

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H205069 & H304225**

ERICA BEARFIELD, EMPLOYEE

CLAIMANT

**ROCK REGION METRO,
EMPLOYER**

RESPONDENT

**ATA WC TRUST,
CARRIER/TPA**

RESPONDENT

OPINION FILED OCTOBER 11, 2023

Hearing before Administrative Law Judge Steven Porch on September 28, 2023, in Little Rock, Arkansas.

Claimant represented by Mr. Steven R. McNeely, Attorney at Law, Jacksonville, Arkansas.

Respondents were represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A full hearing was held on this claim on September 28, 2023. Claimant was represented by Mr. Steven R. McNeely, Attorney at Law, Jacksonville, Arkansas; Respondents were represented by Ms. Melissa Wood, Attorney at Law, Little Rock, Arkansas.

STIPULATIONS

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. An employer/employee relationship existed on 9/3/21 when Claimant alleges to have sustained a compensable injury to her right shoulder and on 3/15/2022 when Claimant allegedly sustained and aggravation to her right shoulder.
3. Respondents initially accepted the claim as medical only and paid some benefits. Respondents now deny claims in their entirety.

4. The parties will stipulate to Claimant's average weekly wage and compensation rates on or before the hearing date.

ISSUES

The parties have identified the following issues to be adjudicated:

1. Whether Claimant sustained a compensable injury to her right shoulder on 9/3/2021.
2. Are there objective findings of an acute injury on 9/3/2021.
3. Whether Claimant is entitled to reasonable medical and indemnity benefits from the date onset to a yet undetermined date.
4. Whether Claimant sustained a compensable injury to her right shoulder on 3/15/2022.
5. Are there objective findings of an acute injury on 3/15/2022.
6. Whether Claimant is entitled to reasonable and necessary medical treatment, including two surgeries performed by Dr. Lawrence O'Malley, including out of pocket expense, mileage and reimbursement for private health insurance.
7. Whether Claimant is entitled to Temporary Total Disability (TTD) following her 3/15/2022 injury for approximately 8 months, specific dates to be provided.
8. Attorney's fees.

All other issues are reserved.

CONTENTIONS

Claimant's and Respondents' contentions are set out in their responses to the Prehearing Questionnaire. Said contentions are hereby incorporated by reference.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, Claimant and Respondents' post hearing briefs that are blue-backed and made a part of

this record and other matters properly before the Commission, and having had an opportunity to hear the testimony of the Claimant, Erica Bearfield, the sole witness in this claim, and observe her demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The Claimant has proven by the preponderance of the evidence that she sustained a compensable injury to her right shoulder during the course and scope of employment on March 15, 2022. The Claimant did not prove a compensable rapid and repetitive injury to her right shoulder on September 3, 2021.
4. The Claimant is entitled to reasonable and necessary medical treatment, including two surgeries performed by Dr. Lawrence O'Malley, including out of pocket expense, mileage and reimbursement for private health insurance.
5. Claimant is entitled to TTD following her March 15, 2022, injury.
6. Claimant has proven by the preponderance of the evidence that her attorney is entitled to controverted attorney fees.

CASE IN CHIEF

Summary of Evidence

The sole witness at the hearing was the Claimant. In addition to the prehearing order discussed above, I also have admitted into evidence Claimant's and Respondent's exhibits that were properly admitted before the Commission. Claimant suffered a

compensable injury to her right shoulder during the course and scope of her employment with Respondent. Claimant is a 48-year-old city bus driver. Claimant has worked for Respondent as a city bus driver for over 17 years. September 3, 2021, during the Covid pandemic, was the first time the Claimant felt pain in her right shoulder. Respondent placed sneeze shields on the buses to protect their employees. The shield separated the passengers from the driver. When passengers boarded the front of the bus where the driver sat, the driver manually opened the shield to a position that would separate her from the passengers boarding the bus. This maneuver also allowed the passengers to find a seat on the bus. When all passengers were on the bus and behind the yellow safety line, the driver would then close the shield separating her again from the rest of the passengers.

The Claimant's job involved working an 8-hour shift. Claimant, within one hour of work, opens and closes the shield 30 to 35 times, lowers the bus 30 to 35 times, process passes 20 to 35 times, accept money in a slot 10 to 15 times. All these activities involve the extension and retraction of Claimant's right shoulder. Claimant testified that she uses her right arm and shoulder 90% of the time while on the job. The shoulder pain on September 3, 2021, was accepted by Respondent as medical-only. Claimant received a steroid shot to her right shoulder. However, Claimant's attorney has acknowledged, during the hearing, that there were no objective findings for the alleged September 3, 2021, right shoulder injury.

However, regarding the March 15, 2022, injury, according to Claimant's testimony, while working an 8-hour shift, continuing to do all of the same things as mentioned above, Claimant's shoulder popped while opening the shield on her bus. That same day while

securing a wheelchair her shoulder was hurting “real bad”. This pain was worse than the September 3, 2021, pain. Claimant went home and woke up the next day and was unable to raise her right arm above her head to put on her shirt. Claimant made Respondent aware that she could not go to work due to her injury. Claimant testified that there were no intervening activities, outside of work, that would have contributed to the pop of her right shoulder. Claimant’s right shoulder was operated upon by Dr. Lawrence O’Malley who repaired tears in the right shoulder. Since Claimant’s attorney admitted to the lack of objective findings for the September 3, 2021, alleged injury, the focus of this opinion will be on the March 15, 2022, alleged injury.

Adjudication

A. Whether Claimant is entitled to reasonable and necessary medical treatment, including two surgeries performed by Dr. Lawrence O’Malley, including out of pocket expense, mileage and reimbursement for private health insurance.

Arkansas Code Annotated § 11-9-102(4)(A)(i) (Repl. 2012), which I find applies to the analysis of Claimant’s alleged injuries, defines “compensable injury”:

- (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) (Repl. 2012). “Objective findings” are those findings that cannot come under the voluntary control of the patient. *Id.* § 11-9-102(16). The element “arising out of . . . [the] employment” relates to the causal connection

between the claimant's injury and his or her employment. *City of El Dorado v. Sartor*, 21 Ark. App. 143, 729 S.W.2d 430 (1987). An injury arises out of a claimant's employment "when a causal connection between work conditions and the injury is apparent to the rational mind." *Id.*

In *Hudak-Lee v. Baxter County Reg. Hosp.*, 2011 Ark. 31, 378 S.W.3d 77, the Arkansas Supreme Court stated:

In order for an accidental injury to be compensable, it must arise out of and in the course of employment. Ark. Code Ann. § 11-9-102(4)(A)(i) (Supp. 2009). A compensable injury does not include an injury that is inflicted upon the employee at a time when employment services are not being performed. Ark. Code Ann. § 11-9-102(4)(B)(iii) (Supp. 2009). The phrase "in the course of employment" and the term "employment services" are not defined in the Workers' Compensation Act. *Texarkana Sch. Dist. v. Conner*, 373 Ark. 372, 284 S.W.3d 57 (2008). Thus, it falls to the court to define these terms in a manner that neither broadens nor narrows the scope of the Act. *Id.*

An employee is performing employment services when he or she is doing something that is generally required by his or her employer. *Id.*; *Pifer v. Single Source Transp.*, 347 Ark. 851, 69 S.W.3d 1 (2002). We use the same test to determine whether an employee is performing employment services as we do when determining whether an employee is acting within the course and scope of employment. *Jivan v. Econ. Inn & Suites*, 370 Ark. 414, 260 S.W.3d 281 (2007). The test is whether the injury occurred within the time and space boundaries of the employment, when the employee was carrying out the employer's purpose or advancing the employer's interest, directly or indirectly. *Id.* In *Conner*, 373 Ark. 372, 284 S.W.3d 57, we stated that where it was clear that the injury occurred outside the time and space boundaries of employment, the critical inquiry is whether the interests of the employer were being directly or indirectly advanced by the employee at the time of the injury. Moreover, the issue of whether an employee was performing employment services within the course of employment depends on the particular facts and circumstances of each case. *Id.*

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing compensability, compensation must be denied. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). This standard

means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

The Claimant has satisfied her burden with objective findings as to her work-related right shoulder injury. The Claimant acknowledged she heard a pop in her right shoulder and felt greater pain while securing a wheelchair on the bus than she did with the September 3, 2021, alleged injury to the same shoulder. I find the Claimant's testimony credible. These things occurred during the course and scope of her employment. The Claimant sustained right shoulder biceps tearing per Dr. Lawrence O'Malley. I credit Dr. O'Malley's medical opinion since he has seen the tears and repaired them. Thus, I find by the preponderance of the evidence that Claimant did meet her burden and her right shoulder claim is granted as to the March 15, 2022, injury. However, does this entitle Claimant to reasonable and necessary medical treatment?

B. Whether Claimant is entitled to reasonable and necessary medical treatment, including two surgeries performed by Dr. Lawrence O'Malley, including out of pocket expense, mileage and reimbursement for private health insurance.

Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*.

Claimant needed surgery to repair the tears in her right shoulder. Otherwise, she would not be able to get her hand and arm above her shoulder. Thus, I find by the preponderance of the evidence that Claimant is entitled to reasonable and necessary medical treatment, including the two surgeries performed by Dr. Lawrence O'Malley, pocket expenses, mileage, and reimbursement of private health insurance. I also find that Respondents are entitled to an offset consistent with Arkansas law.

The final issue involves whether Claimant is entitled to Temporary Total Disability benefits. Temporary Total Disability for unscheduled injuries is that period within the healing period in which the Claimant suffers total incapacity to earn wages. *Ark. State Highway and Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Claimant has missed large amounts of work due to her injury. Thus, I find by the preponderance of evidence that Claimant is entitled to temporary total disability following her March 15, 2022, injury to a date to be determined when she is stable or has reached maximum medical recovery.

ATTORNEY FEES

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). Under Ark. Code Ann. § 11-9-715 (Repl. 2012):

(B) Attorney's fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee . . . In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (1/2) by the employer or carrier in addition to compensation

awarded; and one-half (1/2) by the injured employee or dependents of a deceased employee out of compensation payable to them.

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to additional indemnity benefits. Thus, the evidence preponderates that her counsel, the Hon. Steven McNeely, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums, minus any lawful offsets, shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2002). See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

Hon. Steven Porch
Administrative Law Judge