

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F709716

BILL FRANKS, EMPLOYEE

CLAIMANT

ABF FREIGHT SYSTEM, INC.,
SELF INSURED EMPLOYER

RESPONDENT

OPINION FILED AUGUST 17, 2009

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

Claimant represented by HONORABLE JAMES FILYAW, Attorney at Law, Fort Smith, Arkansas.

Respondent represented by HONORABLE J. LESLIE EVITTS, III, Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed January 7, 2009.

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 24, 2008, and contained in a pre-hearing order filed April 24, 2008, are hereby accepted as fact.
2. The claimant has proven the existence of objective medical findings regarding

his right shoulder difficulties in the form of a rotator cuff tear.

3. The treatment provided to the claimant for his right rotator cuff tear was reasonable and necessary.

4. The claimant failed to prove by a preponderance of the evidence that the objective finding of rotator cuff tear was caused by a specific incident that the claimant alleged to have occurred on July 11, 2007, while performing employment services for the respondent.

5. The claimant has failed to prove by a preponderance of the evidence that his right shoulder injury is compensable.

6. The claimant has failed to prove that he is entitled to temporary total disability.

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.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I concur with the majority opinion affirming the Administrative Law Judge's findings that the claimant proved the existence of objective medical findings regarding his right shoulder difficulties in the form of a rotator cuff tear and that the treatment provided to the claimant for his right rotator cuff tear was reasonable and necessary. However, I must respectfully dissent from the majority opinion findings that the claimant failed to prove by a preponderance of the evidence that the objective finding of a rotator cuff tear was caused by a specific incident that the claimant alleged to have occurred on July 11, 2007,

while performing employment services for the respondent, that his right shoulder was compensable, that he is entitled to temporary total disability or that he is entitled to payment of the related medical treatment. I find that the claimant suffered a compensable injury to his right shoulder in the form of a rotator cuff tear and that he is entitled to both temporary total disability benefits from September 13, 2007 to a date yet to be determined, as well as related medical benefits.

The claimant testified that he had ongoing bilateral shoulder problems but that his right shoulder pain increased significantly after an incident on July 11, 2007 when he was opening the overhead door to a trailer which jerked his shoulder.

The medical records showed that the claimant suffered pain in his back, right knee, right elbow and neck in 2003 through 2005. In April 2006, the claimant presented to Dr. Long with bilateral shoulder pain, hip pain, and pain in his hands and feet. He was diagnosed with arthralgia. He did not have a systemic arthritic disease. His rotator cuff test was negative bilaterally. He received an

injection into right shoulder, which gave improvement, and physical therapy instruction.

In May, 2006, the claimant presented to Dr. Long, reporting that his right shoulder continued to improve. His left shoulder was symptomatic, so he was given an injection. In June 2006, Dr. Long noted that the arthralgia in his shoulders and joints responded well to injections and was felt to be secondary to early osteoarthritis. The next medical record is dated five months later, when the claimant saw Dr. Long again:

He is in today because of three weeks of severe right shoulder pain. He relates this to driving an 18 wheel truck and shifting a great deal. He is unable to lift his arm but he has not had any overt injury. His motion has decreased dramatically in the last three weeks and he hardly wants to lift it at all today. He has full range of motion of the left shoulder, no complaints there.

Dr. Long's impression was degenerative cuff disease of the right shoulder. He performed an injection which provided immediate relief. Dr. Long explained that he could have a rotator cuff tear but it "would certainly be small." He had a negative rotator cuff test after the medication took effect. They planned an MRI.

The December 4, 2006 MRI of the claimant's right shoulder showed:

There is extensive degenerative changes in the acromioclavicular joint. The patient has a type I acromion with horizontal alignment of the clavicle. Osteoarthritic changes at the acromioclavicular joint are present with inferior osteophyte impinging on the musculotendinous junction of the supraspinatus muscle and tendon.

There was no evidence of a rotator cuff tendon tear. On December 14, 2006, Dr. Long noted that the claimant had some soft tissue changes around the articulation of the shoulder and some degenerative changes in the acromioclavicular joint. The November injection gave him distinct improvement, and he had full range of motion of his shoulder. Dr. Long directed him to continue with his exercise program and released him.

The claimant returned to Dr. Long on February 13, 2007, with complaints of pain in his left shoulder. He had an injection, which gave him good initial improvement. "His arthralgia is not associated with any overt arthritic change, but it compromises his activities significantly at time." At a follow-up visit on March 12, 2007, with Dr. Long, the claimant demonstrated a good return of function in his shoulders, with well-relieved arthralgia. He had

several episodes of recurrent symptoms in his shoulders and right hip. Dr. Long released him from care, with instruction to continue exercises and to avoid overworking his shoulder.

On July 9, 2007, Dr. Long saw the claimant with shoulder pain, the left worse than the right. He was given an injection on the left. Tests were planned concerning his medications. The claimant returned on July 16, 2007, noting that his left shoulder was distinctly improved by injection. He had symptoms in his right shoulder and wanted an injection. He had no overt clinical signs of rheumatoid arthritis. His symptoms probably related to early osteoarthritis. He received an injection in his right shoulder.

On July 31, 2007, the claimant returned to Dr. Long, reporting that the injection only helped for about a week. "He cannot lift his shoulder easily now at all even to initiate abduction. He has had an MRI of this shoulder in the past which did not show a tear of his rotator cuff." The claimant enjoyed relief initially upon injection. If his difficulties persisted, they planned to consider surgical treatment. The claimant returned on August 14,

2007 with symptoms. Because the prior injection helped, Dr. Long gave him another one in the right shoulder. His problems increased, and on August 29, 2007, the claimant presented to Dr. Loggains with severe left shoulder pain. Injections done over past few months were decreasingly effective. "Today he is reporting severe pain and inability to sleep. There has been no new injury or aggravating event that he can identify. He has continued to perform his activities of daily living and his job requirements." The examination was painful. He had significant spasms in the trapezium area and pain to the occipital lobe. He was prescribed Ultram and Ambien, instructed to do gentle active passive range of motion therapy, and will follow-up with Dr. Long.

The claimant returned to Dr. Long on September 4, 2007 with symptoms in his right shoulder. Dr. Long noted that he had no injury. Prior exams and an MRI revealed no rotator cuff tear, and he had similar symptoms in the opposite shoulder and his hip. Previously he responded well to injections, but the right shoulder was much more "recalcitrant" at that time. He used his right upper extremity in his work as a heavy truck driver, to shift the

gears. On that date, he was unable to work because of right shoulder pain. The injection three weeks ago did not help much at all. Another MRI was scheduled. Surgical options would be considered upon the results of the MRI. Another injection was given in the right shoulder.

An MRI on September 5, 2007, showed a large tear of the rotator cuff of his right shoulder. He saw Dr. Long again on September 11, 2007, who noted that an MRI of the same right shoulder in December 2006 did not show a tear of his rotator cuff. At that time, he had symptoms of degenerative cuff disease which responded well to the injections, but did recur. He reiterated that, in December, the cuff was intact.

The patient returned here in early July for his first visit since March and was having symptoms in both shoulders, left more severe than right. His left shoulder again improved with a corticosteroid injection and therapy. His right shoulder was injected in mid-July and he has had four injections since then. He has had some transient improvement but largely his symptoms have persisted. The rotator cuff tear in his right shoulder was discussed with him in detail.

He reports that on July 11, 2007 he was having a great deal of pain in his right shoulder at work and had to actually use his left hand to lift his hand off of the gear shift which he uses in his job driving a truck. He feels that he may have had the injury of the right shoulder on that date

and that appears to be a possibility. He has not yet filed a workman's compensation claim.

Dr. Long and the claimant discussed and planned the surgical repair of the claimant's right shoulder rotator cuff.

On September 13, 2007, the claimant signed a Loss of Time Claim Form - Initial Report of Disability, stating that the accident occurred on July 11, 2007 at work when he tore his rotator cuff opening a trailer door.

The claimant had surgery on September 14, 2007, which was apparently successful. He was taken off work and had not returned at the time of the hearing. In November 2007, the claimant developed an infection which resulted in more surgery and hospitalization to control the infection. In the early spring of 2008, the claimant was diagnosed with a rotator cuff tear in his left shoulder, which was treated conservatively.

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. §11-9-102(4)(A)(i)(Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence

that the injury caused internal or external physical 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 (4) (D), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

There is no question that the claimant had an injury to his shoulder which required medical treatment and resulted in disability and which was proven by objective medical findings. There is also no question that the treatment, both conservative and surgical, was reasonable and necessary treatment of his injury. The question is whether or not the rotator cuff tear arose out of and in the course of his employment, caused by a specific incident, identifiable by time and place of employment.

The claimant described the events of July 11, 2007:

I was opening a trailer door. . . . I was in Fayetteville, and there's a strap on it and I - I was opening it and I hung onto that strap just a little bit too long and it just. . . . This was an

overhead door. . . . And I opened the door. Some of them are stronger than the others. Some doors go up real fast and some you have to fight with to go up. This one went up. . . . [W]hen you unlatch it, then you pull it up. . . . [I]t's spring loaded and . . . when it went up, I had my hand in the strap and it - it pulled it. . . . [It pulled it up over his head] and I - I got my hand out of it right quick and then went on about my business.

The claimant stated that he was sore from the trailer door pulling his arm up. He was more sore than usual, but he assumed "it was just one of those things" and that he could "take it." He kept working. Over the next couple weeks, "it was kind of getting harder to do my normal things. It was slowing me down and then it was - there kept being more pain."

He explained that he did not report the incident with the trailer door because "I didn't know you had to report arthralgia and all the stuff that he was telling me. I thought arthritis and I thought I would just get over it." The claimant did not realize that anything more had happened than the pain he had with arthralgia. Once he realized he had a tear, he reported it. He testified that he did not report the incident: "No, that's my mistake. I didn't tell about that."

The medical records do not reflect that the claimant discussed with Dr. Long, an incident on July 11, 2007 until the September 11, 2007 visit to Dr. Long. On September 13, 2007, the claimant explained exactly what happened on July 11, 2007 in a disability report form. I conclude that the claimant presumed that the painful incident with the trailer door was part and parcel of the symptoms of his arthralgia. I also conclude that Dr. Long made the same conclusion and did not change his focus until he received the MRI results showing a new rotator cuff tear. At that point both the claimant and his physician began to focus on what had caused this tear.

I credit the claimant's explicit testimony regarding his activities on September 11, 2007 which were clearly arising out of and in the course of his employment as a truck driver, charged with loading and unloading trailers. I also credit his testimony that it was a specific incident identifiable by place and time. Thus, I find that the claimant has proven by a preponderance of the evidence that he suffered a compensable injury for which he is entitled to indemnity and medical benefits.

The respondents argued that the claimant's left shoulder problems prove that his right shoulder injury is not compensable. I find that the finding of compensability of the right shoulder injury is bolstered by the fact that he is only seeking workers' compensation benefits for the right shoulder and not the left shoulder. Were he motivated merely by financial gain or a desire to have his medical care financed, he would have sought benefits for both shoulders.

The claimant is entitled to temporary total disability benefits from September 13, 2007 to a date yet to be determined. He missed work beginning September 4, 2007, but at the hearing the claimant confirmed that he did not give notice of his injury to the respondent employer until September 13, 2007. The medical records do not indicate that, in regard to his right shoulder injury, the claimant has been released from active treatment, that he had reached maximum medical improvement, or that he was able to return to work.

The claimant is entitled to reasonable and necessary medical treatment. Dr. Long's care, from July 16, 2007 forward, was reasonable and necessary treatment of the

claimant's compensable injury. The claimant suffered pain in his right shoulder which was treated with limited success with therapy and injections. A diagnostic MRI was performed which showed the presence of a new tear, coinciding with an increase in right shoulder symptoms and a decrease in the effectiveness of conservative care. Surgery was performed which was initially effective, until such time as an infection started in the rotator cuff repair wound. The claimant required two surgeries and two hospitalizations to bring the infection under control. I find that Dr. Long's treatment of the claimant's right shoulder from July 16, 2007 to date is reasonable and necessary medical treatment of his compensable injury.

In conclusion, I find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on July 11, 2007 when his shoulder was jerked by an overhead trailer door, that he is entitled to temporary total disability benefits and reasonable and necessary medical benefits, including Dr. Long's care of his right shoulder from September 13, 2007 to a date yet to be determined. I also find that the claimant's attorney is entitled to an attorney's fee, as this claim was

controverted in its entirety, and this claimant required the services of the attorney to obtain his benefits.

For the foregoing reasons, I must respectfully concur, in part, and dissent, in part, from the majority opinion.

PHILIP A. HOOD, Commissioner