

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G010207

CLARENCE JONES,
EMPLOYEE

CLAIMANT

RHEEM MANUFACTURING,
EMPLOYER

RESPONDENT

OLD REPUBLIC INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 5, 2011

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

Claimant represented by the HONORABLE GUNNER DELAY,
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE DIANE GRAHAM,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed June 29, 2011. 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 February 16, 2011, and contained in a pre-hearing order filed February 24, 2011, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that his left shoulder injury is compensable.

3. The claimant has failed to prove by a preponderance of the evidence his entitlement to any benefits in this matter.

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.

The claimant alleges that he sustained compensable injuries that are governed by the Arkansas Workers' Compensation Act, A.C.A. § 11-9-101 et seq. The claimant's alleged injuries are, indeed, injuries that are covered by the Act; however, the claimant has failed to establish the elements necessary to prove these compensable injuries by a preponderance of the evidence.

Therefore we affirm and adopt the June 29, 2011 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 dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. After a de novo review of the record, I find that the claimant sustained a compensable left shoulder specific incident aggravation injury on September 13, 2010.

In workers' compensation law, an employer takes the employee as he finds him, and employment circumstances that aggravate pre-existing conditions are compensable. Heritage Baptist Temple v. Robison, 82 Ark. App. 460, 120 S.W. 3d 150 (2003). An aggravation of a pre-existing non-compensable condition by a compensable injury is itself compensable. Oliver v. Guardsmark, 68 Ark. App. 24, 3 S.W.3d 336 (1999). An aggravation is a new injury resulting from an independent incident. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W. 3d 900 (2000). An aggravation, being

a new injury with an independent cause, must meet the definition of a compensable injury in order to establish compensability for the aggravation. Farmland Ins. Co. v. Dubois, 54 Ark. App. 141, 923 S.W. 2d 883 (1996).

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(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).

A pre-existing disease or infirmity does not disqualify a claim if the employment aggravated, accelerated, or combined with the disease or infirmity to produce a disability for which compensation is sought. Nashville Livestock Commission v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990); Minor v. Poinsett Lumber &

Manf. Co., 235 Ark. 195, 357 S.W.2d 504 (1962); St. Vincent Medical Center v. Brown, 53 Ark. App. 30, 917 S.W.2d 550 (1996).

The claimant is a 60-year-old machine operator who has worked for the respondent for the past 35 years. During that time, the claimant worked 8 years as an assembler and 27 years in the press department. The claimant described his job as a press operator as follows:

Q. Okay, describe for the Judge your work duties and responsibilities as a - in the press department.

A. Well, I was press operator and my job is to take a piece of raw material and put in a dye and I would press either palm buttons on the press or buttons on the pedestal and it would cycle the press and the press - the dye would form the part and I'd take part out and stack in either baskets or on super skids, just depending on what size the part was. Some parts would be large. Some parts would be small.

According to the claimant, in September of 2010, the machine press he was operating was forming some very large and heavy parts. He described the parts he was working with as roughly the size of a door. According to the claimant, his machine would put a break in the part, and he then had to flip and turn it. He

said that, on September 13, 2010, he was working with these parts and felt a pop in his left shoulder, followed by persistent pain. This 35-year veteran felt like he could continue to work through the pain until it got better. He testified, "I wanted to just continue cause I felt like I could work it off as I'd been doing over the years. That's why I didn't quit the first day...."

In the days and weeks that followed, the claimant developed persistent numbness in his shoulder, arm, and hand, that continued to worsen to the point that he could not feel anything in his hand. The symptoms down his arm became so severe that he thought he may be having cardiac symptoms. He reported these symptoms to the VA, and was scheduled for a stress test to rule out the possibility of heart problems. The stress test came back negative.

On September 30, 2010, the claimant reported to the VA clinic for treatment related solely to his shoulder problem. The progress note from that visit reflects two important points; one, that the claimant reported that his symptoms had been present for the past three weeks; and two, he denied any similar symptoms in the past. The VA diagnosed the claimant as having left

shoulder arthralgia and chronic rotator cuff disease. It was recommended that he schedule a follow-up visit with his primary care physician.

On October 5, 2010, the pain finally got so bad that the claimant reported his injury to his supervisor, Todd Allen, who then sent him to the company doctor. According to the respondent's Patient Assessment Form, the claimant reported that his pain began three weeks ago and it came on gradually due to strenuous work, lifting and pulling heavy baskets of parts over the years. It further stated that the pain had become worse since it started. Specifically, he described the pain as "unbearable pain in back of shoulder blade and numbness in left arm."

Dr. Lloyd's notes reflect that the claimant had pain off and on over the years, but he just kept working. He noted, "Pain worse over past 3 wks. - went to V.A. PCP." That same day, the respondent required him to complete an AR-N form. That form reflects an injury date of 9/13/10 and that he hurt his shoulder by "lifting and pulling along with reaching and pulling formed parts out of press dies."

There is an October 15, 2010 MRI which indicates that we are dealing with an aggravation injury:

IMPRESSION:

1. Chronic complete tears of the supraspinatus and infraspinatus tendons with a high humeral head. There is a partial tear suspected in the infraspinatus tendon and there is no intact long head of the biceps tendon identified.
2. Chronic overgrowth and acute edema of the acromioclavicular joint.
3. Bony overgrowth as well as acute edema involving the anterolateral aspects of the humeral head and the inferomedial anterior aspect of the humeral head all of which is presumably related to degenerative change (bone on bone). There is no acute fracture plane identified.

In this case, it is interesting that the Administrative Law Judge, affirmed and adopted by the majority, did not find that the claimant failed to prove his condition was work related. In fact, in his decision, he twice expressed his opinion that the claimant's left shoulder injury was due to "long term heavy use" he experienced on the job. Yet, in spite of that opinion, he found that the claimant failed to meet the statutory definition of a compensable injury.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, 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).

It is clear that the Administrative Law Judge, affirmed and adopted by the majority, ignored two critical points in concluding that the claimant failed to meet his burden of proof. First, he failed to take account of the objective medical findings that showed the claimant's injury was recent in nature. For instance, the MRI report cited above stated that, in

addition to the chronic complete tears of the supraspinatus and infraspinatus tendons, there was evidence of a "partial tear suspected in the infraspinatus tendon" and "no intact long head of the biceps tendon." There is no suggestion that either one of these findings is long-standing in nature. In addition, the radiologist commented that there was acute edema present in the joint. Thus, it was the opinion of the radiologist that the swelling present in the joint was of recent onset. Second, the claimant gave credible testimony as to how the injury occurred. Third, the medical record corroborates the claimant's credible testimony.

The Administrative Law Judge, affirmed and adopted by the majority, dismissed the aggravation claim without making any findings, other than to state: "It is much more likely that the claimant's current condition is due to long-term heavy use of his left shoulder rather than a compensable aggravation injury." As stated above, the employer takes the employee as it finds them, and the Administrative Law Judge is probably correct that most of the damage to the claimant's shoulder came from working for the respondent. But the Administrative Law Judge cannot ignore the acute

findings on the MRI, the claimant's credible testimony, and the corroborating medical record, all indicating that the claimant sustained a compensable specific incident aggravation injury on September 13, 2010.

For the aforementioned reasons, I must respectfully dissent.

PHILIP A. HOOD, Commissioner