

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F906826 & F908545

MICHELE FEASTER,
EMPLOYEE

CLAIMANT

WALDRON SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 19, 2010

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

Claimant represented by the HONORABLE STEPHEN SHARUM,
Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE JAMES ARNOLD, II,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law
judge's opinion filed February 17, 2010. The administrative
law judge found that the claimant proved she sustained a
compensable injury to her right shoulder. The
administrative law judge found that the claimant proved she
was entitled to reasonably necessary medical treatment and
temporary total disability benefits. After reviewing the

entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

Michelle Feaster, age 65, began working for Waldron School District in about July 2001. Ms. Feaster testified that she first worked for the respondent-employer as a cook at the middle school. The claimant testified that she was transferred from the middle school to the elementary school in about March 2009. The claimant described her job duties at the elementary school cafeteria as "Basically the same thing except more of it. The mixer is about one and a half times the size of the mixer at the middle school, so you have to do more. It's more - instead of small pans of dough when we do the baking, we had four big tubs of dough. Instead of 12 pans of biscuits, it was 30 pans, so."

The claimant treated at Williams Medical Clinic on April 7, 2009 for pain in her right shoulder. The claimant was prescribed medication. It was noted at Williams Medical Clinic on May 12, 2009, "1 mo f/u pain in R shoulder. Denies improvement." The claimant was referred to an orthopedist.

The parties stipulated that the claimant sustained "a compensable specific incident right-biceps injury." The claimant testified that a specific incident occurred on May 19, 2009: "I was cooking spaghetti and I went to lift the pot from the stove onto a tray, yeah, a pushcart, okay, because you have to take it over to the sink and then dump it into a strainer, a big strainer....I just started to lift it and it - and the pain just hit my shoulder and I almost dropped it." The claimant testified that she felt acute pain "in the middle of my shoulder blade, I guess, right in here (indicating)."

The claimant testified, "I finished out the day, but one of the girls took over my place of serving the spaghetti because I couldn't hardly do it. It just hurt my shoulder so bad. She gave me her fruit. The fruit was nothing to lift." The claimant testified that after she arrived at home and undressed, she noticed a "big, black bump" on her right arm biceps. "It looked like a big, black ball," the claimant testified, "It was all black and blue and just big, you know." The claimant testified, however, that "it wasn't the biceps that hurt. That's why I didn't look down there

at the biceps at that time. It was in my shoulder that hurt."

The claimant was assessed at a Rural Health Clinic on June 1, 2009. An APN's notes indicated that the claimant was suffering from pain in her right upper arm. It was noted following an apparent x-ray of the claimant's right upper arm and shoulder, "Pt was told the bicep tendon appears separated from bone."

An x-ray of the claimant's right shoulder was done on June 1, 2009:

Two views of the right shoulder dated 6/1/09.
Minimal spur formation inferior glenohumeral joint and AC joint. No fracture or subluxation. No definite soft tissue mass seen.

IMPRESSION:

1. Minimal arthritic changes about the shoulder.
2. No masses seen on the plain film.

Dr. Robert G. Bebout began treating the claimant at Cooper Clinic on June 16, 2009:

Mrs. Feaster is a 64-year-old female who was in the office today complaining of right shoulder pain.

HISTORY OF PRESENT ILLNESS: She has been having trouble on and on for what sounds like maybe a year. Her pain is particularly aggravated depending on her work level. When she is required to do more lifting or repetitive work, she has a lot more pain with the right shoulder in particular. She has had 1 injection by her

primary care doctor, Dr. Williams, in the shoulder. On 05/19/2009 of this year, she tried to pick up a large pot of spaghetti when she had acute pain with a knot to come up on the upper humerus area with some bruising, which is consistent with an acute rupture of her biceps tendon of the right shoulder and upper arm. She still complains of a lot of pain in the shoulder with her activity level....She works as a cook at the elementary and middle schools in Waldron....

UPPER EXTREMITIES: She has a positive Popeye muscle of the right upper arm due to the biceps tendon rupture. The overlying skin around the upper arm and shoulder is not red or warm to the touch. All of the bruising has been resolved. She has no surgical scars or wounds about the right shoulder. She has internal rotation of the right shoulder to T12 versus T6 for the left shoulder. External rotation is 80 degrees bilaterally. She has forward flexion 160 degrees with a positive impingement sign. Her strength is fair to manual muscle testing in the upper extremities. She does appear to have some atrophy of the supraspinatus fossa on the right as compared to the left....

IMAGING STUDIES: Two-view x-rays of her shoulder show acromioclavicular joint disease with spurring and sclerosis of the greater tuberosity, consistent with degenerative joint disease of the acromioclavicular joint and impingement bursitis syndrome, a possible rotator cuff tear, and a possible longhead of the biceps tendon tear.

PLAN: We are going to take her to surgery for a Mumford acromioplasty and rotator cuff repair as required. At this point and time, I do not think that it would be necessary to do anything with the biceps tendon. This will scar in and should function well, but she will have the Popeye-shaped muscle of her biceps. This will be done as an outpatient. She will be in a sling for 2 weeks

for at least 2 weeks postop and it will probably take a couple of months to rehab.

Dr. Bebout noted on August 3, 2009, "Ms. Feaster is a 64-year-old female with injury to her right shoulder. She has a history of lifting at work, repetitive lifting as well as an episode on 05-19-09 of this year when she tried to lift a large pot of spaghetti, had acute pain and a knot come up in her upper arm. She has a long head biceps tendon tear with impingement bursitis and possible rotator cuff tear. I feel this is work related injury and requires surgical intervention to correct."

Dr. Bebout signed a return to work slip on August 3, 2009 indicating that the claimant could return to work with restrictions of lifting no more than 5 pounds, and no lifting higher than waist level with the right hand. It was noted at Cooper Clinic on August 12, 2009 that the claimant "was given a form to take to work saying she cannot lift more than 5 lbs - her work is wanting her to lift - lawyer suggested she get a leave until she has surgery." It was also noted on August 12, 2009 that no surgery was scheduled and no appointment was scheduled.

Dr. Bebout reported on September 10, 2009:

Mrs. Feaster is a 64-year-old female who follows up for re-evaluation of her right shoulder. She is back at work now with school in session, but she is limited with what she is doing. She is doing any heavy lifting. She still has symptoms with her shoulder with different types of activities, i.e., when she tries to raise her arm up overhead to take her shirt off or when she tries to tie and (sic) apron behind her back, which causes pain in the right shoulder. She cannot drive her normal car, which is a standard because she has too much pain when she tries to shift using the right arm....

She has some atrophy of the supraspinatus fossa on the right should (sic) as compared to the left shoulder.

ASSESSMENT AND PLAN: Symptomatic rotator cuff tear with a longhead biceps tendon tear with some degenerative disease of the acromioclavicular joint. This is not going to improve without surgical intervention. She needs a Mumford acromioplasty with a rotator cuff repair of the shoulder. This is the only thing that is really going to resolve her shoulder symptoms. She will continue working on limited duty at this point and time until a determination can be made if this is a worker's compensation injury or not.

Dr. Bebout noted on October 13, 2009, "Mrs. Feaster is a 65-year-old female who follows up for a right shoulder injury that she sustained at work back in May of this year. She is working with restrictions at the school, avoiding heavy lifting....She has a positive Popeye muscle due to her longhead biceps tendon repair....Her symptoms are consistent with a rotator cuff tear and a longhead biceps tendon tear.

PLAN: This definitely requires surgical intervention. She will follow up with us after her worker's compensation hearing, which is coming up in November. Hopefully, we can get her on the schedule sometime after that for her rotator cuff repair and Mumford acromioplasty."

The parties deposed Dr. Bebout on November 4, 2009.

The respondents' attorney questioned Dr. Bebout:

Q. And what was the history that she presented, that she gave you when she initially presented to your office?

A,. Well, she, it sounded like she had been having trouble with this shoulder for about a year or so. It wasn't, you know, just a recent, real recent thing. And she stated that it was aggravated by her work, depending on the level of work she did and the type of work she did. That primarily it was aggravated by a lot of repetitive work and lifting with her arms.

Q. Okay. And did she also give you a history of a specific incident that resulted in a new or different problem other than the chronic problem she had complained of for a period of about a year?

A. Well, she said on May 19th of this year that she tried to pick up a large pot of spaghetti and that she had an acute pain in her arm and a knot came up in the upper arm and bruising appeared in the upper arm from that episode.

Q. Okay. And it's my understanding, based upon my review of your records, that you diagnosed her as having a biceps tendon tear or biceps tendon rupture?

A. That's correct....

Q. Is that a different problem than the chronic problem that she had had for a period, by history, of approximately a year?

A. I really think it's a continuum of the chronic problem. I don't think it's a separate issue or separate problem. It think it's just part of the ongoing problem that culminated with the tendon rupture.

Q. Okay. Do you treat the two problems, the chronic shoulder problem and the biceps tendon rupture, separately?

A. No, I treat it, you know, as one problem....

Q. And is the rest of the shoulder appropriately classified as a rotator cuff tear?

A. Yeah, I think, we don't have an MRI to prove that, but clinically I think she has a rotator cuff tear along with the biceps tendon rupture....

Q. As far as the incident of May 19, 2009 is concerned, this specific incident which apparently precipitated the complete failure of the biceps tendon, in your opinion did that have any significant impact on the underlying rotator cuff problem?

A. Well, I think it does. The biceps is a secondary stabilizer of the shoulder. And that's also a function of the rotator cuff. So when the biceps, when you lose that stability of the biceps, then it puts more strain on the rotator cuff....

Q. Is it fair to say that basically you're relying completely on the history given to you by your patient in formulating your opinion that her rotator cuff problem and the associated biceps

tendon, tendinitis, if not the rupture, is work-related? You're basically relying on what she said?

A. Yes....

Q. One of the findings I noticed in your medical records was that there, was that you were able to observe, clinically, atrophy in the supraspinatus fossa, I believe. Does that not, is that not a finding which is consistent with a long-standing, chronic problem?

A. It can be. Although I noted at the same time that her strength still felt pretty good. I didn't think she had a substantial weakness to her shoulder, you know, at that point, even though she did have some atrophy of that supraspinatus fossa.

Q. Okay. How long, in your opinion, would the rotator cuff issue or the rotator cuff dysfunction have to have been going on in order for her to have the level of atrophy that you found during your clinical examination?

A. Well, probably a few months anyway. Kind of hard to put a very precise date on that.

Q. But probably not something that would have developed to that extent within a month or two?

A. No, I think it would probably take a little bit longer than just a month or two.

Q. Okay. Other than the visual observation of the muscle, of the atrophy - that is something that you can visualize, is that correct?

A. Yes, sir.

Q. Okay, other than that, and other than the bulging, which I believe is an observable effect of the biceps tendon rupture -

A. Yes.

Q. - what other objective findings were there of any shoulder dysfunction?

A. She had some limitation to her internal rotation of that shoulder.

Q. Now, is that an active or passive range of motion restriction?

A. That's her active and, it's a combination of active and passive. You ask her to see how far she can reach and then you see if you can get it, you know, any further than that with you helping her, passively.

Q. Okay. Okay, so there was a passive restrictive range of motion?

A. Yes.

The claimant's attorney questioned Dr. Bebout:

Q. Let me ask you directly the question, within a reasonable degree of medical probability, do you believe that her rotator cuff tear is as a result of her job activities?

A. Well, I felt it, I felt it is, yes, sir.

Q. Do you still believe that's true?

A. Yes, sir....

Q. Do you have an opinion that the event that occurred on May 19, 2009 aggravated her preexisting shoulder problems to the point where the rotator cuff tear occurred on that day?

A. Well, I'm not sure about the rotator cuff, if it tore that same day. It could very well have, but I think it probably had a partial tear, you know, before that. And the biceps, I'm sure, was

fraying and ragged and, and you know, the biceps didn't tear just completely with that one episode. I think it was already weakened and partially torn, and then that was the, like the straw that breaks the camel's back, where it tore the rest of the way on that 5/19 date.

Q. Okay. And is that your opinion, that more likely than not that's the sequence of events?

A. Yeah, that this is a chronic condition that culminated with the obvious biceps tendon complete rupture, completing the rupture that already started in the tendon on that 5/19 date.

A pre-hearing order was filed on November 19, 2009.

The claimant contended, among other things, that she sustained a rupture to her right biceps on May 19, 2009 as she attempted to lift a large pot of spaghetti. The claimant contended that "leading up to the May 19, 2009 injury, because of the gradual-onset by the continuous use as a result of her job activities of the right shoulder, she sustained a right shoulder rotator cuff injury culminating on May 19, 2009 as a result of her job activities. Her job activities as a cafeteria worker for the Waldron School District included a lot of overhead lifting, the lifting of heavy pots and pans, and other job activities that required the use of the right shoulder. The claimant contends the gradual onset of this condition caused the necessity for surgical intervention to the right shoulder. The claimant

claims medical expenses and treatment, temporary total disability benefits during the period of time that she is in her healing period for the surgical treatment, and attorney's fees."

The respondents contended that the claimant "has received all benefits to which she is entitled as a result of the right biceps tendon injury which has been accepted by the respondents as compensable. The respondents contend that the claimant did not sustain a compensable right shoulder injury which arose out of and in the course of her employment with the respondent-employer on either May 19, 2009, on any other specific date, or as the result of cumulative job-related trauma."

A hearing was held on November 19, 2009. The claimant testified that her job duties had changed: "I am on light duty. I am not picking up things. That's the main thing. I am picking up to an extent and pulling and shoving, but I am not lifting things up over my head." The claimant agreed on cross-examination that she had not suffered a loss of income as a result of her right shoulder problem or the biceps injury. However, the claimant testified on cross-

examination that the condition of her shoulder was worsening as a result of the restricted work duty.

An administrative law judge filed an opinion on February 17, 2010. The administrative law judge found that the claimant proved she sustained a compensable injury to her right shoulder. The administrative law judge awarded reasonably necessary medical treatment and temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-102(4) (Repl. 2002), provides:

- (A) "Compensable injury" means:
 - (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 claimant'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 evidence of greater convincing force and implies an overbalancing in weight. *Barre v. Hoffman*, 2009 Ark. 373, ___ S.W.3d ___.

An administrative law judge found in the present matter, "2. The claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her right shoulder on May 19, 2009, while employed by the respondent." The Full Commission affirms this finding. The parties stipulated that the claimant sustained "a compensable specific incident right-biceps injury." The claimant testified that the specific incident occurred on May 19, 2009, as she was lifting a large pot of spaghetti at work. The claimant testified that the accidental injury caused pain in her right shoulder, "in the middle of my shoulder blade." The claimant later noticed a "big, black bump" on her right arm biceps, but "it wasn't the biceps that hurt....It was in my shoulder that hurt."

The claimant began treating with Dr. Bebout on June 16, 2009. Dr. Bebout's physical examination of the claimant included range of motion studies which Dr. Bebout determined

to be abnormal. Dr. Bebout agreed at deposition that the claimant's abnormal range of motion was "passive restrictive range of motion." Passive range of motion evaluations are not within a patient's voluntary control and can constitute objective findings in accordance with Ark. Code Ann. §11-9-102(16) (A) (i). See *Hayes v. Wal-Mart Stores*, 71 Ark. App. 207, 29 S.W.3d 751 (2000).

The Full Commission finds that the claimant proved by a preponderance of the evidence that she sustained a compensable injury to her right shoulder. The claimant proved that she sustained an accidental injury which caused physical harm to her right shoulder. The accidental injury arose out of and in the course of employment and required medical services. The accidental injury was caused by a specific incident and was identifiable by time and place of occurrence on May 19, 2009. The claimant established a compensable injury by medical evidence supported by objective findings not within the claimant's voluntary control, namely, the passive range of motion evaluations performed by Dr. Bebout. We find that these objective medical findings are causally related to the May 19, 2009 accidental injury rather than a chronic pre-existing

condition. Nor does the probative evidence of record demonstrate that the claimant's right shoulder condition was related to non-work activities such as baling and carrying hay, using a pitchfork, or operating a lawnmower. We attach significant evidentiary weight to Dr. Bebout's opinion that the claimant had sustained a work-related injury to her right shoulder.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant proved she sustained a compensable injury to her right shoulder. The Full Commission affirms the administrative law judge's finding that Dr. Bebout's treatment recommendations were reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a). We affirm the administrative law judge's award of temporary total disability benefits. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (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 findings that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on May 19, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The evidence demonstrates that the claimant had been having right shoulder complaints for over a year prior to the incident. A progress note from a May 12, 2009 visit to Dr. Robert Williams shows the claimant continued to complain of right shoulder pain and that she was given a cortisone injection in her right shoulder approximately a week before the incident. In fact, Dr. Williams indicated that the claimant needed to see an orthopedist for her

shoulder prior to the May 19, 2009 incident. The right shoulder pain the claimant attributes to the incident of May 19, 2009, is located in the same place that it was prior to May 19, 2009. The claimant saw Dr. Robert Debout on June 16, 2009. The claimant did not associate her right shoulder problem with the spaghetti pot incident of May 19, 2009 until prompted to do so by Dr. Bebout.

The evidence indicates that prior to March of 2009, the claimant regularly manipulated bales of hay but had to stop these activities due to problems with her shoulder. The claimant also picked up 50-pound bags of feed, cleaned out stalls and put down salt dust chips, and used a manure fork in connection with her horse operation. The claimant did not tell Dr. Bebout about any of her non-work related activities that involved her right shoulder. Dr. Bebout admitted in his deposition that when making a determination as to whether the work-related component of the shoulder problem is a major or minor factor in the overall development of the problem, it would be important to know about the non-work-related activities of the claimant. Dr. Bebout further stated that if the claimant had a substantial work load outside of her job duties, such work

would need to be taken into consideration when determining the cause of the shoulder problem. Additionally, the claimant testified that she mows her 18 acres with a zero-turn lawn mower, requiring her to engage in the pushing and pulling of levers with her arms.

In March of 2009, after she had been moved from her middle school cafeteria duties to her elementary school cafeteria duties, the claimant told her supervisor, Ms. Arlene English, that her job duties at the elementary school hurt her shoulder. When the claimant showed Ms. English the black-and blue knot on her right arm stemming from the tear of her bicep tendon following the May 19 incident, the claimant did not mention pain in her right shoulder.

In my opinion, a review of the evidence demonstrates that the claimant has failed to meet her burden of proof that she sustained a compensable injury to her shoulder on May 29, 2009. First and foremost, there is absolutely no medical evidence in the record to confirm that the claimant has a rotator cuff tear. There is no MRI. The only evidence is the opinion of Dr. Bebout that the claimant had symptoms associated with a torn rotator cuff.

Further, during his deposition, Dr. Bebout was not apprized of the claimant's outside activities of manipulating bales of hay, moving 50-pound bags of feed, cleaning out stalls, putting down salt dust chips, and using a manure fork. Dr. Bebout was not aware of any of the claimant's non-work-related activities that involved her right shoulder. He also was not aware that the claimant mowed 18 acres with a zero-turn lawn mower. Although Dr. Bebout attributed the claimant's right shoulder injury to work-related causes, he did so without being informed about any possible non-work-related causes of the claimant's right shoulders. Dr. Bebout was relying completely on the history given to him by the claimant in formulating his opinion. A medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion January 22, 1996 (Claim No. E417617). Moreover, the Commission is not bound by a doctor's opinion which is based largely on facts related to him by the claimant where there is not sufficient independent knowledge

upon which to corroborate the claimant's claim. Roberts v. Leo Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

I give little weight to Dr. Bebout's opinion that the claimant's shoulder injury was attributed to the incident on May 19, 2009. The Commission has a duty to translate the evidence on all the issues before it into findings of fact. Weldon v. Pierce Bros. Const. Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996). Moreover, the Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). The Commission has the duty of weighing the medical evidence as it does any other evidence, and the resolution of any conflicting medical evidence is a question of fact for the Commission to resolve. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001); CDI Contractors McHale, 41 Ark. App. 57, 848 S.W.2d 941 (1993); McClain v. Texaco, Inc., 29 Ark. App. 218, 780 S.W.2d 34 (1989).

The evidence demonstrates that the claimant was suffering from problems with her shoulder prior to the May 19, 2009 incident. The claimant had been having problems with her right shoulder for over a year prior to the injury

that gave rise to this claim. A progress note from a May 12, 2009 visit to Dr. Williams indicates that the claimant continued to complain of right shoulder pain and that she was given a cortisone shot approximately a week before the May 19, 2009 incident. In fact, Dr. Williams indicated to the claimant that she needed to see an orthopedic doctor at that visit.

Simply put, based upon the lack of medical indicating an objective finding of a rotator cuff injury, the fact that the claimant had shoulder problems prior to the May 19, 2009 incident, the fact that Dr. Bebout was not aware of the claimant's outside activities when he rendered his opinion, and the fact that the claimant was regularly mowing 18 acres using a zero-turn lawnmower, throwing bales of hay, using a pitchfork to clean out horse stalls, and carrying 50-pound bags of horse feed, I cannot find that the claimant has proven by a preponderance of the evidence that she sustained a compensable rotator cuff injury on May 19, 2009. In order for me to make a finding that the claimant sustained a compensable rotator cuff injury on May 19, 2009, would require me to resort to conjecture and speculation. Conjecture and speculation, even if plausible, cannot take

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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 must dissent from the majority's opinion.

KAREN H. MCKINNEY, COMMISSIONER