

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F409837

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| ROBERT HARDIN, EMPLOYEE | CLAIMANT |
| CARL SINGLETON, EMPLOYER | RESPONDENT |
| UNION INSURANCE COMPANY, CARRIER | RESPONDENT |

OPINION FILED DECEMBER 12, 2006

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

Claimant represented by HONORABLE JOHN VERKAMP, Attorney at Law, Greenwood, Arkansas.

Respondent represented by HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal a decision by the Administrative Law Judge finding that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 22, 2004. Based upon our de novo review of the record, we hereby reverse the decision of the Administrative Law Judge.

The claimant began working for the respondent employer on July 21, 2004, as a log truck driver. The claimant contends that on July 22, 2004, he was handing a chain saw up to one of his co-employees and he hurt his

shoulder. The claimant testified that he felt a brief period of pain which subsided within seconds. After this alleged incident, the claimant continued his duties which included, strapping down the logs with cables and securing them without assistance. He then drove to Vernal Singleton's house and left the truck. The claimant then went home.

The claimant stated that on July 23, 2004, his shoulder pain was worse and he could not go to work. He sought treatment from Dr. Danilo Cruz complaining of left shoulder pain. The claimant was given a sling and some pain medications. He followed up with Dr. Cruz a week later reporting that his shoulder pain was better.

The evidence demonstrates that the claimant had been having pain in his shoulders at least since December 19, 1996. On December 12, 2003, the claimant began receiving cortisone injections in both shoulders in an attempt to relieve his pain. Dr. Robert Young diagnosed the claimant's condition as bilateral subdeltoid bursitis. The medical evidence shows that the claimant sought treatment from Dr. Young on April 5, 2004. He again presented on

June 16, 2004, with recurrent left subdeltoid bursitis and received an injection of Cenocort and was prescribed Celebrex and Roxicet.

On August 12, 2004, the claimant followed up his July visit with Dr. Cruz at the Mercy Hospital of Scott County Rural Health Clinic. The medical reports state that the claimant had previously been diagnosed with chronic arthritic changes in his shoulders. He told the examiner that he could live with the problem at the present time and that arthroscopic treatment in the future might be necessary.

In a report dated September 2, 2004, Dr. Cruz examined the claimant and indicated that the claimant was receiving adequate relief using Darvocet and Lorcet. On October 27, 2004, Dr. Cruz injected the claimant's left shoulder with Sensorcaine, Lidocaine and Kenalog and referred him to Dr. William Sherrill at the River Valley Musculoskeletal Center in Fort Smith. The claimant underwent an MRI of both shoulders on October 29, 2004, which revealed mild acromioclavicular arthrosis and a probable partial tear

of the distal infraspinatus tendon of the right shoulder. On the left side, the claimant had mild arthropathy changes of the acromioclavicular joint and a high-grade partial tear of the infraspinatus tendon. Dr. Sherrill recommended an injection in the left shoulder and an exercise program. The claimant ultimately underwent arthroscopic surgery by Dr. Steven Smith, Dr. Sherrill's partner, on January 11, 2005. Dr. Smith shaved off a portion of the claimant's rotator cuff and removed a thick bursitis of the subacromionial space. The claimant received excellent results from the procedure and he was released to return to work after a follow up visit with Dr. Smith on February 15, 2005.

The claimant contends that he sustained a compensable injury to his shoulder on July 22, 2004. The respondents contend that the claimant did not sustain a compensable injury and that the claimant suffered from pre-existing shoulder problems. After conducting a de novo review of the record, we find that the claimant has failed to meet his burden of proof. Accordingly, we reverse the decision of the Administrative Law Judge.

Ark. Code Ann. §11-9-102(4) (A) (i) (Repl. 2002) defines "compensable injury" as "[a]n 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." Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment refers to the origin or cause of the accident," so the employee was required to show that a causal connection existed between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "'in the course of employment' when it occurs within the time and space boundaries of the employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly." City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987). Under the statute, for an accidental injury to be compensable, the

claimant must show that he/she sustained an accidental injury; that it caused internal or external physical injury to the body; that the injury arose out of and in the course of employment; and that the injury required medical services or resulted in disability or death. *Id.* Additionally, the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). Medical opinions addressing compensability must be stated within a reasonable degree of medical certainty. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Servs., 75 Ark. App. 156, 55 S.W.3d 791 (2001).

The medical evidence demonstrates that as early as 1996 the claimant was diagnosed with an arthritic condition in both shoulders. The claimant was advised at that time that he should live with the condition as long as he could,

and he would ultimately have to undergo arthroscopic surgery. This surgery was performed in January of 2005.

The claimant began having steroid injections into his shoulders in December of 2003. Prior to his alleged injury, the claimant had injections in April of 2004, as well as, June 2004. Dr. Smith, the claimant's surgeon, stated that he believed after he was advised of the claimant's long-term pain and receipt of pain medication and steroid injections that the bursitis and rotator cuff tear, which he treated surgically, were the result of chronic and long-term problems rather than an acute injury on July 22, 2004.

When we consider the medical evidence, the fact that the claimant had long-standing shoulder problems as far back as 1996, as well as, the fact that the claimant only worked for the respondent employer for two days, we cannot find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The cause of the claimant's pain was the bone spurs and the underlying degenerative arthritic condition which had been present in

the claimant's shoulder for a long period of time prior to his employment with the respondent employer. The claimant has dealt with the pain for a number of years with medication. The MRI confirmed the presence of bursitis in the subacromial space, as well as, the claimant's treating physician stated that he believed that the claimant's condition existed long before the July incident. Accordingly, we hereby reverse the decision of the Administrative Law Judge.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I respectfully dissent from the Majority's decision reversing the Administrative law Judge's January 26, 2006 opinion. Based upon my de novo review of

the record, it is my opinion that the Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury which is identifiable by time and place of occurrence while working for the respondent employer on July 22, 2004.

_____The Claimant began working for the respondent employer on July 21, 2004, driving a logging truck.

Claimant worked his first day without incident. The Claimant testified that the next day while handing a co-employee a chainsaw he felt an immediate tearing burning feeling in his left shoulder. The Claimant testified that after the saw was out of his hand, he lowered his arm and rubbed it and it kind of quit hurting so he did not think much of it and finished his work for the day.

_____The Claimant testified that as the night went on his left arm continued to get stiff and he was experiencing more pain. Claimant further testified that when he awoke at 4:30 the next morning he could not move his left arm without using his right arm or hand to move it, so he called his employer and reported the accident.

_____The Claimant testified that after he went to the doctor, which was the day after the accident, he returned to his employer's house, and told his employer what the doctor had said. The Claimant testified that he did not work for the respondent since the date of the accident, and he was not able to work at any other occupation.

_____The Claimant did not deny that he had chronic symptoms in both of his shoulders. He had received a number of injections for the chronic pain in both shoulders. However, the Claimant testified that the difference between the pain that he had in both of his shoulders before the accident and the pain that he had experiences as a result of the injury from lifting the chainsaw was greatly different. He testified that the pain before this incident would be like a 1, and after the chainsaw event, it was more like the pain was at 10. Additionally, the Claimant testified that after the chainsaw event, he could not lift any amount of weight with his left arm, and he could not drive a truck. He testified that he could barely turn the steering wheel on his car.

_____After being released from Dr. Steven Smith for his shoulder surgery, the Claimant began working at Tyson driving a truck. He testified that he is now able to work and drive a truck without any problems.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineering

Speciality Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. See, Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Conway Convalescent Center v. Murphree, 266 Ark. 985, 585 S.W.2d 462 (Ark. App. 1979); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996). The employer takes the employee as he finds him. Murphree, supra. In such cases, the test is not whether the injury causes the condition, but rather the test is whether the injury aggravates, accelerates, or combines with the condition. However, although a disabling symptom of a pre-existing condition may be compensable if it is brought on by an accident arising out of and in the course of employment, the employee's entitlement to compensation ends when his condition is restored to the condition that existed before the injury unless the injury contributes to the condition by

accelerating or combining with the pre-existing condition. See, Arkansas Power & Light Co. v. Scroggins, 230 Ark. 936, 328 S.W.2d 97 (1959).

On cross-examination, Dr. Steven Smith, the surgeon who performed the Claimant's left shoulder surgery on January 11, 2005, agreed that if the Claimant was lifting the chainsaw up over his head extending his arm upward, that this action could have been what caused the tears to the labrum or the supraspinatus. Dr. Smith also testified that if a person also has some chronic conditions such as a partial tear to his shoulder tendons, that it would make them more susceptible to further tearing if they lift something overhead. Dr. Smith also testified that the Claimant had a curved acromion that predisposed him to development of a rotator cuff pathology. He agreed that the combination of activity and a curved acromion could have caused shoulder symptoms such as what Claimant has been experiencing over the past years. Dr. Smith agreed that the Claimant, by having a curved acromion, was under a condition that could have caused pain and symptoms without

having a tear to his rotator cuff. Dr. Smith testified that these kinds of symptoms from a curved acromion would be similar to a tear. According to Dr. Smith, it would be pain with overhead activity and impingement syndrome where you have a rotator cuff tendinitis. However, after the chainsaw incident, the Claimant was diagnosed with and had surgery to repair a rotator cuff tear.

On re-cross-examination, Dr. Smith, when asked if he could state within a reasonable degree of medical certainty if he could say whether or not the Claimant further injured or tore his rotator cuff by lifting the chainsaw, he responded, "I don't think that you could state whether he can or can't. He was having symptoms before, and then he has had more symptoms and you know, again, there is no way to definitely say that this is the day he tore it without an MRI before that day and after that day."

In my opinion, the Claimant has met his burden of proving by a preponderance of the evidence that he sustained a compensable injury which is identifiable by time and place of occurrence while working for the respondent employer on

July 22, 2004. The Claimant admitted that he has had long standing shoulder problems for which he has been receiving occasional treatment. As stated above, Claimant also had a predisposition for shoulder problems due to his physical makeup. But it was not until after he had lifted the chainsaw up over his head with his left arm that his problems were so exacerbated that he no longer could work and had to seek medical treatment. The Claimant has shown by objective medical evidence that he did have an injury to his left shoulder for which medical treatment was necessary and he reported his work related injury to his employer on July 23, 2004, after he returned from seeing the doctor.

_____ Claimant was in his healing period and unable to work from the date of the injury until he was released to return to work with no restriction by Dr. Smith on February 28, 2005. Therefore, Claimant has met his burden of proving entitlement to temporary total disability benefits for that period of time.

_____For the foregoing reasons, I respectfully dissent
from the Majority's decision.

SHELBY W. TURNER, Commissioner