

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F908541

BRENDA L. JONES (PRUITT), EMPLOYEE	CLAIMANT
COMMUNITY DEVELOPMENT INSTITUTE, EMPLOYER	RESPONDENT
ZURICH AMERICAN INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 22, 2011

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 MICHAEL C.
STILES, 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 November 29, 2010.

In said order, the Administrative Law Judge made the
following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employment relationship existed among the parties on September 14, 2009, when the claimant earned wages sufficient to entitle her to weekly

compensation benefits of \$229.00/\$179.00, for temporary total/permanent partial disability based on an average weekly wage of \$358.00.

3. On September 14, 2009, the claimant sustained an injury to her right shoulder, in addition to her back and left lower extremity, arising out of and in the course of her employment.
4. The claimant was temporarily totally disabled for the period commencing December 14, 2009, and continuing through the end of her healing period as a result of the September 14, 2009, right shoulder injury.
5. The respondents shall pay all reasonable hospital and medical expenses arising out of the September 14, 2009, right shoulder injury.
6. The respondents have controverted this claim in its entirety, to include benefits associated with the claimant's September 14, 2009, right shoulder injury.

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 November 29, 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 respectfully dissent from the majority's opinion finding that the claimant proved by a preponderance of the evidence that she sustained a compensable right shoulder injury on or about September 14, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The claimant worked for the respondent employer as a cook and kitchen manager. The claimant was driving one of the company vehicles when she had a motor vehicle accident where she flipped the vehicle. The claimant was taken by ambulance to the Northeast Arkansas Baptist Hospital where she complained of back and left lower extremity pain. The claimant was diagnosed with a burst vertebrae at T12.

On September 18, 2009, the claimant provided a recorded statement with the adjuster for the respondent carrier. During the recorded statement, the claimant mentioned only her back and left leg when asked which body parts were injured. The claimant never mentioned any problems with her right shoulder.

The claimant signed a Form ARC with the Commission on October 6, 2009 and described her body parts that were injured as her "broke back auto

accident". There was no mention of a right shoulder injury.

On November 25, 2009, the claimant was deposed by the respondent. The claimant did not mention anything about a shoulder injury at that time.

The medical record indicate that the first complaints of shoulder pain that were registered by the claimant were on December 14, 2009 with Dr. Ricca. Dr. Ricca noted that the claimant reported feeling " a knot on the lateral right arm that is tender." Upon examining this knot, Dr. Ricca diagnosed it as a lipoma-like mass and referred the claimant to her primary care physician. The claimant was released by Dr. Ricca on June 2, 2010 as having reached maximum medical improvement as a result of her back injury.

The respondents accepted the claimant's back injury and paid all related medical bills and indemnity benefits. The claimant now contends that she also sustained a compensable injury to her right shoulder at the time of the motor vehicle accident.

Ark. Code. Ann. § 11-9-102(4) (A) (i) (Supp. 2009) defines a 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 for 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 claimant. Ark. Code. Ann. § 11-9-102(16). Further the employer takes an employee as he finds him.

In my opinion, a review of the evidence demonstrates that the claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury to her right shoulder on September 14, 2009 when she had her automobile accident. First and foremost, the claimant did not mention any problems with her right shoulder for over three months after the accident. At the time the claimant was admitted to the hospital after the accident, she did not complain of a right shoulder injury. When she gave a recorded statement on September 18, 2009, to the claims adjuster, she did not mention any problems with her right shoulder. During her November 25, 2009 deposition, the claimant was asked no less than five times about the body parts that she injured and what her current problems were that were related to the September 14, 2009 accident, and the claimant never referenced her right shoulder. Further, the claimant did not report any

problems with her shoulder until December 14, 2009, when she saw Dr. Ricca for her back injury. At that time, the claimant just stated that she had a knot in her shoulder, which Dr. Ricca diagnosed as a lipoma and told the claimant to get with her primary care physician.

Simply put, I cannot find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder. When I consider the fact that the claimant waited three months to record any kind of problems with her shoulder, the fact the problems were related to an unrelated lipoma, the fact that the claimant did not report a shoulder injury at the time she spoke with the claims adjuster, even though she contended that it was hurting at that time; the fact that the claimant, when she completed the ARC Form, did not put down that she had problems with her right shoulder; and the fact that the claimant did not tell the respondents during the deposition in November that her shoulder was hurting, although she stated that it was hurting the entire time, I cannot find that the claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder. In my opinion, it would require speculation and conjecture to conclude that the shoulder problems she is now suffering from are related to the September 14, 2009 automobile accident.

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, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner