

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F612744**

**RANDY GARRISON, EMPLOYEE**

**CLAIMANT**

**FIRESTONE TUBE COMPANY, EMPLOYER**

**RESPONDENT**

**OLD REPUBLIC INSURANCE COMPANY,  
CARRIER/TPA**

**RESPONDENT**

**OPINION FILED July 20, 2007**

Hearing before Administrative Law Judge O. Milton Fine II on May 9, 2007, in Russellville, Pope County, Arkansas.

Claimant represented by Mr. Aaron L. Martin, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Ms. Betty Demory Hardy, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On May 9, 2007, the above-captioned claim was heard in Russellville, Arkansas. A prehearing conference took place on March 5, 2007. A Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the Order.

**Stipulations**

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following four, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed at all relevant times, including June 2, 2006.
3. The Respondents have previously made payments on this claim, including some medical and physical therapy.
4. The Claimant filed a claim for a right shoulder/elbow injury occurring on June 2, 2006, which was initially accepted as compensable.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit 1. The parties requested an additional one regarding the valuation of Claimant's average weekly wage. Respondents also amended their issue regarding their entitlement to an offset, resulting in the following being litigated:

Claimant:

1. Whether the Claimant is entitled to payment and reimbursement of reasonable and necessary medical expenses.
2. Whether the Claimant is entitled to temporary total disability benefits from November 9, 2006 to a date yet to be determined.
3. Whether the Claimant is entitled to a controverted attorney's fee for his claim for temporary total disability benefits.

Respondent:

1. Whether the Claimant is entitled to additional benefits.
2. In the event Claimant is awarded temporary total disability benefits, whether Respondents are entitled to an offset under Ark. Code Ann. § 11-9-411.

Contentions

Claimant:

1. Claimant contends that he suffered a compensable injury to his right shoulder and right elbow on June 2, 2006.
2. Claimant contends that he is entitled to temporary total disability benefits from November 9, 2006 through a date yet to be determined. The Claimant was taken off work on November 9, 2006 and his condition has not stabilized. Therefore, the Claimant contends that he has remained in his healing period and unable to earn sufficient wages.
3. Claimant contends that he is entitled to controverted attorney's fees.

Respondents:

1. Respondents contend that the Claimant has been provided all appropriate benefits to which he is entitled. Specifically, the Respondents provided the Claimant medical treatment and physical therapy. However, the Claimant missed six of nine appointments for physical therapy.
2. Respondents assert that any additional treatment sought by the Claimant is not reasonably necessary nor causally related to his June 2, 2006 work-related injury.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record as a whole, including 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, I hereby make the following

findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his right shoulder.
4. Claimant has failed to prove by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his right elbow.
5. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from January 17, 2007 to May 4, 2007.
6. Respondents are entitled to a dollar-for-dollar offset under Ark. Code Ann. § 11-9-411 for treatment of Claimant's right shoulder that was covered by his group health insurance, and for Accident/Sickness disability benefits paid to Claimant from January 17, 2007 to April 6, 2007.
7. Because of problems with the Form AR-W introduced into the record, the issue regarding the valuation of Claimant's average weekly wage cannot be reached and will be considered reserved.
8. Claimant's attorney is entitled to a controverted attorney's fee.

### **CASE IN CHIEF**

#### **Summary of Evidence**

Two witnesses testified at the hearing: Claimant and Lorrie Chesser.

In addition to the prehearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Joint Exhibit 1, an Abstract of Joint Exhibit 2, consisting of 23 individually numbered pages; Joint Exhibit 2, Claimant's medical records, consisting of 125 individually numbered pages; Joint Exhibit 3, an Incident Pass regarding Claimant dated June 2, 2006 and consisting of one page; Joint Exhibit 4, a letter from Gallagher Bassett Services, Inc. to Claimant dated November 8, 2006 and consisting of one page; and Joint Exhibit 5, a letter from Respondents' counsel to Ms. Tonia Ray, Certified Court Reporter, dated May 15, 2007, along with a Form AR-W for Claimant, consisting of two pages.

#### Testimony

Randy Garrison. Claimant testified that his full name is Randy Alden Garrison. He described his June 2, 2006 injury as follows: "I was pulling a bale of rubber out of the shredder. It got hung up in the shredder, and when I pulled up, I heard a pop in my shoulder." He filled out an accident report that day. Claimant saw Dr. Kriesel, who sent him to therapy for two weeks. On his second visit to the doctor, he was given a cortisone shot. He stated that the treatment did not help his symptoms, which were pain in front part of his labrum, toward his chest, along with numbness in his arm and hand. He described his injury as "my labrum was coming loose on the bone." He stated that he reported the symptoms to Dr. Kriesel.

Claimant admitted that he missed some physical therapy appointments. He stated that he missed two because he was sick and three because he had to take care his girlfriend's seven-year-old son, who was ill. He testified that he did not notify the therapist

when he was sick, but did so on the occasions involving the boy's illness because Lorrie Chesser had told him he had to call in.

He identified Joint Exhibit 4 as the letter he received that notified him that his benefits were being terminated due to missing therapy appointments. In response, Claimant contacted his counsel and filed a claim. Thereafter, Claimant began seeking treatment with Dr. Bowen, who gave him a cortisone shot, performed surgery and prescribed physical therapy. Claimant stated that the treatment helped with the pain in the front of his shoulder, and enabled him to regain use of his arm.

Claimant testified that he had a previous right shoulder injury in 2004. However, he stated that the pain was much greater, and in a different area, than his 2006 injury, and that his entire arm was numb then. He stated that he had no use of his right arm, and that his bicep tendon, labrum and rotator cuff were torn. He underwent two surgeries for it—the first to repair the injury, and the second to repair a new tear and fix and anchor that had come loose from the first surgery. The second surgery was successful, and he returned to work thereafter.

At the time of the 2004 injury, Claimant was a "stringer operator." The job required that he lift 75-pound bales of raw rubber onto a belt prior to it being mixed. He estimated that he lifted 22,000 pounds in an eight-hour shift. Claimant stated that he did not have any trouble performing that job, and had no other problems with his right shoulder until June 2, 2006. In his later job, the amount he lifted at the banbury depended on what was running, and varied from 25 to 50 to 75 pounds.

Claimant went through Accident/Sickness (hereinafter "A/S") Reports he had filed at Respondent Firestone after his June 2, 2006 shoulder injury, and which involved

hooking up a bushhog (June 22, 2006) and a trailer (September 14, 2006), and moving a fish tank (August 13, 2006), but he testified that none of those injuries involved his shoulder. He also stated that he did not recall sustaining any shoulder injury from June 6, 2006 forward (although his shoulder injury occurred on the 2<sup>nd</sup>). However, he testified that Dr. Kriesel had placed him on light duty with no lifting permitted, and that he had complied with the restrictions.

The light duty ended when Claimant's benefits were terminated on November 9, 2006. It was on this day that he filed an A/S Report for the June 2 shoulder injury. He stated that he has not worked anywhere since November 9. On April 6, 2007, Respondent Firestone laid him off. Dr. Bowen released him from care on May 4 or 5 of 2007, giving him lifting restrictions of 50 pounds from floor to waist, 25 pounds from waist to chest, and no overhead lifting permitted.

Claimant testified that from November 9, 2006 forward, his insurance paid for his treatment. He had out-of-pocket expenses as well as co-pays, along with a \$1,000.00 deductible. From A/S, a disability policy he had through Respondent Firestone, Claimant got \$285.00 per week after taxes. As for his wages at Firestone, he stated his overtime varied, but that he averaged \$850.00 per week before taxes and \$650.00 after taxes.

On cross-examination, Claimant admitted that he was allowed to schedule his physical therapy appointments whenever it was convenient for him. Claimant was the one who made the appointments. While he suffered the shoulder injury on June 2, 2006, he did not seek treatment until October 4, 2006. In the meantime, he continued to work full-time in the banbury area of Respondent Firestone and had complained of some right elbow problems.

With regard to the bushhogging incident, Claimant testified that he hooked up the bushhog to the tractor and mowed approximately one acre. This resulted in lower back problems, and he took some time off work. However, the time off was not due to his shoulder, even though this was after the June 2 accident. In fact, Claimant returned to the banbury area after being off. As for the August 2006 fish tank incident, Claimant stated that he was pushing an empty 42-gallon tank when he pinched a nerve in his back. He was off from August 14-15 and 23-27 of 2006. But again, he testified that this was not due to his shoulder. He returned to work in the banbury area until September 18, 2006, when he was injured while hooking up a trailer to haul hay.

On October 4, 2006, Claimant saw Lorrie Chesser, the safety person at Respondent Firestone, about his shoulder. He filled out a Form AR-N. She set him up to go and see Dr. Kriesel. Thereafter, he worked at light duty until November 8, 2006. His therapy appointments were supposed to be three times a week for two weeks. On October 17, Claimant did not go to therapy because he was sick. However, he did not call in. On October 18, he did not attend, and on October 20, he cancelled the appointment—but he did not recall why. On October 23, he did not show up or cancel the appointment; and he did the same thing on October 31. He testified again that the illness of his girlfriend's son led him to miss three appointments. Claimant went to therapy on November 2, but cancelled the appointments on November 6 and 8. He could not recall why he cancelled them.

After Claimant's benefits were terminated and he began to see Dr. Bowen on his own, Bowen sent him to therapy as well. Claimant testified that he told the doctor that he had earlier made only three out of nine therapy visits when under Dr. Kriesel's care. After

Dr. Bowen performed surgery on his shoulder on January 17, 2007, he prescribed more physical therapy. Claimant stated that he missed some of those appointments as well, but could not recall why.

Claimant testified that he did not feel like he needed to seek medical treatment after the June 2, 2006 incident. He stated that his elbow and shoulder got worse over time thereafter. Dr. Kriesel has diagnosed him as having bursitis in his shoulder.

While he has not worked since November 9, Claimant testified that he has continued to care for his girlfriend's son. He drives him to school each day, which for Claimant is a 23-mile trip one-way when it originates from his house. He also picks him up each afternoon. He also testified that he still rides his four-wheeler "occasionally" and takes his girlfriend's son fishing.

When Claimant was laid off on April 6, 2007, his A/S benefits he received through Respondent Firestone ended. At that time, he applied for and began receiving unemployment benefits. He represented in his application that he was willing and able to work. Claimant stated that he also makes the required twice-weekly job contacts that are required, but has not filled out any job applications. In addition to these benefits, Respondent Firestone pays the difference between this amount and his former wage. Claimant does not know if he is subject to being called back by Respondent Firestone.

On redirect, Claimant testified that he applied for unemployment in the middle of April, and began receiving benefits in the last week of that month. His last A/S check came the week after his layoff. He filed for these benefits on November 9, 2006, and got his first check the week thereafter. In addition, in explaining what changed after June 2, 2006, the following colloquy occurred:

Q. Why didn't you see a doctor between June 2<sup>nd</sup> of 2006 until October of 2006?

A. Oh, the pain wasn't that bad at first. I didn't want to, you know, go through the trouble of going to the doctor, so I—I just kept working.

Q. Did anything change about your job?

A. No.

Q. Did you do anything differently?

A. No.

Q. Okay. Now were you also working—doing some supervisor type job, as well, at the time?

A. Clock card every now and then.

Q. So what kind of work were you doing between June and October?

A. The banbury.

On recross examination, Claimant admitted that while he did not want to go to the trouble of going to the doctor for his shoulder prior to October 9, 2006, he did seek care for his low back.

When questioned by me, Claimant described a "banbury" as where the rubber is cooked after it has been shredded and mixed with carbon black and oil. He described his activity at the time of the June 2, 2006 accident as follows:

Well, when you drop these bales down the shredder . . . sometimes they get hung up in the shredder. Well, you have to turn it off, and you walk up on—up a flight of stairs and you get a hook and you got to hook the bale of rubber and pull it out of the shredder. That's the only way it can come out is if you pull it out. And you have to just pull it completely out and either force it, you know—we usually just turn it around the other way and drop it back down in, then turn the shredder back on. So, I mean, you're basically, pulling a 75-pound bale straight up, you know, with a hook. That's the only way of getting it out.

He stated that while he felt something in his shoulder at this time, he only stopped working for 20 minutes while a stringer operator retrieved the bale. He described A/S benefits as being for an “off the job injury.”

On redirect, Claimant identified Joint Exhibit 3 as the Incident Pass he filled out on the date of the accident. He did not fill it out, but did sign it. As for receiving A/S benefits for his shoulder, Claimant testified that he put on the application that it was a work-related injury but that workers’ compensation had denied benefits.

Lorrie Chesser. Called by Respondents, Chesser testified that she is the Safety and Environmental Manager for Respondent Firestone. She has held this position since August 2004. Chesser is familiar with Claimant, and with the fact that he reported an incident involving his shoulder on June 2, 2006. However, he did not request any treatment until October 4, 2006; and Chesser testified that she had no contact with him for any other reasons during that interim. She testified that A/S is a short-term disability policy that Bridgestone Firestone Corporation provides for workers to cover non-work-related injuries or illnesses. Claimant has taken advantage of this policy in the past.

Chesser testified that the Form AR-N that is in evidence was completed in her office. Claimant came and told her that his shoulder was hurting, and that it was related to his June injury. Chesser retrieved the June 2 Incident Pass and asked Claimant if the shoulder had been bothering him between June and October. He told her that it had not, but that it had slowly started to bother him more. She was also aware that he had a previous right shoulder injury that had required two surgeries.

Chesser accompanied Claimant to his first appointment with Dr. Kriesel—something she testified she normally does as part of her position. She understood that he was given

a diagnosis of mild bursitis, and was prescribed physical therapy. Chesser did not schedule his therapy appointments, but told him that he needed to set them up and attend them. When she discovered that he was not going, she spoke with him again and warned him that not going could put his benefits in jeopardy. His visit with Dr. Kriesel and his therapy were covered.

On October 11, 2006, Claimant returned to Dr. Kriesel. Chesser testified that she accompanied him again. While she did not go on October 9<sup>th</sup> when Claimant underwent an MRI of his right elbow and right shoulder, she received a copy of the reports. The report supported Dr. Kriesel's assessment, which that there was a small amount of fluid on the shoulder, that indicated a mild case of bursitis. Chesser also went with Claimant on his October 26 visit to Dr. Kriesel, when he received a cortisone injection. She described the following occurring:

During that appointment, when they were ready to give Mr. Garrison an injection, he was wearing a long-sleeved shirt over a T-shirt, and Dr. Kriesel asked him just to remove the top shirt, which was a long-sleeved pullover, which he did. And I didn't realize it at first, but the nurse brought it to my attention, that when he removed that shirt, he had pulled it over his head smoothly and cleanly, with no hesitation, in a very fluid movement . . . .

Shortly after that appointment, Chesser received notice from the therapist that Claimant had missed six of nine appointments. His claim was then denied for his non-compliance. Later, it was also denied because his treatment was not related to the June 2, 2006 accident.

Chesser testified that Claimant was the first employee of 14 that was laid off beginning in April 2007 because he had the least seniority. However, he is subject to being recalled if work picks back up, after the other 13 individuals are given the opportunity to

return. Chesser stated that the additional check that Claimant described receiving that made up the difference between his unemployment benefits and his former pay is called "supp pay," and is part of the union contract for workers laid off by Respondent Firestone.

On cross-examination, Chesser testified that in the past A/S benefits have been allowed for a work-related injury if workers' compensation denied the claim.

When questioned by me, Chesser stated that Claimant was wearing a long-sleeve T-shirt with no buttons when he removed it for his cortisone injection. He used his right hand to grasp the lower left portion of the shirt and his left hand to grasp the lower right portion, and pulled it straight off with no hesitation and no grimace on his face.

#### Records

Joint Exhibits 1 and 2. The medical records of Claimant that were introduced at the May 9, 2007 hearing and are part of Joint Exhibit 1 and 2 reflect the following:

On June 26, 2006, Claimant filed an Accident/Sickness Status Report, stating that he hurt his back while bushhogging on June 22. He filed other report on August 21 and 28, 2006, stating that he hurt his back again while moving a fish tank on August 13. These were signed by Russ Pearson, D.C. Another such report on September 18, 2006, stated that Claimant was hauling hay on September 14 and hurt his back. Each report stated that Claimant could not work because the bending, lifting and twisting required by the position would aggravate his injury.

On October 3, 2006, Claimant filed a Form AR-N, stating that on June 2, 2006, he injured his shoulder at work. He reported:

Employee claims that while pulling a bale of rubber from the shredder he hear a "pop" in his right shoulder and experienced pain. His right shoulder continued to hurt and [he] felt numbness in his right hand.

When he presented to Dr. Ben Kriesel on October 4, 2006, he stated that four months ago he pulled on something and felt a pop in his left chest/shoulder. He told Dr. Kriesel that the shoulder continued to hurt and that the bicep is painful now. He also complained of pain in his right elbow and pain and numbness into right arm and hand. He had a right shoulder torn rotator cuff and bicep in 2004. X-rays of the right shoulder showed degenerative changes, with the AC joint widened. The films of the right elbow also showed degenerative changes with spurring. He was diagnosed with right shoulder strain and right elbow tendonitis. Dr. Kriesel placed him on a zero-pound lifting restriction (and other restrictions for his shoulder and elbow) for seven days and referred him for an MRI. The MRI of the shoulder, taken on October 26, 2006, showed the following:

1. Small linear subacromial bursa fluid collection suggesting bursitis. This is somewhat non-specific.
2. Some minimal subchondral cystic degenerative change humeral head.

In addition, the labrum appeared to be intact and the AC joint appeared normal.

The MRI of the elbow, taken the same day, was normal with the exception of a “[b]orderline amount [of] joint fluid.”

After Claimant presented again on October 11 with the same symptoms, he was diagnosed as having right shoulder bursitis and right elbow strain. He was prescribed physical therapy three days a week for two weeks, and was continued on work restrictions for his shoulder for 14 more days. On October 16, 2006, he was evaluated at River Valley Therapy and Sports Medicine. He also went there on October 18 and November 2. He cancelled without reason on October 20, and failed to show up or call on October 23.

When he returned to Dr. Kriesel on October 26, he stated that physical therapy had not helped much yet. The shoulder was negative for impingement. The right subacromial bursa was injected with Depo-medrol 40mg/moraine 1cc. Dr. Kriesel continued Claimant on light duty for 14 more days and prescribed two more weeks of therapy. He went on November 2, but canceled the November 6 and 8 (due to strep) appointments and failed to show or cancel on October 31.

When he returned to Dr. Kriesel on November 9, 2006, he stated that physical therapy was not helping at all. However, the doctor noted that he had missed six of nine appointments. Therapy was stopped, but limitations were continued. As the doctor reported on the A/S Report on November 16, Respondent Firestone refused to continue him on light duty. On November 15, Dr. Kriesel referred Claimant to an orthopedist, who was scheduled to see him on November 28.

Dr. Scott Bowen saw Claimant on the 28<sup>th</sup>. New x-rays of the shoulder showed only a previous acromioplasty. The MRI from Dr. Kriesel on October 9 indicated subacromial bursitis only. The rotator cuff and labrum appeared to be intact. Except for some synovial fluid, the MRI of the elbow was normal. His impressions were:

1. S/P arthroscopic debridement with slap repair, right shoulder.
2. Traumatically induced rotator cuff tendinitis and synovitis with possible injury to the subscapularis, right shoulder.
3. Traumatically induced lateral epicondylitis and medial epicondylitis, right elbow.

Dr. Bowen prescribed physical therapy for three times a week for three weeks. The records only reflect that he missed one appointment, on December 13, 2006.

On December 19, 2006, Claimant presented to Dr. Bowen with continued right shoulder and elbow pain. Dr. Bowen's impression was "[c]ontinued right shoulder pain with possible reinjury." That day, he wrote Dr. Kriesel:

In light of the fact that he became worse with physical therapy [which is not reflected in the therapy notes], this has been ongoing for a number of months and he did have a specific reinjury in June, recommendation is for relook arthroscopy with evaluation of the labrum and possible repair as well as possibly an open subscapularis repair.

Claimant was again referred for therapy in January 2007 and was discharged on the 16<sup>th</sup> of that month.

Dr. Bowen on January 17, 2007 performed the following surgical procedures on Claimant:

1. Right shoulder arthroscopy.
2. Labral debridement and synovectomy.
3. Arthroscopic revision anterior acromioplasty.
4. Arthroscopic distal clavicle resection.

His postoperative diagnoses were:

1. Intact rotator cuff.
2. Synovitis with intact labrum with type 1 abrasion of the superior labrum.
3. Mild external impingement.
4. Acromioclavicular joint arthrosis.

Dr. Bowen referred Claimant to physical therapy, three times a week. His therapy evaluation and plan of care dated January 22, 2007 provided that he was "off work until released by MD." The records note that he missed only his February 16 therapy

appointment during this period. On March 2, Dr. Bowen wrote Dr. Kriesel that he was prescribing four weeks of strengthening and that after that he expected to release him to full activities. Claimant cancelled his March 7 and 14 appointments, and failed to show for his March 21 session. On March 23, he presented with no pain and with full limits range of motion of all planes in the right shoulder. Dr. Bowen ordered that he continue in therapy to work on strengthening. Claimant failed to show for his March 28 appointment, and cancelled the one on the 30<sup>th</sup> of that month. On April 2, Dr. Bowen ordered four more weeks of therapy to focus on strengthening and wrote Dr. Kriesel that he expected to give a full release with an impairment rating and permanent restrictions of 50 pounds lifting to the waist on a regular basis but only occasional lifting of no more than 25 pounds to his chest or above his head. Claimant canceled his April 13 appointment, and failed to show on the 25<sup>th</sup>.

Joint Exhibit 3. This exhibit is an Incident Pass where Claimant reported the June 2, 2006 incident. It reads in pertinent part:

Employee claims that while pulling a bale of rubber from the shredder he heard a "pop" in his right shoulder and experienced pain. His right shoulder continued to hurt and felt [sic] numbness in his right hand.

The record also reflects that Claimant continued to work.

Joint Exhibit 4. This letter dated November 8, 2006 from Gallagher Bassett Services to Claimant reads in pertinent part:

We have been informed that you have missed several of your doctor's appointments and have been warned of the importance of attending these scheduled visits. Seeing as how you have missed three visits now, we are terminating your benefits. If you wish to continue medical treatment you will need to do so under your personal health insurance.

Joint Exhibit 5. This is the Form AR-W for Claimant.

**ADJUDICATION****A. Reasonable and Necessary Medical Treatment**

It is important to note at the outset that Respondents initially accepted this claim as compensable and paid for Claimant's initial treatment. This issue concerns treatment on and after November 9, 2006. Claimant has asserted that his treatment, as discussed herein, was reasonable and necessary. On the other hand, Respondents contend that they properly terminated his benefits on November 9, 2006 for two reasons: (1) his failure to attend physical therapy; and (2) his additional treatment was not reasonably necessary or causally related to his June 2, 2006 work-related injury.

Arkansas Code Annotated Section 11-9-508(a) provides that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As Respondents have alleged, the record shows that prior to their termination of his benefits, Claimant missed six of nine physical therapy appointments that Dr. Kriesel had prescribed. They contend that this relieved them of further obligation to pay for medical treatment. The Arkansas Court of Appeals has held that if a claimant abandons his course of treatment, his healing period could be found to have ended with that abandonment. See, e.g., *Breakfield v. In & Out, Inc.*, 79 Ark. App. 402, 88 S.W.3d 861 (2002). Moreover, the mere existence of a form of treatment that could improve a claimant's condition does not prohibit a finding that a claimant's healing period had ended when he refuses to undergo that treatment. See *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

Based on my review of the evidence, and in light of the above precedents, I find that Claimant did not abandon his treatment. Unlike the situations in *Thurman* and its progeny, Claimant did not refuse further treatment. Rather, he missed some therapy appointments that he explained at the hearing were primarily due to his own illness or the illness of his girlfriend's son. The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.* I view Claimant to be credible on this point.

Respondents also argue that the additional treatment is not reasonably necessary or causally related to his June 2, 2006 injury. The parties stipulated that Respondents initially accepted his claim for a right shoulder/elbow injury on that date as compensable. Again, they are not now controverting compensability. Rather, they question the relation between the treatment and the June 2 accident in light of the following: (1) Claimant continued to work for four months thereafter without seeking treatment; and (2) he filed A/S Reports during this interim regarding accidents reporting treatment to his back due to such activities as bushhogging, hauling hay and moving a large fish tank, but apparently did not experience symptoms regarding his shoulder and elbow to warrant their treatment as well. Claimant by his own testimony admitted that during this period he rode his four-wheeler occasionally, drove his girlfriend's son an extended distance to and from school, and took him fishing.

As stated above, Claimant has the onus of proving that his treatment was reasonable and necessary for the treatment of a compensable injury. His objective findings of injury, as verified by his January 17, 2007 shoulder surgery, were a type 1 abrasion of the superior labrum and mild external impingement in his shoulder. Respondents argue that these related to Claimant's earlier shoulder injury and two surgeries. However, the medical records, which do not include the records of the earlier injury and surgeries, do not indicate this. However, the October 9, 2006 MRI of his right elbow, which Respondents paid for, showed only a small amount of additional fluid. The records do not reflect that Claimant received any treatment for his elbow after this. I also note that Claimant did not mention an elbow injury or elbow pain either in his June 2, 2006

Incident Pass (Joint Exhibit 3) or the Form AR-N he signed on October 3, 2006. Thus, I find that he has met his burden regarding the shoulder, but not the elbow.

In arguing that these injuries could not have arisen due to his June 2, 2006 accident at work, Respondents cannot contend that some intervening cause instead led to the injuries without identifying that event. Speculation and conjecture cannot serve as a substitute for proof. *Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979). This rule applies not only to claimants, but to respondents seeking to employ an affirmative defense. *Johnson v. Wal-Mart Stores, Inc.*, 1998 AWCC 37, Claim No. E612677 (Full Commission Opinion filed February 5, 1998).

In light of the foregoing, and based upon my review of the evidence recounted above, I find that all medical treatment rendered Claimant's right shoulder and reflected in Joint Exhibit 2 to be reasonable and necessary for treatment of his compensable injury. However, I find that Claimant failed to prove the same regarding his right elbow.

B. Temporary Total Disability

Claimant argues that he is entitled to temporary total disability benefits from November 9, 2006 to a date yet to be determined. Claimant's compensable injuries to his shoulder are unscheduled, while the elbow injury is scheduled. See Ark. Code Ann. § 11-9-521 & (a)(1). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the

way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). As for scheduled injuries, a claimant is entitled to temporary total disability benefits “during the healing period or until the employee returns to work, whichever occurs first . . . .” Ark. Code Ann. § 11-9-521(a) (Repl. 2002). See *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1) (Repl. 2002).

As discussed above, Claimant’s MRI of his elbow showed nothing but a “borderline” amount of joint fluid on October 9, 2006. Moreover, the records do not reflect that he received any treatment for his elbow after that date. Hence, a preponderance of the evidence shows that Claimant reached the end of his healing period for his elbow prior to November 9, 2006 and is consequently not entitled to temporary total disability benefits.

As for his shoulder, Claimant stopped working at Respondent Firestone on November 9, 2006 because, as the records show, his benefits were terminated and they no longer would accommodate his light duty restriction. Not until his January 17, 2007 surgery was he totally incapable of earning wages. His therapy evaluation and plan of care dated January 22, 2007 provided that he was “off work until released by MD.” The records before me do not indicate that he has yet been released; but Dr. Bowen in his April 2 letter to Dr. Kriesel indicated that Claimant would be given a full release within 30 days, and Claimant testified that Dr. Bowen released him from treatment on May 4 or 5 of 2007. I note that Claimant testified that he applied for unemployment benefits around April 6, 2006, and that in so doing he represented that he was able and available to work. See

*Collette v. Cottage Café, Inc.*, 2005 AWCC 105, Claim No. F400944 (Full Commission Opinion filed May 13, 2005). Therefore, Claimant is entitled to temporary total disability benefits from January 17, 2007 to May 4, 2007.

C. Average Weekly Wage

Arkansas Code Annotated Section 11-9-518 provides:

(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.

....

(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.

As stated above, Joint Exhibit 5 contains a Form AR-W, Wage Statement Immediately Preceding Injury Date, that was submitted after the hearing by Respondents' counsel. My preliminary calculations using the data from the form, using the above section and the cases that apply it, show that Claimant was entitled to the maximum compensation rate at the time of his injury. However, my review of the form indicates that it may not reflect Claimant's wages for the 52 weeks preceding June 2, 2006 in that the last 12 weeks listed on the form, which should reflect the 12 weeks preceding the accident, reflect that Claimant was receiving A/S benefits in 11 of those weeks. But this is not reflected in the testimony or records before me. Furthermore, while at the hearing I gave the parties the

option of submitting a Form AR-W in lieu of them reaching a stipulation, they represented to me that they would reach a stipulation and submit it within seven days. I directed them to each sign it to reflect their agreement. However, I did not receive that. In sum, I do not believe that I have sufficient evidence before me to reach this issue. I thus will consider this a reserved issue.

D. Offset

Respondents have argued that in the event Claimant is awarded temporary total disability benefits, there must be an offset under Ark. Code Ann. § 11-9-411 for the A/S benefits Claimant has drawn and for the medical treatment that has been paid through his group health insurance. However, they have not argued that there should be an offset under § 11-9-506(b) for unemployment compensation he received prior to the end of his healing period and entitlement to temporary total disability benefits.

Section 11-9-411 provides in pertinent part:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever form or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

Claimant testified that his group health insurance paid for some of his treatment after Respondents terminated benefits. He also testified that he filed for A/S benefits, which was short-term disability, on November 9, 2006, received his first check the week thereafter, and stopped receiving benefits after he was laid off on April 6, 2007. I find that Respondents are entitled to a dollar-for-dollar offset for treatment of Claimant's right

shoulder that was covered by his group health insurance, and for A/S disability benefits paid to Claimant from January 17, 2007 to April 6, 2007.

E. Attorney's Fees

Based on the foregoing, I find that Respondents have controverted Claimant's claim for indemnity benefits. Claimant's attorney is thus entitled to a controverted attorney's fee on all indemnity benefits awarded to Claimant, pursuant to Ark. Code Ann. § 11-9-715.

**CONCLUSION AND AWARD**

Respondents is directed to pay benefits in accordance with the findings of fact set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee on the indemnity benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondent in accordance with Ark. Code Ann. § 11-9-715. See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

**IT IS SO ORDERED.**

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Hon. O. Milton Fine II  
Administrative Law Judge