

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F210756 and F310825

YOLANDA GASCA, EMPLOYEE	CLAIMANT
KROGER, SELF-INSURED EMPLOYER	RESPONDENT
SEDGWICK, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED OCTOBER 29, 2004

Upon review before the FULL COMMISSION in Little Rock, Pulaski County, Arkansas.

Claimant represented by the HONORABLE STEVEN McNEELY, Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE WENDY WOOD, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondent appeals an opinion and order of the Administrative Law Judge filed April 27, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent the relationship of employee-employer existed between the parties.
3. On December 13, 2000 and September 4, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits

of \$113.00 and \$150.00 for temporary total disability benefits, respectively.

4. On December 13, 2000, 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 periods beginning April 4, 2002 and continuing through September 10, 2002, as a result of the December 13, 2000, compensable injury.

6. The claimant's healing period ended November 19, 2002, as a result of her December 13, 2000, compensable injury.

7. The claimant has a permanent physical impairment in the amount of 4% to the body as a whole as a result of the December 13, 2000, compensable injury.

8. Medical treatment rendered to the claimant under the care of Dr. Charles Pearce subsequent to January 11, 2002, was reasonably necessary relative to claimant's December 13, 2000, compensable injury. Respondent is liable for the cost of the afore medical treatment to include surgery.

9. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of December 13, 2000.

10. On September 4, 2003, the claimant sustained an injury to her right shoulder in the form of a new injury or aggravation of her preexisting condition arising out of and in the course of her employment.

11. The claimant was temporarily totally disabled for the periods beginning September 5, 2003, and continuing through the end of her healing period, or until such time as she has been returned to appropriate employment with respondent.

12. The respondent shall pay all reasonable hospital and medical expenses arising out of the injury of September 4, 2003.

13. The respondent has controverted the payment of temporary total disability benefits to claimant relative to the December 13, 2000, compensable right shoulder injury for the periods April 4, 2002 through September 10, 2002; the payment of medical benefits relative to the December 13, 2000, compensable injury subsequent to January 11, 2002; and the payment of permanent physical impairment in the amount of 4% to the body as a whole as a result of the December 13, 2000, compensable injury. Respondent has controverted the payment of all benefits relative to the claimant's September 4, 2003, compensable injury.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the April 27, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant was entitled to additional medical treatment and indemnity benefits

related to her December 13, 2000, compensable injury, and a finding that the claimant sustained a new compensable injury on September 4, 2003. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

My review of the evidence demonstrates that the claimant had recovered from her original compensable injury of December 2001, and had been released by Dr. Safman on May 2, 2001, with a zero percent (0%) impairment rating. At that time there were no objective findings to support an injury and the claimant began working full time doing her regular job duties. She was able to perform her regular job duties for 11 months without problems or complaints. It was not until the claimant had an automobile accident in February of 2002 that the claimant was no longer able to work. An MRI performed after that February 2002 automobile accident showed new objective findings in the form of a torn rotator cuff. The claimant reported to the store manager and the claims adjuster for the respondent carrier that her shoulder complaints and the surgery that subsequently followed was for her shoulder complaints related to the automobile accident. The claimant filed

for group health benefits to pay for the treatment and surgery by Dr. Pearce.

The claimant contended at the hearing that she had been suffering from right shoulder pain leading up to the automobile accident. The evidence demonstrates that the claimant contacted Dr. Pearce with multiple problems, including right shoulder pain in January of 2002. The claimant reported that these complaints were not work related. The claimant conceded at the hearing that she filled out the forms for medical treatment on her private insurance associated with the automobile accident in February of 2002. The claimant stated on these forms that the automobile accident was the reason she needed medical treatment.

The evidence further demonstrates that the claimant was not credible witness and has a very poor memory. The only evidence in support of the finding that the claimant's right shoulder problems subsequent to the February 25, 2002, automobile accident were work related was the claimant's own testimony. The claimant related throughout the hearing that she had a poor memory.

Q. Let me ask you this, Ms. Gasca, do you seem to have a little bit of a problem with your memory?

A. Yes, sir.

Q. Okay. So, if it turns out you said something at one time and it turns out not to be true, were you intentionally trying to mislead or lie to anybody or do you just have trouble remembering?

A. I just have trouble remembering.

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Q. Ms. Gasca, I was there at your deposition. Do you remember if you had trouble remembering how many times you were married?

A. Yes, sir.

Q. Okay. You've kinda of got problems with long term memory or just memory in general, correct?

A. Yes, sir.

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Q. Okay. If you are having a lot of difficulty with your memory, can you rely upon any of your testimony here today?

A. Yes, mam.

Q. Okay. Which parts can we rely upon and which parts can we not rely upon if you have such trouble remembering things?

A. It's hard for me to say.

Q. I'm sorry?

A. It's hard for me to say because most thing I'll remember and most things I don't remember.

Q. Okay. Do you remember the important things and the insignificant things?

A. What do you mean?

Q. Well, what things do you remember and what things do you not remember?

A. It's hard for me to say. Like I say, most things I remember, most things I don't.

Q. And you are asking the Judge to just take your word for whatever it is you do remember and you don't remember?

A. Well, as long as it's something fair. I'm not saying for him to take my word.

Q. So you're not saying for him to take your word?

A. I'm saying whatever is fair for him. I'm not saying, yes, you've got to take my word, uh-uh.

Claimant's testimony about her poor memory was born out throughout the hearing. For example, the claimant testified she did not remember complaining to her family physician about shoulder pain in March of 1999 when medical records show that she did. The claimant testified that she contacted Ms. Bradley in January of 2002, but she doesn't remember what she said to Ms. Bradley. The claimant testified she did not remember reporting to Ms. Bradley that she planned to

file Dr. Pearce's treatment under her group health insurance but then she conceded that she filled out the Union benefit form and that her group health insurance paid for most all Dr. Pearce's treatment. The claimant admitted filling out the Union benefit forms, but testified she couldn't remember why she filled these out. The claimant recalled having a conversation with Mr. Sanders after her motor vehicle accident, but could not remember what they talked about. The claimant thinks a right shoulder MRI was scheduled before the motor vehicle accident when the medical evidence demonstrates that it was not. The claimant testified the shoulder MRI was taken the day after the motor vehicle accident when actually it was the neck MRI taken that day; the shoulder MRI was taken in mid-March.

Ultimately, based upon her own concessions that she has a poor memory, the claimant herself asked the Judge at the hearing to rely more heavily upon the medical evidence and not her testimony:

Q. Would you ask the Judge then to look over the medical records and may be give them preference over your testimony here today?

A. Yes, sir.

Accordingly, when I conduct a de novo review of the evidence, I find that the claimant cannot prove by a preponderance of the evidence that she was entitled to additional medical treatment and temporary total disability benefits after February 25, 2002. The medical evidence demonstrates that the claimant's MRI findings of a torn rotator cuff were subsequent to the claimant's automobile accident. Accordingly, I must dissent from the majority's award of benefits to the claimant.

The majority also found that the claimant sustained a new injury in September of 2003, when she reached up with her right arm for a tote that was stacked too high on the pallet. In my opinion, a review of the evidence demonstrates that this injury was a recurrence of the claimant's automobile accident injury from February of 2002. There are no witnesses to this alleged injury and the claimant did not timely report this injury. The claimant continued to work her entire shift without reporting it to one of her supervisors. When she did decide to report it, she told her union representative and not her supervisor.

Darrell Pye, a co-employee of the claimant, testified that he saw the claimant both before and after the alleged injury and on both occasions she acted as

though she was fine. He saw her pulling a pallet jack to the back of the store without any problems or without showing any evidence of pain. He also testified that she failed to mention any shoulder pain problems to him. Simply put, I cannot find that the claimant sustained an aggravation or a new injury on September 4, 2003. Accordingly, I must dissent from the majority's opinion finding this event was compensable.

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KAREN H. McKINNEY, Commissioner