

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. G902953 & H000123

LONNIE ECHOLS, EMPLOYEE	CLAIMANT
NUCOR YAMATO STEEL CO., EMPLOYER	RESPONDENT
ARCH INSURANCE CO., CARRIER	RESPONDENT

AMENDED OPINION FILED JULY 14, 2021

Hearing before Chief Administrative Law Barbara Webb¹ 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.

¹Upon Chief Judge Webb's departure from the Commission, this matter was reassigned, without objection, to the undersigned in order to write the opinion. The original opinion was issued pursuant thereto on February 22, 2021. That was appealed, and the Full Commission remanded the case to the undersigned to address the issue concerning whether Claimant sustained an injury to his left shoulder that was a compensable consequence of his right shoulder injury that Respondents accepted as compensable. *Lonnie Echols v. Nucor Yamato Steel Co.*, 2021 AR Wrk. Comp. LEXIS _____, Claim Nos. G902953 & H000123 (Full Commission Opinion filed June 17, 2021).

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:

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.

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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. 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: 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 to his left shoulder by specific incident.
4. Claimant has not proven by a preponderance of the evidence that he sustained a compensable injury to his left shoulder by gradual onset.

5. Claimant has proven by a preponderance of the evidence that he sustained an injury to his left shoulder that is a compensable consequence of his right shoulder injury that Respondents accepted as compensable.
6. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable left shoulder injury.
7. Claimant has proven by a preponderance of the evidence that the treatment of his compensable left shoulder injury that is in evidence was reasonable and necessary.
8. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from November 23, 2019, to a date yet to be determined.
9. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee on the indemnity benefits awarded herein.

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 injury 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 Yamato Steel (“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[n] 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 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*

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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 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 23rd. 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 23rd[.]

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

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.

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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, 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 incident at all has been alluded to or identified. Consequently, he 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]henever 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]hatever 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 right shoulder injury that Respondents accepted 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 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).

A compensable consequence must be established utilizing all of the statutory elements of compensability. *Burkett v. Tiger Mart, Inc.*, 2009 AR Work. Comp. LEXIS 472, Claim No. F608022 (Full Commission Opinion filed May 4, 2009), *aff'd in part and rev'd in part on other grounds*, 2009 Ark. App. 93, 304 S.W.3d 2; *Jones v. B.A.E. Sys.*, 2004 AR Work. Comp. LEXIS 123, Claim Nos. F001696 & F212243 (Full Commission Opinion filed May 6, 2004). This includes the requirement that there be medical

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evidence of an injury support by objective findings. *Malone v. Mid-South Mfg., Inc.*, 2003 AR Work. Comp. LEXIS 638, Claim No. F100223 (Full Commission Opinion filed April 28, 2003).

With respect to objective findings, the December 24, 2019, left shoulder MRI—the report of which is in evidence—supplied this. The MRI revealed, *inter alia*, (1) a partial-thickness tear of the supraspinatus along with a tiny partial-thickness/rim rent tear of the insertional fibers and a small partial-thickness/intra-substance tear of the subscapularis, (2) moderate glenohumeral joint effusion, (3) findings consistent with a tear of the superior to posterior glenoid labrum, and (4) a partial-thickness tear of the intra-articular segment long head of the biceps.

It is apparent that the left shoulder condition is causally related to Claimant's compensable right shoulder injury. As discussed above, Claimant's job at Respondent Nucor entailed repetitive, heavy lifting. This included laying bricks weighing from 25 to 35 pounds inside a pouring ladle. His testimony was that once he returned to work in September 2019, he began having problems with his left shoulder. While he did not recall exactly what he was lifting at work when his left shoulder pain became excruciating, it did so while he was lifting something there. Claimant is right-handed. He stated:

When I returned to work, I returned to the bricker stand, a release to full duty and I was—I guess, I was trying to baby my right arm, because it was still hurting. So I was doing a lot of the work using my left—my left arm and shoulder[.]

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I credit the foregoing. The evidence establishes that this overuse of or favoring his left shoulder on the job was the cause of the injury to it. In sum, Claimant has proven by a preponderance of the evidence that he sustained an injury to his left shoulder that was a compensable consequence of his right shoulder injury that Respondents accepted as compensable.

B. Medical Treatment

Introduction. Claimant has contended that he is entitled to reasonable and necessary medical treatment of his left shoulder injury. Respondents disagree.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

Discussion. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable left shoulder injury as set out in the above-quoted statute. Moreover, I have reviewed Claimant's Exhibit 1, and I find that all of the treatment of this injury reflected therein was reasonable and necessary.

C. Temporary Total Disability

Introduction. Claimant has also argued that he is entitled to temporary total disability benefits from November 22, 2019, to a date yet to be determined. Respondents dispute this.

Standards. The compensable left shoulder injury is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). A claimant who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Discussion. Claimant's testimony was that he last worked for Nucor somewhere between November 19 and 22 of 2019. He was definitely no longer working as of November 23, 2019, and it was "[b]ecause the pain was so bad, [he] couldn't do [his] job." The evidence shows that the pain to which he is referring was located in his left

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shoulder. Claimant related that no light duty work was available for him there at that time. I note that the evidentiary record does not include any off-work slips for the time period at issue. But as the Arkansas Court of Appeals found in *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.3d 899 (2002), an off-work slip is not required to show that a claimant is unable to work.

Dr. Matthew Baker, the physician who operated on Claimant's left shoulder on February 21, 2020, has not released him. In fact, according to Claimant, he is still treating with him. I credit this. The evidence preponderates that Claimant began suffering a total incapacity to earn wages on November 23, 2020, and that this period was still continuing as of the date of the hearing. During that same time frame, he had not yet reached the end of his healing period. Thus, he has proven, by a preponderance of the evidence, that he is entitled to temporary total disability benefits from November 23, 2019, to a date yet to be determined.

D. Attorney's Fee

Respondents have controverted Claimant's entitlement to temporary total disability benefits. His counsel is thus entitled to a controverted attorney's fee on all indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid

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in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a twenty-five percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by Claimant and one-half (1/2) to be paid by Respondents, in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012). *See Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

Honorable O. Milton Fine II
Chief Administrative Law Judge