

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F113705**

<b>CLARENCE TAYLOR, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>B &amp; B DISPOSAL, EMPLOYER</b>	<b>RESPONDENT</b>
<b>ZENITH INSURANCE, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED OCTOBER 14, 2003**

Hearing before **ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN**, on July 17, 2003 at Phillips County, Helena, Arkansas.

Claimant represented by the **HONORABLE CHARLES P. ALLEN, JR.**, Attorney at Law, West Helena, Arkansas.

Respondents represented by the **HONORABLE AMY HUFFMAN**, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of medical expenses, temporary total disability benefits and attorney's fees.

At issue is whether or not the claimant sustained a compensable right shoulder injury as defined by Ark. Code Ann. §11-9-102. All other issues are reserved.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on November 15, 2001 at which time the claimant sustained compensable injuries to his neck, back, and left knee in a motor vehicle accident, at a compensation rate of \$288.00/\$216.00. Medical expenses and temporary total disability benefits (until August 15, 2002) and a 2% rating to the lower extremity were paid. This

claim for a shoulder injury has been controverted in its entirety. A child support lien has been filed by Lee and St. Francis Counties.

The claimant contends he injured his right shoulder in the compensable November 15, 2001 motor vehicle accident. He seeks payment of medical expenses, temporary total disability benefits from August 16, 2002 to a date yet to be determined and attorney's fees.

The respondents contend all appropriate benefits have been paid. The claimant cannot meet his burden of proving a compensable shoulder injury. Alternatively, in the event of an award, the respondents seek a credit of \$822.00 for an overpayment of temporary total disability benefits from July 27, 2002 to August 15, 2002.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits contained in the hearing transcript.

The following witnesses testified at the hearing: the claimant; his companion, Caroline Harris; and his former supervisor, Jodie Owensby.

The claimant, age 38 (D.O.B. July 1, 1965) has a high school education. His work experience includes jobs as a cook, farmer, and at a cotton gin. He has a commercial driver's license (CDL) and had worked for the respondent-employer over a year driving trucks prior to his accident. He applied for unemployment benefits in January, 2002, but was denied.

The claimant testified his truck was malfunctioning and he had reported problems to his supervisors on numerous occasions. Six inspection forms were submitted on Truck #4 between October and November 2001, showing complaints of the front wheel locking up when turning to the right.

The claimant sustained multiple injuries when the steering locked up and ran down an embankment before hitting a tree (Tr. p. 12-14). Jodie Owensby, the claimant's former supervisor testified the claimant complained of the truck locking up but he test drove it and found no problem. The claimant did not contact him on the day of the accident but did complain of neck and shoulder pain following the incident. About three months after the accident, the claimant told Mr. Owensby he was raising goats with his sons.

### **MEDICAL EVIDENCE**

\_\_\_\_\_The claimant was treated at the emergency room (ER) following the November 15, 2001 motor vehicle accident (MVA). He gave a history of injury to his face, neck and left knee after the power steering locked and he jumped out of his truck before it hit a tree. The ER report shows "No LOC" or loss of consciousness (TR. p. 13-14/25-26). X-rays were taken of the facial bones, jaw, left shoulder, left knee and cervical spine. He was diagnosed with facial abrasions and a cervical strain. He was prescribed medication and a cervical collar and discharged the same day.

Two months later, the claimant saw orthopedic surgeon, Dr. Stephen Waggoner, complaining of persistent back, neck and left knee and shoulder pain. He was diagnosed with strains of the cervical and lumbar spine and a strain of the left knee based on x-rays. Dr. Waggoner excused the claimant from work and ordered diagnostic testing which had to be postponed due to a death in the claimant's family. The claimant did not keep follow-up appointments in February, March and April.

When the claimant did see Dr. Waggoner again on April 5, 2002, he complained of knee pain, noting improvement with his neck and back. He told the doctor he had been laid off from work. The claimant was diagnosed with an acute chondral defect based on an MRI scan of his left

knee. Dr. Waggoner scheduled surgery on April 25, 2002 but released him to light duty with restrictions against climbing, kneeling or squatting. Following surgery, Dr. Waggoner recommended three weeks of physical therapy. The claimant missed three follow-up appointments in May. When he returned to Dr. Waggoner on June 19, 2002, he complained of right shoulder pain with improvement of his knee. Dr. Waggoner prescribed four more weeks of physical therapy for his knee. The claimant was also diagnosed with impingement syndrome of his right shoulder based on x-rays. Dr. Waggoner prescribed medication, injections and physical therapy for his shoulder.

In a follow-up report dated July 10, 2002, Dr. Waggoner opined that the claimant was reaching maximum medical improvement with regard to his knee after one more week of physical therapy. The claimant was released to full duty on July 29, 2002 with a 2% impairment rating to the lower extremity.

Dr. Waggoner recommended an MRI scan of the right shoulder which revealed a cyst over the humeral head.

Dr. Waggoner's Report of 7-26-02:

As for his shoulder, he is continuing to complain of persistent pain. I reviewed his MRI and he does have a small cyst in the humeral head, but I'm not sure this is causing him any symptoms. There is no evidence of rotator cuff pathology. I am going to refer him to Dr. Harriman for a second opinion to see if he thinks the cyst could be causing any of his symptoms and if he feels that any surgical intervention would be beneficial.

The claimant saw Dr. Harriman on August 1, 2002 and reported a history of right shoulder pain since the MVA. He did not know how he hurt his shoulder because he lost consciousness in the accident. Dr. Harriman ordered additional testing to rule out a labral tear, prescribed medication and returned the claimant to light duty with restrictions against working overhead and lifting more

than twenty pounds. Dr. Harriman advised that if testing confirmed a labral tear, arthroscopic surgery would be necessary.

Although the additional diagnostic testing (MRI arthrogram) was not performed, Dr. Harriman authored a report dated January 14, 2003 opining that the right shoulder condition was caused by the MVA. Dr. Harriman based his opinion on his assessment of the claimant's character, the reported loss of consciousness, his symptoms since the accident and his lack of shoulder problems prior to the accident. Dr. Waggoner however, could not relate the right shoulder injury to the MVA.

### **FINDINGS AND CONCLUSIONS**

As this claim arose after July 1, 1993, this case is governed by Act 796 of 1993 which must be "strictly" construed, Ark. Code Ann. §11-9-704, §11-9-717. The claimant has the burden of proving the following requirements, as defined in Ark. Code Ann. §11-9-102, by a preponderance of the evidence of record, which means "evidence of greater convincing force, "Smith v. Magnet Cove Barium Corporation, 212 Ark. 491, 206 S.W.2d 442 (1947):

- (1) proof that the injury arose out of and in the course of employment
- (2) proof that the injury caused internal or external physical harm to the body which required medical services or resulted in disability
- (3) proof establishing the injury by objective medical evidence
- (4)(a) proof that the injury was caused by a specific incident identifiable by time and place of occurrence

or

- (b) proof that the injury was caused by rapid, repetitive motion and proof that the injury was the major cause of disability or need for treatment.

The evidence of record shows that the claimant sustained multiple injuries in a motor vehicle accident on November 15, 2001. He was examined and treated for his complaints of pain, however there is no mention of a right shoulder injury until June 19, 2002 some seven months after the accident.

The only objective medical finding of the right shoulder is a benign cyst. Neither Dr. Waggoner nor Dr. Harriman felt this cyst was the source of the claimant's symptoms. Dr. Harriman recommended additional testing which is not in evidence. Therefore, an exact diagnosis of the claimant's shoulder symptoms has never been made.

Nevertheless, Dr. Harriman relates the right shoulder complaint to the MVA in part because the claimant told him his symptoms began after the accident. However that history is not confirmed by the medical records. I find it improbable that the claimant would complain of left shoulder pain but not right shoulder pain in the reports of the ER and Dr. Waggoner.

The Commission is not bound by a doctor's opinion which is based on inaccurate information provided by the claimant. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983), Brewer v. Paragould Housing Authority, Full Commission opinion of January 22, 1996 (E417617).

After considering the gap in time between the accident and the reports of symptoms and the lack of a definitive diagnosis, I find the claimant has failed to prove he sustained a right shoulder injury arising out of and in the course of his employment established by objective medical evidence.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties

on November 15, 2001 at which time the claimant sustained compensable injuries in a MVA at a compensation rate of \$288.00/\$216.00. Medical expenses, temporary total disability (until August 15, 2002) and a 2% rating for a left knee injury have been paid.

2. The claimant has failed to prove by a preponderance of the credible evidence that he sustained a compensable injury, caused by a specific incident, arising out of and in the course of his employment which produced physical bodily harm, supported by objective findings, requiring medical treatment or producing disability, pursuant to Ark. Code Ann. §11-9-102.

This claim for additional benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge