

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIMS NOS. F301415 & F400913**

**DAVID ASHLEY**

**CLAIMANT**

**FIRST BAPTIST CHURCH**

**RESPONDENT EMPLOYER**

**CINCINNATI INDEMNITY CO.**

**RESPONDENT CARRIER**

**ORDER AND OPINION FILED AUGUST 26, 2005**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing on June 14, 2005, in Little Rock, Arkansas. A prehearing conference was held on May 4, 2005 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable neck injury on November 4, 2002.
2. The compensation rates are \$350/263.
3. Respondents paid temporary total disability benefits through November 20, 2003.
4. Respondents accepted and paid a 10% permanent impairment rating for the neck injury.

The claimant contends that on November 4, 2002, the claimant injured his neck, back and shoulder. The shoulder has been controverted and claimant contends he is entitled to medical benefits associated with that injury. The claimant also requests benefits associated with a MRI of the brain. Finally, the claimant is requesting wage loss benefits and attorney's fees.

Respondents contend that a visit to Dr. Charles Pearce for the shoulder was paid by respondents; however, respondents contend there are no objective findings to support a compensable injury for the shoulder. Respondents contend the MRI of the brain is not reasonable and necessary and causally related to the claimant's compensable injury to his neck. Respondents contend the medical evidence in the matter provides there are no functional restrictions of the claimant and respondents contend there is no wage loss disability.

### **ISSUES TO BE LITIGATED**

1. Compensability of the shoulder.
2. Medical benefits.
3. Payment for a brain MRI.
4. Wage loss.
5. Attorney's fees.

From a review of 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 witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. §11-9-704:

**FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW**

- 1, There was a compensable neck injury on November 4, 2002.
2. The compensation rates are \$350/263.
3. Respondents paid temporary total disability through November 20, 2003.
4. Respondents accepted and paid a 10% permanent impairment rating for the neck injury.
5. The claimant has proven by a preponderance of the evidence that he sustained a compensable shoulder injury with his November 4, 2002, work incident.
6. The claimant has failed to prove the additional medical for the shoulder was reasonable and necessary.
7. The claimant failed to prove that the brain MRI was reasonable and necessary and related to the compensable injury.
8. The claimant has proven by a preponderance of the evidence that he has sustained a 10% diminished wage earning capacity above the 10% permanent impairment rating.

**DISCUSSION**

The claimant, 48 years old, worked for the respondent employer 18 years and on November 4, 2002, was performing his maintenance job when he sustained his injury. On November 4, 2002, the claimant was helping carry a 10-foot completed cabinet weighing approximately 300 pounds and began having pain in his arms, legs, back and

neck. The claimant continued to work for about three weeks and then sought medical attention. The claimant eventually had neck surgery performed by Dr. Ted Saer.

The claimant continues to have neck stiffness and weakness in his muscles between the shoulder blades and neck. The claimant testified that he mostly has problems with his left arm and shoulder. In order to perform his job at the church, the claimant testified that he had to be able to carry a 20 to 30-pound tool bag, pull himself up to roofs from ladders and lift air conditioners and other fixtures. He must also have strength in his arms to work with the wrenches and tools.

The last doctor's visit paid for by the respondents was a November 20, 2003, visit to Dr. Saer for the claimant's back and neck. The claimant also saw Dr. Cash on November 22, 2004, for his finger and this was paid for by the respondents. The claimant treated with Dr. Saer for his neck and low back pain, but was referred to Dr. Pearce for an evaluation of his shoulder and was sent to physical therapy. The claimant saw Dr. Pearce in October 2003 and again on November 6, 2003.

Respondents introduced a surveillance video tape of the claimant taken between October 31 and November 1, 2003. The claimant confirmed that the video would show him carrying a chainsaw but not operating it, carrying some wood in his left hand, as well as bending and using his arms above his head. The claimant was also videoed driving a tractor and a riding lawn mower.

The claimant testified that respondents had controverted all medical and that any medicine or doctor's visits have to be turned into his wife's group health insurance.

The claimant first contends that he sustained a compensable shoulder injury sustained when he lifted the heavy cabinet on November 4, 2002.

In order to prove a compensable injury as a result of a specific incident that is identifiable by time and place of occurrence, a claimant must establish (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external harm to the body that required medical services; (3) medical evidence supported by objective findings establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and identifiable by time and place of occurrence. Ark. Code Ann. §11-9-102(4) (Repl. 2003). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. *Mikel v. Engineering Specialty Plastics*, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

In the present case, respondents accepted the claimant's low back injury and neck injury as compensable injuries and, as well, sent the claimant to Dr. Charles Pearce for an evaluation of his shoulder/arm condition. A MRI of the shoulder was provided at the direction of Dr. Reginald Rutherford on October 26, 2003 and the impression from the MRI was "Minimal increased signal in the supraspinatus tendon at most may represent some mild tendinosis (sic). Otherwise, normal MRI of the left shoulder." Cl. Exh. No. 1, p. 22. Dr. Pearce examined the claimant on October 9, 2003, and diagnosed the claimant with mild to moderate adhesive capsulitis related to left arm and shoulder pain and gave the claimant an injection. Dr. Pearce saw the claimant again on November 6, 2003 and diagnosed him with resolving left shoulder adhesive capsulitis and opined the claimant was not at maximum medical improvement

at that time but okayed left (sic) hand work only and recommended therapy continue. (Cl. Exh. No. 1, p. 24a). Dr. Pearce was asked at his deposition if there were any objective findings for the claimant's shoulder problems and Dr. Pearce stated there were no objective findings. The MRI results revealed an "increased signal in the tendon" and that would constitute an objective finding that could not come under the voluntary control of the patient. After considering the medical evidence and all other credible information, I find the claimant did sustain a compensable shoulder injury arising out of and in the course of his employment and supported by objective findings.

The claimant has contended that additional medical treatment is needed for the shoulder condition. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. §11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. *Deborah Jones v. Seba, Inc.*, Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D511255). Also, respondents are only responsible for medical services which are causally related to the compensable injury.

After a review of all the credible evidence and hearing the testimony, I find the claimant has failed to prove by a preponderance of the evidence that additional medical treatment for the shoulder is reasonable and necessary. The last medical evidence in

the record reveals the claimant's shoulder/arm problems are improving and more mobility was noted. Shoulder surgery has not been recommended. The only recommendation at that time was additional therapy and the claimant demonstrated in the surveillance that he is using his arm to some extent.

The claimant next requests respondents be responsible for a brain MRI. The claimant sustained a neck, back and shoulder injury. I did not find a recommendation by the authorized treating physicians that a brain MRI was necessary to treat or diagnose the claimant's work injury. The medical record includes a brain MRI performed on April 11, 2003, at the direction of Dr. Martindale. This MRI revealed a chronic maxillary sinusitis condition. I am unable to find this condition is related to the compensable injury and find that the claimant has failed to prove by a preponderance of the evidence that a brain MRI is reasonable and necessary.

The claimant next contends the claimant is entitled to wage loss disability benefits. In considering claims for permanent partial disability benefits in excess of the employee's percentage of permanent physical impairment, the Commission may take into account such factors as the employee's age, education, medical evidence, work experience and other matters reasonably expected to affect his future earning capacity. *Douglas Tobacco Prods. Co., Inc. v. Gerrald*, 68 Ark. App. 304, 8 S.W.3d 39 (1999).

Further, the Commission may consider the claimant's motivation to return to work, since a lack of interest or negative attitude impedes the Commission's assessment of the claimant's loss of earning capacity. *City of Fayetteville v. Guess*, 10 Ark. App. 313, 663 S.W.2d 946 (1984); *Oller v. Champion Parts Rebuilders*, 5 Ark. App. 307, 635 S.W.2d 276 (1982). In addition, a worker's failure to participate in

rehabilitation does not bar his claim, but the failure may impede a full assessment of his wage earning loss by the Commission. *Nicholas v. Hempstead County Memorial Hospital*, 9 Ark. App. 261, 658 S.W.2d 408 (1983).

On November 20, 2003, Dr. Edward Saer assigned a 10% permanent impairment rating to the claimant's cervical condition with no rating to the claimant's lumbar condition. Dr. Saer opined the claimant was MMI for the neck and had no work restrictions pertaining to the neck. Dr. Saer did opine that the claimant would benefit from more therapy on the upper extremity in order to improve its functional ability. On November 6, 2003, Dr. Pearce had re-evaluated the claimant regarding his shoulder and requested he follow up in four weeks but did indicate that the claimant was not at maximum medical improvement at that time.

The claimant was terminated from his employment with respondent on December 2, 2003, because there were no "right arm only" positions available. Respondents contend the claimant has not sustained any wage loss. Respondents rely in part on a surveillance video made of the claimant on October 31 and November 1, 2003, where the claimant is with his son clearing some property. I found the video to be consistent with the claimant's testimony in the hearing in that he attempts to do tasks with his left arm and shoulder. The video depicted the claimant operating a tractor for less than five minutes, using a chain saw for less than five minutes, driving a lawn mower for a few minutes and picking up small pieces of wood with his left hand for a short period of time. The video revealed the claimant using his right arm for most activities but he did use his left arm for some limited tasks. I was more persuaded by the deposition testimony of Dr. Saer over Dr. Pearce's deposition testimony when the

video was summarized for each and questions were asked. Dr. Saer opined if the claimant could do the various activities over an eight-hour period, he would not seem to be severely restricted; however, if he performed various tasks on a limited basis, that would be consistent with the claimant's abilities as observed during the office visits. Dr. Saer recommended a FCE to evaluate the claimant's functional abilities and duration of tasks. After considering the claimant's credible testimony in relation to the surveillance video and the medical evidence, I find the claimant has sustained some diminished earning capacity in the amount of 10% in addition to the 10% permanent impairment rating assigned to the neck. The claimant has an 18-year history with the respondent and has testified to his inability to grip his hand tools, lift, and climb as he had been able to do before the injury. These same limitations resulted in his inability to return to his former job.

### **ORDER**

The claimant has proven by a preponderance of the evidence that he sustained a compensable shoulder injury with his November 4, 2002, work incident. The claimant failed to prove by a preponderance of the evidence that additional medical for the shoulder was reasonable and necessary. The claimant failed to prove that the brain MRI was reasonable and necessary and related to the compensable injury. The claimant has proven by a preponderance of the evidence that he has sustained a 10% diminished wage earning capacity above the 10% permanent impairment rating.

The 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 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**