

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F510979

LISA M. EALEY, EMPLOYEE	CLAIMANT
WAL-MART ASSOCIATES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED SEPTEMBER 22, 2008

Hearing before Chief Administrative Law Judge David Greenbaum on August 8, 2008, at Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. Scott Hunter, Attorney-at-Law, Jonesboro, Arkansas.

Respondent represented by Mr. Dale W. Brown, Attorney-at-Law, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted August 8, 2008, to determine whether the claimant was entitled to additional workers' compensation benefits.

This claim has been the subject of a prior hearing. Specifically, a hearing was conducted before another Administrative Law Judge on May 19, 2006, to determine compensability of an October 6, 2005, alleged injury. An Opinion was entered by the Administrative Law Judge on July 11, 2006, finding the claim compensable and awarding various benefits, together with medical and related expenses. The decision of the Administrative Law Judge was appealed and subsequently affirmed and adopted by the Full Workers' Compensation Commission, Opinion filed March 20, 2007. The Full Commission Opinion is now

final and the law of the case. It is undisputed that respondents have paid the benefits previously awarded.

Additional issues have developed since the prior decisions. A prehearing conference was conducted in this claim on June 11, 2008, to address the additional issues, and a Prehearing Order was filed on June 12, 2008. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the June 12, 2008, Prehearing Order. A copy of the Prehearing Order was introduced as "Commission's Exhibit 1."

It is undisputed that the employee/employer relationship existed at all relevant times, including October 6, 2005; that the claimant sustained a compensable right shoulder injury on said date; that she earned sufficient wages to entitle her to compensation rates of \$219.00 per week for temporary total disability and \$164.00 per week for permanent partial disability; that respondents paid all indemnity benefits and attorney's fees owed pursuant to the Full Commission Opinion and Order filed March 20, 2007, which is now a final decision and the law of the case; that respondents have controverted claimant's entitlement to all permanent disability benefits, as well as all medical benefits beyond those previously paid following an alleged incident and injury on or about July 15, 2007, with the same employer herein.

By agreement of the parties, the following issues were presented for determination:

- 1) Whether the claimant was entitled to permanent impairment benefits related to the October 6, 2005, injury.
- 2) Whether the claimant is entitled to wage-loss disability.
- 3) Whether the alleged July 15, 2007, incident was either a recurrence of the October 6, 2005, admitted injury or a new injury and/or aggravation of the claimant's pre-existing condition.

Claimant contended, in summary, that she was entitled to an eight percent (8%) permanent impairment rating assigned by Dr. Spencer Guinn, together with wage-loss disability in an amount to be determined by this Commission. The claimant further maintained that she sustained either a recurrence or an aggravation of her pre-existing condition following an incident at work on July 15, 2007, and was entitled to payment of additional medical treatment for said aggravation. The claimant requested a controverted attorney's fee on any additional benefits awarded.

The respondent contentions were as follows:

- 1) That the claimant's impairment rating lacks objective and measurable physical findings and, therefore, was invalid pursuant to Ark. Code Ann. §11-9-704 and Ark. Code Ann. §11-9-102, and e.g., *Dept. of Parks & Tourism v. Helms*, 60 Ark. App. 110, 959 S.W.2d 749 (1998). On November 27, 2006, the claimant presented to Dr. Dickson (Dr. Guinn's partner), and he states, "She has very good range of motion with it actively without pain." Resp. Med. Index, pp. 21-22. The claimant was released to return to work without restrictions following two (2) additional weeks of physical therapy. The next day, on November 28, 2006, the claimant had an inconsistent exam from the previous day as physical therapist DeKok found that, "AROM right shoulder now 150 deg abd, 165 deg flexion, 85 deg external rotation and 70 deg internal rotation, all with pain at the end range. PROM right shoulder shows full motion with pain for internal and external rotation, abd and flexion." *Id.* at p. 23. Dr. Guinn, the claimant's orthopedist, expressly states that a "PPD was performed" on the claimant "based off of her last evaluation from Richard DeKok." Resp. Med. Index. p.25. Pursuant to Helms and the

Guides, the claimant's rating is invalid because it is unsupported by measurable and objective findings as the purported rating is based solely on active range of motion testing by Dr. Guinn's own admission. Active range of motion testing requires almost exclusively the patient's cooperation and effort, which is purely subjective. Likewise, pain cannot be considered for purposes of impairment rating.

- 2) The claimant did not sustain a compensable right shoulder injury on or about July 15, 2007. The respondent affirmatively states that it did not receive notice of any injury in July, 2007, as required under the Act, and if such injury is ultimately found to be compensable, the respondent is not liable for related benefits.
- 3) The claimant is not entitled to wage-loss because, first, the claimant has an invalid rating and, second, she earned a greater hourly wage when she voluntarily left her employment in March of 2008 than she earned on the date of the compensable shoulder injury. Ark. Code Ann. §11-9-522(b)-(c)(2).
- 4) Pending further investigation and discovery, the claimant was involved in a motor vehicle accident on or about March 6, 2008, necessitating her to take leave of absence from her employment with the respondent. The respondent further acknowledges that the claimant voluntarily terminated her employment due to a family situation. The injuries the claimant sustained in the motor vehicle accident may be a superseding and intervening cause with respect to any function limitations the claimant may have, and, therefore, such limitation, if any, is not the responsibility of the respondent.

The claimant was the only lay witness to testify. The record is composed solely of the transcript of the August 8, 2008, hearing containing numerous exhibits. The transcript of the prior hearing conducted in this claim on May 19, 2006, together with the Opinions of the Administrative Law Judge filed July 11, 2006, and the Full Commission Opinion filed March 20, 2007, are incorporated by reference and made a part of the record herein.

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 claimant and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. The claimant's healing period ended on or about April 25, 2007.
4. Respondents have paid all appropriate temporary total and temporary partial disability to which the claimant is entitled. Further, there is no claim for additional temporary disability benefits.
5. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to an eight percent (8%) whole body impairment which is directly and causally related to the October 6, 2005, compensable injury.
6. The claimant has proven, by a preponderance of the credible evidence, that she is entitled to a five percent (5%) wage-loss disability in addition to the eight percent (8%) impairment, for an overall permanent partial disability of thirteen percent (13%) to the body as a whole.
7. On or about July 15, 2007, the claimant sustained a recurrence of the October 6, 2005, admitted injury or a temporary aggravation thereof which resulted from the overuse of her right upper extremity while performing

employment services for the employer herein.

8. Respondents are responsible for all reasonably necessary hospital, medical, and related expenses as the result of the claimant's temporary aggravation or recurrence, specifically, the additional medical expenses which remain unpaid and which were introduced as "Claimant's Exhibit 2."
9. Respondents have previously controverted this claim in its entirety and specifically controvert the benefits awarded herein for purposes of attorney's fees.

DISCUSSION

_____The relevant facts in this claim are basically undisputed. In fact, the claimant's testimony concerning her course of conduct and work history following her October 6, 2005, admitted right shoulder injury are undisputed. I found the claimant to be an extremely credible witness. As previously noted, respondents have controverted this claim in its entirety. Although the record reflects that respondents exercised good faith by returning the claimant to work at all times, with employment suitable to the physical restrictions imposed upon her following the October 6, 2005, injury, thereby minimizing its obligation for temporary disability benefits, as well as wage-loss disability, it has refused to recognize the claimant's entitlement to additional benefits which the overwhelming weight of evidence supports. As will be set out further below, respondents' contentions on each issue presented for determination are inconsistent with, and overshadowed by, both the

medical evidence, as well as the claimant's credible and undisputed testimony. Admittedly, respondents' assertion that the claimant did not sustain a second compensable injury to her right shoulder on or about July 15, 2007, is correct. The record clearly reflects that the claimant sustained a recurrence of her admitted injury and/or a temporary aggravation thereof which resulted from the overuse of her right upper extremity while performing employment services for the employer which necessitated the need for additional medical treatment.

CLAIMANT'S ENTITLEMENT TO PERMANENT IMPAIRMENT

Again, it is undisputed that the claimant sustained a compensable shoulder injury on October 6, 2005. The claimant's primary treating physician has been Dr. Spencer H. Guinn, an orthopedic surgeon in Jonesboro, Arkansas. Following an extensive course of conservative treatment which proved unsuccessful, the claimant ultimately required surgery on her right shoulder. On April 13, 2006, Dr. Guinn performed a right shoulder arthroscopy with subacromial decompression and acromioplasty.

Following the claimant's April 13, 2006, surgery, she continued to receive follow-up treatment by Drs. Spencer Guinn and Brian G. Dickson, another orthopedic surgeon in the same clinic. The record reflects that the claimant underwent extensive physical therapy, as well as multiple injections in the right shoulder because of inflammation and to improve range of motion. Again, respondents have, at all times, provided the claimant with suitable employment

within her physical restrictions which will be discussed further when addressing the claimant's entitlement to wage-loss disability. In addition, the claimant underwent a functional capacity evaluation performed by Physical Therapist Richard DeKok on or about November 28, 2006. Mr. DeKok found that the claimant was capable of performing light to medium demand work below shoulder level, and recommended continued physical therapy. Again, the record reflects that the claimant had already returned to work for the employer herein prior to the functional capacity evaluation and prior to the claimant's subsequent release by Dr. Dickson. Dr. Dickson opined that the claimant could return to work without restrictions following additional physical therapy for strengthening the right shoulder. (Jt. Ex. A, pp.22-24)

On April 25, 2007, Dr. Guinn assigned a thirteen percent (13%) total upper extremity impairment which correlated to an eight percent (8%) impairment of the whole person. Dr. Guinn stated that the claimant's work capacity was most consistent with light demand work levels with some work in the medium demand levels for material handling below shoulder level. However, Dr. Guinn first utilized the AMA Guides to the Evaluation of Permanent Impairment, V Edition. He subsequently issued a June 20, 2007, report utilizing the 4th Edition of the Guides, adopted by the Commission; however, the claimant's impairment rating remained the same. (Jt. Ex. A, pp.25-28)

Respondents maintained that the claimant's impairment rating lacked objective and measurable physical findings and were therefore invalid because they

were based upon active range of motion testing requiring almost exclusively the claimant's cooperation and effort, which respondents maintained was purely subjective.

Respondents' contentions are simply not supported by the medical evidence.

Dr. Guinn's June 20, 2007, report states:

I have recalculated Ms. Ealey's impairment. Based upon the AMA Guides to Evaluation of Permanent Impairment IV Edition, there is no change. She continues to have a 13% total upper extremity impairment, which corresponds to an 8% impairment of her whole person. Please reference figures 38, 41, 44, and Table 12 on pages 43 through 49. Conversion of upper extremity impairment to whole person impairment is on Table 3, page 20.

If you have any further questions, please contact me at my office. (Jt. Ex. A, p.28)

Contrary to respondents' assertion that Dr. Guinn used an active range of motion to assess impairment, a review of the Guides, as well as Dr. Guinn's June 20, 2007, report, aforementioned, reflect that figures 38, 41, and 44 involve passive range of motion and that Dr. Guinn did not use figures 39-42 which involve an active range of motion.

Further, Dr. Guinn issued a supplemental report addressed to claimant's attorney on July 8, 2008, which, for the third time, corroborated the initial rating assigned on April 25, 2007. The report is set out in its entirety below:

I am supplementing my previous physician's evaluation dated 4/26/06 so as to include a permanent partial disability rating on my patient, Lisa Ealey, resulting from her injury to her right shoulder at work on October 6, 2005 and my basis for the rating.

In other documents previously provided to you, I have rated Ms. Ealey's permanent disability for her injury as 13% to the upper right extremity, converted [sic] to 8% to the body as a whole, using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fourth Edition, as a guide and considering the following sources in arriving at [sic] the 8% rating to the whole body:

- a. MRI study of right shoulder dated 10/26/05;
- b. Operation on right right [sic] shoulder 4/13/06 (arthroscopy, subacromial decompression and acromioplasty) and objective findings on injury noted during surgery;
- c. Therapy Interval Evaluation on 6/27/06 by physical therapist David Felts;
- d. Therapy Discharge Evaluation on 11/28/06 [sic] by physical therapist Richard Dekok;
- e. Past experience with patients with [sic] shoulder problems similar to those of Lisa Ealey. Ms. Ealey's movement restrictions and grip, lifting and carrying restrictions are similar to other patients with like objective and subjective findings as Ms. Ealey exhibited;
- f. 100% recovery is rarely seen in injuries such as Ms. Ealey's injury due to irreversible damages and trauma to area, especially one with the extent of injury shown in the diagnostic testing and that was noted during the surgery itself.

All of the above statements and opinions are made within a reasonable degree of medical certainty.

If I need provide any further information, please advise. (Cl. Ex. 1)

Suffice it to say that respondents offered no expert medical opinion to contradict the rating of Dr. Guinn. Their contention that the claimant did not sustain any permanent impairment is merely a conclusion, unsupported by any credible evidence. Clearly, respondents could have cross-examined Dr. Guinn. They

declined to exercise their right of cross-examination.

WAGE-LOSS DISABILITY

Respondents contend that the claimant is not entitled to wage-loss disability because first, they maintained the claimant had an invalid rating, and, second, because she was earning a greater hourly wage when she voluntarily left her employment in March, 2008, than she earned on the date of her compensable shoulder injury. Again, respondents' contentions are without merit.

The claimant is thirty-eight (38) years old. She has a seventh grade education without any additional vocational training. Her work experience is extremely limited. The claimant worked at various restaurants as a waitress prior to going to work for Wal-Mart in the late 90s. The claimant has worked for the employer for more than fifteen (15) years. The claimant has worked in various departments. Initially, the claimant was a stocking clerk. Eventually, she started working in the deli where she worked at the time of her admitted injury on October 6, 2005. As part of her duties in the deli department, the claimant was required to lift boxes of deli meats and chickens, weighing up to fifty (50) pounds. In fact, the claimant's injury occurred while lifting a box of rotisserie chickens off the top shelf before prepping them for cooking, at which time she sustained her injury. At the time of her injury, the claimant was earning \$8.69 per hour. When she returned to work for the employer herein, she earned \$7.79 per hour. The record reflects that the claimant was never physically able to return to work in the deli department which

was a higher paying job. Admittedly, the record reflects that the claimant received periodic cost of living pay increases, and that, at the time she voluntarily left her employment, she was earning \$8.79 per hour. However, it is clear from the record that the claimant was employed at a lower classification position and would have been earning comparably more money had she been able to retain her job in the deli department. Accordingly, although the claimant was indeed earning more money at the time she voluntarily terminated her employment, she, nevertheless, had permanent physical restrictions which entitled her to wage-loss disability.

The wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). The Commission is charged with the duty of determining disability based upon a consideration of medical evidence and other matters affecting wage-loss, such as the claimant's age, education, and work experience. *Emerson Electric v. Gaston, supra*.

In determining wage-loss disability, the Commission may take into consideration the worker's age, education, work experience, medical evidence, and any other matters which may reasonably be expected to affect the worker's future earning power. Such other matters are motivation, post-injury income, credibility, demeanor, and a multitude of other factors. *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961); *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Curry v. Franklin Electric*, 32 Ark. App. 168, 798 S.W.2d 130 (1990). A

claimant's lack of interest in pursuing employment with her employer and negative attitude in looking for work are impediments to our full assessment of wage-loss.

Emerson Electric v. Gaston, supra.

The Commission may use its own superior knowledge of industrial demands, limitations, and requirements in conjunction with the evidence to determine wage-loss disability. *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982).

Finally, Ark. Code Ann. §11-9-102(4)(F)(ii) (Repl. 2002) provides:

(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment.

(b) If any compensable injury combines with a pre-existing disease or condition or the natural process of aging to cause or prolong disability or a need for treatment, permanent benefits shall be payable for the resultant condition only if the compensable injury is the major cause of the permanent disability or need for treatment.

"Major cause" is defined as more than fifty percent (50%) of the cause. Ark. Code Ann. §11-9-102(14) (Repl. 2002).

From a purely mathematical formula, the record reflects that the claimant sustained approximately a ten percent (10%) loss in earning capacity. However, the Commission has, on numerous occasions, stated that wage-loss disability is not merely a mathematical calculation. Nevertheless, the record reflects that the claimant has some permanent lifting restrictions, especially, to avoid overhead lifting. The record reflects that the claimant has sustained an eight percent (8%) whole body impairment. After consideration of the claimant's age, education, and

work experience, together with her impairment, I find that a wage-loss disability of five percent (5%) and an overall permanent partial disability of thirteen percent (13%) to the body as a whole fairly and accurately reflects the extent of claimant's permanent disability.

