BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. G904931

PORTER R. SIMS,
EMPLOYEE **CLAIMANT**

BRYANT SCHOOL DISTRICT,
EMPLOYER **RESPONDENT**

ARK. SCHOOL BOARD ASS'N
WORKERS' COMPENSATION TRUST/
ARK. SCHOOL BOARD ASS'N, **RESPONDENT**
INSURANCE CARRIER/TPA

OPINION AND ORDER FILED OCTOBER 24, 2023

Hearing conducted on July 26, 2023, before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens in Little Rock, Pulaski County, Arkansas.

The claimant was represented by the Honorable Daniel E. Wren, Wren Law Firm, Little Rock, Pulaski County, Arkansas.

The respondents were represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

INTRODUCTION

In the prehearing order filed June 1, 2023, the parties have agreed to the following stipulations, which they affirmed on the record at the hearing:

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

2. The employer/employee/carrier-TPA relationship existed at all relevant times including December 20, 2018, when the claimant sustained an admittedly compensable injury to his left shoulder for which the respondents paid medical and indemnity benefits.

3. The claimant's average weekly wage (AWW) was $871.00, which is sufficient to entitle him to weekly compensation rates of $581.00 for temporary total disability (TTD), and $436.00 for permanent partial disability (PPD) benefits.

4. The respondents controvert the payment of any additional medical or indemnity benefits other than those they have already paid to date.

5. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Commission Exhibit 1 at 1-2; Reporter's Transcript at 141-42). Pursuant to the parties' mutual agreement the issues litigated at the hearing were:

1. Whether the claimant is entitled to additional medical and TTD benefits.

2. Whether the claimant's attorney is entitled to a controverted fee on these facts.

3. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; RT 142).

The claimant contends he is entitled to TTD benefits from August 31, 2022, to a date yet to be determined. He contends that on or about December 20, 2018, he sustained an admittedly compensable injury to his left shoulder when he tripped and fell while working on air conditioning (AC) units. The claimant has undergone three (3) surgeries between July 24, 2019, through March 10, 2022, and has attended multiple visits for conservative treatment. The claimant contends that on August 16, 2022, he saw Dr. Smith, who continued his off-work status until September 27, 2022. The claimant contends that on August 31, 2022, without a physician visit/examination, and without any consultation with the claimant, he received a random electronically signed note from a licensed practical nurse (LPN) purporting to change his work status to sedentary with no use of his left arm. At this point, the adjuster for the Arkansas School Board Association Workers' Compensation Trust, Ms. Misty Thompson, discontinued PPD benefits to the claimant. Thereafter, on September 27, 2022, the claimant returned for his scheduled visit with Dr. Smith. The claimant

contends he informed Dr. Smith he had felt a "pop" in his left shoulder while holding a wrench which caused an increase in his left shoulder pain. The claimant contends that Dr. Smith, without any reference to the aforementioned LPN's August 31, 2022, note, continued to keep the claimant on off-work status until he returned to Dr. Smith for review of an MRI Dr. Smith ordered at the September 27, 2022, visit. The claimant contends the respondents have failed and/or refused to pay for any medical treatment past September 27, 2022, and have failed to pay him any additional TTD benefits since they terminated them on August 31, 2022. Therefore, the claimant contends he is entitled to payment of the subject and ongoing additional medical care, as well as TTD benefits from the date the respondents terminated them on August 31, 2022, through a date yet to be determined. (Comms'n Ex. 1 at 2-3; RT 142-43; RT 132-33).

The respondents contend the claimant has received all benefits to which he is entitled. The claimant was released to sedentary duty as of August 31, 2022, which the respondent-employer, the Bryant School District (the school district) offered and made readily available to the claimant; however, the claimant refused this offer of light duty employment and failed and/or refused to even attempt to return to work. Consequently, the respondents contend the claimant is not entitled to any additional TTD benefits since the employer has work that comports with the claimant's physical limitations and restrictions, they offered this work and made it available to him, but he failed and/or refused to accept this offer and did not even attempt to perform the light duty job. In addition, the respondents contend that any additional medical treatment the claimant may require after August 31, 2022, is not causally related to his compensable injury, but is the result of a new injury and/or independent intervening cause that occurred as the result of the claimant working at

home and lifting the wrench. (Comms'n Ex. 1 at 3-4; RT at 143-44; RT 129-32).

The record herein consists of the hearing transcript and all the exhibits therein and/or attached thereto, as well as the parties' blue-backed post-hearing briefs.

STATEMENT OF THE CASE

The claimant called two (2) witnesses at the hearing in support of his contentions: Mr. Terry Harper, the Facilities Maintenance Director (the maintenance director) for the school district (Mr. Harper), and the claimant himself, Porter R. Sims. Due to Mr. Harper's schedule, the parties agreed the claimant would call Mr. Harper as the first witness so he could be excused to attend a prior commitment. (RT 18-22; 31-32).

Mr. Harper testified he became the maintenance director for the school district on July 1, 2022, which was after the claimant had retired, so he never personally supervised the claimant. But Mr. Harper had previously held other positions within the school district and was familiar with the claimant. Mr. Harper testified it is and was the school district's practice to return all employees out on workers' compensation to light duty work that fit within the physical limitations and restrictions the workers' doctor placed upon him. Mr. Harper testified he currently has several employees working on light or sedentary duty and that he "never said no to anyone" [regarding a doctor's light duty work release of an employee who had been injured on the job]. (RT 29; 22-29) (Bracketed material added).

Mr. Harper specifically testified he knew of no reason the claimant would not have been returned to work based on the August 31, 2022 sedentary/light duty work release. He testified further he knew of no reason the claimant would not have been rehired by the district to return to

work on light duty. (RT 27-32).

The claimant was the next witness called to the stand. The claimant is 68 years old, and he worked as a facilities/maintenance employee with the school district. He testified Dr. Joel Smith saw him on August 16, 2022, at which time Dr. Smith's office notes stated the claimant was to remain off work until seen back in the clinic. According to the claimant he did not return to the clinic until late September 2022 and he was unaware the facts and circumstances as to how the August 31, 2022 light duty release came about. (RT 32-43; Respondents' Exhibit 2 at 20; RX1 at 1-2). RX1 is a brief letter/note entitled "RTW", and addressed, "To Whom It Mat Concern" signed by Dr. Joel Smith, the claimant's treating orthopedic surgeon, which states: "Mr. Sims may return to work at a sedentary position only with no use of his left arm." (RX2 at 20). The claimant testified he did in fact see Dr. Smith on August 31, 2022. (RT 41; 34-41). Clinic notes after the date of the August 31, 2022, doctor's visit and light duty work release reveal the claimant continued to experience pain during PT; a 9/15/22 clinic note states the claimant said he had experienced a "pop" in his shoulder when he had rolled over in bed; and a 9/27/2022 clinic note written by Dr. Smith recommends the claimant, "remain off work until seen back in clinic for MRI result follow-up." (RT 35-45; Claimant's Exhibit 1 at 19; 32; 19-33). This off work status note was issued after the claimant had experienced the "pop" in his shoulder rolling over in bed, and when he handed his son a wrench while helping him work on a lawn mower carburetor. (RT 45-60). The claimant admitted he had retired as of June 30, 2022, for his own personal reasons. (RT 117-129).

The claimant testified the school district had previously returned him to work with similar one (1)-arm work restrictions. The claimant testified the school district did not really have light

duty work, but he had always been returned to work and was allowed to work within his restriction even if that meant all he did was drive around in a truck with another employee all day. He further testified that when working light or sedentary duty, the school district abided by any and all physical limitations and restrictions his doctor had placed on him. The claimant testified that he did not have an issue with not receiving temporary total disability benefits as of his light duty release on August 31, 2022. The claimant testified if he was still employed with the district, he could have returned to work on that release, but he retired from the district as of June 30, 2022. (RT 45-65).

Regarding the alleged "new injury" noted in the PT records, the claimant read from the September 27, 2022, PT record that stated in pertinent part: "…and was helping his son change a carburetor on Saturday, holding a wrench, and felt a pop – pain has increased since then." (RT CX1 at 32-33; RX2 at 21-23). The claimant admitted he reported this injury to his physical therapist and that what he told the physical therapist was true. The claimant identified a picture of a wrench he claimed to be the wrench he was holding while helping his son to change that carburetor. Said wrench was as long as a dollar bill and very shiny. The claimant even brought that wrench to the hearing for display. The claimant described the wrench as being lighter than the three-pound (3-lb.) weights used in PT. Concerning his comment that he felt a pop in his shoulder, the claimant testified he had felt pops in his shoulder at other times as well such as when he was rolling over in bed. (RT 43-73).

On cross-examination the claimant admitted he would not have told the physical therapist that he was "helping his son change a carburetor, holding a wrench, and felt a pop" if it was not

important for the doctor to know what he was doing and what caused the shoulder to pop and start hurting. He agreed with respondents' counsel he told his physical therapist that he was "helping" his son change a carburetor, not that he was "watching" his son change a carburetor. He admitted he never said he was not doing anything but holding the wrench when the pop and pain occurred. Regarding his other references to his shoulder popping such as the one when he rolled over in bed, the claimant acknowledged the paid after these incidents had eventually had lessened with time; however, concerning the wrench episode the claimant reported the pop caused an increase in and a different type of pain that did not go away. (RT at 53-76).

Concerning his experience with his previous light duty work releases at the school district the claimant testified that following his first surgery, he was released to light duty work with the restriction of no use of his left arm, and the school district accommodated him, and had provided him work that fit within this restriction. The claimant agreed with Terry Harper's testimony that the school district had a demonstrated practice of allowing employees who had sustained work-related injuries and are released to light/sedentary duty to return to work, and to provide them work that fit within their restrictions. The claimant admitted that each time he was released to work with no use of his left arm or no overhead duty, he was brought back to work and worked under those restrictions. He testified he continued to work with restrictions until he was taken off work by Dr. Joel Smith for his third shoulder surgery. (RT 53-96).

On cross-examination the claimant also reviewed Dr. Joel Smith's August 31, 2022, light/sedentary duty work release and testified – initially over his attorney's objection that was later withdrawn – the light duty work release was valid. He further agreed the August 31, 2022,

light duty release was electronically signed by the same person or persons that prepared and signed the March 15, 2022 off work slip that was honored by the school district. (RT 58-64).

Also, on cross-examination the claimant admitted he had a 2000-square-feet shop on his property and that he and his son often worked there restoring a truck. The claimant recalled a June 10, 2022, note from Carson Physical Therapy where he reported to the physical therapist, he had worked on his truck for three (3) hours the day before his PT appointment without any increase in pain. He admitted this report and work on his truck occurred after his third surgery. When respondents' counsel confronted him with his deposition in which he had testified the last time he worked on his truck was January or February of 2021, or before his third left shoulder surgery, the claimant admitted this was not in fact true. Likewise, the claimant denied he ever raked any leaves after his third surgery in March 2022, but when shown a PT report from July 25, 2022, that stated he had in fact raked leaves over the weekend, he admitted this, as well. (RT 65-65-82

Finally, concerning his knowledge of the August 31, 2022 light duty work release which was given him after the date he retired for his own personal reasons, the claimant admitted on cross-examination he had testified in his deposition that Misty Thompson, the respondents' claims adjuster, reached out to him and told him Dr. Smith had released him to light duty work. He admitted he knew the school district had always previously returned him to work within the restrictions placed upon him by his doctors. He testified that after learning of this release from Ms. Thompson, he said "that was fine" and he "had no arguments" with it, the release. On redirect-examination the claimant testified that when he spoke with Misty Thompson, she said, "if I was going back to work, did they have a place for me, and she said 'yes.' That's all I was told." He

testified, "All she told me is the school said they had a place for me if I was going back to work." (RT 85-109). The claimant testified on re-direct examination that his left shoulder was still hurting, that he was in pain at the time of the hearing, and the pain limited his activities, the things he was able to do. (RT 51-52).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2023 Lexis Replacement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.*** Section 11-9-704(c)(3) (2023 Lexis Repl.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**. *Ark. Code Ann***. § 11-9-704(c)(4) (2023 Lexis Repl.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

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

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

As always, both attorneys did an excellent job zealously representing their respective clients and presenting their respective cases at the subject hearing – both of which resulted in a complete record that was most helpful to this ALJ in examining the relevant evidence and rendering the opinion herein. Consequently, based on the aforementioned law as applied to the facts of this case, and the totality of the credible evidence of record – both testimonial and documentary – I am compelled to find the claimant has failed to meet his burden of proof in

demonstrating he is entitled to additional TTD benefits from August 31, 2022, through a date yet to be determined; and he failed to prove he is entitled to additional medical treatment for his left shoulder at the respondents' expense for the reasons set forth in more detail, *infra*.

1. **The claimant has failed to meet his burden of proof that he remained with his healing period and was totally incapacitated from earning wages after August 31, 2022, the date his treating orthopedic surgeon, Dr. Smith, released him to return to light duty work, which the respondents made available to him.**

In *Lybyer v. Springdale School District*, 2019 Ark. App. 77, 568 S.W.3d 805 (Ark. App. 2019), the Arkansas Court of Appeals held that a voluntary resignation is tantamount to a refusal of employment. The claimant in *Lybyer* sustained a compensable injury on June 22, 2015. Lybyer was returned to work on "very light duty." After being called to the office for leaving early and taking long breaks, the claimant was caught on camera attempting to cover a surveillance camera with tape. Thereafter, the *Lybyer* claimant voluntarily resigned her employment. Since she was still within her healing period, the claimant in *Lybyer* made a claim for additional TTD benefits. The school district denied this request for additional TTD benefits pursuant to ***Ark. Code Ann.*** § 11-9-526 based on the fact the claimant chose to voluntarily resign rather than face firing or termination. The court of appeals in *Lybyer* noted that termination of employment based upon misconduct is not a refusal to return to work under ***Ark. Code Ann.*** § 11-9-526 such that an employee is disqualified from benefits. *See*, *Tyson Poultry, Inc. v. Narvaiz*, 2012 Ark. App. 118, 388 S.W.3d 16 (Ark. App. 2012). The court then found as a matter of law that *a voluntary resignation is a refusal of employment* which bars a claimant from receiving additional TTD benefits.

In the case at bar, it is undisputed the claimant voluntarily retired because of personal reasons on June 30, 2022. Moreover, the evidence demonstrates the school district had a practice of accommodating the claimant (and others) by providing them light/sedentary work each time he was released to work light duty. The claimant admitted Ms. Misty Thompson advised him the school district had work available within his restriction when she reached out to tell him about the August 31, 2022, light/sedentary work release, the claimant already had voluntarily chosen to retire and begin drawing retirement benefits. This voluntary retirement is a declaration of the claimant's refusal to return to suitable employment within his work restrictions. Therefore, as in *Lybyer, supra*, the claimant cannot now credibly claim the respondents did not make him a *bona fide* offer of employment wherein he would be able to draw the entire amount of his salary. Consequently, the preponderance of the evidence proves the claimant is not entitled to additional TTD benefits from August 31, 2022, through a date yet to be determined. Indeed, the claimant admitted he understood Ms. Misty Thompson was offering him the opportunity to come back to work if he chose to do so; however, he had already retired his employment – voluntarily left his job – on June 30, 2022.

Likewise in *Redd v. Blytheville School District*, 2014 Ark. App. 575, 446 W.W.3d 643 (Ark. App. 2014), the evidence revealed that had the claimant not retired at age 62, the respondents had work within the claimant's physical restrictions that was made and remained available to the claimant. Just as in *Redd*, here the claimant testified the school district had allowed him to return to light duty work in the past, and made what he referred to as, "make work" available to him within his restrictions which allowed him to draw the full amount of his salary. Moreover, as in

Redd, the evidence reveals the claimant herein was always provided job duties within his light duty restrictions which were made available to him, but he had already voluntarily chosen to retire at the age of 67 for personal reasons and begin drawing his retirement benefits. Therefore, pursuant to both *Lybyer* and *Redd, supra*, the claimant's voluntary retirement prevents him from any entitlement to additional TTD benefits. It is abundantly clear from the evidence of record the claimant was not totally incapacitated from working when he was released to light duty work on August 31, 2022.

2. <u>The claimant sustained an independent intervening cause injury to his left shoulder in September of 2022. Therefore, he has failed to meet his burden of proof in demonstrating he is entitled to additional medical treatment at the respondents' expense after the date of this independent intervening cause injury.</u>

In a workers' compensation case, the claimant has the burden of proving by a preponderance of the evidence that his claim is compensable, ie., that his injury was the result of an accident that arose in the course of his employment and that it grew out of or resulted from the employment. *Ringier American v. Combs*, 41 Ark. App. 47, 849 S.W.2d 1 (Ark. App. 1993); *Carman v. Haworth, Inc.*, 74 Ark. App. 55, 455 S.W.3d 408 (Ark. App. 2001). In addition, the claimant must prove a causal connection between the work-related accident and his alleged disability. *Bates v. Frost Logging Co.*, 38 Ark. App. 36, 827 S.W.2d 664 (Ark. App. 1992). Plainly stated, the claimant must demonstrate by a preponderance of the evidence there exists a causal relationship between his current condition and his employment. *Harris Cattle Co. V. Parker*, 256 Ark. 166, 506 S.W.2d 118 (1974).

As the respondents note in their post-hearing brief, there exists no presumption an injury is compensable. *O.K. Processing, Inc. v. Servold*, 265 Ark. 352, 578 S.W.2d 224 (1979). The party having the burden of proof on the issue must establish it by a preponderance of the evidence. ***Ark. Code Ann.***. § 11-9-704©(2)(2023 Lexis Replacement). In determining whether a claimant has sustained his or 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. C. Cavenaugh's*, 298 Ark. 363, 768 S.W.2d 521 (1989); and *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 663 (Ark. App. 1987).

In *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (Ark. App. 2000), our court of appeals discussed the difference between an "aggravation" and a "recurrence":

> An aggravation is a new injury resulting from an independent incident. *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). A recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Atkins Nursing Home v. Gray,* 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

The test to determine whether a separate incident that occurs after the work injury is a recurrence or an aggravation is whether the subsequent incident was a natural and probable result of the first injury, or if it was precipitated by an independent intervening cause. *Bearden Lumber Co. v. Bond*, 7 Ark. App. 65, 644 S.W.2d 321 (Ark. App. 1983). Even if there is a causal connection between the initial incident/injury and disability, there is no independent intervening cause *unless* the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances. *Davis v. Old Dominion Freight Line, Inc*. 341 Ark. 751, 20 S.W.3d 326

(Ark. App. 2000); *Georgia-Pacific Corp. v. Carter*, 62 Ark. App. 162, 969 S.W.2d 677 (Ark. App. 1998); *Guidry v. J & R Eads Const. Co.*, 11 Ark. App. 219, 669 S.W.2d 483 (1984).

Concerning the proof required to demonstrate a new injury or aggravation our appellate courts have consistently held that since an aggravation is a new injury, it must be proved by new objective evidence of a new injury different than the preexisting condition. *Vaughn v. Midland School Dist.*, 2012 Ark. App. 344, at 2-3 (Ark. App. 2012) (citing *Barber v. Pork Grp., Inc.*, 2012 Ark. App. 138 (Ark. App. 2012); *Grothaus v. Vista Health, LLC,* 2011 Ark. App. 130, 382 S.W.3d 1 (Ark. App. 2011); *Mooney v. AT & T,* 2010 Ark. App. 600, 378 S.W.3d 162 (Ark. App. 2010). Where the only objective findings present are consistent with prior objective findings or consistent with a long-term degenerative condition rather than an acute injury, this does not satisfy the objective findings requirement for a compensable aggravation of a preexisting condition injury. *Vaughn,* 2012 Ark. App. 344, at 6 (holding that Arkansas courts have interpreted the Act to require "new objective medical findings to establish a new injury when the claimant seeks benefits for the aggravation of a preexisting condition"); *Barber v. Pork Grp., Inc.,* 2012 Ark. App. 138, at 6 (Ark. App. 2012) (affirming the Commission's denial of an aggravation of a preexisting condition claim where the MRI findings revealed a degenerative condition, with no evidence of, and which could not be explained by, an acute injury). In *Mooney,* 2010 Ark. App. 600 at 4-6, 378 S.W.3d at 165-66 (Ark. App. 2010), the court affirmed the Commission's decision denying a back injury claim where the objective evidence of an injury - including muscle spasms, positive EMG test results, and spinal stenosis revealed on an MRI - were all present both before and after the date of the alleged aggravation injury.

Consequently, in this case the claimant must prove a causal relationship exists between his employment and his compensable injury, and his condition after the September 2022 carburetor incident. *Wal-Mart Stores, Inc. v. Westbrook*, 77 Ark. App. 167, 171, 72 S.W.3d 889, 892 (Ark. App. 2002) (citing *McMillan v. U.S. Motors,* 59 Ark. App. 85, 90, 953 S.w.2d 907, 909 (Ark. App. 1997)). Objective medical evidence is not essential to establish a causal relationship between the work-related accident and the injury where objective medical evidence establishes the existence and extent of the injury, and a preponderance of other nonmedical evidence establishes a causal relationship between the objective injury and the work-related incident. *Flynn v. Southwest Catering Co.*, 2010 Ark. App. 766, 379 S.W.3d 670 (Ark. App. 2010). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. § 11-9-102(16)(A); *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, at 80 250 S.W.3d 263, at 272 (Ark. App. 2007). Objective findings "specifically exclude pain, straight-leg-raising tests, and range-of-motion tests." *Burks v. RIC, Inc.*, 2010 Ark. App. 862, at 3 (Ark. App. 2010).

The respondents acknowledge that the claimant sustained a compensable injury to his left shoulder in 2019 for which they paid medical and indemnity benefits; however, the contend herein that the claimant sustained a new injury to his left shoulder, or an aggravation of his preexisting left shoulder condition in September 2022 after Dr. Joel Smith released him to return to light duty work duty on August 31, 2022. At the August 31, 2022, examination Dr. Smith noted the following findings in the claimant's left shoulder:

Forward Flexion	180 degrees
Abduction	110 degrees
External Rotation	65 degrees
Internal Rotation	PSIS

The claimant has undergone two (2) prior surgeries on his left shoulder. After each of those procedures, his first light duty restrictions always consisted of no use of the left arm. Consequently, it is now disingenuous of the claimant to now contend he did not know the full extent of the light duty restrictions placed upon him by Dr. Smith as of August 31, 2022, he was aware that following his previous surgeries these restrictions always included no use of the left arm. Despite being advised that he was released to light duty, the claimant proceeded to help his son change a carburetor on the Saturday prior to his follow up appointment with Dr. Smith on September 27, 2022. The claimant advised Dr. Smith at that visit that while helping his son change a carburetor and while holding a wrench, his left shoulder popped, and "pain has increased since then." Unlike any previously reported incident of his left shoulder popping, this time whatever activity the claimant was performing was unlike any other activity that caused his shoulder to pop as this time, unlike the previous times, the pain from the pop never went away but continued to increase ever since. Accordingly, there is a clear specific incident on that Saturday that caused a new and prolonged increase in the claimant's left shoulder pain. At that office visit, Dr. Smith noted a decrease in the claimant's active range of motion. Specifically, Dr. Smith noted:

Forward Flexion:	with pain and 170 degrees
Abduction:	with pain and 100 degrees
External Rotation:	with pain and 60 degrees
Internal Rotation:	with pain and buttocks

As the respondents acknowledge in their post-hearing brief, active range of motion (ROM) is a subjective finding of new pain and symptoms in the claimant's left shoulder.

But, significantly, in addition to these subjective findings Dr. Theodore Hronas, a board certified radiologist with the American Board of Radiology who the respondents' asked to review the claimant's 3/10/2022 surgical record/operative report, as well as two (2) *objective* diagnostic MRI arthrograms, one (1) of which was performed on 12/23/2021, *before the alleged September 2022 new injury*, and the most recent of which was performed on 11/23/2022, *after the alleged September 2022 new injury*. In his written report dated March 15, 2023, Dr. Hronas explained in some detail the differences between these two (2) objectives diagnostic tests. (RX2 at 26-27). Concerning the 12/23/2021 MRI arthrogram, Dr. Hronas noted:

> …susceptibility artifact within the humeral head related to metallic bone anchors secondary to prior rotator cuff tear. There is a small 2 mm region of contrast signal involving the undersurface of the supraspinatus tendon characteristic of a grade II articular surface tear. The infraspinatus and teres minor muscles and tendons are normal. There is abnormal contrast traversing the superior margin of the subscapularis characteristic of a full thickness tear creating a defect within the adjacent rotator cuff interval, with contrast from the joint space communicating directly with the subacrominal/subdeltoid bursa. There is glenohumeral joint arthritis. The long head of the biceps tendon is not seen within the bicipital groove.

(RX2 at 26).

Dr. Hronas further noted the claimant underwent surgery on 3/10/2022 following the aforementioned 12/23/2021 diagnostic test which included an arthroscopic repair of the subscapularis, a mini open biceps tenodesis, and a humeral head chondroplasty with glenoid and labral debridement.

In describing the MRI arthrogram findings from 11/23/2022 – performed some nine (9) months after the March 2022 surgery, and only three (3) months after the occurrence of and the claimant's report to his doctor concerning September 24, 2022, alleged new injury, Dr. Hronas

noted the November 2022 objective diagnostic study (which he mistakenly refers to as having been performed on "12/23/2022") revealed:

> …susceptibility artifact to bone anchors used in repair oo the supraspinatus and subscapularis tendons. A previously seen small articular surface tear of the supraspinatus has resolved. *There is extensive high grade partial articular surface tear of the midsubstance of the subscapularis tendon with abnormal contrast occupying the rotator interval characteristic of complete tear of the superior glenohumeral ligament and rotator interval capsule.* The coracohumeral ligament is intact. The infraspinatus and teres minor muscles and tendons are normal. The long head of the biceps tendon is not visualized consistent with tenodesis. There is again circumferential labral tearing and detachment.

(RX2 at 26) (Emphasis added).

Dr. Hronas went on to summarize and explain the significance of the differences between these two (2) objectives diagnostic test results. He stated the most recent 11/23/2022 MRI arthrogram showed findings of a successful repair of the supraspinatus tendon. However, he further noted that this same 11/23/2022 MRI arthrogram, "shows a progressive high grade articular surface tear of the subscapularis tendon with a complete tear of the adjacent rotator interval capsule and likely the superior glenohumeral ligament." (RX2 at 27). He goes on to point out that these findings were *not present in the 12/23/2021 MRI arthrogram*, nor did the claimant's treating orthopedic surgeon, Dr. Joel Smith, note them in his 3/10/2022 operative report from the claimant's third left shoulder surgery. The obvious differences Dr. Hronas identifies and explains above provide significant objective medical evidence of a new injury to the claimant's left shoulder, or at least the aggravation of the claimant's preexisting left shoulder condition as it existed after the date of both his compensable injury in 2021, and his third surgery in March of 2022. Since the claimant had not worked after his March 2022 third left shoulder surgery, it is

highly likely and more probable than not that the condition of the claimant's left shoulder as seen in the 11/23/2022 MRI arthrogram was caused by the independent intervening incident the claimant sustained and reported to Dr. Smith in September 2022 – *after his healing period had ended and Dr. Smith had released him to light duty work on August 31, 2022.* In addition, as a board-certified radiologist of the American Board of Radiology Dr. Hronas's report – especially in the total absence of any evidence, medical or otherwise, rebutting or contradicting Dr. Hronas's findings – are entitled to significant weight based on the facts of this case.

The credible evidence of record demonstrates the presence of new objective medical findings resulting from the carburetor-repair incident in September 2022 after the claimant had been released to light duty of no use of his left arm. The claimant tries to downplay this incident by claiming he did not do anything but hold a wrench. However, again as the respondents' point out in their post-hearing brief, the claimant's testimony is considered disputed as a matter of law. Uncorroborated testimony of an interested party is always considered to be controverted. This rule of law also applies to a non-party witness whose testimony might be biased. *Burnett v. Philadelphia Life Insurance Co.,* 81 Ark. App. 300, 101 S.W.3d 843 (Ark. App. 2003). It is not arbitrary for a fact finder to discredit and disregard such testimony. *Id*.; *see also, Sykes v. Carmack*, 211 Ark. 828, 202 S.W.2d 761 (1947). The testimony of an interested party is taken as disputed as a matter of law whether offered on his own behalf or on the behalf of another interested party. *Knoles v. Salazar*, 298 Ark. 281, 766 S.W.2d 613 (1989).

The claimant denied in his deposition having worked on his truck since his third surgery in March 2022; however, when presented with the physical therapy notes indicating he worked on

his truck for three hours in June of 2022, he could no longer continue to deny having worked on his truck after his most recent shoulder surgery. Likewise, at the hearing the claimant denied having raked his yard after his third surgery. But again, the physical therapy records show he reported pain in his shoulder from raking leaves in July 2022. It is patently clear the claimant denied performing any work which might injury or harm his left shoulder such as working on his truck or raking leaves when other evidence directly contradicted the claimant's testimony in this regard. Similarly, there exists no credible evidence to support the claimant's own self-serving, uncorroborated testimony that he did not sustain a new injury or aggravation while performing work on the carburetor in September 2022.

The preponderance of the medical evidence reveals that prior to the new injury or aggravation from changing a carburetor the claimant had a successful repair of the supraspinatus tendon. After this incident, the MRI arthrogram revealed "a progressive high grade articular surface tear of the subscapularis tendon with a complete tear of the adjacent rotator interval capsule and likely the superior glenohumeral ligament." (RX2 at 26-27). This is a new objective finding that supports respondent's contention that the claimant sustained a new injury or aggravation in September of 2022. There is grossly insufficient evidence these new findings are the natural and probable result of the compensable injury. Indeed, these new objective findings provide unrebutted objective medical evidence the new findings are in fact *not causally related to the claimant's original compensable injury*. These objective findings were not present in the first MRI arthrogram nor were they noted in Dr. Smith's operative report. (Moreover, it is interesting to note the claimant's own subjective reports of increased severity of pain, a different type of pain, and decreased active ROM support the new objective findings Dr. Hronas mentions in his report.)

Accordingly, the only reasonable conclusion a fair-minded fact-finder can draw from the preponderance of the credible evidence of record is that the claimant sustained a new injury or aggravation in September 2022 that is not causally related to his original left shoulder injury from 2019. To find otherwise would constitute sheer speculation and conjecture, which cannot support a claim for benefits pursuant to the Act. *See, Dena, supra*. This new injury or aggravation is supported by new objective medical findings, again, as Dr. Hronas credibly explains without rebuttal or contradiction. Consequently, for all the aforementioned reasons I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this claim.

2. The claimant has failed to meet his burden of proof in demonstrating he is entitled to any additional TTD benefits after August 31, 2022 – the date his treating orthopedic surgeon, Dr. Smith, released him to light duty – through a date yet to be determined since: (a) The preponderance of the evidence reveals the claimant's healing period ended as of August 31, 2022, when Dr. Smith released him to light duty work since the claimant clearly was not totally incapacitated from earning wages; (b) The preponderance of the evidence reveals the respondents made the claimant a *bona fide* job offer after Dr. Smith released him to light duty work as of August 31, 2022, that fit within his single physical restriction, but the claimant admittedly refused the job offer, never attempted to perform the light duty job, and testified he had voluntarily retired as of June 30, 2022.

3. I find the preponderance of the evidence demonstrates the claimant sustained a new injury or aggravation supported by new objective medical findings on in September 2022; therefore, he has failed to meet his burden of proof in demonstrating he is entitled to additional medical treatment at the respondents' expense after the date they last paid his medical expenses in late September 2022.

4. The claimant's attorney is not entitled to a fee on these facts.

Therefore, for all the aforementioned reasons, this claim is hereby respectfully denied and dismissed with prejudice subject, of course, to the claimant's statutory appeal rights.

IT IS SO ORDERED.

Mike Pickens
Administrative Law Judge

MP/mp