

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F800723

TERESA COPE, EMPLOYEE	CLAIMANT
M C EXPRESS, INC., EMPLOYER	RESPONDENT
RETENTION MANAGEMENT, INSURANCE CARRIER	RESPONDENT

OPINION FILED SEPTEMBER 9, 2009

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

Claimant represented by the HONORABLE PHILLIP WELLS,
Attorney at Law, Jonesboro, Arkansas.

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

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed May 5, 2009. The administrative law judge
found that the claimant sustained injuries to both shoulders
arising out of and in the course of employment. The
administrative law judge found that the claimant was
entitled to temporary total disability and reasonably
necessary medical treatment. After reviewing the entire

record *de novo*, the Full Commission affirms the administrative law judge's opinion. We find that the claimant proved she sustained compensable shoulder injuries and is entitled to benefits.

I. HISTORY

The claimant, age 47, testified that she had worked as a truck driver since 2001. Dr. John D. Brophy saw the claimant on December 1, 2003:

Ms. Teresa Cope is a 41-year-old white female seen in consultation at the request of Workers' Compensation concerning back pain. On 26 December, 2002, she was involved in a motor vehicle accident with an 18-wheel tractor trailer. She initially complained of back pain and was evaluated with MRI of the lumbar spine in March 2003. She subsequently developed severe left upper extremity radicular pain. She was evaluated through this office and was found to have a large left C6-7 herniated disc as well as a herniated disc at C3-4. On 29 April, 2003, she underwent a C3-4 and C6-7 anterior cervical discectomy and fusion with Dr. Manugian. Postoperatively, she did well with resolution of her upper extremity radicular pain. She was cleared to return to work at full duty in early August 2003. She states she went to work driving her truck and her back pain increased in severity, primarily localized to the inferior lumbar paraspinal muscles on the left. Based on her back pain and her requirement to care for her children, she quit her job in approximately September 2003....Currently, her chief complaint is aching pain at the left lumbar paraspinal muscles.... The patient states a past history of carpal tunnel syndrome and neck problems....

Dr. Brophy's impression was "Lumbar myofascial pain syndrome associated with lumbar spondylosis without clinical evidence of radiculopathy." Dr. Brophy recommended conservative treatment and stated, "She is cleared to continue at a full duty work status."

The claimant testified that she injured her left shoulder while working for another employer in 2004. Dr. Bret R. Sokoloff examined the claimant on October 10, 2005:

Ms. Cope is a 43 year old right hand dominant female. She is a truck driver with her husband who is currently deceased. She was pulling a 5th wheel pin to release her trailer when she said she jerked her left shoulder and pulled it. That was in September 2004. She continued working and re-injured her shoulder December 2004 when unloading water heaters. She said this aggravated her shoulder. Ultimately she underwent arthroscopic decompression, distal clavicle excision and cuff debridement for a partial thickness articular side tear in May 2005. She says she has not returned to work. She had therapy with some good improvement. June 30th at therapy she said she felt a snap with pain in her cervical spine. She says she has had increased symptoms when she lifts overhead. Has a history of cervical fusion by Dr. Brophy. She is using a soft collar. She says she has difficulty lifting and using her left arm....

Circumduction of the shoulder gives her trapezial discomfort and she has well healed incisions about the shoulder and neck without erythema, swelling or ecchymosis. Impingement testing gives her posterior lateral symptoms. Shoulder motion is smooth....

MRI of left shoulder December 28, 2004 shows severe arthritis of the AC joint with impingement on the rotator cuff. No significant tendinopathy noted. 2/22/2005 seen by orthopaedics for left shoulder impingement and left AC joint arthritis. Started therapy....5/16/2005 underwent left shoulder arthroscopy, acromioplasty, distal clavicle excision, rotator cuff debridement for a partial thickness articular side tear. There was also degenerative fraying of the anterior labrum. This was performed by Dr. Edward Cooper, Jr.

Seen 6/1/2005 and noted to have excellent range of motion, still soreness. Continued therapy. Initially given a note to return to work 7/1/2005 at full duty....
The patient was returned to full duty at maximum medical improvement without residual impairment on 7/26/2005.

7/18/2005 had her functional capacities evaluation which showed inconsistencies with functional effort and was inconclusive secondary to patient effort.

Dr. Sokoloff assessed "(1) Chronic left shoulder pain (2) Chronic neck pain." Dr. Sokoloff stated, "With regards to her ability to return to work, I think that although functionally able to return to work and I would not give her any restrictions, I think it unlikely that she will ever return. She has had multiple complaints for many years now with chronic neck pain, migraines, back pain, trapezial pain, depression, thoracic outlet syndrome. I think this is poorly prognostic for her in a future working environment, but again, she does not have any work restrictions. In

conclusion, I agree that she is at maximum medical improvement with regards to the work related injury. I do not think she has sustained any permanent impairment. I do not believe any additional medical treatment necessary nor is any further workup indicated with regards to her workers compensation complaint. I do not believe she has sustained any other injury other than the shoulder symptoms for her injury on September 1 and/or December 9, 2004."

Dr. Sokoloff returned the claimant to work at full duty on October 10, 2005. Dr. Spencer H. Guinn consulted with the claimant beginning October 26, 2005:

This is a 43-year-old right hand dominant female who is a truck driver. She injured her left shoulder at work in September of 2004....She had surgery in May of 2005 and apparently was doing relatively well post op until June 30, 2005 when they decided to increase her therapy. She states that this caused a great deal of increased pain and she has had the pain ever since. By August 2005 it was severe and she was loosing (sic) motion. She has been unable to work at her full job because of continued pain. She still can't drive using her left arm but it may be somewhat improved since she has been resting it. She has also recently had an MVA and reinjured her neck which has had surgery. She is scheduled to see Dr. Eichert for this. She is having numbness and weakness into her left arm and down into her left foot....

Left upper extremity, she has well healed arthroscopy portals....She is point tender

over her AC joint. There is also crepitation at her AC joint and popping which is painful....She has no instability.

X-RAY FINDINGS: Three views of her left shoulder, she appears to still have some probable contact of her AC joint plus there is evidence of under surface resection of the AC. Her surgical report was obtained from the Surgical Hospital. Apparently Dr. Cooper did an arthroscopic subacromial decompression, distal clavicle resection, and a debridement of a partial thickness rotator cuff tear. She has also had a post op MRI of the shoulder with moderate severe bursitis and severe degenerative change of the AC joint with supraspinatus impingement and some subchondral cystic change in the posterior lateral humeral head from impingement.

Dr. Guinn assessed "Continued AC symptoms plus subacromial impingement and status post left shoulder arthroscopy approximately five months ago....She is not interested in pursuing further nonoperative options and therapy since she states that she has been through these before and she wants to proceed with surgery. However because of her significant symptoms in her left arm and left leg with her recent neck injury she is scheduled to see Dr. Eichert. We are going to need clearance from him before we can proceed with her surgery." The record does not show that this proposed surgery was performed.

The claimant testified that she began working for the respondent-employer, M C Express, in 2006. Fred Fraser,

safety director for M C Express, testified at deposition that he believed the claimant had been employed with the respondents beginning in 2005-2006. The record contains a Conditional Job Offer & Medical Review, signed by the claimant and Fred Fraser on May 3, 2006. The claimant indicated on this document that the only job-related injury she had sustained was an injury to her right wrist in 1984 while working for another employer. The respondents' attorney questioned Mr. Fraser:

Q. In looking at some of the documentation I've submitted to the Judge, this is Respondents' Exhibit 2, the Non-Medical Packet, on page 1 there's a Conditional Job Offer. Have you seen that document before?

A. Yes, ma'am....It is our Conditional Job Offer. This is from the first time of employment.

Q. It's got a date on it of May 3rd, 2006....Would that have been the first time you hired her?

A. That would've been the first time we hired her. Yes, ma'am.

Q. Okay. And in the middle section of that there's an indication that she had a prior right wrist injury; is that correct?

A. Yes.

Q. Do you see anything else on that form indicating any other prior injuries or surgeries of any kind?

A. No, ma'am....

Q. Let me ask you this, if she had indicated on her initial application more about the actual injuries she'd had in the past and more about her prior surgeries, what would you have done?

A. The procedure that we follow on that, if there are injuries listed on the Conditional Job Offer, notification is made to the doctor prior to her showing up there at the doctor, there's also a questionnaire that the doctor must fill - that the patient fills out before the exam begins. But we would verbally make a - notify the doctor of these injuries, to check them out and make sure that they're fully capable of performing their duties.

Q. All right. So you would have the doctor then determine whether or not -

A. The doctor really determines whether they're physically fit for the job.

Q. And in this case you weren't able to do that because she didn't tell you about the prior injuries: is that right?

A. Correct.

Q. A form that you might be referring to as far as what the doctor and what one of your drivers might fill out, is that this form that's on page 17, a Medical Examination Report?

A. Uh-huh.

Q. Is that what you were talking about?

A. Yes, ma'am.

The claimant testified that she temporarily left her employment with M C Express in July 2006 and was terminated

in December 2006 "because of a misunderstanding between me and Mr. Fraser, and he put it on my DAC report that I refused a drug test, but I did not." Fred Fraser testified that the claimant's employment was terminated due to the claimant's refusal to take a random drug test.

