

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F306739

EDWARD FOREMAN, EMPLOYEE	CLAIMANT
McKEE FOODS CORP, EMPLOYER	RESPONDENT
RISK MANAGEMENT SERVICES, CARRIER	RESPONDENT

OPINION FILED APRIL 13, 2005

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

Claimant represented by HONORABLE MARK VELASQUEZ, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE CURTIS NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 24, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 1, 2001, and in June 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant's entitled to the maximum compensation rate for 2002.

4. The claimant has failed to prove by a preponderance of the evidence that he sustained a left shoulder injury while working for the respondent. The claimant has testified that he did not report any type of work related injury in October or November of 2001 nor any injury in July 2002 and it was not until he had been terminated by the respondent that his attorney filed a claim on his behalf. The claimant has testified that during his orientation he was instructed on how to fill out a workers' compensation claim and the evidence has further set forth that when he began drawing his short term and long term disability benefits he did not consider his left shoulder problems work related at these times. ...

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and

conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I dissent from the majority opinion because I find that Claimant's injuries are compensable and causally related to his employment for Respondent. Accordingly, I find that the Administrative Law Judge's decision should be reversed.

Claimant began working for Respondent in April, 1991. Claimant contends that he incurred compensable injuries to his left shoulder in 2001 in the form of a rotator cuff tear and in 2002 in the form of a recurrent rotator cuff tear while working for Respondent. Claimant testified that in late October, 2001, he felt a pop in his shoulder while stacking

boxes overhead. Claimant and a co-worker, Jerry Smallings, were unloading a truck at a warehouse in Minnesota at the time of this incident. He testified that he took a 15 minute break to rest his shoulder and try to work out the soreness. Claimant had been complaining of shoulder pain to Dr. Scott Stinnett, his primary care physician, for about one year prior to this incident. He stated that he did not report this injury because at the time that it happened, he was working his last job before the weekend and thought that he had probably just overworked it and could rest it over the weekend. Claimant returned to work after the weekend. Over the Thanksgiving holiday, Claimant said that he hurt his shoulder again while throwing a bag of trash into a dumpster. He then went to see Dr. Stinnett. An x-ray revealed a broken clavicle. An MRI revealed a rotator cuff tear in his left shoulder. Dr. Stinnett referred him to Dr. Mark Allard, an orthopedist. On December 27, 2001, Dr. Allard opined that the MRI of Claimant's shoulder showed a complete rotator cuff tear with osteoarthritis. Claimant underwent rotator cuff repair with distal clavicle resection on February 14, 2002. Claimant was off of work from the time he went to see Dr. Stinnett in November, 2001 until July 8, 2002. Dr. Allard

returned Claimant to work with no restrictions on July 8, 2002. Claimant testified that his recovery went really well and that his shoulder was feeling great prior to his return to work.

In July, 2004, about three weeks after Claimant returned to work, he re-injured his shoulder while lifting cases over his head. Claimant testified that he was stacking 755 cases into a warehouse in Raytown, Missouri when he felt a pain in his shoulder while lifting the cases over his head. Claimant saw Dr. Stinnett on July 29, 2002 complaining of shoulder pain. He was diagnosed with inflammation, noted to have persistent crepitation of the shoulder, prescribed physical therapy, and restricted to lifting no more than 75 pounds and no overhead work for 14 days. Respondent approved Claimant for regular disability leave to begin on July 29, 2002. On August 2, 2002, Dr. Stinnett wrote that he "will reevaluate and make a determination on length of disability in 3 weeks." Claimant continued with physical therapy and regular check-ups with Dr. Stinnett.

Dr. Allard evaluated Claimant on August 21, 2002 at which time he noted the following history:

Mr. Foreman went back to work July 8th and only lasted about three weeks. He said he was working really hard and ended up stacking some 700 box load soon after he started with a tremendous amount of overhead activity and overhead stacking of the boxes as he was loading his truck and he overdid it. He said he felt a distinct pop in his shoulder at one point toward the end of that job. He has had a lot of pain since then. It doesn't seem like he is getting a whole lot better. He has been going to therapy. He has been seeing Scott Stinnett.

Dr. Allard recommended that Claimant continue physical therapy, medication, exercises, and limited heavy lifted. "I'll see him back here in six weeks for a repeat clinical exam but I've told him that it is possible that he might require repeat surgical exploration."

On September 12, 2002, Dr. Stinnett wrote that "we are not going to be able to return to (sic) him handling boxes overhead of that size and weight and that frequency. He does concur that he is not making progress. He has discomfort in the other shoulder as well at this point. I am going to have him look into alternative work and apparently he does have a retraining program at work."

On November 12, 2002, Dr. Allard performed a revision of the left rotator cuff repair after observing during the operative procedure that Claimant had a recurrent tear. Claimant developed a postoperative deep infection in his shoulder and underwent an irrigation and debridement procedure. In a postoperative check-up on December 6, 2002, Dr. Allard noted that the rotator cuff repair had failed. On March 27, 2003, Claimant underwent a second rotator cuff repair with infraspinatus advancement and acromioplasty of the left shoulder performed by Dr. John Park and Dr. Allard. On November 18, 2003, Claimant returned to Dr. Park who noted that Claimant may have to have a fusion of the shoulder in the future.

Claimant was considered to have "voluntarily quit" and his employment terminated on June 15, 2003 because his medical leave had exceeded 18 months. Claimant filed a claim for workers' compensation benefits when his health and disability benefits through his employment terminated. Claimant admitted that he did not fill out any injury reports. However, he stated that he reported his second injury, which occurred in July, 2002, to Johnny Taylor. After the July injury, he gave the doctor's note to a nurse in the

nurse's station. He testified that he did not file a formal report of injury earlier than he did because Respondent directed him to the short term disability carrier and he maintained contact with that adjuster, Christie Howell of UNUM, and turned in doctors' notes to her.

I find that though Claimant did not file a claim for benefits relating to this injury until 2003, the medical records support his argument that his injuries, particularly his July, 2002 injury and subsequent surgeries, were related to his overhead lifting while working for Respondent. The medical record is replete with references that support Claimant's testimony that he re-injured his shoulder in July, 2002. I find that these statements are particularly reliable in light of the fact that they were recorded in 2002, prior to Claimant filing a workers' compensation claim. The medical records clearly set out that Claimant's shoulder pain had resolved prior to his return to work and that his onset of pain in July, 2002, and failed rotator cuff repair, was caused by Claimant lifting overhead while working for Respondent in July, 2002.

Specifically, the history that Dr. Allard recorded in August, 2002 includes a detailed account of Claimant's re-

injury and is consistent with his testimony and post-filing statements. Dr. Allard noted that Claimant went back to work July 8th, only lasted about three weeks and was "stacking some 700 box load soon after he started with a tremendous amount of overhead activity and overhead stacking of the boxes as he was loading his truck and he overdid it. He said he felt a distinct pop in his shoulder at one point toward the end of that job. He has had a lot of pain since then." This statement corroborates Claimant's testimony. Dr. Stinnett's notes from July 29th and early August, 2002 are not nearly as detailed as Dr. Allard's and are, in fact, only short paragraphs and very basic in comparison to the detail reports dictated by Dr. Allard. Claimant, however, should not be penalized by Dr. Stinnett's concise notes. I find that Dr. Allard's notes corroborate Claimant's credible testimony that he re-injured his shoulder in July, 2002 while lifting boxes overhead.

In my opinion, the majority has failed to give adequate consideration to these corroborating statements in the medical records. In fact, the underlying opinion minimally addressed the question of whether the re-injury in 2002 was compensable and instead only focused on the fact

that there was not corroborating testimony for Claimant's 2001 injury. The opinion fails to address credible medical evidence supporting Claimant's argument that he re-injured his shoulder in July, 2002 in the course of his employment. While it is within the province of the Commission to weigh conflicting evidence, the Commission may not arbitrarily disregard medical evidence or the testimony of any witness. *Patchell v. Wal-Mart Stores, Inc.* ___ Ark. App. ___ (May 19, 2004).

In sum, I dissent because the preponderance of the evidence establishes that Claimant incurred a compensable injury to his left rotator cuff in 2001 and again in July, 2002 when he reinjured his shoulder while lifting boxes overhead necessitating additional medical treatment in 2002 and 2003.

SHELBY W. TURNER, Commissioner