

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H103183

BILLY J. JOHNSON, EMPLOYEE

CLAIMANT

**FRITO-LAY, INC.,
EMPLOYER**

RESPONDENT

**INDEMNITY INS. CO. OF
NORTH AMERICA, CARRIER**

RESPONDENT

OPINION FILED NOVEMBER 17, 2021

Hearing before Administrative Law Judge O. Milton Fine II on September 17, 2021, in Jonesboro, Craighead County, Arkansas.

Claimant represented by Mr. George H. Bailey, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Mr. Lee J. Muldrow, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 17, 2021, the above-captioned claim was heard in Jonesboro, Arkansas. A pre-hearing conference took place on July 12, 2021. The Prehearing Order entered on that date pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

The parties discussed the stipulations set forth in Commission Exhibit 1. They are the following, which I accept:

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1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The employer/employee/carrier relationship existed at all relevant times, including March 7, 2021, the date of the alleged injury.
3. Respondents have controverted this case in its entirety.
4. Claimant's average weekly wage entitles him to the maximum compensation rates.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. Following the amendment of the third issue, the following were litigated:
 1. Whether Claimant sustained a compensable injury to his left shoulder by specific incident.
 2. Whether Claimant is entitled to reasonable and necessary medical treatment.
 3. Whether Claimant is entitled to temporary total disability benefits from March 7, 2021, through August 15, 2021.
 4. Whether Claimant is entitled to a controverted attorney's fee.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following amendment at the hearing, read as follows:

Claimant:

1. Claimant contends that he sustained a compensable left rotator cuff injury on March 7, 2021, during the course of and within the scope of his employment with the respondent/employer.
2. Claimant contends that he is entitled to reasonable and necessary medical treatment and unpaid medically related travel expenses, particularly his treatment with Dr. Spencer Guinn, including a surgery that was scheduled for April 22, 2021, with more than thirty (30) days' notice given to the respondents, and subsequently accomplished on said date. Return appointments with Dr. Guinn and all related treatment are claimed as reasonable and necessary.
3. Claimant contends that he is entitled temporary total disability benefits from March 7, 2021, through August 15, 2021.
4. Statutory attorney's fees based upon all controverted amounts are claimed, as this claim has been controverted in its entirety.
5. All other issues are reserved.

Respondents:

1. Respondents contend there is insufficient medical information available to determine whether Claimant's left shoulder condition is the result of a chronic condition requiring surgery, or an acute job injury.
2. The matter is fully controverted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, deposition transcript, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his left shoulder by specific incident.
4. Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary treatment of his compensable left shoulder injury. Moreover, he has proven by a preponderance of the evidence that all of his left shoulder treatment that is in evidence was reasonable and necessary.
5. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 22, 2021, to August 15, 2021.
6. Claimant has not proven by a preponderance of the evidence that he is entitled to temporary partial disability benefits for any period.

7. Claimant has proven by a preponderance of the evidence that his counsel is entitled to a controverted attorney's fee on the indemnity benefits awarded herein, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012).

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the Prehearing Order discussed above, admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of two (2) index pages and nineteen (19) numbered pages thereafter; Claimant's Exhibit 2, non-medical records, consisting of two (2) index pages and eleven (11) numbered pages thereafter; and Respondents' No.1 Exhibit 1, another compilation of Claimant's medical records, consisting of one (1) index page and twenty-eight (28) numbered pages thereafter.

Adjudication

A. Compensability

Introduction. Claimant, a truck driver, has argued that he suffered a compensable injury to his left shoulder in a specific incident on March 7, 2021. Respondents deny this.

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

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in disability or death; (3) the injury is established by medical evidence supported by objective findings, which are those findings which cannot come under the voluntary control of the patient; and (4) the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Mikel v. Engineered Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997). If a claimant fails to establish by a preponderance of the evidence any of the above elements, compensation must be denied. *Id.* This standard means the evidence having greater weight or convincing force. *Barre v. Hoffman*, 2009 Ark. 373, 326 S.W.3d 415; *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

A claimant's testimony is never considered uncontroverted. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994). The determination of a witness' credibility and how much weight to accord to that person's testimony are solely up to the Commission. *White v. Gregg Agric. Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

Testimony. Claimant testified that he worked for Respondent Frito-Lay for twenty (20) years. His testimony was that he injured his left shoulder at work on March 7, 2021, as he was cranking the legs or landing gear of the trailer to which he was seeking to hook to his truck, in order to raise the dollies and make the fifth wheel of the truck slide under it. He related:

I went out and I got in my truck. I done my computer logbook stuff, done my pre-trip inspection, pulled around to hook to my trailer. When I backed up my trailer was too—too low to get hooked to it . . . [o]nce I figured out the trailer was too low, just with my experience, I got as close as I could to the trailer and run the wheels kind of up under it as far as I could. It got a little bit of pressure off the trailer so when I went to crank it, the first couple of cranks wasn't as hard . . . [b]ecause I had some weight off of the trailer at that point. But that third—you know, I felt it on the second one, it was getting heavier. I was pulling up and whenever I got to the third crank that's when I had all of the trailer weight as far as on the crank at that point and when I went to push over the top, that's when I felt the pop and the pain.

Claimant elaborated that by wedging the rear wheels of the truck under the trailer, he was able to raise the trailer's dolly (the legs or landing gear) about one-quarter (1/4) of an inch off the ground. This made cranking the dolly the first couple of turns easier. But once the feet of the dolly again made contact with the ground, Claimant was essentially having to use his left upper extremity and shoulder to rotate the crank clockwise to raise the dolly (and hence, the bottom of the trailer) the remaining two (2) to four (4) inches. This was made even more difficult due to the fact that the trailer was fully loaded. Claimant's estimate was that the weight of the cargo was twelve to fourteen thousand (12,000-14,000) pounds. This does not include the weight of the trailer itself. He stated that the nose of the trailer may or may not be loaded heavily. Even though Claimant was using the low gear on the crank, he stated that turning was still becoming increasingly difficult. On the third (3rd) rotation, he began feeling "pressure" in his bicep area as he pulled up on the crank. As he pushed it over to complete the third (3rd) revolution, he felt "a sharp pain and a pop" in his left shoulder. Claimant stated that he was familiar with this sensation because he injured his right shoulder in a similar fashion in 2018 and underwent surgery on it thereafter to repair a torn rotator cuff.

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According to Claimant, his workday at Frito-Lay on March 7, 2021, began at 6:00 a.m. The shoulder injury occurred at around fifteen (15) to (30) minutes after this. Because he knew something was wrong, Claimant stopped cranking the dolly at that point and contacted his supervisor to inform him what had happened. This female supervisor contacted another supervisor, Tom Edwards, and the two of them agreed that Claimant should go home and ice the shoulder. Later in the day, Edwards contacted him and told him to come into the Frito-Lay plant the next morning to see the plant nurse, Denise. Claimant did as he was told. But when he arrived there on March 8, 2021, he discovered that the nurse was on vacation. Present was a physical therapist, Richard Dekok. Claimant's testimony was that Dekok began performing physical therapy on his injured shoulder without examining him or obtaining x-rays. This therapy did not go well, per Claimant; and after two more sessions, he insisted that he be allowed to see a doctor. Following contact with Denise, permission was given for Claimant to see Dr. Roger Troxel.

Troxel examined Claimant on March 10, 2021, and recommend that he undergo an MRI of the left shoulder. The results of the MRI indicated that emergency surgery was necessary. But Claimant elected to seek out a provider of his own choosing, Dr. Spencer Guinn. Respondents had him see another provider, Dr. Ron Schecter. This was the same doctor who treated him for the 2018 right shoulder injury. Ultimately, Respondents informed Claimant by letter that they were controverting his claim. He took this communication and was able to get his group health insurance provider to cover his surgical treatment with Dr. Guinn.

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Medical Records The records in evidence reflect that on March 7, 2021, Claimant presented to the first aid station at Respondent Frito-Lay. The history portion of the report reads:

Cranking on the trailer to raise it up when and about the 3rd round as he brought crank around his left shoulder “just come unglued” per employee. He described this as sudden shooting pain into the left shoulder. As soon as he tried to raise his arm he states he knew it was messed up so he finished the lowering with the right hand. He then pulled around his truck and reported the incident and 10 minutes later he logged out and went home . . . [h]e states that the left arm feels tender and similar to his [sic] when his right arm was hurt nearly 2 years ago.

Dekok, who took the report, noted that Claimant was tender over the glenohumeral joint at the infraspinatus and also over the acromioclavicular joint in the left shoulder. He wrote that internal rotation of the shoulder was “severely impaired: could not position for measurement.”

When Claimant went to Dr. Troxel on March 10, 2021, after undergoing three (3) visits with Dekok, he related that he was “cranking dolly on trailer up and on the third round [he] felt sharp pain” in his left shoulder three days earlier. Troxel recommended an MRI of the shoulder after noting: “tender at deltoid and at area of origin of biceps tendon; unable to perform subscapularis testing and empty can testing; tender abduction and cannot abduct to 90 even with assistance”

The report of the MRI, which took place on March 17, 2021, reads in pertinent part:

IMPRESSION:

1. Full-thickness supraspinatus tendon tear.
2. Full-thickness, partial-width subscapularis tendon tear superiorly.
3. Severe left AC joint osteoarthritis.

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4. Marrow edema in the greater tuberosity posteriorly may be reactive or due to osseous contusion. No acute fracture.
5. Proximal long head biceps tendon is not visualized suggesting proximal retracted tear.

On March 23, 2021, Dekok authored the following statement:

Regarding the injury of Billy Johnson at Fritol-Lay [sic] Jonesboro:

Billy reported that he was injured while cranking up a loaded trailer after it was left too low for his truck to get under. **We measured the force required to manipulate the crank for the E-van trailer, which is the type Mr. Johnson was using. The force on [sic] required on the E-van was only 16 pounds and 19 pounds respectively for the high and low gear, and was achievable with a single hand when I tried it. My understanding is that it was the E-Van that Mr. Johnson was working on when he was injured.**

The report I read from the MRI shows severe damage to the rotator cuff in Mr. Johnson's left shoulder. This included a severe tear of the supraspinatus with retraction, a partial-width subscapularis tear, and signs consistent with a retracted rupture of the long head biceps tendon. There was also severe left AC joint arthritis and also some marrow edema. The edema was noted by the provider as possibly reactive to due to a contusion.

This is a lot of damage to have been caused by an activity requiring a relatively low amount of force. In older patients sometimes the actual incident is not even known to the patient. I feel it is highly unlikely for such an injury to have occurred in an otherwise healthy shoulder. I noticed the biceps to look retracted when I first examined Mr. Johnson, but he said it looked the same as it always has, so that injury may have already been present. The presence of the edema in the shoulder suggests to me a more acute stage injury, perhaps from the supraspinatus and possibly subscapularis tears.

(Emphasis added)

Claimant saw Dr. Guinn on March 24, 2021, and related the same incident from March 7, 2021. The examination of the left shoulder revealed, inter alia, "a markedly positive drop arm test." The doctor recommended a left shoulder arthroscopy with

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rotator cuff repair, a possible subscapularis repair, a distal clavicle resection, and extensive debridement.

Dr. Schechter examined Claimant on March 30, 2021. During that visit, Claimant again related the incident regarding the trailer crank. He told the doctor that the three therapy visits with Dekok made him worse, so the therapy was discontinued. The doctor's examination notes include the following:

He had a popeye deformity suggestive of a long head biceps tendon rupture which he says [is] a new deformity . . . The patient presented with an outside recent MRI scan of the shoulder. The MRI scan showed he had degenerative change of his AC joint to a moderate degree and also appeared to have at least mild degenerative changes [to the] glenohumeral joint. He had a full-thickness tear of his supraspinatus with it retracted back to the medial head with significant thinning and atrophy of the leading edge suggestive of a chronic longstanding degenerative tear. There is also a full-thickness tear of the subscapularis anteriorly with it retracted back to the level of the glenohumeral joint with significant thinning and degeneration also suggestive of chronic degenerative tearing.

Thereafter, Schechter opined:

I had a long discussion with the patient and his case manager about his problem, the potential etiology, and treatment options. I explained to the patient that even though he felt like he was previously well without any prior problems, based on his MRI scan findings today with significant degenerative changes in atrophy around the margins of his tear, **I believe that he probably had longstanding underlying subacromial impingement with degenerative tearing of his rotator cuff that he was tolerating. Then, with his work related injury he probably disrupted would ever [sic—obviously “whatever”] fibers he had left. There is no question that is work injury obviously was an acute event that worsened his condition, but based on the degenerative change with atrophy and damage that I see on his MRI scan, I think his problem is 51% or more likely due to a pre-existing condition than a work related injury.**

(Emphases added)

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On April 22, 2021, Dr. Guinn operated, performing a rotator cuff repair, including the subscapularis; an extensive debridement, including debridement of the retained stump of the long head of the biceps tendon; debridement of the SLAP tear; subtotal subacromial and subdeltoid bursectomies; and an anterior acromioplasty. The diagnoses he assigned were:

- Large rotator cuff tear including full-thickness full width of the supraspinatus, full-thickness upper subscapularis, and full-thickness upper infraspinatus
- Severe acromioclavicular joint arthrosis
- Prior rupture of the long head of the biceps tendon, with a large retained intraarticular stump
- Complex full-thickness SLAP tear
- Extensive subacromial and subdeltoid bursitis
- Severe anterior acromial impingement

Dr. Reynolds performed a records review on July 20-21, 2021. In his report, he rendered the following opinions:

1. In your opinion, stated within a reasonable degree of medical certainty, was the shoulder damage which necessitated surgery to result in [sic] an acute injury occurring on or about March 7, 2021?

No, it is my professional medical opinion that less than 51% of the documented shoulder pathology on the MRI scan which was personally reviewed was the result of an acute injury. Given the size of the rotator cuff tear, as well as, the degree of retraction I would anticipate significant reactive edema/hemorrhage into the peritendinous structures including infraspinatus and supraspinatus fossae and subacromial/subdeltoid spaces with an acute traumatic rotator cuff tear of this size. Furthermore, the reported mechanism of injury does not correlate with this large of a rotator cuff tear. **It certainly could be that the long head**

biceps tendon rupture was the result of this mechanism of injury as described by Mr. Johnson.¹

2. Assuming Mr. Johnson's report is accurate, i.e., that turning a crank that morning resulted in acute pain, with [sic] his symptoms be properly characterized as an injury, and aggravation, or an exacerbation of symptoms without evidence of additional underlying damage[?]

It is my professional medical opinion that the mechanism of injury could certainly result in pain in his shoulder with this degree of pre-existing tenderness pathology. **I would characterize this as an exacerbation of symptoms without evidence of additional underlying damage.**

(Emphasis added)

Discussion. In this case, the evidence is clear that Claimant has objective findings of an injury to his left shoulder. These findings come from, inter alia, the MRI and the operative report. These document, among other things, a large tear of the rotator cuff.

As for whether the left shoulder condition arose out of and in the course of employment, and was caused by a specific incident that is identifiable by time and place of occurrence, the evidence shows that before the March 7, 2021, incident, Claimant was able to perform the physical requirements of his job as a truck driver without any significant physical problems. This included using his left shoulder not only to raise and lower trailer dollies, but to hoist himself into and lower himself from the cab of his truck. I credit Claimant's testimony on this point.

¹In his operative report, Dr. Guinn found that the long head biceps tendon rupture was a "[p]rior" one, "with a large retained intraarticular stump." See *supra*.

This changed shortly after his workday began on March 7. His credible testimony—which tracks what he related to multiple providers—is that the trailer that he needed to hook onto his truck was too low. To remedy this, he backed up the truck to the trailer and wedged the wheels under the trailer in order to slightly raise it off the ground. Then, using his left upper extremity, he rotated the dolly crank on the trailer in a clockwise direction to raise the trailer high enough so that it would clear the truck’s fifth wheel. Because of the truck’s wheels, the first two rotations were accomplished without too much difficulty. But as Claimant used his left arm to push the crank over the top to complete the third revolution—when he was lifting the trailer that was loaded with approximately twelve to fourteen thousand (12,000 to 14,000) pounds of product—he felt a sharp pain and a “pop” in his left shoulder.

A causal relationship may be established between an employment-related incident and a subsequent physical injury based on the evidence that the injury manifested itself within a reasonable period of time following the incident, so that the injury is logically attributable to the incident, where there is no other reasonable explanation for the injury. *Hall v. Pittman Construction Co.*, 234 Ark. 104, 357 S.W.2d 263 (1962).

Respondents have sought to highlight opinions by three medical practitioners who have weighed in on the question concerning whether the extensive damage to Claimant’s left shoulder was caused by the trailer-cranking incident. The first, by Dekok, the physical therapist who initially saw Claimant, was that he examined the E-Van trailer that Claimant had tried to crank, and that he found that it only took sixteen

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(16) pounds of force to crank the dolly in high gear and nineteen (19) in low. He added that the damage to Claimant's left shoulder was too large to have been caused by the employment of a relatively low amount of force, and that it was "highly unlikely for such an injury to have occurred in an otherwise healthy shoulder."

The Commission is authorized to accept or reject a medical opinion and is authorized to determine its medical soundness and probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002); *Green Bay Packing v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999).

Apart from any other potential problems with Dekok's opinion (for example, it is unclear whether the trailer that he tested was the very same one that Claimant was using that day), the two that prevent me from crediting it go to the condition of the trailer that he tested. Nowhere did he state whether the trailer that he analyzed was loaded, or whether he duplicated the conditions that Claimant was operating under (i.e., the trailer had truck tires wedged underneath it and after a couple of rotations of the crank, the force required to turn it was raising the weight of a loaded trailer). This renders his measurements of the force required to turn the dolly crank meaningless.

As for Dr. Schechter, he gave the opinion that Claimant's "problem is 51% or more likely due to a pre-existing condition than a work related injury." This is the major cause" standard, defined in Ark. Code Ann. § 11-9-102(14) (Repl. 2012). The injury at issue here is one alleged to have occurred in a specific incident. Claimant does not have to show that his left shoulder injury was the major cause of his disability or need for treatment in the case of an alleged specific incident. *See supra*.

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More importantly, Schechter wrote the following that, while quoted above, bears repeating:

I believe that he [Claimant] probably had longstanding underlying subacromial impingement with degenerative tearing of his rotator cuff that he was tolerating. Then, with his work related injury he probably disrupted would ever [sic—obviously “whatever”] fibers he had left.

In *Cooper v. Textron*, 2005 AWCC 31, Claim No. F213354 (Full Commission Opinion filed February 14, 2005), the Commission addressed the standard when examining medical opinions concerning causation:

Medical evidence is not ordinarily required to prove causation, *i.e.*, a connection between an injury and the claimant's employment, *Wal-Mart v. Van Wagner*, 337 Ark. 443, 990 S.W.2d 522 (1999), but if a medical opinion is offered on causation, the opinion must be stated within a reasonable degree of medical certainty. This medical opinion must do more than state that the causal relationship between the work and the injury is a possibility. Doctors' medical opinions need not be absolute. The Supreme Court has never required that a doctor be absolute in an opinion or that the magic words “within a reasonable degree of medical certainty” even be used by the doctor; rather, the Supreme Court has simply held that the medical opinion be more than speculation; if the doctor renders an opinion about causation with language that goes beyond possibilities and establishes that work was the reasonable cause of the injury, this evidence should pass muster. *See, Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001). However, where the only evidence of a causal connection is a speculative and indefinite medical opinion, it is insufficient to meet the claimant's burden of proving causation. *Crudup v. Regal Ware, Inc.*, 341, Ark. 804, 20 S.W.3d 900 (2000); *KII Construction Company v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

I credit Dr. Schechter's opinion on this point. In so doing, I note that an employer under the Arkansas Workers' Compensation Act takes an employee as the employer finds him. Employment circumstances that aggravate pre-existing conditions are compensable. *Nashville Livestock Comm. v. Cox*, 302 Ark. 69, 787 S.W.2d 64 (1990). A pre-existing infirmity does not disqualify a claim if the employment aggravated,

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accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *St. Vincent Med. Ctr. v. Brown*, 53 Ark. App. 30, 917 S.W.2d 550 (1996). “An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury.” *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). This includes the prerequisite that the alleged injury be shown by medical evidence supported by objective findings. *See Heritage Baptist Temple v. Robison*, 82 Ark. App. 460, 120 S.W.3d 150 (2003). Again, objective findings of a left shoulder injury are readily present here.

As for Dr. Reynolds’s opinion, I note at the outset that it is the product solely of a records review. He wrote the following: “[I]t is my professional medical opinion that less than 51% of the documented shoulder pathology on the MRI scan which was personally reviewed was the result of an acute injury.” The opinion is essentially meaningless. If any of Claimant’s shoulder pathology is the result of an acute injury, that is sufficient. Moreover, the opinion is internally inconsistent. At one point, Reynolds states that “[i]t could certainly be that the long head biceps tendon rupture was the result of this mechanism of injury as described by [Claimant].” But right after this, he opines that what Claimant suffered as a result of the crank-turning was simply an “exacerbation of symptoms without evidence of additional underlying damage.” Finally, Dr. Reynold’s opinion is at odds with the opinion of Dr. Schechter, whom I credit, that the force applied to the crank that morning “probably disrupted” that intact fibers that Claimant had remaining in his rotator cuff, completing the tear.

In summary, the evidence shows that Claimant sustained an injury to his left shoulder that that arose out of and in the course of his employment with Respondent Frito-Lay. The injury aggravated, accelerated, or combined with Claimant's pre-existing left shoulder condition to produce the disability for which compensation is being sought. The injury caused internal or external harm to Claimant's body that required medical services—including his April 22, 2021, surgery. The injury has been established by medical evidence supported by objective findings. Finally, the injury was caused by a specific incident and is identifiable by time and place of occurrence: the turning of the trailer dolly crank at Frito-Lay early in the morning of March 7, 2021. Claimant has hence proven by a preponderance of the evidence that he suffered a compensable left shoulder injury by specific incident.

B. Medical Treatment

Introduction. Claimant has alleged that he is entitled to reasonable and necessary medical treatment in connection with his alleged left shoulder injury. Respondents disagree.

Standards. Arkansas Code Annotated Section 11-9-508(a) (Repl. 2012) states that an employer shall provide for an injured employee such medical treatment as may be necessary in connection with the injury received by the employee. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). But employers are liable only for such treatment and services as are deemed necessary for the treatment of the claimant's injuries. *DeBoard v. Colson Co.*, 20 Ark. App. 166, 725 S.W.2d 857 (1987). The claimant must prove by a preponderance of the evidence that medical treatment is

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reasonable and necessary for the treatment of a compensable injury. *Brown, supra*; *Geo Specialty Chem. v. Clingan*, 69 Ark. App. 369, 13 S.W.3d 218 (2000). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. *White Consolidated Indus. v. Galloway*, 74 Ark. App. 13, 45 S.W.3d 396 (2001); *Wackenhut Corp. v. Jones*, 73 Ark. App. 158, 40 S.W.3d 333 (2001).

As the Arkansas Court of Appeals has held, a claimant may be entitled to additional treatment even after the healing period has ended, if said treatment is geared toward management of the injury. *See Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004); *Artex Hydroponics, Inc. v. Pippin*, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Such services can include those for the purpose of diagnosing the nature and extent of the compensable injury; reducing or alleviating symptoms resulting from the compensable injury; maintaining the level of healing achieved; or preventing further deterioration of the damage produced by the compensable injury. *Jordan v. Tyson Foods, Inc.*, 51 Ark. App. 100, 911 S.W.2d 593 (1995); *Artex, supra*.

Discussion. I find that Claimant has proven by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment of his compensable left shoulder injury. In addition, I have reviewed his treatment records that are in evidence, and I find that he has proven by a preponderance of the evidence that all of the treatment of his compensable shoulder injury that is in evidence—particularly the April 22, 2021, surgery—was reasonable and necessary.

C. Temporary Partial and/or Total Disability

Introduction. Claimant has also alleged that he is entitled to temporary total disability benefits from March 7, 2021, to the date Dr. Guinn stated that he could return to full duty: August 15, 2021. Respondents disagree that they should be liable for temporary total disability benefits for any period.

Standards. The compensable injury to Claimant's left shoulder is unscheduled. See Ark. Code Ann. § 11-9-521 (Repl. 2012). An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he has suffered a total incapacity to earn wages. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. *Id.* § 11-9-501(a)(1).

Evidence. During the hearing, Claimant testified that Dr. Guinn gave him a work-restriction slip. The records in evidence reflect that this did not occur until April 19, 2021. On that date, Guinn wrote:

[Claimant] is under my medical care and may return to (xxx) work with restrictions of light duty from 4/12/21 – 4/23/21.

Patient is having shoulder surgery on 4/22/21.

Dr. Schechter, on the other hand, did not ever assign Claimant light duty or take him off work. Instead, he wrote on March 30, 2021: "It is my medical opinion that [Claimant] is

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definitely expected to have discomfort, but may do as tolerated with no formal restrictions.”

Asked whether Respondent Frito-Lay excused him from work based on Guinn’s restrictions, Claimant responded:

Yes, they did. Technically, I was still required to show up to work and basically just sit and—you just had to be there. But instead of doing that, I chose to move some vacations and there was such a pay difference that I needed to protect my money, you know, my bills, so I was taking vacations rather than receiving half the pay and sitting in a break room. I mean, it’s hard to understand that but there was three weeks that I took my personal vacations.

This period began on or around March 15, 2021. Later, Claimant stated that the previous week, March 8-12, 2021, he showed up for work but not receive full pay. Instead, he was paid on an hourly basis.

The timeline laid out by Claimant does not correlate with the documentary evidence. He was not assigned restrictions of any kind until as of April 12, 2021. Consequently, he cannot prove his entitlement to temporary total disability benefits prior to this date.

As for the period of April 12-21, 2021, I credit his testimony that Respondent Frito-Lay reduced his pay and made him an hourly employee during the period he was on light duty. He has not shown that he was temporarily totally disabled during this time. Although Claimant has not argued that he is entitled to temporary partial disability benefits, it can be considered in conjunction with and in the context of a claim for temporary total disability benefits. *See Palazzolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994). Temporary partial disability is the period within the claimant’s

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healing period in which he suffers only a decrease in the capacity to earn the wages he was receiving at the time of the injury. *Breshears, supra*. Per Ark. Code Ann. § 11-9-520 (Repl. 2012):

there shall be paid to the employee sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his or her wage earning capacity after the injury.

However, nothing was offered at the hearing to show what he made during this period. For that reason, he cannot prove his entitlement to temporary partial disability benefits for this period.

As for April 22, 2021, when Claimant underwent rotator cuff repair surgery, this began a time during which he suffered a total incapacity to earn wages. This continued to August 15, 2021, date that Dr. Guinn found that Claimant could return to full duty. I credit this opinion. Consequently, Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from April 22, 2021, to August 15, 2021.

D. Controversion.

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

Standard. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). In this case, the fee would be 25 percent (25%) of any indemnity benefits awarded herein, one-half of which would be paid by Claimant and one-half to be paid by Respondents in accordance with See Ark.

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Code Ann. § 11-9-715 (Repl. 2012). See *Death & Permanent Total Disability Trust Fund v. Brewer*, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

Discussion. The evidence before me clearly shows that Respondents have controverted Claimant's entitlement to indemnity benefits. Thus, the evidence preponderates that his counsel, the Hon. George Bailey, is entitled to the fee as set out above.

CONCLUSION AND AWARD

Respondents are hereby directed to pay/furnish benefits in accordance with the findings of fact and conclusions of law set forth above. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809 (Repl. 2012). See *Couch v. First State Bank of Newport*, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Claimant's attorney is entitled to a 25 percent (25%) attorney's fee awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by Respondents No. 1 in accordance with Ark. Code Ann. § 11-9-715 (Repl. 2012).

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge