

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F211699

RUSSELL BREWER	CLAIMANT
WAL-MART ASSOCIATES, INC.	RESPONDENT
CLAIMS MANAGEMENT, INC. INSURANCE CARRIER	RESPONDENT

OPINION FILED JULY 27, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Springdale, Washington County, Arkansas.

Claimant represented by WESLEY COTTRELL, Attorney, Rogers, Arkansas.

Respondents represented by TOD BASSETT, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

A hearing was held on May 3, 2005, in Springdale, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on October 22, 2004. This pre-hearing order set forth the stipulations offered by the parties, the issues to litigate and the contentions thereto.

The following stipulations were submitted by the parties and are hereby accepted:

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

2. On September 11, 2002, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his right shoulder on September 11, 2002.

4. Temporary total disability has been paid through December 27, 2002.

5. The claimant is entitled to the maximum weekly compensation rate of \$425.00 for temporary total disability and \$319.00 for permanent partial disability.

6. Medical expenses have been paid to December 27, 2002.

By agreement of the parties the issues to litigate are limited to the following:

1. Compensability of the claimant's right shoulder injury after December 27, 2002, and compensability of the claimant's neck and spine problems.

2. Medical since December 27, 2002.

3. Temporary total disability from March 4, 2004, to a date to be determined.

4. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained an injury, which arose out of and in the course of his employment with the respondent/employer. The claimant is entitled to initial permanent partial disability benefits, permanent total disability benefits, rehabilitation, attorney's fees, medical expenses and additional temporary total disability benefits, additional medical expenses, rehabilitation, and attorney's fees. All other issues will be reserved.

In regard to the foregoing issues the respondents contend that the medical proof will show that the claimant has a long-standing problem with symptomology in all areas of his spine. Those problems predated the claimant's right shoulder strain injury of September 11, 2002. The claimant's family physician, Dr. Billy V.

Hall, has provided medical treatment to the claimant over the years for his spine problems. Dr. Hall referred the claimant to Dr. Luke Knox for a consultation of the neck pain and mid-thoracic discomfort. The history provided Dr. Knox at the time was of a "white male who has had nonspecific neck and mid-back pain for quite some time." There was no reference made whatsoever to the pain and discomfort being related back to the right shoulder soft tissue injury of September 11, 2002. Dr. Knox ultimately performed surgery on the claimant's neck on March 4, 2004. Respondents contend that all medical and lost time incurred by the claimant subsequent to December 27, 2002, is directly related to the natural progression of his long-standing pre-existing degenerative disk disease and associated permanent changes in his spine as opposed to the temporary soft tissue strain to his right shoulder sustained almost a year prior in September 2002. Respondents controvert to claimant's entitlement to any and all additional benefits subsequent to December 27, 2002.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order dated October 12, 2004. The claimant submitted a packet of documentary evidence marked Claimant's Exhibit No. 1. The respondents submitted documentary evidence marked Respondents' Exhibit No. 1 and Respondents' Exhibit No. 2. All these exhibits were admitted without objection.

DISCUSSION

The claimant testified that he began working for the respondent as an over-the-road truck driver in July of 1987. The

claimant testified that on September 11, 2002, he was in the process of hooking a loaded trailer to his tractor using the crank when it slipped out of gear and jerked his right shoulder, causing him to have pain. The claimant explained that it was more his right shoulder blade into his back. The claimant testified that following this incident the next morning his pain had progressed to where he couldn't breathe and his pain was from his shoulder blades up into his neck and into his shoulders. The claimant agreed that on September 13, 2002, when he was seen by the nurse practitioner in Dr. Moffitt's office he mentioned that he was having neck pain. The claimant also agreed that on September 26, 2002, when he saw Dr. Moffitt he was complaining of right shoulder and neck pain and that Dr. Moffitt ordered an MRI for his neck. The claimant testified that the pain just continued to progress and it even began to move into his arms. The claimant agreed that following his MRI, Dr. Moffitt continued to treat him until he was released on December 27, 2002, to return to work.

The claimant testified that he returned to work even though he didn't feel like going back. The claimant testified that he continued to work but his condition did not improve and he was seen by Dr. Knox and Dr. Hall. The claimant testified that he returned to the Arkansas Occupational Health Clinic and saw Dr. Berestnev for his shoulder and neck problems. The claimant testified that he also had another MRI of his neck and shoulder and that in March of 2003, Dr. Knox did surgery on his neck at the C6 and C7 level. The claimant agreed that after his neck surgery and release by Dr. Knox

he continued to be seen by Dr. Hall and Dr. Tucker in order to receive his medications.

The claimant testified that he last worked for the respondent in March of 2004. The claimant testified that he is currently not drawing social security but that his case is on appeal. The claimant testified that he is not physically able to return to truck driving.

On cross examination the claimant agreed that around November 3, 2003, he took a medical leave of absence from the respondent. The claimant further agreed that in March of 2004, due to financial necessity he voluntarily terminated with the respondent in order to draw his profit sharing. The claimant testified that his medical bills have been paid by the respondent except for his co-pay and deductibles. The claimant testified that following his surgery some of the major pressure was relieved in his back but he still has aches and pains. The claimant testified that he has pain which radiates down from his neck to the middle of his back. The claimant agreed that he has had low back and middle back pain off and on for the past seventeen years. The claimant testified that over the years of driving for the respondent he has had several workers' compensation claims, all of them involving his back and neck. The claimant remembered that he had been in a truck wreck on July 15, 2001, when his 18-wheeler hit a concrete abutment on a bridge and ended up going into a bar ditch. The claimant stated that during this process of hitting the bridge, although he couldn't remember exactly what all went on, it was a jarring

experience. The claimant remembers that his neck got very sore after this incident. When the claimant was asked about the medical records, he stated that if the medical documentation says that he had a prior neck claim, he was sure that he had. The claimant testified that there was an event in March of 2002, when he was laying down and his arms went asleep. The claimant testified that he went to a doctor to find out what the reason for this problem was but it never happened again. The claimant testified that on September 11, 2002, when he was cranking down the fifth wheel and it slipped out of gear, he felt a pull and pressure in his right shoulder blade area. The claimant testified that after a short period of time this discomfort subsided but did not go away completely and it was really bad the next morning. The claimant explained that the reason he did not report his injury on September 11th was because he was in hopes that the problem would work itself out but then the next morning when he woke up and he could hardly breath, he needed to do something. The claimant agreed that when he was first seen at the Lowell Clinic by the nurse practitioner, Max Beasley, he reported he had problems with his right shoulder. The claimant agreed that after Dr. Moffitt released him on December 27, 2002, he returned to work and worked for the respondent for the next seven months although he was in pain. The claimant testified that when he returned to see Dr. Moffitt on August 1, 2003, he reported a lot of neck pain and pain going down into his arms. The claimant also agreed that eight months before his initial focus or complaint was more on his right shoulder. The claimant agreed that

after he was seen at the Lowell Clinic in August of 2003, he underwent a second MRI and that the next doctor he saw was Dr. Knox.

Earlier in the direct examination testimony the claimant agreed that he has filed several workers' compensation claims while working for the respondent. These claims include a August 19, 1990, injury to the claimant's upper back, a April 1, 1991, multiple body parts injured, September 20, 1995, low back lumbar problem, March 9, 1999, low back lumbar problem, and the September 11, 2002, injury which is the subject of today's hearing.

The medical records set forth that the claimant underwent tests of his cervical spine on October 13, 2001, which were unremarkable and it is noted that the intervertebral disc spaces are preserved as are the posterior elements. Max Beasley, a nurse practitioner, with the Arkansas Occupational Health Clinic writes on September 13, 2002, that the claimant reports that on September 11, 2002, he was cranking a trailer down when the crank jerked his right shoulder causing him to have pain in the right shoulder. Mr. Beasley notes that the claimant denies any neck pain or any paresthesias down either of his arms. Mr. Beasley writes that the claimant has decreased range of motion of his neck and he notes that there is some swelling and some spasm present over the claimant's right rhomboid and trapezoids area. It is further noted that the x-rays taken of the claimant's cervical and thoracic spine do reveal that he has some bone spurring noted at C5-C6. The claimant was diagnosed with having right shoulder strain and

medications and exercises were recommended as well as to return to work but to restrict the use of his right arm. Dr. Moffitt writes on September 20, 2002, that he has rechecked the claimant's shoulder strain and he is much better. Dr. Moffitt writes that the claimant is released to work at full duties and he has no return appointment as well as no permanent impairment. Dr. Moffitt saw the claimant on September 26, 2002, and writes that the claimant's problems with his right shoulder strain are persisting. After examination Dr. Moffitt recommended that the claimant undergo physical therapy, not to return to work for two weeks and to limit his lifting to 20 pounds, as well as not to work with his arms above chest level. The claimant's physical therapist notes on October 8, 2002, October 11, 2002, and October 15, 2002, problems with his cervical spine, and neck. The physical therapist, Jon Lee, on October 18, 2002, writes that the claimant has seen Dr. Moffitt that day and mentioned his cervical spine pain for which Dr. Moffitt recommended one more week of physical therapy. On October 25, 2002, Dr. Moffitt writes that the claimant reports that he is not getting any better and is still complaining of pain along the posterior aspect of his shoulder in the intrascapular area and having numbness and pain going down into his arms. Dr. Moffitt recommended that he did not think the claimant was ready to return to work as a truck driver and recommended an MRI of the claimant's neck and shoulder. Dr. Moffitt on November 1, 2002, writes that he has reviewed the claimant's neck and shoulder MRI's and they are completely normal. Dr. Moffitt writes that he thinks that the

claimant has a muscular problem and that he should exercise and go through therapy. On November 8, 2002, Dr. Moffitt recommended that the claimant continue with his therapy for one more week although doubting it would make any difference in the claimant's condition. Dr. Moffitt saw the claimant on November 29th as well as on December 13, 2002, for his right shoulder problems at which time the claimant also complained of elbow problems. Dr. Moffitt prescribed some anti-inflammatory medications as well as home exercises. On December 27, 2002, Dr. Moffitt writes that the claimant is reporting pain in his elbows which he has had for a long time. The claimant reports that the one on the right is worse since his injury of September 11, 2002. However, his left side was hurting prior to that and was not affected by the injury. Dr. Moffitt released the claimant to work with no restrictions and no permanent impairment as well as no return appointment.

The claimant was seen by Dr. Berestnev on August 1, 2003, where it is noted that he has been treated for a right shoulder strain and neck and thoracic pain since his injury of September 11, 2002. The doctor notes that the claimant continues to hurt in his neck reporting a burning sensation in his neck that radiates into both arms. Dr. Berestnev notes that the claimant had an MRI in October of 2002, which showed a mild broad based central right paracentral disc protrusion at C6-7, but did not think that this disc protrusion would be responsible for his symptoms. The doctor recommended a MRI of the claimant's neck as well as modified his medications. The claimant underwent a MRI of his cervical spine on

August 8, 2003, which revealed straightening of the normal cervical lordosis. Dr. Berestnev writes on August 15, 2003, that he has reviewed the claimant's recent MRI and compared it with his October of 2002 MRI, and there does not appear to be any progression in his disease. Dr. Berestnev talks at length about the results of the claimant's MRI ultimately stating that he has degenerative changes in his cervical spine. The doctor told the claimant that most likely his pain is in the trapezius area and the burning sensation is due to muscle fatigue. The doctor recommended medications.

Dr. Luke Knox writes on October 27, 2003, that he has seen the claimant for his complaints of neck pain and mid thoracic discomfort. Dr. Knox writes that the claimant has marked paraspinal muscle spasms with marked list of the cervical spine to the right as well as muscle spasm of the right rhomboid. Dr. Knox reviewed the claimant's MRI from 2002, and notes that it shows significant disc herniation at C6-7, narrowing the channel down to 7 millimeters. Dr. Knox recommended that the claimant undergo another MRI of his thoracic spine to make certain there was nothing lower down in his spine causing him problems. Dr. Knox also recommended an injection at C6-7 and if there is a positive result which gives him significant relief of his symptoms for a period of time he would recommend the claimant as a candidate for cervical discectomy and fusion. Dr. Knox writes that "normally, I would not recommend surgical options, however, in the face of the rather pronounced findings of his MRI scans, I would be inclined to recommend that he consider having these spinal channel dimensions

re-established.” The medical records set forth that Dr. Knox recommended that the claimant be off work from November 5, 2003, up to his back surgery which was on March 4, 2004. Dr. Knox writes on April 1, 2004, that the claimant is now one month status post surgery and that his x-rays show stable alignment. The doctor notes that the claimant still has some aches and pains but he is going to start him in a physical therapy regime. The x-rays taken on April 1, 2004, set forth that the claimant is status post anterior cervical discectomy and fusion at C6-C7 with intact hardware, plates, and screws. The claimant underwent a bone imaging test on his low back on March 4, 2004, which indicated that he had increased activity in the region of the left L2-L3 facet joint and in the region of the right L4-L5 facet joint. The doctor writes that this is most likely due to osteoarthritis.

The claimant’s earlier medical records set forth that on December 2, 1994, the claimant had complaints of pain and stiffness in his back, which he attributed to a new seat in his truck. Again, in 1996, the claimant was complaining of chronic low back pain mentioning that he was a truck driver and had had chiropractic treatment for his back discomfort. On July 31, 2001, the claimant was seen with back spasms and pain having experienced a motor vehicle accident one week earlier. The claimant continued to be seen for his complaints of back and neck strain describing his neck pain as being in both sides of his neck and down his back into his shoulder blades. On August 15, 2001, the claimant reports that sometimes it causes a burning sensation on his left side and with

movement he gets a ringing in his left ear. The records set forth that the claimant continued to be seen or followed by Dr. Smith and Dr. Thompson up and through September 1, 2001, for these problems resulting from his motor vehicle accident.

After a complete review of this record, I find that the claimant has proven by a preponderance of the evidence that his continuing right shoulder problems after December 27, 2002, were a result of his compensable injury on September 11, 2002, and that at the same time the claimant injured his neck. Although Dr. Moffitt and Dr. Berestnev did not note any problems in the claimant's MRI made in October of 2002, after his compensable injury Dr. Luke Knox, a neurosurgeon after reviewing this test found a significant herniation for which he subsequently did a fusion and discectomy. I give therefore more credibility to Dr. Knox's interpretation of the MRI than I do Dr. Berestnev and Dr. Moffitt. Therefore, the respondents should pay for all medical treatment for this claimant's right shoulder as well as for his cervical problems. The claimant, however, has failed to prove by a preponderance of the evidence that his thoracic or lumbar spine problems, if any, are related to his compensable injury of September 11, 2002. The claimant by his own testimony and the medical records set forth that off and on throughout time due to the claimant's work as a truck driver he has had complaints of low back pain and discomfort but these problems did not and are not a result of his September 11, 2002 injury. It is noted that the claimant did have neck pain and discomfort as well as treatment following a motor vehicle

accident in the year of 2001, but these problems were diagnosed as neck strain and there was a period of over a year where the claimant did not receive treatment for his neck problems prior to his September 11, 2002 injury. The claimant underwent surgery for his back on March 4, 2004. The respondents should pay temporary total disability to this claimant from March 4, 2004 to a date to be determined.

FINDINGS & CONCLUSIONS

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

2. On September 11, 2002, the relationship of employee-employer existed between the parties.

3. The claimant sustained a compensable injury to his right shoulder on September 11, 2002.

4. Temporary total disability has been paid through December 27, 2002.

5. The claimant is entitled to the maximum weekly compensation rate of \$425.00 for temporary total disability and \$319.00 for permanent partial disability.

6. Medical expenses have been paid to December 27, 2002.

7. The claimant has prove by a preponderance of the evidence that his continuing right shoulder problems as well as his cervical spine or neck problems are a result of his compensable injury of September 11, 2002. See Discussion above.

8. The respondents should pay for all medical treatment subsequent to December 27, 2002, for this claimant's right shoulder and neck, cervical problems.

9. The respondents should pay temporary total disability to this claimant from March 4, 2004 to a date to be determined.

10. The respondents have controverted this claim for additional benefits.

11. The claimant's attorney is entitled to the maximum statutory attorney's fee based on the benefits awarded herein.

ORDER

The claimant has proven by a preponderance of the evidence that he sustained a compensable neck injury and his continuing right shoulder problems are the result of his compensable injury of September 11, 2002.

The respondents shall pay for the cost of this claimant's right shoulder and cervical problems subsequent to December 27, 2002.

The respondents shall pay temporary total disability to this claimant from March 4, 2004 to a date to be determined.

The respondents shall pay to the claimant's attorney the maximum statutory attorney's fee on the additional benefits awarded herein, with one half of said attorney's fee to be paid by the respondents in addition to such benefits and one half of said attorney's fee to be withheld by the respondents from such benefits.

All benefits herein awarded which have heretofore accrued are payable in a lump sum without discount.

This award shall bear the maximum legal rate of interest until paid.

IT IS SO ORDERED.

ELIZABETH DANIELSON
ADMINISTRATIVE LAW JUDGE