

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F906955

GERALD DURHAM,
EMPLOYEE

CLAIMANT

WHITE HALL SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED JANUARY 4, 2011

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

Claimant represented by the HONORABLE ANDY L. CALDWELL,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE CAROL LOCKARD
WORLEY, 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 June 16, 2010. The administrative law judge
found that the claimant proved 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 did not prove he
sustained a compensable injury.

I. HISTORY

Gerald Richard Durham, age 56, testified that he was an industrial arts instructor for White Hall School District. The parties stipulated that an employment relationship existed on November 24, 2008. The claimant testified on direct examination:

Q. What happened on November 24th, 2008?

A. We were operating a planer....it's a machine that has a big flat surface and the board goes in rough, and it comes out smooth, and it's got a little lip and it's got feed rollers that feed it in, a cutter head grabs it and cuts it smooth and then feeds it out, and it just doesn't always slide in so it's just very typical to - to grab the - underneath the table like that, catch the board right here and just kind of pull real hard.

Q. And you're motioning that you're catching the board right about your hip?

A. Yeah....I pulled that day and when I pulled, I was pulling with my arms, too, and I just felt some pain just in my shoulders and just like, oh, that hurt, you know.

THE COURT: Both shoulders?

A. Both shoulders. And didn't think anything of it. It wasn't crippling, didn't miss any work, but it was just a real hurting, and, then that night - this is right before Thanksgiving, seemed like that night, I just didn't sleep the whole night long, I hurt, hurt, hurt. And the next day, I told my principal, I said, Mr. Mitchell, I might - if this thing continues, I'm going to go to the doctor. And he said, well, you better fill out a

form. So I filled out a form and that was it....So I never did anything else about it.

The claimant signed a Form AR-N, Employee's Notice Of Injury, on November 25, 2008. The claimant wrote on the Form AR-N that he had injured his shoulder, and the claimant discussed the cause of injury: "I was pushing a bd through the planer & slipped."

The claimant signed a Form AR-C, Claim For Compensation, on August 3, 2009. In the Accident Information section of the Form AR-C, the claimant described the cause of accident: "Slipped while pushing a board through a wood planer." The Date of Accident appeared to be November 28, 2008.

The record indicates that the claimant began treating at Tucker Chiropractic on September 30, 2009. The Application For Treatment indicated that the claimant complained of pain in his right shoulder joint when he raised his arm. The claimant wrote that the cause of the problem was "Pushing a board through a planer," and that he became aware of the problem on November 24, 2008. Dr. Tucker's diagnosis was "Sh. pain MSSP."

Dr. David N. Collins examined the claimant on November 17, 2009:

Mr. Durham is a 55-year-old patient evaluated for left shoulder pain. His daughter is a nurse at St. Vincent. His PCP is Dr. Harris. He has had left far more significant pain than right. No particular event, incident or occurrence. It only hurts him when he abducts the arm. When he does, it is rather sharp pain....He split half a cord of wood this morning without difficulty. He senses some weakness. He has not had evaluation or treatment....

Cervical spine shows physiologic motion without provocation of neck, shoulder or arm pain. Right shoulder shows normal alignment, strength, stability, ROM, translations and peripheral neurovascular status. Left shoulder shows no atrophy. Motion is nearly full though some tightness at the extremes. He has pain as we go into the Hawkins maneuver and internal rotation and elevation in the lateral plane as well. The AC joint is nontender. Biceps intact. Power is satisfactory. Slight tendon signs supraspinatus. Peripheral neurovascular exam is intact.

IMAGING STUDIES: Plain films of the right shoulder show no abnormalities of the scapula, clavicle, humerus or glenohumeral joint. Left shoulder does not show enthesopathic change. There is no osseous change of the clavicle, scapula or humerus.

Dr. Collins' impression was "Left shoulder pain, chronic. Possible subacromial space disorder, rule out rotator cuff tear. RECOMMENDATION: Mr. Durham will have additional imaging. He will be followed accordingly."

An MR scan of the claimant's left shoulder was done on December 2, 2009, with the following findings:

There is minimal hypertrophic change of the acromioclavicular joint. There is only very mild increased signal intensity seen in the distal supraspinatus tendon consistent with tendinosis. I see no evidence for rotator cuff tear. No abnormalities are demonstrated of the glenoid labrum nor of the long head of the biceps.

IMPRESSION:

Mild hypertrophic change of the acromioclavicular joint with very mild tendinosis involving the supraspinatus tendon.

A pre-hearing order was filed on January 13, 2010. The claimant contended that he sustained "a specific injury to his shoulder while planing wood. Alternatively, he contends he developed a gradual shoulder injury. He seeks payment of medical treatment." The respondents contended that there were "no objective medical findings to substantiate a shoulder injury." The parties agreed to litigate the issue of "medical expenses."

After a hearing, an administrative law judge filed an opinion on June 16, 2010. The administrative law judge found that the claimant proved he sustained a compensable injury, and directed the respondents to pay medical expenses. 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) (Repl. 2002). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i) (Repl. 2002). Objective medical evidence is necessary to establish the existence and extent of an injury but not essential to establish the causal relationship between the injury and a work-related accident. *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 433, 990 S.W.2d 522 (1999).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i) (Repl. 2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

In the present matter, an administrative law judge found that the claimant proved he "sustained a compensable injury ... pursuant to Ark. Code Ann. §11-9-102." The Full

Commission reverses this finding. The claimant testified that, while operating a planer on November 24, 2008, he felt a pain in both shoulders after pulling a board. The claimant signed a Notice Of Injury on November 25, 2008 and reported that he had injured his shoulder while pushing a board through a planer. The claimant did not specify in the Notice which shoulder he had allegedly injured. Approximately nine months later, the claimant signed a Claim For Compensation and reported that he had slipped while pushing a board through a planer.

The claimant did not seek any medical treatment until September 30, 2009, at which time Dr. Tucker diagnosed shoulder pain. Dr. Collins saw the claimant on November 17, 2009 for shoulder pain primarily on the left. Dr. Collins noted that there had been "No particular event, incident or occurrence. It only hurts him when he abducts the arm." Dr. Collins diagnosed chronic left shoulder pain and did not attribute the claimant's condition to a work-related incident.

The Full Commission finds that the claimant did not prove he sustained a compensable injury. The claimant did not prove he sustained an accidental injury causing physical

harm to either shoulder. The claimant did not prove he sustained an injury to either shoulder which arose out of and in the course of employment or required medical services. The Full Commission recognizes the impression following the MRI scan of the claimant's left shoulder on December 2, 2009, to wit: "Mild hypertrophic change of the acromioclavicular joint with very mild tendinosis involving the supraspinatus tendon." We are unable to find that the impression of mild hypertrophic change and mild tendinosis on December 2, 2009 was in any way an objective medical finding establishing a compensable injury to either shoulder on November 24, 2008. The instant claimant did not establish the existence of a compensable injury to either shoulder by objective medical evidence. *Wal-Mart Stores, Inc., supra.*

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding. The Full Commission finds that the claimant did not prove he sustained a compensable injury. 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, because I find that the claimant proved by a preponderance of the evidence that he sustained a compensable injury on November 24, 2008, for which he is entitled to reasonable and necessary medical treatment at the respondents' expense.

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).

The claimant felt pain in his shoulder on November 24, 2008, which he reported the next day, verbally, and with a signed N Form. The N Form, dated November 25, 2009, stated that he hurt his shoulder when he was pushing a board through the planer and slipped. The C Form, dated August 3, 2009, stated that he was injured when he slipped while pushing a board through a wood planer. In a statement, dated August 5, 2009, to the adjustor in a separate claim, the claimant stated that he was pushing a board through a planer when he slipped. The claimant reported to Dr. Tucker, his chiropractor, on September 30, 2009, that he had shoulder pain after he pushed a board through a planer, on the job, on November 24, 2008. In the claimant's prehearing questionnaire, received by the Commission on October 7, 2009, he wrote that he pushed a board through a planer and hurt his shoulder and neck. Dr. Collins evaluated the

claimant on November 17, 2009. His report reflected no precipitating event. Lastly, the claimant described the circumstances of the injury at the hearing, explaining that he was operating a planer, which smooths boards. Often, he had to catch the board at the level of his hip and pull "real hard" with his arms to get the board out of the machine, but that, on November 24, he felt some pain in his shoulders when he pulled the board.

I find that the claimant has proven by a preponderance of the evidence that there was a specific incident on November 24, 2008, when he was operating a planer at work. The claimant's description of the injury was sufficiently consistent, in content and over time, to be credible. I note that the claimant did not always refer to slipping in his description, but he was clear that he was using the planer which caused his pain. He reported the exact same information in his N Form, his C Form, and his statement to the adjustor. I do not find the descriptions in Dr. Tucker's record and at hearing to be sufficiently different to impact the claimant's credibility. At hearing, the claimant was able to explain what occurred when he regularly used the planer in more detail. The fact that he

slipped was not mentioned, which is more reflective of the length of time that had passed since the injury than anything else, and why the completion of the N Form the day after the incident was important and so useful now. I find that the claimant proved by a preponderance of the evidence that the claimant sustained an injury arising out of and in the course of employment, caused by a specific incident, identifiable by time and place of occurrence.

I note that Dr. Collins evaluated the claimant on November 17, 2009. His report includes the phrase "no particular event, incident or occurrence." The record is insufficient to determine if the claimant was asked if the problem was work-related, if he responded or merely failed to respond at all, or how that information was obtained. In light of the claimant's otherwise consistent history, this phrase is not evidence of the cause or lack of cause of the claimant's shoulder problem.

The claimant testified, and the N Form corroborates, that he reported his injury the following day, stating that he had pain in his shoulders. The claimant consistently testified, and the medical records reflect, that his condition caused pain only in certain

circumstances, and that he was able to adjust his activities to limit his pain without interference with his work. He testified that he had never a shoulder injury before November 24, 2008, and that he had no other injuries affecting his shoulder before or after. The claimant also stated that, at first, he tolerated the pain, but then he decided to have it addressed during his summer vacation, so that he would not miss work. His request for treatment to the respondents was denied at the end of the 2009 school year. The claimant did seek treatment for his shoulder pain, which he related to the planer incident. The December 2009 MRI showed, objectively, that the claimant had hypertrophic change in his acromioclavicular joint with very mild tendinosis involving the supraspinatus tendon. As noted by the Administrative Law Judge and the respondents, hypertrophy means an enlargement, and tendinosis refers to inflammation or calcification. The findings of the MRI are clearly outside the control of the claimant. The claimant was not diagnosed with degenerative findings, nor was his MRI normal. While there are no pre-injury scans with which to compare post-injury scans, the record does show that the claimant's complaints in that shoulder arose on November 24,

2008 and not before, and that, since that time, they have not resolved. The claimant has demonstrated that the November 24, 2008 injury caused internal physical harm to the body which required medical services, established by medical evidence supported by objective findings.

On the issue of objective findings, the majority states that the MRI findings were not "in any way an objective medical finding establishing a compensable injury." This is an inappropriate expansion of the requirements of the Arkansas Workers' Compensation Act, which states that a "compensable injury must be established by medical evidence supported by objective findings as defined in subdivision (16) of this section." Ark. Code Ann. Section 11-9-102(4)(D). Objective evidence is not required to establish the injury, but only to support the evidence which does establish the injury. Objective findings are simply those findings which cannot come under the voluntary control of the patient according to Ark. Code Ann. Section 11-9-102(16)(A)(i). Therefore, the Commission is expected to look to the medical evidence, which must include objective findings, to establish an injury. In this claim, there is a previously asymptomatic patient, who

experienced pain during a specific work activity, which did not resolve. This pain was localized in his shoulders and specific to certain movements. Based upon the claimant's history and examination, Dr. Tucker, a chiropractor, assessed shoulder pain. Dr. Collins evaluated the claimant's left shoulder, assessing chronic left shoulder pain, with a possible subacromial space disorder and possible rotator cuff tear. He planned further imaging, which showed hypertrophic change of the acromioclavicular joint with tendinosis involving the supraspinatus tendon. Taken as a whole, the medical evidence, which includes, but is not limited to the objective findings in the MRI, shows the presence of a shoulder problem. The majority's expectation that objective findings alone must establish the injury is unsupported by the Act and is inappropriate.

I observe that there was a notation that the claimant complained of his right shoulder to Dr. Tucker, and that he was treated for his left shoulder. This is not evidence negatively affecting his credibility. In fact, during the hearing, the claimant admitted to confusing his right and left shoulders during the deposition. The claimant's credibility suffers no tarnish because of a

simple confusion of right versus left, when the record showed that the claimant gestured to the left even when he referred to the right and that his physicians were focused on his left as well.

I find that the claimant has established a compensable injury, the treatment of which is the responsibility of the respondents. I also find that the claimant requested treatment at the end of the school year, which was denied.

For the foregoing reasons, I must respectfully dissent from the majority opinion.

PHILIP A. HOOD, Commissioner