

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F908857

DEBORAH KOESTER,
EMPLOYEE

CLAIMANT

O'REILLY AUTOMOTIVE, INC.,
EMPLOYER

RESPONDENT

HARTFORD INSURANCE COMPANY
C/O GALLAGHER-BASSETT SERVICES,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED OCTOBER 24, 2011

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

Claimant represented by the HONORABLE GARY DAVIS,
Attorney at Law, Little Rock, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and Claimant cross-appeals an
opinion and order of the Administrative Law Judge filed
May 24, 2011. In said order, the Administrative Law
Judge made the following findings of fact and
conclusions of law:

2. (Sic) The employer/employee relationship
existed on or about April 14, 2009.
3. (Sic) Claimant was earning wages sufficient to
entitle her to a compensation rate of
\$353.00 per week for temporary total

disability and \$265.00 per week for permanent partial disability.

4. (Sic) The respondents have controverted this claim in its entirety.
5. (Sic) The claimant has established by a preponderance of the evidence that she sustained a compensable shoulder injury on April 14, 2009.
6. (Sic) The claimant has established by a preponderance of the evidence that all of the medical treatment documented in pages 101 through 156 of Respondents' Exhibit 1 was reasonably necessary to either treat or diagnose her compensable shoulder injury.
7. (Sic) The claimant has established by a preponderance of the evidence that she was temporarily totally disabled for the period from October 8, 2009, through January 6, 2010.
8. (Sic) The preponderance of the evidence establishes that the claimant has sustained no compensable permanent anatomical impairment as a result of her compensable shoulder injury.
9. (Sic) Because the respondents have controverted this claim in its entirety, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein.

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 May 24, 2011 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 concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that she's entitled to any permanent anatomical impairment. However, I must respectfully dissent from the majority's finding that the claimant proved by a preponderance of the evidence that she sustained a compensable injury on April 14, 2009. Based upon my de novo review, I find that the claimant has failed to meet her burden of proof.

The claimant alleged that she sustained a compensable injury on April 14, 2009 to her shoulder. There was an incident that the claimant reported on that date involving her shoulder but she continued to work an additional three weeks until she took off time for foot

surgery. There were no accommodations made for the claimant's shoulder, and she did not go to the doctor until September 16, 2009, when she had an MRI, which showed she had a torn rotator cuff. Between the time of the claimant's foot surgery in September of 2009, the claimant was on crutches and using a walker to get around because of her foot surgery. She was also able to pick up her grandchild during this period of time. I submit that it makes absolutely no sense that if the claimant had a torn rotator cuff injury in April that she was able to use crutches and put weight on a walker while she was off for foot surgery.

The claimant did not file a Workers' Compensation claim until she got the positive MRI results back. The claimant admitted that she had to "connect the dots" to the April 14th incident. In fact, she turned in all the initial medical reports to her group health coverage, thinking it was a non-work-related arthritis situation. The claimant has a long history of work-related injuries and is well aware of the process.

Simply put, I cannot find that the claimant proved by a preponderance of the evidence she sustained a compensable injury on April 14, 2009. Therefore, I

must respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, Commissioner