

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H300312

TAB OGDEN, Employee	CLAIMANT
MCDONALD'S/BUCKLIEW ENTERPRISES, Employer	RESPONDENT
RISK MANAGEMENT RESOURES, Carrier	RESPONDENT

OPINION FILED APRIL 23, 2024

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Harrison, Boone County, Arkansas.

Claimant represented by FREDERICK S. SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by CAROL LOCKARD WORLEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On January 29, 2024, the above captioned claim came on for a hearing at Harrison, Arkansas. A pre-hearing conference was conducted on October 9, 2023, and a Pre-hearing Order was filed on October 10, 2023. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The relationship of employee-employer-carrier existed between the parties on November 21, 2022.
3. The respondents have controverted the claim in its entirety.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether Claimant sustained a compensable injury to his right shoulder on or about November 21, 2022.
2. Whether Claimant is entitled to medical treatment for his compensable right shoulder injury.
3. Respondents raise lack of notice as a defense in that December 1, 2022, was the first notice of any alleged work-related injury.

The claimant's contentions are as follows:

“The Claimant sustained a compensable injury to his right shoulder. The Claimant contends that he was attacked by another employee as he was performing employment services for the respondent employer. The Claimant contends that he did nothing to instigate the attack.

The Claimant contends that he is entitled to reasonable and necessary medical treatment by Dr. Cutler and Dr. Sidani.

The Claimant contends he is entitled to past TTD benefits (dates to be determined).

The Claimant contends that he is entitled to an impairment rating related to the surgery he had on his right shoulder. The Claimant contends that he is entitled to permanent partial disability benefits related to the rating.”

The respondents' contentions are as follows:

“Respondents contend that Claimant did not suffer a compensable injury on or about 11/21/22. Respondents contend they did not receive notice of any claimed injury until 12/1/22 and that they would not be liable for any benefits prior to receipt of actual notice of injury in the event compensability is found. Respondents contend that Claimant's need for medical treatment, if any, is associated with preexisting and underlying problems and not any acute injury while working for Respondent/Employer.”

The claimant in this matter is a 38-year-old male who alleges to have sustained a compensable right shoulder injury when he was involved in an altercation he alleges to have

occurred on November 21, 2022, between himself and another employee. The claimant identified the other employee as Nick D'Angelo. Both the claimant and Mr. D'Angelo were working in the respondent's kitchen on November 21, 2022.

On direct examination the claimant described the altercation he alleges as follows:

Q Okay. So sometime after that point in time, what happened?

A Well, Nick attacked me. He grabbed my arm, and he twisted and jerked and popped and he and – and he was – I think he was drunk, and I've never been attacked before at a job and he – I didn't even have a reason why he attacked me.

Q How do you think – why do you think he was drunk?

A Because I could smell alcohol on his breath; that's why.

Q Did his demeanor indicate he was mad at you or just mad at – what caused him to do it? Do you have any idea of why he did it?

A I think just to hurt me.

Q Why?

A I don't – that's the reason I don't know. I don't know why people don't like one person or another. Jealousy, maybe, or I don't know, you know. I don't know what causes people to hate one person.

Q Had you ever had an altercation or problems with this employee before?

A No. In fact, I always liked him.

The claimant was questioned on direct examination about his reporting of the alleged altercation as follows:

Q As a result of that, did you tell your employer immediately when it happened, or was it later in the day, or was it later in the week, or what?

A As soon as I – when I went to leave that day, I – we were swamped all day, like, I don't know why it seems like when something happens you get so busy that you – I call it taking bullets, you know, making a thousand burritos and everything else that we do, sandwiches. We got so busy and then at the end of the day I told Tonya I said, "Tonya, I'd make a report. Nick attacked me this morning." And she said, "Are you hurt?" And I said, "I don't even know yet." But I was in like a different kind of pain then.

Q When he attacked you, how do you know that something was hurt?

A Because something popped and I was going to try toughing it out because I'm a tough person. I mean look at my build. I mean I'm not a weakling. And...

Q How tall are you?

A I'm five-eleven.

Q How much do you weigh?

A Probably 199 now.

Q And so you felt a pop?

A Yes, sir.

Q And you said, "It was a different pain." And how was it different?

A Like I couldn't no longer lift my arm up, like I had full function. Can I demonstrate?

Q Sure.

A I can – when I lift up my arm, I can lift my arm up like this now. And I could before he attacked me. After he attacked me, I could only lift it this high.

While the claimant did report the alleged altercation at the end of the day in which he alleges it occurred, he did not report an alleged injury from that alleged altercation until

December 1 or December 2, 2022. Following is a portion of the claimant's cross examination testimony:

Q Okay. And you told the – you told the judge on direct you were at the doctor within a day of the accident. There's no medical records in November. You didn't go to a doctor until after you started saying you had a work injury on December 1st, right?

A The work – I was going to the doctor prior for the pain.

Q Okay. I'm talking about between November 21st and when you first reported an injury on the 1st of December. There's no doctor visits in that window of time, right?

A I did report the attack and stuff to Tonya Mosley, and the very next day I wrote out a statement and gave it to her.

Q Okay. Reporting the attack and reporting a work-related injury are two different things. Don't you agree with that?

A Reporting an incident is the same thing.

Q Okay. In the report of an incident, you did not report that you were injured in any way. You've already agreed with me on that.

A I told her I wasn't sure.

Q In your deposition under oath, you told me December 1st was the first time. Are you going back on that testimony?

A The first time that I had when to the doctor over the injury?

Q No, you told me December 1st was the first time you reported a work injury to anyone at McDonald's under oath at your deposition. Are you changing your –

A. Okay. No.

Q Let me finish my question, please.

A Okay.

Q Are you changing your testimony today?

A No. I think I can stick with that.

Q Okay. Now in-between the 21st of November and December 1st when you finally tell Tonya that you were saying you were hurt, you were working your regular duty, regular hours, regular shifts, right?

A Yes.

The respondent called Tonya Mosley as a witness. Ms. Mosley is the general manager for the respondent's facility where the claimant alleges the altercation on November 21, 2022, to have occurred. Following is a portion of Ms. Mosley's direct examination testimony about the claimant's reporting of the alleged altercation:

Q Mr. Ogden has testified multiple times today that he told you he didn't know if he was hurt on the day of the incident. Did he make any type of statement like that to you?

A No, sir.

Q On the 21st?

A No, sir.

A Did he report an incident of Nick D'Angelo putting his hands on him?

A Yes.

Q Was there any mention by Mr. Ogden of being hurt or thinking he was hurt –

A No.

Q -- with regard to his right shoulder?

A No.

Q Did you hear anything about him saying he had any injury because of being touched by Nick D'Angelo before December 1st, 2022?

A No.

Q And did you work with Nick on a day-in/day-out basis or on a regular basis in that window of time between the 21st and December 1st?

A Yes.

A First Report of Injury is found at Respondents' Exhibit 2, page 6, regarding the claimant's allegation of injury to his right shoulder from the November 21, 2022, altercation he alleges. That First Report of Injury is marked as received on December 2, 2022.

The first medical record in evidence after November 21, 2022, is a visit note from Arkansas Orthopedics Sports Medicine in Harrison, Arkansas. Following is a portion of that visit note:

Impression/Plan:

This 37-year-old male well-known to us after performing a AC reconstruction a revision a reconstruction several years ago is here with chief complaint of right shoulder injury. He states he was involved in an altercation a few weeks ago he got his right shoulder injured. He had gone to formal physical therapy and he states it helped a little bit but is having quite a bit of pain and weakness.

Physical exam right shoulder shows prominence over the AC joint with feelings of instability. He has positive supraspinatus and Jobes testing. Negative Spurling's. He has 5/5 strength biceps testing. He has full range of motion. Forward flexion 180 degrees external rotation to 45.

X-rays 3 views of the right shoulder today show some superior migration of his clavicle and possibly some migration of his retention button.

Assessment and plan, right shoulder injury he may have stretched his donor graft or the repair may have failed possibly has a rotator cuff injury due to the altercation he was in. He has been already in formal physical therapy. At this point we have recommended an

MRI of his right shoulder. We will make further recommendations pending the studies.

On December 28, 2022, the claimant underwent an MRI of the right shoulder at North Arkansas Regional Medical Center in Harrison, Arkansas. Following is a portion of that diagnostic report:

FINDINGS: Postsurgical changes are seen of AC joint reconstruction. The supraspinatus, infraspinatus, and subscapularis are intact. The biceps tendon is well seated in the bicipital groove and shows appropriate labral attachment. Degenerative changes are seen involving the posterior glenoid with likely labral tear. Joint capsule is slightly thickened.

IMPRESSION: Possible tear of the posterior labrum with associated degenerative changes of dislocation. Joint capsule is thickened raising the possibility of adhesive capsulitis. Postsurgical changes are seen of AC joint reconstruction.

On December 29, 2022, the claimant was seen by Dr. Tarik Sidani of Arkansas Orthopedics and Sports Medicine. Dr. Sidani recommended surgical intervention at that time for the claimant's right shoulder. Following is portion of that medical record:

Chief Complaint: Right shoulder

HPI: This is a 37 year old male who is being seen for a chief complaint of Right shoulder, post MRI rt shoulder Dec. 28 @ 4pm chkin @ NARMC.

Impression/Plan
MRI follow-up right shoulder.

Physical examination shows a deformity at the AC joint gross instability here exquisite tenderness palpation over the posterior aspect of the clavicle prominent hardware shoulder joint itself shows negative supraspinatus sign negative biceps maneuvers no instability posterior or anteriorly negative labral maneuvers.

MRIs reviewed as well as plain film x-rays shows redislocation of the AC joint with hardware pulled through the coracoid process radiologist reading this is possible posterior labral tear and

unimpressed by this he also has advanced degenerative changes of the distal clavicle.

Assessment plan recurrent AC separation at this patient's age activity level and amount of instability and dislocation at this point will recommend revulsion surgery risks benefits potential case postoperative course healing times and restrictions to lifting were all discussed he understands like proceed we will get him on the schedule for right AC reconstruction and distal clavicle excision utilizing semitendinosus allograft.

On February 10, 2023, the claimant underwent surgical intervention at the hands of Dr.

Sidani. Following is a portion of that operative report:

PREOPERATIVE DIAGNOSIS:

1. Recurrent AC separation right shoulder
2. Acromioclavicular arthritis right shoulder

POSTOPERATIVE DIAGNOSIS:

1. Recurrent AC separation right shoulder
2. Acromioclavicular arthritis right shoulder

PROCEDURE:

1. Revision reconstruction right AC joint and coracoclavicular ligaments
2. Distal clavicle excision, open

The claimant has returned to work for the respondent and was asked on direct examination about his "ability after the surgery."

Q Tell the judge in your own words what has happened in terms of your ability after the surgery. Have you been able to go back to work at McDonald's?

A Yes, sir. Your Honor, I was attacked at McDonald's, and these are in my own words. I was attacked by Nick D'Angelo. I didn't know his last name, but he attacked me. He jerked my left or right arm, I don't even remember this, but the way that he jerked me, he popped something and tore my arm off. I mean – and I have worked at McDonald's for two years prior, and I've continued to work there afterwards on this.

The claimant has had serious difficulties with his right shoulder prior to the alleged injury on November 21, 2022. On direct examination the claimant discussed his prior right shoulder difficulties as follows:

Q Now, Tab, one of the things that – one of the questions that we have is that you had had prior problems with your right shoulder before this injury and you've not really denied that, have you?

A No, I don't deny that at all. In fact, it hurts right now. I think I'm going to have to live with the pain all my life.

Q But did you ever lose any time or have any problems associated with the shoulder that interfered with your ability to work prior to November 21 of 2022?

A No, sir.

Q But you did have a surgery, did you not, beforehand?

A Yes, I think – I believe two prior surgeries.

Q And to the right shoulder?

A Yes, sir.

Q And you worked there for approximately, what, two years when the injury occurred?

A Two years, I'd say.

On cross examination the claimant was also questioned about his right shoulder difficulties before his alleged November 21, 2022, injury as follows:

Q Mr. Ogden, I want to talk to you in more detail about your problems before November 21st of 2022. You wrecked a bicycle in 2018 and had a pretty severe shoulder separation, correct?

A Yes.

Q And you had to have surgery with Dr. Sidani?

A I believe so.

Q Alright. And going forward from there you told me your shoulder hurt all the time, correct?

A Yes.

Q Alright. It popped again that same year while you were in jail, and your shoulder and neck started hurting, and they determined you had another complete separation; correct?

A Yes, sir.

Q You had to have a second operation with Dr. Sidani, right?

A Yes, sir.

Q And coming out of that second operation you continued to have severe ongoing pain in that right shoulder, right?

A Correct.

Q Alright. You told me it hurt all the time, and it was hurting within the seven days leading up to November 21st, 2022, right?

A Yes, sir.

Q And you explained it was a 10 out of 10 on a pain scale for at least six months before this accident, right?

A Yes, sir.

Q And if 10 is the max on the pain scale, you can't get any worse than 10 out of 10, can you?

A I don't think so.

Q Okay. And you confessed here on direct you were already seeing a pain specialist for the shoulder before November 21st, 2022, right?

A Yes. Yes, sir.

Q You've consistently complained of severe right shoulder pain and neck pain from 2018 all the way up to this incident on November 21st, 2022, right?

A Yes, sir.

Q And you explained the pain you have had before November 21st, 2022, was going through the collar bone/clavicle into the shoulder, right?

A What I believe is that, those body parts.

The respondent has also introduced several medical records dating from September 10, 2018, through October 20, 2022, that well document the claimant's long history of right shoulder difficulties. In fact, the claimant was actively treating for his right shoulder about a month before the November 21, 2022, injury he alleges.

It is the claimant's burden to prove that he sustained a compensable right shoulder injury on November 21, 2022, during the altercation he alleges to have occurred between himself and Mr. D'Angelo.

In order to prove a compensable injury as the result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish by a preponderance of the evidence (1) an injury arising out of and in the course of employment; (2) the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings establishing an injury; and (4) the injury was caused by a specific incident identifiable by time and place of occurrence. *Odd Jobs and More v. Reid*, 2011 Ark. App. 450, 384 S.W. 3d 630.

The respondents called Ms. Adriane Green as a witness in this matter. Ms. Green is currently a general manager for the respondent but served as a district manager for the respondent in November of 2022 which included the responsibility for the facility the claimant

alleges the November 21, 2022, altercation and injury to have occurred. Ms. Green gave direct examination testimony about her interaction with the claimant about the alleged altercation and obtaining video of the alleged altercation as follows:

Q Had you received any report that Mr. Ogden was saying he had been hurt at work before December 1st, 2022?

A I don't believe so. I got a phone call from Tonya, saying hey, I need to come up there. I think that was about the first.

Q And these conversations Mr. Ogden is talking about where you – you're talking about the incident, you're looking at video, you're talking about going to doctors, is that after December 1st, on or after December 1st?

A It was on or after. Yeah. Because I had to have him come up there and show me the incident, where it happened.

Q Okay. I've introduced a video for the judge to watch and I have it here on my iPad, and we'll look at it here in a minute. Did you produce or procure that video?

A Yes, I did.

Q And did you share that with Mr. Ogden in the course of the investigation –

A Yes, I did.

Q -- we were just talking about? Did he look at the video with you?

A Yes.

Q And did he agree that this video that we have was what he was talking about as far as –

A Yes.

Q -- it being an attack or an incident involving Nick D'Angelo?

A Yes.

The video was played during the hearing and this administrative law judge has reviewed it multiple times in preparation for issuing a decision. Mr. D'Angelo is in a black shirt and the claimant is wearing a blue shirt. At one point in the relatively short video, around the 49 second mark, Mr. D'Angelo does appear to very briefly lay a hand on the claimant's right shoulder, but I find no force being used. It is certainly a better descriptor to say it was a gentle touch than a forceful touch of the right shoulder. At roughly the one-minute mark, Mr. D'Angelo does use both hands to pull downward on the claimant's left arm. But frankly, it does not appear to have much force or effect on the claimant. During the remainder of the video, it does not appear that the two men have any physical contact. I also note it does not appear that the claimant is in any physical distress. The only pull or tug to the claimant's body by Mr. D'Angelo is to his left arm, not his right.

The claimant was asked on cross examination about the video as follows:

Q Okay. You've seen a video of the incident that you have described here today with Nick grabbing you, correct?

A Yes, when Adriane showed it to me. I think that's the only time I've seen it prior.

Q So you watched it with Adriane who was sitting next to me?

A Yes, sir.

Q And you don't dispute that what you two guys watched on the video is the incident you are talking about with Nick, right?

A That's me getting attacked, yes, sir.

The claimant can certainly show objective medical findings regarding this right shoulder, particularly given his history of right shoulder treatment, including two prior surgical

interventions. However, the claimant cannot prove a causal relationship between any objective medical findings regarding his right shoulder and the November 21, 2022, altercation he alleges. It is not possible for a reasonable person to view the video evidence of the altercation he alleges on November 21, 2022, and conclude that his right shoulder was injured or even affected in some way. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable right shoulder injury on or about November 21, 2022. As the claimant has been unable to prove that he sustained a compensable injury to his right shoulder, he is also unable to prove his entitlement to medical treatment for his right shoulder. The respondents have also raised the lack of notice defense in this matter. Given that the claimant failed to prove his alleged right shoulder injury compensable, the respondent's lack of notice defense is moot.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on October 9, 2023, and contained in a Pre-hearing Order filed October 10, 2023, are hereby accepted as fact.
2. The claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury to his right shoulder on or about November 21, 2022.
3. The claimant has failed to prove by a preponderance of the evidence that he is entitled to medical treatment for his right shoulder.
4. The respondent's defense of lack of notice is moot.

ORDER

Pursuant to the above findings and conclusions, I have no alternative but to deny this claim in its entirety.

If they have not already done so, the respondents are directed to pay the court reporter, Veronica Lane, fees and expenses within thirty (30) days of receipt of the invoice.

IT IS SO ORDERED.

**HONORABLE ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE**