

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F508738

ROBERT NEWBY, EMPLOYEE	CLAIMANT
ASSOCIATED BUILDING & DEVELOPMENT, EMPLOYER	RESPONDENT NO. 1
BITUMINOUS CASUALTY CORP., INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED MARCH 26, 2009

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by the HONORABLE BETTY HARDY, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE JUDY RUDD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 27, 2008. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on May 28, 2008, and contained in a pre-hearing order filed May 30, 2008, are hereby accepted as fact.

2. The claimant is entitled to an impairment rating of 10 percent to the upper extremity which translates to 6 percent to the body as a whole.
3. The respondents are entitled to a credit for any monies paid to the claimant in the form of permanent partial disability benefits paid to the claimant with regard to his left shoulder.
4. The appropriate fees for the claimant's attorney is the maximum statutory attorney's fee on all applicable benefits herein and herein awarded to the claimant.

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 27, 2008, decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he was entitled to additional permanent partial disability benefits in the form of an anatomical impairment rating to his left shoulder. Based upon my de novo review of the record, I find that the claimant has failed to meet his burden of proof.

The claimant sustained an admittedly compensable injury to both of his shoulders on July 16, 2005, when he was running a jack-hammer and the jack-hammer got stuck in concrete. A prior hearing in this matter was held and the Full Commission, in an opinion and order dated September 13, 2007, affirmed and adopted the Administrative Law Judge who found that the claimant had proven by a preponderance of the evidence that was entitled to additional medical treatment for his left shoulder. At this time, the claimant is requesting a permanent anatomical impairment rating assessed by his treating physician after that additional medical treatment. In a report dated February 14, 2008, Dr. Evans, the claimant's treating physician, indicated that the claimant had reached maximum medical improvement for his left shoulder and he assigned a

permanent anatomical impairment rating to the left upper extremity due the arthroplasty of the left shoulder acromioclavicular joint, which translated to a 6% to the body as a whole. The respondents controverted this impairment due to the claimant's pre-existing degenerative condition. Dr. Evans performed a left shoulder arthroscopic subacromial decompression and arthroscopic distal clavical resection on October 26, 2007. The operative report from that date stated that the claimant's rotator cuff was extensively probed and found to be intact although Dr. Evans's prior reports all indicated that the claimant had a left shoulder rotator cuff tear. His post-operative diagnosis of the claimant was left shoulder impingement syndrome and acromioclavicular joint arthritis, surgically treated.

Dr. Evans was deposed and testified that he thought that the claimant's arthritis pre-existed the injury and that the compensable injury exacerbated the claimant's chronic condition. Dr. Evans testified that:

Q. Okay. And it sounds like, doctor, that the reason you took off the distal clavical of the collar bone was because of the degenerative process?

A. The arthritis. Right.

Q. So the major cause of that impairment is actually the pre-

existing arthritis as opposed to the injury in July of 2005. Is that right?

A. Well, that will be the crux of an argument and let me explain that and I will use terms in my explanation, I will use terms just like what I would do if I were seeing you as a patient. I have to answer this question, oh probably three or four times a month because in workmans' comp cases it always comes up. Its just as common as it can be. I always get the question, if this guy has got arthritis of his acromioclavicular joint then how do you call that, you know, a workmans' comp problem when we know that that arthritis didn't develop on July 15, 2005. Well, I think that certainly the arthritis pre-existed the injury of this particular date but I think that as far as I know and as far as I have a history on, he had no problem with that shoulder prior to that date and so what I consider it is an exacerbation of the chronic condition. And I think that is really the only way that you can honestly look at it and say that that's what happened because if you don't have a previous history of shoulder pain and tenderness, the palpation at that particular joint, and you don't have any other specific injury that you can tie it to, but you know that you have got arthritis that shows up on the x-ray, then really all you can all (sic) it is an acute exacerbation of a chronic condition. And that's always the answer. And I think if you honestly, if you always use that as your, as what you tell them its not like, well, you just kind of pulled that out of your, you know what. And so, Eddie has been in here a number of times and has, I've

gotten that question from him before, and so, but its always the same answer and I think that's about as honestly as you can address it.

Q. Okay. And that would go to the fact that he had symptoms and you did surgery?

A. Correct.

Q. Now, once you get past that, then under the Arkansas Workers' Compensation procedures and rules and regulations law, that sort of thing, for the impairment rating, the major cause of that impairment rating has to be the work related injury, and it sounds like from what you are telling me here today and the reports that we have, is the major cause of his impairment rating is actually the pre-existing arthritis. Is that right?

A. Well, I think that there is, there would normally be a place for you to, for the impingement but you know, you have treated that and there is no, he has got good range of motion and he has got good strength and so really the only thing that you have is just the arthroplasty, but by the same token, I don't know exactly how you would be able to separate the acute exacerbation from the chronic condition. Do you see what I'm saying. That's gonna be, again, that's gonna be the crux of the matter but also that's going to, I don't know how to separate those two.

Q. As far as the acute exacerbation, that was corrected when you did the surgery?

A. Right.

Q. So now, for all practical purposes, has a good range of motion. Is that right?

A. Yes.

Q. And he's not complaining of any symptoms with his shoulder as far as pain and so forth. So from a permanent standpoint, the surgery corrected his exacerbation?

A. Right.

Q. And then the only permanent residual or permanent impairment is left over from that, is what's left over from [sic] the surgery that you did regarding his arthritis. The shaving off of the clavical and that sort of thing?

A. But is this number not related to the arthroplasty that you did. See, I think that it is and I don't think that there is anything in the guides that tells you otherwise. Certainly, the purpose of the surgery was reached. We treated the problem that was there, But to my knowledge, in the guides there it doesn't spell out the fact that, hea, he had surgery, so this doesn't apply. Am I correct on that. I mean, I don't recall that there is a place in there where that says, okay, you had surgery, we fixed it, we got the acute exacerbation finished, and so this doesn't apply.

Q. But the distal clavical problem that he had, and that then results in the impairment that is outlined in Table 27, is something that was pre-existing the exacerbation that occurred in July of 2005. Is that right?

A. Right.

In order for the claimant to be entitled to permanent benefits, he is required to show that he 1) suffered an injury arising out of and in course of his employment; 2) that the injury was caused by a specific incident; 3) that the injury caused internal or external physical harm to his body; 4) that the injury is supported by objective findings; and, 5) that the injury was the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102.

It is clear that the first four factors are supported by the evidence and the parties' stipulations. The claimant suffered a compensable injury while at his workplace that was caused by him getting the jack-hammer stuck in the concrete and having to remove it. The incident caused injury to the claimant's left shoulder which required him to seek medical treatment. The injury was accepted as being compensable. However, the claimant cannot prove that the injury was the major cause of his disability in order to receive permanent anatomical impairment. The testimony of Dr. Evans clearly shows that the claimant's permanent anatomical impairment rating is due to his pre-existing condition. The major cause of this rating is not related to the claimant's work-related injury.

The facts of this case are very similar to those in the case of Hickman v. Kellogg, Brown & Root, 372 Ark. 501, _____ S.W.3d. _____ (2008). In Hickman, the Arkansas Supreme Court found that even though the claimant's total knee replacement surgery was compensable, the impairment rating he received was not. The Court pointed out that there are different standard to prove benefits related to a compensable injury verses entitlement to an impairment rating. In that case, the major cause of the impairment was Mr. Hickman's pre-existing arthritis. This case is clearly the same thing. The major cause of the claimant's impairment for his left shoulder was his pre-existing arthritis. This was demonstrated by the operative report that showed arthritis and there was no rotator cuff tear, although Dr. Evans had thought there was one. Further, the testimony of Dr. Evans shows that the information used to determine the claimant's permanent anatomical impairment rating was due to his pre-existing arthritis.

Therefore, after considering the evidence of record, I find that the claimant has failed to prove by a preponderance of the evidence that the major cause of his permanent anatomical impairment was his injury but instead was his pre-existing arthritis. Therefore, for

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all the reasons set forth herein, I must respectfully
dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner