

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. H303648**

**CONTESSA L. ALLISON,
EMPLOYEE**

CLAIMANT

**S.E. ARK. HUMAN DEV. CTR.,
EMPLOYER**

RESPONDENT

**STATE OF ARKANSAS/
PUBLIC EMPLOYEE CLAIMS DIVISION,
INSURANCE CARRIER/TPA**

RESPONDENT

OPINION FILED JANUARY 29, 2025

Hearing conducted on October 31, 2024, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in Monticello, Drew County, Arkansas.

The claimant, Ms. Contessa L. Allison, of Warren, Bradley County, Arkansas, appeared pro se.

The respondents were represented by the Honorable Charles L. McLemore, Public Employee Claims Division (PECD), Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed September 20, 2024, the parties agreed to the following stipulations, which they affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed at all relevant times including August 26, 2021, when the claimant alleges she became disabled as a direct result of alleged "compensable" gradual onset injuries to both her right and left shoulders.
3. The claimant's average weekly wage (AWW) is \$453.10, which is sufficient to entitle her to weekly compensation rates of \$302.00 for temporary total disability (TTD), and \$227.00 for permanent partial disability (PPD) benefits if the claim is

deemed compensable.

4. The respondents controvert this claim in its entirety.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission's Exhibit 1 at 1; Hearing Transcript at 6-7). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether this claim is barred by the applicable statute of limitations (S/L).
2. If the claim is not barred by the applicable S/L, whether the claimant sustained "compensable" gradual onset injuries within the meaning of the Arkansas' Workers' Compensation Act (the Act) to her right and/or left shoulder(s) that culminated in disability on or about August 26, 2021.
3. If the claimant's alleged injury(ies) is (are) deemed compensable, the extent to which she is entitled to medical and indemnity benefits.
4. If the claimant retains an attorney in this matter, whether her attorney is entitled to a controverted fee on these facts.
5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 6-7).

The claimant contends her claim is not barred by the applicable S/L. Furthermore, she contends she has sustained gradual onset "compensable" injuries to either or both her right and left shoulder(s); that she is entitled to both medical and indemnity benefits; and, if she retains one, her attorney is entitled to a controverted fee. (Comms'n Ex. 1 at 3; T. 6-7; 18; T. 114-121; 123-25).

The respondents contend that on June 8, 2023, the claimant reported having allegedly

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sustained a gradual onset injury(ies) to her right and/or left shoulder(s) that she further alleged resulted in her inability to work as of August 26, 2021. The respondent contends the claimant did not timely file this claim and, therefore, the applicable S/L now bars her claim for benefits. The respondent contends further the claimant cannot establish she sustained either a specific incident or a gradual onset injury to either or both her right and/or left shoulder(s) on or before August 26, 2021; or that she sustained any gradual onset injury whatsoever arising out of an in the course of her employment caused by both rapid and repetitive motion. The respondent contends the claimant cannot meet her burden of proof pursuant to the Act in establishing her alleged injury(ies) is (are) were the result of rapid-repetitive motion and were the “major cause” of any disability or need for treatment. Alternatively, the respondent contends that if the claimant’s alleged injury(ies) is (are) deemed compensable they cannot be held liable for the payment of any medical and/or indemnity benefits prior to the date the claimant reported her alleged injury(ies) to her employer. Finally, the respondents reserve the right to raise additional contentions, or to modify those stated herein, pending the completion of any and all appropriate and necessary investigation and discovery. (Comms’n Ex. 1 at 3-4; T. 6-7; T. 121-22).

The record includes the hearing transcript and any and all exhibits contained therein and attached thereto. The hearing record does *not* include Claimant’s Proffered Exhibit 1 since the claimant failed and/or refused to comply with the clear and specific terms of the subject prehearing order which required her to provide copies of this exhibit to opposing counsel at least seven (7) days before the hearing date. (T. 7-13; CPX1 at 1-13).

STATEMENT OF THE CASE

The relevant facts in this case are straight-forward. The claimant, Ms. Contessa A. Allison (the claimant), is 54 years old. She began working as a residential assistant with the Southeast Arkansas Human Development Center (HDC) on March 3, 2020. The claimant's regular shift hours were from 10 p.m. to 6 a.m., although there were times when she was required to work overtime to substitute for other employees who did not come into work for one reason or another. The claimant's job duties consisted of, among other things, working in the kitchen, as well as washing clothes for 15 male HDC residents. (T. 18-24). In summary, the claimant attributed the right and left shoulder problems which are the subject of this claim to her job duties of working in the kitchen, mopping, wiping the counters and, most notably, to the physical movements she performed while washing loads of laundry for the 15 male HDC residents while loading and unloading the washing machine and dryer, folding the clothes, and related activities. (T. 38-45; 52-63).

The claimant initially testified she first started having problems with her shoulders in March of 2021 while she was working light-duty for a leg injury, which she described as a pulled hamstring. (T.25-32; Respondents' Exhibit 1 at 1-22). She later clarified that, specifically with respect to her shoulder(s), she began having problems around April or May of 2021. (T. 32-33). A medical report dated May 28, 2021, from a clinic visit with Dr. Joe Wharton notes the claimant advised him of some problems with her right shoulder which she told Dr. Wharton were from a previous injury she sustained years ago. (T. 35; RX1 at 17-22). The claimant explained she did not recall Dr. Wharton asking her about any prior injuries. She testified she did not have a specific

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prior injury to her shoulder, but that she did have some “soreness” in her shoulder in 2015 which she attributed to her prior job duties of “a lot of repetition, stirring, stirring” working in the cafeteria at the University of Arkansas at Monticello (UAM). (T. 34-38).

While the claimant testified her employer was aware of her alleged work-related shoulder problems, the respondents offered the written statements of two (2) HDC witnesses, Ms. Sandra Harris (statement dated June 14, 2023) and Ms. Casondra Jones, the HDC assistant personnel manager (statement dated June 15, 2023), contradicting the claimant’s testimony in this regard. (T. 67-72; Respondents’ Exhibit 2 at 10-11). The claimant was terminated from HDC effective September 26, 2021, for refusal to “float” (rotate job duties) and other reasons which are set forth in a Department of Human Services (DHS) Notice of Disciplinary Action form dated September 26, 2021. (RX2 at 7-8). This disciplinary form states the claimant had “displayed a consistent pattern of failure to comply with workplace policies...”; had “received multiple verbal warnings, has been on Probation...”; and had been given “multiple policy re-trainings by her supervisor regarding the same policy violations.” (RX2 at 7). The claimant did not file her Form AR-C alleging the subject gradual onset right and left shoulder injuries until June 7, 2023, almost 21 months after the date HDC terminated her on September 26, 2021. (RX2 at 9).

The claimant did not introduce any medical records into evidence in support of her alleged right and left shoulder gradual onset compensable injury claim. The respondents introduced the above-cited medical exhibit, RX1. These medical records reflect the claimant first mentioned problems with her right shoulder on May 28, 2021, which she attributed to a previous injury. (RX1 at 17-22). X-rays taken of the claimant’s right shoulder on May 28, 2021, revealed mild

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degenerative spurring at the acromioclavicular (AC) joint and acromion, and no acute osseous abnormality. (RX1 at 23). Dr. Wharton's clinic/progress note of October 11, 2021, notes the claimant's complaints of right shoulder pain of "unspecified chronicity." (RX1 at 24-26). X-rays taken on the same date revealed no acute findings, and mild degenerative changes of the AC joint. (RX1 at 27). The claimant underwent a steroid injection into her right shoulder on December 9, 2021. (RX1 at 28-31).

The first mention of left shoulder pain in the medical records is reflected in a clinic note dated July 21, 2022, which goes on to reveal the claimant had been experiencing these symptoms for seven (7) to eight (8) months. (RX1 at 32-25). The last medical record in RX1 is an X-ray report of the claimant's right ankle which notes some swelling and no acute fracture; and X-ray of the claimant's left shoulder which the radiologist interpreted as, "Unremarkable...No acute osseus abnormality." (RX1 at 36-37).

DISCUSSION

The Burden of Proof, Generally

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. *Ark. Code Ann.* § 11-9-704(c)(2) (2025 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel*, 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). *Ark. Code Ann.* Section 11-9-704(c)(3) (2025 Lexis Repl.) states that the ALJ, the Commission, and the courts "shall strictly

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construe” the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles*, 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met her burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party. *Ark. Code Ann.* § 11-9-704(c)(4) (2025 Lexis Repl.); *Gencorp Polymer Products v. Landers*, 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers’ compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep’t of Corrections v. Glover*, 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission’s exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees*, 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant’s or any other witness’s testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc.*, 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission’s province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg’ing v.*

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Baker, 337 Ark. 94, 989 S.W.2d 151 (1999).

In a case such as this one where the claimant is pro se, the law requires both the ALJ and Commission to hold pro se claimants to the same standards as those represented by counsel. *Moon v. Holloway*, 353 Ark. 520, 110 S.W.3d 250 (2003). Moreover, ALJ, the Commission, and the courts must strictly construe *Ark. Code Ann.* § 11-9-702. *Sykes v. Williams*, 373 Ark. 236, 283 S.W.3d 209 (2008).

Statute of Limitations (S/L)

The controlling statute of limitations (S/L) is set forth in *Ark. Code Ann.* §11-9-702(a)(1) (2025 Lexis Repl.) which mandates:

A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within (2) years from the date of the compensable injury. If during the two-year period following the filing of the claim the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

In *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 982 S.W.2d 11 (1999) and *Pina v. Wal-Mart Stores, Inc.*, 91 Ark. App 77, 208 S.W.3d 236 (Ark. App. 2005), our state supreme court and court of appeals, respectively, held the S/L for gradual onset, scheduled injuries begin to run when the injury first becomes apparent to the claimant. But in this case the claimant is alleging work-related injuries to both her right and left shoulders and, of course, a shoulder injury is not a scheduled injury, it is an injury to the body-as-a-whole (BAW). Consequently, in the case at bar the general S/L rule relating to an Arkansas workers' compensation injury applies: *i.e.*, the S/L

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does not begin to run until the true extent of the injury manifests itself *and* results in an incapacity to earn wages sufficient to give rise to a claim for compensation. *Hall's Cleaners v. Wortham*, 311 Ark. 103, 842 S.W.2d 7 (1992).

Based on the aforementioned law as applied to the facts of this case, I find this claim is *not* barred by the applicable S/L. The preponderance of the credible evidence of record reveals that while the claimant's shoulder problems manifested in April and May of 2021, and that she apparently attributed her shoulder symptoms to her job duties at HDC at that time, the shoulder problems did not result in disability until August 26 (or 28), 2021. (*See*, T. 125-26). The claimant signed the Form AR-C alleging the subject gradual onset right and left shoulder injuries on June 6, 2023, which the Commission received on June 7, 2023. (RX 2 at 9). Of course, it is readily apparent the Form AR-C was prepared, signed, and filed within the two (2)-year S/L applicable to the facts of this case.

Gradual Onset Compensable Injuries

In order meet the Act's requirements of a gradual onset compensable injury a claimant must prove by a preponderance of the evidence that the injury: (1) arose out of and in the course of her employment; (2) caused internal or external physical harm to the body that required medical services or resulted in disability or death; (3) was caused by rapid-repetitive motion; and (4) was the "major cause" of the disability or need for treatment. *Ark. Code Ann.* Section 11-9-102(4)(A)(ii)(a) (2025 Lexis Repl.); *Lay v. United Parcel Service, Inc.*, 58 Ark. App. 35, 40, 944 S.W.2d 867, 870 (Ark. App. 1997); *Carlat v. Ark. Hwy. & Trans. Dep't*, 2018 Ark. App. 157, 546

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S.W.3d 514 (Ark. App. 2018). An alleged gradual onset injury caused by rapid repetitive motion is compensable *only if* the alleged compensable injury is the “major cause” of the disability or need for treatment. **Ark. Code Ann.** § 11-9-102(4)(E)(ii); *Medlin v. Wal-Mart Stores, Inc.*, 64 Ark. App. 17, 977 S.W.2d 239 (1998). “Major cause” means greater than fifty percent (50%) of the cause. **Ark. Code Ann.** § 11-9-102(4)(E)(ii); *Lowe's Home Ctrs., Inc. v. Pope*, 2019 Ark. App. 24, 482 S.W.3d 723 (Ark. App. 2016).

The test for determining whether an injury is caused by rapid repetitive motion is two (2)-pronged: (1) the task must be repetitive, and (2) the repetitive motion must be rapid. *Malone v. Texarkana Public Schools*, 333 Ark. 343, 969 S.W.2d 644 (1998). Multiple tasks involving different movements can be considered together to satisfy the “repetitive element” of rapid repetitive motion. *Id.*

Just as in the case of any other compensable injury, an alleged gradual onset compensable injury must be established by medical evidence supported by objective findings. **Ark. Code Ann.** § 11-9-102(4)(D); **Ark. Code Ann.** § 11-9-102(16). “Objective findings” are defined as findings which cannot come under the voluntary control of the patient. **Ark. Code Ann.** § 11-9-102(16)(A); *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, at 80 250 S.W.3d 263, at 272 (Ark. App. 2007). Objective findings specifically exclude such subjective complaints or findings as pain, straight-leg-raising tests, and range-of-motion (ROM) tests since they all are subjective in nature and subject to the claimant’s voluntary control or manipulation. *See, Burks v. RIC, Inc.*, 2010 Ark. App. 862 (Ark. App. 2010).

Both our state supreme court and court of appeals have held that even where a claimant had

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several job duties which required various rapid motions repeated at differing time intervals and separated by periods of several minutes, this does not meet the Act's rapid-repetitive motion requirement. *See, Lay v. UPS, supra*, (UPS driver who briefly performed several different rapid motions repeated at differing intervals separated by several minutes failed to meet the rapid-repetitive motion requirement); *Pulaski County Special School District (PCSSD), v. Stewart*, 2010 Ark. App. 487, 375 S.W.3d 758 (Ark. App. 2010) (the court reversed the Commission and found that a school bus driver who opened and closed the bus door an average of five (5) times per hour did not meet the rapid-repetitive motion requirement); and *Carlat, supra*, (claimant's use of a weed-eater as part of his job duties did not constitute rapid-repetitive motion).

The overwhelming preponderance of the totality of the credible evidence of record in this claim (*see*, the "Statement of the Case", *supra*) conclusively reveals the claimant has failed to meet her burden of proof in demonstrating that her HDC job duties were either rapid or repetitive in nature. Indeed, there is no other reasonable conclusion that may be reached on these facts. There simply exists no evidence in the record with respect to the claimant's job duties – and specifically relating to her job duties of working in the HDC kitchen, mopping, and washing clothes, etc. – that may reasonably be characterized as either rapid or repetitive as defined by the Act and as interpreted by the applicable case law. (T. 18-113; RX1 at 1-37; RX2 at 1-13).

Likewise, the medical evidence in this case is particularly revealing and demonstrates by the overwhelming preponderance of the evidence that, even *if* the claimant had met the Act's rapid-repetitive requirement, it cannot be reasonably held that her HDC job duties were the "major cause" of her shoulder problems. The X-rays of both the claimant's right and left shoulders were

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unremarkable and revealed only mild degenerative changes at most, degenerative changes that are not consistent with a work-related injury, either specific or gradual onset. The objective medical findings the X-rays reveal is not only – in the words of the interpreting radiologists – “unremarkable” and/or represent only “mild degenerative” changes, they are consistent with the normal aging process and lack any evidence of an injury, work-related or otherwise, gradual or specific. (RX2 at 1-37).

Finally, it must be noted that it is rather incredible, inexplicable, troublesome and disappointing the claimant would wait almost two (2) years after she was fired from HDC to file a workers’ compensation claim alleging she had sustained work-related injuries. The very late filing of the claim; the unrebutted credible facts contained in the HDC termination report relating to the claimant’s history of poor performance/poor attitude and disciplinary problems that were resistant to all apparent attempts at correction and/or rehabilitation; as well as the claimant’s demeanor and other relevant communication factors while testifying on both direct and cross-examination at the hearing are, indeed, troublesome and disappointing, and do not reflect well on her credibility. (T. 18-113; RX2 at 1-13).

Therefore, for all the aforementioned reasons, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.
2. The stipulations contained in the prehearing order filed September 20, 2024, which the parties affirmed on the record at the hearing, hereby are accepted as facts.

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3. This claim is not barred by the applicable S/L.
4. The claimant has failed to meet her burden of proof pursuant to the Act in demonstrating she sustained compensable gradual onset injuries to either her left and/or right shoulder(s).
5. The claimant has failed to meet her burden of proof in demonstrating her job duties at HDC constitute either rapid-repetitive motion, and/or that they were the “major cause” of her right and left shoulder pain/problems. *See, e.g., Lay, PCSSD, and Carlat, supra.*

WHEREFORE, for all the aforementioned reasons, this claim hereby is denied and dismissed subject to the claimant’s statutory appeal rights.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp