

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F608300

ERNEST C. WAY, EMPLOYEE

CLAIMANT

LOWE'S HOME CENTERS, INC., EMPLOYER

RESPONDENT

SPECIALTY RISK SERVICES, CARRIER/TPA

RESPONDENT

OPINION FILED DECEMBER 31, 2007

Hearing before Administrative Law Judge O. Milton Fine II on October 3, 2007, in Mountain Home, Baxter County, Arkansas.

Claimant represented by Mr. Frederick S. "Rick" Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by Mr. Randy P. Murphy, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 3, 2007, the above-captioned claim was heard in Mountain Home, Arkansas. A pre-hearing conference took place on May 21, 2007. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following three, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed on or about April 13, 2006 and at all relevant times.

3. This claim has been controverted in its entirety.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. Claimant asked that the record reflect that he was expressly reserving all issues not listed below. The following issues were litigated:

1. Whether Claimant sustained a compensable injury to his right shoulder.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.

Contentions

Claimant:

1. Claimant contends that he sustained a compensable injury arising out of the course and scope of his employment with the Respondent and is entitled to all related benefits.

Respondents:

1. Respondents contend that Claimant did not sustain an injury within the course and scope of his employment with Respondent employer.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his right shoulder.
4. The reasonable and necessary medical care issue is moot in light of the above finding.

CASE IN CHIEF

Summary of Evidence

_____ Three witnesses testified at the hearing: Claimant; Daphne Winters, the Human Resource Manager for Respondent Lowe's; and Jesse Peglar, a sales manager for Lowe's.

In addition to the pre-hearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit No. 1, a compilation of his medical records, consisting of one index page and 38 individually numbered pages thereafter; Respondents' Exhibit No. 1, a compilation of Claimant's medical records, consisting of a two-page abstract and 116 individually numbered pages (Respondents removed pp. 8-16 prior to the hearing); Respondents' Exhibit 2, an ADA/Title VII accommodation request form dated June 7, 2006; Respondents' Exhibit 3 an ADA/Title VII accommodation request form dated June 3, 2006; and Joint Exhibit 1, the 47-page transcript of the October 25, 2006 deposition of Claimant.

Testimony

Ernest Charles Way. Claimant, an honorably discharged Marine and Vietnam War veteran, testified that he was working for Respondent Lowe's on April 13, 2006, when he

was injured. Later, he stated that the date was April 22, 2006. He described the incident in question as follows:

I was on the cherry picker putting top stock away, lifting a 60 inch sink. And I was, it was very tough, and I just couldn't lift it on my own, and I pulled too hard. Then, I felt something in my shoulder, felt some pain in my shoulder. And I got off the, down off the cherry picker.

The cherry picker is similar to a forklift, and raised the pallet on it to where it was on the same level as the top shelf. Claimant later changed the description of the object to a 60-inch vanity, which did not hold a sink. He was pulling the vanity onto the shelf when he felt the sensation in his right shoulder. He stated that he was called into the office of Jesse Peglar at 9:00 to go over his scheduling, and that was when he reported that he had injured his arm. Peglar asked him if the injury was related to the strokes he had in March 2006, but Claimant told him that it was not, that it was a new injury. Claimant did not ask him for workers' compensation paperwork, but instead went back to work. Claimant stated that he could not lift his arm above shoulder-level. Prior to the alleged accident, he had no problems with heavy lifting.

Later that week, he saw his physician at the Veteran's Administration, Dr. Richard Chitsey. Dr. Chitsey performed an x-ray and sent Claimant to the Fayetteville VA Hospital for an MRI. According to Claimant, the MRI "showed there was a problem, but they couldn't really see the rotator tear until they went in for surgery." Claimant underwent shoulder surgery on April 26, 2007 at the Fayetteville VA. That took care of the rotator cuff tear. Claimant testified that while he still experiences pain in the shoulder, he is now able to raise his arm.

According to Claimant, he had asked Daphne Waters, who was in human resources at Lowe's, on three occasions after the alleged accident for workers' compensation forms; but she had refused to provide them because the accident did not happen at Lowe's. She did not tell him where Lowe's thought the accident had taken place. Claimant stated that he had "told her, I mentioned it was from a [sic] old baseball injury, but I never had a rotator tear when I was playing baseball." However, he stated that he said this because he attributed his symptoms to sore muscles he used to experience while playing. He realized that his was not an old baseball injury after he got the MRI results.

He stated that he was able to work after being injured and despite the pain because he was given a 10-pound lifting restriction by Dr. Chitsey, which Lowe's honored. Claimant last worked for Lowe's around June 5, 2006. Dr. Chitsey had written that Claimant could perform no lifting, and Claimant delivered that note to Daphne Waters, who was in Human Resources at Lowe's. He stated that he told her that he had a shoulder problem, and that he could not lift anything. She told him that he could no longer work there because he could not lift anything. He was fired without warning. Claimant has only held one job since leaving Lowe's, substitute teaching in a high school.

With respect to the stroke referenced above, Claimant testified that he had two strokes in one day; one on the way to work, and one at work. His symptoms included lethargy, numbness and paralysis on his right side. He was absent from work for four days due to this condition, and stated that he had no further symptoms after that time.

When questioned by Respondents, Claimant testified that he had recently returned to California, where he had lived for over 50 years before moving to Arkansas. He has

been diagnosed with post-traumatic stress disorder and exposure to Agent Orange. Claimant gets 60 percent disability for this, but was denied Social Security disability.

Claimant worked at Lowe's from January 5, 2006 to June 5, 2006. He was a team leader in the store's plumbing department. Claimant testified that after the alleged accident occurred at 9:00 a.m., he was summoned to Peglar's office to discuss his scheduling and to schedule around his upcoming medical appointments concerning his hypertension and diabetes. He did not ask Peglar for any workers' compensation forms or mention his alleged injury.

Claimant went to Dr. Chitsey on April 26, 2006. He stated that he does not know why twice in his medical records, on April 26 and May 2, it reads that he had been having shoulder pain for three months, because he had not been. Claimant stated that when he went to the doctor on April 26 and May 2, he told them that he had been injured at Lowe's. Again, however, he could not explain why the records do not reflect that.

When he went to Lowe's with work restrictions in April and May 2006, Lowe's was able to accommodate him. Claimant gave the doctor's notes to "George," his operations manager. His note on June 5, 2006 stated that he could do absolutely no lifting, and he was told that Lowe's could not accommodate that. He received short-term disability benefits through Lowe's *via* a Liberty Mutual policy. Lowe's did not controvert this request.

In July 2006 he received a letter from Lowe's that stated that he was to be terminated because he had not accumulated enough hours during his tenure. Claimant went in and spoke with Winters and with Jason Simpson, the store manager. Winters told him that this incident had never been turned in as workers' compensation. Claimant had never filed a claim until it was done so through his attorney. He reiterated that he had

spoke with Winters about it on three separate occasions, but that she refused to file it. Claimant did admit that when he went in with doctor's restrictions on three occasions, Winters promptly completed the requisite forms to accommodate the restrictions. He also stated that he did not speak with anyone else at Lowe's about filing a workers' compensation claim.

Following his termination from Lowe's, Claimant went to work in August 2006 as a substitute teacher. He was terminated from this position. At first, he testified that he was not given a reason for the termination. Then, he stated that he was fired "[f]or hugging a girl." He has not worked anywhere since.

Claimant stated that he has seen no other doctors than those at the VA regarding his alleged injury.

When questioned further by his attorney, Claimant stated that his only explanation for his medical records reflecting that he had had shoulder pain for three months was that it had actually been three or four days and that this had been incorrectly transcribed. The first time he knew that he had an injury that arose out of his work was on April 22, when he could not lift his shoulder. While he mistakenly thought at first that his symptoms were due to an old baseball injury, the MRI showed otherwise by disclosing a rotator cuff tear. Only his work at Lowe's would explain the injury. At first, he stated that the most he lifted at work was 300-pound vanities. He then modified his answer to state that he did not lift them but merely pulled or moved them.

When questioned by me, Claimant stated that the vanity he was moving had the dimensions of five feet by three feet by three feet. It is made of wood and has drawers and doors. The vanity was in a box. He testified that the end of the box tore while he was

moving it and “that’s when my shoulder went and did its thing.” With regard to his baseball injury, he stated that he never had an acute injury, but merely sore muscles—he played until he was 46 (again, he was 58 at the time of the hearing).

Daphne Winters. Called by Respondents, Winters testified that she is employed at the Lowe’s in Mountain Home, where she has been human resource manager since it opened. Her duties include the processing of workers’ compensation forms. She stated that if a worker comes in and reports an on-the-job injury, a standard workers’ compensation form and a First Report of Injury are filled out immediately. While the worker is in the office, Respondent Specialty Risk Services (“SRS”) is contacted and a report is made. Also, Winters stated that she makes an appointment for the worker to be checked out by the company doctor that same day at North Arkansas Medical Center. When the paperwork is returned from the physician, it is faxed to SRS. The foregoing are done per Lowe’s policy.

Winters stated that she is aware of who Claimant is. It was not until August 2006 that she became aware of his alleged injury, when she “was informed by my area HR to go ahead and submit it to SRS to see if they would accept or deny his claim.” The First Report of Injury was filled out at that time as well. She denied that Claimant ever came to her and asked to have a workers’ compensation claim filed. When he came to her with accommodation forms, he did not mention having a work-related problem. Lowe’s was able to accommodate his two ten-pound lifting restrictions. When he brought in the third note on June 5, 2006, specifying that he could do no lifting, Winters contacted the area HR, Joe Dodson, and was informed that the restriction could not be accommodated. She informed Claimant that he could not return to work until he had a doctor’s release. The

language in Respondents' Exhibits 2 and 3 are not descriptions of an accident, but a description of the alleged functional limitation.

Claimant was ultimately fired pursuant to a Lowe's policy that provides that an employee with no hours for 180 days is automatically terminated. After Claimant received the letter notifying him of his termination, he came in and spoke with Winters and Simpson. Claimant stated that he had been under the impression that he was on workers' compensation. Winters stated that she told him "that we had filled out his accommodation requests and they were both denied." She testified that she was not sure why Claimant's workers' compensation claim was denied by SRS. While meeting with Claimant that day, Winters advised him regarding the availability of short-term disability benefits.

Under cross-examination, Winters stated that Claimant never told her about his shoulder difficulties. She testified that she normally does not ask about the nature of the injury unless the worker states that it occurred on the job. When he came in with the ten-pound lifting restrictions, she merely told him that those could be accommodated. When he came in on June 5 with the zero-lifting restriction, she made him fill out an accommodation request, which was denied.

When questioned by me, Winters identified Respondents' Exhibit 2 as an accommodation request that she signed and submitted. The language on the form was placed there by Claimant. Winters could not identify Respondents' Exhibit 3, and stated that she would not have submitted this because it did not bear her signature, which was required. But when asked to explain the two requests coming in the same day, Winters testified:

Well, there was two fax [sic], the first one being when he said he couldn't lift anything at all. And if I remember correctly, he sent in or had his doctor fax in a doctor's note shortly after that stating [sic] he could not push or pull anything and could not lift anything over ten pounds. I again, then, had him fax, I faxed over another accommodation request for him. We were told at that time we were not able to accommodate that either.

Winters categorically denied that Claimant asked her to fill out workers' compensation forms for him.

Jesse Peglar. Called by Respondents, Peglar testified that he is a sales manager for Lowe's in Mountain Home and is acquainted with Claimant. He recalled Claimant coming to him in March or April, at the time when the store was getting ready for its opening, and stating that he did not feel okay and was having problems speaking. He did not mention any shoulder problems. Peglar stated that he told him to go home if he felt he needed to, and Claimant went home. A few days later, Claimant told him that he thought he had had a mini-stroke. He stated that had Claimant reported a work-related injury, he would have referred him to Winters to fill out workers' compensation paperwork. Claimant never mentioned a shoulder injury or being injured on the job while lifting a 60-inch vanity.

When questioned by Claimant, Peglar stated that he first learned of Claimant's shoulder injury when Claimant was working at a cash register. Peglar asked him to help with some loading, but Claimant stated "I had an old baseball injury just act up on me." This occurred in April or May, when Claimant was on light duty restrictions. Claimant's job requirement was to be able to lift 50 pounds with reasonable accommodation. Heavy lifting was sometimes required. He stated that 60-inch vanities are in the 50-pound range "or more." But vanities were to be lifting by more than one person, according to the box.

Peglar stated that one person could move a 60-inch vanity from a cherry picker to a shelf “pretty easily,” since it could be maneuvered to where the box could be slid right off onto the shelf.

When questioned by me, Peglar stated that it would be very easily to pull or drag a box containing a 60-inch vanity. It would not be unusual at Lowe’s for one person to operate a cherry picker to take such a vanity up and slide it onto a shelf. The cardboard boxes the vanities come in are designed to be dragged or pushed across a floor without damaging the box, and he stated that “more than half” the boxes look to be in good shape.

Claimant-Rebuttal. Testifying on rebuttal, Claimant reiterated that he asked Winters three times to file a workers’ compensation claim for him. Under questioning from Respondents, Claimant stated that Peglar lied in his testimony, and that Winters was incorrect. He also stated that his medical records are incorrect in stating that he had shoulder problems for three months, and in failing to note that he had been injured at Lowe’s. Claimant wound up his testimony by agreeing with Respondents that he was stating that everybody is wrong but him.

Testimony-Deposition

Ernest Way. Claimant was deposed on October 25, 2006. As noted above, the transcript of his deposition was admitted as Joint Exhibit 1. He testified that the incident at issue occurred on April 13, 2006 at around 9:00 a.m. He described the incident as “I was putting top stock away, and a vanity, a 60-inch vanity—and it went one direction, and I kind of went the other.” Claimant stated that he was by himself on the cherry picker, and another worker, T.J. Laru, was acting as a spotter.

Claimant testified that he went and told Jesse Peglar what had occurred. He was meeting with Peglar to schedule around his April 26 appointment at the VA. Claimant stated that he told Peglar that he had hurt his arm, and that he would have it checked out during the VA appointment. Peglar asked him if the problem was part of his stroke or was it a new injury, and Claimant replied that it was a new injury. However, Peglar did not do anything. Peglar was the only person Claimant told about the injury. However, he later stated that he told Don Guinn, his department manager, about his injury a week after it occurred.

Claimant stated that he received treatment at the VA clinic in Harrison and the VA Medical Center in Fayetteville. They prescribed pain pills and home therapy, neither of which helped. He was x-rayed in Harrison and sent to Fayetteville for an MRI. The VA recommended surgery. Claimant stated that he told Dr. Chitsey, the first doctor he saw, about injuring himself at work. He was initially given a ten-pound lifting restriction, which Lowe's accommodated by assigning him to work as a cashier along with other light duties. He testified that he asked Daphne Winters three different times to fill out a workers' compensation form for him, and that she denied the request each time.

Claimant identified a letter (which was never introduced) to Matt Goodrich with Risk Management that stated:

I am Ernest Way. I spoke to you on the phone, numerous times, regarding my employment at Lowe's in Mountain Home, Arkansas. I want to get this on the record that I was injured on April 13, 2006. I reported it to Jesse, my Zone Manager. This injury occurred while lifting a 60-inch vanity. When the box gave way, it hurt my shoulder.

Claimant stated that he never received a response to the letter.

He testified that Lowe's accommodated his restrictions for no lifting over ten pounds, but would not let him work with a five to seven-pound restriction. He did not work until becoming a substitute teacher with the Mountain Home School District in the fall of 2006, and did not file for unemployment benefits. He was terminated on August 12, 2006, but was reinstated August 23 and given a closing date in December 2006, when he is scheduled to be terminated again for lacking five pay periods.

Records

Claimant's Exhibit 1 and Respondents' Exhibit 1. The medical records of Claimant that were introduced at the October 3, 2007 hearing and are part of Claimant's Exhibit 1 and/or Respondents' Exhibit 1 reflect the following:

The record of Claimant's April 26, 2006 visit to the VA Clinic in Harrison reflects that he presented with "right shoulder pain x 3 months" He told Dr. Chitsey that he works at Lowe's in Mountain Home and does a lot of heavy lifting, that his right shoulder had been giving him problems the last few weeks, especially if he tried to raise his arm above his head. He was assessed as having a frozen shoulder. The radiology report for that same date reflects a clinical history of "right shoulder pain x 3 months" as well. The x-rays taken of his right shoulder were normal. Claimant saw a nurse on May 2, 2006 and presented with "RIGHT SHOULDER PAIN X 2-3 MONTHS. When he saw Dr. Chitsey on May 5, the doctor thought the shoulder pain was radiating from Claimant's neck. The doctor offered to perform an MRI, but Claimant declined, stating that his pain was not unbearable.

On June 26, 2006, he was prescribed conservative treatment, including home exercises. He was noted as having "3-4 month hx [history] of right shoulder pain after

lifting freight at work.” He told an orthopedic nurse that day that he had been having problems since late April or early May, when he was lifting freight and “felt something give and it made a pop.” Claimant told an orthopedic nurse on August 7, 2006 that he first began having shoulder problems in “late April or early May.” According to an August 31, 2006 note, his shoulder MRI showed the rotator cuff to be intact, with mild hypertrophic changes at the acromioclavicular joint that caused minimal impingement on the muscular junction of the supraspinatus muscle. However, because Claimant stated that the pain was “intolerable,” an appointment was scheduled with Dr. Banford Mitchell, an orthopedic surgeon.

On September 29, 2006, Claimant was given a surgical evaluation by Dr. Mitchell at the VA Hospital in Fayetteville. He stated that he had been having shoulder problems since March/April 2006. His history reads in pertinent part: “The patient hurt his shoulder at work. He was working on a cherry picker and strained his shoulder sometime [sic] back.” His MRI reflected “subacromial impingement, marked AC arthropathy, and his AC joint is essentially bone on bone. There is a small loose body beneath his joint . . . and this all amounts to marked subacromial impingement.” Dr. Mitchell opined that surgery would probably be necessary following therapy to increase range of motion. The physical therapist’s note for September 29 reads that Claimant “report[ed] he injured [his shoulder] while working at LOWE’S while lifting a 60 inch vanity and moving it.” He was assessed as having adhesive capsulitis, tendinopathy, and acromioclavicular arthropathy of the right shoulder.

When he returned for PT follow-up on November 3, 2006, he rated his shoulder pain as 9/10. He was noted to have had problems with his shoulder for eight months at that

point. That day, Dr. Mitchell noted that Claimant's shoulder motion had improved to the point where it was equal with his left. However, pain remained, particularly during extension and somewhat during abduction. Claimant requested surgery, and Dr. Mitchell saw little harm in proceeding.

When Claimant presented on January 9, 2007, he stated that his shoulder injury occurred on April 22, 2006.

He underwent shoulder surgery on March 26, 2007. Dr. Mitchell performed a right shoulder distal clavicle resection, acromioplasty, rotator cuff repair. Claimant was given a pre- and post-operative diagnosis of right shoulder impingement, acromioclavicular disease, and rotator cuff tear.

Respondents' Exhibit 2. This is a Lowe's ADA/Title VII Accommodation Request Form signed by Claimant and Winters on June 7, 2006 in which he requested a temporary accommodation due to his alleged problem with the lifting of heavy material.

Respondents' Exhibit 3. This is another Lowe's ADA/Title VII Accommodation Request Form signed by Claimant June 3, 2006 in which he requested a temporary accommodation of "no lifting" based on his alleged problem with lifting heavy objects. No one signed the form to signify that Lowe's received it from Claimant.

ADJUDICATION

A. Compensability

Claimant has alleged that he suffered a compensable injury to his right shoulder as the result of moving a vanity from a cherry picker to a shelf at Respondent Lowe's. In his testimony he gave two different dates that this allegedly occurred: April 13 and 22 of 2006.

Respondents deny that Claimant sustained an injury within the course and scope of his employment with Lowe's.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2002), which I find applies to Claimant's alleged injury, defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body . . . arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. § 11-9-102(4)(D) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element "arising out of . . . [the] employment" relates to the causal connection between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.* a causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

After review of the evidence presented in this case, I cannot find that Claimant has proven by a preponderance of the evidence that his right shoulder injury was caused by a specific incident identifiable by time and place of occurrence, nor can I find that there is a causal connection between a workplace incident on April 13 or 22, 2006 and the injury. In so doing, I find that, based upon my observation of Claimant while testifying, and based upon his testimony when arrayed against the balance of the evidence, he is not a credible witness.

Claimant's testimony was marked by numerous inconsistencies, and has been rebutted by other evidence. First, as noted above, he gave testimony that his injury occurred on April 13, 2006 and April 22, 2006. He even gave these two different dates during his hearing testimony. In his deposition testimony, he gave the date as April 13. That was also the date in the letter that was addressed to Matt Goodrich that was mentioned in Claimant's deposition.

The record shows that Claimant first sought treatment for his shoulder when seeing Dr. Chitsey on April 26, 2006. At the hearing, he testified that the reason that his medical records of that visit may reflect that he complained of shoulder pain for three months was that it was actually three or four days, and the statement was misunderstood. But his

records reflect on multiple instances that Claimant reported that he was hurt earlier than even April 13, 2006. In addition to the statement above, Claimant told Dr. Chitsey on April 26 that his right shoulder had been giving him problems the last few weeks, especially if he tried to raise his arm above his head. The radiology report for that same date also shows a clinical history of "right shoulder pain x 3 months." When he returned on May 2, 2006, he reported right shoulder pain for the last two to three months. On June 26, 2006, he was noted as having a three to four- month history of right shoulder pain. This same day and on another occasion, he gave the period of the injury as late April or early May. But on his September 2, 2006 visit to Dr. Mitchell, he gave the period as March/April. Not until January 9, 2007 does his records reflect that he gave a date of April 22, 2006.

His account of the incident varied as well. Claimant at the hearing testified initially that he was pulling the vanity when he felt his shoulder pop. At another point, he stated that he was lifting the vanity. His records reflect multiple instances where he reported that he was lifting when his injury occurred. This statement was apparently in the Goodrich letter as well. Nowhere in his records is there a reference to him pulling an object. Of course, based upon the dimensions of the vanity, five feet by three feet by three feet, its apparent weight, the credible testimony by Peglar that the box could easily be slid across the floor, and the instructions on the box that it should only be lifted by two people, it is doubtful that Claimant lifted the vanity.

Claimant testified at the hearing that he felt pain in his shoulder when he pulled the vanity. But his records do not reflect anything other than pain for three months when he first presented with his shoulder on April 26, 2006. Not until June 26, 2006 did he report

experiencing a “pop” when the injury occurred—but again, he reported in that instance that it occurred while he was “lifting freight.”

In support of his case, Claimant testified that he told Jesse Peglar about the injury the date that it occurred. Peglar denied this at the hearing, and in his rebuttal testimony Claimant accused Peglar of lying. However, I find Peglar to be more credible.

Claimant also testified that he specifically asked Daphne Winters to file workers’ compensation paperwork regarding his shoulder on three separate occasions, but that she refused. As with the testimony regarding the alleged report to Peglar, this evidence does not go to whether Respondents had notice of the claim—a defense they have not raised. Rather, it goes to whether Claimant, contemporaneously with his alleged injury, was reporting a specific incident identifiable by time and place of occurrence, with a causal connection to his shoulder injury. As with Peglar, Winters categorically denied that such a conversation ever took place. Claimant admits that when presented with a ten-pound lifting restriction, Winters saw to it that he was accommodated. They are also in agreement that when he asked for a no-lift accommodation, Winters processed the request and it was refused. Based upon my assessment of these witnesses, I find Winters to be more credible.

Finally, while it does not bear directly on the issues in this case, I note that in testifying regarding why he was terminated as a substitute teacher, Claimant was initially deceptive, stating that he did not know why he was fired before finally admitting that he knew the reason for his termination. This, too, reflects negatively on his credibility.

Taking into consideration the foregoing, along with the other evidence set forth above, one could only find that Claimant sustained a compensable injury by resorting to

speculation and conjecture. But speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). Hence, Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury.

B. Reasonable and Necessary Medical Care

Because of the above finding, the other issue litigated at the hearing— whether Claimant is entitled to reasonable and necessary medical care—is moot and will not be addressed.

CONCLUSION

Claimant bears the burden of proving by a preponderance of the evidence that his right shoulder injury is compensable. He has not done this. Therefore, his claim must be, and hereby is, denied and dismissed.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge