

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F809275

JONATHAN ALLEY,
EMPLOYEE

CLAIMANT

SYSTEMS CONTRACTING CORP.,
EMPLOYER

RESPONDENT

INTEGRATED CLAIMS MANAGEMENT,
INSURANCE CARRIER

RESPONDENT

OPINION FILED APRIL 27, 2010

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

Claimant represented by the HONORABLE KEITH M. WREN,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed September 4, 2009. The administrative law judge essentially found that the claimant did not prove he sustained a compensable injury. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. The Full Commission finds that the claimant proved he sustained a compensable injury. We find that the claimant proved he was entitled to temporary total disability benefits and reasonably necessary medical treatment.

I. HISTORY

Jonathan Wayne Alley, now age 19, testified that he injured his shoulder in September 2006 while playing soccer. Dr. Jason T. Hutchison examined the claimant on September 7, 2006:

Chief complaint: Got hit in the left shoulder.

History of present illness: This is a 16-year-old male who has had about two-year history of left shoulder instability, which sounds like it is anterior. He dislocated it in a soccer game initially and it went back in. He says he has had probably four to five dislocations since that time, all of which had gone back in on their own, he has not had formal treatment for. He was slam dancing in a concert and was hit from behind on the posterior aspect of his left shoulder and he has had continued pain since then. He points all of the anterolateral shoulder as where his pain is.

Physical examination: Today, he has full range of motion of the shoulder. He does have anterior apprehension of his shoulder. He has good motor strength. Has a hint of winging of his scapula when having pushed forward. Normal ulnar, median, and radial nerve function otherwise, good radial pulse.

X-rays, two views of his shoulder, shows type II acromion, dislocated shoulder. No other signs of pathology. It is concerning.

Dr. Hutchison's impression was "1. Anterior shoulder instability, chronic. 2. Acute injury, left shoulder." The Plan was, "I think we should go ahead and get an MRI to see what degree his labrum is torn and to see if there is any other factors contributing to his

current situation. We will see him back after the MRI is complete."

An MRI of the claimant's left shoulder was done on September 11, 2006, with the following findings:

No significant AC joint abnormality. Rotator cuff outlet appears normal. There is no significant rotator cuff tendinopathy or evidence of tear. No degenerative change is appreciated. The subscapularis tendon also appears normal. No obvious abnormality of the glenoid labrum, although the labrum is difficult to evaluate on routine MRI without intra-articular contrast. Long head of the biceps tendon appears to be intact. In addition, the axial images are somewhat limited due to patient motion.

IMPRESSION

1. No gross abnormality of the glenoid labrum. Within limitations of a noncontrast study, the labrum appears to be within normal limits. In addition, there is no evidence of a Bankart lesion or Hill-Sachs deformity.
2. No other significant shoulder abnormality.

The claimant followed up with Dr. Hutchison on September 19, 2006:

His MRI report is normal. I have reviewed his MRI. I do not see any evidence of labral tear, SLAP lesion, Hill Sachs or other indication of dislocation.

On exam today, he does have some anterior instability and some anterior apprehension and a little bit of sulcus sign. He has normal motor and sensory exam. Good muscle tone. Good strength. No weakness. Good pulse. No swelling of the arm.

Dr. Hutchison's impression was "Anterior instability, left shoulder. Plan: I do not think Johnson (sic) is dislocating his shoulder. He may be subluxing it and having the sensation of dislocation, but certainly I would expect some edema in the humeral head or glenoid or some evidence of dislocation on the MRI if it were frankly going all the way out. I think we need to put him in an intense shoulder stabilization program. I will check him back in about six weeks. Any questions or problems in the interim, I will be glad to see him sooner...."

The claimant testified that he followed up with Dr. Hutchison "after I went through physical therapy and stuff like that." The claimant testified that he did not suffer any additional injuries to his left shoulder after September 2006 and that he did not suffer from continued problems with his shoulder.

The claimant testified that he began working for the respondent-employer in about July 2008. The parties stipulated that the claimant was an employee of the respondent-employer and that there was an incident on September 5, 2008. The claimant testified on direct examination:

Q. Tell the Judge in your own words what happened to your left shoulder on September the 5th of 2008.

A. I was back behind Carl Ward, and he bends metal and stuff like that, and I'm not qualified to do that. So he said something about going back there and stacking metal. After doing it for not too long - I was back there stacking little pieces of metal and stuff like that for maybe 30 or 45 minutes. I got to this big - it wasn't a real big sheet of metal, but I was turning it up to try to stack it where it was supposed to be. So when I went to stand it up, I felt my shoulder give way, and it shot up through my neck, and I couldn't do it. There was no way in the world that I could get that thing up there. I went and talked to the shop foreman about it, and he said I needed to go talk to Don Henson about it and see what we needed to go and talk to the safety guy. So that's what I went and did, and I was pretty much in a sweat because it hurt so bad.

Q. When you felt this pain in your shoulder on September the 5th of 2008, was it like any other shoulder pain you'd ever had before?

A. No, sir....It was like shocking. It felt like it possibly hit a nerve or something like that, and it hurt really bad almost like a headache as soon as it happened....

The record indicates that a company physician, Dr. Ronald Smith, saw the claimant on September 5, 2008:

He comes in because of problems with the left shoulder. He hurt this at work lifting some metal sheets. Said he was kind of trying to pick them up and push them up so he could walk them over and put them up somewhere. He was using both arms. His left arm just kind of gave away with him. He had problems with his left rotator cuff sometime ago. He has been to rehab with it. He's had MRI scan, the best

I can determine it was recommended he have some sort of surgical correction but he didn't want to get that tended to. His exam today is consistent with a rotator cuff injury. He has problems with abduction. There's no question about that. I did encourage him to use OTC Ibuprofen, one t.i.d. w/food. He can work but he's going to have to avoid using his left arm for any sort of abduction. I'll plan on touching base with him again in two weeks.

Dr. Smith diagnosed "1) Rotator cuff injury left arm."

Dr. Hutchison saw the claimant on September 10, 2008:

Jonathon returns today. It has been a couple of years since I have seen him. He has had about 5 dislocations of his left shoulder since I last saw him. The most recent one has been associated with a lot of posterior pain afterwards. He usually does not have a great deal of pain afterwards.

PHYSICAL EXAMINATION: On examination today, his shoulder has some rotator cuff weakness but no drop-arm. His axillary nerve is intact. He does have significant anterior instability and guards against a true Lachman. Normal range of motion of the elbow and normal motor and sensory examination otherwise.

X-RAYS: Three views show no clear evidence of any osteochondral fractures. However, it does look like there is a Hill-Sachs lesion on the axillary to me.

PLAN: I will go ahead and repeat an MRI to make sure he has not damaged his cuff. I do think he is going to need a stabilization procedure and I have talked to him and his family about what that would entail today. We will see him back in the next week or so after his MRI.

An MRI of the claimant's left shoulder was done on September 15, 2008, with the following impression:

1. Increased signal intensity within the posterior glenoid labrum concerning for posterior labral tear. Mild thickening of the middle glenohumeral ligament and anterior joint capsule, which may be congenital or related to chronic injury.
2. Mild infraspinatus and supraspinatus tendinosis.
3. Slightly low lying acromion, which can be associated with impingement.

The claimant followed up with Dr. Hutchison on September 17, 2008:

MRI SCAN: Shows a posterior labral tear and some thickening anteriorly consistent with his injury. I was talking with him today. Essentially, he has had an unstable shoulder for some time but it has never been symptomatic to the point of giving him pain until this most recent dislocation. This most recent dislocation did occur at work. He works at Systems in Blytheville, Arkansas. On 09/08/08, he was lifting a heavy sheet of sheet metal and stacking it and felt a pull and tearing and cramping sensation in his shoulder after he felt the dislocation and relocation. He did report it that day. He was taken to the doctor by them and then his family, because he had been seen by me in the past, wanted him to see me and so they brought him to see me under his private insurance, and we proceeded with an MRI which is what he is here today for.

PHYSICAL EXAMINATION: Essentially, on examination today, he has a positive sulcus sign. He does have anterior apprehension and he also has some posterior clicking when we go over the labrum. He is very resistant and sore. I am not able to demonstrate clear dislocation today but certainly I feel a pop

on the posterior labrum. I feel anterior and posterior laxity.

IMPRESSION:

1. Left shoulder instability, possibly posterior and anterior.
2. Labral tear, posterior labrum.

PLAN: This young man needs an evaluation under anesthesia and then arthroscopic capsulolabral repair and/or plication as necessary to stabilize his shoulder. I have gone over this with them. Because this most recent dislocation/subluxation did occur at work and was properly documented initially, they do want to now go back and file this under Work Comp after I discussed the down time, the expense, and so forth with them. I do think that is reasonable given his history of not having significant pain prior to this injury. In essence, what I am understanding from this young man is that clearly he had preexisting shoulder instability which he tolerated without significant pain. However, after this most recent episode, he is now having significant pain that he is not able to tolerate. I have given them the records and should Work Comp deem it appropriate, I would be glad to treat him. However, if they run into any problems and would like for me to treat him under his private insurance, I would be glad to do that also. I have given them copies of their MRI today and I will wait for further contact from them.

Dr. Charles Poole noted on October 10, 2008, "Mr. Alley is an 18-year-old gentleman who is to undergo a left shoulder arthroscopy and repair of labral tear by Dr. Jason Hutchison. Dr. Hutchison has consulted anesthesia to help with postoperative pain. I have reviewed the patient's chart. I have discussed doing

both the left superficial cervical plexus block as well as a left supraclavicular plexus block with the patient....The patient wishes to have both procedures done to help with his postoperative pain." Dr. Poole performed the following procedures: "1. Left superficial cervical plexus block for postoperative pain control. 2. Left supraclavicular brachial plexus block for postoperative pain control."

Dr. Hutchison performed a surgical procedure on October 10, 2008: "Left arthroscopic capsule labral repair and shift, (posterior Bankart), left shoulder." The pre- and post-operative diagnosis was "Left posterior labral tear and instability, left shoulder."

Dr. Hutchison noted on October 20, 2008, "Jonathan returns for follow-up of his shoulder surgery. When we examined him clinically he had posterior shoulder instability. He did not have anterior shoulder instability clinically. This is what we saw with the scope as well. We did a posterior Bankart capsular labral shift. He has done well postop. He is already off of his pain medication....Jonathan's former employer has terminated him and he is going through Arkansas worker's comp to try to get some type of back pay and coverage on this matter."

The claimant continued follow-up visits with Dr. Hutchison, and Dr. Hutchison continued to note good post-surgical recovery.

Dr. Hutchison reported on March 24, 2009:

Jonathan returns for followup of his posterior Bankart repair, doing excellent, has no complaints. He has full range of motion, no atrophy, no weakness, no instability, no popping or catching. I told him to continue to exercise caution with heavy lifting and athletic activities. I want him to continue with his strengthening and stabilization exercises on a home program. I am not going to schedule any followup unless he has problems. He will be at the sixth month mark April 10th and that would be my official release date so that he could potentially do a manual labor job.

The claimant's testimony indicated that he began working for another employer after April 10, 2009.

A pre-hearing order was filed on May 5, 2009. The claimant's contentions were, "1. On September 5, 2008, the claimant was lifting some sheet metal when he sustained an injury to his left shoulder. He subsequently underwent surgery on his left shoulder to repair a labral tendon tear. He has been unable to return to work since that time. 2. The claimant contends that he is entitled to medical benefits. 3. The claimant contends that he is entitled to TTD

benefits from September 6, 2008 to a date yet to be determined. 4. Attorney's fee."

The respondents' contentions were, "1. The claimant had a documented shoulder condition prior to his employment. He did not injure his shoulder on September 5, 2008. It was already injured. The major cause of the condition is pre-existing."

A hearing was held on June 9, 2009. At that time, the claimant contended that he was entitled to temporary total disability benefits from September 6, 2008 through April 10, 2009.

An administrative law judge filed an opinion on September 4, 2009. The administrative law judge found that "on September 5, 2008, the claimant experienced another recurrence of his well documented preexisting left shoulder instability, and not an aggravation of that condition or a new injury." The administrative law judge therefore denied the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Compensability

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

(A) "Compensable injury" means:

(i) An 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[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

An aggravation is a new injury resulting from an independent incident. *Farmland Ins. Co. v. Dubois*, 54 Ark. App. 141, 923 S.W.2d 893 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998).

The burden of proof of a compensable injury shall be on the employee, and the burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means evidence of greater convincing force and implies an overbalancing in weight. *Barre v. Hoffman*, 2009 Ark. 373, ___ S.W.3d ___.

In the present matter, the Full Commission finds that the claimant proved he sustained a compensable injury pursuant to the relevant provisions of Act 796 of 1993. We recognize from the record that the claimant has suffered from left-shoulder instability for several years. Dr. Hutchison noted left-shoulder instability after the claimant was injured in a soccer game in 2006. Dr. Hutchison also noted, however, that an MRI of the claimant's left shoulder in September 2006 was normal. The medical evidence does not show any further treatment for the claimant's left shoulder after September 19, 2006 until the alleged accident of September 2008.

The parties stipulated that the claimant was an employee of the respondent-employer and that there was an incident on September 5, 2008. The claimant testified that, while stacking a section of sheet metal in the course and scope of his employment, "I felt my shoulder give way, and it shot up through my neck...." The claimant testified that he reported the specific incident to his supervisors. The claimant treated with Dr. Smith, the company physician, on September 5, 2008. Dr. Smith noted that the claimant hurt his left shoulder at work while lifting sheet metal. Dr. Smith diagnosed a rotator cuff injury.

The claimant returned to Dr. Hutchison on September 10, 2008. A left shoulder MRI performed on September 15, 2008 showed a posterior labral tear, which objective finding was not shown on the MRI taken September 11, 2006. We reiterate Dr. Hutchison's conclusion in September 2006 that the left shoulder MRI at that time was normal. Dr. Hutchison reported on September 17, 2008, following the September 5, 2008 workplace incident, that MRI showed "a posterior labral tear and some thickening anteriorly consistent with his injury....This most recent dislocation did occur at work." Dr. Hutchison also physically felt a "pop on the posterior labrum" on September 17, 2008. Dr. Hutchison noted, "Because this most recent dislocation/subluxation did occur at work and was properly documented initially, they do want now to go back and file this under Work Comp after I discussed the down time, the expense, and so forth with them."

In the present matter, an administrative law judge determined that the claimant was not a credible witness and specifically found that the claimant was dishonest regarding the condition of his left shoulder. It has long been held that an administrative law judge's credibility determination is not binding on the Full

Commission. See *Roberts v. Leo Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983), citing *Arkansas Coal Co. v. Steele*, 237 Ark. 727, 375 S.W.2d 673 (1964) and *Moss v. El Dorado Drilling Co.*, 237 Ark. 80, 371 S.W.2d 528 (1963). The Full Commission reviews an administrative law judge's decision *de novo*, and it is the duty of the Full Commission to conduct its own fact-finding independent of that done by the administrative law judge. *Crawford v. Pace Indus.*, 55 Ark. App. 60, 929 S.W.2d 727 (1996), citing *Willmon v. Allen Canning Co.*, 38 Ark. App. 105, 828 S.W.2d 868 (1992).

In the present matter, the Full Commission finds that the claimant was a credible witness, because the medical evidence expressly corroborated the claimant's testimony. We can find no deceptive intent in the claimant's decision, based on his treating physician's recommendation, to seek worker's compensation benefits following the workplace accident. We can find no effort on the claimant's part to mislead the Commission regarding his pre-existing shoulder condition. Nor did the administrative law judge identify any aspect of the claimant's "demeanor" which led the administrative law judge to conclude that the claimant was not credible.

The Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained a compensable injury. The claimant proved that he sustained an accidental injury causing physical harm to his left shoulder. The claimant proved that the injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific incident and was identifiable by time and place of occurrence on September 5, 2008. The claimant established a compensable injury by medical evidence supported by objective findings. The objective findings of record in the present matter included, but were not limited to, the post-accident labral tear and "popping" in the labrum noted by Dr. Hutchison. These objective findings were causally related to the compensable injury and were not the result of a "recurrence" or pre-existing condition. The administrative law judge's decision is reversed.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the compensable injury. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The employee

must prove by a preponderance of the evidence that he is entitled to requested medical treatment. *Fayetteville School Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The Full Commission has determined in the present matter that the claimant proved he sustained a compensable injury on September 5, 2008. The claimant proved that all of the medical treatment of record, including surgery performed by Dr. Hutchison, was reasonably necessary in connection with the compensable injury. Dr. Hutchison performed left-shoulder arthroscopic surgery on October 10, 2008. Dr. Hutchison noted during follow-up visits that the claimant's post-surgical condition continued to improve to the extent that the claimant was eventually able to return to work for another employer. Post-surgical improvement is a relevant consideration in determining whether or not surgery was reasonably necessary. *Hill v. Baptist Medical Center*, 74 Ark. App. 250, 48 S.W.3d. 544 (2001). The respondents are liable for the costs of the medical

treatment of record provided to the claimant following the September 5, 2008 compensable injury.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). In the present matter, the Full Commission has determined that the claimant proved he sustained a compensable injury on September 5, 2008. Although he planned to release the claimant to work on September 5, 2008, Dr. Smith advised the claimant "to avoid using his left arm for any sort of abduction." The claimant performed manual labor for the respondent-employer, and the record does not demonstrate that restricted, one-armed work was available for the claimant. The claimant underwent left-shoulder surgery on October 10, 2008, which treatment the Full Commission has determined was reasonably necessary in connection with the compensable injury. Dr. Smith released the claimant to return to manual labor as of April 10, 2009. The claimant proved that he remained within his healing period and was totally incapacitated from earning wages beginning September 5, 2008 until April 10, 2009. The record

therefore demonstrates that the claimant proved he was entitled to temporary total disability benefits beginning September 5, 2008 through April 10, 2009. The respondents are entitled to a credit for any wages paid the claimant during that period.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved he sustained a compensable injury on September 5, 2008. The claimant proved that all of the medical treatment of record, including surgery performed by Dr. Hutchison, was reasonably necessary in connection with the compensable injury. The claimant proved that he was entitled to temporary total disability benefits from September 5, 2008 through April 10, 2009. The respondents are entitled to a credit for any wages paid the claimant during that period. The administrative law judge's decision is reversed. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to 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 respectfully dissent from the majority opinion finding that the claimant proved by a preponderance of the evidence that he sustained a compensable shoulder injury on September 5, 2008. In my opinion, the claimant has failed to meet his burden of proof.

In my opinion, a review of the evidence demonstrates that the claimant has failed to meet his burden of proof. The medical evidence demonstrates that the claimant had a long standing history of shoulder pain prior to the September 5, 2008, incident. This coupled with the claimant's inconsistent testimony is sufficient to find the claimant has failed to prove compensability.

The claimant gave inconsistent testimony that was contradicted by the evidence. In my opinion, the

claimant's credibility is suspect at best. On direct examination the claimant responded to questions regarding any previous problems between September of 2006 and September of 2008 with his left shoulder. The claimant replied that there was nothing the he could not do but then said his shoulder might get sore like someone punched him in the arm. Later he was asked again about having any problems during this time period and the claimant replied that he was having no problems whatsoever. On cross-examination the claimant admitted that the whole shoulder problem began with a soccer game. The claimant said he "forgot" about the incident where he was slam dancing and he injured his shoulder again. When asked whether the claimant had dislocated his shoulder at any time between the soccer game and the slam dancing incident the claimant said that he could not say for sure.

Furthermore, the claimant denied that he ever had a previous shoulder dislocation. When asked to describe what happens with his shoulder, the claimant stated that "It was just normal, it wasn't anything at all." When asked about Dr. Hutchinson's report that indicated the claimant had a history of having five dislocations between September of 2006 and September of

2008, the claimant said he did not remember giving that information. He said the doctor must have guessed that figure but later said that he may have told the doctor that it dislocated a couple of times. Moreover, Dr. Hutchinson's September 10, 2008, report does not even mention a work-related injury.

I find the claimant is not a credible witness and that the medical records fail to show the claimant's shoulder problems were related to the September 5, 2008 incident. Simply put, I cannot find that the claimant proved by a preponderance of evidence that there is a causal connection between his September 5, 2008, incident and his shoulder problems. Accordingly, I must dissent from the majority's finding that the claimant sustained a compensable injury on September 5, 2008.

KAREN H. MCKINNEY, COMMISSIONER