

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F001124

LARRY D. COUCH, EMPLOYEE

CLAIMANT

FIRESTONE TUBE COMPANY, EMPLOYER

RESPONDENT

**INSURANCE COMPANY OF PENNSYLVANIA/
GALLAGHER BASSETT, CARRIER/TPA**

RESPONDENT

OPINION FILED SEPTEMBER 23, 2004

The hearing was held in this case on June 25, 2004, before ADMINISTRATIVE LAW JUDGE D. FRANKLIN AREY III, at Russellville, Pope County, Arkansas.

Claimant was represented by Aaron Martin, Attorney at Law, Fayetteville, Arkansas.

Respondents were represented by Betty J. Demory, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On June 25, 2004, the above-captioned claim came on for a hearing at Russellville, Arkansas. Following a prehearing conference, a Prehearing Order was filed in this claim on February 17, 2004.

The parties agreed to four stipulations; the first three are set forth in the Prehearing Order and were confirmed by the parties at the hearing, while the fourth stipulation was agreed to at the hearing. The stipulations that follow are hereby accepted:

1. The employee-employer-carrier relationship existed at all relevant times.
2. Claimant sustained a compensable injury to his neck and left shoulder on January 10, 2000.
3. Respondents paid 18% and 9% impairment ratings to the whole body.

4. Claimant's average weekly wage was \$671.04, which yields a temporary total disability rate of \$394.00.

At the June 25, 2004 hearing, the parties discussed the issues set forth in the Prehearing Order, and Claimant's request (after the Prehearing Order was filed) that two additional issues be raised at the hearing. Respondents did not object to raising the two additional issues. Therefore, as agreed upon by the parties, the issues to be litigated and resolved are limited to the following:

1. Whether Claimant sustained a compensable injury to his right shoulder and to his back on January 10, 2000.

2. Whether Claimant is entitled to an 8% permanent impairment rating to the whole body for his right shoulder injury.

3. Whether Claimant is entitled to temporary total disability from June 2 to September 29, 2003.

4. Whether Claimant is entitled to medical treatment.

5. Whether Claimant is entitled to permanent and total disability benefits.

6. In the alternative, whether Claimant is entitled to additional permanent partial disability benefits in the form of wage-loss.

7. Whether Claimant is entitled to an attorney's fee.

Claimant contends that he sustained a compensable injury to his right shoulder and to his back, in addition to the stipulated left shoulder and neck injuries. Claimant requests payment of an 8% permanent impairment rating to the whole body for his right shoulder injury. Claimant further contends that he is entitled to permanent and total disability or wage-loss benefits, in the alternative. Claimant seeks additional benefits and an attorney's

fee as noted in the issues raised.

Respondents contend that Claimant has been provided all appropriate benefits to which he is entitled. Respondents argue that Claimant's right shoulder and back complaints are not causally related to his employment. Respondents also challenge Claimant's entitlement to either wage-loss disability or permanent and total disability benefits.

DISCUSSION

Claimant worked as a maintenance man for Respondent/Employer. On January 10, 2000, during the night shift, Claimant attempted to force an eighteen-inch long bushing, weighing about seventy or eighty pounds, back into its machine. Claimant described what happened next:

It's like 360 degrees, and the molds are spaced about 24 to 36 inches apart. You have to go in between the two molds with a sledgehammer and work over your head to beat this seven-inch bushing back in. There's the weight from the head of the mold and everything on it. So there's several thousand pounds of pressure on this when you're trying to beat it back in, so it takes quite an aggressive amount of force to beat this bushing back in. So I was in the process of beating one of these bushings back in and felt something kinda like a pop or give. I noticed my left shoulder wasn't working, so I just let the sledgehammer fall where it was.... I got quite concerned because my left shoulder wouldn't work anymore.

Claimant duly reported his injury and was referred for medical treatment.

The parties stipulated that Claimant sustained a compensable injury to his neck and left shoulder on January 10, 2000. Claimant has undergone four surgeries. On March 20, 2000, Claimant underwent an anterior cervical discectomy and fusion at the C4-5 and C6-7 levels. On July 13, 2000, Claimant underwent a diagnostic arthroscopy of his left shoulder with rotator cuff repair and superior labral anterior posterior tear repair, among other

procedures. On July 17, 2001, Claimant underwent an anterior cervical discectomy and cervical fusion at the C5-6 level. Finally, on December 27, 2001, Claimant underwent a diagnostic arthroscopy of his right shoulder with repair of labrum and other procedures.

A. Compensability of Right Shoulder and Back Injuries

1. Right Shoulder

Claimant reported to Jewel Cutright, the plant nurse, on the morning following his injury. In reporting his night shift injury, he only indicated to Ms. Cutright that his left shoulder was injured; he did not mention any injury to his right shoulder, neck, or back. Ms. Cutright arranged for Claimant to visit with Dr. Mike Hendren. Dr. Hendren's note dated January 10, 2000 reports weakness in Claimant's left arm, and places a restriction on his use of that arm; it also states that Claimant "[m]ay do normal duties on the right side."

Subsequent medical records are devoid of any indication of a right shoulder injury, until after Claimant's first surgery on March 20, 2000. A February 8, 2000 note by Dr. Julian McCoy states that Claimant "has no weakness in the left side of his face, right arm or left leg." However, on March 29, 2000, some nine days after the first surgery, Dr. Anthony Russell reported in a clinic note that Claimant "has noted some right shoulder and arm pain. However, this is improving as time goes on."

Claimant testified that he began to have pain in his right shoulder, either during the shift in which he injured himself or later in the day. He insisted that, beginning with Dr. Hendren, he told his treating physicians about his right shoulder. Although the pain in his right shoulder was becoming progressively worse, Claimant was mostly concerned about his left shoulder. He testified:

Q. Did you notice at home that you had to over-compensate for the loss of use of your left shoulder?

A. Well, yeah. When you lose one of your shoulders or one of your limbs, you have to use the other limb to do everything with.

Claimant testified that he reported his right shoulder pain to Drs. Russell Allison and Anthony Russell.

Claimant was referred to Dr. Jimmy Tucker for an evaluation of his left shoulder injury. Dr. Tucker's first note of June 14, 2000, only records a problem with Claimant's left shoulder; Dr. Tucker performed Claimant's second surgery, to address his left shoulder pain, on July 13, 2000. Claimant testified that he told Dr. Tucker about his right shoulder, but again, the left shoulder was the focus of treatment.

On October 5, 2001, Dr. Tucker recorded the following:

[Claimant] presents today for a recheck of the left shoulder and because of increasing pain in his right shoulder. He has undergone a repeat cervical fusion for herniated disc since I saw him last. He appears to have recovered from this well, however he indicates that he has had increasing pain in the right shoulder with a catching sensation. He is not sure if this is related to his neck.

Dr. Tucker expressed some concern about the possibility of a rotator cuff tear in Claimant's right shoulder, and directed Claimant to obtain an MRI. An "MR scan right shoulder" was performed October 25, 2001. The subsequent radiology report noted "evidence for tendinosis involving the supraspinatous tendon and evidence for a small full-thickness tear of the supraspinatous near it's insertion into the humeral head."

Claimant reported to Dr. Tucker on October 31, 2001. In a clinic note, Dr. Tucker recorded:

Recheck of the right shoulder. We sent him for a MRI on the right shoulder. He has had continued pain for the last several months. He has basically had

to use his right arm for all activity and I believe the right shoulder pain is related to his initial neck and rotator cuff injury on the left side.

Dr. Tucker recorded an impression of “[r]otator cuff tear of the right shoulder.” In a note dated November 28, 2001, Dr. Tucker again opined “I do believe that this right shoulder injury is related to the problems he has had with his cervical spine and left shoulder.” Claimant confirmed that, from the date of his accident until the date of the MRI on his right shoulder, there were no accidents that might have damaged his right shoulder.

As noted above, Claimant underwent surgery on his right shoulder on December 27, 2001. The surgery initially helped, but during the process of physical therapy, Claimant’s right shoulder went “back to causing me a lot of pain when I used it repetitively.” He testified that he still has “pain down my right shoulder, and my arms and hands go numb and tingly,” among other continuing symptoms.

Dr. Terry Sites performed an independent medical evaluation on Claimant on June 13, 2002. With regard to Claimant’s right shoulder, Dr. Sites wrote:

For the right rotator cuff tear, I think it less-likely-than-not that this is an injury which occurred 01-10-00, and less-likely-than-not that this is a compensable injury. However, in terms of impairment, based upon the objective findings above and within a reasonable degree of medical certainty it is my opinion that the mild weakness would result in a 4% impairment, and the loss of motion a 4% impairment, resulting in a combined impairment of 8%.

Dr. Sites did not see any benefit to continued physical therapy for Claimant’s shoulders.

Dr. Tucker disagrees with Dr. Sites. In an October 30, 2002 letter, Dr. Tucker stated that “[a]t this time I think [Claimant] has reached maximal medical improvement of the right shoulder.” After discussing Claimant’s left shoulder, Dr. Tucker wrote:

On the right side, the impairment rating based on the same figures would be 9% for range of motion with 4% for mild weakness, giving a combined impairment rating of 13% with a whole person impairment rating of 8%.

These would be combined to be 16% whole person impairment rating. It is my medical opinion within a reasonable degree of medical certainty, the right shoulder injury was obtained at work and occurred on 1/10/00 and both of these should be compensated injuries.

Claimant asserts the compensability of his right shoulder injury. Claimant must demonstrate two things to prove that his right shoulder injury is a compensable consequence of his admittedly compensable injury: (1) that there is a causal connection between the compensable injury and the consequential episode; and (2) that there are objective findings of a compensable consequence. See Long v. L & J Mechanical, Full Workers' Compensation Commission Opinion filed September 30, 2003 (F008439); Atchison v. John P. Marinoni Construction Co., Full Workers' Compensation Commission Opinion filed September 19, 2001 (E616344).

Regarding the causal connection requirement, the Arkansas Court of Appeals has stated the test as follows:

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for any natural consequence that flows from that injury. The basic test is whether there is a causal connection between the two episodes.

Jeter v. B. R. McGinty Mech., 62 Ark. App. 53, 58, 968 S.W.2d 645, ___ (1998) (citations omitted). Claimant must prove this causal connection by a preponderance of the evidence. Bezzard v. American Greetings, Full Workers' Compensation Commission Opinion filed January 22, 1999 (E616529). "Preponderance of the evidence" means evidence of greater convincing force; the term does not mean preponderance in amount, but implies an overbalancing in weight. Smith v. Magnet Cove Barium Corp., 212 Ark. 491, 496-97, 206 S.W.2d 442, ___ (1947).

I find that Claimant has sustained his burden of proving by a preponderance of the

evidence that a causal connection exists between his January 10, 2000 compensable injury and his subsequent right shoulder problem. The parties stipulated that Claimant suffered a compensable injury to his left shoulder on January 10, 2000. Claimant testified that he began to over-compensate for loss of use of his left shoulder. On October 31, 2001, Dr. Tucker noted this causal connection: “[Claimant] has basically had to use his right arm for all activity and I believe the right shoulder pain is related to his initial neck and rotator cuff injury on the left side.”

Claimant must also establish the compensability of right shoulder injury by medical evidence supported by objective findings. As noted by the Commission in Atchison, supra, “we interpret Ark. Code Ann. § 11-9-102(4)(D) as requiring objective medical findings to establish the full extent of a compensable injury (including alleged compensable consequences)....” “Objective findings” are those which cannot come under the voluntary control of the claimant. Ark. Code Ann. § 11-9-102(16) (A) (i). A medical opinion addressing compensability must be stated within a reasonable degree of medical certainty. Ark. Code Ann. § 11-9-102(16)(B).

The record contains the required medical evidence supported by objective findings. The October 25, 2001 radiology report, interpreting Claimant’s “MR scan right shoulder,” found a full-thickness tear that Dr. Tucker also interpreted on October 31, 2001 as “a small full thickness rotator cuff tear.” As noted above, Dr. Tucker stated his belief that Claimant’s right shoulder pain is related to his initial compensable injury. On November 28, 2001, Dr. Tucker again stated that “I do believe that this right shoulder injury is related to the problems he has had with his cervical spine and left shoulder.” I find that Dr. Tucker’s opinion, expressed on two separate occasions, is stated within a reasonable degree of

medical certainty.

It must be acknowledged that, despite Claimant's testimony, the initial medical records do not reflect a right shoulder injury. However, a medical record dated March 29, 2000, less than three months after the admittedly compensable injury, does note a report of right shoulder pain; this is consistent with Claimant's testimony of over-compensation for loss of the left shoulder. Dr. Sites' June 13, 2002 independent medical evaluation should also be acknowledged; contrary to Dr. Tucker, Dr. Sites did not see a connection between the January 10, 2000 injury and Claimant's right shoulder problem. However, I find that Dr. Tucker's opinion is entitled to greater weight. Dr. Tucker is Claimant's treating physician; Dr. Tucker's October 31, 2001 opinion, stated above, is consistent with Claimant's testimony of increased reliance on his right shoulder.

To summarize, Claimant has proven by a preponderance of the evidence that his right shoulder injury is a compensable consequence of his January 10, 2000 compensable injury. Claimant lost the use of his left shoulder; he over-compensated by relying on his right shoulder, which establishes a causal connection confirmed by Dr. Tucker's opinion. An MRI of Claimant's right shoulder provides objective findings of his injury; Dr. Tucker's opinion concerning the compensability of this injury is stated within a reasonable degree of medical certainty.

2. Back

As noted above, Claimant did not initially report pain in his back to the plant nurse; indications for such pain are also absent from the initial medical records. Claimant testified that "[t]he middle of my back has been painful ever since back in 2000 or whatever." However, his testimony also appears to indicate that his back pain began

shortly after his left shoulder surgery, which occurred on July 13, 2000. Claimant testified that, at the time of the hearing, he continued to experience pain down his spine and in his back.

In January 2001 Claimant was referred to Dr. Robert Valentine for pain management consultation. On April 13, 2001, during one such visit, an office note of Dr. Valentine's records that Claimant complained of "increasing low back pain." Dr. Valentine noted: "I have explained to Mr. Couch that this is probably unrelated to his neck and therefore he needs to be prepared to have this covered under his regular medical insurance." At the hearing, Claimant did not dispute that this notation is the first indication of back problems or pain in Claimant's post-January 10, 2000 medical records.

Dr. Russell also addressed Claimant's back pain in a letter dated November 30, 2001.

In addition, we have studied Mr. Couch's lumbar spine due to ongoing pain there. Although this was not part of the initial complaint for which I saw him in March, 2000, it has been a source of pain in subsequent visits. It is certainly consistent with an injury that could be related to the initial work-type injury that he had upon presentation.

I find that Claimant has not sustained his burden of proving the compensability of his low back problem, either as a compensable injury in its own right or as a compensable consequence of his January 10, 2000 compensable injury. Claimant did not initially report a low back injury; the first medical record reflecting such a report is dated April 13, 2001. Dr. Valentine opined that Claimant's low back pain "is probably unrelated" to Claimant's compensable neck injury; Dr. Russell could only state that Claimant's lumbar spine pain "could be related" to Claimant's work injury. Thus, Claimant did not sustain his burden of proving by a preponderance of the evidence that his January 10, 2000 compensable

accidental injury caused physical harm to his back. See Ark. Code Ann. § 11-9-102(4)(A)(i). Likewise, Claimant failed to sustain his burden of proving by a preponderance of the evidence that his back injury is a compensable consequence of his admittedly compensable injury; there is insufficient proof of a causal connection between the two episodes. See Jeter, 62 Ark. App. at 58, 968 S.W.2d at ____.

B. Permanent Impairment Rating - Right Shoulder Injury

Claimant argues that he is entitled to an 8% permanent impairment rating to the whole body for his right shoulder injury. There are three statutory requirements to establish an entitlement to benefits for a permanent impairment. See Excelsior Hotel v. Squires, 83 Ark. App. 26, 33-34, ____ S.W.3d ____, ____ (2003); Schalski v. Family Cleaners & Laundry, Full Workers' Compensation Commission Opinion filed March 3, 2004 (E711809). First, it must be determined that the compensable injury was the major cause of the impairment at issue. Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). "Major cause" means more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A). Second, any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical findings. Ark. Code Ann. § 11-9-704(c)(1)(B). Third, benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Ark. Code Ann. § 11-9-522(g); Workers' Compensation Commission Rule 34. A claimant must prove by a preponderance of the evidence that he is entitled to an award of permanent physical impairment. Schalski, supra; see Ark. Code Ann. § 11-9-704(c)(2).

Based upon the record as a whole, I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to benefits based upon a

permanent impairment rating of 3% to the body as a whole. The proof demonstrates that Claimant's compensable injury is the major cause of his right shoulder injury. Claimant credibly testified to over-compensation for loss of his left shoulder; he also credibly testified that no accidents occurred to his right shoulder between January 10, 2000 and the MRI of his right shoulder. Dr. Tucker underscored this causal connection on October 31, 2001: "[Claimant] has basically had to use his right arm for all activity and I believe the right shoulder pain is related to his initial neck and rotator cuff injury on the left side." Dr. Tucker made a similar statement on November 28, 2001.

The record contains objective and measurable physical findings supporting the existence or extent of Claimant's right shoulder impairment. Specifically, the MRI of Claimant's right shoulder performed October 25, 2001 provides objective findings, which Dr. Tucker interpreted on October 31, 2001 as "[r]otator cuff tear of the right shoulder."

Claimant's request for benefits for permanent impairment must be based on an impairment rating using the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993) (hereinafter "Guides").

The Commission has adopted The Guides and to the extent that The Guides allow the use of subjective criteria for the establishment of an impairment rating, The Guides must give way to the statutory definition of objective findings as defined by the General Assembly.

...

The Commission is authorized to decide which portions of the medical evidence to credit and to translate this medical evidence into a finding of permanent impairment using the AMA Guides. Moreover, the Commission may assess its own impairment rating rather than rely solely on ratings assigned by physicians.

Williams v. Willamette Industries, Inc., Full Workers' Compensation Commission Opinion filed July 7, 2004 (E700242) (citing Polk County v. Jones, 74 Ark. App. 159, 47 S.W.3d 904

(2001) and Avaya v. Bryant, 82 Ark. App. 273, 105 S.W.3d 811 (2003)).

The record contains two documents stating impairment ratings for Claimant's right shoulder: Dr. Sites' June 13, 2002 independent medical evaluation, and Dr. Tucker's October 30, 2002 letter. Both doctors recorded range of motion measurements. Because Dr. Tucker's letter does not indicate whether his range of motion measurements resulted from active or passive testing, his measurements cannot be utilized. "[I]t has been held that passive range-of-motion tests may be proven to be objective findings where the testing was described in the record by the treating physician, at least for the limited purpose of assessing permanent impairment caused by a shoulder injury." Mays v. Alumnitec, Inc., 76 Ark. App. 274, 278, 64 S.W.3d 772, ___ (2001) (citing Hayes v. Wal-Mart Stores, 71 Ark. App. 207, 29 S.W.3d 751 (2001)). However, Dr. Sites recorded the following upon physical examination of the Claimant:

He has passive [emphasis supplied] motion to the both [sic] shoulders: flexion left 120 degrees, right 150 degrees; abduction left 120 degrees, right 150 degrees; internal rotation left T7, right T7; abduction left 20 degrees, right 20 degrees; external rotation left 30 degrees, right 20 degrees.

Based upon the foregoing, Dr. Sites opined "that the mild weakness would result in a 4% impairment, and the loss of motion a 4% impairment, resulting in a combined impairment of 8%" for Claimant's right rotator cuff tear.

I find that, based upon Dr. Sites' passive range of motion measurements and utilizing the Guides, Claimant is entitled to a permanent impairment rating of 3% to the whole body. Using the formulas for calculating impairment due to abnormal motion of the shoulder found on pages 41 to 45 of the Guides, based upon Dr. Sites' measurements, produces an impairment rating of 5% to the upper extremity. Using Table 3 on page 20

of the Guides to relate that impairment to impairment of the whole person results in a 3% rating of impairment to the whole person. Dr. Sites' rating for "mild weakness" cannot be utilized; as noted on page 64 of the Guides, "strength measurements are functional tests influenced by subjective factors that are difficult to control...." Thus, under the statutory requirements, such a rating cannot be utilized.

To summarize, upon review of the Guides and the record as a whole, I find that Claimant is entitled to a 3% impairment rating to the body as a whole. Claimant's credible testimony, buttressed by Dr. Tucker's opinion, establishes that Claimant's compensable injury was the major cause of his right shoulder impairment. The MRI of Claimant's right shoulder provides objective and measurable physical findings in support of the existence and extent of his physical impairment. Finally, Claimant's award of benefits for permanent impairment is based upon an impairment rating using the Guides, taking into account Dr. Sites' passive range of motion measurements. Thus, Claimant has proven by a preponderance of the evidence that he is entitled to an award of permanent physical impairment in the amount of 3% to the body as a whole.

C. Temporary Total Disability Benefits

Claimant seeks temporary total disability benefits from June 2 to September 29, 2003. Ark. Code Ann. § 11-9-519(a) provides for payment of total disability benefits.

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. The healing period ends when the employee is as far restored as the permanent nature of his injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended.

K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 227-28, 79 S.W.3d 414, __ (2002) (citations omitted); see Wilson v. Conagra, Inc., Full Workers' Compensation Commission Opinion filed August 24, 2004 (F214295). Claimant must prove his entitlement to temporary total disability benefits by a preponderance of the evidence. See Ark. Code Ann. § 11-9-704(c)(2).

Claimant credibly testified that from July 17, 2001 (the date of his second neck surgery) until September 19, 2003 (the date Dr. Russell released Claimant), he was not able to perform any type of work whatsoever.

I was having too many problems, too many symptoms, too much medication. It would've just been very difficult to return to work. ... With the severe headaches and the medication I was taking, it would have been impossible.

Concerning Claimant's healing period, Dr. Russell wrote on May 19, 2003:

Mr. Couch returns today in routine follow-up continuing to have quite a bit of neck, shoulder and arm pain bilaterally. He has not reached MMI at this point, and in fact, may still require further shoulder surgery by Dr. Tucker. In addition, there may be further spinal surgery in the future as well.

Dr. Russell next addressed the subject in a note dated September 29, 2003.

Larry Couch returned today in follow-up and to review his most recent MRI scan of the cervical spine. Although he shows progressive deterioration of the segments adjacent to his fusion, we still do not at this time see a good source that would amenable to surgical intervention.

I do believe that Mr. Couch has reached MMI at this point. His previously assigned partial impairment rating would still hold.

It should be noted that, by October 30, 2002, Dr. Tucker had declared Claimant at maximum medical improvement with regard to both of his shoulders.

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to temporary total disability benefits to September 29, 2003.

Dr. Russell's notes support my finding that Claimant remained within his healing period until September 29, 2003. Claimant credibly testified that he was unable to work up to that date; Claimant's testimony is supported by Dr. Russell's two notes. Indeed, on May 19, 2003, Dr. Russell predicted that Claimant might still require shoulder surgery as well as spinal surgery. Thus, Claimant remained totally incapacitated from earning wages within his healing period, which ended on September 29, 2003.

D. Medical Benefits

Claimant testified to continuing symptoms, despite four surgeries. He still experiences pain in his neck, between his shoulder blades, and down his spine. He has limited mobility in his neck; overuse of his neck causes headaches. He testified that his left shoulder never regained its strength following his initial injury; however, Claimant uses his left shoulder if he needs to do a repetitive task, instead of his right shoulder. He has to use both hands if he lifts a gallon of milk. If he stands or walks too long, his neck and shoulders begin to bother him; however, he cannot sit more than 15 or 20 minutes before he needs to stand. Claimant takes medication for pain management; at least one of his medications is addictive and causes memory loss. On a pain scale of one to ten (with ten being extreme pain), Claimant testified that a good day would be "probably five or six" while a bad day would be "eight or nine."

With regard to continuing pain, Dr. Sites wrote in his independent medical evaluation: "I think he would benefit from continued management with Dr. Valentine or other doctor involved in chronic pain, as this is likely to persist to some degree. I think his chronic pain is related more to his neck than to his shoulders." Dr. Sites opined that Claimant could work within restrictions, noting that Claimant's "pain makes it difficult for

prolonged sitting....”

Claimant presented to Dr. Michael Calhoun on April 12, 2004. After noting Claimant’s medications, Dr. Calhoun set forward the following plan:

Our plan is to send him a pain contract and keep him on his medications. I feel it would be dishonest to cut him off since he has been started on this with Dr. Russell.

On April 22, 2004, Dr. Calhoun opined that Claimant “does not appear to be medically able to undergo an FCE.”

Claimant seeks medical benefits. An employer shall promptly provide for an injured employee such medical services or apparatus as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). A claimant must prove by a preponderance of the evidence that the medical treatment is reasonably necessary in connection with his compensable injury. Cox v. Aeroquip, Full Workers’ Compensation Commission Opinion filed September 10, 2003 (F010474).

Medical treatment intended to reduce pain or enable an injured worker to cope with chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment. In addition, an employer may remain liable for medical treatment reasonably necessary to maintain a claimant’s condition after the healing period ends.

Lewis v. WSD Turner, Full Workers’ Compensation Commission Opinion filed July 12, 2004 (F212623) (citations omitted).

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is entitled to continuing reasonably necessary medical treatment in connection with his compensable injury. The parties stipulated to compensable neck and left shoulder injuries; this Opinion finds that Claimant’s right shoulder injury is compensable as well. Having observed Claimant at the hearing, I find his testimony concerning

continuing pain to be entirely credible. Claimant's testimony directly relates this continuing pain to his compensable injuries. Further, both Dr. Sites and Dr. Calhoun anticipate that Claimant will need continuing medical treatment for pain management. Thus, the evidence of greater convincing force establishes Claimant's entitlement to continuing reasonably necessary medical treatment in connection with his compensable injuries.

Claimant introduced, without objection, his Exhibit No. 2, a "Mileage Statement" seeking a balance of \$1,504.81 for mileage reimbursement for various trips for medical treatment or therapy. This exhibit appears to comply with Workers' Compensation Commission Advisory 89-2, revised. I find that the mileage was incurred in the course of seeking reasonably necessary medical treatment in connection with Claimant's injury, and that Claimant should therefore be reimbursed \$1,504.81.

E. Permanent and Total Disability Benefits

As previously noted, the parties stipulated that Claimant sustained a compensable injury to his neck and left shoulder on January 10, 2000; this Opinion finds that Claimant's right shoulder problem is a compensable consequence of that left shoulder injury. Claimant has undergone four surgeries since January 10, 2000, one each to his left and right shoulders, and two to his cervical spine. Claimant testified to continuing pain despite his treatment; at least two physicians agree that he will require continuing pain management.

At the time of the hearing Claimant was 46 years of age. He completed high school and an eighteen-month course in aviation maintenance. His work history is primarily in aviation or general maintenance, all of which involved manual labor.

Following his compensable injury, Claimant worked until January 26, 2000. In

October 2000 he applied for social security disability benefits; his application was approved, and Claimant is currently receiving those benefits. Claimant's second cervical spine surgery occurred on July 17, 2001; from then until Dr. Russell determined that Claimant had reached maximum medical improvement on September 29, 2003, Claimant testified that he could not work.

At the hearing Claimant testified that he would be working now if he could. He visited a State rehabilitation office prior to his September 29, 2003 release, without results. Claimant admitted that he did not return to the rehabilitation office after his release. He further admitted that he had not applied for work, checked on additional education, or looked into odd jobs or work with his hands. Claimant confirmed that he does not plan to return to work in the future. Claimant explained why:

I've got two discs in my neck that are just fixing to explode. They've gone from bulging to protruding. I guess it would be hearsay to say what my doctor told me, so I can't say that; but from what I understand, I believe it would be detrimental to my health to go back to work and blow those other two discs.

Claimant also referenced his inability to sit for a very long period of time, and his inability to concentrate due to his pain and medication.

Dr. Russell, who treated Claimant's cervical spine problems, expressed concern about Claimant's future employment as early as April 27, 2000. On June 8, 2000, Dr. Russell wrote: "I let Mr. Couch know that the degree of deterioration in his cervical spine leaves him at risk for problems in the future should he continue to be engaged in very physical/strenuous activities." On January 10, 2001, exactly one year after Claimant's work incident, Dr. Russell opined: "I do not believe that he is able to return to gainful employment at this time. In fact, I have encouraged him to begin evaluating long-term

options for retirement and/or long-term disability.” Again, on March 18, 2002, Dr. Russell wrote:

[Claimant] is the unfortunate gentleman who has now undergone multiple operative procedures on the cervical spine for severe cervical disc disease. Unfortunately this has left him at risk for significant problems in the future. I have let him know that I would be reluctant to release him to any significant gainful employment due to the severity of his disease. ... I let him know that I would support his application [for social security disability] as I do not believe that he is going to be able to resume gainful employment without a marked increased risk of further injury and the need for further surgery.

While declaring Claimant at maximum medical improvement on September 29, 2003, Dr. Russell noted “progressive deterioration of the [cervical] segments adjacent to his fusion....”

Dr. Sites’ independent medical evaluation of June 13, 2002 should be noted. Dr. Sites specifically declined to address “the patient’s longstanding cervical disease.” Focusing solely on Claimant’s shoulders, Dr. Sites believed that Claimant should be able to return to light duty with restrictions, noting that Claimant’s pain makes it difficult for him to engage in prolonged sitting.

Dr. Ben Kriesel completed a “Company Medical Doctor’s Certificate of Disability” on Claimant on November 3, 2003. Jewell Cutwright, the plant nurse, arranged the appointment for Claimant to see Dr. Kriesel. She believed that Dr. Kriesel’s task was strictly to determine whether Claimant could return to work for Respondent/Employer; however, she conceded that she did not speak to Dr. Kriesel directly, and that the company form may not have informed him of the limited nature of his task.

When asked if he considered Claimant’s physical restrictions to be temporary or permanent, Dr. Kriesel responded “Permanent-total disability.” He believed that Claimant

could not work in a sedentary capacity, perform light duty, or return to restricted duty. Dr. Kriesel did not believe that Claimant had any tolerance for standing or that he could sit for long periods during the day or walk at a normal pace during a normal day. Dr. Kriesel indicated that “pain medications, loss of balance” prevented Claimant from working around hazardous machinery. He did not believe that Claimant could bend, reach, lift, carry, push, or pull. When asked, “Are there any rehabilitative or treatment procedures that would improve the employee’s chance to return to full gainful employment?”, Dr. Kriesel marked “no” and that “Rehab. seems to have worsened pain.” When asked, “In your judgement, will he/she be disabled as indicated above for the rest of his/her life?”, Dr. Kriesel marked “Yes.”

Claimant’s most recent medical records are consistent with his testimony and his earlier medical records. On April 12, 2004, Dr. Calhoun stated his intent to keep Claimant on pain medications. On April 22, 2004, Dr. Calhoun rescinded an order approving Claimant’s participation in a functional capacity evaluation; Dr. Calhoun wrote that Claimant “does not appear to be medically able to undergo an FCE.”

Claimant seeks an award of permanent and total disability benefits. “Permanent total disability” in this claim means inability, because of compensable injury, to earn any meaningful wages in the same or other employment. Ark. Code Ann. § 11-9-519(e)(1). Claimant has the burden of proving his inability to earn any meaningful wage in the same or other employment; he must sustain this burden by a preponderance of the evidence. Ark. Code Ann. §§ 11-9-519(e)(2) and 11-9-704(c)(2).

Claimant’s injuries are not scheduled under the Act; therefore, his entitlement to permanent disability benefits is controlled by Ark. Code Ann. § 11-9-522. Pursuant to this

statute, when a claimant has been assigned an anatomical impairment rating to the body as a whole, the Commission has the authority to increase the anatomical rating, and it can find a claimant permanently and totally disabled based upon wage-loss factors. Whitlatch v. Southland Land & Dev., ___ Ark. App. ___, ___ S.W.3d ___ (January 21, 2004).

Permanent disability compensation is paid where the permanent effects of a work-related injury incapacitate the worker from earning the wages which he was receiving at the time of the injury. When making a determination of the degree of permanent disability sustained by an injured worker with an unscheduled injury, the Commission must consider medical evidence demonstrating the degree to which the worker's anatomical disabilities impair his earning capacity, as well as other factors such as the worker's age, education, work experience, and other matters which may reasonably be expected to affect the worker's future earning capacity. Such other matters are motivation, post-injury income, credibility, and demeanor. When it becomes evident that the worker's underlying condition has become stable and that no further treatment will improve the condition, the disability is deemed to be permanent. If the employee is totally incapacitated from earning a livelihood at that time, he is entitled to compensation for permanent and total disability.

Bradley v. Standard Register Company, Full Workers' Compensation Commission Opinion filed April 13, 2004 (F211782) (citations omitted).

In addition, Ark. Code Ann. § 11-9-102(4)(F)(ii) provides that: "(a) Permanent benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." "Major cause" is defined as more than 50% of the cause. Ark. Code Ann. § 11-9-102(14)(A).

As an initial matter, it should be noted that Claimant has been assigned three separate anatomical impairment ratings to the body as a whole; therefore, the Commission has the authority to find him permanently and totally disabled based upon wage-loss factors. See Ark. Code Ann. § 11-9-522(b)(1); Whitlatch, ___ Ark. App. at ___, ___ S.W.3d at ___. Dr. Russell assigned Claimant an 18% impairment rating to the whole body based

upon his cervical spine problems; Dr. Tucker assigned Claimant a 9% impairment rating to the whole body based upon his left shoulder problems; the parties stipulated that Respondents have paid both of these ratings. Further, this Opinion assigns Claimant a 3% impairment rating to the whole body based upon his right shoulder problem.

I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is not able to earn any meaningful wages in the same or any other employment. The medical evidence demonstrates that Claimant's anatomical disabilities impair his earning capacity; Dr. Russell opined that if Claimant resumed gainful employment he would be at a marked increased risk of further injury and the need for further surgery, while Dr. Calhoun, as late as April of this year, did not believe Claimant was even medically able to undergo an FCE. Dr. Kriesel's evaluation of Claimant supports these opinions. Claimant is middle-aged and has a technical education beyond a high school degree. However, his work experience is in aviation or general maintenance; Dr. Russell does not believe that Claimant can return to this type of activity, nor does Dr. Kriesel. Further, Claimant's concentration is impaired by his pain and medications; he is not able to sit, stand, or perform a whole range of physical activities. In short, Claimant's anatomical disabilities have totally impaired his earning capacity.

I further find that Claimant's compensable injury is the major cause of his impairment. The parties stipulated that Claimant sustained a compensable injury to his neck and left shoulder on January 10, 2000; Respondents have paid impairment ratings to the whole body for Claimant's neck and left shoulder problems. Claimant was able to perform his duties prior to January 10, 2000; after that date, Claimant has been unable to perform these duties. Dr. Russell opined that Claimant's cervical spine problems would

prevent his return to gainful employment without an increased risk of injury and surgery. The evidence of greater convincing force proves that the only cause of Claimant's disability or impairment is his compensable injury.

To summarize, I find that Claimant is entitled to permanent and total disability benefits. Because he has been assigned permanent impairment ratings to the whole body, the Commission has the authority to consider an award of permanent and total disability benefits. After considering all relevant wage-loss factors, I find that Claimant has sustained his burden of proving by a preponderance of the evidence that he is unable, because of his compensable injury, to earn any meaningful wage in the same or any other employment. Further, I find that Claimant has sustained his burden of proving by a preponderance of the evidence that his compensable injury is the major cause of his disability or impairment.

F. Permanent Partial Disability Benefits

Claimant requested, in the alternative, additional permanent partial disability benefits in the form of wage-loss. In light of this Opinion's finding with regard to permanent and total disability, this request is moot.

G. Attorney's Fee

Since Claimant's injury occurred prior to July 1, 2001, his attorney's fee request is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. See Estridge v. Waste Management, Full Workers' Compensation Commission Opinion filed July 12, 2004 (E500479); compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002).

Attorney's fees shall only be allowed on the amount of compensation controverted and awarded. Ark. Code Ann. § 11-9-715(a)(2)(B)(ii) (Repl. 1996). The real object of this statute is to place the burden of litigation expenses upon the party which made it necessary. Cleek v. Great Southern Metals, 335 Ark. 342, 345, 981 S.W.2d 529, ___ (1998). Assuming a position which requires an employee to retain the services of an attorney to take the actions necessary to assure that the employee's rights are protected may constitute controversion. Icenhower v. DeQueen School District, Full Workers' Compensation Commission Opinion filed June 14, 2004 (F002583); see Cleek 335 Ark. at 345, 981 S.W.2d at ___.

I find that Respondents have controverted the payment of those benefits discussed in this Opinion. Specifically, Respondents have controverted Claimant's entitlement to an 8% permanent impairment rating to the whole body for his right shoulder; his entitlement to temporary total disability benefits from June 2 to September 29, 2003; his entitlement to additional medical benefits; and his entitlement to permanent and total disability benefits. Respondents forced Claimant to engage the services of counsel in order to secure these benefits. Thus, I find that, with regard to those benefits awarded in this Opinion, Claimant is entitled to the maximum statutory attorney's fee allowed pursuant to Ark. Code Ann. § 11-9-715 (Repl. 1996).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed upon by the parties are reasonable and are approved.
2. The employee-employer-carrier relationship existed at all relevant times.
3. Claimant sustained a compensable injury to his neck and left shoulder on January 10, 2000.

4. Respondents paid 18% and 9% impairment ratings to the whole body.
5. Claimant's average weekly wage was \$671.04, which yields a temporary total disability rate of \$394.00.
6. I specifically find that Claimant was a credible witness. I make this finding after having observed his demeanor at the hearing.
7. Claimant sustained his burden of proving a compensable injury to his right shoulder as a compensable consequence of his stipulated compensable left shoulder injury on January 10, 2000. Claimant's over-compensation for loss of use of his left shoulder supplies a causal connection between the two episodes; his October 25, 2001 radiology report constitutes medical evidence supported by an objective finding; and, Dr. Tucker's two statements addressing compensability are stated within a reasonable degree of medical certainty.
8. Claimant did not sustain his burden of proving a compensable injury to his back on January 10, 2000. Specifically, Claimant did not demonstrate a causal connection between his compensable injury and his back problem.
9. Claimant sustained his burden of proving his entitlement to a 3% permanent impairment rating to the whole body for his right shoulder injury. Again, Claimant's testimony concerning his over-compensation for loss of use of his left shoulder, supported by Dr. Tucker's statements, proved that Claimant's compensable injury is the major cause of his right shoulder injury. The MRI of Claimant's right shoulder performed October 25, 2001 provides objective findings. Utilizing Dr. Sites' passive range of motion measurements and the Guides results in a 3% permanent impairment rating to the body as a whole.

10. Claimant sustained his burden of proving his entitlement to temporary total disability benefits from June 2 to September 29, 2003. Claimant remained within his healing period until that date; Claimant's testimony and the medical records demonstrate Claimant's total incapacity to earn wages during this period.

11. Claimant is entitled to reasonably necessary medical treatment or benefits in connection with his compensable injury. Claimant's testimony and the medical records prove that he is in continuing pain and in need of treatment to maintain his condition. Claimant is also entitled to reimbursement of mileage expenses in the amount of \$1,504.81.

12. Claimant sustained his burden of proving his entitlement to permanent and total disability benefits. Claimant has been assigned three separate impairment ratings to the body as a whole, providing the Commission with authority to find him permanently and totally disabled. Based upon all relevant wage-loss factors, and in light of the statements of Dr. Russel and Dr. Kriesel, I find that Claimant's anatomical disabilities have totally impaired his earning capacity. And, the record reflects that Claimant's compensable injury is the major cause of his impairment.

13. Claimant's attorney is entitled to the maximum prescribed attorney's fee under Ark. Code Ann. § 11-9-715 (Repl. 1996).

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact and Conclusions of Law set forth herein.

Claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by Claimant and one-half to be paid by

Respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996) and Death and Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

IT IS SO ORDERED.

D. FRANKLIN AREY, III,
Administrative Law Judge

DFA/ml