

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F410732**

JANICE NICHOLS, EMPLOYEE	CLAIMANT
OMAHA SCHOOL DISTRICT, EMPLOYER	RESPONDENT NO. 1
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2
DEATH AND PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 3

**OPINION FILED SEPTEMBER 10, 2008**

A hearing was held before ADMINISTRATIVE LAW JUDGE CHANDRA HICKS, in Harrison, Boone County, Arkansas.

The claimant was represented by The Honorable Evelyn Brooks, Attorney at Law, Fayetteville, Arkansas.

Respondents #1 were represented by The Honorable Curtis Nebben, Attorney at Law, Fayetteville, Arkansas.

Respondent #2 represented by The Honorable David Simmons, Attorney at Law, Little Rock, Arkansas. Mr. Simmons waived participation in the hearing due to the issue being litigated.

Respondent # 3 represented by The Honorable Christy King, Attorney at Law, Little Rock, Arkansas. Ms. King did not participate in the hearing.

**STATEMENT OF THE CASE**

A hearing was held in the above-styled claim on August 13, 2008, in Harrison, Arkansas. A prehearing telephone conference

was conducted in this case on May 19, 2008. A Prehearing Order was entered in this claim on that same date. This Prehearing Order set forth the stipulations offered by the parties, the issues to be litigated, and their respective contentions.

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee-employer-carrier relationship existed at all relevant times.

3. The prior Opinion of June 8, 2007 of the Full Commission is the law of the case.

4. This claim for additional benefits has been controverted in its entirety.

5. The issue of past medical treatment is reserved.

By agreement of the parties, the issue to be presented at the hearing was as follows: whether the claimant is entitled to additional treatment for her compensable left shoulder injury.

The claimant contends that she was attempting to move a plywood screen out of her classroom when she injured her shoulder.

Respondents #1 contend that additional medical treatment for the claimant's left shoulder is unreasonable and unnecessary. (This contention was modified at the time of the hearing).

The documentary evidence submitted in this case consists of

the Commission's Prehearing Order of May 19, 2008; the claimant's Response to Prehearing Filing; respondents #1's Response to the Prehearing Filing; respondent #3's Response to the Prehearing Filing; the Commission's letter of June 3, 2008 to Mr. Simmons; and Mr. Simmons' letter of May 30, 2008 to Judge Hicks, as these were all marked as Commission's Exhibit No. 1. The claimant's Medical Packet was marked as Claimant's Exhibit No. 1. The claimant's Non-Medical Packet was marked as Claimant's Exhibit No. 2. Respondents # 1's Medical Packet was marked as Respondents #1's Exhibit No. 1. The May 16, 2006 Hearing Transcript was marked as Joint Exhibit No. 1.

The following witness testified at the hearing: the claimant.

#### **DISCUSSION**

The claimant, age 55 (5/20/53), sustained an admittedly compensable injury to her left shoulder while working for the respondent-employer on or about October 1, 2004. At the time of her injury, the claimant worked as a classroom teacher.

She essentially admitted that respondents referred her for treatment with Dr. Chu. After that, the claimant admitted to seeing Dr. Sites, in Fayetteville. She also admitted to having received a change of physician to Dr. O'Brien, who performed repair surgery on her left shoulder in December 2004. After the surgery, the claimant agreed that she underwent physical therapy treatment for about three months, and to having received an impairment rating

in August of 2005. She admitted that the surgery gave her some relief, as it was better than it was before the surgery.

The claimant testified that Dr. O'Brien did not perform surgery on her back, but he did treat it for approximately one year.

With respect to her shoulder, around May of 2006, the the claimant gave the following testimony:

A. It was better after the surgery, much better. It was never perfect but it got much better. And I could use it doing some things but not everything.

Q. Okay. And over the next year after the surgery how was it during that period of time?

A. I would have spells where I would have to put it in a sling for a week or two at a time. About once a month I was in a sling about a week.

Q. And what seemed to cause the need for this sling?

A. Usually it was popping and grinding back here in the joints. And when I moved it like it is now, whenever I moved it enough and popped it enough the pain would build up and my muscles would spasm and start drawing and it felt like this arm weighed 50 pounds, you know, so that's when they would put me in a sling.

