

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H009300**

KIMBERLY TAYLOR, EMPLOYEE

CLAIMANT

**HINO MTRS. MFG. USA, INC.,
EMPLOYER**

RESPONDENT

SOMPO AMER. INS. CO., CARRIER

RESPONDENT

OPINION FILED JANUARY 23, 2024

Hearing before Administrative Law Judge O. Milton Fine II on October 27, 2023, in Marion, Crittenden County, Arkansas.

Claimant represented by Mr. Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Jason Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On October 27, 2023, the above-captioned claim was heard in Marion, Arkansas. A prehearing conference took place on July 24, 2022. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. Following an additional one reached at the hearing—which pertains to the period for which temporary total disability benefits were paid, supplements language in Stipulation No. 3, and thus will be cited there—they are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

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2. The employer/employee/carrier relationship existed on or about October 21, 2020.
3. Respondents initially accepted Claimant's alleged right shoulder injury as compensable and paid medical and temporary total benefits (from November 6, 2020, through May 12, 2022) pursuant thereto; but they have now controverted this claim in its entirety.
4. Claimant's average weekly wage entitles her to compensation rates of \$347.00/\$260.00.

Issues

The parties discussed the issues set forth in Commission Exhibit 1. The following were litigated:

1. Whether Claimant sustained compensable injuries by specific incident to her back and right shoulder.
2. Whether Claimant is entitled to reasonable and necessary medical treatment.
3. Whether Claimant is entitled to additional temporary total disability benefits.
4. Whether Claimant is entitled to a controverted attorney's fee, including a fee on all indemnity benefits previously paid in this claim.

All other issues have been reserved.

Contentions

The respective contentions of the parties, as amended, read as follows:

Claimant:

1. Claimant contends that she sustained injuries to her back and right shoulder in the course and scope of her employment on October 21, 2020, when she was removing parts from a machine. Respondents initially accepted the right shoulder as compensable and paid medical and temporary total disability benefits from November 6, 2020, through May 12, 2022. Respondents have now controverted the claim in its entirety.
2. Claimant was under the treatment of Christopher Gross, APN with Coast to Coast Medical, who diagnosed her with a SLAP tear of the right shoulder and low back pain with radiculopathy. He recommended an MRI of the lumbar spine and a referral to an orthopedist. Claimant was treating with Dr. David Brown for her shoulder. Dr. Brown opined that she sustained a SLAP tear of the right shoulder. He was concerned with performing surgery due to her stiffness. Brown recommended a second opinion with an option to treat, and kept Claimant on light duty. Respondents have denied the recommendations of Drs. Gross and Brown.
3. Claimant contends that she sustained compensable injuries to her back and right shoulder. She is entitled to the recommended MRI of the lumbar spine, physical therapy and a repair of her right shoulder SLAP tear, payment/reimbursement of medical and out-of-pocket expenses, and

additional temporary total disability benefits from May 13, 2022, to a date yet to be determined.

4. All other issues are reserved.

Respondents:

1. Claimant did not suffer a compensable back injury. Her right shoulder was accepted and all reasonable and necessary benefits were paid. She gave an unreliable effort in a functional capacity evaluation, failed to attend physical therapy appointments, and then was released at maximum medical improvement with zero percent (0%) impairment by Dr. Charles Pearce on February 28, 2022.
2. Respondents have not controverted the claim in its entirety and do not owe attorney's fees on previous indemnity.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to 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. Respondents' motion to withdraw Stipulation No. 3 is hereby denied.

4. Respondents' motion, made after the close of the evidence, to add both an issue and a contention concerning the alleged running of the statute of limitations regarding one of Claimant's alleged injuries, is hereby denied.
5. Claimant has not proven by a preponderance of the evidence that she sustained a compensable injury to her back by specific incident.
6. Claimant has proven by a preponderance of the evidence that she sustained a compensable injury to her right shoulder by specific incident.
7. Claimant has not proven by a preponderance of the evidence that she is entitled to reasonable and necessary treatment of her alleged back injury.
8. Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of her compensable right shoulder injury. Moreover, she has proven by a preponderance of the evidence that all of her treatment therefor that is in evidence was reasonable and necessary.
9. Claimant has not proven by a preponderance of the evidence that she is entitled to additional temporary total disability benefits.
10. Claimant has proven by a preponderance of the evidence that her counsel is entitled to a controverted attorney's fee on the indemnity benefits previously paid under this claim, pursuant to Stipulation No. 3 and Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation¹ of her medical records, consisting of two index pages and 141 numbered pages thereafter; Claimant's

¹This exhibit includes two Forms AR-3. Per Ark. Code Ann. § 11-9-529(a)-(c) (Repl. 2012):

(a) Within ten (10) days after the date of receipt of notice or of knowledge of injury or death, the employer shall send to the Workers' Compensation Commission a report setting forth:

- (1) The name, address, and business of the employer;
- (2) The name, address, and occupation of the employee;
- (3) The cause and nature of the injury or death;
- (4) The year, month, day, and hour when, and the particular locality where, the injury or death occurred; and
- (5) Such other information as the commission may require.

(b) Additional reports with respect to the injury and of the condition of the employee shall be sent by the employer to the commission at such time and in such manner as the commission may prescribe.

(c) Any report provided for in subsection (a) or (b) of this section shall not be evidence of any fact stated in the report in any proceeding with respect to the injury or death on account of which the report is made.

(Emphasis added) Form AR-3—one of the numerical, or administrative, forms of the Commission—is one of the forms covered under this provision. Even though no party objected to their admission, the above-highlighted language prohibits the Commission from considering them for the purpose of determining, inter alia, whether Claimant sustained a compensable injury.

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Exhibit 2 a letter to her counsel from Delta Rehab dated January 27, 2022, consisting of one page; Claimant’s Exhibit 3, an affidavit from Alvin Sims dated October 20, 2023, consisting of one page; and Respondents’ Exhibit 1, medical and non-medical records, consisting of one index page and 38 numbered pages thereafter.

Also, I have blue-backed to the record the post-hearing briefs of the parties, both filed on November 10, 2023, and consisting of 12 and 49 (including attachments) pages, respectively.

PRELIMINARY RULINGS

Withdrawal of Stipulation No. 3

As addressed above, a prehearing telephone conference concerning this matter took place on July 24, 2023—over three months before the hearing. The Prehearing Order was issued the same day as the conference and included the following stipulation:

3. Respondents initially accepted Claimant’s alleged right shoulder injury as compensable and paid medical and temporary total benefits pursuant thereto; but they have now controverted this claim in its entirety.

Not until the October 27, 2023, hearing did Respondents take issue with the stipulation; they made no earlier effort to amend or withdraw it. But they did move to withdraw it at the hearing, explaining that it was “essentially a mistake.” In their attempt to support this position, their counsel pointed out that the stipulation ran counter to their contention that reads: “[Claimant’s] right shoulder was accepted and all reasonable and necessary benefits were paid . . . Respondents have not controverted the claim in its entirety and

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do not owe attorney’s fees on previous indemnity.” However, the above-quoted stipulation comports with Issue Nos. 1 and 4, which seek a determination regarding whether Claimant suffered a compensable injury to her right shoulder and whether she is entitled to a controverted attorney’s fee on indemnity benefits already paid.

“A stipulation is an agreement between attorneys respecting the conduct of the legal proceedings.” *Ark. Dept. of Corr. v. Jackson*, 2019 Ark. App. 124, 571 S.W.3d 539 (citing *Dinwiddie v. Syler*, 230 Ark. 405, 323 S.W.2d 548 (1959)). As a general rule, parties are bound by their stipulations. *Dempsey v. Merchants Natl. Bank of Fort Smith*, 292 Ark. 207, 729 S.W.2d 150 (1987). Nonetheless, the Commission may in its discretion permit a party to withdraw a stipulation. *Ark. Dept. of Corr., supra; Jackson v. Circle T Express*, 49 Ark. App. 94, 896 S.W.2d 602 (1995).

In *Gillespie v. E-Z Mart, Inc.*, 1997 AWCC 191, Claim No. E516049 (Full Commission Opinion filed April 18, 1997), the Commission stated: “Although we recognize that a party can withdraw a stipulation, we specifically find that they must do so prior to the matter being submitted for determination.” Here, Respondents waited until the last possible time—the addressing of preliminary matters at the hearing itself—to seek to withdraw the stipulation. As the Arkansas Court of Appeals wrote in *Sapp v. Tyson Foods*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549, “elementary principles of fair play” apply in Commission proceedings. The withdrawal of the stipulation would change the nature of what the parties reasonably expected to litigate at the hearing. It would violate “elementary principles of fair play” to allow the withdrawal at that juncture.

In *Circle T Express, supra*, the respondents were allowed to withdraw a stipulation concerning compensability that they had made in the case prior to the joinder of the Second Injury Fund (“SIF”). The stipulation was included in the prehearing order following the December 16, 1991, prehearing conference. Thereafter, the SIF was joined to the claim, and it took the position that the claimant had not sustained a compensable injury. For that reason, the respondent employer and carrier withdrew the compensability stipulation. The administrative law judge conducted a hearing and ruled that while the respondent employer and carrier were precluded from contesting compensability, the SIF could do so. On appeal, the Full Commission reversed, stating that “[e]nforcing the stipulation under the facts of this case would be contrary to basic notions of justice and fair play. These concepts require results which are logically consistent with the findings made by the fact finder.” *Jackson v. Circle T Express*, Claim No. E016465 (Full Commission Opinion filed February 9, 1994), *aff’d*, 49 Ark. App. 94, 896 S.W.2d 602 (1995). The Commission pointed out that if it were to find (for purposes of the compensability issue raised by the SIF) that the claimant had not proven compensability, while at the same time holding the respondent employer and carrier to the stipulation that the claimant had in fact sustained a compensable injury, would not be “logically consistent or compatible with the interests of justice or fair play.” *Id.* The Arkansas Court of Appeals affirmed this decision. *Circle T Express, supra*. In a similar vein here, Stipulation No. 3 is logically consistent with Issue Nos. 1 and 4—which they parties expected to litigate—and in fact did litigate—at the hearing. It would

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hardly be “compatible with the interests of justice or fair play” to permit the withdrawal of the stipulation at that juncture.

As for Respondents’ position that the stipulation was “essentially a mistake,” in *Ark. Dept. of Corr., supra*, the Arkansas Court of Appeals held that the respondent employer and carrier were bound to a stipulation to which they had agreed at a previous hearing concerning the claimant’s average weekly wage and compensation rates (\$602.00/\$452.00), even though a subsequent hearing (in which the Death & Permanent Total Disability Trust Fund participated) showed them to be lower, (\$505.00/\$379.00). In finding that the respondent employer and carrier were not entitled to a credit for an overpayment of indemnity benefits at an inaccurately high rate, the court wrote:

At the time of the stipulation, appellants should have been aware of Jackson’s employment and wage history, and we cannot find that the Commission abused its discretion in failing to allow appellants to retroactively withdraw their stipulation and benefit from a mistake discovered years after the fact.

In the case at hand, Respondents had months to consider the Prehearing Order and take steps to correct any perceived mistake therein. They did not do so.

In sum, the evidence preponderates that Respondents should not be allowed to withdraw their assent to Stipulation No. 3. Their motion to do so is, respectfully, denied.

Addition of Statute of Limitations Issue and Contention

At the hearing, after testimony concluded and the parties had rested, the following motion was made:

Respondents would move to amend their contentions due to testimony elicited at this hearing, that the statute [of limitations] . . . bars at least one

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of these injuries because they were—they occurred in two different instances, one of which was not claimed.

As the Court of Appeals wrote in *Sapp, supra*, “elementary principles of fair play” apply in Commission proceedings. *See also Circle T Express, supra*. I find that such an amendment would change the nature of what the parties reasonably expected to litigate—and did litigate—at the hearing. Coming after the close of the evidence, it would violate “elementary principles of fair play” to allow such an amendment at that juncture.

In addition, the allegation that the statute of limitations has run is an affirmative defense. *See Johnson v. Elkhart Prods. Corp.*, AWCC No. D303314 (Full Commission Opinion filed March 28, 1995). Respondents waived it here because they did not raise it in a timely manner. *See Poff v. Brown*, 374 Ark. 453, 288 S.W.3d 620 (2008); *Harris v. Otis*, 2020 Ark. App. 375, 605 S.W.3d 538. After due consideration, Respondents’ motion is hereby denied.

ADJUDICATION

A. Compensability

Introduction. Claimant has argued that she suffered compensable injuries to her back and right shoulder in a specific incident on October 21, 2020, while working for Respondent Hino Motors Manufacturing USA, Inc. (“Hino”). Respondents initially accepted the alleged right shoulder injury as compensable, but later controverted it. *See supra*. They never accepted the alleged back injury.

Standards. In order to prove the occurrence of an injury caused by a specific incident identifiable by time and place of occurrence, a claimant must show that: (1) an injury occurred that arose out of and in the course of his employment; (2) the injury

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caused internal or external harm to the body that required medical services or resulted in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Id.* 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 Agric. 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.*

Discussion. Per the testimony of Claimant, she had been working for Respondent Hino during the time period at issue as a worker in the rear axle assembly section. Her job was to “[p]ut the seals on the axle and screw down the bolts.” After being employed there just three days, she became injured on the job. On October 21,

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2020, she was pulling on an axle that was on the conveyor belt in order to dislodge it. As a result, she hurt her lower back and her right shoulder. Later, on cross-examination, Claimant elaborated that there were actually two incidents on the date in question. First, she felt a “pinch” in her lower back when reaching for an axle; and second, she felt pain in her shoulder when she was pulling a part down in order to align the bolts. According to the medical records in evidence, when she presented for treatment at Coast to Coast Medical that same day, she informed treating personnel that she “hurt [her] lower [right] side back pulling on [a] part.” Although the record reflects that she was administered a Toradol injection, Claimant did not recall this. She went back to work. In a follow-up visit on November 6, 2020, Claimant was noted to be tender to palpation of her right shoulder, upper back, and lower back. Physical therapy was recommended. Motrin, Tramadol and Zanaflex were prescribed. While the last of those medications is a muscle relaxant, no spasms were noted in the Coast to Coast records.

The following exchange took place:

- Q. And what were your complaints? Do you remember what you were complaining of in terms of body part and—body parts and pain?
- A. My lower back, **the swelling in my lower back** which was aching, and a sharp pain down my right leg, and my right shoulder, the swelling and aching going down my right arm.
- Q. And just so that—for the Judge’s edification, are you still having those problems?
- A. Yes, sir.
- Q. Have you continued to have those problems since this injury?

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A. Yes, sir.

(Emphasis added) But lay observations do not constitute “medical evidence supported by objective findings.” *Overstreet v. Pontiac Coil, Inc.*, 2004 AR Work. Comp. LEXIS 361, Claim No. F307136 (Full Commission Opinion filed November 3, 2004). Notwithstanding the above, the medical records in evidence are silent as to any back swelling. Her December 1, 2020, physical therapy record includes the following: “Observation: swelling continues to R upper trap and R anterior deltoid.” But I note that neither body part pertains to the back—and certainly not the lower back. While Claimant on December 28, 2020, told Coast to Coast Medical that her right shoulder was still swollen, no objective findings of such accompanied it in the report.

On March 23, 2021, Claimant underwent an MRI of her right shoulder. The report reads in pertinent part: “Irregularity of the mid to posterior portion of the superior labrum is compatible with SLAP tear.” The reading radiologist, Dr. Vu Loi, diagnosed the presence of a SLAP tear. The physician at Coast to Coast Medical opined that the tear would require surgery. Claimant was referred to Dr. David Brown. He saw her on May 6, 2021, for “right shoulder pain . . . [that] began on 10/21/20 after she pulled on a piece of equipment at work that strained her shoulder.” The doctor wrote that “[h]er medical records state that she has a possible SLAP tear.” He prescribed Diclofenac and withheld a more definitive diagnosis pending his own review of the MRI. When Brown saw her again on May 18, 2021, he concurred with the SLAP tear diagnosis, but expressed concern with proceeding with surgery in light of Claimant’s stiffness. He administered a steroid injection and ordered physical therapy. According to Claimant,

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she had difficulty obtaining the therapy. He recommended that she obtain a second opinion regarding her desire for surgery to address the SLAP tear. She last saw Dr. Brown on August 12, 2021. On that date, he wrote:

The patient continues to complain of pain and stiffness. Her daughter recently passed away with Covid. She has not been able to do physical therapy secondary to her daughter's situation. I am very hesitant to proceed with any sort of surgery considering the amount of patient's stiffness and apprehension with range of motion. She has evidence of a SLAP tear that occurred in October 2020. I recommend the patient undergo an independent medical exam with an option to treat via a second opinion.

On February 28, 2022, Claimant went to Dr. Pearce. The report of that visit reads in pertinent part:

CC: Right shoulder pain

INJURY DATE: October 19, 2020

HPI: The patient is a 40-year-old right-handed employee of Hino Motors who was injured the 1st day of training/work when she was instructed to pull an axle off of a line. She says she could not pull the axle despite leaning over the part and as she did so she felt a pinch and pull in her right shoulder. She has been on light duty restrictions since. She was seen and evaluated on May 6, 2021 by Dr. Davis Brown who prescribed diclofenac and ordered an MRI scan of her shoulder. Additionally she had a cortisone injection. Prior to that visit she had had a course of therapy, modification activities and anti-inflammatories. She has never had similar problems in the past. She complains of neck and shoulder pain. MRI scan was done and by report showed a SLAP tear. Surgery apparently was discussed but there was concern that she had not gained motion despite the above modalities to include the steroid injection. Dr. Brown asked for a 2nd opinion. Currently, she is complaining of shoulder, shoulder girdle, right neck and arm pain to about the elbow.

PHYSICAL EXAM:

[RIGHT] SHOULDER: No obvious abnormality to inspection. Wide area of tenderness throughout her shoulder girdle and periscapular. Difficult to establish range of motion is there is much patient resistance secondary to

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pain. She has give-way weakness in all planes tested. There is no gross motor or sensory loss distally include radial, median and ulnar nerves. She complains of pain with range of motion all directions cervical spine.

IMAGING: X-rays ordered and interpreted by me surgical spine and right shoulder show no significant acute abnormality. There may be slight straightening of her lordotic curve. MRI scan from March 23, 2021 is a noncontrast scan and shows some possible undercutting of her superior labrum that was labile [sic] a slap tear. However this can be a normal finding as well.

IMPRESSION: Right shoulder, shoulder girdle, arm pain and weakness not consistent with MRI finding of slap tear.

PLAN:

1. I would recommend a functional capacity evaluation prior to any further diagnostic testing or treatment.
2. Patient can continue with light duties, anti-inflammatories in the interim time.

(Emphasis added)

Straightening of the lordotic curve can be an objective finding. *See Estridge v. Waste Mgmt.*, 343 Ark. 276, 33 S.W.3d 67 (2000). Pearce’s notation that “[t]here may be slight straightening” of the curvature, however, falls short of the standard of definiteness needed to establish the presence of an objective finding. The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). But to credit the above as a definitive finding would require that I engage in speculation and conjecture—which is impermissible. *See Dena Construction Co. v. Herndon*, 264 Ark. 791, 796, 575 S.W.2d 155 (1979).

Claimant underwent the recommended functional capacity evaluation on April 6, 2022. According to the report thereof, she demonstrated the ability to perform work in

at least the Sedentary classification. However, this finding was admittedly very suspect because evaluation showed that the effort that Claimant put forth was extremely unreliable:

RELIABILITY AND CONSISTENCY OF EFFORT

Consistency of effort testing obtained during this evaluation indicate significant observational and evidence based inconsistencies resulting in self-limiting behavior and sub-maximal effort. The results of this evaluation indicate that an unreliable effort was put forth, with 27 of 52 consistency measures within expected limits. Analysis of the data collected during this evaluation indicates that she did not put forth consistent effort. She produced low and inconsistent grip strength with each hand with C.V.'s that indicate great variance with repeated trial testing. She also demonstrated significantly higher or lower force with both the right and left hand during rapid grip testing, which further validates that less than full effort was being put forth with standard grip testing. She also failed to produce an appropriate bell shaped curve with 5 position testing. It is also noted that she demonstrated inconsistent movement patterns and inconsistent AROM of the shoulder when comparing her formally measured AROM with that demonstrated during functional aspects of testing. She also failed to produce a significant cardiovascular response to physical testing that would indicate that a significant degree of effort was being put forth. She also demonstrated indicators of self limiting effort. For example, her reaching patterns when formally tested were slow, yet when performing a similar task during other aspects of testing were normal and completed without apparent difficulty. She also demonstrated a bi-manual floor to knuckle lift of 10 lbs., yet later demonstrated the ability to lift and then carry 20 lbs. when lifting from the same plane.

...

FUNCTIONAL LIMITATIONS

Although Ms. Taylor reported and/or demonstrated numerous functional limitations during her evaluation, she also exhibited numerous inconsistencies which invalidated her entire evaluation. Therefore, her current functional status remains unknown at this time due to her failure to produce sufficient objective data to substantiate her reported and/or demonstrated limitations.

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After Dr. Pearce received the functional capacity evaluation report, he authored the following addendum on April 18, 2022:

The patient completed a functional capacity evaluation on April 6, 2022. She gave an unreliable effort only meeting 27 of 52 consistency measures. She was placed in at least the sedentary classification of work. However this is not valid because of her unreliable effort. The patient has reached maximal medical improvement. The patient can return to regular work duties without restriction. There is no indication for further diagnostic testing and/or treatment. The patient has sustained 0% permanent partial impairment as it pertains to her upper extremity. The statements are made within a degree of medical certainty.

Reflected in her testimony and the medical records in evidence is a gap in Claimant's treatment of her shoulder until she saw Pearce for the aforementioned second opinion. During that six-month-plus period, she went to her primary care physician. When she saw APRN Denise Purnell on February 7, 2022, she complained of "low back and hip pain for 3-4 days." Claimant did not report what she believed to be the origin of the pain—and certainly its relatively short duration did not tie it to the October 2020 incident at Hino. When she returned to the clinic on March 4, 2022, she saw Dr. Camdin Gray. Gray wrote: "Low back pain—referral to PT as suspect muscle spasm. XR as above, with trial [C]yclobenzaprine." As the above shows, the doctor did not observe or palpate a spasm. He made a therapy referral and prescribed a muscle relaxant based solely on what Claimant related to him. This is not an objective finding. When physical therapy did not prove fruitful, Dr. Gray on April 13, 2022, referred Claimant for pain management.

Pursuant to the referral, Claimant went to see Dr. Ted Shields at Pain Treatment Centers of America on October 6, 2022. The records in evidence show that he has

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been treating her for right shoulder and lower back pain. The pain management has consisted not only of prescription medications such as Gabapentin, Oxycodone, and Cyclobenzaprine, but also more invasive procedures such as lumbar medial branch blocks and lumbar radiofrequency ablation neurotomies for the back, and suprascapular and axillary nerve blocks for her shoulder. The pain management records lack any objective findings of an injury to the back. While, for instance, Claimant reported relief from the injections and ablations, this—again—is subjective and not objective in nature. See Ark. Code Ann. § 11-9-102(16)(A)(i) (Repl. 2012)(“Objective findings” are those findings which cannot come under the voluntary control of the patient”). But Shields did include objective findings of Claimant’s shoulder in the form of crepitation. This can constitute an objective finding. See *Greer v. Ozark Opportunities*, 2009 AWCC 124, Claim No. F704899 (Full Commission Opinion filed July 8, 2009); *Goss v. Baker Engr.*, 2002 AWCC 127, Claim No. E910877 (Full Commission Opinion filed June 19, 2002).

On September 13, 2023, Claimant underwent another MRI of her right shoulder. In this instance, the radiological findings, by Dr. Ezekial Shotts, were of a “[t]iny” low-grade partial interstitial tear at the greater tuberosity footprint of the infraspinatus tendon, and an anterior to posterosuperior labral tear. She related on the witness stand that she has undergone an MRI of her lumbar spine as well. But such is not reflected in her medical records in evidence.

Claimant in her testimony denied having any back or shoulder problems before October 21, 2020. In reference to her credibility as a witness, the following exchange took place on cross-examination:

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Q. So your earlier testimony that you did work [at the home health business] is incorrect, is that right?

A. I am confused. I'm sorry, 'cause I take a lot of meds. I'm confused. But I know I tried to work there like three weeks.

Q. Can I ask what meds you're on right now?

A. I take Percocets and muscle relaxer and—

Q. When did you last take a Percocet?

A. Last night.

Q. Are they affecting your cognition now?

A. Well, I don't know—

Q. Okay.

A. —'cause I take—I take quite a bit of meds, and I also take depression meds, too.

Q. Okay. And you understand that you're under oath and that the credibility of your testimony is an issue at this hearing?

A. Yes.

Later, when questioned by the Commission on this matter, Claimant stated that her testimony is reliable, but that she gets “confused on the dates.”

In analyzing the elements of compensability vis-à-vis Claimant's alleged injuries, the evidence is devoid of objective findings of a back injury. *See supra*. Therefore, that portion of her claim must fail at the outset.

As for her alleged right shoulder injury. I credit the MRI findings as read by Drs. Brown, Loi, and Shott—all of whom found that she sustained tears to the shoulder, and

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with the first two specifically finding that there was a SLAP tear. I am unable, based on my review of the evidence, to credit Dr. Pearce, who did not concur in this.

As to whether this shoulder injury arose out of and in the course of her employment at Respondent Hino, and was caused by a specific incident that is identifiable by time and place of occurrence, the evidence shows that the injury was sustained by Claimant on October 21, 2020, while she was pulling on a part so that the bolts could be brought into line. A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962). That is certainly the case here. Claimant has, consequently, proven by a preponderance of the evidence that she suffered a compensable right shoulder injury by specific incident.

B. Medical Treatment

Introduction. Claimant has alleged that she is entitled to reasonable and necessary medical treatment in connection with her alleged shoulder and back injuries.

Standards. 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

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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*.

Discussion. I find that Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment of her compensable right shoulder injury. Moreover, I have reviewed her treatment records that are in evidence, and I find that she has proven by a preponderance of the evidence that all of the treatment of her compensable right shoulder injury reflected therein—including her pain management by Dr. Shields and the additional treatment that has been

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recommended and/or performed in connection with her shoulder—was reasonable and necessary.

On the other hand, because Claimant has not established that she sustained a compensable back injury, she has not met her burden of proving her entitlement to reasonable and necessary treatment of it.

C. Temporary Total Disability

Introduction. Claimant has also alleged that she is entitled to temporary total disability benefits from the date last paid—May 12, 2022—to a date yet to be determined. Respondents disagree with this.

Standards. The compensable injury to Claimant’s right shoulder is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. 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). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1).

Evidence/Discussion. During the hearing, Claimant testified as follows:

Q. Have you been back to work for Hino at any time since this accident?

A. No, sir.

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This is at odds with her earlier testimony that she initially continued to work after getting hurt. This is confirmed by Stipulation No. 3 and her contentions, which show that her temporary total disability benefits did not begin until November 6, 2020; and that she is not seeking them for any period prior to their cessation as of May 13, 2022. Claimant acknowledged during her testimony that following her release by Pearce, she worked for three weeks for a home health provider. She was able to do this because the client she was assigned only required care that fell within her previously-assigned light-duty restrictions. However, she was unable to continue when her assignment changed—and the duties required in order to care for the new client increased.

Dr. Pearce, based upon the functional capacity evaluation, which showed that Claimant gave an extremely unreliable and inconsistent effort, found that Claimant reached maximum medical improvement as of the date of his report addendum, April 18, 2022, and released her to full duty. Claimant's testimony was that she was unaware of this, and would have attempted to go back to a full-duty job had she known.

Based upon my review of the totality of the credible evidence, I credit Dr. Pearce's opinion on this matter and find that the evidence preponderates that Claimant reached the end of her healing period on April 18, 2022. To the extent that Claimant continued to present with pain in her right shoulder since then, I note that persistent pain, by itself, is not sufficient to extend the healing period. *See Mad Butcher, supra.* Consequently, she has not proven her entitlement to additional temporary total disability benefits for any period.

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D. Controversion

Introduction. Claimant has asserted that she is entitled to a controverted attorney's fee in this matter.

Standard. Arkansas Code Annotated Section 11-9-715 (Repl. 2012) is the authority in this matter. This provision reads in pertinent part:

(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.

(ii) The fees shall be allowed only on the amount of compensation for indemnity benefits controverted and awarded.

Id. § 11-9-715(a)(1)(B) & (a)(2)(B)(i)-(ii). (Emphasis added) 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).

Discussion. As Stipulation No. 3 has established, Respondents ultimately controverted Claimant's alleged right shoulder injury—herein proven to be compensable—and by extension, the indemnity benefits that were paid pursuant thereto. Thus, the evidence preponderates that her counsel, the Hon. Andy L. Caldwell, is entitled to the controverted fee as set out above on the indemnity benefits that were paid in connection therewith.

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 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. 2012). *See Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to the 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge