

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602406

PHILLIP MILLER, EMPLOYEE	CLAIMANT
WATSON'S INC., EMPLOYER	RESPONDENT
CCMSI, CARRIER	RESPONDENT

OPINION FILED DECEMBER 15, 2006

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 13, 2006.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on April 26, 2006, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable injury to his right shoulder while employed by the respondent.

The claimant alleges that he sustained a compensable injury that is governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injury is, indeed, an injury that is covered by the Act; however, the claimant has failed to establish the elements necessary to prove a compensable injury by a preponderance of the evidence.

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 must respectfully dissent from the Majority opinion finding that the claimant did not sustain a compensable shoulder injury on February 8, 2006. After a de novo review of the record, I find the preponderance of the evidence shows the claimant sustained an aggravation to his pre-existing degenerative condition.

_____ The claimant began working for the respondents in July 2005. His job duties included moving and delivering appliances and furniture and setting up the items. The claimant testified that he worked nine and a half hours per day, six days per week.

The claimant testified that on February 7, 2006, he lifted furniture and that by the end of the day he noticed tightness in his shoulder. By the next morning, the claimant was suffering from severe pain. He initially attributed his pain to sleeping on his shoulder wrong. However, when his pain did not subside and actually worsened, he concluded that his pain was attributable to lifting furniture at work.

The claimant reported his injury on February 8, 2006, and indicated that he told Arthur Olson, Manager, that his pain was due to sleeping on his shoulder wrong. The claimant testified that he returned to work and his pain worsened and that he continued to complain to Olson and the owner, Betty Thomas.

The claimant initially sought medical treatment on February 13, 2006. The claimant reported pain in his A-C joint and indicated that he had a history of pain for one week. He denied any specific injury, but the report indicates, "pain for 1 week, worse after Friday when pt reprotts (sic) he lifted a lot of furniture." The claimant was diagnosed with a sprain and was released with a restriction of light duty work for three days. The physician further instructed the claimant to see an orthopedic doctor if his pain had not subsided in three days. Finally, the claimant was prescribed Flexeril, Naprosyn, and Ultram.

On February 23, 2006, the claimant was treated by Dr. Mark W. Powell. Dr. Powell indicated that the claimant had a history of bursitis from 1999, but that the claimant denied having problems after that time. Dr. Powell further indicated that the claimant reported with right shoulder pain after, "lifting a lot of heavy furniture on 02/08/06." He further indicated that the claimant had used a sling for three days without relief and that his pain had worsened.

After examining the claimant and performing x-rays, Dr. Powell noted that the claimant had a positive Cross-body impingement test. He further indicated that the claimant's x-rays revealed, "possible erosive changes of the distal clavicle, AC joint osteoarthritis."

Based on these findings, Dr. Powell diagnosed the claimant with a right shoulder strain, right shoulder impingement, and with right shoulder AC joint osteoarthritis. He recommended the claimant undergo an MRI for further evaluation of the claimant's rotator cuff and other possible derangement. Finally he opined, "I feel the patient's right shoulder problems are a result from his work related injury on 02/08/06."

By affirming and adopting the decision of the Administrative Law Judge as their own, the Majority finds the claimant did not sustain a compensable injury. In making this finding the Majority notes that the claimant's initial medical report did not indicate he had injured himself while lifting furniture. Additionally, they conclude that because the claimant did not originally

attribute his condition to lifting furniture at work, he did not sustain a compensable injury. The Majority also notes that the claimant did not suffer from pain on February 7 and that he waited one week to report the injury was work-related. Finally, the Majority opines that the claimant had not shown objective findings of a compensable injury.

After a de novo review of the record, I find that the decision of the Administrative Law Judge should have been reversed. Specifically, I find that the claimant's reports to the emergency room were consistent with the claimant sustaining an injury from lifting. Additionally, I find that while the claimant did not originally attribute his pain to lifting at work, he testified that he had tightness in his shoulder by the end of the day, which is consistent with sustaining an injury. Additionally, I find that great weight should be given to Dr. Powell's opinion that the claimant sustained a work-related injury. Finally, I find that the x-rays showed objective signs of degeneration and that the claimant exacerbated his pre-

existing degenerative condition. Accordingly, I would have reversed the decision of the Administrative Law Judge.

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).

While medical evidence is not required to show a causal connection, claimant must show proof by a preponderance of the evidence. Wal-Mart Stores Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999).

It has long been recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury upon a showing that the injury manifested itself within a reasonable period of time following the incident, is logically attributable to the incident, and there is no other reasonable explanation for the injury. Hall v. Pittman Construction Co., 235 Ark. 104, 357 S.W.2d 263(1962).

I find the evidence supports a finding that the claimant injured himself while lifting a piece of furniture. The claimant credibly testified that by the end of the day on February 7, his shoulder had tightened, indicating that he injured himself while lifting at work. While the claimant did not originally attribute his symptoms to lifting something at work, that certainly does not mean that

is not how the injury occurred. Additionally, while the claimant did not report a specific injury when he reported for treatment on February 13, he indicated that he had been lifting furniture and indicated that he had been suffering from pain for one week, which is a time period that would be consistent with his testimony that he injured himself while lifting furniture at work on February 7.

I also find the preponderance of the evidence shows that while the claimant had pre-existing degenerative changes in his shoulder, he aggravated an asymptomatic condition. While the claimant had a history of being diagnosed with bursitis in 1999, he credibly testified that he suffered no further problems with his shoulder after that time. Additionally, there is no indication that the claimant had to seek medical attention for his shoulder after 1999, indicating that he was asymptomatic.

As previously noted by the Court of Appeals in Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W.3d 150 (2003),

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances which aggravate pre-existing conditions are compensable. An aggravation of a preexisting noncompensable condition by a compensable injury is, itself, compensable. An aggravation is a new injury resulting from an independent incident. An aggravation, being a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. (Internal citations omitted).

Finally, I find that the preponderance of the evidence shows that the claimant had objective findings showing a medical injury. The claimant was diagnosed with a sprain. Additionally, his treating orthopedic physician, Dr. Powell, specifically noted that the claimant tested positive for a Cross-body impingement test. Additionally, the claimant's x-rays revealed that the claimant had degenerative changes in the form of erosive changes and osteoarthritis. Certainly these findings were not within the control of the claimant. Furthermore, since Dr. Powell specifically indicated that the claimant's symptoms were

caused by the claimant lifting furniture, I find that the claimant has shown that he aggravated his already degenerative shoulder.

For the aforementioned reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner