003, the claimant returned to Dr. Hamlin reporting another dislocation, this one occurring when he “rolled over in bed.” Dr. Hamlin diagnosed “probable anterior dislocating shoulder chronic” and again recommended anterior reconstruction. Records attached to Dr. Hamlin’s deposition, submitted by the parties jointly, establish that Dr. Hamlin performed the reconstruction on October 21, 2003, and subsequent follow-up notes reflect that the claimant reported

significant improvement in his shoulder.

II. Adjudication

A. Independent Intervening Cause

When the primary injury is shown to have arisen out of and in the course of employment, the employer is responsible for every natural consequence that flows from that injury. *K II Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). However, benefits are not payable for a condition resulting from a non-work related independent intervening cause that causes or prolongs a need for treatment. ARK. CODE ANN. § 11-9-102 (4)(F)(iii). The Legislature amended this section via Act 796 of 1993 to provide, “A nonwork-related independent intervening cause does not require negligence or recklessness on the part of a claimant.” Despite this amendment, however, the courts continue to hold that in the presence of a causal connection between the original injury and the subsequent disability, there can be “no independent intervening cause unless the subsequent disability was triggered by activity on the part of the claimant that was unreasonable under the circumstances.” *Hislip v. Helena/West Helena Schools*, 74 Ark. App. 395, 48 S.W.3d 566 (2001); *see generally, Davis v. Old Dominion Freight Line, Inc.*, 341 Ark. 751, 20 S.W.3d 326 (2000) (holding that Act 796 did not change prior case law regarding

independent intervening causes). Where an employee knowingly performs an activity that is contrary to his medical restrictions, such behavior can constitute an independent intervening cause relieving the employer of liability. *Thompson v. Washington Reg. Med. Ctr.*, 71 Ark. App. 126, 27 S.W.3d 459 (2000).

That there is a causal connection between the claimant's original injury of October 15, 2001, and his subsequent disability and eventual surgery, seems indisputable. The claimant's surgeon, Dr. Frank Hamlin, testified that for an individual of the claimant's age, the first shoulder dislocation placed the claimant in a "fairly high risk group" for having future shoulder dislocations. He further testified that "all" of the claimant's subsequent dislocation episodes were related to the original, compensable dislocation of October 15, 2001. Finally, he testified that the claimant's pattern of experiencing more frequent dislocations with the passage of time was something that he would anticipate in light of the claimant's original, compensable injury. Given this evidence, I find that the claimant has proven by a preponderance of the evidence a causal connection between his original injury and his eventual disability, need for treatment, and surgery.

Since there is a causal connection between the original injury and the subsequent disability and need for treatment, the question then becomes whether the claimant's conduct constituted an independent intervening cause. The

respondents point to three specific incidents as being such causes: the lassoing incident, the Nintendo cartridge incident, and the ratchet strap incident.

The facts of this case are similar to those of *Harris v. Multi Craft Contractors*, Workers' Compensation Commission E315989 (June 24, 1996). Like the present claimant, Harris sustained an initial dislocation of his shoulder, followed by multiple repeat dislocations. *Id.* Like the present claimant, Harris' second dislocation occurred several months after the original dislocation, though Harris incurred his second dislocation by moving a box. *Id.* Harris incurred his third dislocation by "rolling over in bed," and his fourth while operating a circular saw. *Id.* The Commission determined that none of these incidents qualified as independent intervening causes, and I can find little practical difference between these incidents and the incidents of the present claim.

I note that Dr. Hamlin testified that he doubted any of these subsequent incidents could have caused a dislocation were it not for the original, compensable dislocation. Dr. Hamlin testified that "all" of these dislocation episodes were related to the original, compensable dislocation, and that the claimant would have needed surgery even if these subsequent incidents had not taken place.

Of the three incidents relied upon by the respondents, none of them violated any work restrictions imposed by the claimant's physicians. None of them

constituted unusual exertions. There is simply no evidence to suggest that any of these activities were unreasonable under the circumstances. Rather, the claimant's testimony, the medical records, and Dr. Hamlin's deposition together establish that the subsequent dislocations experienced by the claimant were natural consequences of the original injury. Given these facts, I must find that the claimant has proven by a preponderance of the evidence that his eventual disability and need for treatment was the natural consequence of his original, compensable injury, and not the result of any independent intervening cause.

In making this finding, I note that the claimant did fail at one point to pursue physical therapy as prescribed by his physician. However, the claimant testified that he ceased the physical therapy because he could not afford it. I cannot find that his choice was unreasonable under the circumstances, and there is no medical evidence to establish that this failure contributed to the claimant's eventual disability and need for treatment.

B. Additional Medical Treatment

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark.

App. 232, 878 S.W.2d 420 (1994).

The treatment and surgery provided by Dr. Hamlin is consistent with the treatment and diagnoses provided by the claimant's previous physicians. There is no evidence in the medical record to suggest that any of the claimant's medical treatment has been *per se* unreasonable or unnecessary, and as discussed above the claimant has established that his treatment was causally connected to his compensable injury. In addition, Dr. Hamlin's notes reflect that the claimant's shoulder problems are greatly improved since the surgery, and it is well established that success of a treatment is a relevant factor to be considered in determining whether a treatment was reasonably necessary. *Winslow v. D&B Mechanical Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). Therefore, I find that the claimant has proven by a preponderance of the evidence that the additional medical treatment he has received, including the surgery performed by Dr. Hamlin and subsequent follow-up treatment, has been reasonably necessary in connection with the compensable injury.

In making this finding, I note the deposition testimony of Curtis Langley to the effect that the claimant had complained of shoulder pain in 1999 or 2000. I found Langley not to be credible, because his testimony is not corroborated by, and in effect contradicts, the medical records of 1999 and 2000 submitted by the parties.

Even if I found Langley to be credible, however, his testimony would matter not, for he professed no knowledge as to the nature of this alleged shoulder pain – whether a dislocation, or a sprain or strain, or a tear, or something else. To assume that this allegedly pre-existing pain was related to the October 15, 2001, dislocation and the claimant’s subsequent shoulder dislocations, would require conjecture and speculation, and such cannot substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002).

C. Temporary Total Disability Benefits

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas 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). An injury to the shoulder is an unscheduled injury. *Taylor v. Pfeiffer Pblg. & Htg. Co.*, 8 Ark. App. 144, 648 S.W.2d 526 (1983).

Though the medical documents submitted by the parties establish that the claimant was placed on restricted duty several times due to unrelated injuries, none

of the documents reflect that the claimant was placed on restricted duty or taken off of work because of this compensable injury or its recurrences. The claimant testified that Dr. Hamlin placed him on light duty as of September 8, 2003. The claimant was not working at that time, though, because he had been laid off from his job on September 5. The claimant's surgery was October 21, 2003, and Dr. Hamlin testified that as of November 18, 2003, the claimant had not yet reached the point where he could go back to work.

Given this evidence, I find that the claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from the date of his surgery, October 21, 2003, until he reaches the end of his healing period or he regains the capacity to earn wages, whichever occurs first.

AWARD

The claimant has proven by a preponderance of the evidence that additional medical treatment, including surgery by Dr. Hamlin, has been reasonably necessary in connection with his compensable injury; and that he is entitled to temporary total disability benefits from October 21, 2003, to a date yet to be determined.

The respondents are hereby directed and ordered to pay for all outstanding medical and related treatment for the claimant's shoulder injury, including the

surgery performed by Dr. Hamlin, and the respondents remain liable for continued reasonably necessary medical treatment. The respondents are further directed and ordered to pay indemnity and other benefits in accordance with the findings of fact and conclusions of law set forth herein.

The claimant's attorney, Mr. Gregory R. Giles, is hereby awarded the maximum statutory attorney's fee on all indemnity benefits controverted, pursuant to ARK. CODE ANN. § 11-9-715.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to ARK. CODE ANN. § 11-9-809.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge