

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209409

CHRISTOPHER M. CHILDERS, EMPLOYEE **CLAIMANT**

**GEORGIA-PACIFIC CORP.,
SELF-INSURED EMPLOYER** **RESPONDENT**

SEDGWICK CLAIMS MGMT. SVS., TPA **RESPONDENT**

OPINION FILED JUNE 13, 2005

Hearing before Administrative Law Judge J. Mark White on April 28, 2005, in El Dorado, Union County, Arkansas.

Claimant represented by Mr. Dwain Oliver, Attorney at Law, Hampton, Arkansas.

Respondents represented by Mr. Andrew Ivey, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 28, 2005, the above-captioned claim came on for a hearing in El Dorado, Arkansas. A pre-hearing conference was conducted on February 14, 2005, and a Prehearing Order was entered that same day. A copy of the February 14, 2005, Prehearing 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 Order.

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

relationship existed at all relevant times, including June 7, 2002; that on June 7, 2002, the claimant sustained a compensable injury to his right shoulder; and that respondents accepted the June 7, 2002, injury as compensable medical-only and paid benefits through July 28, 2002. At the hearing, the parties further stipulated that the claimant earned wages sufficient to entitle him to the maximum compensation rates.

The parties agreed that the issues to be presented were whether additional medical treatment is reasonably necessary in connection with the compensable injury; whether the claimant is entitled to temporary total disability benefits; whether the claimant is entitled to permanent partial disability benefits; whether the claimant is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505; and controversion and attorney's fees.

The claimant contends that he sustained an on-the-job injury that required him to be off of work for several months; that he is entitled to benefits pursuant to Ark. Code Ann. § 11-9-505, in that the respondent failed to return him to work; and that this injury also has created a partial permanent disability precluding claimant from performing the type of work that he did before and precluding claimant from returning to his old job.

Respondents contend that the claimant is not entitled to the requested benefits; that the claimant sustained an additional injury to his right shoulder on

July 28, 2002, which was unrelated to the work injury; and that this July 28, 2002, injury served as an independent intervening cause discharging respondents from their liability for any additional benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing 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 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 failed to prove by a preponderance of the evidence a causal connection between his original compensable injury and his shoulder condition, surgery, and related treatment after July 28, 2002.
4. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the

compensable injury.

5. The claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after July 28, 2002.
6. The claimant has therefore failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits after July 28, 2002.
7. The claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits.
8. The claimant has failed to prove by a preponderance of the evidence his entitlement to benefits under Ark. Code Ann. § 11-9-505 (a)(1).
9. The respondents have controverted all benefits sought herein.

DISCUSSION

I. History

In June 2002 the claimant sustained a compensable injury to his right shoulder while swinging a sledgehammer. Dr. Don Howard treated him the day of the accident, June 7, and diagnosed a shoulder strain; x-rays taken that day revealed nothing abnormal. The claimant testified that he suffered two subsequent incidents of pain, both while lifting on the job. The claimant returned to Dr. Howard on June

13, and x-rays taken that day revealed "a possible torn rotator cuff" but no fracture or dislocation. On Dr. Howard's referral, the claimant saw an orthopaedic specialist, Dr. John Lytle, on June 24. Contrary to the radiologist's opinion noted above, Dr. Lytle viewed both sets of x-rays as "normal." Dr. Lytle diagnosed "strain of the subscapularis of the R shoulder" and prescribed physical therapy and medication.

The claimant underwent physical therapy for about a month. The therapist noted "popping" in the claimant's shoulder as well as spasms. On July 25, the therapist issued a final report to Dr. Lytle stating that the claimant still had pain, spasms, loss of range of motion, and loss of strength.

On July 28, the claimant was involved in a motor vehicle accident when his car was struck on the left side as he was turning left. At the hearing, the claimant said he was not injured, described the impact as a "glancing blow," and testified the cost to repair his car was \$188. However, the day after the accident Dr. Lytle recorded the claimant as saying the impact "spun him around" and resulted in \$2,600 worth of damage to his car. Dr. Lytle also noted, "He was not injured at the time that he could recognize but certainly shook up his shoulder as he was thrown about in the front seat of the vehicle." X-rays taken that day revealed no new injury, and Dr. Lytle recommended an arthrogram to rule out a rotator cuff tear, based on the claimant's failure to improve with conservative treatment.

The respondents determined that the car accident was an independent intervening cause sufficient to relieve them of further liability for the claimant's injuries and terminated benefits as of July 28. The claimant requested a leave of absence due to his continued shoulder problems; his application form states as the cause of his disability, "I was involved in a car accident on 7-28-02 that aggravated my right shoulder."

An arthrogram was performed August 1 and was interpreted as an "essentially normal exam. No evidence of rotator cuff injury or other pathology identified." On August 5, unbeknownst to Dr. Lytle, the claimant saw Dr. Robert Floss, complaining of "painful right hip secondary to MVA."

The claimant returned to Dr. Lytle on September 11, and Dr. Lytle recommended arthroscopic surgery to diagnose the claimant's continuing problems. Two days later, on a referral from Dr. Floss the claimant saw a psychiatrist, Dr. David Margolis. Though Dr. Margolis' extensive, detailed notes state that the claimant was soon to have shoulder surgery, and that he had been in a car accident in July, Dr. Margolis made no mention of the claimant's June work injury.

Dr. Lytle performed surgery on September 20; his post-operative diagnosis was, "Bursal side incomplete cuff tear and hypertrophic synovitis and impingement." Dr. Lytle released the claimant to light-duty work on September 26,

and on October 24 he indicated the claimant was “doing very well. He has virtually no pain. His motion is improving.” By November 21, according to Dr. Lytle’s notes, the claimant had almost completely recovered and had regained “virtually all” of his motion. Dr. Lytle indicated his intent to release the claimant to full-duty work within a month.

However, the claimant subjectively determined that he could not perform his regular work on account of his shoulder injury. On account of the claimant’s unwillingness to return to his old job, Dr. Lytle extended his light-duty release for several more weeks. On February 13, 2003, Dr. Lytle finally released the claimant to return to work without restriction as of February 17 and indicated his intention to see the claimant again in eight weeks. Dr. Lytle also noted that the claimant’s motion was “excellent” and that he still had some stiffness and a “twinge of pain,” with “acute pain” when he tried to do his job.

On February 17, the claimant saw James Wells, a physician’s assistant in the office of Dr. Floss. Mr. Wells wrote in his notes:

A white male said he was in ___ and injured himself on the job last July, went to local physician. He referred him back to his work on light duty. Then he was in a motor vehicle accident, injured his shoulder again and after seeing an orthopedic surgeon, Dr. ___ in ___, who did surgery on his shoulder and after 12 weeks of physical therapy, he still has pain in his shoulder and he cannot return to work because he cannot do his job.

Dr. Floss referred the claimant to another orthopaedic surgeon, Dr. C. Dwayne Daniels. Dr. Daniels recommended only medication and noted as follows:

Christopher Childers comes in complaining of right-sided shoulder pain. He states that he had been treated by Dr. Lytle for shoulder pain with physical therapy for about 10 weeks, and then he was involved in a motor vehicle accident. After that he had worsening of his shoulder pain.

The claimant returned to Dr. Floss on March 5, complaining of “ongoing shoulder pain.” Dr. Floss gave his history as, “Significant for work-related rotator cuff injury and a secondary motor vehicle accident with exacerbation of the rotator cuff injury.”

The claimant acknowledged that he went to see these “other doctors” – presumably Dr. Floss and Dr. Daniels – “to build a file” for a personal injury lawsuit against the other driver. However, according to his notes Dr. Floss was under the impression that the respondent-employer had referred the claimant to him for a second opinion. In any event, the claimant at one point denied telling any of these doctors that he was injured in the July 2002 motor vehicle accident, and at another point testified he “could not recall” what he told them. On redirect, the claimant testified as follows:

Q. So, you went to these other physicians, based upon the advice of these personal injury attorneys, but never at any time did you tell any of these physicians that you

were hurt in a motor vehicle accident, is that correct?

A. That's correct.

Q. You did tell them you had a motor vehicle accident?

A. Yes, sir.

Q. So basically, you were allowing them to infer such –

A. That's correct.

Q. –you never told them so?

[...]