The claimant testified that she worked for another company from January 2007 until about May 2007. The claimant testified that she returned to work for the respondent-employer in May 2007. The record contains a Medical Examination Report For Commercial Driver Fitness Determination, date of examination May 29, 2007. The Health History section of the Report indicated that the claimant reported an injury within the past five years, and that the claimant had undergone left shoulder surgery by Dr. Eddie Cooper, "RTW 100%." The Physical Examination section of the Report indicated that Dr. Richard Covert found no impairment in the claimant's extremities or spine. Dr. Covert indicated that the claimant was eligible to drive for one year, and the only comment was that the claimant was overweight.

A note from Dr. Terry D. Hunt dated January 4, 2008 indicated that the claimant reported falling on January 1,

2008, hurting her right hip, back, and neck. Dr. Hunt reported lumbar tenderness, "paravertebral spasms," and "large bruise left flank."

The parties stipulated that the employment relationship existed at all pertinent times, including January 10, 2008. The claimant wrote on a Driver's Vehicle Inspection Report dated January 10, 2008, "Hurt my R shoulder and my L shoulder opening and closing the doors each time on this trailer!! Also, very hard to crank the dollies."

The claimant testified on direct examination:

Q. To the best of your ability, describe to the Judge what incident or incidents occurred that caused injury to your shoulders.

A. Okay. I had the trailer and they have two (2) handles that you pull up and pull out, and this had been previously damaged - the door had. I guess somebody had slammed it against the dock. I had to jerk them open, and when I jerked those open, I felt, you know, like it strained or pulled my shoulders, and I made a note of it on my log sheets, and I was hoping it was just pulled muscles. I think it was a day or two later, there was ice and snow on the ground, and a blizzard type situation. Matter of fact, the shipping office told me to hurry up and get out of there because it was getting worse and, anyway, I had to open the door to get my load lock out of the back of the truck, cause we have to keep up with those to secure our loads. And when I went to open that door, I had it with - holding it with my right hand, and the wind grabbed it, and I reached to grab with my left arm to hold it, and it still

jerked it out of both arms and it ripped this shoulder and tore those ligaments (indicating).

Q. And you're pointing to the right shoulder and the left shoulder - is that correct?

A. Yes, sir, it hurt both of my shoulders real bad.

The claimant signed a Form AR-N, Employee's Notice Of Injury, on January 15, 2008. The claimant reported an accident occurring January 10, 2008: "Right and left shoulder and pulling L shoulder up to L side of my neck." The claimant wrote on the Form AR-N: "Couldn't get trailer doors to open and shut without jerking and pulling. Also had difficult time cranking dollies they were very stiff and stuck even in easy gear on trk #5311A. Then I hurt both shoulders again on trailer #57038 (1/15/08) Had to use (1/10/08) hammer to get doors shut on both trailers."

Fred Fraser testified that the claimant notified him on or about January 15, 2008 that she had sustained an accident. Dr. Jeffery Barber signed a Form AR-3, Physician's Report on January 16, 2008, indicating that an injury had occurred on January 10, 2008. In the Brief Description of Accident section of the Physician's Report, it was written that while in a snowstorm, the claimant pulled a trailer latch to enter the back of a trailer to get

a load lock out, which caused the claimant's shoulders to hurt "when she pulled it and the wind slammed door open. Had trouble getting in and out. Then had to pull door against wind and had trouble getting door to latch closed. Felt like she ripped L shoulder again." Examination showed "paravertebral spasm in neck and shoulders." The physician assessed "Muscle strain in shoulders from opening trailer doors, complicated by past fall and medical history." The claimant was released to restricted light duty work, no driving until the next appointment on January 21, 2008.

Dr. Hunt examined the claimant on January 17, 2008 and reported "Neck, Thyroid: tenderness on trapezius muscle; spasms noted painful to turn head to right....Extremities: no clubbing, cyanosis, or edema." Dr. Hunt assessed Migraine, Anxiety Disorder, Back pain, and obesity.

The claimant followed up with Dr. Barber on January 21, 2008. Dr. Barber noted that the claimant still complained of pain in both shoulders and had been on light duty over the weekend. Dr. Barber appears to have observed "Thoracic spasm," and he noted, "Pt doesn't think she can drive due to weakness in arms and back pain. As far as work comp is concerned, I believe pt is almost fully recovered from

shoulder and arm strain....Pt admits improvement but still some pain in R shoulder. This will not interfere with her driving." Dr. Barber returned the claimant to work on January 21, 2008 with no restrictions.

The claimant testified that she was unable to return to work, despite Dr. Barber's release. The claimant left a message at Dr. Hunt's office on January 22, 2008: "Pt would like a note saying she can be off work until the results of her MRI scan are back. Said her back is really hurting & is not able to go back & drive the truck right now."

Dr. Hunt noted on January 24, 2008, "C/O back pain - states she bent over yesterday and lifted on something and her back is worse - with stabbing pain." Dr. Hunt assessed Back pain, Hemorrhoids, and Sinusitis. Dr. Hunt gave the claimant an off-work slip on January 24, 2008: "Please excuse from work 1/17/08 for four weeks 2-24-08 for strict bed rest due to back condition."

The claimant testified that her employment with M.C. Express was terminated on February 13, 2008: "They told me that they had to put someone in the truck, and I had - they had told me already to get my stuff out of it the day they sent me to the work comp doctor." Fred Fraser testified

that the claimant's employment was terminated because the employer discovered the claimant was taking Xanax. Mr. Fraser described Xanax as "a very dangerous drug to be taking and driving, in fact, most drivers are disqualified, if not - all should be disqualified according to the medical criteria board, you know, that works with DOT."

The claimant returned to Dr. John D. Brophy on February 18, 2008: "Ms. Teresa Cope is a 45-year-old white female referred at the request of Dr. Terry Hunt for evaluation of low back pain and neck pain....On 9 January, 2008, she was shutting the doors of her truck when she noted some increased left trapezius pain. Currently, her chief complaint is low back pain localized to the right SI joint." Dr. Brophy recommended conservative management of lumbar myofascial pain and cervical/trapezius myofascial pain.

Dr. Hunt's impression on February 25, 2008 was migraine, anxiety disorder, back pain, and pain in limb. Dr. Hunt's notes did not indicate that he kept the claimant off work.

An MRI of the claimant's right shoulder was taken on March 12, 2008, with the following findings:

Degenerative hypertrophy of the acromioclavicular joint is present. Bony undersurface spurring of

the distal clavicle is present. The inferior glenohumeral ligament is normal. The long head of biceps tendon and the subscapularis appear normal. The glenoid labrum, suprascapular notch and the spinoglenoid notch are normal. The infraspinatus and teres minor musculature appear normal. Subcoracoid recess is normal. The abduction and external rotation view shows no major abnormality. Mild increased T2 signal is seen in the anterior supraspinatus tendon on second review.

CONCLUSION:

1. Mild supraspinatus tendinopathy, secondary to chronic impingement, degenerative hypertrophied acromioclavicular joint. There is bony undersurface spurring of the distal clavicle impinging on the anterior musculotendinous junction.
2. Tiny glenohumeral effusion.

An MRI of the claimant's left shoulder was also done on March 12, 2008:

Mild degenerative hypertrophy of the acromioclavicular joint is present. No significant supraspinatus tendinopathy, however, there is a small amount of fluid in the subacromial bursa. The long head of biceps tendon, the subscapularis tendon and coracoid process are normal. The glenoid labrum and inferior glenohumeral ligament appear normal. Subcoracoid recess, infraspinatus and the teres minor muscle appear normal. The bony undersurface of the acromion is normal.

CONCLUSION: Mild subacromial bursitis likely secondary to chronic impingement from a mildly hypertrophied and degenerative acromioclavicular joint. No significant supraspinatus tendinopathy at present.

The claimant consulted with Dr. Spencer H. Guinn on April 2, 2008:

She states that since our last visit she has been asymptomatic and doing very well. She is full duty at work. In January of this year she was working on a trailer and injured her shoulders while working on doors. She's had progressive pain since then. She states that the right one feels like the left one did before she required surgery several years ago. She restarted her home therapy program from before. She has taken a Medrol dose pack which gave her some initial relief, but the pain has returned. She's also tried Absorbing (sic) Junior and she was given some pain medication. She was also given a month off, but the pain is persistent. It is local at the shoulders and radiates to the deltoid tuberosity. She has pain with overhead activities....

X-RAYS: AP and outlet of bilateral shoulders. Her right shoulder has a Type II acromion. On the left it is Type I post-surgical. Well maintained acromiohumeral joint spaces and narrowing at her AC joints. MR's of both shoulders were available. On the right she has some increased signal within her anterior supraspinatus tendon. She also has degenerative hypertrophy at the AC joint with undersurface spurring with impingement. On the left she has degenerative hypertrophy at the AC joint with bursitis.

Dr. Guinn assessed "Bilateral shoulder pain. Right with possible partial tear versus tendonitis and bilateral AC degenerative change with undersurface impingement....It is clear to Mrs. Cope that she was asymptomatic before this work related injury and that now she is in quite severe pain....Since she has already tried her therapy and anti-inflammatory and is having worsening symptoms, she wants

to go ahead and proceed with right shoulder surgery first and possibly depending on how that one does even consider the left. I will plan an arthroscopy with a subacromial decompression and a distal clavicle resection. I will look at her rotator cuff and repair it if necessary."

Dr. Guinn performed surgery on April 17, 2008: "Right shoulder arthroscopy with 1. SLAP repair. 2. Rotator cuff debridement. 3. Subacromial decompression. 4. Distal clavicle resection." Dr. Guinn noted during surgery, "She had a complete full-thickness tear of the biceps anchor all along the superior labrum from approximately the 11 o'clock to the 1 o'clock position with easy displacement down into the glenohumeral joint, also had fraying of the biceps itself but it was intact to probing."

Dr. Guinn noted post-surgical improvement on April 30, 2008.

Dr. Guinn performed another surgery on May 29, 2008: "Left shoulder arthroscopy with: 1. Subacromial decompression. 2. Distal clavicle resection. 3. SLAP debridement." Dr. Guinn noted during surgery, "She had a large type 1 SLAP with was debrided back with the shaver until I could thoroughly examine the base. It was thin but

intact throughout the entire superior anchor. She also had some fraying of the anterior labrum which was debrided back and it was stable as well." The postoperative diagnosis was "Left shoulder: 1. Subacromial impingement. 2. Acromioclavicular degenerative joint disease. 3. Type I SLAP."

The record contains an Application For Unemployment Insurance Benefits dated June 19, 2008. The claimant indicated that her employment began on June 20, 2007 and ended on February 13, 2008.

Dr. Guinn noted post-surgical improvement on July 16, 2008. The claimant testified regarding her bilateral shoulder condition post-surgery, "It's improved, but they're not like they used to be, unfortunately."

The claimant returned to Dr. Guinn on September 30, 2008: "Mrs. Cope is here to follow-up of her shoulders. She has been going to therapy with Teddy and was just switched over to a home program. She was also recently diagnosed with fibromyalgia....She has continued to make improvements with range of motion and is getting somewhat stronger....I am going to get her set up once again for bilateral extremity EMG nerve conduction studies. I will have her

continue working on home strengthening and we will see her back in about a month."

On October 1, 2008, Dr. Guinn answered correspondence and a questionnaire provided him by the claimant's attorney. Dr. Guinn checked a space beside the statement, "Yes, in my medical opinion, the on-the-job injuries described above represent the major cause of her shoulder injuries that required orthopaedic surgery at my direction." Dr. Guinn indicated that the claimant sustained a new injury to her right shoulder and an aggravation of a pre-existing condition with objective evidence on the left shoulder. Dr. Guinn opined that the claimant was temporarily disabled from work activities from April 2008 until July 17, 2008.

Dr. Guinn reported on January 21, 2009:

Mrs. Cope is here for follow-up of her shoulders and for follow-up of her bilateral upper extremity nerve studies. It sounds as if she has plateaued. She has maybe regressed a little bit on her right shoulder. She tried to go to the next stronger Thera-band and has had some pain. Her nerve studies were reviewed with her. Dr. Braden interpreted bilateral upper extremities as normal....Discussed that symptoms maybe coming from her fibromyalgia. She is going to continue working on her strengthening exercises. She is going to back off a little bit on the right and see if this increases, but I think she maybe getting close to MMI.

A pre-hearing order was filed on February 2, 2009. The claimant contended, "on or about January 10, 2008, Claimant sustained injuries to her shoulders while in the course of her employment when she was pulling on her trailer latch to enter the back of trailer when the wind slammed the door open and when she was closing trailer door, Claimant had to push against the wind to shut trailer doors causing pain her shoulders....Claimant contends that as a result of the work injuries to her shoulder, Dr. Guinn performed surgery on her right shoulder in April 2008, and on her left shoulder in May 2008. Claimant further contends that as a result of her work injury on January 10, 2008, and the subsequent surgeries, Claimant's claim should be held as compensable and she be entitled to all appropriate benefits."

The respondents contended that the claimant did not sustain a compensable injury on or about January 10, 2008. The respondents contended, "the medical records do not support a compensable injury nor do they support a causal relationship between the Claimant's need for medical treatment and her work for Respondent Employer. It is Respondents' position that Claimant's need for medical treatment, if any, pre-existed her alleged injury. Further,

Respondents contend that they did not receive notice of any alleged injury until 01/15/08."

A hearing was scheduled on the issues of compensability, temporary total disability, medical benefits, and fees for legal services.

Michelle Wingo, a physician's assistant in Dr. Guinn's office, saw the claimant on February 25, 2009:

Mrs. Cope is in today for follow-up of bilateral shoulders. She states that she has been doing her home exercises. She has begun to have pain in both shoulders, especially in the right. She has no neurovascular complaints....