ADDITIONAL MEDICAL TREATMENT

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. A.C.A. §11-9-508; *American Greeting Corp. v. Garey*, 61 Ark. App. 18, 963 S.W.2d 613 (1998). What constitutes reasonably necessary medical treatment under A.C.A. §11-9-508 is a question of fact for the Commission. *Gansky v. Hi-Tech Engineering*, 325 Ark. 163, 924 S.W.2d 790 (1996); *Geo Specialty Chem., Inc. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). Medical treatment which is required to stabilize and maintain an injured worker's status remains the responsibility of the employer. *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

Respondents contend that the claimant did not sustain a compensable right shoulder injury on or about July 15, 2007. Respondents affirmatively maintained that it did not receive notice of any injury in July, 2007, as required under the Act, and that if such injury was ultimately found to be compensable, that the respondents would not be liable for related benefits.

Respondents' reliance on the notice defense has no application to this claim.

Admittedly, the claimant did not sustain a second specific incident identifiable in time and place of occurrence; however, her undisputed testimony reflects that her job duties with the employer herein required additional medical treatment which respondents unreasonably resisted. A portion of the claimant's testimony is set out below:

BY MR. HUNTER:

Q Now, you went back – I believe you started in the clothing department at one point there?

A Yes, sir.

Q When was that?

A 10/7/06.

Q Okay. And I believe that – what did you do in that job?

A Hung up clothes, answered the phone, priced clothing.

Q Did you start having trouble with your right shoulder again?

A Yes, sir, I did.

Q Tell us about that.

A I hang up clothes and stuff and it just started hurting. I just overused it that day.

Q But there wasn't any one single traumatic occurrence that took place whenever?

A No, sir.

Q Okay. And what did you do as far as seeking medical treatment is concerned about your shoulder at that time?

A Well, I ended up going to the ER because I was in quite a bit of pain, and they told me to go back to –

MR. BROWN: Judge, Objection to what the ER says.

JUDGE GREENBAUM: Sustained.

BY MR. HUNTER:

Q You went to the ER?

A Uh-huh.

Q Is that St. Bernards Hospital?

A Yes, sir.

Q And after that what did you do?

A I followed up with Dr. Guinn and had a cortisone shot and MRI.

Q Did Wal-Mart pay for that?

A No, sir.

Q Did they decline payment?

A Yes, sir.

Q Was that related to your care and treatment for the right shoulder that you had injured previously?

A Yes, sir.

Q Was that related to your care and treatment for the right shoulder that you had injured previously?

A Yes, sir.

Q And how did it go after that? The cortisone shot helped you, I'm sure?

A It helped me, and I went back to a little bit of therapy.

Q Okay. And then did you have further problems with your shoulder?

A I still have problems with it sometimes and I usually just go get a cortisone shot.

Q Okay. Did you try to get Wal-Mart to authorize an MRI?

A Yes, sir.

Q And did they authorize it?

A No, sir, it was declined.

Q And I'm going to show you the two bills that we've introduced by agreement and see if you can identify those. This is Dr. Spencer Guinn's bill?

A Yes, sir.

Q Claimant's Exhibit No. 2(a)-2(b)?

A Yes, sir. (Tr.25-27)

Rather than conduct a further analysis of the record in this cause, suffice it to say that the claimant has proven, by a preponderance of the evidence, that her need for medical treatment after July 15, 2007, was directly and causally related to her admitted injury. In view of the foregoing, I hereby make the following:

AWARD

Respondents, Wal-Mart Associates, Inc., and Claims Management, Inc., are hereby directed and ordered to pay, to the claimant, permanent partial disability benefits at the rate of \$164.00 per week beginning April 26, 2007, and continuing for 58.5 weeks, representing an overall permanent partial disability of thirteen percent (13%) to the body as a whole.

All accrued benefits shall be paid in lump sum and without discount.

Respondents are further directed and ordered to pay the outstanding medical and related expenses, specifically, "Claimant's Exhibit 2," in accordance with the medical fee scheduled established by Commission Rule 099.30.

Additionally, claimant's attorney, Mr. Scott Hunter, is hereby awarded the maximum statutory attorney's fee pursuant to, and limited by Ark. Code Ann. §11-9-715.

This award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge