

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F401605

CAROL LUELLEN, Employee	CLAIMANT
WAL-MART STORES, Employer	RESPONDENT
CLAIMS MANAGEMENT, INC., Carrier	RESPONDENT

OPINION FILED JULY 29, 2004

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On July 7, 2004, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 12, 2004, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #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 the within claim.
2. The relationship of employee-employer existed between the parties on February 3, 2004.
3. The claimant was earning an average weekly wage of \$408.82 which would entitle her to a compensation rate of \$273.00 per week for temporary total disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's left shoulder on February 3, 2004.
2. Medical.

3. Temporary total disability benefits from February 17, 2004 through March 11, 2004.

4. Attorney fee.

The claimant contends she suffered a compensable injury to her left shoulder on February 3, 2004, and that she is entitled to medical expenses, temporary total disability, and an attorney fee.

The respondent denies that claimant sustained an accidental injury to her left shoulder which arose out of and during the course of her employment with respondent.

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 witness and to observe her 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 May 12, 2004, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left shoulder while employed by respondent.

#### FACTUAL BACKGROUND

The claimant is a 36-year-old woman who has been employed by the respondent for approximately one and a half years. Apparently, claimant's primary job is to work on the dock at respondent's warehouse unloading trucks. Claimant's job also may include sweeping and cleaning the dock area. Claimant was performing the job of sweeping and cleaning the dock area on February 3, 2004. Claimant testified that on that date she had

a broom in her right hand and was using her left hand to move a large metal bar which weighed 20 to 30 pounds. The bar fell backwards pulling claimant's arm behind her body and injuring her left shoulder. Claimant testified that she reported the accident to her supervisor, Gary Donhan, and to Eric Lampier.

On February 5, 2004 claimant was sent to Dr. Berestnev for an evaluation. Dr. Berestnev diagnosed claimant as suffering from a shoulder strain, prescribed medication, and released claimant to return to work with restrictions. Claimant testified that she returned to work for respondent in the office filing paperwork for one week. Claimant testified that she was next evaluated by Dr. Berestnev on February 12, 2004 and that he ordered physical therapy but this was not approved by the respondent.

Claimant sought medical treatment on her own from Dr. Tomlinson on February 25, 2004. Dr. Tomlinson has diagnosed claimant's condition as chronic rotator cuff tendinitis with impingement syndrome, Type II. Dr. Tomlinson recommended an injection and a short period of physical therapy.

Claimant has filed this claim contending that she suffered a compensable injury to her left shoulder while working for respondent on February 3, 2004. She seeks payment of temporary total disability benefits beginning February 17, 2004, and continuing through March 11, 2004. She also seeks payment for medical treatment and a controverted attorney fee.

### ADJUDICATION

The claimant contends that she suffered a compensable injury to her left shoulder when a 20 to 30 pound metal bar she was holding in her left hand fell backwards causing her arm to be pulled behind her body. Claimant's claim is for a specific injury identifiable by time and place of occurrence. The Commission has stated in *Henry Weaver v. Precision Packaging*, Full Commission Opinion filed February 2, 1995 (E400880), that

pursuant to Act 796 of 1993, the following must be shown in order to establish the compensability of an injury occurring after July 1, 1993:

- (1) proof by a preponderance of the evidence of an injury arising out of and in the course of his employment;
- (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
- (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. §11-9-102(16), establishing the injury;
- (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant has failed to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury.

Initially, I note that the record is somewhat confusing surrounding the circumstances of the claimant's injury. At the hearing, claimant testified that she injured her left shoulder on February 3, 2004, when a large metal bar she holding with her left hand fell causing her arm to be pulled backwards behind her body. This history of injury is also contained in the initial medical report of Dr. Berestnev on February 5, 2004. However, there is a somewhat conflicting history given in the medical report of Dr. Tomlinson dated February 25, 2004. While Dr. Tomlinson's medical report does contain a history of the incident on February 3, 2004, Dr. Tomlinson's medical report indicates that claimant's left shoulder pain has been present for seven months. According to Dr. Tomlinson's medical report, the claimant related her initial shoulder problems to an incident at work where she was forced to lift a 15-pound box over her head. As a result of this incident claimant was off work for two days and had significant soreness thereafter. According to Dr. Tomlinson's medical report, the incident on February 3, 2004 was an aggravation of this prior injury.

While the history given to Dr. Tomlinson is of a work-related injury, it is unclear why claimant never mentioned this prior shoulder injury during her testimony or to Dr. Berestnev.

In order for claimant to meet her burden of proving by a preponderance of the evidence that she suffered a compensable injury, claimant has the burden of offering medical evidence supported by objective findings establishing an injury. I find that claimant has failed to meet that burden of proof. Initially, I note that a review of Dr. Berestnev's medical report from February 5, 2004 contains no objective findings establishing an injury or supporting his diagnosis of a left shoulder strain. Dr. Berestnev stated that x-rays of the claimant's shoulder revealed no fractures or dislocations.

As previously noted, claimant also underwent an evaluation from Dr. Tomlinson. Dr. Tomlinson diagnosed claimant as suffering from a chronic rotator cuff tendinitis with impingement syndrome, Type II. This is a diagnosis, not an objective medical finding. There must be objective findings substantiating a diagnosis of impingement syndrome. *Bezzard v. American Greetings*, Full Commission Opinion filed January 22, 1999 (E616529).

In this particular case, Dr. Tomlinson reviewed x-rays of the claimant's left shoulder. His report of February 25 indicates that x-rays revealed a 2B acromion process with no evidence of glenohumeral or AC joint arthrosis. Thus, the question becomes whether Dr. Tomlinson's finding of a 2B acromion process is an objective finding which establishes an injury.

I find insufficient evidence that this constitutes an objective finding establishing an injury. The acromion process is not a disease or syndrome. The *Attorney's Dictionary of Medicine* (Schmidt) contains the following definition for acromion process:

**acromion process.** Same as *acromion*, ...

Acromion is defined by the *Attorney's Dictionary of Medicine* as:

**acromion.** The expanded, almost rectangular end of the spine of the scapula (shoulder blade), a ridge of bone which juts from the outer surface of the shoulder blade in a sidewise direction toward the tip or angle of the shoulder. Somewhat below the acromion is the depression in the shoulder blade into which the upper end of the humerus (arm bone) fits, forming the shoulder joint. The acromion, therefore, overhangs the shoulder joint, protects it, and actually forms the angle or tip of the shoulder. It forms a joint with the clavicle (collar-bone) and gives attachment to part of the deltoid and of the trapezius muscles. Also called *acromion process* and *acromial process*.

Thus, the acromion process which was observed by Dr. Tomlinson on the claimant's x-rays is not indicative of an injury. Instead, the acromion process is simply a bone structure present in all human beings. I do note that Dr. Tomlinson indicated that claimant had a "2B" acromion process. It is unclear from a review of the record as to whether this is significant or even the basis for Dr. Tomlinson's diagnosis. However, it is claimant's burden to prove that this is an objective finding establishing an injury to the claimant's shoulder.

In summary, in order to meet her burden of proving that she suffered a compensable injury, claimant has the burden of offering medical evidence supported by objective findings establishing an injury. I find that claimant has failed to meet that burden of proof. While Dr. Tomlinson diagnosed the claimant as suffering from chronic rotator cuff tendinitis with impingement syndrome, this diagnosis must be supported by objective findings establishing an injury. According to Dr. Tomlinson x-rays revealed a 2B acromion process with no evidence of glenohumeral or AC joint arthrosis. The acromion process is a bone structure, not an injury. With respect to "2B", it is unclear whether this is significant or whether it would constitute an objective finding establishing a compensable injury. However, given that claimant has the burden of proof, I find that she has failed to offer medical evidence in the form of objective findings establishing an injury.

ORDER

Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable injury to her left shoulder while employed by respondent. Therefore, her claim for compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE