

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION  
CLAIM NO. G902241**

**MARY L. DAWSON, EMPLOYEE**

**CLAIMANT**

**DOLLAR GENERAL STORE, EMPLOYER**

**RESPONDENT**

**DOLGENCORP/YORK RISK SERVICES  
GROUP, INC., INSURANCE CARRIER/TPA**

**RESPONDENT**

**OPINION FILED JANUARY 19, 2022**

Hearing before Administrative Law Judge, James D. Kennedy, on the 17<sup>th</sup> day of November, 2021, in Mountain Home, Baxter County, Arkansas.

Claimant is represented by Frederick S. Spencer, Attorney at Law, Mountain Home, Arkansas.

Respondent is represented by Jason Lee, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was conducted on the 17<sup>th</sup> day of November, 2021, to determine the issues of compensability for injuries to the neck, back, right wrist, and left shoulder, reasonable and necessary medical, vocational rehabilitation, permanent total disability, or in the alternative wage loss, plus compensation for the care given claimant by her husband Tim Dawson during the recovery period, and attorney's fees, with all other issues reserved. The parties were instructed in the Prehearing Order to submit briefs seven (7) days prior to the hearing if they were unable to reach an agreement as to the temporary total disability (TTD)/permanent partial disability (PPD) rate. At the time of the hearing, the parties agreed that the average weekly wage of the claimant was \$233.00, and the TTD/PPD rate was \$233.00/\$155.00. A copy of the Prehearing Order was marked "Commission Exhibit 1" and made part of the record without objection. The Order provided that the parties stipulated that the Arkansas Workers' Compensation Commission had jurisdiction of the within claim and that an employer/employee

relationship existed on November 22, 2018, the date of the claimed injuries in question, when the claimant sustained a compensable injury to her right shoulder, and the claimant obtained a Change of Physician to Doctor Wesley Cox, who opined that the claimant reached MMI on June 24, 2020, and assigned the claimant a three percent (3%) impairment rating to the body as a whole. There was no objection to these stipulations and the Prehearing Order was admitted into the record.

The claimant's and respondents' contentions are all set out in their respective responses to the Prehearing Questionnaire and made a part of the record without objection. The witnesses for the claimant consisted of Mary Dawson, the claimant, and her husband, Tim Dawson. Tom Lynch was called by the respondents. From a review of the record as a whole, to include medical reports and other matters properly before the Commission, and having had an opportunity to observe the testimony and demeanor of the witnesses, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. That an employer/employee relationship existed on November 22, 2018, the date of the right shoulder injury that was accepted as compensable by the respondents. At the time, the claimant earned an average weekly wage of \$602.84 a week, sufficient for a TTD/PPD rate of \$402.00/\$301.00 per week.
3. That the claimant has proved by a preponderance of the evidence that her left shoulder injury is compensable as result of the compensable work-related right shoulder injury on November 22, 2018, and she is entitled to reasonable and necessary medical for the treatment of the left shoulder.

4. That the claimant has failed to satisfy the required burden of proof that injuries to her neck, back, and right wrist are compensable work-related injuries.
5. That the claimant failed to satisfy the required burden of proof that she is entitled to permanent total disability. In addition, the claimant has failed to satisfy the required burden of proof that she is entitled to wage loss.
6. That the claimant has failed to satisfy the required burden of proof that she is entitled to § 505 vocational rehabilitation, and specifically to the payment of books and tuition to attend Ozarka College to obtain a degree in agricultural.
7. The claimant is entitled to the appropriate attorney fees pursuant to Ark. Code Ann. § 11-9-715. This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809.
8. If not already paid, the respondents are ordered to pay for the cost of the transcript forthwith.

### **REVIEW OF TESTIMONY AND EVIDENCE**

The Prehearing Order, along with the Prehearing Questionnaires of the parties, were admitted into the record without objection. The claimant submitted four (4) exhibits that were admitted without objection: (1) the deposition of the claimant, (2) the claimant's Functional Capacity Exam (FCE), (3) the claimant's medical records, and (4) College Information with a cover letter.

The parties' representatives were allowed to make opening statements. The claimant contended that on November 22, of 2018, while working for Dollar General, she suffered from a compensable injury to her right shoulder that was accepted as compensable. The claimant also contended she suffered from an injury to her neck, back, right wrist, and left shoulder at that time, and that these injuries should be found to be compensable. The claimant obtained a change of physician to Doctor Wesley Cox, who later performed surgery on the right shoulder and opined that the claimant reached MMI

on June 4, 2020, when he gave her a three percent (3%) disability rating to the body as a whole. He released the claimant from his care on June 24, 2020. The claimant had been unable to perform her work even though the respondents provided what they called light duty. Eventually, the claimant received surgery by Doctor Cox, and the left shoulder is of course now injured from over-use. The claimant's husband provided care for the claimant during this period of time, and it is contended that he is entitled to a minimum wage of \$12.00 an hour for a six (6)-week period, plus an additional 244 hours for driving the claimant to and from work, physical therapy, and doctor appointments. These matters total \$12,000.00. The claimant had to quit her employment by the 31<sup>st</sup> of December, 2019, because she could not perform her job. She reported her injury to "Brandon." She would like to obtain a degree in agriculture and attend Ozarka College. The claimant contends she is entitled to permanent total disability or at the least, wage loss plus vocational rehabilitation. The claimant received a nerve conduction study from Doctor Dylan Carpenter, which was positive, and he prescribed the claimant a wrist splint at night for carpal tunnel of the right wrist. He also mentioned the claimant had a lot of pain in her cervical spine and pain in her upper arm and thigh. She has not received the correct treatment for her back, neck, or shoulder.

The respondents opening statement provided they accepted the injury to the right shoulder as compensable and that the claimant underwent surgery for rotator cuff repair by Doctor Wesley Cox. In regard to the neck, Doctor Cox's reports made no provision for neck pain or any neck issue. She was discharged for right shoulder treatment by Doctor Cox on June 24, 2020, and was assigned a three percent (3%) rating to the right shoulder. She did not receive any additional treatment for the right shoulder or any additional

medical treatment or make any additional request for anything else until she returned to Doctor Cox in July of this year. Doctor Cox noted in his July 13, 2021, report that there was no complaint of pain in the right shoulder, and to the extent that there was an overuse problem with the left shoulder caused by issues arising from an inability to use the right shoulder, there was nothing from Doctor Cox indicating that. In regard to the right carpal tunnel issue, she had an EMG NCV report on April 4, 2019, and the work-related incident occurred in November of 2018. While the claimant was recovering from the surgery, Doctor Cox placed her under a light duty restriction, and the respondents were able to make work-related accommodations for the claimant and she worked under these restrictions from September 30, 2019, until she voluntarily quit on January 1, 2020. The respondents contend that the claimant is not entitled to vocational rehabilitation due to the fact that work was provided under the restrictions, and she voluntarily quit her job while in the course of that employment. The respondents also contend that as far as permanent and total disability, there is no evidence that she is entitled to these benefits. She was given a three percent (3%) impairment rating to the body as a whole and the FCE provided she was able to perform in the medium classification of work. The respondents also contended that Mr. Dawson is disabled and not working, and Doctor Cox never ordered any kind of healthcare or anything like that after her surgery and he is not entitled to any compensation for the claimant's care during her recovery.

The claimant was the first witness to testify. She testified she had obtained her GED, and that she worked at the General Dollar Store in Salem. (Tr. 15) She was injured while stocking dog food and she picked up a smaller box and felt her right shoulder pop. "On the day it happened, it was the shoulder, went down into my arm, and to my hands

[...] At that particular point in time, the neck didn't bother me. That came later from how I had to articulate to get things done." The claimant stated she was right hand dominant when it happened. (Tr. 16)

She stated, "Light duty is not light duty." She was required to move totes which are small, roughly about two feet wide and a foot tall more or less, but she never knew what was in them. They would be stacked seven to eight tall, and since she could not reach them with her right hand, she would have to reach them with her left hand. She was eventually given a table to stand on to reach the top totes. The totes could be light or heavy. "The other light-duty thing was where you rotate. You take things from the back of the shelf, bring them forward. That's fine when a shelf is straight across, but a lot of our shelves are tall." (Tr. 18) "And I wasn't allowed to use a step stool, wasn't allowed to use a ladder, so I had to do this on my tippy toes in most cases to try to reach back to the back of that shelf to pull that stuff forward." (Tr. 19) The claimant also testified that she would have to push a cart around and with one tote that doesn't weigh very much wasn't as difficult as when there's something on it that weighs a lot more. It weighed less than a fifty-pound bag of dog food but more than the what she was supposed to be dealing with. (Tr. 19) On October 10, 2019, Doctor Cox gave her a two (2) pound weight limit with the shoulder. The claimant stated "The main issue was, usually when I worked, it was me and maybe one or two other people. We would get what our job was on a given day. Sometimes I would get a piece of paper that would have the list of stuff. You know, it's - - They knew what my limitation was but still gave me these things to do." (Tr. 20 - 22) She stated that she let them know it was beyond her capability. The claimant denied that the respondents were following light-duty restrictions. (Tr. 23) She testified that after

the surgery and after Doctor Cox provided her the limitation of no lifting, pushing or pulling greater than two (2) pounds, her pain was moderate to severe, depending on how long she worked. (Tr. 23) She was working and going to physical therapy, and when she asked for additional help, she was unable to get any because everyone else was busy doing their jobs. When questioned about notifying her employer about problems with her left shoulder due to how she had to use it, she testified, “I know it was mentioned to the manager at the time.” (Tr. 24)

The claimant testified she initially saw Doctor Carpenter and from the surgery on, saw Doctor Cox, an orthopedic surgeon. (Tr. 25) Every time she went to the doctor, she stated she would give the restrictions to her manager. She was talking about the problems she had with the other parts of her body, the other shoulder, the right wrist and the hand, and the problems with her neck and back. She testified the right wrist problem started the same day as the shoulder. “The doctor said he could only do - - he was only allowed to look at one thing at a time.” (Tr. 26) The respondents paid for the shot in the right wrist, but when the test came back, they said that they weren’t going to pay for it. In regard to the neck and the back, Doctor Cox said the same thing. (Tr. 27) The claimant testified she told Brandon, the Assistant Manager, about all of her issues. (Tr. 28) The claimant denied that there was a Form P or poster on the wall telling her what to do. (Cl. 30)

The claimant was initially sent to Doctor Carpenter, who ordered a nerve conduction study of her right hand, and she testified she told Doctor Cox about her neck and other shoulder. (Tr. 31) She stated that after surgery, she was instructed to use ice two (2) hours on and one (1) hour off, twenty-four (24) hours a day. She did this for six

(6) weeks because she wasn't supposed to see the doctor for six (6) weeks. Her husband would put the ice on every two (2) hours. The claimant admitted that she was requesting the payment of six (6) weeks of work for her husband, for eighteen (18) hours a day at the rate of \$12.00 an hour for the care her handicapped husband provided. He also would have to drive her to physical therapy and doctor appointments which totaled 244 hours, since physical therapy was in Fayetteville, and it was four (4) hours there and four (4) hours back to Salem. The claimant also testified she wanted to obtain an agricultural degree from Ozarka College. (Tr. 32, 33) In regard to her right shoulder, the more she uses it and depending on how she uses it, the more it hurts. (Tr. 34) The claimant also testified she was able to be productive about four (4) to five (5) hours a day. (Tr. 35) Additionally, she stated she does not swing her arm correctly and has to remember to swing it or keep it moving. (Tr. 36) She has been unable to perform an income-producing job since the injury. In regard to her neck and upper back, the claimant stated her neck pops now like gravel is in there and her back is the same. The claimant denied having any physical issues prior to the Dollar General injury. She did admit that she currently feeds her rabbits on her farm. (Tr. 38, 39)

The claimant testified that she would like to attend Ozarka College so she could return to work. (Tr. 41) The claimant also requested she be allowed to return to Doctor Cox for her other shoulder and if that is not allowed and vocational rehabilitation is not allowed she be found permanently and totally disabled. (Tr. 42)

Under cross examination, the claimant was questioned about working on her home. She stated she had been assigned the job of painting the living room by brushing and rolling on the paint. (Tr. 47) Additionally, her husband had poured a step in the living



room due to the fact that the room was a converted carport, and it was her job to tile the step. She also stated she was making the molding with a router but she was having a difficult time holding onto the wood, so she was removed from that job. (Tr. 48, 49)

The claimant was also questioned about living on twenty acres of land with her animals. She admitted she loaded up her side by side with the rabbit's water and feed about every day, driving it left-handed, to take care of the rabbits. She also admitted to driving the tractor but stated she did not drive it as much as she used to. She also admitted she had a garden and picked some of the vegetables. She also admitted to assisting on the building of a chicken house after the date of the accident. (Tr. 51 - 53) She also admitted to the use of a drill "for a certain amount of time, yes" and that she had not had a job since the Dollar General job, but that she had applied for one. (Tr. 54) The claimant admitted she had officially applied for one (1) job since the Dollar General accident. (Tr. 55)

The claimant testified that she believed that she had stated in her deposition that she wanted to return to Doctor Cox to determine what restrictions she would be placed on before applying for jobs and that she had returned to see Doctor Cox this past July. She was questioned about the July report not providing for any work limitations. The claimant responded that she had read the report. (Tr. 56) The claimant was also questioned about a medical report from Doctor Cox that was dated October 17, 2019, which had nothing in the report that indicated she had mentioned to Doctor Cox issues about her light duty restrictions. She stated, "Just because I brought something up with him, everything didn't make it into his report." (Tr. 57) She stated Doctor Cox never discussed any additional restrictions. (Tr. 58) The claimant testified that only her left

shoulder was discussed with Doctor Cox this past July, because he stated he could not discuss anything else. In regard to previous work, she admitted that she had previously worked for a church and also for a lawyer. She also stated that Doctor Cox provided that he would start off treating her left shoulder just right her right. (Tr. 59, 60)

In regard to Doctor Cox's instructions about placing ice on her shoulder every two (2) hours after the surgery twenty-four (24) hours a day, seven (7) days a week, the claimant testified that was exactly what the paper said. "We did it for 24 hours a day, seven days a week, for six weeks." (Tr. 60) In regard to home healthcare, the claimant stated that Doctor Cox said that she would need help, but did not specifically say who was supposed to provide it. (Tr. 61, 62)

On redirect, the claimant was questioned about the Functional Capacity Evaluation and stated it took a couple of hours. She stated she could pick up twenty (20) pounds with one shoulder and fifteen (15) with the other and was tired after the evaluation. (Tr. 63)

At this time, the claimant called Tim Dawson, the husband of the claimant. (Tr. 65) He testified he had been with the claimant since 2013, and she came home to him after the incident at Dollar General. She had lost the use of her right hand, had a loss of strength, and control, and that pain went down her right arm, with pain in her right shoulder and that her arm would turn blue. (Tr. 65) She would come home and try some Tylenol or Ibuprofen, which most of those upset her stomach greatly. After returning from her Functional Capacity Exam, she was very sore. (Tr. 66) He stated that she probably works on the farm an hour or two a day at best, depending on the control and strength required for the job. She was unable to work with the router in regard to the wood-work

to her full ability. “She cannot do what she did four years ago. And what she can do today, maybe an hour, hour-and-a half, in that time frame.” (Tr. 68) She has difficulty manipulating the tractor due to needing both hands and arms being fully functional to control the tractor and the lift. It is the same story with the side by side since it also does not have power steering. (Tr. 69)

In regard to post surgery care, he testified that they had received a packet for post-surgery care which specified two (2) hours on and then one (1) hour off. “Now, she could not get up and do anything else, so I’m the one having to take care of her, the house, the yard, and the animals, get her to and from all her appointments [...] I had to drive her full time after the surgery.” (Tr. 69, 70) He stated that he was requesting minimum wage for the time he put in taking care of the claimant. He agreed that he had put in forty-two (42) days at eighteen (18) hours a day, \$12.00 an hour, for a total of \$9,072.00. In addition, there were 244 hours of drive time to and from work, physical therapy, and doctor’s appointments. (Tr. 71) He also testified he had observed the claimant develop problems with her left shoulder since she has had to overcompensate for the loss of use of her right shoulder. (Tr. 72) “She’s over-exerted the left, which is pulling in her neck and in her back, I believe, and I’m not a doctor - -.”

Under cross examination, Mr. Dawson, admitted he did not keep “detailed daily notes” of the claimed work. He further testified he had lumped driving his wife to work, and doctor’s appointments and physical therapy is all separately, “but it was all lumped together in one total.” (Tr. 74) At this time, the claimant rested.

The respondents then called Mr. Tom Lynch, who testified he had worked for Dollar General for twelve (12) years, and was currently the District Manager for twenty-five (25)

stores. He further stated he was familiar with the claimant as an employee. (Tr. 76) In regard to the restrictions, he testified they need to live with the guidelines that were given. If the restrictions provided for a two (2)-pound lifting limit, that would be the restrictions that we would live within. “We want to try to go ahead and try to give the hourly associate up to 24 hours if they’re in a part-time position or 30 hours if they’re in a full-time position. Most of the time, it would be on stuff - - like we call it recovery, which is taking items forward to the end of the shelf so the isles look nice and clean. We do not want any employee to ever get hurt any further that they currently were, so.” He was aware that the claimant was placed on light-duty restrictions. (Tr. 77, 78) He further testified that the claimant voluntarily quit her job, on December 31 of 2019 or 2020. (Tr. 79)

He additionally stated every store has two (2) step stools and a yellow platform that he called a SpongeBob as well as the Federal and State Posters on what to do in case of injury. (Tr. 80)

Under cross examination, Mr. Lynch testified the posters were in the breakroom, along with his phone number, his boss’s number, and the nurse’s number. He also stated that he attempts to work in each of the twenty-five (25) stores, two (2) hours each month. (Tr. 81) Each store has between eight (8) to twelve (12) employees for a total of 220 employees currently. He admitted he did not know the claimant personally. (Tr. 82) He also admitted he did not have any personal knowledge of “anything she was doing or having to do or anything that she was told by the assistant manager”. (Tr. 83)

The claimant’s first exhibit consisted of her deposition, which consisted of ninety (90) pages, and was taken on September 16, 2020. In the deposition, the claimant admitted her husband was receiving social security disability benefits, due to a back

injury. (Cl. Ex. 1, P. 9) In regard to their small farm, she stated that her husband does the mowing, bush hogging and weed eating, and when he can't do it, "it doesn't get done." (Tr. 10) She also testified her primary care doctor was Doctor Frank Bivens of Heber Springs. (Cl. Ex. 1, P. 16) The claimant admitted medications which consisted of lisinopril, propranolol, one that starts with an A to keep her blood pressure down, clozapine, and a daily aspirin. (Cl. Ex. 1, P. 19 - 21) In regard to pain medication, she stated that the only thing that she can take without upsetting her stomach was aspirin. (Cl. Ex. 1, P. 22) The claimant denied seeing any other doctors outside of the workers' compensation issues, with the exception of Doctor Bivens. She admitted to being sent to Katie Stucker, nurse practitioner, due to the workers' compensation claim. (Cl. Ex.1, P. 24) Besides the claimant's garden, she admitted she had a green house, where she started some of her plants and where she grows her miniature tomatoes and normally keeps her rabbits, unless she was cleaning out their area. She also admitted that sometimes she could drive the tractor or the side by side and sometimes she could not. (C. Ex. 1, P. 27 – 29) She thought that it had been a month since she had driven the tractor, but admitted she drove the side by side every day. (Cl. Ex. 1, P. 30) She also testified that the garden is at least a third smaller after the accident, and the plants are now raised in buckets or tires, and not in the tilled ground like prior to the accident. (Cl. Ex. 1, P. 32) In regard to applying for work, the claimant admitted she had talked to a friend at Baxter Labs in Mountain Home and to an Inn in Salem, but had not officially applied. (Cl. Ex. 1, P. 33)

In regard to the accident, the claimant testified she could not tell where exactly any particular person was at the time of the accident which happened at the back of the store. (Cl. Ex. 1, P. 44) The claimant also admitted to saying hi to Tom Lynch about a month

prior to quitting, when he was in the store assisting in getting the store ready for an inspection. (Cl. Ex. 1, P. 47) The claimant contended that Shekiahna made a statement about the accident but that she did not know what the statement was and Shekiahna was harassed by management in regard to the statement. The claimant admitted she did not know what somebody else was told. (Cl. Ex. 1, P. 49 – 51) She contended that a Cody Harlow, who quit a few weeks after her accident, was also instructed to lie about how the injury took place. However, when asked specifically if Cody Harlow had been asked by Tom Lynch and store manager Megan Flowers to lie about when the injury took place, the claimant responded, “He did not specifically tell me that, no.” (Cl Ex. 1. P 53, 54) The claimant was questioned about former employees or current employees telling her that Tom Lynch and Megan Flowers tried to get Cody to change his story and the claimant responded as follows:

When I first went in to tell Megan about the accident and that I needed the phone number to call, she said that I could not call and report the accident until she had the opportunity to talk with Tom Lynch. She was on the phone with that man all day. I could not leave at the end of my shift because she still did not have - - she still hadn't given me that phone number yet. She had been on the phone with Tom Lynch all day, so part of that is probably inference.

Because she did not mention me having to lie about when my accident happened until after she got off the phone with Tom Lynch.” (Cl. Ex. 1, P. 55)

The claimant also contended that customers would come up to her and ask her about her workers' compensation claim (Cl. Ex. 1, P. 58) In regard to her left and right shoulder, the claimant stated she had could not recollect having any problems with them prior to November 2018. She also testified she had no recollection of ever being diagnosed with carpal tunnel prior to November 2018. (Cl. Ex. 1, P. 59)

