

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H002384

BRANDON KAMER, EMPLOYEE	CLAIMANT
PRODUCERS RICE MILL, INC., EMPLOYER	RESPONDENT
LIBERTY MUTUAL GROUP, CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 24, 2021

A hearing was held before ADMINISTRATIVE LAW JUDGE KATIE ANDERSON, in Pine Bluff, Jefferson County, Arkansas.

Claimant was represented by Mr. Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents were represented by Mr. Rick Behring, Jr., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-captioned claim on August 26, 2021, in Pine Bluff, Jefferson County, Arkansas. A Prehearing Order was previously entered in this case on July 14, 2021. The Prehearing Order has been marked as Commission's Exhibit #1 and was made a part of the record without any objection from the parties.

Stipulations:

During the prehearing telephone conference and/or during the hearing, the parties agreed to the following stipulations. They read:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer-employee relationship existed on January 22, 2020, when Claimant sustained compensable work-related injury to his left shoulder.
3. Respondents have accepted this claim and paid some benefits in the form of medical treatment and temporary total disability (TTD).

4. The parties will stipulate to an average weekly wage and compensation rates at or before the hearing.¹
5. Claimant's treating physician, Dr. David Wassell, released Claimant at maximum medical improvement with no work restrictions and no impairment on September 14, 2020.
6. Claimant has returned to work for Producers Rice Mill.

Issues:

The parties agreed to litigate the following issue:

1. Claimant's entitlement to an Independent Medical Evaluation (IME).

Contentions:

The following contentions were submitted by the Claimant:

Claimant contends that he sustained a compensable injury to his left shoulder in the course and scope of his employment on January 22, 2020, when pulling on a twenty-four (24)-foot screed board while leveling concrete. Claimant suffered a complete rotator cuff tear of the left shoulder. Claimant is under the treatment of Dr. Wassell, who performed surgery on April 16, 2020. Dr. Wassell placed him at MMI with zero (0) impairment on September 14, 2020. Claimant contends that he is entitled to an impairment rating pursuant to the *Guides*.

1. Arkansas law clearly permits for an IME in this case. Ark. Code Ann. § 11-9-511 provides:
 - a) An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission...
 - b) The places of examination and treatment shall be reasonably convenient for the employee.
2. An IME is reasonable and necessary in this case in that Claimant has documented signs, symptoms and findings that are ratable pursuant to the *Guides to the Evaluation of Permanent Impairment*, 4th Edition, and there are inconsistent medical opinions as to the appropriate degree of permanent impairment. Dr. Baskin is a physical medicine

¹ At the hearing, the parties agreed that Claimant's average weekly wage and compensation rates were not relevant to the issue to be litigated and, thus, were not addressed at the hearing.

and rehabilitation expert with great experience in assessing permanent impairment under the Arkansas Workers' Compensation Act. Alternatively, Claimant requests that the Commission select and assign another physician for the IME.

Claimant requests that the Commission order an Independent Medical Examination with Dr. Barry Baskin, or another independent doctor chosen by the Commission, to determine the nature and extent of Claimant's permanent impairment. All other issues are reserved.

Claimant's attorney made additional contentions at the hearing. Specifically, counsel stated: "And, Your Honor, and I don't think it's actually spelled out in the contentions that are set forth in our prehearing questionnaire. Specifically, it's addressed in my email of August 10th. But it's our position that this case is like Ira Pollins v. Union County Highway Department which is G904646, which is a . . . and that was a very similar case, same fact pattern. The claimant had had surgery to his shoulder, was released with no restrictions and no impairment. Judge Pickens in that case held that an independent medical examination was reasonable and necessary in connection with determining the nature and extent of the impairment. The Full Commission affirmed it, and that's the basis for that. And I think we've talked briefly off the record, but I'm certainly willing to offer a brief in support of our position in this case."

The following contentions were submitted by the Respondents:

Respondents accepted as compensable a left shoulder injury arising from a specific incident on January 22, 2020. Respondents have provided all appropriate benefits to date and no benefit has been controverted.

Claimant returned to work for the respondent-employer with no work restrictions or accommodations.

Claimant's treating physician, Dr. Wassell, released the claimant at MMI with no work restrictions on September 14, 2020. After performing a physical examination, Dr. Wassell

concluded that Claimant had not suffered any permanent anatomical impairment as a result of the specific incident on January 22, 2020.

Claimant has not used his change of physician request.

To the extent Claimant requests Respondents pay for an IME, Respondents object. Claimant has not proven an IME is reasonable and necessary in this claim. Dr. Wassell noted that he performed a physical examination and found no functional impairment. Claimant incorrectly presumes that, because a surgery was performed, he is automatically entitled to an impairment rating. Moreover, Claimant has not utilized his change of physician. Respondents contend that Claimant cannot force Respondents to pay for an IME (of Claimant's choosing) simply because he is unhappy with the opinions of his treating physician.

Respondents contend that Claimant is responsible for the payment of an IME pursuant to Ark. Code Ann. § 11-9-511(c) ("Such physician as the employee...may select and **pay for** may participate in the examination if the employee...so requests").

In the alternative, to the extent Claimant requests Respondents pay for his requested IME, Respondents object to an IME with Dr. Barry Baskin.

In the alternative, if it is determined Claimant is entitled to any additional indemnity benefits, Respondents hereby request a set off for all benefits paid by Claimant's group health carrier, all short-term disability benefits received by Claimant, all long-term disability benefits received by claimant, and all unemployment benefits received by Claimant.

At the hearing, Respondents also offered additional contentions. Respondents added their contention that this case is similar to Mary Livingston v. AR Healthcare Personnel, Inc., claim number G806988.

Respondents reserve the right to supplement and/or amend their contentions to assert any applicable defense prior to the Full Hearing.

Summary of Evidence:

The record consists of the hearing transcript of February 25, 2021, and the exhibits contained therein. Specifically, the following exhibits have been made a part of the record: Commission's Exhibit #1 included the Prehearing Order entered on July 14, 2021, and the parties' responsive filings; Claimant's Exhibit #1 consisted of eighty-eight (88) pages of medical records; Respondents' Exhibit #1 consisted of five (5) pages of medical records, specifically a report from Dr. Wassell; Respondents' Exhibit #2 consisted of five (5) pages of Arkansas Game and Fish Commission records². The parties' post-hearing briefs, both filed on September 27, 2021, and both consisting of five (5) pages, have been blue-backed and marked as Commission's Exhibit #2.

Witnesses:

During the hearing, Brandon Kamer (Claimant, used interchangeably herein) and Clay Kannada, construction crew manager at Producers Rice Mill, were the only witnesses to testify.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witnesses and observe their 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 of this claim.
2. I hereby accept the aforementioned stipulations as fact.

² Claimant objected to Respondents' Exhibit #2 on the basis of relevance; however, the objection was overruled.

3. Claimant failed to prove by a preponderance of the evidence that an independent medical examination/IME is reasonable and necessary per Ark. Code Ann. § 11-9-511(a) for the assessment of a permanent anatomical impairment rating due to his left shoulder injury of January 22, 2020.

CASE IN CHIEF

Hearing Testimony:

Claimant:

Claimant testified that on January 22, 2020, he sustained an injury to his left shoulder in the course and scope of his employment while working on a concrete/maintenance crew for Producers Rice Mill. Claimant was still employed with Respondent-Employer at the time of the hearing.

Claimant testified that he underwent treatment for his left shoulder injury, most recently from Dr. David Wassell, who performed shoulder surgery on Claimant's left shoulder. Dr. Wassell released Claimant in September of 2020. Claimant testified that at the time Dr. Wassell released him, he was still having left shoulder symptoms, including decreased range of motion and loss of strength.

Claimant also stated that at the time of the hearing he was unable to raise his arm above his head or chest and that he could not lift as much weight as before the injury. Claimant testified that despite his left shoulder issues, he had returned to work for Respondent-Employer at full duty; that he was able to perform his normal job duties; and that he had since received an increase in pay. He confirmed that Respondent-Employer had not made any accommodations to his duties since his return to work and that he would ask for help when he needed it.

When questioned regarding Claimant's hunting activities since his left shoulder injury, Claimant admitted that he had been untruthful in his deposition testimony when he stated that he had not been able to hunt since his injury. Claimant further admitted that, he had, in fact, killed a

deer since his left shoulder injury. Claimant stated that he killed the deer with a bow and that he used his nephew's forty-five (45) pound compound bow to kill the deer. Claimant explained that he had to use his nephew's bow because his bow was "too hard to pull back."

Lastly, Claimant testified that he had not undergone an evaluation to determine the nature and extent of his range of motion or the extent of any limitations on lifting.

During cross-examination, Claimant testified that, since being released by Dr. Wassell in September of 2020, he had not sought additional medical treatment; he had not scheduled any additional medical appointments; and he had not taken any prescription medication for his left shoulder injury. Claimant confirmed that Dr. Wassell had previously placed him on light duty work and that he performed his light duty responsibilities for Respondent-Employer during that time. Subsequently, Dr. Wassell released him to return to work with no restrictions and a zero percent (0%) impairment rating for the left shoulder. Since that time, Claimant had been able to perform his work at full duty.

Claimant testified that Dr. Wassell performed a physical examination of his left shoulder in September of 2020. Contrary to his testimony on direct examination, Claimant agreed that the physical examination included some active and passive range of motion testing and muscle strength testing. Claimant stated that "as far as he [knew]", the test results were normal. Claimant did note, however, that the strength testing consisted of him squeezing Dr. Wassell's fingers.

Claimant testified that his position with Respondent-Employer was a very physical job that required working on his knees, pushing, pulling, climbing, and tasks with overhead movement. Claimant admitted to having performed the same job duties required of him prior to the injury after his release in September of 2020. Claimant also stated that he had performed several "concrete jobs" since his release in September of 2020.

Also on cross-examination, Claimant was asked about his deposition testimony when he stated that he had on one occasion reported to Mr. Kannada, his direct supervisor, that he was having problems with his left shoulder at work. Claimant stated that Mr. Kannada's response was that he would modify Claimant's job duties or have someone help him if there was something he could not do because of his shoulder.

On cross-examination, Claimant confirmed that since his release to full-duty work, he had done some side jobs for his family outside of his work duties, including laying shingles, fixing wiring underneath a trailer, and sweeping pine needles off a roof.

Moreover, Claimant admitted to having testified at his deposition that he had not done any hunting since his left shoulder injury in January of 2020. He failed to specifically mention that he killed a deer with a bow in November of 2020, approximately two (2) months after his release to return to work. Claimant also confirmed that his criminal history included convictions for theft of property, breaking and entering, theft by receiving, and forgery, and that as a result, he was prohibited from possessing a firearm.

Claimant testified that he had not requested a change of physician from the Commission. He also stated that he felt as though he was addicted to Aleve, which he took for his left shoulder symptoms.

Claimant testified when Dr. Wassell performed a physical examination of his left shoulder in September of 2020, Dr. Wassell only had him push and pull against his hands to test Claimant's muscle strength. Claimant stated that Dr. Wassell did not test him for any overhead lifting restrictions or lifting an item up from the floor.

Clayton Kannada:

Clayton Kannada, Claimant’s supervisor, was the second witness to testify. Mr. Kannada stated that his team’s duties included pouring concrete, changing out the shaft on a conveyor, and performing other miscellaneous job duties. He testified that concrete work was very physical and required a lot of pulling, pushing, and lifting, including overhead work. With respect to Claimant, Mr. Kannada testified that he assigned Claimant his job duties. Mr. Kannada stated that he was onsite with his crew while they worked and that he had observed Claimant completing various duties while at work.

Mr. Kannada stated that he was aware of Claimant’s shoulder injury in January of 2020. Mr. Kannada testified that Claimant initially returned to work on light duty and then transitioned to full duty. At the time he was returning to work at full duty, Mr. Kannada testified that he told the Claimant and the safety director for Respondent-Employer that Claimant needed to be “100 percent” before returning to work after the left shoulder surgery. Claimant agreed that he was “100 percent” and was returned to full duty at that time. Mr. Kannada testified that Claimant had been performing all of his job duties since September of 2020, including overhead work, and Mr. Kannada had not observed Claimant experiencing any limitations or difficulties.

Mr. Kannada testified that Claimant had come to him on one occasion and reported that he “might need help getting certain things done.” However, Mr. Kannada testified that was a common request when the crew had to move heavy equipment, and the conversation was not related to Claimant’s shoulder or any limitations he was having. He testified that Claimant had not come to him since his release to full duty in September of 2020 for any accommodations or work restrictions. Mr. Kannada stated that he had not observed Claimant performing any work activities that would have indicated that Claimant was suffering from any limitations or problems with his

left shoulder since September of 2020. Further, he stated that Claimant had not complained about his shoulder at work.

Upon cross-examination, Mr. Kannada testified that he had known Claimant for approximately four (4) years. He testified that Claimant was a dependable worker. He explained that the crew was like a family and that they all work together to help one another and get the job done. Mr. Kannada testified that Claimant had received an increase in pay since his left shoulder injury. Specifically, Respondent-Employer paid for Claimant to obtain his Class B CDL, and once Claimant passed the test, he received an increase in pay. Also, on cross-examination, Mr. Kannada testified that he had always expected his crew members to manage their responsibilities. Mr. Kannada did not believe it was fair for a crew member, making less money, to be doing the job of another crew member that was making more money. He testified that Claimant was aware of his expectations, and that he reiterated that to Claimant when he returned to work at full duty in September of 2020.

On redirect examination, Mr. Kannada stated that Claimant had not come to him since the full-duty release in September of 2020 with any complaints about problems with his left shoulder.

Claimant's rebuttal testimony:

After a recess, Claimant was recalled to give brief rebuttal testimony. He further testified that he had not complained to Mr. Kannada about his left shoulder symptoms because he was afraid of losing his job and thus, being unable to provide for his family. Claimant stated that he loved his job and loved going to work.

Medical Exhibits:

On January 22, 2020, Claimant was seen at Baptist Health for complaints of left shoulder pain following an incident at work when he felt a sharp pain and an inability to lift his arm above

shoulder level. An x-ray of Claimant's left shoulder was unremarkable. Dr. Kirk Coker assessed Claimant with a sprain of the left rotator cuff capsule and treated Claimant conservatively with medication. He was placed on light duty work.

Claimant returned to Baptist Health for a follow-up appointment on February 5, 2020. Claimant reported that he had seen no improvement with his symptoms. An MRI revealed a left rotator cuff tear. On March 16, 2020, Dr. Coker recommended a mini open rotator cuff repair of the left shoulder.

On April 13, 2020, Claimant saw Dr. David Wassell, an orthopedic specialist, for the pain in his left shoulder following his injury. Based on his records, Dr. Wassell also recommended a mini open rotator cuff repair of the left shoulder. Claimant underwent the surgical procedure performed by Dr. Wassell on April 16, 2020.

Claimant returned to Dr. Wassell on April 29, 2020. Dr. Wassell's clinic notes indicated that Claimant was to continue physical therapy and "advance as able." He was also released to return to work on "one arm duty" and could perform any work with his right hand. He was limited to no use of the left hand.

Claimant returned to Dr. Wassell on May 4, 2020, where he complained of tenderness in the acromioclavicular joint. Dr. Wassell recommended that Claimant continue the physical therapy and to wean off the pain medication. He also recommended that Claimant be placed in an office-type environment where he can avoid heavy machinery.

Claimant's physical therapy records between April 20, 2020, and May 15, 2020, indicated generally that Claimant was progressing as expected; he was not having to take pain medication; and he was tolerating therapy with minimal complaints of pain and difficulty. Claimant's May 1, 2020, physical therapy records indicated that Claimant's "ROM was still very good today, no

abnormal tightness or pain noted throughout the session.” Although Claimant reported soreness and discomfort during the therapy session on May 4, 2020, by the next session, Claimant was tolerating therapeutic treatment without complaints of pain or difficulty. Claimant’s progress continued and he was taken out of his shoulder sling on May 13, 2020, when he completed his therapy without any complaints or difficulty.

At a final office visit with Dr. Wassell on September 14, 2020, Dr. Wassell’s clinic notes revealed that Claimant’s left shoulder had been “rapidly improving” and his treatment had provided significant relief. Claimant’s shoulder examination yielded normal results. Specifically, Dr. Wassell’s records indicated the following with regard to the physical examination of the left shoulder:

Left Shoulder Exam

Tenderness

The patient is experiencing tenderness in the acromioclavicular joint.

Range of Motion

Active abduction: normal Left shoulder active abduction: 155.

Passive abduction: normal Left shoulder passive abduction: 180.

Extension: 60 normal

External rotation: 90 normal

Forward flexion: 180 normal

Internal rotation 90 degrees: 80 normal

Muscle Strength

Abduction: 5/5

Internal rotation: 5/5

External rotation: 5/5

Supraspinatus: 5/5

Subscapularis: 5/5

Biceps: 5/5

Tests

Apprehension: negative

Hawkins test: negative

Cross arm: negative

Impingement: negative
Drop arm: negative
Sulcus: absent

Other
Erythema: absent
Scars: present
Sensation: normal
Pulse: present

Comments: No post op complications

Dr. Wassell opined that Claimant had reached maximum medical improvement (MMI) and as a result of his normal physical examination, he opined that Claimant had no impairment rating. He also opined that Claimant was released to resume his normal work duties without restrictions.

Documentary Exhibits:

Respondents presented Arkansas Game and Fish Commission records indicating that Claimant had maintained his hunting licenses since this January 22, 2020, work injury. The 2020-21 Deer Gamecheck records also reveal that Claimant killed a deer with a bow on November 22, 2020, in Pulaski County.

ADJUDICATION

The sole issue for determination is whether the Claimant is entitled to an independent medical examination/IME for a determination of a permanent anatomical impairment rating to his left shoulder injury of January 22, 2020.

Claimant alleges that an Independent Medical Examination (IME) is reasonable and necessary in that Claimant has documented signs, symptoms, and findings that are ratable pursuant to the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition. Respondents assert that an IME is not reasonable and necessary as Dr. Wassell performed a physical examination of Claimant's shoulder and found no functional impairment.

Arkansas Code Annotated section 11-9-511(a) (Repl. 2012) provides, in relevant part: An injured employee claiming to be entitled to compensation shall submit to such physical examination and treatment by another qualified physician, designated or approved by the Workers' Compensation Commission, as the Commission may require from time to time if reasonable and necessary. The threshold question is whether the examination is reasonable and necessary. King v. Willow Oaks Acres, Full Commission Opinion filed on January 25, 2001 (Claim No. E903202).

In the matter at hand, Claimant sustained an admittedly compensable injury to his left shoulder on January 22, 2020, while performing employment duties for Respondent-Employer. Dr. Wassell ultimately performed a mini open rotator cuff repair procedure of Claimant's left shoulder on April 16, 2020. Soon thereafter, Claimant underwent physical therapy, and therapy records indicate that Claimant's condition improved with therapeutic treatment.

At the last appointment on September 14, 2020, Dr. Wassell opined that Claimant had reached maximum medical improvement (MMI) and that Claimant was released to resume his normal work duties without restrictions. Furthermore, Dr. Wassell's notes reflect that he performed a physical examination of Claimant's left shoulder, including range of motion testing and muscle strength testing that yielded normal results. Claimant's own testimony confirmed that Dr. Wassell had performed both range of motion and strength tests on September 14, 2020, and that the test results were normal. Based on Claimant's testimony, it appears that Claimant did not have any issues with pain or other symptoms that rendered him unable to participate in or complete the testing. As a result of Claimant's normal physical examination and a lack of objective findings with regard to the left shoulder, Dr. Wassell opined that Claimant had no permanent impairment of the left shoulder. I am persuaded, based on the evidence of record, that Dr. Wassell used the *AMA Guides to the Evaluation of Permanent Impairment*, 4th Edition in his determination that

Claimant had no permanent impairment rating. I assign great weight to Dr. Wassell's expert opinion.

Claimant testified at the hearing that he continued to have problems with his left shoulder, including a decrease in range of motion and strength; however, I assign minimal weight to this testimony. Claimant's testimony in this regard is not corroborated by Dr. Wassell's physical examination and assessment of the Claimant's left shoulder on September 14, 2020. Moreover, the record is clear that Claimant had returned to work and had been performing all of his pre-injury duties up through the date of the hearing, which included several concrete jobs. In addition to his work for Respondent-Employer, Claimant had also been performing work for his family, including laying shingles, completing electrical work underneath a trailer, and sweeping pine needles off a roof, and notably, he had obtained his CDL.

Furthermore, Claimant's testimony on cross-examination was that his left shoulder condition had not changed since he was released by Dr. Wassell in September of 2020. The medical records indicate, and Claimant confirmed, that he had not sought any additional medical treatment for his left shoulder in more than one year, and he had not pursued a change of physician with the Commission. Lastly, since his release by Dr. Wassell, he had not taken any prescription medication prescribed by a treating physician for his left shoulder in more than one year. Based on the foregoing, I find that the evidence of record comports with a zero percent (0%) impairment rating.

Mr. Kannada also testified that since Claimant was released to full-duty work, he had observed Claimant performing his normal job duties without the benefit of accommodations for his left shoulder and without complaints regarding this left shoulder. I find Claimant's explanation

that he did not report his ongoing shoulder issues to Mr. Kannada because he was fearful of losing his job to be unreliable and contrary to the remaining evidence of record.

In addition, Claimant testified in his deposition that his left shoulder issues had impacted his ability to participate in hunting activities. However, documentary evidence, as well as Claimant's own admission, show that since his release to full duty work, he continued to maintain a current hunting license, and he killed a deer with a bow in November of 2020, just two months after his release by Dr. Wassell.

Claimant alleges that this case is similar to Pollins v. Union County Highway Dep't., Full Commission Opinion filed on February 5, 2001 (Claim No. G904646). I find that the Pollins case is distinguishable. In the matter at hand, unlike in Pollins, the record supports a zero percent (0%) impairment rating in light of the following: Claimant had returned to full-duty work for Respondent-Employer; he was performing his admittedly physical, pre-injury duties; he had obtained his CDL; he had been doing laborious work for his family; he had not sought any medical treatment or taken any prescription medication for his left shoulder in more than one year; and he had continued to participate in outside activities such as hunting with a bow. Moreover, unlike the case at bar, it does not appear from the available record in Pollins that there were issues with Mr. Pollins's credibility.

Therefore, based on all of the evidence before me, I find that the Claimant failed to prove by a preponderance of the evidence that an independent medical examination/IME is reasonable and necessary pursuant Arkansas Code Annotated section 11-9-511(a) for the assessment of a permanent anatomical impairment rating due to his left shoulder injury of January 22, 2020, based on Claimant's work and extracurricular activities, including deer hunting with a bow.

ORDER

Claimant has failed to prove by a preponderance of the evidence that an independent medical examination/IME is reasonable and necessary in connection his compensable left shoulder injury of January 22, 2020, under the provision of Ark. Code Ann. § 11-9-511(a), for an assessment of a permanent impairment rating. Therefore, this claim is respectfully denied and dismissed.

IT IS SO ORDERED.

KATIE ANDERSON
ADMINISTRATIVE LAW JUDGE