

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F500516**

|   |                   |
|---|-------------------|
| <b>TERRY TUCKER, EMPLOYEE</b>                       | <b>CLAIMANT</b>   |
| <b>DAVID CLINE CONSTRUCTION CO., INC., EMPLOYER</b> | <b>RESPONDENT</b> |
| <b>BITUMINOUS CASUALTY CORP., CARRIER</b>           | <b>RESPONDENT</b> |

**OPINION FILED JUNE 23, 2005**

Hearing before ADMINISTRATIVE LAW JUDGE ANDREW L. BLOOD, on June 17, 2005, at Jonesboro, Craighead County, Arkansas.

Claimant represented by the HONORABLE JIM R. BURTON, Attorney at Law, Jonesboro, Arkansas,

Respondents represented by the HONORABLE JULIE M. HANCOCK, Attorney at Law, Little Rock, Arkansas,

**STATEMENT OF THE CASE**

A hearing was conducted in the above-style claim to determine claimant's entitlement to workers' compensation benefits.

On March 22, 2005, a pre-hearing conference was conducted in this claim from which a Pre-hearing order of the same date was filed. The Pre-hearing Order reflects stipulations entered by the parties, the issues to be addressed during the course of the hearing, the parties' contentions relative to the issues. The Pre-hearing Order is herein designated a part of the record as Commission Exhibit #1.

The testimony of Terry D. Tucker, the claimant, Matthews Summers, David Cline, Seneca Vaughn, and Jim Tate, coupled with medical reports and documents comprise the record in this claim.

**DISCUSSION**

Terry D. Tucker, the claimant, with a date of birth of April 18, 1962, has had an

employment relationship with respondent-employer over the course of twelve years. Claimant operated a track hoe in his employment with respondent.

Claimant asserts that on or about November 30, 2004, while discharging employment duties for respondent he suffered an injury to his right shoulder which serves the basis for the present claim. The testimony is record reflects that claimant commenced his shift at 5:00 a.m. Claimant's testimony reflects that on or about November 30, 2004, while working at a job site in Blytheville, Arkansas, he suffered an injury to his right shoulder at approximately 10:00 a.m. Respondent was in the process of constructing manholes on a parking lot at a Lowe's store. In describing the mechanics of the accident claimant noted that he was going down in the manhole when his foot slipped on the rebar which was lining to hole, and, in an effort to avoid injury he pushed his right shoulder against side of the hole.

Claimant's testimony reflects that at the time of the accident he was working with a co-worker, Matthew Summer, who was operating the track hoe. Claimant testified that he relayed that he thought he had hurt his shoulder in the accident. The testimony of the claimant reflects that within an hour of the accident he reported the accident and right shoulder injury to David Cline, the owner of respondent-employer. Claimant acknowledged that he continued to working following the accident and did not seek medical treatment until he was seen by Dr. Julie Dow at Harrisburg Clinic on December 21, 2004.

Claimant asserts that he has suffered other injuries in his employment with respondents, to include a hernia, for which he has not filed a workers' compensation claim. Claimant denies that he has seen physician for his shoulder prior to his treatment under the care of Dr. Dow in December 2004. Claimant's testimony reflects that he was reluctant to file a workers'

compensation claim because he was concern that his employment would be terminated by respondent if he did so. The testimony of the claimant reflects that after he filed his claim and sought medical treatment relative to his right shoulder injury, respondent was terminated his employment.

The testimony of the claimant reflects that after diagnostic studies by Dr. Dow relative to his right shoulder compliant, he was referred to Dr. Edward Cooper, a Jonesboro orthopedic physician. Dr. Cooper ultimately performed surgery relative to t he claimant's right shoulder on or about February 21, 2005. Claimant has not been released to return to work and is next schedule to see Dr. Cooper on June 29, 2005.

The testimony Mr. Matthew Summers is corroborative of that of the claimant regarding the November 30, 2004, work accident at the Lowe's store in Blytheville, Arkansas. The testimony in the record reflects that Mr. Summers in the son-in-law of the claimant's wife. Mr. Summers was employed by respondents for a period of one and half years and preformed duties of pipe laying and machine operator.

Mr. David Cline, the owner of respondent-employer, testified that respondent is in the business of contracting utility work. Mr. Cline noted that respondent employed between three and six employees in the operation of its business. Mr. Cline confirmed that he had had employment relationship with the claimant for ten to twelve years with an onset in 1993. Mr. Cline testified that 85 to 95 percent of the time claimant operated equipment in his employment with respondent. The Mr. Cline acknowledged that claimant worked at the Lowe's store in Blytheville and divided his job duties between operating the equipment and routine manual labor. Respondent denied that the claimant ever reported having sustained a work related injury

to him relative to the Blytheville Lowe's store job. The testimony of Mr. Cline reflects that a period of six months prior to November or December 2004, claimant had complained of pain relative to both shoulders and that he had complained of a hernia a couple of years.

Regarding the events on or about December 20, 2004, the testimony of Mr. Cline reflects that he, as employer, give three bonuses to his employees, which included the claimant. Mr. Cline testified that the claimant was unhappy with the bonuses being equal having expressed the opinion that since he did more work than the others employees his bonus should have been greater. The testimony of Mr. Cline further reflects that claimant later told him he wanted to be laid off so that he could draw unemployment benefits while he have his hernia repaired. Mr. Cline testified that he informed the claimant if he was laid off per his request he would not be a position to say that work was not available. Further, Mr. Cline explained that he informed the claimant that if he was going to have the hernia repaired he would be unable to draw unemployment benefits because he would not be capable of working. Mr. Cline testimony reflects that claimant became upset and relayed that he could just file a workers' compensation claim.

Mr. Cline's testimony reflects that the claimant did not report for work the next day, and that he was informed by Seneca Vaughn, another employee of respondent, that claimant had relayed that he was not going to show up for work the next day and had encourage remainder of the crew to do likewise. The testimony in the record reflects that the claimant, Seneca Vaughn, and Jim Tate all worked the Blytheville job and commuted together.

Mr. Seneca Vaughn testified that he had been employed by respondent for a period of two years as a pipe layer, and worked with the claimant during his employment. The testimony of Mr.

Vaughn reflects that when he started working for respondent in September 2003, on a work project in Hoxie claimant then complained of problems or pain with his shoulders. Mr. Vaughn denies that the claimant ever reported to him that he had injured his shoulders at work or that he had suffered the hernia at work, although claimant did relay that he had a hernia. Mr. Vaughn testified that as they were leaving Blytheville in December 2004, claimant was upset and said he was not going to show up for work the next day and suggested to his co-workers they should not show up for work either.

Further, Mr. Jim Tate, another employee of respondent-employer, corroborated the testimony of Mr. Vaughn regarding the claimant being upset or unhappy with respondent as they left the Blytheville job on December 20, 2004.

The medicals in the record reflect that claimant was seen at the Harrisburg Medical Center by Mr. Julie Dow on December 21, 2004, with a chief complaint of pull muscle in the left shoulder. The history, as reflected in the chart note of Dr. Dow relative to the claimant's visit of December 21, 2004, reflects, in pertinent part:

Patient states he was pulling nails overhead out of concrete wall. States he has injured self several times at work but boss would not let anyone file worker's comp. States his L shoulder actually was injured initially at work and just never got any better. It hasn't improved with medrol pack but in middle of taking it reached and may have reinjured it. It initially started hurting after several days of crawling through manhole and working on confined spaces.

Patient also feels his umbilical hernia is caused by work related activity; years of lifting too much and pulling on things heavier than he should without proper precautions. He states he and 2 others were lifting a 600# mechanism and another time he was

lifting a 3 foot backhoe shovel. He likes his job and has not wanted to rock the boat by trying to file worker's comp. (CX 1 p10)

Diagnosis of the claimant's complaints as reflected in the December 21, 2004, chart note of Dr. Dow included contact dermatitis, rotator cuff injury right shoulder, and enlarge lymph nodes, right groin and umbilical hernia. On December 21, 2004, a restricted release was authored on behalf of the claimant by Harrisburg Family Medical Center prohibiting lifting over thirty pounds through January 5, 2005, and no pulling or tugging. (CX 1. p11)

A December 30, 2004, chart note of Harrisburg Family Medical Center, relative to the claimant reflects that he was seen by Dr. Dow on said date and relayed that he had been fired for filing a workers' comp claim. The December 30, 2004, chart note reflects an assessment of the claimant's complaints as rotator cuff injury to the right shoulder and rotator cuff injury to the left shoulder. The chart note further reflects plans to refer the claimant for an orthopedic evaluation for both shoulders.. (RX 1,p3-4)

The medical in the record reflects on January 5, 2005, claimant was seen at Advance Orthopedics by Dr. R. Edward Cooper, a Jonesboro orthopedic physician, pursuant to the referral of Dr. Dow. (RX 1,p5) The record further reflects that on January 25, 2005, Dr. Cooper ordered MRIs of the claimant's right shoulder and left shoulder relative to the diagnosis of bilateral shoulder rotator cuff tears. (RX 1, p6) Claimant ultimately underwent surgery under the care of Dr. Cooper relative to the right shoulder.

After a through consideration of all of the evidence in this record, to include the testimony of the witnesses, a review of the medical reports and other documentary evidence and application of the appropriate statutory provisions and case law, I make the followings:

## **FINDINGS**

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. At all times pertinent the relationship of employee-employer-carrier existed among the parties.
3. At all time pertinent the claimant earned wages sufficient to entitle him to weekly compensation benefits of \$400.00/\$300.00, for temporary total/permanent partial disability.
4. The claimant has failed to sustain his burden of proof by a preponderance of the credible evidence that he suffered an accidental injury to his right shoulder arising out of and in the course of his employment either on November 30, 2004, or December 20, 2004.

## **CONCLUSIONS**

Claimant asserts that while this discharging employment duties for respondent on November 30, 2004, he suffered an accidental injury to his right shoulder which ultimately required medical treatment, to include surgery, and rendered him totally incapacitated from engaging in gainful employment commencing December 21, 2004, and continuing through the end of his healing period, a date yet to be determine. Claimant asserts entitlement to the afore workers' compensation benefits as well as attorney fees. Respondents contend that the claimant did not sustained an injury within the course and scope of his employment.

The present claim is one governed by the provisions of Act 796 of 1993, that the claimant asserts entitlement to workers' compensation benefits as a results of an injury having been sustained subsequent to the effective date of the afore provision. In order to prove a compensable injury as a result of a specific incident which is identifiable time and place of occurrence, claimant must establish by a preponderance of the evidence an injury arising out of

and in the course of his employment; that the injury caused internal or external harm to the body which requires medical services or resulted in disability or death; medical evidence supported by objective findings, as defined in part. Ark. Code Ann. §11-9-102(16), establishing the injury; and that the injury was cause by specific incident and identifiable by time and place of occurrence, Ark. Code Ann. §11-9-102 (4)(A)(i). Should the claimant fail to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the claim, compensation must be denied. Mickel v. Engineered Specialty Plastic. 56 Ark. App. 126, 938 S.W. 2d 876 (1997).

In his testimony before the Commission, claimant asserted that he suffered the injury to his right shoulder on November 30, 2004, and a result of slipping and forcing his right shoulder against the wall or side of a manhole, while discharging employment duties. Claimant asserts that prior to the November 2004, incident he did not experience difficulty with his right shoulder nor had he received medical treatment relative to same. Claimant concedes that he had pain complaints relative to left shoulder prior to November 2004. Nonetheless, claimant maintains that he continued to discharge his employment duties until receiving medical treatment at the Harrisburg Family Medical Center on December 21, 2004. Claimant maintains that he reported the November 30, 2004, injury to appropriate supervisory personnel of respondents within an hours of its occurrence. Further, claimant asserts they was reluctant to file a claim for workers' compensation benefits for fear of being fired by respondent.

Claimant acknowledged that he filed one Form AR-C on January 5, 2005, and another one was filed on his behalf on January 11, 2005. The January 5, 2005, Form AR-C reflects a date of injury of December 20, 2004, and an injury in the form of "rotator cuffs bilateral". In

describing the mechanics of the injury the January 5, 2005, Form AR-C reflects “approximately five three weeks prior to pulling and tugging on 1200 lb ductal iron pipe - felt pain in shoulder told David Cline the owner - he ignored this issue and continued to talk about something else. I was working mainly with left arm the same pain came to this shoulder. Reported to David Cline told him I need form for workers’ comp - he refused went to the doctor on 21<sup>st</sup> David Cline told my co-workers he had written my final pay check I was fired today he found out I went to the doctor and was trying to file.” (RX 2) The Form AR-C which was signed by the claimant on January 11, 2005, also reflects the date of the accident as December 20, 2004, and, in describing the injury reflects: Tugging and pulling on 1200 lb ductal iron. Injured: both shoulders. (RX 3)

The credible testimony of claimant’s co-workers, Seneca Vaughn and Jim Tate, reflects that claimant complained of pain in both shoulders prior to November 2004. Further, neither Mr. Vaughn or Mr. Tate provided testimony that they witnessed an accident on November 30, 2004, involving the claimant or that the claimant reported having sustain an injury to his right shoulder or left shoulder on November 30, 2004. The testimony of M r. David Cline, respondent-employer, reflects his presence on the job site during pertinent time period. Mr. Cline provided credible testimony regarding the basis for the termination of claimant’s employment in December 2004, which did not relate to an on-the-job injury having been reported by the claimant.

The medical in the record, commencing with the December 21, 2004, chart note of Dr. Julie Dow regarding a visit by the claimant to the Harrisburg Family Medical Center, reflects a history inconsistent with the testimony presented by the claimant during the hearing before the Commission. While it is not disputed that the claimant sought and obtained medical treatment relative to his shoulders in December 2004, the evidence fails to establish that the same was the

product of a specific incident injury suffered in the employment of respondent. This claim is respectfully denied and dismissed.

**IT IS SO ORDERED.**

---

**Andrew L. Blood**  
**Administrative Law Judge**