OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-276-942-001

ISSUES

- Did Claimant prove she suffered a compensable injury to her left shoulder on September 28, 2022?

- If the claim is compensable, did Claimant prove entitlement to medical benefits, including a March 4, 2024, appointment at Concentra?

- The parties agreed to reserve the issues of AWW and temporary disability benefits.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver, delivering frozen foods and meals to residential customers. She typically worked 8- to 12-hour shifts, five days per week. The job required lifting up to 50 pounds on a regular basis.

2. On September 28, 2022, Claimant was retrieving items from a shelving unit in her vehicle, when a tray holding containers of ice cream became unbalanced and fell. She caught the tray at approximately waist level. When she did so, Claimant felt a sharp, stabbing pain in her left shoulder.

3. Claimant took a break for approximately 30 minutes to allow the pain to subside. The initial "severe" pain improved to a "mild" level, and she resumed working. Claimant testified that she limited the use of her left arm during the remainder of her shift. But she did not leave early or lose any wages.

4. Claimant called her supervisor immediately after the accident and was instructed to call Insurer's "1-800 number" to report the injury. Claimant's supervisor advised it was "up to her" if she wanted to see a doctor. Claimant called the 1-800 number and completed an accident report. She declined an offer of medical treatment because "I figured I would just tough it out."

5. Thereafter, Claimant worked her regular job and sought no treatment for the left shoulder for more than a year. Claimant testified she occasionally had difficulty handling food items because of the shoulder pain and skipped delivery of certain items because they were too heavy. However, there is no persuasive evidence she missed any time or lost any wages because of her left shoulder.

6. Employer had financial difficulties in 2023 and eventually closed the branch where Claimant worked around November 2023. Employer ceased operations shortly thereafter.

7. Claimant saw her private physicians several times between August 2023 and December 2023 for unrelated conditions, with no mention of any left shoulder issues. This includes a November 20, 2023 appointment with Dr. Ashima Singh, at which Claimant provided a relatively comprehensive history outlining chronic neck and back pain and other general health issues. Claimant reported "distress" about losing her job but said nothing about any left shoulder injury or symptoms.

8. On December 4, 2023, Claimant told her PCP that her longstanding anxiety had worsened when she lost her job with Employer. She again did not mention any left shoulder issues.

9. The first medical report referencing Claimant's left shoulder is a December 21, 2023 note from Dr. Singh. Claimant's primary concern at that appointment was a recent visit to the ER for severe neck pain and headaches. However, she also reported that "a year and a half ago she injured her left shoulder at work. She has been having difficulty raising her arm. . . . She did not pursue further treatment because she wanted to keep working." Examination of the left shoulder showed weakness in abduction and adduction. Empty can test and Hawkins test were positive. Dr. Singh suspected a rotator cuff tear but made no treatment recommendation because Claimant wanted wait until she could determine if her workers' compensation claim was "still valid."

10. Claimant contacted Respondents and asked to see a doctor for her shoulder. Claimant was referred to Concentra, where she saw Dr. Tanya Hrabal on March 4, 2024. Claimant reported that she injured her left shoulder in September 2022 while pulling a tray of ice cream from her vehicle. She stated, "she will go a long time without pain and then do something to aggravate it and it will hurt again." Claimant said she could not raise her arm above shoulder level and that reaching to the side was painful. Dr. Hrabal concluded that Claimant did not suffer a work injury. She put Claimant at MMI and released her with no impairment and no restrictions.

11. At hearing, Claimant agreed her shoulder symptoms were intermittent rather than continual but disputed the characterization that she went "a long time" without symptoms. She testified that the symptom-free intervals typically lasted 2-4 weeks.

12. Claimant went to the St. Mary Corwin Hospital Emergency Department on March 22, 2024, for evaluation of left shoulder pain. Claimant complained of "intermittent" left shoulder pain for one and a half years since an incident at work. Claimant stated, "she dealt with the pain and never got evaluated." X-rays showed mild arthritic changes but no acute pathology. Claimant was prescribed lidocaine patches and Voltaren gel, and referred to an orthopedic surgeon "per her request."

13. Dr. Mark Failinger performed an IME for Respondents on January 18, 2025. Claimant told Dr. Failinger she was offered medical treatment when she reported the injury but had declined. She said her shoulder pain subsequently waxed and waned over the next two years and she "learned to live with" it. Claimant told Dr. Failinger she had an MRI of the left shoulder in June 2024, and was told it showed a partial rotator cuff tear. Claimant saw an orthopedic surgeon, Dr. Craig Fossee in September 2024, who performed two cortisone injections and referred Claimant to therapy. [1]

14. Dr. Failinger opined that the mechanism described by Claimant could reasonably cause a "mild strain" but would not normally be expected to cause any long-term or permanent structural injury to the rotator cuff, labrum, or biceps tendon. Such strains typically heal in six to eight weeks. Dr. Failinger considered it important that Claimant sought no treatment for 18 months after the incident, and did not report shoulder issues to providers she saw for other conditions during that interval, despite working a "relatively physical job" that required reaching and lifting in overhead positions and carrying food items. Therefore, Dr. Failinger concluded that any strain had resolved long before the first report of shoulder symptoms in March 2024.

15. Dr. Failinger reiterated and expanded on his opinions in his deposition testimony. Dr. Failinger opined that Claimant's description of waxing and waning symptoms in the 18 months after the incident is consistent with degeneration changes and arthritis, rather than an acute injury. Dr. Failinger testified that, in his experience, partial rotator cuff tears are typically degenerative in nature. Dr. Failinger concluded that Claimant's recurring shoulder symptoms were, with very high medical probability, due to ongoing osteoarthritis and degenerative rotator cuff pathology, rather than any permanent pathology caused by the alleged work accident in September 2022.

16. Dr. Failinger's opinions are credible and persuasive.

17. Claimant testified that even though she reported the accident to Employer, she did not pursue treatment because she was worried about losing her job. Claimant testified there were instances where her supervisor had been upset with other employees who had called off from work. However, Claimant conceded that Employer had covered a previous claim involving her right shoulder.

18. Claimant failed to prove she suffered a compensable injury to her left shoulder on September 28, 2022. Although Claimant may have suffered a minor strain, she sought no treatment and continued working her regular job until November 2023, when her position was eliminated for economic reasons. Dr. Failinger is persuasive that the symptoms Claimant reported when she finally sought treatment for the shoulder were unrelated to the incident in September 2022. Because the accident did not proximately cause disability or a need for medical treatment, it did not give rise to a compensable "injury."

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[1] Neither the MRI report nor Dr. Fossee's records were offered at hearing.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment by a preponderance of the evidence. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant failed to prove she suffered a compensable injury on September 28, 2022. Although Claimant may have suffered minor soft tissue strain, she received no treatment for it. Nor is there persuasive evidence that the incident proximately caused disability or a wage loss. Claimant's allegation of significant ongoing symptoms and limitations is undermined by her failure to mention any shoulder problems at multiple medical appointments before December 2023—nearly 18 months after the accident. Dr. Failinger is persuasive that any minor strain had resolved well before then. The shoulder symptoms Claimant reported in December 2023 and thereafter probably reflect the natural progression of a degenerative process, without contribution from the incident at work.

Because the September 28, 2022 incidenet did not proximately cause a disability or need for medical treatment, there was no compensable "injury."

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 27(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 11, 2025

DIGITAL SIGNATURE

Patrick C.H. Spencer II

Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts