

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F114155

DWIGHT LANDER,
EMPLOYEE

CLAIMANT

RAB HOLDINGS, INC.,
EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 6, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE WILLIAM GREENHAW, Attorney
at Law, Fayetteville, Arkansas.

Respondents represented by HONORABLE JOHN DAVIS, Attorney at
Law, Fayetteville, Arkansas.

Decision of the Administrative Law Judge: Affirmed in part
and reversed in part.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed May 16, 2003. The administrative law judge
found, "The claimant has failed to prove by a preponderance
of the evidence that his currently (sic) left shoulder
problems are a result of his compensable injury." The
administrative law judge found, "The claimant is not
entitled to additional medical expenses to be paid by the
respondent for his ongoing left shoulder problems." The
administrative law judge also found that the claimant failed
to prove he was entitled to additional temporary total

disability compensation. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that the claimant failed to prove he was entitled to additional temporary total disability. We reverse the administrative law judge's finding that the claimant failed to prove he was entitled to additional medical expenses. The Full Commission finds that the claimant proved he was entitled to additional medical treatment as recommended by Dr. Oliver.

I. HISTORY

The parties stipulated that Dwight Leon Lander, age 61, sustained compensable injuries "to his left shoulder and arm" on December 5, 2001. The claimant testified that a spare tire fell from his truck onto a highway. The claimant testified, "I stopped and went back to get it out of the highway before it caused a severe wreck and proceeded to put it back under the trailer; and when I did, it got in the wrong position. This left shoulder, something tore loose in there; and from there on, it's just been nothing but chaos."

Dr. Charles Klepper reported on December 6, 2001, "Mr. Lander comes to clinic complaining of left arm and shoulder pain. He injured his shoulder yesterday when he had a flat tire on the road. He had to change a large tractor tire by

himself and get the spare tire in the back of his truck. He wrenched his shoulder in the process and has had severe pain since that time." Dr. Klepper assessed "Shoulder injury, probably rotator cuff tear" and "Cervical strain."

The claimant was referred to an orthopaedic surgeon, Dr. Todd M. Oliver. The impression from an MRI scan of the left shoulder taken December 18, 2001 was "small focal tear of the rotator cuff anteriorly, but a complete tear with retraction of the cuff is not seen. The described tear does extend through the full thickness and there is fluid in the subacromial bursa."

Dr. Oliver wrote to the respondent-carrier on January 15, 2002:

I received your letter asking about the possibility of light duty for Mr. Lander. I do feel what you have described to me, namely light duty with right handed work only, would be certainly appropriate. He has a small rotator cuff tear which may eventually require surgery if not improved with physical therapy, but even postoperatively, he would be able to continue with light duty, using his right hand. I had actually given Mr. Lander a release to return to work at his appointment on December 20, 2001, a copy of which is enclosed.

On February 15, 2002, Dr. Oliver performed an "Open rotator cuff repair, Arthroscopic subacromial decompression," and "Arthroscopic distal clavicle

resection." Dr. Oliver reported on February 26, 2002 that the claimant was "Doing very well" post-surgery. Dr. Oliver informed the respondent-carrier on March 11, 2002 that the claimant could return to light duty, stating, "My only request would be that you keep him from using his left arm for work purposes. Therefore, he would be one-handed duty." Kris Greening, human resources manager for the respondent-employer, testified that the claimant was offered a full-time position performing right-handed work. The claimant testified that he was able to perform light-duty work, but the claimant did not return to work. On April 9, 2002, Dr. Oliver indicated that the claimant could be released to drive on May 15, 2002.

The record indicates that the claimant began receiving physical therapy at HealthSouth in Branson, Mo. on April 17, 2002. The claimant began treating at HealthSouth in Harrison, Ark. on April 22, 2002. The claimant testified that he never experienced substantial relief of his shoulder pain. He testified, "I asked for another doctor's opinion, and they actually thought I was going through a criminal stage, I think, when I asked for another doctor's opinion, but I really had nothing against Oliver. The first surgery failed, and I asked for another one, and they refused that."

The respondents began surveillance of the claimant on April 29, 2002 and May 1-2, 2002. The claimant is generally seen on videotape performing light yard work, including use of a large shovel and what appears to be a garden rake. The claimant testified that he was "Picking up small dog dumpings" with the shovel on April 29, 2002. The claimant testified that he was ingesting prescription medications to the point, "you feel like you could whip Hercules."

On May 8, 2002 at HealthSouth, the claimant reported "a catching and locking" in his shoulder and anterior shoulder pain. The claimant was referred back to Dr. Oliver on May 9, 2002:

Mr. Lander returns today for follow-up of his left rotator cuff repair, subacromial decompression, and distal clavicle resection. He is quite miserable. He states he thought he was making excellent progress until the last two weeks when things have drastically taken a turn for the worst. He states he is now to the point where he can lift the arm out to the side but he then gets stuck and he has to help lift the arm back down. I have never quite heard this complaint in any of my patients with a rotator cuff repair or any shoulder problem really....

On examination, he is hypersensitive, exquisitely tender to palpation anywhere but maximally along the anterior deltoid. He fires the anterior deltoid very well and I feel this is in continuity, absolutely no evidence that this perhaps has torn off. He actually has good strength of the rotator cuff supraspinatus tendon with his arm at his side but he will not let me

bring the arm anywhere out to the abducted position or forward flexed. He fights me intensely and I cannot get any kind of exam at all....

I have no idea what is going on with this gentleman and why he is having this kind of exam....

Dr. Oliver planned "an examination under anesthesia with a possible arthroscopic evaluation for perhaps a failed repair of his rotator cuff."

The parties stipulated that medical expenses and temporary total disability compensation had been paid until June 11, 2002. The record indicates that the respondent-carrier denied any further medical treatment as of June 17, 2002. The record also indicates that the claimant's employment was terminated at about this time. After a follow-up visit with the claimant, Dr. Oliver stated on July 17, 2002, "I suppose it is reasonable that his rotator cuff repair could have failed and to this end, I will obtain a MRI scan to evaluate this further. I do not think this is what is going on but I would certainly like to make sure that is not the problem."

An MRI of the left shoulder was taken on July 23, 2002:

1. Postoperative shoulder with a clip in the humerus head post rotator cuff repair.

2. There is no significant spurring remaining at the acromioclavicular joint or under the acromion.

3. There is abundant abnormal signal in the rotator cuff which normally would be interpreted as a rotator cuff tear, but may simply represent incomplete healing post surgery. The same can be said for abundant fluid in the subacromial/subdeltoid bursa which normally would indicate a full-thickness tear of the rotator cuff, however, the patient had an injection into the subacromial/subdeltoid bursa 2 to 3 days ago, so the fluid may come from that source.

RECOMMENDATION: Followup MRI or arthroscopy of the left shoulder will be necessary for clarification.

Dr. Oliver stated on August 7, 2002, "He definitely has some postoperative changes and it is quite possible that he has return his rotator cuff. Really, the only way to tell, at this point, would be with a diagnostic arthroscopy which I am definitely recommending in this active patient. Mr. Lander states he would like to discuss this with his lawyer, and he will let us know what he needs from our end."

Dr. Oliver wrote to the claimant's attorney on August 22, 2002:

I received your inquiry into Mr. Leon Lander's current condition. As you well know, Mr. Lander originally injured his shoulder back in December, 2001, while on the job. He was driving his truck, when a spare tire had apparently fallen out on the highway. He went out to lug the tire along, and felt immediate and sharp pain in his left shoulder. He was then diagnosed by myself to have a rotator cuff tear, as well as an exacerbation of

the degenerative changes in his acromioclavicular joint.

He underwent extensive conservative treatment, attempting to get him better with therapy. He did not do well with this, and then went on to surgical repair of the rotator cuff on February 15, 2002. He was actually doing well initially, but soon developed a significant increase in his problems.

It was my impression on follow up examinations that the patient had unfortunately failed his rotator cuff repair. I did obtain an MRI on July 23, 2002, which was somewhat difficult to assess based on his recent operation, but did raise the suspicion of a possible re-rupture of his rotator cuff. This is obviously based on the history I've just given, all related to his initial injury.

I feel strongly that this patient would benefit from repeat arthroscopy for evaluation of the rotator cuff and possible repeat repair if indeed a re-rupture has occurred. It is indeed my medical opinion that this is all related to his initial injury.

Mr. Lander claimed entitlement to additional worker's compensation. The parties agreed to litigate the issues of (1) Compensability of the claimant's current left shoulder and arm problems; (2) Additional medical treatment; (3) Additional temporary total disability from June 11, 2002 to a date to be determined; and (4) Attorney's fees. After a hearing before the Commission, the administrative law judge found that the claimant failed to prove that his current left shoulder problems were the result of the claimant's

compensable injury. The administrative law judge found that the claimant was not entitled to additional medical expenses. The administrative law judge found that the claimant failed to prove he was entitled to additional temporary total disability. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Medical treatment

The claimant bears the burden of proving by a preponderance of the evidence that he is entitled to additional benefits. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 3d 543 (1999). 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 for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the Full Commission finds that the claimant proved he was entitled to additional medical treatment as recommended by Dr. Oliver. The parties stipulated that the claimant sustained a compensable injury

in December 2001, and he was subsequently assessed with "Shoulder injury, rotator cuff tear." Dr. Oliver performed surgery on the claimant's left shoulder in February 2002.

The claimant initially reported good improvement after surgery, but he eventually began complaining of a "catching and locking" in his shoulder. The respondents controverted additional medical treatment after June 17, 2002.

Nevertheless, an MRI of the claimant's injured left shoulder in July 2002 was abnormal. Dr. Oliver recommended a diagnostic arthroscopy. Dr. Oliver opined in August 2002, "I feel strongly that this patient would benefit from repeat arthroscopy for evaluation of the rotator cuff and possible repeat repair if indeed a re-rupture has occurred. It is indeed my medical opinion that this is all related to his initial injury."

The Commission is authorized to accept or reject medical opinion and is authorized to determine its medical soundness and probative force. McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989). Moreover, we are not authorized to arbitrarily disregard the testimony of any witness. Crow v. Weyerhaeuser Co., 46 Ark. App. 295, 880 S.W.2d 320 (1994). In the present matter, the Full Commission attaches significant weight to the expert opinion

of Dr. Oliver. Dr. Oliver expressly stated that additional medical treatment for the claimant's left shoulder was reasonably necessary, and Dr. Oliver causally linked the need for this treatment to the claimant's compensable injury. There are no medical opinions to the contrary before the Commission. Nor does the record show that the claimant's continued shoulder problems were the result of any independent intervening cause. Pursuant to Ark. Code Ann. §11-9-508(a), we find that the claimant proved he was entitled to additional medical treatment as recommended by Dr. Oliver.

B. Temporary disability

The claimant sustained an unscheduled compensable injury to his left shoulder. An employee with an unscheduled injury is entitled to temporary total disability compensation during the time that he is within his healing period and is totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). On appeal to the Full Commission, the instant claimant has abandoned his contention that he is entitled to additional temporary total disability compensation. We nevertheless find from the record that the claimant failed to prove he was entitled to

additional temporary total disability. Following surgery, Dr. Oliver released the claimant to light duty on March 11, 2002. The respondents' human resources manager testified that the claimant was offered a full-time restricted position. The claimant testified that he was able to perform restricted work duties, but the claimant just did not return to work. In addition, the surveillance videotape introduced by the respondents shows that the claimant was not totally incapacitated to earn wages. The Full Commission finds that the claimant failed to prove he was entitled to additional temporary total disability compensation after June 11, 2002.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he was entitled to additional medical treatment as recommended by Dr. Oliver. The Full Commission therefore reverses the administrative law judge's findings in this regard. We affirm the administrative law judge's finding that the claimant failed to prove he was entitled to additional temporary total disability compensation. For prevailing in part on appeal to the Full Commission, we award the claimant's attorney a fee of five hundred dollars (\$500) pursuant to Ark. Code Ann. § 11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur in part and dissent in part from the majority opinion. I concur with respect to the finding that claimant is entitled to additional medical treatment as recommended by Dr. Oliver. I must respectfully dissent, however, from the finding that claimant failed to prove entitlement to additional temporary total disability benefits.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority opinion. Specifically, I concur in the finding that the claimant failed to prove by a preponderance of the evidence that he was entitled to additional temporary total disability. However, I must dissent from the finding

that the claimant was entitled to additional medical treatment for his ongoing left shoulder problems. In my opinion, the claimant has failed to meet his burden of proof.

When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary total disability benefits. Ark. Code Ann. § 11-9-102(4)(F)(i)(Repl. 2002). Benefits are not payable for a condition which results from a non-work-related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment Ark. Code Ann. § 11-9-102(4)(F)(iii)(Repl. 2002). Whether there is a causal connection between an injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. Oak Grove Lumber Co. V. Highfill, 62 Ark. App. 42 968 S.W.2d 637 (1998). Further, there is no independent intervening cause unless the subsequent disability is caused by activity on the part of the claimant that is unreasonable under the circumstances. Davis v. Old Dominion Freight Line, 341 Ark. 751, 205 S.W.3d 326 (2000).

The claimant testified that he re-injured his shoulder during a physical therapy session on April 19,

2002, with Mr. Williamson. The claimant testified that something "popped" in his left shoulder when Mr. Williamson was raising his left hand above his head. According to the claimant, the pain was so bad when his shoulder popped that he went outside threw up and sat in his vehicle for an hour before driving home. It is of note that the claimant's wife was apparently unaware of the claimant's contention that he injured his shoulder on April 19, 2002. At the hearing, the claimant's wife testified that no one had done anything to her husband to hurt his shoulder since his surgery in 2002.

The respondents offered the testimony of Mr. Williamson who stated that the claimant did not report anything unusual about his left arm or shoulder during the session or at the end of the session. The report from that April 19th session states: "the client tolerated today's treatment/therapeutic activity with minimal complaints of pain and difficult."

On May 9, 2002, the claimant had an appointment with Dr. Oliver, his treating physician. Dr. Oliver's records from that appointment indicate that the claimant appeared to be "quite miserable" and that the claimant had reported making excellent progress until the last two weeks when things took a turn for the worse. Dr. Oliver noted that

the claimant was hyper-sensitive. Dr. Oliver's notes indicate that the claimant fought him "intensely" and that he could not get "any kind of an exam at all." Dr. Oliver had no idea what was going on with the claimant and could not explain the claimant's actions during the examination. The claimant blamed the drastic change in his condition on the physical therapy session with Mr. Williamson on April 19, 2002.

The claimant was under video tape surveillance starting on April 27, 2002, and ending on May 2nd. The tape shows the claimant using his left arm to garden, plant, weed with a hoe, use a shovel, work on a fence, lift and carry a box springs, lift and carry other furniture, bend over using his left arm to support himself, drive his jeep, and use a gasoline weedeater for approximately 45 minutes without a break. The claimant is not observed wearing his left arm sling in the video at all.

To explain why the claimant was down on his hands and knees during the video surveillance, the claimant explained that he was "praying". It was clear from the video that the claimant was shown on his knees using both hands working the soil while planting a garden. The claimant testified that he was on his knees "praying to God" not

planting seeds or picking up rocks. The claimant also testified that the reason he was moving his arms while he was down on his knees was because some people move their arms while they pray to God.

During his deposition on May 27, 2002, the claimant testified that his left shoulder limited his household chores to setting the table with his good arm. However, the video surveillance tells a completely different story. In my opinion, the claimant is not a credible witness at all. Questions concerning the credibility of witnesses and the weight to be given to their testimony are within the exclusive province of the Commission. White v. Gregg Agricultural Ent., 72 Ark. App 309, 37 S.W.3d 649 (2001). When there are contradictions in the evidence, it is within the Commission's province to reconcile conflicting evidence and to determine the true facts. Id. 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 I consider the fact that the claimant was observed on video tape surveillance doing things that he stated that he was not able to do after the April 19, 2002,

physical therapy session, the claimant's lack of credibility and the medical records, I find that the claimant has failed to prove by a preponderance of the evidence that his current problems with his left shoulder are the result of his compensable injury.

Therefore, I must respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner