BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510360

ALVIN STUCKEY, EMPLOYEE — **CLAIMANT**

COOPER TIRE & RUBBER CO., SELF-INSURED EMPLOYER — **RESPONDENT**

CROCKETT ADJUSTMENT, TPA — **RESPONDENT**

OPINION FILED JUNE 22, 2006

Hearing before Administrative Law Judge J. Mark White on April 6, 2006, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Nelson Shaw, Attorney at Law, Texarkana, Texas.

Respondents represented by Mr. William Bullock, Attorney at Law, Texarkana, Texas.

STATEMENT OF THE CASE

On April 6, 2006, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on December 5, 2005, and a Prehearing Order was entered that same day. A copy of the December 5, 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; and that the employee/self-insured

employer relationship existed at all relevant times, including September 2004. At the hearing, the parties further stipulated that the claimant earned wages sufficient to entitle him to the maximum compensation rates; and that the claimant returned to his regular full-time job as of March 1, 2006.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury; whether the claimant is entitled to temporary disability benefits; whether the claimant is entitled to medical treatment; whether the respondents are entitled to an offset for benefits paid per Ark. Code Ann. § 11-9-411; and controversion and attorney's fees.

The claimant contends that he suffered a compensable gradual-onset injury to his right upper extremity through repetitive motion; and that he is entitled to temporary total disability benefits and temporary partial disability benefits.

Respondents contend that claimant will be unable to meet his burden of proof under Act 796 regarding an accidental injury or disability or regarding an entitlement to any of the workers' compensation benefits claimant seeks; that the disability periods claimant has sustained, if any, were not incurred as the result of a compensable injury; that claimant has had a natural progression of a preexisting injury or condition; that anything that happened to claimant's right shoulder or right upper extremity on the job at the time of his alleged accidental injury does not

constitute the major cause of any periods of total or partial disability or any permanent impairment with regard to which claimant seeks to recover benefits herein; and that in the event an award is rendered in favor of claimant, the respondent is entitled to an offset against any disability benefits found to be owing in the amount of money paid to claimant by respondent pursuant to its group health plan, its accident and sickness benefit plan, and any other employee benefit plan meeting the definition set forth in Ark. Code Ann. § 11-9-411.

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 that he

sustained an injury arising out of and in the course of his employment.

4. The claimant has therefore failed to prove by a preponderance of the evidence that he sustained a compensable injury.

5. The respondents have controverted this claim in its entirety.

DISCUSSION

I. History

The claimant began working for the respondent-employer in April 2003. At first, he alternately performed five different jobs to "qualify" for each position, including some work as a tire layer. On March 27, 2004, the claimant was injured in a motor vehicle accident unrelated to his employment. The treatment notes of Dr. James Sarrett a few days later reflect that the claimant injured his right shoulder in the accident:

> He was about to have an AC joint separation and was placed in a sling. His pain has not been severe enough that he has even got his Darvocet filled. The patient does have persistent pain in his shoulder with abduction of the shoulder but no real pain without movement.

X-rays taken March 31 "revealed a possible distal clavicle fracture without displacement." On April 14, the claimant returned to Dr. Sarrett with shoulder pain severe enough that he had been unable to return to light-duty work with the

respondent. Dr. Sarrett noted tenderness and swelling over the right AC joint with no crepitus or erythema. He added a diagnosis of "possible AC joint separation" to the prior diagnosis of a clavicle fracture. However, when the claimant returned on April 28 with his shoulder pain "pretty much completely resolved," Dr. Sarrett opined:

> X-rays reveal questionable possible distal clavicle fracture though no evidence of healing. It makes me wonder if there actually was a fracture there. He does have pain in this area.

Dr. Sarrett also noted "a prominent distal right clavicle on the right compared to the left. This is new since his motor vehicle accident."

The claimant was off of work for about eight weeks due to the shoulder problems resulting from the motor vehicle accident, according to his testimony. He testified that he transitioned to a full-time position as tire layer in April 2004, but as just noted he was off work in April 2004 and so could not have begun this full-time position until late May or early June.

The claimant returned to Dr. Sarrett for his shoulder on September 29, 2004:

> The patient has had recurrent [sic] of his shoulder pain. This has been an on going problem. It appears to be exacerbated with his work. He has been seen by Dr. Hilborn and has been felt to have sub-acromion bursitis and has had marked improvement with steroid injections back in April. The patient states the pain is worse with abduction. He has had no injury.

Dr. Hilborn's records have not been introduced into evidence herein, and nothing in the medical record documents the April steroid injections. The claimant testified that the first injection was given during the time he was off work from the motor vehicle accident – i.e., in April or May 2004, consistent with what Dr. Sarrett's note above says. Dr. Sarrett injected the claimant's shoulder again in the September 2004 visit and diagnosed a "sub-acromion bursitis of both shoulders." He injected the shoulder again on January 14, 2005, with the same diagnosis.

When the claimant returned to Dr. Sarrett on March 7, he continued to complain of "worsening right shoulder pain." An MRI exam revealed a torn rotator cuff, and Dr. Sarrett referred the claimant to an orthopedic surgeon, Dr. Chris Alkire. Dr. Sarrett also took the claimant off of work again, and the claimant requested disability benefits from the respondent on March 11. The next day, his fellow workers went on strike, and the plant did not resume operations until the following month.

Dr. Alkire eventually performed surgery in May 2005 to repair a "pretty significant rotator cuff tear." He wrote to the claimant that the claimant's job had, "at the very least, exacerbated your right shoulder pathology and necessitated surgery for your right shoulder."

On direct examination, the claimant described his injury as follows:

> It started as - it was just gradually came on. My shoulder started to bother me and I just assumed, I said, well, it's just a slight problem, it's going to get better, I'll work through it. But as time went on, well, I got to the point where I had to go to the doctor to have a MRI and X-rays on it. I had got to the point out there that I had reported it to the supervisor that I just wasn't able to use it no more so I had to go on light duty because I wasn't able to pull the racks around or reach above my head and grab the tires off the racks to put them in the pans. I just got to the point where I wasn't able to do that no more.

He testified that his shoulder problems and limitations began "in 2004, I would say around the early part of September." Though he described no specific incident on direct examination, and though Dr. Sarrett and Dr. Alkire both noted that the claimant denied having any specific injury, the claimant testified on cross-examination that he had an incident on the job in September 2004 that affected his right shoulder. A Form AR-N completed by the claimant and dated June 8, 2005, records this September 2004 incident as follows: "Raised right arm up to pull tire off of top rack, right shoulder went to far back above head, and I felt my shoulder pop loud."

The claimant testified that he reported this incident to his supervisor but did not complete an accident report. Later in his testimony, however, he acknowledged not telling Dr. Sarrett about this alleged incident "because it was something that just gradually had got worser and worser." An accident report completed by his

supervisor asserts the claimant complained of shoulder problems in the first three months of 2005, but that the claimant "did not want" to complete an accident report.

The claimant then testified to a second incident involving his shoulder:

> Q Isn't what you reported to the company in June of 2005 that something took place nine months previously on the job that involved a tire coming back on you and hurting your right shoulder?
>
> A Yes, this is what I reported, but at the same time what I'm also saying is when I first started at Cooper Tire on one of those five jobs, I was realizing at one point back in the spray booth, that I had hurt my shoulder but I continued to work through the pain hoping that it was going to get better and better, but when it got to that point where I raised my arm up that particular day and it pulled my shoulder back, I knew something had to be done. But this had already been reported to the supervisor. Even though I didn't document it at the time, I reported it to the supervisor. This one incident didn't just happen just like that (witness snaps fingers).

Nothing in the medical records nor in the documentary evidence corroborates the claimant's account of a shoulder injury incurred in the spray booth when he was qualifying for the five job positions. The claimant later testified this spray-booth incident occurred in his first three months of employment, which would put it sometime in 2003, well before his March 2004 motor vehicle accident.

II. Adjudication

For the claimant to prove a gradual-onset injury compensable, he must establish by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was a major cause of the disability or need for treatment; and (4) the existence and extent of the injury is established by objective medical evidence. *Wal-Mart Stores v. Leach*, 74 Ark. App. 231, 48 S.W.3d 540 (2001).

The credibility of the claimant's contentions is damaged by the various explanations of injury he has given. Because the claimant's testimony was internally inconsistent and was inconsistent with the other evidence of record, I find that the claimant was not a credible witness.

The claimant testified that he gradually developed symptoms in his right shoulder, culminating in a need to seek medical treatment in September 2004. Medical records from that time identify no specific injury. Yet in forms he completed for the respondent the following summer, the claimant tied his shoulder problems to a September 2004 specific incident involving his lifting a tire. And on cross-examination, the claimant mentioned a second, earlier specific incident involving his work in the spray booth in 2003. Moreover, the claimant injured his right shoulder

in a March 2004 motor vehicle accident, and his right shoulder was treated continually from that accident until his 2005 surgery.

The claimant testified that his symptoms began in September 2004, but Dr. Sarrett's treatment note of September 29, 2004, indicates the claimant had already been treating with Dr. Hilborn for the same symptoms for several months. Since Dr. Hilborn's records were not introduced herein, there is no way to know precisely how long the claimant had been complaining of these symptoms, or when he was first diagnosed with bursitis. Moreover, the claimant tied this shoulder problems to his work as a tire layer, but he did not begin working full-time as a tire layer until June 2004 – two months after his first shoulder injection, according to his own testimony and Dr. Sarrett's notes.

Given this evidence, I am not persuaded that the claimant's shoulder problems are causally connected with his work. I can only speculate as to whether his shoulder problems developed gradually as a result of his work in 2004, or were caused by the September 2004 tire-lifting incident, or by the 2003 spray booth incident, or by the March 2004 motor vehicle accident, or some combination thereof. It is well established that conjecture and speculation, even if plausible, cannot take the place of proof. *Ark. Dept. of Correction v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (1991).

I note that Dr. Alkire has opined that the claimant’s work exacerbated his shoulder condition, but Dr. Alkire’s opinion is plainly based on the history related by the claimant, a history which I cannot find to be credible. The commission is not bound by a doctor's opinion which is based largely on facts related to him by a claimant where there is no sufficient independent knowledge upon which to corroborate that claimant's claim. *See, Roberts v. Leo-Levi Hospital,* 8 Ark. App. 184, 649 S.W.2d 402 (1983).

I find that the claimant has failed to prove by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment. I note that I would make this finding regardless of whether the claimant was contending his injury arose gradually or from a specific incident. Because I so find, I conclude that the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury.

CONCLUSION

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

IT IS SO ORDERED.

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HON. J. MARK WHITE
Administrative Law Judge