The claimant testified the accident occurred on Thanksgiving and she made a noise and met Brandon coming down the aisle to her. “I don’t know what had happened and he took me out from underneath the camera into the employee break room and had me sit down for a few.” Cody Harlow and Shekiahna were there. (Cl. Ex. 1, P. 60) In regard to how she hurt herself, the claimant stated that she picked up a box from the roll-tainer and it was like, “Somebody had stabbed me in my shoulder and the pain ran all the way down into my hand and all the way back up and my shoulder hurts all the way down through.” She did not know how much the box weighed. (Cl. Ex. 1, P. 61) The claimant stated that she thought that she finished her shift that day and returned the next day. On the date of the injury, she hurt all day and was placed on light duty the following day. After a couple of weeks, the claimant stated she was still hurting, and they were not doing anything. She told Megan and Brandon she was still having problems with her shoulder and wrist, and she was taken off of the register because she could not feel money anymore, and was returned to freight. (Cl. Ex. 1, P. 62 - 64) The claimant denied knowing what to do in regard to her claim, but found out later. She also denied that the poster that explained what to do was hanging in the store. (Cl. Ex. 1, P. 65) She stated she told Megan about two (2) or three (3) weeks later she needed to go to the doctor. (Cl. Ex. 1, P. 67)

In regard to the claimant’s right shoulder, she testified that it had improved but was still not where it used to be. (Cl. Ex. 1. P. 70) “Everything is altered because of the shoulder. I carry more left-handed because I still don’t have the weight capabilities of the right.” (Cl. Ex. 1, P. 71) “My left shoulder is giving me problems because I’m overworking it.” In regard to her right wrist, “I can’t sew anymore because I can’t feel the needles.” (Cl.

Ex. 1, P. 73) The claimant was questioned about asking for home health, and she stated she did not believe that she made the request personally, because she was medicated, but she would have to check her messages. (Cl. Ex. 1, P. 75)

The claimant's Exhibit Two consisted of a Functional Capacity Evaluation that occurred on July 7, 2020. A reliable effort was put forth, with 52 of 52 measures within the expected limits. It provided the claimant demonstrated an occasional bi-manual lift/carry of up to thirty-five (35) pounds and an ability to perform lifting/carrying of up to twenty (20) pounds on a frequent basis. She also exhibited an occasional RUE lift of fifteen (15) pounds and a LUE lift of twenty (20) pounds when lifting unilaterally from knuckle to shoulder level. She completed the reaching with each hand at an above normal pace with normal movement patterns and no outward pain indicators. The report additionally provided that the claimant exited the clinic at the same pace as when she entered earlier in the day. (Cl Ex. 2, P. 1 – 20)

The claimant's Exhibit Three consisted of forty-five (45) pages of medical records. The MRI report in regard to the right shoulder, which was dated January 7, 2019, provided that there was a small low-grade undersurface tear of the anterior supraspinatus tendon. No full or partial-thickness tear of the rotator cuff was seen. No definite labral tear was shown. Mild tendinopathy of the supraspinatus tendon was seen. (Cl. Ex. 3, P. 1)

The claimant presented to Doctor Carpenter on January 8, 2019, and the report provided that the claimant felt her shoulder give while picking up stock. She appeared with an MRI on a disc. She was assessed with carpal tunnel of the right wrist, arthritis of the right acromioclavicular joint, and cervical myofascial pain syndrome. (Cl. Ex. 3, P. 2 – 5) A follow-up dated February 12, 2019, stated the claimant provided that the motion



and weakness of the shoulder was improving with the weakness localized to the right shoulder, arm, and hand. (Cl. Ex. 3, P. 6 – 8) The claimant returned to Doctor Carpenter on March 26, 2019. This report provided the claimant returned for an evaluation of the right shoulder and she stated that the therapy was helping with the range of motion but was not helping with the pain. She was having some arm and hand numbness and tingling with her skin turning blue. (Cl. Ex. 3, P. 9 - 12)

An EMG & NCV Evaluation occurred on April 4, 2019, which provided for a moderate median nerve compromise at the wrist on the right involving demyelination of sensory and motor fibers with no electrophysiologic evidence suggestive of radiculopathic axon loss process across the C5–T1 nerve roots on the right, no evidence of a brachial plexus axon loss process on the right, and no ulnar nerve compromise at the wrist or the elbow on the right. (Cl. Ex. 1, P. 13 – 16) The claimant returned on April 11, 2019, for a follow up, which provided the claimant had not found any relief. The report further provided the claimant received a right shoulder and right carpal tunnel injection at that time. (Cl Ex. 3, P. 17 – 20)

On June 11, 2019, the claimant made an initial visit to Doctor Wesley Cox, after a Change of Physician, with the chief complaint being right shoulder pain. The report provided that the quality of the MRI that was provided was poor, and that the RTC tear that she had could be very painful. (Cl Ex. 3, P. 21 – 24) On August 19, 2019, Doctor Cox performed surgery for a right shoulder rotator cuff tear and for right shoulder pain. (Cl. Ex. 3, P. 25 – 26) A work/school note was provided on August 26, 2019, which stated the claimant should not use her right arm for five (5) weeks. (Cl. Ex. 3, P. 27) Later, on September 30, 2019, the work/school note appeared to provide that the claimant was

released to return to work with no lifting or pulling greater than two (2) pounds below the shoulder level and with nothing above the shoulder level. (Cl. Ex. 3, P. 28) A short time later on October 7, 2019, another work/school note provided for the same instructions. (Cl. Ex. 3, P. 29)

On October 7, 2019, the claimant presented to Doctor Cox for a six (6) week follow-up following the surgery. The report provided that the right shoulder pain was better with no throbbing. A prescription for physical therapy was given to improve the range of motion. (Cl. Ex. 3, P. 30, 31) On December 3, 2019, the claimant again returned to Doctor Cox and the report provided that the claimant was just three (3) months into recovery. The report further provided it was common to have stiffness at this point and the claimant should continue range of motion exercises and should start strengthening exercises. (Cl. Ex. 3, P. 33, 34) On June 24, 2020, the claimant again returned to Doctor Cox for her ten (10)-month evaluation. The report provided that the recovery of the right shoulder had been a very slow process but that the right shoulder looked excellent today and placed her at maximum medical improvement (MMI). The report also mentioned the claimant had been complaining for a while about her left shoulder bothering her and he opined that “this is likely secondary to overuse and compensation given the longstanding recovery on her right shoulder.” He also mentioned that he was unsure whether the left shoulder had been approved as a workers’ compensation injury. (Cl. Ex. 3, P. 35, 36)

An impairment rating was obtained on July 7, 2020. The report provided that “each shoulder functional unit has been taken into consideration in the impairment charts” and rated the claimant at a three percent (3%) impairment rating to the body as a whole. (Cl. Ex. 3, P. 37 – 41)

On January 14, 2020, Doctor Cox issued a letter addressed to the claimant's attorney. The letter provided as follows:

I do remember issues with regard to their transportation due to the size of the truck and Ms. Dawson not being able to drive a dually truck while in a sling safely, and her husband Tim was having to take off work to help with some of these issues. With regard to compensation for Mr. Dawson's time off from work, it is difficult to provide a specific quantity that is typical for a surgery recovery of this nature. Certainly in the days and weeks following surgery, many patients need fairly significant help, certainly not around the clock care after the first several days but help as needed with some basics of daily life, meal preparation, grooming and so forth. In the weeks following her surgery, I cannot be certain as to how much time is typically required as many patients require very little care and live independently after surgery of this nature after the first week or two. I do think it certainly reasonable while she was in a sling for a total of six weeks that there may be periods during each day where she needed transportation and activities of daily living, certainly not around the clock care. I am speculating this would be in the hour to two hour a day range but again, this is a loose estimation." (Cl. Ex. 3, P. 42)

The claimant presented to UAMS on July 13, 2021, for biceps tendinitis of the left upper extremity. The claimant provided that the left shoulder pain began after her right shoulder injury. "Her exam and story today is consistent with biceps tendinitis and SLAP pain." The report provided that the claimant's options were discussed, and she stated that she wanted to try physical therapy exercises. (Cl. Ex. 3, P. 43, 44)

A letter was issued by Doctor Cox, dated October 29, 2021, which provided that it was his belief within a reasonable degree of medical certainty that the claimant's current problems with her left shoulder were a result of the injury on November 22, 2018, to her right shoulder, and that the medical treatment to her left shoulder is a compensable consequence of the injury on November 22, 2018. (Cl. Ex. 3, P. 45)

The claimant's Exhibit Four consisted of five (5) pages in regard to her vocational rehab in regard to obtaining a degree in agriculture from Ozarka College. The documents

provided that the degree in question is a two (2)-year degree and provides that courses that are required. (CI Ex. 4, P. 1 – 5)

## **DISCUSSION AND ADJUDICATION OF ISSUES**

### Compensability and Medical

In regard to the primary issue of compensability, the claimant has the burden of proving by a preponderance of the evidence that she is entitled to compensation benefits for injuries to her neck, back, right wrist, and left shoulder under the Arkansas Workers' Compensation Law. In determining whether the claimant has sustained her burden of proof, the Commission shall weigh the evidence impartially, without giving the benefit of the doubt to either party. Ark. Code Ann. § 11-9-704. Wade v. Mr. Cavanaugh's, 298 Ark. 364, 768 S.W.2d 521 (1989). Further, the Commission has the duty to translate evidence on all issues before it into findings of fact. Weldon v. Pierce Brothers Construction Co., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The claimant, testified that she was working at the back of the store on Thanksgiving, when she picked up a box from the roll-tainer and it was like, "Somebody had stabbed me in my shoulder and the pain ran all the way down into my hand and all the way back up and my shoulder hurts all the way down through." She did not know how much the box weighed. She thought she finished out the work day and then returned the following day, where she worked light duty. The right shoulder injury was accepted as a compensable work-related injury. She was eventually sent to the doctor for her right shoulder, and after obtaining a Change of Physician, received right shoulder surgery by Doctor Cox.

The claimant contends that at the time of the work-related injury to her right shoulder, she also injured her neck, back, right wrist and left shoulder. Compensable injuries must be established by medical evidence supported by objective findings and medical opinions addressing compensability must be stated within a degree of medical certainty. Smith-Blair, Inc. v. Jones, 77 Ark. App. 273, 72 S.W.3d 560 (2002). Speculation and conjecture cannot substitute for credible evidence. Liaromatis v. Baxter County Regional Hospital, 95 Ark. App. 296, 236 S.W.3d 524 (2006). More specifically, to prove a compensable injury, the claimant must establish by a preponderance of the evidence: (1) an injury arising out of and in the course of employment; (2) that the injury caused internal or external harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102 (16) establishing the injury; and (4) that the injury was caused by a specific incident and identifiable by time and place of occurrence. If the claimant fails to establish any of the requirements for establishing the compensability of the claim, compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Further, it is noted that a claimant is not required in every case to establish the casual connection between a work-related incident and an injury with an expert medical opinion. See Wal-Mart Stores, Inc. v. VanWagner, 337 Ark. 443, 990 S.W.2d 522 (1999). Arkansas courts have long recognized that a causal relationship may be established between an employment-related incident and a subsequent physical injury based on 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. Hail v. Pitman Construction Co. 235 Ark. 104, 357 S.W.2d 263 (1962)

The claimant testified that she was using her left shoulder more due to her right shoulder injury and her later surgery to her right shoulder and this additional use is found to be believable. The ten (10)-month follow-up report by Doctor Cox on June 24, 2020, mentioned that the recovery of the right shoulder was a slow process but that the right shoulder looked excellent at the time of the report. The report also mentioned that the claimant had been complaining a while about her left shoulder bothering her. Doctor Cox opined that “this is likely secondary to overuse given the longstanding recovery on her right shoulder.” He later signed a letter dated October 29, 2021, which provided that it was his belief within a reasonable degree of medical certainty the claimant’s current problems with her left shoulder were a result of the injury on November 22, 2018, to her right shoulder, and that the medical treatment to her left shoulder is a compensable consequence of the injury on November 22, 2021. It is additionally noted that the claimant went to UAMS on July 13, 2021, and that report provided the claimant presented with left shoulder pain which began after her right shoulder injury. “Her exam and story today is consistent with biceps tendinitis and SLAP Pain.” Here, there is no alternative but to find that the claimant has satisfied these requirements and it is found that there is a causal relationship between the work-related injury on November 22, 2018, to the right shoulder and the injury to her left shoulder, and that the left shoulder injury is compensable.

In regard to medical treatment, the employer shall promptly provide for an injured employee such medical treatment as may be reasonable in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The employee has the burden

of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Stone v. Dollar General Stores, 91 Ark. App. 260, 209 S.W.3d 455 (2005) What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 A.W.2d 750 (1984)

That based upon the above, it is found that the claimant has satisfied the required burden of proof that the injury to the left shoulder is a compensable consequence of the work-related incident on November 22, 2021, and that the claimant is entitled to the reasonable and necessary medical treatment for the left shoulder injury.

In regard to the claimed injuries to the neck, back, and right wrist, the claimant received a EMG & NCV evaluation on April 4, 2019, which provided for a moderate medical nerve compromise at the wrist on the right involving demyelination of sensory and motor fibers with no electrophysiologic evidence suggestive of radiculopathic axon loss process across the C5–T1 nerve roots on the right, no evidence of a brachial plexus axon loss process on the right, and no ulnar nerve compromise at the wrist or the elbow on the right. This finding, along with little to no medical mention in regard to the neck, back and right wrist, and applying the applicable law as mentioned above, leaves no option but to find that the claimant has failed to satisfy the required burden of proof that the claimed injuries to her neck, back and right wrist are compensable.

#### Permanent Total Disability and Wage Loss

Permanent total disability means the inability, because of a compensable injury or occupational disease to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). The burden of proving the inability to earn any

meaningful wages is on the employee. Ark. Code Ann. § 11-9-519(e)(2). Permanent benefits may be awarded only if the compensable injury was the major cause of the disability impairment. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). Here the only evidence produced at the hearing that the claimant is unable to earn meaningful wages as a result of the compensable injuries was the testimony of the claimant and her husband. The treating physician provided that the claimant reached MMI and assigned only a three percent (3%) disability rating to the body as a whole. The Functional Capacity Evaluation provided that the claimant was capable of lifting a fairly significant amount of weight. The claimant admitted to gardening, painting, feeding her rabbits, occasionally driving a tractor, and nearly daily driving her side by side. It is noted that no medical provider indicated that the claimant is unable to work. The claimant's compensable injury has not caused permanent and total disability. Here the claimant has failed to prove by a preponderance of the evidence that she is unable to earn meaningful wages as a result of the compensable injury and consequently she is not entitled to permanent total disability. See Greenfield v. Conagra Foods, 210 Ark. App. 292 (2010).

In the alternative, the claimant contended she is entitled to wage loss. Wage loss is the degree to which the compensable injury has affected the claimant's earning capacity. The extent of disability is a question of fact for the Commission. Cross v. Crawford County Memorial Hospital, 54 Ark. App. 130, 923 S.W.2d 886 (1996). The Commission is charged with assessing wage loss on a case-by-case basis. Factors to be considered in assessing wage loss include the claimant's age, education, post-injury income, work experience, medical evidence, and other matters which may reasonably be expected to affect the worker's future earning power such as motivation, *bona fide* job



offers, credibility or voluntary termination. Glass v. Edens, 233 Ark 786, 346 S.W.2d 685 (1961); Oller v Champion Parts Rebuilders, 5 Ark. App. 307, 635 S.W.2d 276 (1982); Hope School District v. Charles Wilson, 2011 Ark. App. 219, 382 S.W.3d 782 (2011). The award of wage-loss is not a mathematical formula but a judicial determination based on the Commission's knowledge of industrial demands, limitations, and requirements. Hensen v. General Electric, 99 Ark. App. 129, 257 S.W.3d 908 (2008).

Pursuant to Ark. Code Ann. § 11-9-522(b)(1), when a claimant has an impairment rating to the body as a whole, the Commission has the authority to increase the disability rating based upon wage loss factors. The wage loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. Emerson Electric v. Gaston, 75 Ark. App. 232, 58 S.W.3d 848 (2001). Objective and measurable physical findings which are necessary to support a determination of "physical impairment" or anatomical disability are not necessary to support a determination of wage loss. Arkansas Methodist v. Adams, 43 Ark. App 1, 858 S.W.2d 125 (1993). To be entitled to any wage loss disability benefit in excess of a permanent impairment, a claimant must prove that he or she sustained a permanent physical impairment as a result of a compensable injury. Walmart Stores, Inc. v. Connell, 340 Ark. 475, 10 S.W.3d (2000).

Here the claimant suffered a work-related compensable injury to her right shoulder and the right shoulder injury led to work related left shoulder injury. The claimant was given a three percent (3%) disability rating to the body as a whole. The claimant has worked in the past at an attorney's office, as well as a church. She also has worked to repaint part of home, works in her garden, occasionally drives a tractor, and regularly drives a side by side to feed her rabbits, although she testified that her injuries inhibited

her ability to work. The claimant also admitted that she had talked to two (2) people about returning to work, but had apparently not actively pursued a new job. After reviewing the evidence impartially, it is found that the claimant has failed to satisfy the required burden of proof that she is entitled wage loss determination.

#### Section 505 Rehabilitation Benefits

In regard to the benefits as spelled out in Ark. Code Ann. § 11-9-505, the claimant's treating physician performed surgery on the right shoulder on August 19, 2019. Doctor Cox opined that the claimant could return to work on September 30, 2019, with no lifting greater than two (2) pounds. A second work/school release was issued on October 7, 2019, which provided the same restrictions. The claimant quit her employment on December 31, 2019, contending she quit due to the fact the respondents were not providing the light duty work that was required, commensurate with her injuries. The respondents contended that they were providing the appropriate light duty and the claimant quit. On June 4, 2020, Doctor Cox opined that the claimant reached MMI in regard to her right shoulder injury, and a three percent (3%) impairment rating to the body as a whole was issued on July 7, 2020. No additional medical reports were provided by the claimant in regard to any additional light duty restrictions, and for that matter, medical reports providing that the claimant could return to work. However, it is noted that it is the claimant's burden of proof in matters such as this.

Ark. Code Ann. § 11-9-505 provides that the employee must prove by a preponderance of the evidence that she sustained a compensable injury, that suitable employment within her physical and mental limitations were available with the employer, and that the employer had refused to return her to work. See Torrey v. City of Fort Smith,

55 Ark. App. 226, 934 S.W.2d 237 (1996). Here, the claimant originally suffered a work-related injury to her right shoulder on November 22, 2018, and this was accepted as compensable, with surgery being performed on her right shoulder on August 19, 2019. The claimant was allowed to return to light duty work on or about September 30, 2019. The claimant continued to progress in her healing process, reaching MMI on June 4, 2020, with only a three percent (3%) disability rating to the body as a whole.

Several requirements must be met to satisfy the act. The employee must prove by a preponderance of the evidence that she sustained a compensable injury, that suitable employment which is within her physical and mental limitations is available with the employer, that the employer refused to return her to work, and that the employer's refusal to return the claimant to work is without reasonable cause. See Torrey v. City of Fort Smith, *supra*. It is also important to note that the claimant's testimony is never considered uncontroverted. Lambert v. Gerber Products Co., 14 Ark. App. 88, 684 S.W.2d 842 (1985).

Here the claimant apparently worked a type of light duty from on or about September 30, 2019, to the end of the year, a period of three (3) months. The claimant made progress in regard to her healing process during this period of time, based upon the medical record. Testimony that appropriate work was made available for the claimant is found to be convincing, since the claimant worked for three (3) months. The claimant did not attempt to return to work after the date of December 31, 2019. Without any attempt by the claimant to return to work after the date of December 31, 2019, it cannot be said that the respondents refused to return the claimant to work. See Burke v. Arkansas Dept. of Correction, 2018 Ark. App. 231, 547 S.W.3d 745 (2018). That based

upon the above, there is no alternative but to find that the claimant has failed to satisfy the burden of proof required for 505 benefits.

Claimant's Husband's Request for Reimbursement

The claimant contends her husband provided care for her after her surgery when he placed ice on her shoulder every two (2) hours, twenty-four (24) hours a day, seven (7) days a week, for a six (6) week period, following the instructions of Doctor Cox, and that consequently, he is entitled to be reimbursed for this. In addition, the claimant contends that her husband is entitled to be reimbursed for driving the claimant to doctor appointments and physical therapy, and that these matters total \$12,000.00.

In regard to the claimed twenty-four (24) hour a day nursing care for six (6) weeks, it is found surprising that the claimant did not contact her surgeon or his nurse in regard to the placement of ice on the claimant's shoulder every two (2) hours for six (6) weeks. It is also noted that Doctor Cox did not order home health care. In addition, although Doctor Cox noted that the claimant's vehicle was a large dually pickup in his letter of January 14, 2021, that he addressed to the claimant's counsel and the letter referred to the claimant's conclusion about being unable to drive the vehicle safely, no medical records confirmed this. Additionally, the claimant admitted to occasionally driving a tractor and driving a side by side nearly every day. No specific records were maintained about the actual trips. Consequently, there is no alternative but to find that the claimant has failed to satisfy the required burden of proof, that her husband is entitled to be reimbursed the sum of \$12,000.00.

The claimant and her attorney are entitled to the appropriate legal fees as spelled out in Ark. Code Ann. § 11-9-715.

After weighing the evidence impartially, without giving the benefit of the doubt to either party there is no alternative but to make the following findings:

1. It is found that the claimant has satisfied the required burden of proof that the injury to her left shoulder is a compensable consequence of the work-related incident on November 22, 2021, and she is entitled to the reasonable and necessary medical treatment for the left shoulder injury.
2. The claimant failed to satisfy the required burden of proof that injuries to her neck, back, and right wrist are compensable work-related injuries.
3. The claimant has failed to prove by a preponderance of the evidence that she is unable to earn meaningful wages as a result of the compensable injuries and consequently she is not entitled to permanent total disability. It is also found that the claimant failed to satisfy the required burden of proof that she is entitled to a wage loss determination.
4. There is no alternative but to find that the claimant failed to satisfy the burden of proof required for § 505 benefits.
5. There is no alternative but to find that the claimant failed to satisfy the required burden of proof that her husband is entitled to be reimbursed the sum of \$12,000.00.
6. The claimant is entitled to attorney fees as spelled out by the Arkansas Workers' Compensation Act. This award shall bear interest at the legal rate pursuant to Ark. Code Ann. § 11-9-809. If not already paid, the respondents are ordered to pay the cost of the transcript forthwith.

**IT IS SO ORDERED.**

---

**JAMES D. KENNEDY**  
**Administrative Law Judge**