

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NOS. G902953 & H000123**

<b>LONNIE ECHOLS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>NUCOR YAMATO STEEL CO., EMPLOYER</b>	<b>RESPONDENT</b>
<b>ARCH INSURANCE CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 22, 2021**

Hearing before Chief Administrative Law Barbara Webb<sup>1</sup> on November 6, 2020, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Ms. Laura Beth York, Attorney-at-Law, Little Rock, Arkansas.

Respondents represented by Mr. Zachary F. Ryburn, Attorney-at-Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On November 6, 2020, the above-captioned claim was heard in Jonesboro, Arkansas. A prehearing conference took place on September 22, 2020. A Prehearing Order entered on September 23, 2020, pursuant to the conference, was admitted without objection as "Commission Exhibit 1." At the hearing, the parties confirmed that the stipulations and issues, and respective contentions, as amended, were properly set forth in the order.

**Stipulations**

At the hearing, the parties discussed the stipulations set forth in "Commission Exhibit 1." With the amendment of the third stipulation, they are the following, which I accept:

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<sup>1</sup>Upon Chief Judge Webb's departure from the Commission, this matter was reassigned, without objection, to the undersigned in order to write this opinion.

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employee/employer/carrier relationship existed at all times pertinent hereto.
3. Claimant's average weekly wage entitles him to the maximum compensation rates.

Issues

At the hearing, the parties discussed the issues set forth in "Commission Exhibit 1." After amendments of the first and third issues at the hearing, the following were litigated:

1. Whether Claimant sustained a compensable injury to his left shoulder by specific incident, by gradual onset, or as a compensable consequence of his earlier right shoulder injury.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to temporary total disability benefits from November 22, 2019, to a date yet to be determined.
4. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following an amendment at the hearing, are as follows:

Claimant:

1. On April 24, 2019, Claimant was lifting items at work and injured his right shoulder. Respondents accepted this claim and provided benefits. The Claimant underwent surgery to his right shoulder on July 17, 2019, and was released to full-duty work with a four percent (4%) impairment rating on October 21, 2019.
2. On October 28, 2019, Claimant was lifting heavy items at work and injured his left shoulder. The Respondents denied this claim; and Claimant has treated on his own. An MRI revealed a tear; and on February 21, 2020, he underwent surgical repair.
3. Claimant contends that he sustained a compensable left shoulder injury in the scope and course of employment and that he is entitled to temporary total disability benefits, medical benefits, and a controverted attorney's fee. All other issues are reserved.

Respondents:

1. Respondents will assert the following defenses: The Claimant did not suffer a compensable work-related injury. He did not report the accident to the employer. He initially said that the condition was a gradual injury.

His job does not involve rapid and repetitive activity. Respondents do not think Claimant's left shoulder condition is a compensable consequence of the right shoulder injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has not proven, by a preponderance of the evidence, that he sustained a compensable injury his left shoulder by specific incident.
4. Claimant has not proven, by a preponderance of the evidence, that he sustained a compensable injury his left shoulder by gradual onset.
5. Because the parties have not stipulated that Claimant sustained a compensable right shoulder injury and/or made the compensability of such an injury an issue in this proceeding, the issue of whether Claimant sustained an injury to his left shoulder that is a compensable consequence

of his purported right shoulder injury cannot be addressed herein. Instead, it will be considered a reserved issue.

6. Because of Findings/Conclusions Nos. 3-5 *supra*, the remaining issues—whether Claimant is entitled to reasonable and necessary treatment, temporary total disability benefits, and a controverted attorney’s fee—are moot and will not be addressed.

### **CASE IN CHIEF**

#### Summary of Evidence

Claimant was the sole witness at the hearing.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were “Claimant’s Exhibit 1,” a compilation of his medical records, consisting of two abstract/index pages and 29 numbered pages thereafter; and “Claimant’s Exhibit 2,” case management notes, consisting of one index page and six numbered pages thereafter.

#### Adjudication

##### A. Compensability

In this action, Claimant has alleged that he suffered a compensable injury to his left shoulder. In doing so, he has posited that the occurred one of three ways: (1) by specific incident; (2) by gradual onset; or (3) as a compensable consequence of his purported right shoulder injury.

He testified that he has worked for Respondent-Nucor since 1996. Claimant worked in the refractory area of the steel mill as a fire bricker. He described his work there:

It's one of the most physical jobs at Nucor. We have these big pots that's, probably, 125 tons. They are round. That's all. Twenty-five feet tall, and it's so big, probably, four people can get on the inside of these pots. So we have these pallets of brick that we lay in them. So It's about 200 something bricks on a pallet of brick and we, like I say, we pick up a pallet of bricks, put it on the pallet jack, and we lift it up with a crane and put it right in the middle of the ladle that we gonna brick, and it's about three of us. We get inside the ladle, and the brick that we are using is like a fire brick to keep the steel contained in the ladles. So the brick has got a angle on each end; so they connect and bond together with each other. So we pretty much take the brick off the pallet stand. The brick weighs, probably, 25—25 pounds. We use two different types of bricks with the 25 pounds and the other bricks is, probably, 32 to 35 pounds that we use to put in the ladle. So we just take the bricks off the pallet stand and just lay them against the wall, all the way up to the top of the ladle.

According to Claimant, 25-pound bricks are laid inside the ladle until they reach halfway up. Thereafter, the heavier bricks are used. A floor jack raises Claimant and one or two other members of the bricking crew and enables them to complete the bricking all the way to the top of the inside of the ladle.

Claimant's testimony was that on April 24, 2019, he was lifting a bucket of mortar that weighed 50 to 55 pounds when he felt a pop and ensuing pain in his right shoulder. He was ultimately diagnosed as having a rupture of his biceps tendon and underwent surgery to repair it on July 17, 2019. Thereafter, on October 23, 2019, he was released to full duty with an impairment rating of four percent (4%) to the body as a whole. Meanwhile, on September 23, 2019, he had returned to his old job. He related that he

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began experiencing “a lot of soreness” in the left shoulder; and it led him on October 28, 2019, to report it to his supervisor.

Specific Incident. With respect to Claimant’s specific-incident injury theory, Arkansas Code Annotated §11-9-102(4)(A)(i) (Repl. 2012) 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**[.] (Emphasis added)

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4)(D) (Repl. 2012). “Objective findings” are those findings that cannot come under the voluntary control of the patient. *Id.* §11-9-102(16). The element “arising out of . . . [the] employment” relates to the causal connection between the Claimant’s injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a Claimant’s employment “when a causal connection between work conditions and the injury is apparent to the rational mind.” *Id.*

If the Claimant fails to establish, by a preponderance of the evidence, any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009

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Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the Claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

In *Edens v. Superior Marble & Glass*, 346 Ark. 487, 58 S.W.3d 369 (2001), the Arkansas Supreme Court held that to be "identifiable by time and place of occurrence," a Claimant does not have to "identify the precise time and numerical date upon which an accidental injury occurred. Instead, the statute only requires that the Claimant prove that the occurrence of the injury is capable of being identified." However, the court was quick to add that the Commission could take into account the inability of a Claimant to specify the date of the alleged accident in weighing the credibility of the evidence. *Id.*

In this case, Claimant has not identified any specific incident as the cause of his alleged left shoulder injury. Initially, he testified that on or about October 28, 2019,

I started feeling discomfort in my left shoulder, I don't recall what I was carrying or—but I start feeling—we used so many different materials, and have to do a lot of shoveling in the bottom of the ladle. So I don't recall exactly what I was carrying, when I hurt my left shoulder, but I felt a lot of discomfort in my left shoulder.



But on cross-examination, Claimant made clear that he could not even point to October 28, 2021, as the date when his shoulder began bothering him. The following exchange took place:

Q. Okay. Now, when you returned to work with your right shoulder, when did your left shoulder pain begin?

A. I reported it on the 23<sup>rd</sup>. So like I said, I was having a lot of soreness in my shoulder; so I don't recall when that exact pain started happening, but that's when I reported it on the 23<sup>rd</sup>.[.]

Q. Okay. And let me clarify that 23<sup>rd</sup>. You reported it on October 23<sup>rd</sup>?

A. Yes.

Q. That's a month after returning to work?

A. Yes.

Q. Okay. But throughout that month, the pain in your left shoulder increased, is that correct?

A. Yes, it is.

Q. Okay. And I'm assuming it was a minor pain at first, and a major pain by the end of that time period, the few months that you worked?

A. Yes, sir.

It is not the October 23 versus October 28 discrepancy that is truly problematical, since *Edens, supra*, provides that a particular date does not have to be identified. However, the Claimant must show that the specific incident that caused the injury is capable of being identified. The above testimony shows that this cannot be done. No

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incident at all has been alluded to or identified. Consequently, Claimant cannot prove that he sustained a compensable left shoulder injury by specific incident.

Gradual Onset. With regard to this injury theory, Ark. Code Ann. § 11-9-102(4)(A)(ii) & (a) (Repl. 2012) reads:

(ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident and is identifiable by time and place of occurrence, if the injury is:

(a) Caused by rapid repetitive motion.

In addition to rapid repetitive motion, a Claimant seeking workers' compensation benefits for a gradual-onset injury must prove that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; and (3) the injury was the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4)(A)(ii) & (E)(ii) (Repl. 2012). In *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998), the Arkansas Supreme Court held that there is a two-part test for determining whether an injury is caused by rapid repetitive motion: (1) the tasks must be repetitive, and (2) the repetitive motion must be rapid. If the first element is not met, the second is not reached. *Id.*; *Westside High School v. Patterson*, 79 Ark. App. 281, 86 S.W.3d 412 (2002). Moreover, “even repetitive tasks and rapid work, standing alone, do not satisfy the definition. The repetitive tasks must be completed rapidly.” *Malone, supra*.

On cross-examination, Claimant testified that “[w]henver we [he and the other fire brickers] get tired, that’s when we take a break.” The following exchange took place:

Q. When you returned back to work, were you working slower than you were previously, previous to your right injury?

A. Yes, all of us work at a comfortable speed. We never—we never get in a hurry.

Later, he elaborated on this: “[W]henver we did, the job got done at the end of the day; so that’s all that matters that the job got done. It don’t matter if it’s a fast or slow, the job, eventually, got done.”

In light of the above, Claimant cannot establish that job entailed rapid repetitive motion, because the laying of the bricks, while arguably a repetitive task, was not performed rapidly under *Malone, supra*. Thus, he has not proven that he sustained a compensable injury to his left shoulder by gradual onset.

Compensable Consequence. Finally, Claimant has posited that his alleged left shoulder injury is a compensable one because it is a compensable consequence of his purported right shoulder injury that he sustained in April 2019.

If an injury is compensable, every natural consequence of that injury is likewise compensable. *Air Compressor Equip. Co. v. Sword*, 69 Ark. App. 162, 11 S.W.3d 1 (2000); *Hublely v. Best West. Governor’s Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The test is whether a causal connection between the two episodes exists. *Sword, supra*; *Jeter v. McGinty Mech.*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). The existence

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of a causal connection is a question of fact for the Commission. *Koster v. Custom Pak & Trissel*, 2009 Ark. App. 780, 2009 Ark. App. LEXIS 947. It is generally a matter of inference, and possibilities may play a proper and important role in establishing that relationship. *Osmose Wood Preserving v. Jones*, 40 Ark. App. 190, 843 S.W.2d 875 (1992). A finding of causation need not be expressed in terms of a reasonable medical certainty where supplemental evidence supports the causal connection. *Koster, supra*; *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003).

As *Sword, supra*, specifies, the *sine qua non* of a compensable consequence is the compensability of the original injury—which in this case is the purported right shoulder injury. But the parties have not stipulated to the compensability of such an injury. Moreover, the Commission in this proceeding has not been asked to make that determination; whether Claimant sustained a compensable right shoulder injury is not among the enumerated issues. The issue cannot be addressed *sua sponte*. See *Carthan v. School Apparel, Inc.*, 2006 AWCC 182, Claim No. F410921 (Full Commission Opinion filed November 28, 2006)(improper for administrative law judge to address issues *sua sponte*); *Singleton v. City of Pine Bluff*, 2006 AWCC 34, Claim No. F302256 (Full Commission Opinion filed February 23, 2006), *rev'd on other grounds*, No. CA06-398 (Dec. 6, 2006) (unpublished)(same).

Because the compensability of Claimant's alleged right shoulder injury cannot be resolved in this proceeding, the issue of whether Claimant sustained an injury to his left

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shoulder that was a compensable consequence of that supposed right shoulder injury cannot be addressed. Instead, this particular issue will be considered reserved.

B. Remaining Issues

Because of the foregoing, the remaining issues—whether Claimant is entitled to reasonable and necessary medical treatment, temporary total disability benefits and a controverted attorney’s fee—are moot and will not be addressed.

**CONCLUSION**

In accordance with the findings of fact and conclusions of law set forth above, these claims are hereby denied and dismissed.

**IT IS SO ORDERED.**

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Honorable O. Milton Fine II  
Chief Administrative Law Judge