

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209409

CHRISTOPHER M. CHILDERS,
EMPLOYEE

CLAIMANT

GEORGIA-PACIFIC CORPORATION,
EMPLOYER

RESPONDENT

SEDGWICK CLAIMS MANAGEMENT SERVICES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED FEBRUARY 10, 2006

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

Claimant represented by the HONORABLE C. MIKE WHITE,
Attorney at Law, North Little Rock, Arkansas.

Respondents represented by the HONORABLE ANDREW IVEY,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed June 13, 2005. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

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.

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.

Therefore we affirm and adopt the June 13, 2005 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

The Majority affirms and adopts the decision of the Administrative Law Judge finding that the claimant has not shown a causal connection between his original compensable injury and his torn rotator cuff after July 28, 2002. Accordingly, the Majority finds that the claimant's motor vehicle accident, occurring on July 28, 2002, acted as an independent intervening cause and that the claimant's benefits should be cut off at

that time. In my opinion, the claimant has shown that he sustained a rotator cuff injury prior to July 28, 2002, and that any change in his condition was a natural and probable consequence of that injury. Furthermore, in my opinion, the Majority has failed to show that the claimant's actions were in any way unreasonable so as to establish that an independent intervening cause existed. Accordingly, I would have reversed the decision of the Administrative Law Judge and awarded the claimant all requested benefits. For these reasons, I must respectfully dissent.

The Majority, by affirming and adopting the decision of the Administrative Law Judge as their own, finds that the claimant's motor vehicle accident on July 28, 2002 was tantamount to an independent intervening cause so as to cut off the respondent's liability. However, in my opinion, the Majority fails to adequately consider the medical evidence indicating that the claimant already had sustained a rotator cuff injury prior to July 28, 2002, that the condition never resolved, and that any symptoms in the claimant's shoulder from the motor vehicle accident were directly related to his original injury. Furthermore, there is no evidence in the record to indicate that the claimant's involvement in the motor vehicle accident in

any way showed unreasonable conduct as needed to establish an independent intervening cause and cut off liability.

Respondents are responsible for benefits that result from an injury that is causally related to a compensable injury. However, the respondent is not responsible for benefits when the injury is sustained due to a non-work related, independent intervening cause which causes or prolongs disability or need for treatment. Richardson v. ACF Industries, 2003 AWCC 120, Claim No. F100097 (Opinion filed June 18, 2003); A.C.A. § 11-9-102(4)(F)(b). An intervening cause does not exist unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998), citing Guidry v. J& R Eads Construction Co., 11 Ark. App. 219, 669 S.W.2d 483 (1984). The claimant's knowledge of her condition must be considered in determining whether her conduct was unreasonable under the circumstances. Lunsford v. Rich Mountain Electric Corp., 33 Ark. App. 66, 800S.W.2d 732 (1990); Lunsford v. Rich Mountain Electric Corp., 38 Ark. App. 188, 832 S.W.2d 291 (1992). However, when a primary injury is shown to have arisen out of the course of employment,

the employer is responsible for any natural consequence of that injury. Wackenhunt Corp. v. Jones, 73 Ark. 158, 40 S.W.3d 333(2001). See also; Pitts v. Rheem Manufacturing Company, 2005 AWCC 75 Claim No. F307388 (Opinion filed April 21, 2005).

In this instance, the Majority, by relying on the Administrative Law Judge's decision, finds that the claimant's torn rotator cuff was not related to his admittedly compensable rotator cuff injury from June 2002. In supporting this finding, they primarily reason that after the motor vehicle accident, the claimant provided contradictory information to doctors regarding causation and that, as a result, causation cannot be established between his initial injury and alleged subsequent injury. In my opinion, even if one finds the claimant is not credible (a finding which I do not make), the Majority's conclusion is contrary to the medical evidence showing a causal connection between the admittedly compensable injury and any other shoulder injury occurring from the motor vehicle accident. In fact, since there appears to be no dispute that the claimant's rotator cuff strain had not resolved, I find that they erroneously attempt to deny his claim based solely on discrepancies in histories the claimant had given to doctors.

It is unrefuted that the claimant sustained a compensable injury to his shoulder on June 7, 2002. While the Majority attempts to assert that the claimant's condition changed after his accident, I note that his admittedly compensable rotator cuff strain from June 2002 had not resolved when his accident occurred. Likewise, it is undisputed that the claimant was later diagnosed with a rotator cuff tear. In my opinion, given the claimant's unresolved shoulder condition as of the time of his accident, it is only logical to conclude that any injury sustained by the claimant during the motor vehicle accident was directly related to his initially compensable injury.

At a minimum, I find that the record is clear the claimant had a rotator cuff injury in June 2002, as noted by the objective findings of spasms, popping, and a diagnosed sprain to his rotator cuff. However, in my opinion, the medical records indicate that it is likely the claimant had already sustained the rotator cuff tear prior to his automobile accident on July 28, 2002. As early as June 13, 2002, an x-ray indicated that there was a possible rotator cuff tear. Additionally, the claimant's symptoms and objective findings remained largely the same before and after his accident,

indicating there was little if any change in his condition.

While the Majority points to the note by Dr. Lytle dated June 24, 2002, indicating the claimant had not sustained a rotator cuff tear, I note that Dr. Lytle later admitted that a tear could not be diagnosed by an x-ray alone. Dr. Lytle testified, "That is correct. You cannot identify rotator cuff tear from plain x-ray." The respondents argue that was the reason the subsequent arthrogram was ordered and that it, too, was negative. However, I note that the arthrogram was performed on August 1, 2002, which was after the accident had occurred. In fact, the extent of the claimant's injury was only fully recognized once he had surgery in September 2002.

The medical evidence also shows that the claimant had, "popping" in his shoulder and that his condition was not improving prior to the accident, which indicates the claimant had already sustained the rotator cuff injury or tear before July 28, 2002. Though the Majority opines there was a change in the claimant's objective findings before and after his accident, I note that there was little testing done in advance of the accident. However, what little testing was performed suggested that the claimant had a shoulder injury, if

not a rotator cuff tear. I also note that to show a compensable injury, it is only necessary to show a causal connection between the initial compensable injury and the subsequent injury; not that there was no change in objective findings between the initial and subsequent injury.

The claimant's symptoms remained largely the same both before and after the accident and were shown by objective findings both before and after July 28, 2002, which tends to support the finding that the claimant's condition was recurrent in nature. Since there was virtually no change in the claimant's condition after the motor vehicle accident, it is only logical that any exacerbation caused by the accident was directly related to the claimant's initial, compensable rotator cuff injury. The Majority opines that the claimant's objective findings changed, in that the claimant did not have "crepitus" prior to the accident and that on July 29, 2002, the claimant's "popping" symptoms were noted as "significant", whereas before, they were merely noted. In my opinion, the Majority, by using this reasoning, ignores the evidence indicating that the claimant had significant popping in advance of his accident. It is undisputed the claimant had popping in advance of the wreck. Furthermore, I note that the

physical therapist's initial evaluation reveals that the claimant had popping. The same report indicates the claimant complained of "constant popping" in his shoulder. This language indicates that the claimant already had significant enough popping in his shoulder to indicate that he had sustained an injury consistent with a rotator cuff tear. Once again, I note that at a minimum, the claimant had already shown unresolved objective findings that were so similar that it is only reasonable to conclude that the claimant's initial and subsequent injury were directly related.

Interestingly, the Majority's only notation of a change in symptoms or in objective findings after the motor vehicle accident is a notation of "crepitus" on July 29, 2002. However, since crepitus appears to be a crackling noise, one can only wonder if that noise was not occurring simultaneously with the claimant's "popping" shoulder and merely not notated prior to July 29, 2002. Furthermore, there was no testimony regarding when crepitus would occur after sustaining a rotator cuff tear. Accordingly, in my opinion, to conclude that this new finding was directly related to the July 28, 2002, accident is merely conjecture and speculation on the part of the Majority. Additionally, it in no way shows that the claimant's original injury had resolved

or that the two would not be related if the claimant's motor vehicle accident did cause an increase in symptoms.

In my opinion, the physical therapist's notes also indicate that the claimant's injury had not resolved prior to July 28, 2002. The physical therapy notes specifically indicate that the claimant was suffering from muscle spasms on the date of his initial evaluation. The physical therapy notes further show spasms or increased muscle tightness as late as July 17, 2002. Furthermore, it is unrefuted that the claimant continued to suffer from shoulder pain and was still undergoing his initially-prescribed treatment as of the time of his motor vehicle accident on July 28, 2002. In fact, Dr. Lytle's note specifically indicates that the physical therapist's report from July 24 indicates that the claimant was still unable to use his arm and suffering from pain, indicating that his condition had not resolved as of the time of his wreck. As such, I find that the claimant's condition already existed and had not resolved as of the time of the accident. Accordingly, any change in his symptoms were directly related to the admittedly compensable strain in June 2002.

The Majority concludes that the claimant is not credible and that, therefore, his statements and any doctor's notes relying on his statements should be discounted. Specifically, the Majority opines that the claimant gave inconsistent statements regarding the reason for his injury and his symptoms to various doctors. However, as noted by the Court of Appeals in Guidry, "It is not, however, the Commission's prerogative to refuse compensation to a claimant simply because he is untruthful." I also note that Guidry is similar to the present case, in that, in Guidry, the claimant had been deemed not credible because he gave inconsistent statements when he first pursued civil litigation and testified his injury was due to a non-related work incident and then filed a workers' compensation claim for additional benefits.

In this instance, the question should not be whether the claimant gave contradictory stories. Instead, it should be whether the objective medical findings show his second injury was related to his initially-compensable injury and whether his subsequent injury was due to his own unreasonable activity.

In my opinion, though the claimant in this case gave varying histories to different doctors, that does not discount the fact that the medical records and

objective findings contained therein show he had sustained a rotator cuff tear or injury in advance of the accident on July 28, 2002. I note that the respondents did not cut the claimant off from receiving benefits until after the claimant's initial visit subsequent to the motor vehicle accident on July 28, 2002. More importantly, I note that there appears to be almost no change in the claimant's objective findings to his shoulder. Likewise, there is no indication that the respondent intended to cut the claimant off from benefits due to his rotator cuff strain having resolved until they learned he was in an accident outside of work. Since the two were related, the question should have been whether the claimant was engaged in unreasonable conduct; not whether he was to be denied benefits based on his alleged lack of credibility.

The claimant testified that after he was cut off from benefits by the respondents, he attempted to make sure he would be able to pursue a personal injury claim. I further note that there appears to be no inconsistency in the claimant's testimony prior to that time and there appears to be no reason or motive for the claimant to give an inaccurate account of the motor vehicle accident to Dr. Lytle on July 29, 2002. Furthermore, the claimant reported the accident to Dr.

Lytle on July 29, 2002 and told him of the accident.

The doctor's note reads,

Report from the therapist on the 24th states that he has not been able to become pain free or use his arm. This has been complicated by a motor vehicle crash yesterday. He was the driver, restrained, of a Buick Park Avenue, which was making a L turn and had another vehicle hit him on the L front and spun him around. It did \$2,600 of damage. It was drivable. 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.

The note goes on to indicated that the claimant submitted to an x-ray which showed no new bone injury and that because the claimant had not improved significantly, Dr. Lytle believed he had sustained a rotator cuff tear. In my opinion, the language of the doctor's note shows that the claimant did disclose the severity of his wreck. Furthermore, Dr. Lytle, who was familiar with the claimant's prior history and with his injury, initially opined that the claimant had sustained a rotator cuff tear. While the Majority opines he recanted that opinion, I note he did not take back his opinion that the claimant initially sustained a sprain. He also provided no testimony indicating he had reason to believe that the claimant's shoulder condition resolved as of the time of July 28, 2002.

Since, in my opinion, the claimant has shown causation between his initially compensable injury and his subsequent alleged injury, I find that the appropriate question should have been whether the claimant acted unreasonably in causing his subsequent condition. Since the claimant was not at fault in causing the accident and there is no indication that the claimant's driving a vehicle was in any way unreasonable, his injury should have remained compensable.

In conclusion, I find that even if one defers to the Majority's finding that the claimant's testimony is not credible, the medical evidence overwhelming shows that no independent intervening cause exists. As noted by the medical records, the claimant's symptoms and objective findings were virtually the same both before and after the motor vehicle accident. In my opinion, to now conclude that the claimant's condition was not recurrent in nature, solely based off of allegedly inconsistent statements he made and despite objective medical evidence showing causation, is in error.

For these reasons, I must respectfully dissent.

SHELBY W. TURNER, Commissioner