Q. [H]owever they got that inference, and every doctor that you went to see, you did mention the motor vehicle accident?

A. Yes, sir.

Q. You did not mention a GP injury?

A. Yes, sir, that's correct.

On May 18, 2004, Dr. Lytle authored a letter in which he opined that the claimant's shoulder injury was caused by his on-the-job injury incurred in June 2002. However, when presented in his deposition with the records of the claimant's visits with these other medical providers, Dr. Lytle withdrew this opinion.

The claimant was terminated by the respondent-employer on June 30, 2003, since he had not returned to work. The claimant denied knowing he was terminated,

though the respondents introduced documentation with the claimant's signature establishing that he was terminated "by mutual agreement between Georgia-Pacific and employee." The documentation included the claimant's application for unemployment benefits. Even when faced with this documentation, the claimant denied knowing whether he had been terminated.

On August 23, 2004, the claimant returned to Dr. Floss. He recorded the claimant's "chief complaint" as, "Right shoulder pain that the patient attributes to an MVA approximately 2 years ago." An MRI performed December 13, 2004, revealed postoperative changes and joint disease, as well as a possible tear. The claimant testified that he continues to have pain and limited range of motion in his shoulder.

II. Adjudication

A. Independent Intervening Cause

When a claimant's 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). The basic test is whether there is a causal connection between the two episodes. *Air Compressor Equip. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1

(2000). If there is a causal connection between a primary injury and a subsequent disability, there is no independent intervening cause, unless the subsequent disability was triggered by an activity on the part of the claimant which was unreasonable under the circumstances. *Davis v. Old Dominion Freight Lines*, 341 Ark. 751, 20 S.W.3d 326 (2000).

If the claimant's testimony were the only evidence in the record, one could reasonably conclude that the claimant's surgery and related treatment was a natural consequence of his original compensable injury. The difficulty is that the claimant's testimony significantly conflicts with the medical records submitted into evidence. The claimant denied telling any physician that his motor vehicle accident aggravated his shoulder injury, but three separate medical professionals recorded that the claimant's symptoms worsened after the motor vehicle accident. The claimant admitted not telling other doctors about his original work injury, apparently in an effort to improve the chances of his tort claim. The claimant testified at the hearing that the motor vehicle accident caused \$188 in damage to his car, and the police officer who investigated the accident estimated the damage at \$1,000, while Dr. Lytle recorded the claimant as saying the accident did \$2,600 in damage. The claimant testified that his car received only a "glancing blow," but Dr. Lytle recorded the claimant as saying the impact "spun him around." In his

testimony, the claimant testified that he does not know whether he has been terminated by the respondent-employer, while the documentary evidence includes unemployment forms signed by the claimant clearly reflecting his termination. The claimant admitted that he lied in his deposition. Given these multiple, serious conflicts between the claimant's testimony and the other evidence of record, I cannot find the claimant to be a credible witness.

While the claimant did exhibit popping in his shoulder both before and after the motor vehicle accident, the popping after the accident was described by Dr. Lytle as "significant." Also, after the accident Dr. Lytle noted crepitus in the shoulder for the first time. Crepitation is defined by *Dorland's Illustrated Medical Dictionary* (26th Edition) as, "A sound like that made by rubbing the hair between the fingers, or like that made by throwing fine salt into a fire." Multiple medical providers recorded the claimant as saying his shoulder condition was aggravated by the motor vehicle accident. Only one doctor, Dr. Lytle, has offered an opinion as to causation, but Dr. Lytle withdrew that opinion in his deposition in light of the records from the claimant's other medical providers.

I recognize that as of July 25, before the motor vehicle accident, the claimant was still experiencing problems with his shoulder as documented by his therapist. But I also note that after the accident, the claimant exhibited new objective signs of

injury – crepitus and “significant” popping – and medical records quote the claimant as saying the accident exacerbated his condition. A radiologist interpreted the pre-accident x-rays as showing a possible tear, but Dr. Lytle interpreted it as being “normal.” Nothing else in the record documents the existence of a tear before the motor vehicle accident. Standing on its own, without the claimant’s testimony, the medical evidence is simply too ambiguous to support a finding of a causal connection between the claimant’s compensable injury and his condition after his motor vehicle accident.

Because I do not find the claimant’s testimony to be credible, the only way I can find the existence of a causal connection between his compensable injury and his surgery and subsequent treatment after the motor vehicle accident is by speculation and conjecture, and such can never substitute for credible evidence. *Smith-Blair, Inc. v. Jones*, 77 Ark. App. 273, 72 S.W.3d 560 (2002). I find that the claimant has failed to prove by a preponderance of the evidence a causal connection between his original compensable injury and his shoulder condition, surgery, and related treatment after July 28, 2002.

Because I so find, I also find that the claimant has failed to prove by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with the compensable injury. 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). 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). Given my findings above, I find that the claimant has failed to prove by a preponderance of the evidence that he remained in his healing period after July 28, 2002. Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that he was entitled to temporary total disability benefits after July 28, 2002.

B. Permanent Partial Disability Benefits

Permanent impairment is “any permanent functional or anatomical loss remaining after the healing period has been reached.” *Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994), citing *Ouachita Marine v. Morrison*, 246 Ark. 882, 440 S.W.2d 216 (1969). An injured employee is entitled to the payment of

compensation for the permanent functional or anatomical loss of use of the body as a whole whether his earning capacity is diminished or not. *Id.* Without submitting into evidence a physician's report assigning a permanent impairment rating, a claimant is not entitled to permanent disability benefits or wage-loss benefits. *Wren v. Sanders Plumbing Supply*, 83 Ark. App. 111, 116 S.W.3d 461 (2003); *but see Johnson v. General Dynamics*, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

The claimant's attorney stated at the hearing that Dr. Lytle assigned the claimant an impairment rating of between 16 and 20%. However, after searching the record I am unable to find any written evidence of an impairment rating assigned by Dr. Lytle or any other physician. Therefore, given the Court's most recent statement on the subject, in *Wren v. Sanders Plumbing Supply*, *supra*, I must find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to permanent partial disability benefits.

I note that even if the claimant had introduced an impairment rating into evidence, I would still find that the claimant had failed to prove by a preponderance of the evidence that this compensable injury was the major cause of his disability or impairment. Benefits for permanent disability may be awarded "only upon a determination that the compensable injury was the major cause of the disability or impairment." ARK. CODE ANN. § 11-9-102(4)(F)(ii)(a).

C. Penalties per Ark. Code Ann. § 11-9-505

An employer who without reasonable cause refuses to return an injured employee to work where suitable employment is available is liable to the employee for the difference between benefits paid and wages lost during the period of refusal, for up to one (1) year. ARK. CODE ANN. § 11-9-505 (a)(1). The claimant bears the burden of proving entitlement to such payments, by proving that he sustained a compensable injury; that suitable employment which is within his physical and mental limitations is available with the employer; that the employer has refused to return him to work; and, that the employer's refusal to return him to work is without reasonable cause. *Torrey v. City of Fort Smith*, 55 Ark. App. 226, 934 S.W.2d 237 (1996). Moreover, penalties under § 11-9-505 (a)(1) are not appropriate where a claimant is no longer receiving compensation benefits for a compensable injury. *Davis. v. Dillmeier Enterprises, Inc.*, 330 Ark. 545, 956 S.W.2d 155 (1997).

The claimant admitted in his testimony that the respondent offered him the opportunity to return to his old job, but that he himself chose not to because of his subjective view of his own limitations. He admitted, and the record reflects, that Dr. Lytle released him to return to regular-duty work. The only evidence suggesting limitation of the claimant's capabilities is his own testimony, and as noted above I do not find his testimony credible. Given this evidence, I cannot find that the

respondent-employer refused to return the claimant to a suitable position. I conclude that the claimant has failed to prove by a preponderance of the evidence his entitlement to benefits under § 11-9-505 (a)(1).

AWARD

The claimant has failed to prove by a preponderance of the evidence that he is entitled to additional benefits for his compensable injury. Therefore, this claim for benefits must be, and it hereby is, denied and dismissed.

IT IS SO ORDERED.

HON. J. MARK WHITE
Administrative Law Judge