

# NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F801739

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| ROSE JONES, EMPLOYEE                                      | CLAIMANT   |
| TARGET CORPORATION, EMPLOYER                              | RESPONDENT |
| SEDGWICK CLAIMS MANAGEMENT<br>SERVICES, INSURANCE CARRIER | RESPONDENT |

OPINION FILED AUGUST 20, 2009

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

Claimant represented by the HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE GUY ALTON WADE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

## OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed March 25, 2009. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on December 11, 2008, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.
2. Claimant has met her burden of proving by a preponderance of the evidence that

she suffered a compensable injury to her left shoulder while employed by the respondent.

3. Respondent is liable for payment of all reasonable and necessary medical treatment provided in connection with claimant's compensable injury. This includes medical treatment from Dr. Benafield and surgery he has recommended.

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 March 25, 2009, 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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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

**DISSENTING OPINION**

I respectfully dissent from the majority opinion. The respondent appeals a decision by the Administrative Law Judge finding that the claimant

proved by a preponderance of the evidence that she sustained a compensable left shoulder injury. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof. Accordingly, I would reverse the decision of the Administrative Law Judge.

The claimant was employed by the respondent employer as an "in-stocks" team member. The claimant testified that she was doing a "team lift" with another employer, Travis, on a piece of boxed furniture when she hurt her shoulder. The claimant testified that she thought she pulled a muscle but did not report any alleged injury until she returned to work after being off for two days. She reported an injury to her immediate supervisor, David Price. The claimant told Mr. Price that she was just letting him know that she had a pain in her shoulder and agreed to tell him if it got worse. She continued working.

The claimant testified that her shoulder got so bad that she could not sleep so she returned to talk to Mr. Price. Mr. Price took the claimant to Becky Williams in Human Resources where a report was completed and the claimant was sent to Dr. Konstantin Berestnev. Dr. Berestnev saw the claimant on November 28, 2007. He

assessed the claimant with left rotator cuff tendinitis.

Dr. Berestnev stated in his report:

We are going to treat the patient with Arthrotec to take one pill twice a day. We are going to put the patient on Vicodin to take only at nighttime. We are going to recommend that the patient do Codmant type exercises for the left shoulder initially. We are going to recommend that the patient avoid lifting more than five pounds with the left hand and avoid working above the shoulders.

The claimant returned to Dr. Berestnev on December 5, 2007. Dr. Berestnev again assessed the claimant with left rotator cuff tendinitis. He recommended physical therapy and anti-inflammatory medicine. He gave the claimant Darvocet to help her sleep.

On December 19, 2007, the claimant saw Dr. Berestnev. Again, the claimant was diagnosed with left rotator cuff tendinitis and was noted as "healing". He changed the claimant to Celebrex and noted she had not been to physical therapy.

On December 26, 2007, Dr. Berestnev ordered an MRI of the claimant's left shoulder to rule out rotator cuff tears. The claimant was now complaining of neck pain. The claimant underwent the MRI on January 9, 2008. The MRI revealed the following:

1. DEGENERATIVE OSTEOARTHRITIS IN THE AC JOINT WITH PROMINENT PANNUS FORMATION IMPINGING THE SUPERIOR MARGIN OF THE DISTAL PORTION OF THE SUPRASPINATUS MUSCLE AND TENDON.
2. MARROW EDEMA IN THE DISTAL CLAVICLE AND ACROMION MOST LIKELY RELATED TO BONY INJURY THAT IS SUBACUTE.
3. THERE IS NO DEMONSTRATION OF ROTATOR CUFF TENDON TEAR.
4. NO GLENOID LABRAL TEAR, DISPLACEMENT OF THE BICIPITAL TENDON, OR SUBSCAPULARIS TENDON AND NO DEMONSTRATION OF DISPLACE FRACTURE LINE.

The claimant was seen by Dr. Berestnev on January 16, 2008. In his note from that date, he stated:

Ms. Jones presents today to follow up on the left rotator cuff tendinitis and the neck pain. The patient states that she doesn't feel any better, if anything she feels worse. Numbness and tingling is in the shoulder blades. She was told, according to the patient, by a physical therapist that she needs to do an MRI of her neck because it sounds to him that the problem is in the neck. The patient denies any previous history of neck or shoulder problems. She is asking how could an MRI show that she has degenerative osteoarthritis of the left shoulder and not having the pain prior to this injury which happened in November of 2007. I did explain to the patient the etiology and natural history of degenerative osteoarthritis, but the patient told me that she "wants a second opinion."

\* \* \*

It appears to me that her main problem is left rotator cuff tendinitis and osteoarthritis of the left AC joint with some prominent pannus formation impinging on the superior margin of the distal portion of the supraspinatus muscle and tendon. In addition to this, the patient has some other occupational circumstance such as dissatisfaction affecting the course of this illness. The main source of the shoulder problem, in my opinion, is the overexertion and strenuous movement at the shoulder which was already diseased and had osteoarthritis of the left acromioclavicular joint.

The patient, as I said, insisted on the MRI of the neck because she is convinced that this is the source of her illness. We are going to obtain an MRI of the cervical spine. We are going to keep her on anti-inflammatory medicine in the interval time. We are going to see her back for the follow up in two weeks after the physical therapy. I explained to the patient that working above the shoulder level or lifting, pushing or pulling of more than ten pounds with the left hand is going to exacerbate her pain and she should avoid this work. We will see the patient for the follow up in two weeks after the MRI.

On January 30, 2008, the claimant complained to Dr. Berestnev that she had "an orange ball in between her shoulder blades and in the left side of her neck". She was diagnosed as having a "buffalo hump" which is an

age related change in the position of fat at the back of the neck. He assessed the claimant as follows:

In my opinion, the patient has a left rotator cuff tendinitis and associated tenderness in her left trapezius area and occipitocervical area. I think that there is also a postural stress to the muscles in the left upper back. The patient does have underlying degenerative joint disease as found on MRI. In addition to this, the patient has some unspecified psych-social circumstance and physiologic malfunction arising from the above mentioned factors.

The claimant sought treatment from the Emergency room at Northwest Medical Center on February 7, 2008. The claimant underwent an MRI of her neck at that time. She was diagnosed with cervical strain and degenerative joint disease. The next day the claimant went to her primary care physician, Kathy Mayhew, where it was noted the claimant has type 2 diabetes.

The claimant underwent an MRI on her thoracic spine on March 12, 2008. The following findings were made:

There is normal alignment of the thoracic vertebral column. There is mild degenerative disc disease at all levels. There is no focal disc protrusion or extruded disc fragment. There is no central canal stenosis. There is no cord

compression, cord enlargement, or cord syrinx. There is no pathologic marrow signal intensity arising from the vertebral bodies that would suggest bony metastatic disease or healing trauma. There is no paravertebral mass identified on the axial images.

The claimant was diagnosed with a thoracic strain.

The claimant began treatment with Dr. Rebecca Lewis who referred the claimant to Dr. Bryan Benafield, an orthopedic surgeon. He injected the claimant's shoulder with steroids and wanted her to return in four to six weeks. The claimant continued to treat with Dr. Benafield who ultimately recommended surgery stating that "she does have signs and symptoms of impingement and rotator cuff syndrome and AC joint arthritis."

The evidence demonstrates that the claimant has had several incidents away from work where she was injured. The claimant was involved in a slip and "almost" fall at the Panda Restaurant. She hurt her left ankle which required treatment. The claimant has been involved in several car accidents including one where she injured her neck and back. In another accident, she was sideswiped by a semi and was pushed over to a curb.

The claimant continued to work for the respondent employer after the alleged injury. She is unable to state the date in which she was hurt. The claimant acknowledged that October 11, 2007, was not an accurate date. The claimant acknowledged that she does not know the actual date of injury. She does not recall mentioning an injury to the co-worker who was helping her team lift. She does not recall the day of the week it happened.

Ark. Code Ann. §11-9-102(4) (A) (i) (Supp. 2005) defines "compensable injury" as "[a]n 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. Wal-Mart Stores, Inc. v. Westbrook, 77 Ark. App. 167, 72 S.W.3d 889 (2002). The phrase "arising out of the employment" refers to the origin or cause of the accident, so the employee is required to show that a causal connection exists between the injury and his employment. Gerber Products v. McDonald, 15 Ark. App. 226, 691 S.W.2d 879 (1985). An injury occurs "in the course of employment" when it occurs within the time and space boundaries of the

employment, while the employee is carrying out the employer's purpose, or advancing the employer's interest directly or indirectly. City of El Dorado v. Sartor, 21 Ark. App. 143, 729 S.W.2d 430 (1987).

In addition to establishing the general requirements for compensability set forth in §11-9-102(4)(A)(i), the claimant must establish a compensable injury by medical evidence, supported by objective findings as defined in §11-9-102(16). That a compensable injury be established by medical evidence supported by objective findings applies only to the existence and extent of the injury. Stephens Truck Lines v. Millican, 58 Ark. App. 275, 950 S.W.2d 472 (1997). "Objective findings" are those that cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16). Moreover, objective medical evidence, while necessary to establish the existence and extent of an injury, is not necessary to establish a causal relationship between the injury and the work-related accident. Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. App. 443, 990 S.W.2d 522 (1999). The onset of pain does not satisfy our statutory criteria for benefits. Test results that are based upon the patient's description of the sensations produced by various stimuli are clearly under the voluntary control of the patient and therefore, by statutory definition,

do not constitute objective findings. Duke v. Regis Hair Stylists, 55 Ark. 327, 935 S.W.2d 600 (1996). Finally, medial opinions addressing compensability and permanent impairment must be stated within a reasonable degree of medical certainty. Ark. Code Ann. §11-9-102(16)(i)(B); Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

There is no presumption that a claim is indeed compensable. O.K. Processing, Inc., et al v. Servold, 265 Ark. 352, 578 S.W.2d 224 (1979). Crouch Funeral Home, et al v. Crouch, 262 Ark. 417, 557 S.W.2d 392 (1977). The injured party bears the burden of proof in establishing entitlement to benefits under the Workers' Compensation Act, and must sustain that burden by a preponderance of the evidence. See Ark. Code Ann. § 11-9-102(4)(E)(i)(Repl. 2002); Clardy v. Medi-Homes LTC Serv. LLC, 75 Ark. App. 156, 55 S.W.3d 791 (2001). In other words, in a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that her claim is compensable, ie., that her injury was the result of an accident that arose in the course of her employment and that it grew out of, or resulted from the employment. Carman v. Haworth, Inc., 74 Ark. App. 55, 45 S.W.3d 408 (2001); Ringier Am. v. Combs, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Further,

the claimant must show a causal relationship exists between her condition and her employment. Harris Cattle Co. v. Parker, 256 Ark. 166, 506 S.W.2d 118 (1974).

It is well established that the party having the burden of proof on the issue must establish it by a preponderance of the evidence. Ark. Code Ann. § 11-9-704(c) (2) (Repl. 2002). A preponderance of the credible evidence of record means "evidence of greater convincing force." Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See also, Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 206 S.W.2d 42 (1947). In determining whether a claimant has sustained his or her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704; Wade v. Mr. C Cavanaugh's, 298 Ark. 363, 768 S.W.2d 521 (1989); and Fowler v. McHenry, 22 Ark. App. 196, 737 S.W.2d 663 (1987).

In my opinion, a review of the evidence demonstrates that the claimant cannot meet her burden of proof. I find it significant that the claimant is unable to recall the date of the alleged injury and the fact that she did not report it to her co-worker. In fact, she did not report it for three days to her supervisor and at that time she did not think it

required treatment. It is apparent that the claimant did not think much of it other than she might have "pulled something."

When the claimant sought medical treatment several weeks later, she reported her symptoms as on and off. Dr. Berestnev diagnosed the claimant with left rotator cuff tendinitis. He noted no swelling, bruising, discoloration, anatomical deformities, fracture, or dislocation. He did find the claimant had "some degenerative changes" with bone spurring in the left acromioclavicular joint. In January of 2008, she was diagnosed with degenerative osteoarthritis. The claimant, not satisfied with Dr. Berestnev's explanation of the etiology and history of arthritis, demanded a second opinion. At that visit, Dr. Berestnev confirmed there was "no evidence of shoulder instability; no significant swelling or tightness" and that the claimant had full range of motion in her neck. Dr. Berestnev opined that the claimant's "main problem is left rotator cuff tendinitis and osteoarthritis of the left AC joint with some prominent pannus formation impinging on the superior margin of the distal portion of the supraspinatus muscle and tendon."

The claimant's last visit with Dr. Berestnev was on January 30, 2008, and this is when she started

complaining of the orange ball between her shoulder blades. Dr. Berestnev opined that it was a buffalo hump - an age related condition. When she complained of her neck, it was likewise diagnosed as degenerative in nature. Any new complaints the claimant has had are age related.

In my opinion, all of the claimant's complaints are related to either pre-existing osteoarthritis or are age related. They are clearly not related to any lifting incident the claimant may have had on an unspecified date that she can not remember. To find otherwise requires conjecture and speculation. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991); Dena Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Accordingly, I would reverse the decision of the Administrative Law Judge.

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner