

**ARKANSAS COURT OF APPEALS**

DIVISION I  
No. CA10-1240

ROGER LANKFORD

APPELLANT

V.

CROSSLAND CONSTRUCTION  
COMPANY and CNA INSURANCE  
COMPANY

APPELLEES

Opinion Delivered JUNE 1, 2011

APPEAL FROM THE ARKANSAS  
WORKERS' COMPENSATION  
COMMISSION  
[NO. F904661]

AFFIRMED

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**RAYMOND R. ABRAMSON, Judge**

Roger Lankford suffered a compensable, work-related injury to his right shoulder in April 2007. Dr. Jeffrey Evans performed surgery on Lankford's shoulder, and Lankford's employer, Crossland Construction Company, paid benefits accordingly. Lankford eventually returned to work and continued to seek treatment from Dr. Evans. In 2009, Lankford had another appointment scheduled with Dr. Evans, but Crossland refused to continue paying for the additional treatment. The administrative law judge found that Lankford had failed to prove that the continued treatment was reasonably necessary and determined that Lankford's average weekly wage was \$372.60. Lankford appealed, and Crossland cross-appealed to the Commission. The Commission likewise found that Lankford failed to prove that the additional treatment was reasonably necessary but calculated Lankford's average weekly wage to be \$365.39. Lankford appeals.

Cite as 2011 Ark. App. 416

On appeal, we view the facts in the light most favorable to the Commission's decision and affirm if its decision is supported by substantial evidence. *Owens Planting Co. v. Graham*, 102 Ark. App. 299, 302, 284 S.W.3d 537, 539 (2008). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* "[When] the Commission denies a claim because of the claimant's failure to meet his burden of proof, the substantial-evidence standard of review requires that we affirm the Commission's decision if its opinion displays a substantial basis for the denial of relief." *Martin Charcoal, Inc. v. Britt*, 102 Ark. App. 252, 255, 284 S.W.3d 91, 93 (2008). It is the Commission's duty, not ours, to make credibility determinations, to weigh the evidence, and to resolve conflicts in the medical testimony. *Id.*, 284 S.W.3d at 94.

#### ***Additional Medical Treatment***

By statute, Crossland had to provide for Lankford such medical services "as may be reasonably necessary in connection with the injury received by [Lankford]." Ark. Code Ann. § 11-9-508(a) (Supp. 2009). Lankford had the burden of proving by a preponderance of the evidence that the additional medical treatment requested was reasonable and necessary. *Amaya v. Newberry's 3N Mill*, 102 Ark. App. 119, 126-27, 282 S.W.3d 269, 275 (2008). "What constitutes reasonable and necessary treatment under this statute is a question of fact for the Commission to decide." *Id.* at 127, 282 S.W.3d at 275.

Lankford has a history of problems with his right shoulder. In September 2001, Lankford suffered a posterior glenoid labral tear while working for a different employer.

Lankford underwent extensive treatment for this injury, including with Dr. Evans, who ultimately performed surgery on Lankford's right shoulder in March 2002. An MRI performed around this time showed what the Commission characterized as "degenerative changes in the form of mild spurring and capsular hypertrophy." Lankford was subsequently discharged from Dr. Evans's care in April 2002. Less than a year later, however, Lankford again sought treatment from Dr. Evans for his recurring right-shoulder problems. Dr. Evans diagnosed Lankford as having "[r]ight shoulder anterior instability." Lankford then suffered a second right-shoulder injury in January 2005, while in prison. He sought treatment often, including injections in his shoulder, over the next year or so, as reflected in his prison medical records.

Lankford's injury at Crossland occurred in April 2007. Lankford underwent an MRI and eventually again came under the care of Dr. Evans. Dr. Evans performed diagnostic arthroscopic surgery on Lankford's shoulder in July 2007. Postoperatively, Dr. Evans diagnosed Lankford with "[r]ight shoulder degenerative joint disease." In a note dated two weeks after the surgery, Dr. Evans wrote that Lankford was doing well and was back at work answering phones. Dr. Evans's assessment was "[r]ight shoulder degenerative joint disease." In a September 2007 note, Dr. Evans noted that Lankford was "doing very well now with no pain complaints at all." Dr. Evans's assessment remained the same. Lankford saw Dr. Evans again in November 2007 for a follow-up visit. At this visit, Lankford complained of some discomfort, mainly in the evenings. Dr. Evans noted that Lankford had crepitus with

range of motion of his right shoulder but had an otherwise normal inspection. His assessment remained “[r]ight shoulder degenerative joint disease.”

At a February 2008 follow-up, Lankford complained that his shoulder had been acting up since a gate had hit his shoulder at work. Dr. Evans again noted the crepitus in Lankford’s right shoulder but noted that Lankford had an otherwise normal inspection. Dr. Evans gave Lankford an injection in his shoulder and again assessed Lankford as having “[r]ight shoulder degenerative joint disease.” Lankford followed up with Dr. Evans again in May 2008. Lankford complained of increased pain in his shoulder after having to raise a heavy hammer over his head. Dr. Evans again noted the “slight crepitus” finding in an otherwise “normal inspection of the bilateral shoulders.” Dr. Evans’s assessment remained “[r]ight shoulder degenerative joint disease.” At a January 2009 visit to Dr. Evans, Lankford again complained of right-shoulder pain, and Dr. Evans gave him another injection. In his note, Dr. Evans again noted crepitus but stated that Lankford’s exam was otherwise normal. Dr. Evans’s assessment remained the same.

In a March 2008 letter to Crossland, Dr. Evans wrote:

This is in response to your letter dated February 27, 2008 regarding Roger Lankford. I first saw Roger on January 2, 2002 for his right shoulder glenoid labral tear. I have seen him numerous times over the past six years, all of which, by my record, were workman’s compensation visits. He most recently had a shoulder arthroscopy on July 20, 2007 with the major finding being degenerative joint disease of the right glenohumeral joint. I have not released him from the shoulder portion of his workman’s compensation case. He has done really well with his shoulder, but I anticipate that he will continue to require Celebrex for perhaps the rest of his life. Perhaps, for your paperwork purposes, his degenerative joint disease of the shoulder could be more

accurately termed posttraumatic arthritis. By whatever term is used for the diagnosis, his primary issue with the shoulder is the wear of the glenohumeral joint. It may become symptomatic enough years from now to require a total shoulder arthroplasty.

In denying Lankford's claim for additional treatment, the Commission first noted the extensive, preexisting damage to Lankford's right shoulder even before his April 2007 work injury. These preexisting problems included degenerative joint disease. The Commission concluded that there was no objective evidence that Lankford's compensable injury "resulted in any additional permanent or long term physical damage." In support of this finding, the Commission noted that Lankford's 2007 arthroscopic surgery did not reveal any evidence of recent traumatic injury but showed only preexisting degenerative changes relating back to Lankford's earlier injury. The Commission also reiterated the fact that Dr. Evans's diagnosis has remained the same—"right shoulder degenerative joint disease."

Lankford counters that his 2007 injury was serious enough to require the diagnostic arthroscopic surgery and that he continued to complain of pain even after the surgery. Lankford also cites Dr. Evans's March 2008 letter, in which Dr. Evans wrote that Lankford's "degenerative joint disease of the shoulder could be more accurately termed posttraumatic arthritis." Lankford argues that this connects his ongoing problems to the work-related injury he suffered in 2007. Lankford also cites his own testimony that there has been no time, since his 2007 injury, that he felt he had completely recovered. But viewing the facts in the light most favorable to the Commission's decision, substantial evidence supports its conclusion that

Lankford failed to prove that the additional medical treatment was reasonably necessary in connection with his work-related injury. We therefore affirm on this point.

*Average Weekly Wage*

Arkansas Code Annotated section 11-9-518 is the applicable statute for calculating Lankford's average weekly wage. This statute reads:

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Ark. Code Ann. § 11-9-518 (Repl. 2002).

On this point, the facts are not in dispute. Lankford was not under an employment contract with Crossland. His hours per week varied from a low of 16 to a high of 52. At some point, Lankford received a raise from \$9.00 per hour to \$9.50 per hour for 40 hours

of work in a week and time-and-a-half for any overtime hours. In the 51 weeks leading up to his 2007 injury, Crossland paid Lankford \$16,826.01 for regular hours and \$1,808.74 for overtime hours, totaling \$18,634.76. In calculating Lankford's average weekly wage, the Commission simply took Lankford's total pay for those 51 weeks (\$18,634.76) and divided by 51. It thus found that Lankford's average weekly wage was \$365.39.

On appeal, and without citation to any authority, Lankford argues that the ALJ—not the Commission—employed the correct method for calculating his average weekly wage. Lankford claims that the Commission should have taken his average number of hours worked per week over the 51-week period and multiplied that number by \$9.50 per hour (or \$14.25 per overtime hour). This would yield, according to the ALJ's calculations, an average weekly wage of \$372.60.

Substantial evidence, however, supports the Commission's decision on this point. The formula used by the Commission is not contrary to the applicable statute. And Lankford has pointed us to no authority holding otherwise. As such, we affirm on this point as well.

Affirmed.

HART and GLADWIN, JJ., agree.