

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. **H109777**

RONALD L. STEWARD, Employee	CLAIMANT
INTERNATIONAL PAPER COMPANY, Employer	RESPONDENT
SEDGWICK CLAIMS MANAGEMENT SERVICES INC., Carrier	RESPONDENT

OPINION FILED **OCTOBER 6, 2022**

Hearing before ADMINISTRATIVE LAW JUDGE JOSEPH C. SELF in Fort Smith, Sebastian County, Arkansas.

Claimant represented by MATTHEW J. KETCHAM, Attorney, Fort Smith, Arkansas.

Respondents represented by JOHN P. TALBOT, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 2, 2022, the above captioned claim came on for hearing at Fort Smith, Arkansas. A pre-hearing conference was conducted on May 5, 2022, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed on or about June 3, 2021.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Whether claimant sustained a compensable gradual onset injury on or about June 3, 2021.
2. If compensable, whether claimant is entitled to medical benefits, and temporary total disability benefits.
3. Compensation rate.

4. Attorney fees.

The claimant contends that “he was injured on or about June 3, 2021, after working the conveyor where he would have to pull folded boxes, inspect same and then send the folded boxes down the line. The claimant reserves the right to amend and supplement his contentions after additional discovery has been completed.”

The respondents contend that “claimant did not sustain a compensable injury to his right clavicle, shoulder, and arm while employed with respondents on or about June 3, 2021, or he cannot carry his burden of proving he sustained a compensable injury to his right clavicle, shoulder, and arm within the meaning of Ark. Code Ann. § 11-0-102 (4). It appears claimant had a history of neck and shoulder pain, treated with steroid injections, prior to the date in question. His employment with respondents had only begun on April 7, 2021. There are inconsistent injury dates with indications his problems are not work related. Claimant cannot carry his burden of proving an injury was caused by his work or an incident at his work. Respondents reserve the right to revise, modify, supplement, or amend these contentions as discovery and investigation continue.”

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 5, 2022 and contained in a pre-hearing order filed that same date are hereby accepted as fact, as is the stipulation announced at the hearing regarding the claimant’s compensation rate.

2. Claimant has met his burden of proving by a preponderance of the evidence that he

suffered a compensable gradual-onset injury to his right bicep.

3. Claimant has met his burden of proof by a preponderance of evidence that he is entitled to temporary total disability benefits beginning June 4, 2021 and continuing through January 31, 2022.

4. Claimant has met his burden of proof by a preponderance of the evidence that he is entitled to medical benefits in the amount of \$23,508.36.

5. Respondents have failed to prove by a preponderance of the evidence that claimant is barred from receiving benefits due to false statements on his employment application.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

Following the entry of the pre-hearing order, respondents advised in a timely manner that it was going to assert a defense pursuant to *Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 369, 578 S.W.2d 232, 234 (1979). At the hearing, the pre-hearing order was orally amended without objection to add this defense to the issues to be tried. Further, the parties stipulated that the claimant's average weekly wage was \$678.57, making the weekly temporary total disability rate \$452.00.

Claimant clarified that his claim for temporary total disability benefits was limited to the period from June 4, 2021, the first day of work he missed due to this injury, until he was released by his surgeon without restrictions, which was January 31, 2022.

#### HEARING TESTIMONY

Claimant testified that he had been working at respondent International Paper Company for about four months when he injured his bicep tendon while working as a general box worker. Claimant said that his job was to inspect the boxes to make sure that they were correct with no damages. Once he had a certain amount in a stack, those went down the conveyor to shipping. When the boxes arrived at his station, there could be between thirty to fifty at a time and the weight varied depending on the

size of the stack and the size of the box. Claimant estimated that a bundle could weigh as little as five pounds or as much as fifty pounds. When the box came off the rolling conveyor belt to his station, claimant stated that he had to pull them onto the table. He said the boxes were going “really fast. Sometimes it is going so fast that the boxes actually push each other, so you have to be really fast.” Claimant was responsible for checking the boxes to make sure there were no glue stickers or rips or anything like that. After the inspection, the claimant moved the boxes to a different conveyor; if the box was defective, it was taken out and replaced with a box from a nearby stack. The separate conveyor sends the inspected boxes to the shipping department.

Claimant said that his job required him to rotate ninety degrees to his left to push the boxes. He never had to push a box to his right.

Claimant was not clear on which day he was injured; “it was either the 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, because we go in at 11:00 pm... and I would say probably maybe 2:00 in the morning whichever day it was.” Claimant testified on the day that he was injured, he felt a little pop which slowed him down for a minute and as he continued to work, the pain gradually got worse. Claimant was then off for the weekend and when he returned to work on Monday, he said “I couldn’t hardly take it. So, I figured, you know, I had to work up-I guess work through it, so I did that for Monday and Tuesday, and I think Wednesday is when I couldn’t. I mean my arm, like I couldn’t move it.” Claimant said he was pushing a bundle primarily with his right arm when he felt the popping sensation in his right upper front shoulder.

Claimant said he tried to work through the pain for several shifts, but on June 3, after he had gone to lunch and came back to his shift, he told the supervisor he was not going to be able to do it. At that time, he could not raise his arm above his head. The supervisor had him clock out and go home. Claimant stated that between the time that he felt the pop in the front of his right shoulder

until the time he told the supervisor he could not work, he had not reported the injury. Claimant has not returned to work for respondent International Paper Company since June 3, 2021.

Claimant said that he called respondent International Paper Company HR manager on June 4. He said he did not raise the issue of workers' compensation because he didn't know that he needed to do that. The HR manager gave him a number to call for short-term disability and he filled out paperwork for that. Claimant first sought medical attention for the injury on June 7 at the Good Samaritan Clinic. The doctor began with conservative care, but when claimant felt he wasn't getting better, he returned on June 10. An MRI was ordered and performed on June 12; after the MRI report, claimant was referred to Dr. Stephen Smith, an orthopedic doctor in Fort Smith. Claimant eventually had surgery to repair a tear in his bicep tendon. Claimant was released from care on February 1, 2022, without any restrictions. Claimant said he contacted the HR department at respondent International Paper Company and was told for him to return to work, he would have to see a doctor selected by respondent International Paper. He did not receive a call about when he would get to see that doctor, nor did he call to find out if that appointment had been made.

Claimant had an automobile accident in 2019 when another vehicle side-swiped him and knocked him off the road. He had neck and back injuries, including radiating pain into his right arm, causing a tingling like a numbness, which he equated to the feeling that his hand had fallen asleep or something of that nature. Claimant had therapy on his neck and upper back and testified that the problems he had following the automobile accident resolved. Claimant said at the time that he started working for respondent International Paper Company that he was not seeing a doctor for anything regarding the automobile accident.

Claimant was shown respondent's non-medical exhibit number eight which contained his answers to some forms he completed before he began working at respondent International Paper

Company. There were a series of questions that claimant answered in the negative, including if he had ever had numbness or pain in his hands, or had neck, shoulder, arm, or back pain, and claimant then said no. Claimant denied having any previous injuries. He explained that since this was being completed at his physical for the job at respondent International Paper Company, he said “I guess I was thinking they were saying do you have any of this stuff going on at the moment.” At the time he completed the form, claimant said he did not have any current physical problems at the time he was hired.

On cross-examination, claimant was asked about his claim that he suffered a gradual onset injury as opposed to a specific incident as he had testified on direct examination. Claimant did not know why Dr. Smith noted that claimant had told him that he did not feel a pop in his shoulder. Claimant said that he told all his doctors, including Walton, Ziegler, and Smith, that he felt a pop on the 27<sup>th</sup>.

When asked about the automobile accident in 2019, claimant said he had aches and pains in his neck and shoulder and arms before he had started to work for respondent International Paper Company. He had seen doctors in Oklahoma and in Fort Smith for his injuries and received some injections at Meridian Clinic. Claimant admitted that following the auto accident, his injuries were causing him difficulty with his sleep, work, and household chores. Claimant had pain in his neck and right shoulder that got worse with movement. He had muscle spasms, headaches, and joint pain, and was prescribed hydrocodone. Claimant stated that the records from Meridian would be incorrect if those stated that he left treatment early because he was moving, because Meridian is in Fort Smith.

Claimant conceded that on the health questionnaire he completed when he started with respondent International Paper Company, it asked “have you ever had or do you have now” various types of symptoms and claimant conceded that the answer to the questions regarding headaches,

difficulty sleeping, numbness or pain in his hands, numbness or general weakness on his shoulder, neck shoulder and arm pain were all “yes.” Claimant again said he thought he was being asked if he had any of those symptoms now, and therefore answered in the negative on each of those questions.

Claimant was shown the form completed by the medical examiner that he could work without restrictions and saw where the form had been marked “based on my review of the occupational health history form and test results, no work activity restrictions are recommended.” The medical examiner had the option of selecting “based upon the review of the occupational health history form and test results, the following work activity restrictions are recommended,” and then restrictions for lifting, use of hands twisting, and reaching could have been marked by the examiner. Claimant believed it was fair for respondent International Paper Company to rely on what he had put on the form.

Claimant said that when he talked to Karen Edgar, the HR Manager, he told her that he had gotten injured at work. Claimant was shown Respondents’ Exhibit 1 page 6 and specifically the following section “prognosis, due to the injury he sustained and his continued symptoms, it is likely he would need further treatment in the future, but it is unlikely to fully recover.”

On redirect-examination, claimant stated that he did not have a shoulder injury in May 2019. Claimant was shown the same medical records from respondents’ exhibits where the subjective complaints were listed as “upper back pain, numbness down the right arm and into the hand.” Claimant testified that while working for respondent International Paper Company he did not injure his right arm, neck, or upper back, but rather his bicep. Claimant was shown page 48 of Respondents’ Exhibit 1 where he had told Dr. Ziegler that he had felt a pop in his shoulder and said he had told Dr. Smith the same thing. He pointed out that on page 56 of Respondents’ Exhibit 1 that Dr. Smith recorded that the bicep tendon injury happened on June 30, but he had told the doctors June 3. He also noted an error where it was recorded that he worked for “U. S. Paper” rather than respondent

International Paper Company.

Claimant stated that when he filled out the questionnaire, he was not having any physical problems, did not need any accommodations in lifting, twisting, standing or anything else. Between October 23, 2019, when he was last treated for his automobile accident in Oklahoma City and the period of late May and early June, 2021, when claimant maintains he injured his bicep tendon, he said he did not have any medical treatment whatsoever, meaning that he had no treatment for headaches, shoulder pain, neck pain, upper back pain, right or left arm numbness or tingling.

On recross-examination, claimant said there was a mistake in the record from Meridian Medical Clinic on October 23, 2019, because he had moved from Oklahoma City to Fort Smith which resulted in him going to Valley Health. Claimant was then asked about his complaint to Dr. Ziegler on June 7, 2021 that his pain in his right shoulder and arm had started five days earlier. He said that could be attributed to the fact that he went in to work at 11:00 p.m. and after midnight, it becomes the next day.

Christopher Atkins testified on behalf of respondents. He is the complex environmental health and safety manager for respondent International Paper Company. His duties vary but included performing inspections, running reports, and case management. His case management duties included working with employees who were injured on the job, ensuring that the employee is taken care of and performing an investigation of the injury. He assists in modification of job duties for employees. If there is a restriction on an employee, he would determine how the employee could be accommodated.

After an employee is offered a position but before beginning work, a health assessment is performed to determine if the individual can perform a particular task at the job site. Mr. Atkins said that he relied on the employee to be accurate and truthful during the assessments to determine whether an accommodation needs to be made to perform a given task. Without accurate information, Mr.



Atkins testified that he was not able to explore potential work accommodations or modifications of job duties, which in turn could result in an employee being placed in a position that he otherwise would not have been given. Mr. Atkins stated that he had not been made aware of claimant's allegations of an on-the-job injury until the first quarter of 2022. He did not know why it took so long for him to be informed.

On cross-examination, he stated that the injury was reported to the HR representative, but he did not know why it was not reported to him. The company's process would have been for the HR representative to report it to him. Mr. Atkins conceded that after finding out about the injury claim, he did not perform any investigation.

On redirect-examination, Mr. Atkins said he did not become aware of the claim before it was in litigation. He did not know of any reason why it was not reported to him.

On recross-examination, Mr. Atkins testified that employees come to him seeking accommodations at their job. He would consult with the supervisor and site manager about the issue. He said that claimant did not ask for an accommodation, indicating that he could not complete his job duties, or that he was having any problems at all.

#### REVIEW OF THE MEDICAL RECORDS

Because of the *Shipper's* defense raised by respondents, records from 2019 were submitted by respondents regarding the motor vehicle accident in which claimant was injured. Claimant's accident was on May 11, 2019, and he first saw a medical provider on May 13, 2019. Claimant was first treated by Dr. Robert Arndt at Brooks Accident and Injury South and complained of left shoulder pain which radiated to the lower neck. (R.X.1) The record from that visit appears to be incomplete, but it is apparent that claimant was scheduled for an MRI, which was conducted on May 24, 2019. Dr. Jeffrey Watts prepared a report following the cervical spine MRI and his impressions were as follows:

- “1. There are prominent left greater than right foraminal disc protrusions at C3/4 with moderate to severe left greater than right foraminal narrowing as a result.
2. I see hypertrophy of the C4/5 facets with a modest posterior disc protrusion. There is fairly significant right greater than left foraminal narrowing, and the exiting right C5 nerve may be contacted, perhaps the left as well to a lesser degree.
3. A small posterior disc margin annulus fibrosis tear is present at C5/6 associated with a subtle disc bulge. The central canal is not compromised, but there is again significant left and less pronounced right foraminal narrowing. The exiting left C6 nerve could easily be contacted.
4. I see mild narrowing of the foramina at C6/7 due to subtle disc bulging and mild hypertrophy of the facets.
5. The central canal is not compromised in the cervical spine.
6. Normal cervical cord signal.
7. Full details above, level by level.” (R.X.2-3)

Claimant returned to Brooks Accident and Injury South on May 30, 2019, and saw Dr. Jerry Pritchett. While claimant had told Dr. Arndt that the pain radiated to the lower neck, in this visit, he complained of headaches, neck pain, and pain radiating toward the left shoulder. (R.X.4) This record again appears to be incomplete.

The next record provided was from June 26, 2019, from Valley Healthcare in Fort Smith, Arkansas. Claimant reported that he was having pain in his “upper back into neck and shoulder. Trouble getting comfy/sleeping.” (R.X.5) The prognosis after that visit there were thirteen daily treatment notes outlining chiropractic treatment that claimant received which included hot packs, traction, muscle stimulation, as well as an occasional massage or ultrasound treatment. The physician’s report of August 6, 2019, listed the subjective patient’s complaints as “neck pain, upper back pain, numbness down right arm and into hand, headaches.” The prognosis was “due to the injuries he sustained and his continued symptoms, it is likely he will need further treatment in the future but is unlikely to fully recover. (R.X.6)

Claimant next saw Dr. Danny Silver at Meridian Medical Clinic, with the first visit being on September 12, 2019. Claimant’s complaint was that he had neck pain and Dr. Silver recorded “he has

pain in the cervical region. Also light shoulder pain... He reports the pain radiates to right arm and right shoulder. Associated symptoms are muscle spasm, stiffness, headache, and joint pain.” (R.X.24) Dr. Silver’s assessment was that claimant had a sprain of ligaments of his cervical spine and his plan was to continue treatment for pain, including trigger point injections. (R.X.26) On September 25, 2019, claimant returned to Meridian Medical Clinic and was seen by APRN Patricia Rich who performed a trigger point injection of his right trapezius, rhomboids major/minor, levator scapulae, serratus position superior. (R.X.29) Claimant returned to see APRN Rich on October 9, 2019, and reported that his joint pain, excessive muscle aches, and neck pain had improved with injections. He still complained of “upper extremity pain, shoulder pain, and numbness/tingling sensation.” (R.X.30)

His final visit with APRN Rich was October 23, 2019, where the assessment stated “Ronald’s pain is managed to a functional level with current treatment regimen. He has continued to work at meeting/maintaining goals as discussed. He is having to leave treatment early due to moving to a different state. He has had some improvement of his pain with current treatment. The plan stated that he was released from care, having responded well to trigger point injections and “will have CESTI’s. If he responds well to CESTI’s, he may need trigger point injections or CESTI’s for future care.” The final assessment was cervicalgia, strain of other muscles, fascia and tendons at shoulder and upper arm level, right arm, right shoulder pain, and insomnia due to his medical condition. (R.X.47)

Following the date claimant maintains he was injured, he was first seen at the Good Samaritan Clinic in Fort Smith. The records submitted show two visits to that clinic, the first of which on June 7, 2021. The subjective complaint was “pain in right shoulder and arm for five days. Took Ibuprofen but it did not help. Needs note to return to work.” In the assessment, the doctor wrote “nerve impingement? Has history of damage at C3-C4. Received steroid injections in neck and shoulders in past.” The plan was to start claimant on Prednisone and Tizanidine, with a referral to physical therapy.

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Three days later, claimant returned to the Good Samaritan Clinic, with an entry by the doctor stating “here for work note. Stated shoulder pain started to get better today. No new issues.” Claimant asked for a return to work note for Monday, June 13. (CL.X.1-3)

An MRI was performed at Mercy’s Imaging Services on July 12, 2021. This was ordered by Dr. Malissa Morton at the Good Samaritan Clinic, who saw claimant on June 10, 2021. The impression of the MRI was “1. Increased signal within the substance of proximal bicep tendon from the origin suggest a partial tear at origin of bicep tendon. Moderate fluid in the bicipital tendon sheath/ganglion. If further assessment is clinically desired, an arthrography may be of use. 2. Partial tear/tendinopathy supraspinatus tendon with mild hypotrophy acromioclavicular joint. 3. Thicken imperial pouch to shoulder joints with mild debris within the imperial pouch, and maybe due to arthritis.” (CL.X 4-5)

Following the MRI, claimant was referred to physical therapy by Leslie Ziegler at the Good Samaritan Clinic. This therapy was performed at the Arkansas Colleges of Health Education, beginning on July 15, 2021. Claimant reported that he had an acute injury to his right shoulder while working. The assessment was that claimant presented with “a settling right shoulder disfunction that involves the supraspinatus and bicep tendon (LH).” Claimant went to physical therapy on two other occasions, July 16, and July 20, 2021, before he was referred to an orthopedic specialist. (CL.X 6-16)

On July 22, 2021, claimant saw Dr. Steven Smith at Mercy Clinic. In the section of his report regarding the history of the present illness, Dr. Smith recorded “Mr. Steward is a 52-year-old male who complains of pain in the right shoulder. He states he works as a general box worker at International Paper Company, stacking and had increased pain in his right shoulder anteriorly where he complains of pain primarily, did not feel a pop, this happened on June 3.” After examining claimant and review the imaging, Dr. Smith’s impression was “bicep tenosynovitis verses bicep

tendon sheath ganglion.” During the visit, the bicep tendon sheath was injected with Marcaine and Betamethasone. Dr. Smith said claimant should not work until follow up in two to three weeks. (CL.X.17-19)

Claimant continued with his physical therapy and returned to see Dr. Smith on August 5, 2021, where he reported that he was better after the injection. Dr. Smith put a fifteen-pound lifting restriction on his right arm and continued with conservative care, although he did discuss repeating the bicep tendon injection or a possible arthroscopic surgery. (CL.X.24)

When he returned to Mercy Clinic on August 31, 2021, claimant saw Physician’s Assistant Patrick Walton. It was determined that surgery was probably the best option (CL.X.25), which was performed on September 29, 2021. During the surgery, Dr. Smith performed an open bicep tenodesis. There were no complications during the surgery and the follow-up notes from October, November, and December are unremarkable, as claimant appear to recover as expected. (CL.X.40-42) On December 28, 2021, claimant was released from post operative physical therapy. On January 11, 2022, Dr. Smith ordered an additional three weeks of physical therapy and released him to return to work on February 1, 2022, without restrictions. (R.X.68-69)

Claimant included the bills from the Good Samaritan Clinic, Mercy Hospital Fort Smith and Dr. Stephen Smith. The total of these bills was \$23,508.36. (Cl. X. 40)<sup>1</sup>

#### REVIEW OF THE NON-MEDICAL RECORDS

Respondent presented several documents related to this claim. The General Labor Position Description and the Job Analysis Physical Questionnaire (R.NMX1-4) describes what a general laborer is expected to do while working for respondent International Paper. There is no signature

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<sup>1</sup> There was an entry on the summary of medical bills for ACHE, but no bill from that provider was included in claimant’s exhibits.

on these documents indicating claimant had received a copy, but such is not critical to my evaluation of this case. Likewise, there were wage records submitted as an exhibit, but as the parties stipulated to an average weekly wage, it was not necessary for me to review these. (R.NMX.12-16)

There were two documents signed by claimant on March 16, 2021: The Post-Offer/Pre-Placement Health History and a form from Arkansas Occupational Health Clinic (R. NMX 5-11). On the former, claimant denied that he had any of the various health issues listed within the previous five years; this list of questions included one about severe headaches. The latter asked: "have you ever had or have you now" several health conditions, including "numbness or pain in his hands" and "neck, shoulder or arm pain, injury or surgery," and claimant again answered in the negative to those questions.

#### ADJUDICATION

For an injury to be compensable under the gradual-onset, rapid-repetitive-motion law, a claimant must prove by a preponderance of the evidence that (1) the injury arose out of and in the course of his or her employment; (2) the injury caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) the injury was caused by rapid-repetitive motion; and (4) the injury was a major cause of the disability or need for treatment. *Lay v. United Parcel Serv.*, 58 Ark. App. 35, 40, 944 S.W.2d 867, 870 (1997); Ark. Code Ann. § 11-9-102(4)(A)(ii)(a). Additionally, to be compensable, the injury must be established by medical evidence, supported by "objective findings," Ark. Code Ann. § 11-9-102(5)(D).

The only testimony regarding the cause of the injury itself came from claimant. Although a claimant's testimony is never viewed as uncontroverted, the Commission need not reject the claimant's testimony if it finds that testimony worthy of belief. *Ringier America v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (1993). Having had the benefit of seeing claimant testify, I found him to be credible on the

issue of how he injured his bicep. As such, I find that the injury arose out of and in the course of his employment, that it caused internal harm to his right arm for which there was objective medical evidence, and that it was the major cause for the need for treatment, satisfying three of the four elements he must prove to prevail.

The fourth element is that the injury was caused by rapid-repetitive motion. Claimant described the work as “really fast,” and that there were times when the boxes he was charged with inspecting and placing on a different conveyor line were pushing each other; that indicated to me there were times he was not able to keep up with the rapid pace. While the burden of proof rests with claimant and respondents are not required to put on any testimony, I did notice that Mr. Atkins, the health and safety manager for respondent International Paper, did not contradict claimant’s description of how quickly the inspection and transfer of the boxes had to be done. Claimant’s testimony about when he felt the initial pop in his arm sounded like a specific incident injury, but given that he continued to work for several shifts after that incident and his condition deteriorated as he worked, I am satisfied that claimant met his burden of proof that the injury was caused by the rapid and repetitive nature of his duties.

This finding, however, does not end this matter. Respondents raised as a defense that claimant had not been truthful in his pre-employment application, and was therefore barred from receiving workers’ compensation benefits pursuant to *Shippers Transport of Georgia v. Stepp*, 265 Ark. 365, 368, 578 S.W.2d 232, 233 (1979) (hereinafter called “the *Shippers* defense”). To defeat a claim for benefits using the *Shippers* defense, a respondent is required to prove: (1) The employee must have knowingly and willfully made a false representation as to his physical condition; (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring; and (3) There must have been a causal connection between the false representation and the

injury.

It is obvious to me that claimant knowingly and willfully made a false representation in his answers to the Post-Offer/Pre-Placement Health History and then the Health Assessment that he completed on March 16, 2021. The first form specifically and unambiguously asked whether claimant had severe headaches within the previous five years; the second form asked “have you ever had or have you now...” several physical maladies, including headaches, difficulty sleeping, numbness, as well as neck, shoulder or arm pain, injury or surgery. Claimant answered all these questions in the negative. As detailed in the above review of the medical records following claimant’s automobile accident in 2019, claimant had neck pain as well as radiating pain and numbness in his right shoulder down to his hand, and he complained of headaches and difficulties sleeping in the months following that accident. Claimant’s explanation that he thought he was being asked if he currently was experiencing any of those health issues is unpersuasive; I am convinced by a preponderance of the evidence that respondent satisfied the first element of its burden of proof.

However, respondents did not meet its burden of proof on the second or third element of a *Shippers* defense. As recited above, one of the forms with inaccurate information provided by claimant was the Post-Offer/Pre-Placement Health. The title to that form indicates that the offer of employment had already happened before the false representations was made. That is consistent with the testimony of Mr. Atkins that a person is sent for a health assessment after an offer of employment has been made.

In *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, 212 S.W.3d 25 (2005), the respondent raised a *Shippers* defense which was first rejected by the Commission and then by the Arkansas Court of Appeals under very similar facts. In *Allen Canning*, the employee had an extensive history of work-related back injuries before going to work at Allen Canning. He stated on the employment application



his general health was "good." When asked, "Do you have any physical or mental conditions which may limit your ability to perform certain kinds of work?" it appeared that Woodruff checked "no," although he denied doing so. Woodruff had previously been assessed a 9% permanent impairment rating on his back, and Allen Canning maintained his answers were false.

The Arkansas Court of Appeals ruled against the employer on two grounds. First, it found the questions asked on the employment application were too broad and general to establish a knowing and willful deception.<sup>2</sup> More relevant to the present case is the language regarding the second ground, which is the employer's reliance on the false statement in hiring an employee:

"Jody Yoakum, appellant's director of claims services, testified that as a general rule, people hired at the plant were not necessarily interviewing for a specific position, but for a general-labor position, and Yoakum could not say what appellee was told regarding what his job duties or assignment would be at the time he filled out his application. Furthermore, Yoakum testified that it was only after an employee was hired that the employee was asked to fill out a data card listing any conditions that would limit the employee's ability to perform any type of work. If this inquiry was not made until after appellee was hired, then appellant cannot argue that it relied upon the "false representation" and that it was a substantial factor in the employment decision, another requirement of the *Shippers* defense. We find no error in the Commission's determination that the *Shippers* defense is inapplicable in the present case." (Emphasis added.)

As the hiring decision had already been made, as the respondent's form states and its witness testified, the "false representation" could not be a substantial factor in the employment decision.

Further, the medical records following claimant's accident in 2019 did not reveal any treatment for the right bicep tear that was surgically repaired in 2021. Had this claim been for a cervical injury or even one to claimant's right shoulder, a causal connection might have been made; respondent's argument tries to connect two different injuries simply because they occurred in the same part of the

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<sup>2</sup> To be clear, I do not find the questions asked in the "Post-Offer/Pre-Placement Health History" to be too broad or general, and in that respect, this case differs from *Allen Canning*.

body. However, the medical evidence does not show that claimant had an injury to a part of his body—a torn right bicep—that was affected by the prior automobile accident.

Therefore, as I find claimant met his burden of proof regarding the injury and respondents were unable to prove the claim was barred by the *Shippers* defense, claimant is entitled to temporary total disability benefits from June 4, 2021, until January 31, 2022. He is also entitled to have his medical expenses paid.

ORDER

Respondents are directed to pay benefits in accordance with the findings of fact set forth herein this Opinion.

All accrued sums shall be paid in lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809.

Pursuant to Ark. Code Ann. § 11-9-715, the claimant's attorney is entitled to a 25% attorney's fee on the indemnity benefits awarded herein. This fee is to be paid one-half by the carrier and one-half by the claimant.

All issues not addressed herein are expressly reserved under the Act.

Respondent is responsible for paying the court reporter her charges for preparation of the transcript in the amount of \$ 621.25

IT IS SO ORDERED

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JOSEPH C. SELF  
ADMINISTRATIVE LAW JUDGE