

**BEFORE THE ARKANSAS WORKERS' COMPENSATION**

**CLAIM NO. F409969**

<b>PEGGY CHENEY, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>FRED'S INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>FEDERAL INSURANCE CO., CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED AUGUST 9, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on May 27, 2005, at Marion, Crittenden County, Arkansas.

Claimant represented by the HONORABLE MARC I. BARETZ, Attorney at Law, West Memphis, Arkansas.

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

**STATEMENT OF THE CASE**

A hearing was conducted in the above-styled claim to determine the claimant's entitlement to workers' compensation benefits.

On February 22, 2005, a pre-hearing conference was conducted in this claim, from which a Pre-hearing Order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, and the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1. The testimony of Peggy J. Cheney, the claimant, Pamela Moore, and Nancy Whalley, coupled with medical reports and other documents comprise the record in this

claim.

### DISCUSSION

Peggy J. Cheney, the claimant, with a date of birth of February 18, 1945, is a high school graduate with some post secondary education. Claimant commenced her employment with respondent on November 1, 2002.

Claimant, who is originally from Michigan, began her employment history working in an automobile factory. Thereafter, claimant worked in factories for several years. Upon moving to Arkansas, claimant continued working in factories until she was hired by an individual who was opening a convenience store. Claimant explained that as a result of the afore she got into the convenience store business:

. . . . I went in as a manager from ground up, learned the business, moved on to other convenience stores, and decided I would change careers and go to work for Fred's, which was a little different. It's still retail but a little different from what I had been doing. (T. 10).

Claimant worked in a management capacity in the convenience store business for several years. Claimant noted that in the afore capacity her job entailed physical activity to include stocking coolers, mopping floors or anything that it took to keep the store operating. Claimant successfully performed the afore activities at work and was not limited or physically restricted as far as manual labor was concerned away from work. Claimant painted the outside of her house in 2001.

At the time of her employment by respondent, claimant was hired for the position of assistant manager. Regarding her job duties, claimant testified:

Well, you're responsible for making sure all the freight is out of the back room, put up on the shelves the way they want it.

Basically, you know, supervising the people, some scheduling. I did just about everything - - I was training to be a manager, so I was doing just basically everything. (T. 11).

During the period between the time she commenced her employment with respondent and until December 3, 2003, claimant's testimony reflects that she was responsible for putting out all the seasonal lay-outs on the aisles, which included Halloween, Thanksgiving and Christmas. The testimony of the claimant reflects that her routine job duties entailed tasks requiring lifting, pulling, overhead work with her arms and shoulders. Claimant denied having any major problems during the interval, (from the date of her employment until December 3, 2003).

Claimant explained:

I had had a problem through the years with different parts of my body including my shoulders, my elbow. I had tendinitis several years back. Just, you know, as you get older you have more problems, okay? (T. 12).

Claimant's manager was James Barron.

Claimant acknowledged that she has recently seen Dr. Trent Pierce, in May 2003, for complaints relative to tendinitis in her left elbow. Claimant was again seen by Dr. Pierce on August 25, 2003. Although the records of Dr. Pierce recite that the claimant was evaluated during the afore visit for right arm and shoulder pain, claimant testified that there was a mistake and in fact it was for left shoulder and arm pain. Claimant's testimony reflects regarding her work activity between the May 25, 2003, and August 25, 2003, visits to Dr. Pierce:

I was doing a lot of lifting. When I first went to work for the store I was working under another manager, Mary Miles, and I was doing a lot of lifting as far as putting chemicals, which we call chemicals - - it's soap and whatever - - up on risers. And so I was continually using these arms, so I was having some - - it wasn't actually - - it was more shoulder pain. It was down in here. (T. 14).

Claimant described the area as underneath her shoulder - - rib pain. Claimant's testimony reflects that after diagnosing her complaint during the August 25, 2003, visit as a musculoskeletal injury, she was referred by Dr. Pierce to Dr. L'Heureux, an orthopedist.

The testimony of the claimant reflects that she was seen by Dr. L'Heureux on September 15, 2003, with a complaint of pain in her right shoulder. Claimant relayed to Dr. L'Heureux the history of injuring her right shoulder when she was 10 years old and being in a cast for six weeks. Claimant also relayed to Dr. L'Heureux that during the past nine to ten months she had been doing a lot of lifting at her place of employment and was having complaints of right shoulder pain. Following diagnostic studies, Dr. L'Heureux diagnosed claimant's complaints as tendinitis of the right rotator cuff and subacromial bursitis of the right shoulder. Claimant received medical treatment for her diagnosed complaints.

The testimony of the claimant reflects that she continued to use her arm and shoulder in performing her job duties for respondents subsequent to the treatment by Dr. L'Heureux. Claimant testified that she was able to perform her duties of physical lifting and stocking shelves following her treatment with Dr. L'Heureux.

The testimony of the claimant reflects that on or about December 3, 2003, she suffered an accidental injury which serves as the basis for the present claim. In describing the accident, claimant testified:

A customer had come in the store and we didn't have any men working that day. James Barron, the manager, was in the office. I was up in the office with him, and a customer came in and wanted a wooden toy that was up on what we call rises, up on a ledge around the store. So the apparel expert and myself, Pamela Moore - - I'm sorry, Pamela Moore went to get this toy down for the customer. Mary Ellen went and got a ladder, and she got up on the ladder and she was

going to hand this toy in this box down to Pamela and I. (T. 17).

\* \* \*

Mary Ellen was on the ladder and she was going to hand this down to us. I was sort of underneath her. I was looking up at her. She was on the ladder.

She was up on like the second or - - she might have been up on the top step of the ladder. I'm not really sure.

To the ledge where the toy was it had to have been a good eight and a half to nine foot tall. I mean, I can barely, if I stretch, reach the ledge with my hand, so it was up pretty high. Anyway, she was to hand it down to us, and I don't know if - - she started inching it over to the side. I remember that. I remember telling her to wait and Pam was telling her to wait, and let us get another ladder. At about that point she - - I guess she dropped it. I don't know. It fell and it hit my shoulder. (T. 17-19).

Claimant explained that her right shoulder was struck by the box, which weighted forty or fifty pounds. Claimant testified:

My right shoulder. And I guess I went down because I remember it sliding and hitting my hip and it hit the floor and broke. (T. 19).

Claimant's testimony reflects that she went down to her knee, and remembered being "kind of dazed", as a result of the accident. Claimant added:

I didn't land on my shoulder, I know that. I was still upright. I remember landing on my knee. My knee didn't hurt as bad as my hip did because like I said, it came down and brushed across this shoulder and came down and hit my hip as I was going down like this. (T. 19).

The testimony of the claimant reflects that the box contained wooden rocker. The size of the box was described as three feet long and eighteen inches wide.

The testimony of the claimant reflects the impact of the accident on her immediately

following its occurrence:

Well, I remember Pam helping me up. I was sick to my stomach. I remember that. I pulled my shirt back and looked at my shoulder, and I was feeling it. I didn't feel that anything was broke, but I had a big red place (red-like a bruise comes up) across here (top of right shoulder, collarbone area). (T. 20).

Claimant testified that she knew that she was hurt as a result of the accident based on the sensation of feeling sick to her stomach, the pain in the top of her shoulder, and the difficulty moving her right arm following the accident. Claimant added that the arm ached .

In terms of physical work activity claimant explained that she really did not do very much the remainder of the day following the accident. Claimant testified that she did not attempt to rotate her arm because she knew it was hurt, however she did not think it was broken. A few minutes after the occurrence of the accident, claimant testified that she went to the office and she informed the manager, James Barron, of the accident. Claimant's testimony reflects:

I showed him my shoulder and told him what had happened. He asked me, he said, "Are you all right?" And at that point I said, "I don't know." (T. 22).

Claimant added that because Mr. Barron responded that he would "take care of it", she assumed that he would make a report to the workers' compensation insurance carrier pursuant to respondent's policy.

Claimant did not seek medical treatment at the time of the accident, explaining:

Well, I didn't really feel that there was anything they could do. I thought it was bruised. I didn't feel that there was anything broke. That was my concern, that one of these bones, my collarbone, or whatever, I thought it was broke. I didn't think it was broke. I'm sorry. And so I thought, you know, if I just kind of rested for a few days it would get better. (T. 22).

Claimant's symptoms did not improve as she had hoped. Instead, claimant testified that her

symptoms grew progressively worse:

. . . . . The pain was - - it was like I didn't have any use of this arm. It was getting worse. At that point we were in transition. The district manager was - - like I said, I was being trained to take the store. The district manager was pushing Mr. Barron, "Get her ready. Get her ready." He had another place he wanted to put him. And so I was - - I kind of put this on the back burner because I was up for this store, which is what I was working there for, was to become manager. (T. 23).

Claimant was ultimately promoted to the position of manager of the store where she was working as assistant manager at the time of the accident. Claimant received the promotion on or about January 2, 2004.

Claimant denies doing anything outside of work that aggravated her shoulder complaint. Following the December 3, 2003, accident, claimant noted that respondent was in the mist of the Christmas season, and that she was working in excess of sixty (60) hours a week, leaving very little time for outside activities.

The claimant further testified regarding the progression of her symptoms which she attributed to the December 3, 2003, accident:

Okay. Like I said, the use of my right arm was getting worse. I knew that. I couldn't lift things like I was. I knew that. There was something wrong in this arm, here. I also was having more pain down around my shoulder, which I had been to the doctor to before when I went and saw Dr. Pierce. So I was attributing a lot of this to this was old injury. Okay. I thought that was what was - - that it was the same thing he told me before. (T. 25).

Claimant continued performing her assigned job duties. Claimant noted that once she became manager in January 2004, she cut back substantially of the physical/manual labor aspect of the tasks that she had formerly did because she was in the office a lot more. Claimant delegated the physical labor that she formerly performed. Claimant's testimony reflects that her physical

capacity diminished during the interval following her December 3, 2003, accident.

Claimant testified that she obtained medical treatment from Dr. Lisa Sanchez, a Marion general practitioner, for a urinary tract infection and was provided medication and a followup appointment. Prior to the June 2004, follow-up visit an knot came up on her right shoulder. Claimant described the knot as being hard, and almost like a bone. Claimant denies an recollection of a specific incident at home or work that cause the knot to develop. Claimant noted that the condition of her right shoulder and arm had never returned to their pre-December 3, 2003, status following the incident with the fall box.

Claimant's testimony reflects regarding the condition of her arm/shoulder between December 2003 and May 2004:

No. The only difference was that this - - I was in a lot of pain. I spent a lot of nights sitting up in a chair because I couldn't lay down and I couldn't sleep. Then when I went back to her (Dr. Sanchez) for the follow-up, she - - I showed her this knot that was on my shoulder, and she was alarmed. She said, "We need to . . ." (T. 27).

Claimant provided a history to Dr. Sanchez of the December 2003, box falling incident.

Claimant's testimony reflects that she was referred by Dr. Sanchez for further diagnostic studies, to include a bone density test, and later a MRI, which was performed on July 30, 2004, at Crittenden Memorial Hospital. Regarding her understanding of the results of the MRI scan, claimant testified:

That it was fluid from my rotator cuff that had caused this knot on my shoulder, that it was leaking, and that I had more than one tear. I had two tears in the rotator cuff, and the ligaments in my right arm were severed. (T. 29)

Claimant was referred to an orthopedist, Dr. Frederick M. Azar, who she first saw on August 23, 2004.

Claimant disputes that portion of the history contained in Dr. Azar's report regarding her having seen multiple physician for her shoulder complaint and an inability of same to diagnose her complaint. The testimony of the claimant reflects that Dr. Azar recommended physical therapy to address her right shoulder complaint, however, after discussing it with her husband, she declined it. Claimant explained:

Well, I had been doing enough physical therapy at work. I didn't feel that it was going to do any good. I didn't see the point in delaying the inevitable any longer because I was in so much pain by that point, and my husband helped me make this decision. . . . (T. 32).

Claimant returned to Dr. Sanchez and requested a referral to another doctor, and was in turn referred to Dr. Stephen Waggoner. On September 13, 2004, claimant was seen by Dr. A.H. Manugian, who is the same medical group as Dr. Waggoner, and surgery was recommended. Claimant did undergo the surgery on September 26, 2004.

The group healthcare carrier paid a portion to the claimant's medical bills relative to her treatment under the care of Dr. Azar, Dr. Manugian, and the MRI at Crittenden Memorial Hospital. Claimant was off work for treatment relative to her right shoulder/arm from September 14, 2004, through October 31, 2004.

Claimant acknowledged that she filed for approval of her surgery under the care of Dr. Manugian with her health care carrier and it was pre-approved. Regarding the point in time she attempted to file her claim as a workers' compensation claim, the testimony of the claimant reflects:

When I - - yes, when I found out the results of the MRI and I also had talked to a person that worked for Workers' Comp. He was in the store. It just so happened he was - - we had a - - through the years Fred's had had too many injuries, okay, too many

Workers' Comp injuries, and so we were on a - - what do you call it - - where he had to come in and check. We had to do safety checks and I had to keep a folder that was passed down to me from the other manager. He made visits periodically to check to make sure that we were withholding our - - upholding, excuse me, upholding our part of the agreement to keep the store safe so that there wouldn't be more injuries. At that point it just happened that he was in the store and when I had this knot, this manifestation on my shoulder, and I showed it to him. . . . (T. 36).

The testimony of the claimant reflects that after speaking with the individual with the Safety Department of the Arkansas Workers' Compensation Commission, upon her return visit to Dr. Sanchez, she relayed the work-relatedness of her shoulder complaint.

Claimant also talked with a workers' compensation representative of respondent-employer, Shonda Sanders, and told her the accident with her shoulder and that she felt that she needed to go ahead and file it under workers' compensation instead of the health insurance carrier. Claimant's testimony reflects regarding the response of the representative:

At that point I don't remember exactly what she said because I was talking to Jennifer Clifton, which was our insurance person, and I was talking to Shanda at the same time. I believe Shanda told me that. . . .

\* \* \*

Okay. I believe at that point she told me that there was going to be a problem, is what she told me, because it was in the middle of the - - insurance had already approved the surgery, and then it was dropped into Workers' Comp, and she said, "You need to wait." And at that point I couldn't wait any more. I was - - I mean, you can see from my doctor's visit I was running the store on pain pills. I wasn't sleeping. I wanted to get some relief. I wanted to go ahead with the surgery. (T. 42-44).

Claimant asserts that she informed Dr. Sanchez that her right shoulder complaint was the product of a work-related injury. Thereafter, claimant testified that she told her other medical provider of the work-related nexus.

Although she proceeded with the surgery, claimant's testimony reflects that same has not been paid by either the health care provider or the workers' compensation carrier. Claimant has paid two-thirds of the East Memphis Surgery Center bill, which is where her surgery was performed, as well as some of the other providers. Claimant acknowledged that respondents continued to pay her salary from September 19, 2004, until September 24, 2004. Claimant acknowledged receiving short-term disability through Aetna Disability Services beginning October 6, 2004, through October 31, 2004. Claimant 's testimony reflects that she elected to take out the policy of short-term disability, although it was offered through her employer, and that she paid the premium for same. The testimony in the record reflects that claimant received \$1,575.00, in short-term disability payments.

The knot on the claimant's right shoulder was visible. Claimant testified that she showed it to Nancy Whalley, one of her co-workers. The testimony of the claimant reflects that as assistant manager, she reported her December 3, 2003, injury to the store manager, James Barron, who was her supervisor. As of the date of the hearing in this claim, claimant estimated that Mr. Barron had been gone from the employment of respondent-employer six to eight months.

The testimony of the claimant reflects that due to the number of work-related injuries, respondent-employer was deemed a high risk employer, and was being monitored by the Health and Safety Department of the Arkansas Workers' Compensation Commission. Accordingly, claimant had access to a file containing checklists and safety forms that had to be completed by respondent-employer pursuant to the directions of the Commission. The visit by Mr. Dan Cook of the Health & Safety Division of the Arkansas Workers' Compensation Commission which resulted in the claimant's efforts to file a workers' compensation claim relative to her right

shoulder complaint was the product of the safety program of the Commission. (T. 53-54).

Claimant testified that she had been informed by management personnel of respondent-employer that any work-related claim had to be filed within twenty-four hours of the occurrence. (T. 63). Claimant acknowledge the posting of a Form P at the store that she has managed since January 2004. Claimant added that it is her understanding that the reporting, even pursuant to the Form P, must be made within twenty-four hours.

Ms. Pamela Moore, a cashier and stocker at respondents off and on since November 2003. Ms. Moore's testimony reflects that she had an opportunity to work with the claimant on a daily basis, and that the claimant was physically capable of doing whatever the store needed her to do. In terms of the physical activity that she witnessed the claimant performing, Ms. Moore testified:

We unloaded the truck weekly as it came in with freight. From there putting it on the six-wheelers and getting it our to the floor. From the floor up to the shelves, just stocking. a little bit of everything, actually. (T. 68).

Ms. Moore's testimony reflects that she did not observe the claimant having any difficulties or problems lifting, pushing, pulling, or working overhead.

Ms. Moore testified that she observed the incident in which the claimant was struck by a package that was being retrieved from a riser in December 2003. The testimony of Ms. Moore reflects:

We had a customer wanting a toy that was above the shelf in apparel, a high shelf, probably eight foot level. It was wood, a wooden toy that was still packaged in a box to be assembled. Ms. Cheney and another employee and myself were at the apparel trying to retrieve that particular toy for the customer.

The other lady was standing on the ladder trying to reach to

that level, and it was my idea at that time to get another ladder to be able to be at the same height she was to help get it off the shelf and lower it down.

So the employee that was on the ladder didn't - - she told me "No, I can get it myself. Don't worry about going and getting another ladder." While she was on the ladder I was standing right beside her on the floor. And as she tried to pull it off of the shelf, like I said, it was pretty heavy, a solid wood toy, and she dropped it. My hand was on the box to try to help levelize it as she was bringing it down, but when she dropped it, of course I didn't have any control of it, and from there Ms. Cheney was standing on the other side of me, and it came down on top of her. (T. 68-69).

Ms. Moore's testimony reflects that the box fell onto the side of the claimant's head, knocking her glasses off, and struck her directly on the right shoulder. Thereafter, Ms. Moore added, the claimant went to the surface on her knees. Ms. Moore testified regarding her observations following the accident:

Yes, it did leave a tremendous red spot on her shoulder where the corner of the box had actually - - from the impact of hit almost to the point where it looked like when you would injure yourself blood would come to the surface of the skin but not actually break the skin for you to bleed. (T. 70).

Ms. Moore observed the afore shortly after the occurrence of the accident.

Ms. Moore's testimony reflects that the claimant continued to work the days and weeks following the accident and was later promoted to the position of manager after Christmas. Ms. Moore noted that the claimant was limited in her ability to lift, carry, pull and perform overhead activities following the accident. Ms. Moore explained:

Well, after the injury she wasn't physically capable of doing the heavier lifting and pulling and reaching above and up on the shelves, and that sort of thing, yes. (T. 72).

Ms. Moore observed that it was the responsibility of the manager to do "pretty much anything",

from a physical standpoint as the other employees. Ms. Moore testified that Mr. Barron, the store manager was present at the store on the date of the claimant's accident. Ms. Moore left the employment of respondent for two months beginning January 2004. Ms. Moore noted that during the period that she remained in the employment of respondent following the claimant's December 2003, accident, she observed a decrease in the claimant's capabilities to physically perform her duties as compared to prior to the accident.

Ms. Nancy Whalley, an employee of respondent since 1998, is a floor supervisor, testified that while she was at the store on the day to the claimant's December 2003, accident, she did not witness it. Ms. Whalley was told of the accident by the employee who was retrieving the box from the shelf at the time of accident. Regarding her observation of the claimant prior to December 3, 2003, Ms. Whalley testified:

I thought she was in very good shape. I mean I'm a little bit older than she is, but I had no idea that she was even that age. That little lady was a worker.(T. 84).

Ms. Whalley testified that the claimant was able to do lifting, pulling, reaching and overhead work.

Following the accident, Ms. Whalley's testimony reflects, regarding her observation of the claimant:

Yes, sir, I did after the lady that dropped the box on her, after she had told me. And then I started to the back and I met Ms. Peggy, which she was real pale, and she showed me her shoulder.

There was - - on her right shoulder there was a - - it looked like blood under the skin. It was real red.

And there was a knot that was coming up on her shoulder.

I asked if she was okay, and at first she said "I don't know,"

but she was real nauseated. She said she was sick to her stomach. (T. 84).

Ms. Whalley testified about her observations of the claimant's physical capabilities subsequent to the December 3, 2003, accident.

Well, she wasn't able to move her arm like she had been. She was not able to like - - there at Fred's we have a lot of picking up because we get the freight in in cases, so we have a lot of lifting, and I noticed that Ms. Peggy would mostly work with her left arm and hand.(T. 85).

Ms. Whalley testified that the claimant's symptoms seemed to progressively worsen as time passed:

It would seem like some days that maybe it might feel a little better, but when she would go and try to work, I think that would probably aggravate it, and then I would notice that she just was not able - - what I noticed more so, she was not able to lift, to pick up, because I'm floor supervisor so I'm over the floor a lot, and I noticed when people are working. That's my job - -not her so to speak - - but when you notice a difference in someone. . . .

. . .I did notice that she could not lift and have the movement that she had had before.(T. 85-86).

Ms. Whalley testified that the claimant did report the accident to Mr. Barron, the store manager. Ms. Whalley's testimony reflects regarding a conversation of Mr. Barron relative to the claimant:

No, sir, I don't believe - - he did say one thing, that he hoped Ms. Peggy was okay, so he knew about the incident. I said, "Well, I do too because I know that the hurt her arm." He said that he knew that it did too. (T. 86).

Ms. Whalley noted that the above conversation occurred the same day as the claimant's accident.

Ms. Whalley's testimony reflects that while she saw the knot and red place on the claimant's shoulder on the date of the accident, she also observed a different looking knot on claimant's

shoulder later, that was higher and stuck up more. (T. 88).

The medical in the record reflects that claimant was seen by Dr. Trent Pierce in May and August 2003, with complaints relative to her right arm and shoulder. (RX. #1, p.3). Claimant was referred by Dr. Pierce to D. Guy L'Heureux, a West Memphis orthopedic physician, relate to shoulder/arm complaint.

Claimant was seen by Dr. L'Heureux on September 15, 2003, pursuant to the above referral. The September 15, 2003, report relative to the claimant's visit reflects, in pertinent part:

HISTORY: This 58 year old white female is referred by Dr. Pierce for evaluation of right shoulder pain that has been present for at least six months. The patient says that at a young age, 10 years old, she sustained an injury to the right shoulder for which she was in a cast for six weeks. . . . for the past 9 or 10 months she has been working at Fred's where she does a lot of lifting, sometimes 30 to 40 pounds. She complains of pain in the right shoulder. She shows the right AC joint with pain radiating sometimes towards the scapula and right rib cage. . . .(RX. #1, p. 4).

Following his physical examination of the claimant during the September 15, 2003, visit, Dr. L'Heureux diagnosed the claimant's complaint as tendinitis of the right rotator cuff and subacromial bursitis of the right shoulder. Claimant was treated by an injection, provided over the counter medication (Aleve), and provided instructions for an exercise program. (RX. #1, p. 4-5).

Claimant was again seen by Dr. L'Heureux on October 21, 2003. After noting the improvement in claimant's right shoulder complaints since the prior visit, and the results of the physical examination, the October 21, 2003, report of Dr. L'Heureux concludes:

Recommendation: Since she is doing better I recommend that she continues the Aleve, heat and the exercise program. The patient is resuming her regular work and I will be glad to re-evaluate if there is recurrence of pain or if she doesn't regain full range of motion of

her shoulder within the next month. (RX. #1, p. 6).

There is no evidence in the record to reflect that claimant sought or obtained medical treatment relative to her right shoulder/arm between the October 21, 2003, visit of Dr. L'Heureux and the December 3, 2003, accident in the employment of respondent.

The first evidence of medical treatment received by the claimant subsequent to October 21, 2003, is a May 21, 2004, visit to Dr. Ilsa Sanchez for a urinary tract infection. (CX. #1, p. 1-4). (CX. #1, p. 36). Claimant attributed her right shoulder complaints for which she received medical treatment in 2004, to the December 3, 2003, incident in her employment with respondent. Pursuant to a July 16, 2004, follow-up visit, wherein claimant registered complaint relative to her right shoulder, claimant underwent additional diagnostic studies, to include a July 30, 2004, MRI scan of her right shoulder.(CX. #1, p. 9-10). Claimant was referred by Dr. Sanchez to the Campbell Clinic for further medical treatment following the MRI scan. (CX. #1, p. 36).

On August 23, 2004, claimant was evaluated Dr. Frederick M. Azar, an orthopedic physician, pursuant to the referral of Dr. Sanchez. Following his examination of the claimant and review of available medical records, Dr. Azar's impression of the claimant's complaint was that of possible right rotator cuff tear and degenerative cyst of distal clavicle. While the history as provided by the claimant in the August 23, 2004, report of Dr. Azar is consistent with the testimony of the witnesses during the course of the hearing, there is no evidence in the record to reflect that claimant had seen "multiple other physicians" between the December 3, 2003, incident and May 2004, visit to Dr. Sanchez. (CX. #1, p. 13).

The evidence in the record reflects that on August 30, 2004, claimant was seen by Dr.

Stephen M. Waggoner, a Memphis orthopedic physician, relative to her right shoulder complaint.

Claimant had previously seen Dr. Waggoner for right hip complaint in 1998. A September 13, 2004, clinic note of Memphis Orthopaedic Group reflects that the claimant was referred by Dr.

Waggoner to Dr. A.H Manugian. The September 13, 2004, report reflects, in pertinent part:

PI: Ms. Chaney is referred by Dr. Waggoner for further evaluation and treatment of a right shoulder injury since December 2003. An MRI revealing a supraspinatus as well as a tear of the subscapularis tendon. Her records are reviewed. She has been treated nonoperatively with worsening symptoms since that time. She has difficulty at night. Occasional numbness in the right hand, reaching overhead and pain. Denies any previous problems until a box dropped on her shoulder in December 2003 at work.

PE: On examination today, well developed, well nourished 59 year-old in no acute distress. Examination of her neck in normal. The left shoulder is normal. The right shoulder is tender over the anterior capsule and biceps tendon. Has a mild impingement arc with pain. Some atrophy of the posterior musculature. Weakness of external rotation against resistance. A very mild Speed test. . . . .

Xrays and MRI of her right shoulder are reviewed. She has a Type II acromion and what appears to be a supraspinatus irregularity consistent with possible tear as well as a tear of the subscapular tendon and retraction.

IMPRESSION: Persistent right shoulder pain, subscapularis and possible supraspinatus rotator cuff tear and a Type II acromion.

RECOMMENDATION: I fully agree with Dr. Waggoner's evaluation and recommendations. It is felt at this point that an examination of the right shoulder under anesthesia, diagnostic arthroscopy, evaluation of the articular surfaces, cuff, subscapularis and subacromial bursa followed by most likely a subacromial decompression, possible repair of the cuff and/or subscapularis and debridement. . . . . She would like to proceed. . . . . In the interim she is to continue on her modified work. . . (CX. #1, p. 19-20).

Claimant did undergo surgery relative to her right shoulder in September 2004. The parties have stipulated a temporary total disability period of September 19, 2004, through October 31, 2004, in the event of a finding of compensability.

After a thorough consideration of all of the evidence in this record, to include the testimony of the witnesses, review of the medical reports and documentary evidence, application of the appropriate statutory provisions and case law, I make the following:

### **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On December 3, 2003, the relationship of employee-employer-carrier existed among the parties.
3. On December 3, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$317.00/238.00, for temporary total/permanent partial disability.
4. On December 3, 2003, the claimant sustained an injury to her right shoulder arising out of and in the course of her employment.
5. The Claimant was temporarily totally disabled for the period beginning September 19, 2004, and continuing through October 31, 2004, as a result of her December 3, 2003, compensable injury.
6. The provisions of Ark. Code Ann. §11-9-411 are applicable to the present claim. Accordingly, respondents are entitled to credit against short term disability benefits paid to the claimant in the amount of \$1575.00.
7. The respondent shall pay all reasonable hospital and medical expenses arising out of the claimant's right shoulder injury of December 3, 2003.
8. The respondents have controverted this claim in its entirety.

### **CONCLUSIONS**

The present claim is one governed by the provisions of Act 796 of 1993, in that the claimant asserts entitlement to workers' compensation benefits as a result of an injury having been sustained subsequent to the effective date of the afore provision. Specifically, the claimant maintains that as a result of a December 3, 2003, accidental injury to her right shoulder within the course and scope of her employment, she required medical treatment and was rendered totally incapacitated from engaging in gainful employment, and is entitled to corresponding medical and indemnity workers compensation benefits.

In order to prove a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, claimant must establish by a preponderance of the evidence; an injury arising out of and in the course of employment; that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16), establishing the injury; and that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. § 11-9-102 (4) (A) (i). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the instant claim, it is undisputed that the claimant received medical treatment relative to her upper right extremity prior to December 2003. Claimant has last been seen by a physician relative to her right shoulder complaint during an October 21, 2003, follow-up visit to Dr. Guy L'Heureux, at which time she was released from the care of same to resume her regular work activity. While the claimant had received medical treatment under the care of Dr. Pierce and Dr.

L'Heureux, in May, August, September and October 2003, having been seen on two occasions by each physician, she was not removed from work as a result of the treatment. Indeed, the credible evidence in the record reflects that claimant continued discharge her employment duties, much of which entailed manual labor.

The evidence preponderates that while assisting in retrieving an item for a customer claimant suffered a blow to her right shoulder on or about December 3, 2003, as she was struck by the falling merchandise. The injury was reported to appropriate supervisory personnel of respondents, the store manager. Claimant continued to experience symptoms in her right shoulder/arm following the December 3, 2003, accident. Immediately following the accident, objective evidence of an injury was present on the claimant's right shoulder, to include a noticeable red mark and swelling in the area where the box of merchandise impacted the claimant's shoulder.

As time progressed, claimant curtailed the amount of physical labor she usually performed due to the adverse effect of same on her right shoulder. The credible testimony of claimant's co-workers corroborate that of the claimant regarding the reduced activity level of the claimant with respect to such activities as lifting, pulling, and performing overhead tasks.

At the point in time claimant sought medical treatment relative to her right shoulder/arm complaint, she relayed the history of the December 3, 2003, work accident as the basis for the need for her medical treatment. Claimant's diagnostic studies disclosed objective medical finding consistent with the mechanism of the December 3, 2003, work accident. The claimant has sustained her burden of proof by a preponderance of the evidence that she suffered a compensable injury to her right shoulder arising out of and in the course of her employment on

December 3, 2003, which required medical treatment and rendered her totally incapacitated from engaging in gainful employment from September 19, 2004, through October 31, 2004.

Respondents have controverted the compensability of this claim in its entirety.

Respondents were provided notice of the claimant's injury on the date of its occurrence, December 3, 2003, when claimant notified her supervisor, the store manager. Prior to receiving active medical treatment for her injury on May 21, 2004, respondents were again provided notice that the treatment was due to the accidental injury that the claimant had suffered on December 3, 2003. Medical treatment rendered to the claimant under the care of her treating physicians regarding her right shoulder subsequent to May 21, 2004, has been reasonably necessary and related to the December 3, 2003, compensable injury, and for which respondents are liable pursuant to Ark. Code Ann. § 11-9-508.

Claimant received \$1575.00, in short term disability benefits pursuant to a group disability policy issued through respondent-employer. The evidence further reflects that claimant continued to receive her salary through September 24, 2004. Claimant was totally disabled from engaging gainful employment from September 19, 2004, through October 31, 2004, and correspondingly entitled to temporary total disability benefits, as she remained within her healing period. Respondents have controverted the claimant's entitlement to all workers' compensation benefits as a result of the December 3, 2003, compensable injury, to include temporary total disability benefits.

### **AWARD**

Respondents are hereby ordered and directed to pay to the claimant temporary total disability benefits at the weekly compensation rate of \$317.00, for the period

September 19, 2004, through October 31, 2004, as a result of the December 3, 2003, compensable right shoulder injury. Said sums accrued shall be paid in lump without discount. Respondents may claim credit for sums heretofore paid to the claimant pursuant to Ark. Code Ann. § 11-9-411.

Respondents are further ordered and directed to pay all reasonably necessary related medical, hospital, nursing and other apparatus expenses, to include medical related travel, growing out of the December 3, 2003, compensable right shoulder injury. Respondents are further ordered and directed to reimburse the claimant for sums expended out of pocket for medical treatment relative to the December 3, 2003, compensable right shoulder injury.

Maximum attorney fees are herein awarded to the claimant's attorney on the controverted indemnity benefits herein awarded pursuant to Ark. Code Ann. § 11-9-715.

This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809, until paid.

Matters not addressed herein are expressly reserved.

**IT IS SO ORDERED.**

---

**Andrew L. Blood, Administrative Law Judge**