PHYSICAL EXAM: With passive range of motion she has essentially 180 degrees of forward flexion and lateral elevation bilaterally. She has approximately 90 degrees of external rotation bilaterally and 45 degrees of internal rotation bilaterally. With active range of motion she has approximately 120 degrees of forward flexion and lateral elevation bilaterally. She has 45 degrees of internal rotation bilaterally and 90 degrees of external rotation bilaterally. She is neurovascularly intact to sensory and vascular exam today. No skin changes or wounds. Compartments are soft.

PLAN: I explained to Mrs. Cope that the main treatment currently is to continue therapy with her home exercise program and she understands. She states that she has been using a TENS unit on her shoulders that she had from previous therapy. This is okay. She knows to do her exercises at least once daily. We will see her back as needed. She is at MMI.

(Dr. Guinn signed Michelle Wingo's report on March 11, 2009).

A hearing was held on March 20, 2009. At that time, the claimant's attorney contended that the claimant was entitled to temporary partial disability benefits from the date of her application for unemployment compensation, June 21, 2008, until a date to be determined. Counsel stated that unemployment benefits were paid until March 7, 2009. The claimant contended that the evidentiary requirements of the *Shippers* defense would not be met; the respondents raised the *Shippers* defense.

An administrative law judge filed an opinion on May 5, 2009. The administrative law judge found, among other things, that the claimant "sustained injuries to both shoulders arising out of and in the course of her employment." The administrative law judge found that the claimant was entitled to temporary total disability benefits from January 21, 2008 through July 17, 2008, less the payment of unemployment compensation benefits. The administrative law judge found that the medical treatment of record, including surgery by Dr. Guinn, was reasonably necessary. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ... arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

An administrative law judge found in the present matter, "3. On January 10, 2008, the claimant sustained injuries to both shoulders arising out of and in the course of her employment." The Full Commission affirms this

finding. The parties stipulated that the employment relationship existed on January 10, 2008. The claimant testified that she strained both shoulders on that date while forcefully pulling on two trailer handles. The Driver's Vehicle Inspection Report completed by the claimant on January 10, 2008 corroborated her testimony, as did the Form AR-N, Employee's Notice Of Injury, signed by the claimant on January 15, 2008. Dr. Barber examined the claimant on January 16, 2008 and noted "paravertebral spasm in neck and shoulders." Muscle spasms constitute objective findings. *Kimbrell v. Arkansas Dep't of Health*, 66 Ark. App. 245, 989 S.W.2d 570 (1999). Additionally, Dr. Guinn reported a number of objective findings with regard to the claimant's left and right shoulders during surgery. These objective findings included a full-thickness tear in the claimant's right shoulder, and a large SLAP tear and fraying in the claimant's left shoulder. We find that the objective findings of record were causally related to the January 10, 2008 accidental injury.

The Full Commission finds that the instant claimant proved she sustained compensable injuries to her left and right shoulder on January 10, 2008. The claimant proved by

a preponderance of the evidence that she sustained an accidental injury causing physical harm to the body, i.e., her left and right shoulders. The accidental injury arose out of and in the course of employment, required medical services, and resulted in disability. The injury was caused by a specific incident, identifiable by time and place of occurrence on January 10, 2008. The claimant established a compensable injury to her left and right shoulder by medical evidence supported by objective findings, namely, Dr. Barber's January 16, 2008 report of spasm in the claimant's shoulders. We find that the spasm in the claimant's shoulders was causally related to the January 10, 2008 accidental injury, as were Dr. Guinn's objective findings noted during surgery on the right and left. The Full Commission finds that the respondents had notice of the claimant's accidental injury no later than January 15, 2008, the date of the Employee's Notice Of Injury.

At the beginning of the hearing held March 20, 2009, the parties discussed that the respondents had raised the so-called *Shippers* defense. The administrative law judge incorrectly concluded on p. 27 of his opinion that the respondents had subsequently waived the *Shippers* defense.

We can find no indication in the record that the respondents waived this defense. Both parties on appeal brief this issue and neither party asserts that the respondents have waived the *Shippers* defense. The Arkansas Supreme Court has held, in pertinent part:

[We] are of the view that public policy, in the absence of a clear legislative intent to the contrary, requires the application here of the test as stated in 1B Larson's Workmen's Compensation Law § 47-53:

The following factors must be present before a false statement in an employment application will bar benefits: (1) the employee must have knowingly and wilfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury....[Citations omitted]

The rationale of Larson's rule is demonstrated by the fact that Workmen's Compensation Law requires that the employer must take an employee as it finds him. Employment places on the employer the risks attendant upon hiring a known or unknown infirm employee. Consequently, it is only fair that the appellant employer here have a right to determine a health history before employment of the appellee as a mechanic to avoid the possible liability for an accidental injury, causally related to an infirmity.

Here, we think the fair and just policy is to adopt the rule enunciated in Larson, supra, that a false representation as to a physical condition in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise

compensable injury if it is shown that the employee knowingly and willfully made a false representation as to his physical condition, the employer relied upon the false representation, which reliance was a substantial factor in the employment, and there was a causal connection between the false representation and the injury.

Thompson v. Washington Reg'l Med. Ctr., 71 Ark. App. 126, 27 S.W.3d 459 (2000), citing *Shippers Transp. v. Stepp*, 265 Ark. 365, 578 S.W.2d 232 (1979).

In the present matter, the claimant testified that she began working for the respondent-employer in 2006. The claimant, along with the respondents' safety director, signed a Conditional Job Offer & Medical Review on May 3, 2006. The claimant indicated on the Conditional Job Offer that the only job-related injury she had sustained was an injury to her wrist in 1984. The record shows that the claimant had in fact complained of neck pain and back pain after a motor vehicle accident in 2002. The claimant underwent neck surgery in 2003. The claimant injured her left shoulder in 2004 and underwent left shoulder surgery in 2005. The evidence thus demonstrates that the claimant on May 3, 2006 knowingly and willfully made a false representation as to her physical condition. Fred Fraser, the respondents' safety director, testified that if the

claimant had disclosed her prior injuries, then the respondents would have directed the claimant to undergo a medical examination in order to ensure that the claimant could perform her work duties. Mr. Fraser testified, "The doctor really determines whether they're physically fit for the job."

The claimant stopped working for M C Express in about July 2006 but returned to work for the respondent-employer in about May 2007. A Medical Examination Report For Commercial Driver Fitness Determination was done on May 29, 2007. This Medical Examination Report did describe in detail the claimant's prior injuries. Dr. Covert also noted in the Medical Examination Report that he could find no physical impairment, and that the claimant was eligible to work as a driver for one year. We reiterate Mr. Fraser's testimony that he would have relied on a physician's report in order to determine whether or not the claimant was physically able to perform her work as a truck driver. The Medical Examination Report concluded that the claimant was physically able to work for the respondents. The Full Commission therefore finds that the respondent-employer did not prove that it relied on the claimant's prior false

representation as to her physical condition. Nor was there a causal connection between the false representation and the compensable injury. The Full Commission therefore finds in the present matter that the *Shippers* defense raised by the respondents does not preclude the claimant's entitlement to appropriate benefits.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). If the underlying condition causing the disability has become more stable and if nothing further will improve that condition, the healing period has ended. *Id.* The determination of when the healing period ends is a question of fact for the Commission. *Thurman v. Clarke Indus., Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

An administrative law judge found in the present matter, "4. The claimant was temporarily totally disabled for the period commencing January 21, 2008, and continuing through July 17, 2008, and correspondingly entitled to the payment of temporary total disability benefits less the payment of unemployment compensation benefits for the period June 21, 2008 through July 17, 2008, pursuant to Ark. Code Ann. §11-9-506(b)." The Full Commission affirms this finding. The claimant proved by a preponderance of the evidence that she sustained compensable injuries to her left and right shoulders on January 10, 2008. Dr. Barber restricted the claimant's work duties beginning January 16, 2008. Although Dr. Barber attempted to return the claimant to full work duty on January 21, 2008, the claimant testified that she was unable to drive a truck because of the traumatic injuries to her shoulders. Dr. Hunt took the claimant off work for the period beginning January 17, 2008. The claimant's employment was terminated on or about February 13, 2008.

On April 17, 2008, Dr. Guinn performed surgery on the claimant's right shoulder including a repair of a full-thickness tear. Dr. Guinn performed similar surgery on the

claimant's left shoulder on May 29, 2008. Dr. Guinn noted post-surgical improvement on July 16, 2008. The claimant on appeal agrees that her healing period ended on July 17, 2008. The Full Commission therefore finds that the claimant remained within a healing period and was totally incapacitated from earning wages for the period January 21, 2008 until July 17, 2008. The administrative law judge's finding is affirmed.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she sustained compensable injuries to her left and right shoulders on January 10, 2008. The claimant's claim is not barred pursuant to the *Shippers* defense. The claimant proved that all of the medical treatment of record for her shoulders, including surgery performed by Dr. Guinn, was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a). The claimant proved that she was entitled to temporary total disability benefits from January 21, 2008 through July 17, 2008. Temporary total disability shall be payable to the claimant with respect to any week for which she received unemployment benefits, but only to the extent that the temporary total disability otherwise payable exceeded the

unemployment benefits. See Ark. Code Ann. §11-9-506(b). The Full Commission therefore affirms the administrative law judge's opinion. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she sustained injuries to both her shoulders on January 10, 2008. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. I find that the claimant is barred from receiving benefits for her left shoulder because she failed

to disclose pre-existing problems when she was hired by the respondent employer.

The respondent contended that the claimant's claim for benefits for her left shoulder should be barred because she did not disclose multiple pre-existing problems she had when she was hired. I agree with the respondents. In Shipper's Transp. V. Stepp, 265 Ark. 365, 578 S.W.2d 232 (1979, the Court set out the following factors that must be present before a false statement in an employment application will bar benefits: (1)The employee must have knowingly and willfully made a false representation as to his physical condition. (2)The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3)There must have been a causal connection between the false representation and the injury. Thompson v. Washington Regional Med. Ctr., 71 Ark. App. 126, 129, 27 S.W.3d 459, 465 (2000).

In this case, the claimant lied to her prospective employer regarding her pre-existing problems; the employer relied on her representations, and part of the claimant's injury was causally linked to her extensive pre-existing left shoulder problems. She freely admitted at the hearing

that she had prior workers' compensation claims while working for Penn Athletics in the early 1980's involving her wrists and thoracic outlet syndrome. She had a more severe injury in 2002 while driving for Charlie Transport when her trailer flipped, causing disc problems in her neck and back. The claimant also had two injuries in 2004 while working at Equity, both causing injury to her left shoulder.

The medical records reflect that the claimant underwent a C3-4 and C6-7 anterior cervical discectomy and fusion in April of 2003. She testified that she still has neck pain if she does not have mirrors on her truck, causing her to turn her neck from side to side. With regard to the 2004 left shoulder injury, the claimant underwent arthoroscopic decompression, distal clavicle excision and cuff debridement for partial tear in March of 2005. An MRI of the left shoulder on December 28, 2004 showed "severe arthritis of the AC joint with impingement on the rotator cuff." The claimant admitted at the hearing that her prior left shoulder injury was difficult to get over, and she continued to take Ambien after her surgery. Dr. Bret Sokoloff performed an IME in October of 2005 and indicated

that he did not believe the claimant would ever return to work.

Due presumably to continued left shoulder complaints, another MRI was performed on December 28, 2006, which revealed glenohumeral joint effusion, impingement on the supraspinatus, and bursitis. On October 2, 2007, the records reveal that the claimant called White River Rural Health Center, requesting "an MRI from her neck to her tail bone." She later called on October 30th and November 1st for Lyrica to help with nerve pain. Only one week prior to her alleged injury, the claimant was seen on January 4, 2008 by Dr. Terry Hunt after having fallen with complaints for pain in the upper neck on the left side.

The claimant then had her alleged injury on January 11, 2008. An MRI on her left shoulder was performed on March 12, 2008 which revealed "mild subacromial bursitis likely secondary to chronic impingement from a mildly hypertrophied and degenerative acromioclavicular joint." The history she gave to her treating physician, Dr. Guinn, was that she injured her shoulders while working on trailer doors. The evidence indicates that the claimant's MRI reports from December 28, 2006, and March 12, 2008 are

nearly identical. She admitted at the hearing that she was told she had osteoarthritis in her left shoulder.

Despite having had a prior surgery on her left shoulder, the claimant only disclosed on her conditional job offer with the respondent employer that she had a prior right wrist surgery in 1984. In looking close at the conditional job offer, it shows that the claimant filled it out in May of 2006. When asked specifically why she failed to disclose all of her other prior injuries or illnesses, the claimant could not recall why she did not complete the form and tried to say that she was essentially distracted by speaking to Fred Fraser, her supervisor.

Mr. Fraser was questioned about his knowledge of any pre-existing problems the claimant might have had, other than the one right wrist surgery she disclosed on her conditional job offer. He replied that he had no knowledge of prior injuries until he got a Form 3 from Dr. Barber dated January 16, 2008, which was after claimant's alleged injury on the 11th of January. Mr. Fraser specifically knew nothing about a prior left rotator cuff injury. When asked what he would have done if claimant had been honest about her actual injuries, Mr. Fraser indicated that he would have

sent the claimant to the company doctor for determination as to whether she was fit for the job. In this case, he was not able to do that because he was not informed about her prior injuries other than the right wrist. Had the claimant been honest and had she disclosed a full history to her doctor, she may not have gone to work for respondent employer. As mentioned previously, at least one doctor, Dr. Bret Sokoloff, did not feel that claimant would ever return to work as of 2005. Therefore, in my opinion, the Claimant's present claim should be barred as to her left shoulder because of the Shipper's defense.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner