

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F902094

TRACY MORGAN, EMPLOYEE	CLAIMANT
HIGHLAND WINDOW, EMPLOYER	RESPONDENT
NEW HAMPSHIRE INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED MARCH 5, 2010

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

Claimant represented by the HONORABLE LAURA BETH YORK, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE MELISSA WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed September 3, 2009. The administrative law judge found that the claimant sustained a compensable injury to his left elbow. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion. We find that the claimant did not prove by a preponderance of the evidence that he sustained a compensable injury to his left elbow.

I. HISTORY

The respondents stipulated that the claimant sustained a compensable left shoulder injury on December 2, 2008. The claimant testified, "We was ready to move our truck from one point to another. We had windows leaning against a pickup. The tailgate's down, I grabbed a window, stepped back and was gonna set it up in there, and as I come around, the window hit the tailgate and hurt my arm." The claimant testified that he immediately felt pain "in my arm, but, mainly located in my shoulder." The claimant testified that he felt pain in his elbow, but "It just wasn't near as great as the shoulder." The claimant testified that he reported the accident to his supervisor, Brent Watts, but admitted on cross-examination that he did not mention an elbow injury. Brent Watts, the shop foreman and claimant's supervisor, testified, "He reported that he had hurt his shoulder lifting windows into the back of a truck....Just shoulder pain is all he mentioned to me, nothing about arm or elbow at that time."

The claimant received authorized medical treatment on December 3, 2008: "New patient, complains of constant left shoulder pain onset yesterday. Works at Highland Windows -

does a lot of heavy lifting. Could hear shoulder popping yesterday while lifting heavy objects. Has difficulty flexing left forearm....Has limited ROM due to pain; hand is numb at times. Was not lifting over head at the onset....LEFT ARM EXAM: guarded ROM due to shoulder pain; tenderness to palpation of the anterior shoulder just medial to the humerus; no tenderness of AC joint; no tenderness below the acromion, brachial and radial pulses +2 intact; tenderness to palpation of the posterior elbow." The assessment was "Hypertension, Benign" and "Tendinitis."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on January 8, 2009. The claimant indicated on the Accident Information section of the Form AR-N that he had injured his shoulder on December 2, 2008. The claimant described on the Form AR-N the cause of injury: "Lifting window, the window hit the truck tailgate. The sudden stop injured shoulder." The claimant testified, "the whole area was hurting, but the shoulder was just more chronic - it hurt worse."

Dr. W. C. Grammer saw the claimant on February 9, 2009:

The patient is a 49 year old male who presents for orthopaedic evaluation of an injury to the left shoulder that occurred on 12/29/2008. The patient is 6 weeks out from injury.

Mechanism of Injury:

The patient was lifting a heavy object and strained the shoulder. The patient describes the mechanism of injury as a traction injury and reports there was immediate pain in the left shoulder. The pain is currently mild to moderate in intensity and has an aching, a dull and sharp quality. It does not radiate. He denies any additional injuries.

Associated Signs and Symptoms:

The discomfort interferes with sleep and is present at rest. The patient also describes, decreased range of motion and catching in the left shoulder. He has tingling in both hands which has been there prior to the injury. The pain is aggravated by lifting the arm above the head, lifting an object, activities of daily living, and elevating the arm....

The doctor physically examined the claimant's cervical spine, right upper extremity, and left upper extremity.

Examination of the claimant's left elbow showed "**Range of Motion:** full and painless in all planes, no crepitance."

The assessment was "R/O Rotator Cuff Tear (Traumatic)" and "Moderate Shoulder Pain Unresponsive to treatment."

The claimant underwent another physical examination on or about February 23, 2009, including examination of the claimant's left elbow: "**Range of Motion:** full and painless in all planes, no crepitance." The assessment was "Large Rotator Cuff Tear (Traumatic)" and "Moderate Shoulder Pain Unresponsive to treatment."

Dr. Grammer noted on February 25, 2009, "This is a 49-year-old man who came in with a chief complaint of left shoulder injury that happened on December 29, 2008 and shoulder pain. The patient was lifting a heavy object, when he strained his shoulder. There was immediate pain and he had difficulty sleeping at night." Dr. Grammer performed a "1. Left mini-open rotator cuff repair. 2. Left open distal clavicle resection."

A physical therapist's initial evaluation on February 27, 2009 indicated that the claimant complained of left elbow pain. It was noted on March 19, 2009, "Patient presents today and reports that his elbow was fine until the accident. He states that he reported these symptoms but the focus was on his left shoulder. He states that since the accident he has pain on the tip of his elbow and has limited ROM that is worsening." Dr. Grammer examined the claimant's left elbow on March 19, 2009: "moderate localized tenderness over the olecranon/proximal ulna radial head triceps insertion, no swelling, no joint effusion present, no deformities noted, test for epicondylitis negative." A range of motion test showed "mild diffuse crepitance present-noted during flexion and extension, ankylosis

present." Dr. Grammer's assessment included "R/O Elbow Contusion," "Osteoarthritis of the elbow," and "Elbow pain."

The record contains a Radiology Report dated March 19, 2009: "Left Elbow: AP, lateral and oblique views were obtained, there are no soft tissue abnormalities, alignment is normal, no fractures, marked osteophytes present-ulnohumeral joint, decreased joint space-ulnohumeral joint, osteophytes present-radiocapitellar joint, normal bone density, no bony lesions, no evidence of prior surgery." The assessment was "Severe Osteoarthritis of the elbow."

A pre-hearing order was filed on June 29, 2009. The claimant contended that he sustained a compensable injury to his left shoulder and elbow on December 2, 2008. The claimant contended that he was entitled to medical treatment and temporary total disability benefits.

The respondents contended that there were "no objective findings to support a compensable injury to the left elbow. Claimant's need for medical treatment, if any, is associated with pre-existing and underlying problems and not an acute injury. Respondents contend that Claimant did not suffer an aggravation of an underlying problem at the time of the left shoulder injury. Respondents contend that all appropriate

benefits have been and are continuing to be paid with regard to the left shoulder injury.”

After a hearing, an administrative law judge filed an opinion on September 3, 2009. The administrative law judge found, among other things, that the claimant injured his left elbow on December 2, 2008. The respondents appeal to the Full Commission.

II. ADJUDICATION

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). The requirement that a compensable injury must be established by medical evidence supported by objective findings applies only to the existence or extent of the injury. *Stephens*

Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997).

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

In the present matter, an administrative law judge found that the claimant sustained an injury to his left elbow on December 2, 2008. The Full Commission reverses this finding. The respondents stipulated that the claimant sustained a compensable left shoulder injury on December 2, 2008. The claimant testified that he sustained an accidental injury while attempting to pick up a window. The claimant testified that the accident caused pain in his elbow and arm, but mainly in his left shoulder. The claimant admitted that he did not report an elbow injury at that time to his supervisor, Brent Watts. Mr. Watts testified, "He reported that he had hurt his shoulder lifting windows into the back of a truck....Just shoulder

pain is all he mentioned to me, nothing about arm or elbow at that time."

The evidence of record does not demonstrate that the claimant injured his left elbow on December 2, 2008. A medical note on December 3, 2008 indicated that the claimant complained of left shoulder pain, not left elbow pain. The claimant signed a Form AR-N, Employee's Notice Of Injury, on January 8, 2009. The claimant reported on the Form AR-N that he had injured his left shoulder, but the claimant did not report on the Form AR-N that he injured any other part of his anatomy, including the left elbow. Dr. Grammer noted on February 9, 2009, "The patient was lifting a heavy object and strained the shoulder." Dr. Grammer did not report an injury to the claimant's left elbow. We recognize that Dr. Grammer examined the claimant's cervical spine, right upper extremity, and left upper extremity. Dr. Grammer's examination of the claimant's left elbow showed full and painless range of motion with no crepitation. Nor was any crepitation seen in the claimant's left elbow on February 23, 2009.

A physical therapist began reporting left elbow pain on February 27, 2009. The claimant told Dr. Grammer beginning

March 19, 2009 that the claimant had suffered from elbow pain since the accident. A range of motion test on March 19, 2009 showed "mild diffuse crepitation" in the claimant's elbow. A subsequent x-ray showed "severe osteoarthritis" in the claimant's left elbow.

The respondents stipulated that the instant claimant sustained a compensable left shoulder injury on December 2, 2008. Based on the record before the Commission, we find that the claimant did not prove by a preponderance of the evidence that he sustained an accidental injury which caused physical harm to his left elbow. The claimant did not prove that he sustained an elbow injury which arose out of and in the course of employment. The claimant did not establish a compensable injury to his left elbow by medical evidence supported by objective findings. The reports of "crepitation" beginning March 19, 2009 did not prove the existence or extent of an alleged left elbow injury occurring December 2, 2008. Dr. Grammer's assessment of "osteoarthritis" on March 19, 2009 did not prove the existence or extent of a compensable left elbow injury.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant did not prove by a

preponderance of the evidence that he sustained a compensable injury to his left elbow on December 2, 2008. The Full Commission reverses the opinion of the administrative law judge, and this claim is denied and dismissed.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. McKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

After my de novo review of the entire record, I must respectfully dissent from the majority opinion, as I would affirm and adopt the Administrative Law Judge's findings.

I find the claimant's testimony credible, that at the time of his injury, the focus was on his very painful shoulder and that while he was aware of and mentioned his elbow pain, his main concern was his elbow. This is consistent with his initial reports of shoulder and arm pain and with the medical record noting pain at his elbow. I

further find that the treatment of the claimant's shoulder, including narcotic pain medications and muscle relaxers from the day after the injury, would have masked the claimant's elbow symptoms. The claimant began complaining again of elbow pain after his shoulder surgery as he engaged in physical therapy for his shoulder and in resuming physical activities. The record supports a finding of causal connection among the claimant's injury on December 2, 2008, the pain he felt in his arm and elbow on December 3, 2008, the pain he and limited range of motion reported and observed on March 19, 2009, and the objective findings of crepitation on March 19, 2009 and popping observed by the physical therapist.

For the foregoing reasons, I must respectfully dissent from the majority opinion as I would award the claimant medical and indemnity benefits for his left elbow injury and an attorney's fee as well.

PHILIP A. HOOD, Commissioner