

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F402498

ALVIS GREGORY	CLAIMANT
STATE HIGHWAY & TRANSPORTATION DEPT.	RESPONDENT
ARKANSAS INSURANCE DEPARTMENT INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 11, 2005

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH DANIELSON in Fort Smith, Sebastian County, Arkansas.

Claimant represented by R. GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents represented by WILLIAM WHARTON, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on February 10, 2005, in Fort Smith, Arkansas.

A pre-hearing conference was held in this claim, and as a result a pre-hearing order was entered in the claim on December 1, 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 March 1, 2004, the relationship of employee-employer-carrier existed between the parties.

3. The claimant sustained a compensable injury to his left shoulder on March 1, 2004.

4. Medical expenses have been paid.

5. Respondents have accepted and are paying a 5 percent impairment rating to the body as a whole.

6. The claimant is entitled to a weekly compensation rate of \$423.00 for temporary total disability and \$317.00 for permanent partial disability.

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

1. Compensability of the claimant's cervical spine problems of March 1, 2004.

2. Related medical.

3. Temporary total disability from October 6, 2004, to a date to be determined.

4. The claimant's correct impairment rating.

5. Attorney's fees.

In regard to the foregoing issues the claimant contends that he sustained an injury to his cervical spine on March 1, 2004, that he is entitled to TTD to a date yet to be determined, that he is entitled to the payment of medical expenses, and that he is entitled to an attorney's fee.

In regard to the foregoing issues the respondents contend that the claimant's cervical/neck complaints are not causally related to the March 1, 2004, work related injury to the left shoulder.

The documentary evidence submitted in this matter consists of the Commission's pre-hearing order marked Commission's Exhibit No.

1. The claimant submitted medical records marked Claimant's Exhibit No. and Claimant's Exhibit No. 2. The respondents

submitted their pre-hearing questionnaire marked Respondents' Exhibit NO. 1. There was a letter with an attached envelope submitted by the claimant subsequent to the hearing by agreement of the parties at the hearing concerning a clarification from Dr. Bebout as to the claimant's appropriate whole body impairment rating. This document is blue booked to the record. All these exhibits were admitted without objection.

#### DISCUSSION

The claimant testified and it has been stipulated by the respondents that he sustained a compensable injury on March 1, 2004, while putting in a fuel pump. The claimant testified that to do this task he had to drop the gas tank of the automobile in order to work on the fuel pump. The claimant stated that in the process of replacing the gas tank the jack which he was using slipped and the gas tank fell approximately eight to ten inches onto his left shoulder. The claimant testified that the gas tank was a thirty-five-gallon tank and had approximately thirty gallons of fuel in it at the time of the event. The claimant testified that he would estimate that the tank would have weighed over a hundred pounds, maybe as much as two hundred pounds, not being sure what a gallon of gasoline weighs. The claimant testified that at the time it was his complete left side that was affected, specifically stating his neck, shoulder and all the way down into his hand. The claimant testified that this accident was reported to Kenneth Tucker, they filled out an accident report and he was sent to the doctor. The

claimant testified that at the time he was not sure what he had hurt but he thought that he had just torn his shoulder.

The claimant testified that he was seen by Dr. Kannout who then referred him to Dr. Bebout. The claimant testified that he had never had any prior left shoulder problems or neck problems before this March 1, 2004, event. The claimant testified that Dr. Bebout took x-rays and eventually operated on his left shoulder. The claimant testified that Dr. Bebout referred him to Dr. Queeney due to his ongoing problems with pain in his neck and numbness and pain in his left hand and three fingers. The claimant testified that he saw Dr. Queeney one time and that Dr. Queeney had him undergo a CT scan since he already had an MRI of his neck. The claimant testified that he understood that his test revealed that he had a disc protruding a little bit but not severe enough to require surgery. The claimant testified that the respondents have controverted his neck problems as being work related and that he is continuing to have problems with his neck and would like to have these problems medically addressed. The claimant testified that his problems consist of a numbness or drawing on the left side of his face plus pain in his neck and shoulder all the way down into his hand. The claimant testified that these problems have caused him to lose control of his hand a couple of times where he cannot close it.

On cross examination, the claimant stated that he has not worked for the respondent since March 2, 2004. The claimant testified that he has done work on his own vehicle and he has also done some

work on Aubrey Bowen's vehicle. The claimant testified that his neck pain became noticeable after he had his operation on his shoulder and the pain from that operation subsided. The claimant testified that he talked to the people in physical therapy about his problems and they thought it might be a pinched nerve so they worked on it for him. The claimant testified that he also received two cortisone shots to try and relieve the pain. The claimant testified that he also talked to Dr. Bebout about his neck, hand and arm pain. The claimant testified that Dr. Bebout sent him to Dr. Queeney and that it took approximately two months for him to get an appointment to see Dr. Queeney. The claimant testified that since March 2, 2004, he has taken part in fishing tournaments. The claimant explained that his boat does not have to be cranked up to load it because all he does is back it into the water and it floats off the trailer. The claimant also stated that he does not have to load or unload ice chests because his ice chest is built into his boat. The claimant testified that the numbness which he feels goes down his left arm and into three of his fingers. The claimant agreed that there are times when he cannot close his hand and that his problems have affected his ability to lift. The claimant testified that he and Darrell Roper rent a building where they have a pool table and keep their fishing equipment. The claimant testified that he also uses this building to work on his private vehicles and that one time he did some work for another person. The claimant also remembered that he has helped a friend of his, Johnny Cart, on his automobiles primarily supervising the work

being done. The claimant testified that the work he did for the respondent was much heavier than the work he has done since his accident, noting that the sensor which he put in Aubrey Bowen's car weighed less than a pound. The claimant again explained that he supervises his friend to help locate what the problem is with his automobile so that it can be fixed.

On redirect examination, the claimant testified that he is right-hand dominant and that he uses his right hand to cast. The claimant testified that his doctor never told him not to go fishing nor do any of his fishing activities violate the physical restrictions which are placed on him. The claimant testified that the sensor which he took out of Aubrey Bowen's car was approximately the size of a spark plug maybe a little bigger and that he used his right hand to take out this part. The claimant stated that he did receive compensation for helping his ex-boss, Aubrey Bowen. The claimant testified that the work he does on his own vehicles pertains to changing the oil and oil filters and that he can do all of this with his right hand. The claimant testified that the help he has given Johnny Cart was really light and if anything heavy had to be done, his friend did that work. Again, the claimant testified that Johnny Cart would do any of the heavy work that needed to be done but he might check to see if everything was hooked up right. The claimant testified that any of the work which he did at Darrell Roper's garage was within his restrictions that the doctor had placed on him. The claimant testified that the work for the respondent required lifting over one hundred pounds

and the use of both of his hands. The claimant testified that he had restrictions of light duty with no lifting more than five pounds, noting that he could not pull a torque wrench or lift his arms over his head. The claimant testified that he told the respondent about his restrictions and that no work was made available for him because the minimum requirement for the respondent is fifty pounds.

The claimant testified that he has not changed the oil on his truck since his accident. The claimant agreed that he has been underneath an automobile but has not done any work on them. On redirect examination, the claimant testified that when he is laying on his back underneath a vehicle his arm is not over his head but extended out in front of him.

Kenneth Tucker testified that he is employed with the respondent as the equipment maintenance supervisor. This witness testified that he was familiar with the claimant as well as his workers' compensation claim and that the claimant had undergone surgery. Mr. Tucker testified that in July 2004 he was in Paris on business and went by the claimant's shop to check on him. Mr. Tucker testified that the claimant was working on the air conditioner of a Dodge car. This witness testified that he is a mechanic himself and knows about compressors as well as air conditioning systems and that there was no question but that the claimant was working on an air conditioner. This witness testified that when he walked up and saw the claimant, the claimant got up and went and sat down. This witness stated that he talked with the

claimant a little bit and discussed his working on the automobile and told him that if he was able to work at home he should be able to come back to work. Mr. Tucker stated that the claimant told him that he had to go back to the doctor on July 29. Mr. Tucker stated that he specifically remembers the date that he spoke with the claimant, noting that it was July 16, 2004.

On cross examination, Mr. Tucker testified that when he walked in the door of the garage he saw the claimant working on an air conditioner putting on the clutch but when he came in the claimant went over and sat down and never did anything else until after he left. Mr. Tucker testified that during the period of time he visited with the claimant he did not see the claimant lift anything nor did he see any tools in his hand. Mr. Tucker testified that in his travels around the district doing his work, he goes by the claimant's shop at least once a week although some of these trips are at night. Mr. Tucker stated that this was the only time that he saw the claimant at a shop. On redirect examination, this witness was asked about how the fan belt was released while working on this air conditioning system. Mr. Tucker replied that this particular system has a serpentine belt which you have to use two hands and a wrench or break over bar with a lot of tension to take it off as well as to put it back on. On recross examination, Mr. Tucker was asked if he had asked the claimant if there was anyone else helping him with the work and this witness responded that the claimant said, "I am doing all this work myself."

Kim McDowell testified that he was employed by the respondent as the assistant district maintenance superintendent. Mr. McDowell testified that he was familiar with the claimant and had seen him at the Wal-Mart fishing tournament during the summer of 2004. Mr. McDowell stated that when they saw the claimant he had won some sort of a door prize and he observed the claimant pick up a box and carry it off to his truck with no problems. This witness testified that he did not know what was in the box. Mr. McDowell testified that later on in the day he again saw the claimant and that the claimant had come over to his truck to talk with him. This witness testified that when he saw the claimant this time the claimant's boat was already loaded and that he did not observe the claimant exhibiting any discomfort.

On cross examination, Mr. McDowell testified that the respondent requires an employee to be able to lift at least fifty pounds. This witness stated that on some occasions, for a limited amount of time, an employee who cannot meet this requirement is allowed to return to their employment, noting that if they know the length of the restrictions they will work with an employee. Mr. McDowell testified that he was not aware of what the claimant's restrictions were.

Dr. Bebout writes on March 24, 2004, that the claimant is right-hand dominant and injured his left shoulder at work on March 1, 2004. Dr. Bebout writes that the claimant's MRI shows that the claimant has a rotator cuff tear and displacement of the biceps tendon. The doctor further writes that the claimant's plain film

shows significant degenerative disease at the AC joint and there is a large spurring on the distal clavicle inferiorly eroding into the rotator cuff space. Dr. Bebout recommended a repair of the claimant rotator cuff and surgery was scheduled. The claimant underwent surgery on his left shoulder on April 1, 2004, performed by Dr. Bebout. Dr. Bebout saw the claimant on April 16, 2004, and a range of motion program was begun. The doctor notes that additional exercises will be added as he improves and he is to remain off work. On April 30 Dr. Bebout writes that the claimant is still somewhat stiff on the left side and since his home exercises are not going as desired, he was prescribing physical therapy and the claimant was asked to apply heat to his shoulder before exercising and ice down afterwards. On May 28, 2004, Dr. Bebout notes that the claimant is still having some stiffness in his shoulder which is causing discomfort. Dr. Bebout notes that although the claimant has been working with a physical therapist he has still lost some motion in all directions. Dr. Bebout injected the claimant's shoulder, continued his physical therapy and home stretching program. Dr. Bebout followed up with the claimant on June 25 and on August 4, 2004. On August 18, 2004, due to the claimant's continued shoulder pain and pain in his upper arm, Dr. Bebout again injected the claimant's shoulder. On September 15, 2004, Dr. Bebout writes that the claimant complains of pain in his shoulder but he also now has complaints of numbness and tingling in his thumb, index and middle fingers of his left hand and he feels as though he is losing strength in his hand. X-rays taken that day

of the claimant's cervical spine showed spurring with auto fusion between C5 and 6 and spurring between C6 and 7 and some spurring between C4 and C5. Dr. Bebout notes that these x-rays show that the claimant has some narrowing on the left side at the 4-5 level. Dr. Bebout writes that he thinks that the claimant's shoulder itself is healed and that it is not the source of the claimant's ongoing pain and trouble. The MRI of the claimant's cervical spine made on September 30, 2004, revealed mild spondylosis and right sided foraminal narrowing at C3-4, mild spondylosis without definite foraminal narrowing at C4-5, possible small central protrusion at C4-5 and central to the left para central small disc protrusion at C6-7. Dr. Bebout writes on October 6, 2004, that the claimant continues to have problems and that the claimant's MRI did show some small central disk protrusions. Dr. Bebout notes that in his opinion this very likely is the source of the claimant's continued pain and it is his opinion that it is all related to his shoulder injury at work back in March 2004. Dr. Bebout writes that the claimant's shoulder has reached maximum medical improvement and assessed the claimant with an impairment rating. There was some confusion as to the degree of impairment which this claimant is entitled due to the difficulty in determining what Dr. Bebout has hand written on the report of October 6, 2004. It was agreed by the parties that the claimant would send a letter to Dr. Bebout asking for a clarification as to the correct impairment rating. Dr. Bebout responded to the claimant's attorney's letter dated March 5, 2005, where the doctor has circled 9 percent to the whole

body and initialed this notation. This particular record is marked Claimant's Exhibit No.3 and is blue booked to this record. In Dr. Bebout's October 6, 2004, office note, he recommended that the claimant be sent to a neurosurgeon for evaluation of his continued pain, continue the claimant's physical therapy program and return the claimant to work but to avoid heavy lifting and no overhead use of the extremity.

After a complete review of this case, I find that the claimant is entitled to a 9 percent whole body impairment rating for his compensable injury to his left shoulder as assessed by Dr. Bebout. I further find that the claimant has proven by a preponderance of the evidence that he sustained an injury to his cervical spine on March 1, 2004, while working for the respondent. The testimony has been uncontroverted that this claimant sustained a sudden onset type injury where a hundred plus pounds fell on the claimant's left side. The claimant has complained of continuing pain in his left shoulder, neck and arm area since the date of injury and an MRI has revealed that there is a small protrusion at C4-5 which Dr. Bebout relates back to the claimant's March 1, 2004, injury. The claimant, therefore, should be entitled to medical treatment for his cervical problems. I further find that the claimant has proven by a preponderance of the evidence that he is entitled to additional temporary total disability from October 6, 2004, to a date to be determined. October 6, 2004, is the date that Dr. Bebout assessed an impairment rating for the claimant and released him from his care as to his shoulder. Dr. Bebout, however,

referred the claimant to a neurosurgeon for possible treatment of his cervical problems. Dr. Bebout did release the claimant to return to work with no heavy lifting and no overhead use of his left extremity but the respondents have testified that the work required of the claimant would be in excess of 50 pounds and they would only work with him as to finding some type of light duty if they knew the extent of time he would be on light duty. It is further noted that the respondents did not indicate that light duty would be available for the claimant if he were interested in returning to work. Although it has been testified that the claimant has performed some light maintenance on his automobile and helped a friend or two out with their mechanical problems on their automobiles, there is no indication that the claimant would be able to do the type of mechanic's work required by the respondent and which he is trained to do.

#### FINDINGS & CONCLUSIONS

1. The Arkansas workers' Compensation Commission has jurisdiction of this claim.
2. On March 1, 2004, the relationship of employee-employer-carrier existed between the parties.
3. The claimant sustained a compensable injury to his left shoulder on March 1, 2004.
4. Medical expenses have been paid.
5. Respondents have accepted and are paying a 5 percent impairment rating to the body as a whole.

6. The claimant is entitled to a weekly compensation rate of \$423.00 for temporary total disability and \$317.00 for permanent partial disability.

7. The claimant has proven by a preponderance of the evidence that he is entitled to a 9 percent whole body impairment for his left shoulder compensable injury. See discussion above.

8. The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004, while working for the respondent. See discussion above.

9. The claimant is entitled to reasonable and necessary medical treatment for his cervical spine problems.

10. The claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability from October 6, 2004, to a date to be determined. See discussion above.

11. The respondents have controverted this claimant's impairment rating as well as the compensability of the claimant's cervical spine problems.

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

#### ORDER

The respondents should pay to this claimant a 9 percent whole body impairment for his left shoulder compensable injury.

The claimant has proven by a preponderance of the evidence that he sustained a compensable injury to his cervical spine on March 1, 2004. Therefore, the respondents should pay for all

reasonable and necessary medical treatment for this claimant's cervical spine problem.

The claimant has shown that he is entitled to temporary total disability from October 6, 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.

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ELIZABETH DANIELSON  
ADMINISTRATIVE LAW JUDGE