Q. When you say they would put you in a sling, who would do that?

A. The doctors, Dr. O'Brien or Dr. Jackson, my family doctor.

Q. Now did you try to seek treatment at some point after Dr. O'Brien released you? From Dr. O'Brien.

A. Yes.

The claimant admitted she attempted to return to see Dr. O'Brien about six months after her surgery, but he had retired. As

a result, she went to see Dr. Jackson, her family doctor. According to the claimant, Dr. Jackson has periodically put her in a sling and done some x-rays, pain pills and muscle relaxers.

She testified that since the shoulder surgery, her shoulder has never been back to normal. According to the claimant, she has continued with symptoms of the shoulder, which include, popping, grinding, and it feels like a nerve being pinched at the top or maybe a bone spur. She further described symptoms of impingement, as if she attempts to move it, it won't move that way and kind of hangs up on her and locks up.

The claimant also testified that she has problems sleeping as a result of her shoulder problems, and has to use a TENS unit and heating pad. According to the claimant, it is not uncommon for her to sleep less than an hour. She denied problems with her shoulder before the October 2004 incident. However, the claimant admitted to her shoulder being sore for about a week or two after and incident in 2001 or 2002, wherein she fell and hurt her elbow.

The claimant testified that she is requesting treatment for her shoulder so that they can go ahead and evaluate her and tell her the cause of her pain and get rid of it.

On cross examination, the claimant admitted she has suffered from fibromyalgia for some twenty years. She also admitted that she has applied for Social Security Disability benefits, but her claim has been denied for her fibromyalgia. According to the

claimant, after the shoulder surgery, her claim was granted.

She admitted that she has had a previous back surgery from Dr. Blankenship, two surgeries total but only one after the October 1, 2004 incident. The claimant maintains that when she went in to see Dr. Jackson in December of 2006 for sinus problems, she mentioned her shoulder problems.

On redirect examination, the claimant admitted that she last saw Dr. O'Brien on August 24, 2005.

A review of the medical evidence of record demonstrates that the claimant was seen by Dr. Victor S. Chu on October 4, 2004 due to complaints of left shoulder pain as a result of moving a piece of heavy plywood screen. He notes that the claimant has a history of fibromyalgia. Dr. Chu assessed the claimant with left shoulder pain, and placed her on light duty restrictions.

The claimant underwent an initial orthopedic evaluation with Dr. Terry Sites on October 18, 2004, it appears pursuant to referral by Dr. Chu for ongoing discomfort in her left shoulder. His impression was "left shoulder rotator cuff strain/possible tendinopathy and chronic periscapular pain associated with fibromyalgia." Dr. Sites ordered an MRI to more fully evaluate for an acute soft tissue injury.

On October 26, 2004, the claimant underwent an MRI of the left shoulder with the following impression:

THERE IS AT LEAST A PARTIAL TEAR INVOLVING THE ANTERIOR ASPECT OF THE SUPRASPINATUS TENDON. A VERY MINIMAL AMOUNT

OF FLUID IS PRESENT IN THE SUBACROMIAL AND THE SUBDELTOID BURSA REGIONS. THE PRESENCE OF A SMALL FOCAL FULL THICKNESS TEAR CANNOT BE COMPLETELY EXCLUDED. SHOULDER ARTRHROGRAM MAY BE HELPFUL FOR FURTHER EVALUATION IF NEEDED.

MILD DOWNSLOPING OF THE ACROMION PROCESS. SOME T1 AND T2 PROLONGATION APPEARS PRESENT INVOLVING THE GLENOID PROCESS. THIS MAY REPRESENT SOME YELLOW TO RED MARRROW RECONVERSION RATHER THAN A MORE AGGRESSIVE PROCESS. CORRELATION WITH RADIOGRAPHS AND/OR TOTAL BODY BONE SCAN MAY HELPFUL FOR FURTHER EVALUATION.

NO JOINT EFFUSION DEMONSTRATED.

On October 28, 2004, the claimant returned to see Dr. Sites for continuing complaints of left shoulder pain. He wrote:

Jan returns to the clinic today following the left shoulder MRI. I reviewed this with her in detail, consistent with rotator cuff tendinopathy and possibly a small tear. She has some anterolateral pain, but more pain over the suprascapular area with pain across to the opposite shoulder blade and some radiation down the upper extremity. She has some longstanding fibromyalgia which confuses her clinical interpretation. There was a suggestion of some bone marrow changes in her glenoid by the radiologist, reviewed by me, with two additional films of her left shoulder, outlet and axillary views, showing no specific glenoid change.

Dr. Sites recommended a subacromial injection, which was administered and tolerated well, but it offered no immediate relief from pain. He further noted that the claimant was not at maximum medical improvement.

The claimant returned to see Dr. Sites on November 18, 2004 for continuing complaints of left shoulder pain. He noted that the claimant was having ongoing difficulty performing her regular job duties. Dr. Sites also noted that the claimant had seen Dr. Pat

O'Brien, and he had recommended against physical therapy, feeling she would do better with surgery. After discussing her treatment options, the claimant opted to proceed with left shoulder arthroscopy, distal clavicle resection, rotator cuff repair and other as indicated.

She underwent left shoulder surgery on December 30, 2004, with Dr. O'Brien, in the form of an open acromioplasty due to Stage II impingement, left shoulder, with anterior osteophyte and significant subacromial scarring.

On January 11, 2005, the claimant saw O'Brien for a post-op check. He noted that the claimant was doing very well and that she was already able to flex and abduct at 90. His assessment was impingement syndrome shoulder, for which he referred the claimant for physical therapy.

The claimant saw Dr. O'Brien again on February 8, 2005. At that time, she reported that she was still struggling to get her arm over her head and she was feeling tired. He continued her physical therapy treatment, and directed the claimant to return to see him in one month.

On March 16, 2005, Dr. O'Brien reported that the claimant continued to improve and her range of motion was better. Therefore, he gave the claimant a conditional work-release and continued her physical therapy with a follow-up visit in three weeks.

When the claimant returned to see Dr. O'Brien on April 13, 2005, she reported that her shoulder was somewhat more uncomfortable. However, the claimant reported that she was able to get her arm over her head, with some discomfort. Dr. O'Brien's assessment was "impingement syndrome shoulder." He directed the claimant to continue exercising her shoulder and instructed her to return to see him for a final visit in six weeks.

On May 6, 2005, the claimant reported to Dr. O'Brien that two weeks ago she had left shoulder bumped anteriorly by a chair and that it had been sore since that time and that she was afraid to exercise. Therefore, he stopped her therapy for one week until her shoulder calmed down.

The claimant reported on June 1, 2005, to Dr. O'Brien that her shoulder was feeling better, but she felt she had hurt her upper back lifting boxes at work. He noted that she had multiple trigger points and her trapezius muscle bilaterally and that her shoulder was a little bit tender over AC joint. His assessment at that time was fibromyalgia, for which he referred her to a fibromyalgia clinic.

On August 24, 2005, Dr. O'Brien, wrote:

On the basis of a full active and passive range of motion but with a residual mild strength deficit, this lady would rate a 5% permanent disability to her left upper extremity on the basis of her left shoulder injury and surgery.

Dr. O'Brien reported on September 28, 2005 that the claimant

had reached maximum medical improvement with regard to her shoulder. He further reported that she did not have a rotator cuff repair but had only an open subacromial decompression. He also noted that she that she would not rate any permanent disability.

The respondent-carrier wrote to the claimant on November 16, 2005 advising that her 5% impairment to the upper extremity equated to a 3% whole person rating, which totaled some \$4,590.00.

On December 7, 2006, the claimant saw Dr. Jackson due to sinus problems.

Further review of the medical evidence shows that the claimant sought treatment from Dr. Kevin Jackson due to left shoulder, neck and chest pain on June 26, 2007. The claimant returned to see Dr. Jackson on November 2, 2007 due to several days of left shoulder pain. She reported no recent injury, and that she had no relief with Darvocet. Dr. Jackson assessed the claimant with joint pain of the shoulder, for which he prescribed Vicodin, and directed the claimant to use heat and massage.

On January 28, 2008, the claimant returned to see Dr. Jackson due to continued complaints of shoulder pain and nerve pain. He again assessed the claimant with joint pain of the shoulder, for which he prescribed medications.

On July 22, 2008, Dr. Jackson saw the claimant for a follow-up visit of left shoulder pain. He noted that x-rays of the left shoulder revealed no evidence of fracture or dislocation.

### ADJUDICATION

There are two medical reports included in respondents no. 1's exhibit #1, at pages 16 and 18, that have not been considered in the adjudication of the issue at bar, because these two reports relate to other patients rather than the claimant.

The sole issue for determination in this matter is whether the claimant is entitled to additional medical treatment for her compensable left shoulder injury of October 1, 2004.

An employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant bears the burden of proving that he or she is entitled to additional medical treatment. Dalton v. Allen Eng'g Co., 91 Ark. App. 260, 209 S.W. 3d 445 (2005). What constitutes reasonably necessary medical treatment is a question of fact to be determined by the Commission. White Consolidated Industries v. Galloway, 74 Ark. App. 13, 45 S.W. 3d 396 (2001).

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that the claimant did not sustain her burden of proving by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with her compensable injury of October 1, 2004.

It is undisputed that the claimant sustained an admittedly compensable left shoulder injury on October 1, 2004, for which she

underwent an open subacromial decompression.

Respondents #1 have paid medical benefits, temporary total disability compensation, and a 3% whole body impairment for this injury. Specifically, I note the claimant has received extensive conservative treatment and surgical intervention for her compensable left shoulder injury. The claimant underwent shoulder surgery on December 30, 2004, under the care and direction of Dr. O'Brien. On August 24, 2005, Dr. O'Brien assessed the claimant with a 5% permanent impairment to her left shoulder. In a subsequent letter dated September 28, 2005, he pronounced that the claimant was at maximum medical improvement with respect to her shoulder. In November of 2005, the respondent-carrier notified the claimant that she would be receiving \$4,590.00, in benefits for the 5% rating to the upper extremity, which equated to a 3% whole person rating. It appears that this rating has in fact been paid.

The claimant testified that she last saw Dr. O'Brien on August 24, 2005 for treatment of her left shoulder injury. However, a review of the medical evidence shows that the claimant did not seek medical treatment for her shoulder again until June 26, 2007. At which point, she saw Dr. Jackson due to complaints of left shoulder, neck and chest pain. In sum, based on my review of the medical evidence of record, after the claimant saw Dr. O'Brien for her shoulder on August 24, 2005, she did not seek treatment for her shoulder again until June 26, 2007, this amounts to almost a two-year gap in treatment for her shoulder.

The claimant's testimony essentially indicates that she did

not seek treatment for her shoulder during this gap in treatment because Dr. O'Brien retired. She also testified that she received treatment from Dr. Jackson for her shoulder during this period, and that she mentioned to him problems with her shoulder during the December 7, 2006 visit. However, although the claimant received extensive care for her neck, back, fibromyalgia and other medical complaints during the above mentioned two-year period of time, there is absolutely no medically documented complaint of any ongoing problems with her shoulder during this period of time to Dr. Jackson or any of her many treating physicians. In light of the foregoing, I am persuaded that it would require conjecture and speculation to causally link the claimant's current shoulder problems to her work incident.

Therefore, considering the two-year gap in treatment for her left shoulder and because there is no medically documented complaint of any shoulder problems during this period of time by any of the physicians that she was seeing for her neck, back, fibromyalgia and other unrelated problems, I find that the claimant has failed to prove by a preponderance of the evidence that her current need for treatment is related to her compensable left shoulder injury of October 1, 2004. Hence, the record compels the conclusion that additional medical treatment is not reasonably necessary in connection with the claimant's compensable injury.

Accordingly, respondents #1 shall not be liable for any additional medical treatment in connection with the claimant's compensable injury. This claim for additional benefits must be,

and is hereby respectfully denied and dismissed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee-employer-carrier relationship existed at all relevant times.
3. The prior Opinion of June 8, 2007 of the Full Commission is the law of the case.
4. This claim for additional benefits has been controverted in its entirety.
5. Additional medical treatment is reserved.
6. The claimant did not sustain her burden of proving by a preponderance of the evidence that additional medical treatment is reasonably necessary in connection with her compensable left shoulder injury of October 1, 2004.

**ORDER**

The claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable left shoulder injury of October 1, 2004.

Therefore, pursuant to the above recited reasons, this claim for additional medical benefits is respectfully denied and dismissed.

**IT IS SO ORDERED.**

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**CHANDRA HICKS**  
**Administrative Law Judge**

CH/ml