BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G703025

DARIAN AYALA, Employee	CLAIMANT
1ST EMPLOYMENT STAFFING, Employer	RESPONDENT #1
ZURICH AMERICAN INSURANCE COMPANY, Carrier	RESPONDENT #1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT #2

OPINION FILED JULY 23, 2021

Hearing before ADMINISTRATIVE LAW JUDGE ERIC PAUL WELLS in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent #1 represented by CURTIS L. NEBBEN, Attorney at Law, Fayetteville, Arkansas.

Respondent #2 represented by DAVID L. PAKE, Attorney at Law, Little Rock, Arkansas, although not present at hearing.

STATEMENT OF THE CASE

On April 27, 2021, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on February 4, 2021, and a Pre-hearing Order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 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. On all relevant dates, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to her left shoulder on January 13, 2017.

By agreement of the parties the issues to litigate are limited to the following:

1. Whether claimant is entitled to surgery as recommended by Dr. Arnold in regard to her left shoulder.

Claimant's contentions are:

> "Claimant contends she is entitled to surgery on her left shoulder as recommended by Dr. Chris Arnold. The claimant reserves all other issues."

Respondent #1s' contentions are:

> "The respondent contends that the recommended surgery is unreasonable and unnecessary and does not arise out of the compensable injury. The claimant had an unreliable functional capacity evaluation due to a lack of consistent effort. Dr. Benafield suspected malingering and secondary gain on the part of the claimant."

The claimant in this matter is a 40-year-old female who sustained a compensable injury to her left shoulder on January 13, 2017. On October 31, 2019, a hearing was conducted by an administrative law judge in this matter with the singular issue of "whether the claimant is entitled to surgery as recommended by Dr. Arnold regarding her left shoulder."

On January 27, 2020, the ALJ issued an opinion regarding the October 31, 2019 hearing. The ALJ found in part, "The claimant failed to prove by a preponderance of the evidence that the requested medical treatment, specifically surgery recommended by Dr. Arnold, is reasonable and necessary for the treatment of her admittedly compensable left shoulder injury from January 13, 2017." On February 7, 2020, the claimant filed a Motion to Open Claim for New and Material Evidence, with that motion being denied by the ALJ on February 19, 2020.

The claimant appealed the ALJ's Opinion filed on January 27, 2020 to the Full Commission. On July 1, 2020 the Full Commission issued an order finding that the new evidence submitted by the claimant shall be submitted into the record and directed the Clerk of the Commission to establish a briefing schedule. The Full Commission also stated, "The record shall consist of the testimony and evidence submitted on October 31, 2019 in addition to the exhibits submitted by the claimant in her

motion filed February 5, 2020." I note that no motion was filed by the claimant on February 5, 2020; but a motion as described by the Full Commission's Order was filed on February 7, 2020. It is clear that a clerical error has occurred and the exhibits from the February 7, 2020 motion will be considered.

On November 20, 2020 the Full Commission issued another order in the present matter which remanded the case back to the administrative law judge for additional proceedings consistent with the Full Commission's July 1, 2020 order. That same order also allowed for the deposition of Dr. Arnold and the ability to conduct additional discovery. It should be noted that the original administrative law judge was no longer engaged in the process of adjudication for the Commission at the time of the Full Commission's November 20, 2020 order remanding the case to the administrative law judge level; as such, the case was randomly assigned to this administrative law judge.

On April 27, 2021, a hearing was conducted in this matter and the evidence set forth in the July 1, 2020 and November 20, 2020 orders of the Full Commission has been included in the new record and considered by this administrative law judge. The singular issue of whether the claimant is entitled to surgery as recommended by Dr. Arnold in regard to her left shoulder will now be addressed.

The claimant was treated for her compensable left shoulder injury and was eventually referred to Dr. Bryan Benafield. Dr. Benafield engaged the claimant in several forms of conservative treatment including prescription medications, physical therapy, and steroid injections for her compensable left shoulder injury. The claimant continued to complain of symptoms regarding her left shoulder, and on July 17, 2017, the claimant underwent an MRI without contrast of the left shoulder at the referral of Dr. Benafield. Following is a portion of that diagnostic report from that MRI which was read by Dr. Benjamin Lowery at Ozark Orthopedics:

> **FINDINGS:**
> The supraspinatus demonstrates intermediate signal consistent with tendinopathy. No tear is identified. The infraspinatus and subscapularis are intact and demonstrate normal signal. The long head biceps tendon is intact.
>
> Acromioclavicular joint is well-maintained. A type I acromion is seen. There is trace amount of fluid signal seen in the subacromial region.

> There is increased signal in the superior labrum. This could represent a tear. The glenohumeral articular cartilage is well maintained. No muscular atrophy is seen. No abnormal bone marrow signal is identified.
>
> **Impression:**
> 1. There is questionable increased signal involving the superior labrum which could represent a tear. MR arthrogram could be performed for further evaluation.
> 2. Tendinopathy of the supraspinatus.

On August 1, 2017, the claimant was again seen by Dr. Benafield. Following is a portion of that clinic note:

> **HISTORY OF PRESENT ILLNESS:** Ms. Acevedo Ayala seen after her MRI. The MRI showed questionable superior labrum problem, mild tendinopathy of the supraspinatus. No other abnormalities.
>
> **ASSESSMENT AND PLAN:** I think this does not explain the level of pain or discomfort that she is having. A lot of it seems to be coming from her neck. I think she should have her neck evaluated. We are going to refer her to Dr. Deimel for an evaluation. She is to remain on no lifting greater than 5 pounds. We will see her back in a month for a recheck.

On October 5, 2017, the claimant was again seen by Dr. Benafield who apparently was not pleased with the claimant's progress or overly concerned about the possible tear involving the superior labrum found in the claimant's July 17, 2017, left shoulder MRI. Following is a portion of that medical record:

> **HISTORY OF PRESENT ILLNESS:** The patient is seen in follow-up For the shoulder. She has basically had procedures done by Dr. Deimel That have helped minimally. She still has continued left arm pain.
>
> **ASSESSMENT AND PLAN:** I am beginning to have some worries about secondary gain and malingering. I think we should obtain a Functional Capacity Exam for reliability, validity, and then functional limitations. I still think it is likely that they are not going to need to have surgery.

The claimant underwent a functional capacity evaluation at the Functional Testing Centers in Mountain Home, Arkansas on October 24, 2017 at the recommendation of Dr. Benafield. That FCE

returned results that indicated an unreliable effort on the part of the claimant. Dr. Benafield authored a letter regarding the claimant dated November 30, 2017, as a result of her testing. The body of that letter is as follows:

> To Whom It May Concern:
>
> Ms. Acevedo Ayala had a functional capacity exam done recently. The results were sent to me. She was noted to have unreliable effort and failed the functional capacity exam for validity and effort. Therefore, there is a reason to suspect secondary gain in this individual.
>
> She is going to be released to MMI immediately with zero impairment. She is released from my care.

The claimant continued to work after her release from Dr. Benafield. However, the claimant testified that her left shoulder difficulties continued and increased. The claimant sought treatment at Advanced Orthopedic Specialists from Dr. Christopher Arnold. Dr. Arnold began to treat the claimant and ordered a second MRI of the claimant's left shoulder; this time the MRI was done with contrast at Cerner Imaging on May 2, 2018. The diagnostic report from that MRI was done by Dr. Jarrett Sanders. Following is a portion of that report:

> **FINDINGS:** Moderate supraspinatus tendinosis is seen without evidence of rotator cuff tear. The infraspinatus, teres minor, and subscapularis tendons are intact. The long head of the biceps tendon is normal. Normal muscle bulk and symmetry is maintained. No evidence of labral tear is seen. There are no chondral defects. No loose body formation. No evidence of osteonecrosis noted. A sublabral sulcus is incidentally noted.
>
> A type 1 is seen without subacromial spur. AC joint is normal. There is mild subacromial-subdeltoid bursitis. Coracoacromial and coracoclavicular ligaments are normal.
>
> **IMPRESSION:**
> 1. MODERATE SUPRASPINATUS TENDINOSIS WITHOUT EVIDENCE OF ROTATOR CUFF TEAR.
> 2. MILD SUBACROMIAL BURSITIS.
> 3. INTACT GLENOID LABRUM.

The claimant continued to treat with Dr. Arnold for her left shoulder difficulties. Following is a portion of a medical report from her June 12, 2018, visit:

> **HISTORY:** Daria Acevedo had a work injury to the left shoulder. This happened six months ago. She has had persistent pain about the left shoulder and weakness. She has had a systemic injection as well as two subacromial injections without any relief.
>
> ***
>
> **RADIOGRAPHS:** I reviewed her MRI. She may have a small tear of the superior labrum. She does have a partial supraspinatus tendon tear.
>
> **IMPRESSION:** Left shoulder pain work related secondary to probably superior labral tear, possible high-grade partial tear of the rotator cuff.
>
> **PLAN:** She has failed therapy, anti-inflammatories, systemic injection and two subacromial injections. We discussed the options with regard to repeating these, living with it versus a scope. In six months if she is not getting better and she has profound weakness on a rotator cuff testing, I think the next step would be to scope the shoulder and do a labral debridement versus biceps tenodesis and a rotator cuff debridement versus a rotator cuff repair. This is work related I think given the fact that it is chronic, she has not gotten better with the throw program and she has profound cuff weakness, this will be the next step. She will consider her options and let us know.

On March 11, 2019, Dr. Arnold authored a letter to the claimant's attorney regarding the claimant's attorney's inquiry into her left shoulder difficulties. The body of that letter follows:

> In response to your recent inquiry, as you know, she had a workers' compensation injury. She had an MRI as well as an arthrogram MRI. I reviewed the MRI. I do think she has a small tear of the superior labrum and also a has a partial supraspinatus tendon tear. Clinically, she had marked weakness with supraspinatus testing with a positive drop-arm. She also had markedly positive O'Brien indicative of either a biceps tendon tear versus a tear of the superior labrum where the biceps attaches. She has failed an extensive course of physical therapy and anti-inflammatories. I would recommend a shoulder arthroscopy, possible cuff repair, and possible biceps tenodesis. In response to your recent inquiries on my physical exam on page 3 of my clinic note dated June 12th, the range of motion was passive. I did do some strength testing as well. When I did review the MRI, I do think she has a partial tear of the supraspinatus. An answer to your final question, what indicates possible biceps tendon tear is the clinical examination with a positive O'Brien and review of the MRI with a possible superior labral tear where the biceps attaches. I hope this answered your questions.

As previously stated, this matter is on remand from the Full Commission and was originally heard at the administrative law judge level by a different administrative law judge who is no longer employed by the Commission. However, it should be noted that Dr. Arnold's March 11, 2019, letter was the most recent documentary piece of evidence that was considered by the Administrative Law Judge in the previous January 27, 2020, decision; that decision has been remanded to this administrative law judge. The original administrative law judge found in the January 27, 2020 opinion that "The claimant has failed to prove by a preponderance of the evidence that the requested medical treatment, specifically surgery recommended by Dr. Arnold, is reasonable and necessary treatment for her admittedly compensable left shoulder injury from January 13, 2017", and specifically stated: "After the release by Dr. Benafield, the claimant sought a second opinion from Dr. Arnold and got the recommendation for surgery. I have reviewed Dr. Arnold's findings subsequent to the 2018 MRI. I find, based on the balance of the evidence, the MRI results showing no tears to the left shoulder and the FCE findings - - - Dr. Benafield's opinion is more reliable."

The Full Commission in an Order dated July 1, 2020, allowed for the submission of new evidence by the claimant stating, "The record shall consist of the testimony and evidence submitted on October 31, 2019, in addition to the exhibits submitted by the claimant in her motion filed February 5 [sic], 2020." It should be noted that the Commission's file shows claimant's motion was filed February 7, 2020.

On November 20, 2020, the Commission remanded the case back to the Administrative Law Judge and included instructions to allow the deposition of Dr. Arnold and the ability to conduct additional discovery. The previous administrative law judge was unavailable so now this Administrative Law Judge will consider the additional evidence before the Commission.

On December 24, 2019, the claimant was again seen by Dr. Arnold. Following is a portion of that medical report:

> **HISTORY:** Darian Acevedo had a worker's compensation injury to her left shoulder. This is no longer in a worker's comp. I last saw her a year

ago. She has been treated with aggressive therapy, anti-inflammatories, and an injection. She has failed all this. She has pain with rest as well as with day-to-day activities.

IMPRESSION: Left shoulder pain secondary to high-grade partial tear rotator cuff, AC arthropathy, and impingement syndrome. She has failed therapy, anti-inflammatories, and corticosteroid injections. The next step would be surgical treatment. I have discussed the option of treating these, living with it versus surgical treatment. She wants it fixed. I would recommend exam under anesthesia, arthroscopy, acromioplasty, distal clavicle resection, possible cuff repair, and possible biceps tenodesis. We have discussed the relative risks and benefits. The patient elects to undergo exam under anesthesia, arthroscopy, acromioplasty, distal clavicle excision and possible arthroscopic vs. mini-open rotator cuff repair. The patient understands risks & benefits of the procedure including but not limited to infection, damage to nerves, vessels, tendons, persistent symptoms, stiffness, weakness, blood clot, heart/ lung problems, need for surgery manipulation, loss of limb, loss of life, compartment syndrome, fracture, dislocation, worsening pain/symptoms, heart attack, stroke, even death. Referred pain from neck, neurological etiology and/or pain from arthrosis would persist. A rotator cuff tear of 50% or less will be debrided; 50% or more, will be completed and repaired; a full thickness tear will be repaired. In regard to the biceps tendon, a tear of 50% or less will be debrided; a tear of 50% or more would require a tenodesis or tenotomy. The patient understands rotator cuff surgery could be career ending for overhead activity and is willing to accept this.

On January 8, 2020, the claimant underwent surgical intervention at the hands of Dr. Arnold.

Following is a portion of that operative report:

PREOPERATIVE DIAGNOSES:
1. Left shoulder partial rotator cuff tear.
2. Left shoulder possible superior labral tear with unstable biceps anchor.
3. Left shoulder acromioclavicular arthropathy.
4. Left shoulder anterior acromial spur.

Secondary diagnoses:
1. Anemia.
2. Depression.
3. Pulmonary valve stenosis.

POSTOPERATIVE DIAGNOSES:
1. Left shoulder high-grade partial tear supraspinatus, bursal side, 80%.
2. Left shoulder superior labral tear with unstable biceps anchor.
3. Left shoulder acromioclavicular arthropathy.
4. Left shoulder anterior acromial spur – impingement syndrome.

Secondary diagnoses:

1. Left shoulder high-grade partial tear supraspinatus, bursal side, 80%.
2. Left shoulder superior labral tear with unstable biceps anchor.
3. Left shoulder acromioclavicular arthropathy.
4. Left shoulder anterior acromial spur – impingement syndrome.

PROCEDURE:
1. Left shoulder arthroscopic rotator cuff repair using a double row technique.
2. Left shoulder open subpectoral biceps tenodesis.
3. Left arthroscopic acromioplasty/distal clavicle excision.

The new evidence submitted by the claimant is compelling evidence that Dr. Arnold's recommendation for surgery of the claimant's left shoulder was reasonable and necessary. When Dr. Arnold performed the surgical intervention, he found tears present as he believed they would be. This is clearly supported both through Dr. Arnold's January 8, 2020, operative report and his deposition. Following is a portion of Dr. Arnold's deposition taken on March 18, 2021, while being questioned by the claimant's attorney:

Q. Doctor, I don't know if you're aware that she had been fighting to get your treatment approved and to be able to get this surgery. We went to a hearing on October of 2019 –

A. Right.

Q. --on this. Got a decision shortly after you did the surgery, and then had appeals, and it's just – we're about to go to another one to get that surgery approved. So I say that because I'm not sure what her insurance was at that time or how she was able to come in or not come in. But, clinically, I believe you wrote a letter, and I don't know if you have a copy of that letter –

A. Yeah.

Q. -- toward the –

A. Yeah.

Q. -- end of your records, about why you believe that the tear existed. If you could glance at that and just tell me if you still believe the same thing. I believe that was dated March 11th of 2019. If you believe that those -- those thoughts and that letter were proven out by surgery.

A. Yeah, I dictated a note. I suspect that was probably going through appeal. I thought she had a small tear superior labrum

partial supraspinatus tendon tear. Clinically she was weak. Yes, I still agree with that.

Q. And there is an MRI, that I don't know if you had seen, that was dated July of 2017. Her accident was in January of 2017, so this is about six moths after the accident. And I'm going to give it to you to review.

A. Okay.

Q. And this is – it's attached unfortunately, but –

A. Yeah.

Q. -- to this page.

A. Correct. Yeah, the superior labrum is one that a lot of times gets missed on the MRI. Has a very high false negative rate. So we kind of rely on the clinical testing for a superior labrum tear. But when I spoke to her I thought that – that was – I thought that was going to be the biggest thing that was causing her pain.

Q. And does that MRI from July of 2017 seem to support your theory?

A. Correct.

It is clear that the opinion of Dr. Arnold was much more reliable in this instance than the opinion of Dr. Benafield. Dr. Arnold's opinion of derangement in the claimant's left shoulder was proven through the surgical intervention conducted. The claimant has proven by a preponderance of the evidence that she is entitled to the surgery recommended by Dr. Arnold regarding her left shoulder as it is reasonable and necessary medical treatment for her compensable left shoulder injury of January 13, 2017.

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 witness and to observe her 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 the pre-hearing conference conducted on February 4, 2021 and contained in a Pre-hearing Order filed that same date are hereby accepted as fact.

2. The claimant has proven by a preponderance of the evidence that she is entitled to surgery as recommended by Dr. Arnold regarding her left shoulder as it is reasonable and necessary medical treatment for her January 13, 2017, compensable left shoulder injury.

ORDER

Respondent #1 shall be responsible for the costs associated with the surgical intervention performed by Dr. Arnold on January 18, 2020, as it was reasonable and necessary medical treatment for her compensable left shoulder injury.

IT IS SO ORDERED.

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ERIC PAUL WELLS
ADMINISTRATIVE LAW JUDGE