

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F711345

MICHAEL WALTON,
EMPLOYEE

CLAIMANT

ARKANSAS DEPARTMENT OF CORRECTION,
EMPLOYER

RESPONDENT

PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 27, 2010

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

Claimant represented by the HONORABLE M. SCOTT WILLHITE,
Attorney at Law, Jonesboro, Arkansas.

Respondents represented by the HONORABLE RICHARD S.
SMITH, 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 April 30, 2010. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the employer/employee/carrier relationship existed among the parties on October 17, 2007, at which time the claimant sustained compensable injuries at a compensation rate of \$496.00/\$372.00.

2. The claimant remained symptomatic with activity following his surgery. His present symptoms are in the same area of the shoulder as his compensable injury. He violated no restrictions in performing activities. Therefore, I find his present symptoms are a compensable consequence of the original injury necessitating additional medical treatment.
3. The respondents are directed to pay all medical treatment within thirty days of receipt pursuant to Rule 30.
4. The claimant remained in his healing period unable to work and is entitled to additional temporary total disability benefits from August 21, 2008, to a date yet to be determined.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. § 11-9-715, § 11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of *Coleman v. Holiday Inn*, (November 21, 1990) (D708577), and *Chamness v. Superior Industries*, (March 5, 1992) (E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. § 11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a

preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the April 30, 2010 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.

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's present problems are a compensable consequence of his original injury thereby necessitating additional medical treatment. In my opinion, the claimant has failed to his burden of proof.

The claimant sustained an admittedly compensable injury on October 17, 2007 when he was thrown from a horse. The claimant had initial problems with his neck, left shoulder, and knee. His left shoulder presented the most problematic and the claimant underwent conservative care. Eventually, he came under the care of Dr. Ken Martin who performed a left shoulder arthroscopy on the claimant on July 3, 2008. Dr. Martin

released the claimant from his care and found him to be at maximum medical improvement as of December 9, 2008, with no ratable impairment.

The medical evidence demonstrates that the claimant underwent an MRI of his left shoulder on November 30, 2007. The scan suggested some inflammation with swelling in the AC joint and there was a suggestion of a small tear involving the anterior labrum. When Dr. Martin performed an arthroscopic procedure on the claimant's shoulder on July 3, 2008, he noted that the "anterior, superior, and posterior labrum were all well intact." Dr. Martin's findings were limited to inflammation in the subacromial space in the bursa as well as evidence of impingement affecting the acromion. The claimant underwent a functional capacity evaluation on October 6, 2008 and was cleared to work in the heavy classification level lifting between 51 to 100 pounds.

On November 5, 2008, the claimant presented to Dr. Martin that he had pain at night and pain with strenuous activity. He told Dr. Martin that he had picked up a bale of hay and after carrying it 20 feet, he developed a sharp pain in the shoulder blade. The claimant had an MRI repeat on February 6, 2009, which showed a labral tear of the left shoulder with

impingement. The claimant went to see Dr. Harold Chakales who diagnosed the claimant with a "partial tear of the rotator cuff with suspected continued separation of the labrum." Dr. Chakales recommended additional testing and prescribed medication. He also recommended shoulder surgery if there was evidence of a rotator cuff injury or impingement.

When an employee is determined to have a compensable injury, the employee is entitled to medical and temporary total disability benefits. Ark. Code Ann. § 11-9-102(4)(F)(i)(Supp. 2005). Benefits are not payable for a condition which results from a non-work-related independent intervening cause following a compensable injury which causes or prolongs disability or need for treatment Ark. Code Ann. § 11-9-102(4)(F)(iii)(Supp. 2005). Whether there is a causal connection between an injury and a disability and whether there is an independent intervening cause are questions of fact for the Commission to determine. Oak Grove Lumber Co. V. Highfill, 62 Ark. App. 42, 968 S.W.2d 637 (1998). Further, there is no independent intervening cause unless the subsequent disability is caused by activity on the part of the claimant that is unreasonable under the circumstances. Davis v. Old

Dominion Freight Line, Inc., 341 Ark. 751, 20 S.W.3d 326 (2000).

In my opinion, the hay bale incident was an independent intervening cause. The evidence demonstrates that after the hay bale incident, the claimant presented an entirely new finding. The MRI performed on February 6, 2009 indicated that the claimant had a partial thickness tear of the infraspinatus tendon. The tendon was undamaged according to the claimant's earlier MRI and there was no mention of any problems with his tendon in Dr. Martin's operative note from July 2008. After lifting an approximately 40-pound bale of hay, the claimant now has entirely new objective findings, both in degree and kind, from his compensable injury. Although the claimant testified that he was still having continuing problems with his shoulder prior to going to see Dr. Martin on November 5th, the claimant underwent an FCE and was able to perform in the heavy category.

Therefore, when I consider the fact that the MRI prior to Dr. Martin's arthroscopic shoulder failed to show a tear, the fact that Dr. Martin's operative notes of July 2008 failed to show any problems and the fact that the tear was noted on an MRI after the claimant lifted a 40-pound hay bale and carried it 20

feet, I cannot find that this injury is related to the claimant's compensable injury. Accordingly, I must dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER