

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F811854

HENRY MORRIS,  
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,  
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 26, 2009

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

Claimant represented by the HONORABLE THOMAS W. MICKEL,  
Attorney at Law, Conway, Arkansas.

Respondent represented by the HONORABLE CURTIS L. NEBBEN,  
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondent appeals an administrative law judge's  
opinion filed June 30, 2009. The administrative law judge  
found that the claimant proved he sustained a compensable  
injury. After reviewing the entire record *de novo*, the Full  
Commission affirms the administrative law judge's opinion.

I. HISTORY

Henry L. Morris, age 48, testified that he had been employed with Wal-Mart for six years. The parties stipulated that an employment relationship existed on November 19, 2008. The claimant testified that he "felt like I had sprung something" after lifting a heavy tire and that he felt pain in his left shoulder. According to a Worker's Compensation Request For Medical Care dated November 19, 2008, the claimant reported that an accident happened as the result of "Lifting tires putting them on the tire balance machine." The claimant reported "Left shoulder burning." The claimant was diagnosed with "L chest wall strain."

A Physician at Health Care Plus, Dr. Waseem A. Shah, examined the claimant on November 19, 2008:

This patient is a 47-year-old male who is workers' compensation from the Wal-Mart Supercenter. The patient states he was working on a tire which he was taking off a truck and tried to put it in for a wheel balance. The patient states he started feeling pain under his left rib cage area. This started earlier this afternoon. The patient states now it is difficult to move his arm around because of the pain....

CHEST WALL: There is tenderness to palpation over the left axilla involving the ribs to the axillary line as well as extending from there to the mid-

clavicular line of the ribs. There is no erythema or edema noted. The pain is slightly increased with moving the shoulder....

X-RAYS: Left rib cage - No fracture or dislocation. The lungs are within normal limits....

Dr. Shah assessed "1) Left chest wall strain. 2) Gastritis." Dr. Shah prescribed medication and scheduled a follow-up visit.

The claimant agreed at hearing that his initial visit was paid for by Health Care Plus and that subsequently his medical was paid for through group health. The parties stipulated that the claimant's group health carrier, Blue Cross Blue Shield, had paid some medical expenses.

Dr. Shah completed a Form AR-3, Physician's Report, on November 25, 2008. The diagnosis was "1) Left chest wall strain. 2) L shoulder strain."

Dr. Shah reported on November 25, 2008:

This patient is a 47-year-old male who is workers' compensation for Wal-Mart Supercenter. He had an injury to his left chest wall. He states today he is also having pain to his shoulder which has improved from last week significantly but he is still having discomfort if he turns or moves a certain way....

CHEST: There is tenderness to palpation located mostly over the mid clavicular line to the mid axillary line. There is still tenderness to palpation but not as severe as last week.

MUSCULOSKELETAL: On the superior shoulder, there is tenderness to palpation as well as anteriorly and posteriorly to the shoulder. The patient does have range of motion but it is slightly decreased. No crepitation or irregularities heard there.

Dr. Shah assessed "1) Left chest wall strain. 2) Left shoulder strain." The treatment plan included medication and physical therapy.

Dr. Priti Duggal saw the claimant on December 16, 2008:

Mr. Henry has been haing (sic) pain in his left shoulder, was lifting tyre (sic) last month when he started to have pain in his left shoulder, is difficult for him to move his shoulder, lift objects. Denies numbness, tingling in arm, radiation of pain to arm. Denies any other pain....

**Musculoskeletal**

**LUE:** NO SWELLING SEEN ON THE SHOULDER, ARM, SHOULDER JOINT NONTENDER TO PALPATION. ROM LIMITED. ABDUCTION LIMITED TO 45 DEGREE. LIMITED EXTERNAL ROTATION. EMPTY BEER CAN TEST POSITIVE. X-RAY SHOULDER - NO ACUTE FRCATURE (sic) SEEN.

Dr. Duggal diagnosed rotator cuff injury of the left shoulder and left shoulder pain.

An x-ray of the claimant's left shoulder was taken on December 16, 2008:

The glenohumeral joint is unremarkable. The acromioclavicular joint also reveals no definite abnormality. The bone density and trabecular pattern are normal. No soft tissue swelling or mass lesion is seen. No lytic or blastic process is noted.  
IMPRESSION: Normal study.

Dr. Torrance A. Walker reported on January 6, 2009:

Henry Morris is a 47 years old male with a history of left shoulder injury with onset beginning on 11/19/08. The initial pain was associated with lifting a large tire at work. The pain is worse with ROM. Rest improves the pain. Physical therapy has been tried. Medications that have been tried included: None. The pain restricts the patient from lifting....

The left shoulder was examined and compared with contralateral extremity. On inspection there is no gross deformity. There is no atrophy of the supraspinatus or infraspinatus. The deltoid appears normal. The AC joint is nontender. There is significant tenderness over the greater tuberosity and associated subdeltoid/subacromial bursa. Active range of motion is as follows: flexion 170°, extension 30°, internal rotation 80°, external rotation 90°, abduction 170°, adduction 30°. There is a painful arc of motion between 60 and 90° of abduction. With the arm at the side, external rotation is 70 degrees and internal rotation is to the L2 vertebral body. Passive motion is generally slightly greater with tenderness and pain at the extremes.... Three views of the right shoulder show normal radiographs.

Dr. Walker diagnosed Rotator Cuff Syndrome. Dr. Walker recommended physical therapy and scheduled an MRI of the left shoulder.

Dr. Walker noted on February 10, 2009, "An MRI of his L shoulder shows normal findings....I do feel that he has strained his shoulder significantly with this injury. Additional therapy and time are all that is necessary at

this point." Dr. Walker performed a steroid injection on March 3, 2009. The claimant reported decreased pain following the injection.

A pre-hearing order was filed on March 25, 2009. The claimant contended that he injured his left shoulder on November 19, 2008. The claimant contended that he was entitled to payment of medical expenses, temporary total disability benefits from December 14, 2008 to March 3, 2009, and attorney's fees. The respondent contended, "The respondents concede the claimant sustained an accident at work but there are no objective medical findings to substantiate an injury."

The parties agreed to litigate the following issues: "Compensability; medical expenses; temporary total disability benefits; and attorney's fees."

A hearing was held on June 26, 2009. The claimant testified regarding his left shoulder, "It still kind of stings. Sometimes it just hurts in certain positions."

An administrative law judge filed an opinion on June 30, 2009. The administrative law judge found that the claimant was not entitled to any indemnity benefits; the claimant does not appeal that finding. The administrative

law judge otherwise found that the claimant proved he sustained a compensable injury. The respondent appeals to the Full Commission.

## II. ADJUDICATION

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

(A) (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).

In the present matter, an administrative law judge found that the claimant proved he sustained a compensable

injury. The Full Commission affirms the administrative law judge's finding. The claimant testified that he "felt like I had sprung something" in his left shoulder after lifting a heavy tire at work on November 19, 2008. The claimant subsequently treated with Dr. Shah, Dr. Duggal, and Dr. Walker for acute symptoms related to a left shoulder strain. The respondents at pre-hearing "conceded" that the claimant sustained an accident at work but contended there were no objective medical findings to substantiate an injury. Dr. Shah's musculoskeletal examination of the claimant on November 25, 2008 revealed "slightly decreased" range of motion in the left shoulder. On December 16, 2008, Dr. Duggal reported that range of motion in the claimant's left shoulder was "limited." The record does not show whether the November 25, 2008 or December 16, 2008 medical examinations were based on "active" or "passive" range of motion. The Arkansas Court of Appeals has held that active range of motion tests come under the voluntary control of the patient and therefore do not constitute objective findings under Ark. Code Ann. §11-9-102(16) (A) (i). *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000), citing *Department of Parks & Tourism v. Helms*, 60 Ark. App.

110, 959 S.W.2d 749 (1998). We therefore cannot rely on the November 25, 2008 or December 16, 2008 medical examinations as objective medical findings.

Dr. Walker examined the claimant's left shoulder on January 6, 2009 and reported, "With the arm at the side, external rotation is 70 degrees and internal rotation is to the L2 vertebral body. Passive range of motion is generally slightly greater with tenderness and pain at the extremes." The record indicates that greater *passive* range of motion in the present matter was based on a test in which the examiner passively moved the claimant's left arm. As such, we find that Dr. Walker's notation of slightly greater passive range of motion was an objective medical finding not within the claimant's voluntary control. See *Hayes, supra*. The instant claimant therefore established a compensable injury to his left shoulder by medical evidence supported by objective findings.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved by a preponderance of the evidence that he sustained an accidental injury causing physical harm to his left shoulder. The accidental injury arose out of and in the

course of employment and required medical services. The injury was caused by a specific incident and was identifiable by time and place of occurrence on November 19, 2008. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely, Dr. Walker's finding of slightly greater passive range of motion on January 6, 2009. We therefore affirm the administrative law judge's finding that the claimant proved he sustained a compensable injury. The claimant proved that all of the medical treatment of record was reasonably necessary in connection with the compensable injury. Ark. Code Ann. §11-9-508(a) (Repl. 2002). The respondent is liable for payment for said medical treatment. For prevailing on the respondent's appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to 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 must respectfully dissent from the majority opinion. Based upon my de novo review of the entire record, without giving the benefit of the doubt to either party, I find that the claimant has failed to meet his burden of proof.

Whether the claimant in this claim has established a compensable injury with objective medical evidence is clearly a matter of semantics. The majority finds that the Dr. Walker's statement that the claimant's passive range of motion is "slightly greater" than the active range of motion is sufficient to establish objective medical evidence of a compensable injury. However, what the majority fails to acknowledge is that the claimant's active range of motion findings are only "slightly less" than the norm. Thus, if the active findings are slightly less than normal, the passive findings which were slightly greater than the active range of motion findings may well have been normal. Dr. Walker specifically indicated the actual degree of movement recorded during the active range of motion testing, however, he did not identify the actual degree of movement during his passive range of motion testing. After reviewing Dr. Walker's findings of claimant's active range of motion, he could have easily classified claimant's active range of

motion as "slightly less than normal." Thus, it would require speculation and conjecture to find that the objective findings of passive range of motion which were slightly greater than the active range of motion findings establishes objective medical evidence of a compensable injury. 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). Based upon the record presently before the Commission and the claimant's barely subnormal active range of motion findings, the vague reference to passive range of motion being "slightly greater" than the active range of motion is simply insufficient to establish the existence of a compensable injury with objective medical evidence. Therefore, I cannot find that the claimant has meet his burden of proof. Accordingly, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, COMMISSIONER