

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F107582**

<b>THERON J. WALSTON, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>SMITH-BLAIR, INC., EMPLOYER</b>	<b>RESPONDENT</b>
<b>TRAVELERS INDEMNITY CO. OF CT, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED FEBRUARY 10, 2004**

Hearing before Administrative Law Judge J. Mark White on January 15, 2004, in Texarkana, Miller County, Arkansas.

Claimant represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondents represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On January 15, 2004, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A pre-hearing conference was conducted on October 6, 2003, and a Prehearing Conference Order was entered that same day. A copy of the October 6, 2003, Prehearing Conference Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Conference Order.

The parties stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of this claim; that the employee/employer/carrier

relationship existed at all relevant times; that the claimant sustained a compensable injury to his right shoulder on or about June 23, 2001, as a result of the rapid and repetitive nature of his work-related activities; and that respondents accepted the injury as compensable and paid benefits. At the hearing, the parties further stipulated that the claimant earned sufficient wages to be entitled to the maximum compensation rates; and that the claimant reached the end of his healing period on June 9, 2003.

Several of the issues initially identified in the Prehearing Order were settled by the parties prior to the hearing. The parties agreed at the hearing that the issues to be presented were whether the claimant is entitled to temporary total disability benefits from January 2, 2002, when his TTD benefits were terminated, until June 14, 2002, when his benefits were reinstated; wage-loss disability benefits; and controversion and attorney's fees.

The claimant contends that he is entitled to temporary total disability benefits from January 2, 2002, until June 14, 2002, during which time his symptoms continued and he requested a change of physician to get additional care and treatment, and that following the change of physician surgery was scheduled on his shoulder and TTD benefits were reinstated; that he is entitled to wage-loss disability benefits in excess of any permanent impairment rating; that for the purpose of

computing attorney's fees, the respondents have controverted the permanent impairment rating assigned by Dr. Rudder; and that he is entitled to attorney's fees as permitted by law.

Respondents contend that they have paid appropriate benefits for the claimant's compensable injury and they are unaware of any unpaid benefits owed to the claimant. At the hearing, the Respondents stated they are not controverting the 10% permanent impairment rating as assigned by Dr. Rudder. The respondents conceded that they had not paid, as of the date of the hearing, the permanent impairment rating assigned by Dr. Rudder; and that they have previously paid the claimant benefits based on an incorrect compensation rate.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages, and thus entitled to temporary total disability benefits, from January 2, 2002, until June 14, 2002.
4. The claimant has proven by a preponderance of the evidence that he has sustained wage loss of 5% over and above his permanent anatomical impairment rating of 10%.
5. The respondents have controverted all permanent impairment and wage-loss benefits owed the claimant.

## **DISCUSSION**

### **I. History**

The claimant sustained a compensable injury to his right shoulder on June 23, 2001. At the time of his injury, he was working in the respondent-employer's paint department, operating a hydrostatic paint gun. His initial treatment was from a physician's assistant, Norman Hebert, who placed him on light duty, provided conservative treatment, and then eventually prescribed physical therapy. The respondent-employer offers no light-duty work, so the claimant returned to his

regular job. Within a few days, the claimant testified, he began to experience renewed swelling and inflammation in his shoulder. Hebert ordered an MRI, performed July 17, which revealed "tendonosis" [sic] and shoulder impingement. Based on the MRI results, Hebert referred the claimant to an orthopaedist, Dr. Greg Smolarz.

Dr. Smolarz saw the claimant on August 14. He provided several injections and prescribed an exercise program to strengthen the claimant's shoulder. A month later the claimant was still complaining of pain, and Dr. Smolarz referred him to Dr. Harold Weems for a surgical evaluation.

Dr. Weems saw the claimant on September 4 and assessed "ongoing shoulder pain with what sounds like a radiculopathy to the upper extremity." Dr. Weems recommended at least two months of an exercise program before he would consider arthroscopic surgery. To locate the source of the radiculopathy he ordered a cervical spine MRI which revealed, "left paracentral disc extrusion at the C6-7 level causing a mild cord compression and left C7 foraminal stenosis." Dr. Weems noted in his treatment note of September 18 that while the MRI showed a herniation to the left, the claimant's complaints of pain were on the right. Dr. Weems referred the claimant to Dr. Deitz for evaluation of the cervical herniation, but the respondent-carrier denied additional treatment for the cervical spine.

The claimant returned to Dr. Weems on October 30. Dr. Weems told the claimant that surgery was not necessary and released him to return to work. The claimant resumed his job but stopped working on November 27 because of the continuing problems in his shoulder. He returned to Dr. Weems on December 4. Dr. Weems recommended additional physical therapy and exercise, but the claimant and his wife preferred surgery. Because Dr. Weems would not offer surgery, they told him they would seek a second opinion.

The claimant saw a chiropractor, Stacy Warner, on December 13. Warner opined that the claimant needed a surgical second opinion from an orthopaedist, and that he had nothing to offer the claimant. He also indicated that the claimant should be released from "all but sedentary duty until this second opinion workup can be performed." On December 18, the claimant petitioned the Commission for a change of physician. The request was finally granted on May 9, 2002, and the claimant was instructed by the Commission to see Dr. Ethan Schock on June 14, 2002.

When Dr. Schock saw the claimant on June 14, he released the claimant from work and recommended a subacromial decompression with a distal clavicle resection. Though the record contains no operative report, the claimant testified that he underwent arthroscopic surgery on September 2, 2002. Other medical records

identify the date of surgery as September 9.

The claimant underwent a functional capacity evaluation on January 8, 2003. The report concluded that the claimant was capable of doing medium-level work, meaning that his maximum lift capability was 20 to 50 pounds and his frequent lift capability was 10 to 25 pounds. The report noted that the claimant "cannot work overhead with his right upper extremity." On January 15, the claimant's employment was terminated by the respondent-employer due to his continued absence from work.

Dr. Schock saw the claimant again on January 16. In his report to the respondent-carrier, he noted that a "bursal sided 10% partial thickness rotator cuff tear" had been discovered during surgery. The claimant continued to have problems with his shoulder, and conservative treatment had failed to alleviate them. An MRI ordered by Dr. Schock failed to reveal why the claimant continued to have shoulder problems. Dr. Schock diagnosed "right shoulder tendonitis" and recommended a second opinion. Dr. Kevin Rudder saw the claimant several times and provided conservative treatment. On June 9, 2003, Dr. Rudder opined that the claimant had reached maximum medical improvement, with a permanent anatomical impairment of 10% to the body as a whole.

The claimant testified that a few weeks earlier, in May, 2003, he had started

working for a friend doing cabinet work. At first he worked for free, as a way of repaying his friend for work done on the claimant's home driveway. As of the hearing, the claimant was still working for this friend, earning \$8 per hour. The claimant testified that he was typically only working 20 or 30 hours per week.

The respondents arranged for surveillance videotape to be taken of the claimant on June 3 and June 6, 2003. The claimant acknowledged at the hearing that he is the individual portrayed on the videotape. The videotape of June 3 shows the claimant working at a home under construction approximately from 8 a.m. to 4 p.m. The claimant is shown carrying assorted tools and pieces of wood into the home, as well as a large air compressor. He is shown carrying, with the help of one other worker, a large table saw. The claimant testified that the table saw weighed 50 to 60 pounds. The videotape of June 6 shows similar activities, in addition to the laminate and trim work being done inside the house by the claimant. The videotape indicates the claimant worked on June 6 approximately from 8 a.m. to 5:15 p.m.

## **II. Adjudication**

### **A. Temporary Total Disability**

An employee who suffers a compensable injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers

a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The parties have stipulated that the claimant's healing period ended on June 9, 2003, well after the time period in dispute. Therefore, the only remaining question is whether the claimant was totally incapacitated from earning wages from January 2, 2002, when his TTD benefits were terminated, until June 14, 2002, when his benefits were reinstated.

The claimant's TTD benefits were terminated because his then-treating physician, Dr. Weems, had released him to work on October 30, 2001. Dr. Weems saw the claimant again on December 4 and authored a letter a few days later stating that the claimant was capable of working at least light duty. Six months elapsed between the claimant's final treatment with Dr. Weems and the treatment with Dr. Schock that brought about the reinstatement of TTD benefits. Notably, however, the delay was entirely attributable to the time it took the Commission's Medical Cost Containment Division to grant the claimant's change-of-physician request.

Dr. Weems opined that the claimant was capable of working as of December, 2001, albeit perhaps at light duty. The claimant testified that the respondent-

employer offers no light-duty work. A chiropractor, Stacy Warner, saw the claimant on December 13, 2001, and opined that the claimant was capable of only sedentary work at best. After the change-of-physician request was finally approved, the claimant saw Dr. Schock on June 14, 2002, and Dr. Schock immediately took the claimant off of work. There is no evidence in the record to suggest that the claimant's condition when he saw Dr. Schock was any different than it was six months prior when the chiropractor had opined the claimant could not work at anything other than sedentary duty. It stands to reason, then, that Dr. Schock's actions corroborate the chiropractor's opinion, and that the claimant was unable to work from January 2, 2002, until June 14, 2002. Therefore, I find that the claimant has proven by a preponderance of the evidence that he was totally incapacitated from earning wages, and thus entitled to temporary total disability benefits, from January 2, 2002, until June 14, 2002.

### **B. Wage-Loss Disability**

In considering permanent disability benefits in excess of a claimant's anatomical impairment, the Commission may consider "such factors as the employee's age, education, work experience, and other matters reasonably expected to affect his or her future earning capacity." ARK. CODE ANN. § 11-9-522 (b)(1). These

“other matters” may include the claimant's motivation to return to work. *Rice v. Georgia-Pacific Corporation*, 72 Ark. App. 148, 35 S.W.3d 328 (2000). In summary, the wage-loss factor is the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. *Emerson Electric v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001).

The claimant testified that he had earned \$12.30 per hour at his job with the respondent-employer, with significant overtime work, while his present job pays only \$8 per hour. However, the claimant also testified that he made \$10 per hour from a prior employer, doing work similar to what he is doing now. He testified that he can no longer do that former job because he cannot lift 20 pounds. However, the surveillance videotape shows the claimant repeatedly lifting, with one helper, a table saw that he acknowledges weighs 50 to 60 pounds. Because of the surveillance videotape evidence, I do not find credible the claimant's testimony that he is incapable of performing the former job at which he earned \$10 per hour. Likewise, I do not find credible the claimant's testimony that he cannot work a full 40-hour week. The surveillance videotape indicates the claimant worked from 8 a.m. until after 4 p.m. on one day, and from 8 a.m. until after 5:15 p.m. the following day.

The claimant has an 11<sup>th</sup> grade education and a varied work history. He has done manual labor, but he has also performed skilled labor such as welding. He

offered no evidence to establish what effort, if any, he has undertaken to find another job. He has chosen to work for a friend of his for only \$8 per hour, but based on his relatively young age (45), his past work experience, the surveillance videotape, the results of his functional capacity evaluation and the other medical evidence, I find that he is capable of earning more in wages than he is earning at present. Nonetheless, there is no question that the compensable injury has affected his work capabilities, as demonstrated by the results of the functional capacity evaluation. Therefore, considering the wage-loss factors as outlined above, I find that the claimant has proven by a preponderance of the evidence that he has sustained wage loss of 5% over and above his permanent anatomical impairment rating of 10%.

#### **AWARD**

The claimant has proven by a preponderance of the evidence that he was entitled to temporary total disability benefits from January 2, 2002, until June 14, 2002; and that he has sustained wage loss of 5% over and above his permanent anatomical impairment rating of 10%. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

The respondents acknowledge they have not paid the 10% permanent anatomical impairment rating assigned by Dr. Rudder. Because the respondents have effectively controverted this rating, as well as the claimant's entitlement to wage-loss benefits, the claimant's attorney, Mr. Gregory R. Giles, is hereby awarded the maximum statutory attorney's fee on all permanent impairment and wage-loss benefits, pursuant to Ark. Code Ann. § 11-9-715 as it applies to injuries sustained prior to July 1, 2001.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge